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

PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

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NOW COMES Plaintiff Thomas L. Taylor III ("Receiver"), solely in his capacity as temporary Receiver for the Breitling group of companies, and files this Motion for Protective Order pursuant to FRCP 26(c) (the "Motion"), and would show the Court the following:

I. INTRODUCTION

The instant lawsuit was filed by the Receiver on July 1, 2019 asserting claims against Defendants arising from their role in issuing "clean" audit opinions for the Breitling entities as Breitling's external auditors after having discovered – and concealed – the fraudulent conduct underpinning the related enforcement action brought against the Breitling entities and their management by the U.S. Securities & Exchange Commission ("SEC"). As the Court is aware, the SEC has alleged that the Breitling entities were operated by their management (principally Chris Faulkner) as a massive multi-million dollar fraud perpetrated against approximately 1,300 investors. See, e.g., First Amended Complaint in *SEC v. Faulkner et al*., Case No. 3:16-CV-1735-D (the "SEC Action") at ECF No. 22.

This case is currently set for trial on April 19, 2021 with discovery closing in less than 60 days on November 16, 2020. The Court approved the Receiver's retention of the undersigned counsel on a contingency fee basis on July 15, 2019 [SEC Action, ECF No. 457] to prosecute the claims against Defendants which, as narrowed by the Court's Order on Defendants' Rule 12(b)(6) motion [ECF No. 34], currently consist of negligence/gross negligence and participation in breach of fiduciary duty.

While the instant lawsuit has been pending for a little over a year, Defendants and their counsel have been involved in the related SEC Action since 2014;[1] have since 2017 defended a related state court case arising from Defendants' same audits of the Breitling entities, *Jinsun LLC*

[1] Defendants' counsel first appeared to defend Defendant Brian Matlock in an SEC deposition in the SEC Action on August 20, 2014. Declaration of Edward C. Snyder, attached as Appendix Exhibit "B", at ¶5, App. 0015.

et al. v. Rothstein Kass & Company PLLC, in the Dallas County Court No. 3 (the "Jinsun Case"); and Defendants' counsel have also defended an administrative proceeding the SEC brought against Defendant Brian Matlock for his conduct related to Defendants' Breitling audits - which recently resulted in an SEC Order barring Matlock from auditing public companies (the "Matlock Proceeding") (the SEC Case, the Jinsun Case and the Matlock Proceeding are hereinafter collectively referred to as the "Related Cases").

As a result, over the last 6 years Defendants and their counsel have been intimately involved in Breitling-related matters and have received various document productions and participated in multiple depositions in the Related Cases. They even served a Subpoena on the Receiver in the *Jinsun* Case in July 2019, shortly following the filing of the instant lawsuit, and the Receiver produced the entirety of the Breitling-related documents he had received from the SEC at that time. See Declaration of Thomas Taylor, Appendix Exhibit "A", at ¶6, App. 0006-0007.

As the present case has developed, Defendants and their counsel have embarked on a campaign of discovery overreach and harassment directed against the Receiver, the SEC and other third parties. For example, despite the obvious burden to the Receivership Estate and lack of relevance of the requested documents, Defendants have demanded that the Receiver produce all documents concerning or related to all of his activities as the Receiver for the Breitling entities, including all of his e-mail communications with Breitling investors since his appointment in 2017 - which Magistrate Judge Rutherford denied on June 29, 2020 [ECF No. 64]. Yet Defendants have recently filed a new Motion to Compel [ECF No. 67] the Receiver to search for and produce all of his e-mails with investors based on the Receiver's recently produced expert report which, as

explained below, is not premised on or related in any way to investor communications with the Receiver.

Moreover, Defendants and their counsel have recently served a new request for production on the Receiver in which they demand that the Receiver produce all of his communications with the SEC, various former Breitling employees and agents, and various third party service providers to the pre-Receivership Breitling entities (including law firms) and have demanded the Receiver produce notes of his interviews of former Breitling employees – irrespective of whether the communications or notes have anything to do with this lawsuit, Defendants, or their audits of the Breitling entities. And Defendants and their counsel have issued multiple third-party document production subpoenas to the SEC and various other third parties, all of whom have - as a result - contacted the Receiver or his counsel, thereby adding further burden to the Receivership.

The bottom line is that, in the face of an indefensible case from a liability standpoint as described below, and despite their 6 year involvement in and possession and mastery of "all things Breitling", Defendants and their counsel have opted to launch a massive discovery "fishing expedition" in the final stretch of this case and to wage a war of attrition against the Receiver with the apparent goal of (i) trying to wear the Receiver down with constant discovery demands and skirmishes and/or (ii) further eroding the remaining insurance policy limits under diminishing policies that provide coverage for Defendants.[2] Defendants' seemingly never-ending demand for documents (including re-demanding documents that they already have received from multiple sources) should be reined in by the Court. Defendants' document requests do not satisfy the proportionality test under Rule 26(b)(1) and impose undue and unnecessary burdens on the

[2] It is important to note that the corporate Rothstein Kass entities are defunct and no longer operating, as KPMG purchased their assets (but not their liabilities) several years ago. Thus, the eroding insurance policies are the only potentially recoverable assets of the Rothstein Kass entities at this time.

Receiver and his counsel. As a result, and for the reasons set forth below, the Court should grant this Motion for Protective Order.

II. CERTIFICATE OF CONFERENCE

The undersigned counsel has conferred with counsel for Defendants concerning the issues described herein and the need for the instant Motion. In particular, counsel for the Receiver conferred with counsel for Defendants and requested that they narrow their document requests to only seek documents related to Defendants or their conduct that is the subject of the instant suit, and also to seek resolution of Defendants' pending demand that the Receiver produce all of his past (and future) communications with Breitling investors since the inception of the Receivership.

When the Receiver's counsel attempted to confer with counsel for Defendants in an attempt to get them to narrow their requests solely to, *e.g.*, communications related to Defendants or their audits of Breitling, Defendants' counsel countered that they would only agree to limit the requests to the Receiver's communications with the former Breitling employees and agents and the SEC concerning (1) opportunities for the Receiver to potentially recover from other parties, (2) the Defendants or facts of the instant case, (3) assets or liabilities of the Receivership, and (4) the potential culpability of third parties for increased liabilities of the Receivership entities. Snyder Declaration, at ¶8, App. 0016-0017.

The Receiver could not agree to Defendants' proposed compromise because the four proposed categories do not actually limit the requests; in particular, categories (1), (3) and (4) essentially encompass the entirety of the Receiver's mandate under the appointment Order – to investigate and marshal the assets and liabilities of the Receivership estate, including the recovery of assets from third parties through litigation. Because Defendants' proposed compromise was purely cosmetic and would still require the Receiver to search for and produce essentially every e-

mail he's ever exchanged with the former Breitling employees/agents and/or their counsel as well as with the SEC since 2017, the Receiver rejected Defendants' counter-proposal. The parties likewise could not reach compromise on the other issues that are the subject of this Motion. As such, the parties were not able to reach agreement thereby necessitating the filing of the instant motion.

III. ARGUMENTS AND AUTHORITIES

A. Legal Standard

In addition to providing the guidelines for discovery and disclosures, Rule 26 also provides parties with the ability to seek protection from certain discovery upon demonstrating the necessity for such a safeguard. See generally Fed. R. Civ. P. 26(c). A Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). The burden is upon the party seeking the protective order to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements. *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (citation omitted). A protective order is warranted in those instances in which the party seeking it demonstrates good cause and a specific need for protection. See *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990). To be specific, the moving party must demonstrate that the discovery sought by the opposing party causes "annoyance, embarrassment, oppression, or undue burden or expense." *Wright v. Csabi (In re Wright)*, 568 B.R. 770, 776 (Bankr. S.D. Tex. 2017) (citing Fed. R. Civ. P. 26(c)(1)). The Court has broad discretion in determining whether to grant a motion for a protective order. See *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985). "The trial court is in the best position to weigh fairly the competing

needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

A party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable, *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990), and, where applicable, must show how the requested discovery is overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. See *Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005); see also *S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) ("A party asserting undue burden typically must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.").

In addition to having an adequate basis to support the motion, Rule 26 requires parties to certify that they have conferred—or attempted in good faith to confer—with the opposing party to resolve the issue or dispute before involving the court, which is similar to other provisions of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(c)(1).

Upon a moving party meeting the burden of both prerequisites, a court has "broad discretion in fashioning protective orders 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)). Under Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can — and must — limit proposed discovery that it determines is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the

proposed discovery outweighs its likely benefit — and the court must do so even in the absence of a motion. See *Crosby v. La. Health Serv. & Indem. Co*., 647 F.3d 258, 264 (5th Cir. 2011).

But a party seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address — insofar as that information is available to it — the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. See e.g., *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016).

Rule 26 enumerates certain remedies, which may be used singularly or in tandem with one another: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. Fed. R. Civ. P. 26(c)(1)(A)-(H).

B. Summary and Status of Case

The instant lawsuit was filed on July 1, 2019. In sum, the Receiver alleges (and will prove at trial) that Defendants knew since mid-December 2013 that Breitling's management, principally

Chris Faulkner, was using the Breitling entities to commit a massive fraud against investors while misappropriating millions of dollar from said entities, and yet Defendants proceeded to issue not one, but two "clean" audit opinions for the Breitling entities in 2014. Faulkner thereafter continued to cause the Breitling entities to fraudulently raise millions of dollars in new investor funds, a large portion of which he - and other members of Breitling management - misappropriated or misused, until the SEC filed the SEC Action and shut down the scheme in June 2016.

The Court largely denied Defendants' Motion to Dismiss via its Order dated February 4, 2020 [ECF No. 34]. As a result of that Order, the Receiver has continued to prosecute his claims against Defendants for negligence/gross negligence and for participation in the breaches of fiduciary duty by the former management of the Breitling entities (primarily Faulkner). The parties have exchanged written discovery and have taken multiple depositions.[3] Per the Court's Scheduling Order (as amended) [ECF No. 33], discovery in this case closes on November 16, 2020. In the interim, the Receiver has made efforts to resolve this case with Defendants including through a June 24, 2020 formal settlement demand on Defendants within the limits of their available insurance policies (which are being eroded on a daily basis by defense costs) but Defendants have declined to engage in any settlement negotiations at this time.

On August 14, 2020, the Receiver produced his expert witness disclosures and written report. The Receiver's expert witness report of Saul Solomon is attached hereto as Appendix Exhibit "E", App. 0046 to 0117. In his report, Mr. Solomon opines that Defendants were grossly negligent and engaged in a whole host of violations of auditing standards, App. 0047 to 0101, and that their conduct led to increased rescission liability damages to the Receivership entities ranging

[3] Given that Defendants' primary witnesses, including Defendant Matlock, had already been deposed multiple times with respect to their involvement in the Breitling audits in the Related Cases, and in order to conserve Receivership resources, the Receiver and his counsel agreed to enter into a Stipulation with Defendants waiving the Receiver's right to depose Defendants' witnesses again. ECF No. 47.

from $25.5 million to $52.4 million, and misappropriation damages to the Receivership entities ranging from $12.8 million to $34 million. *Id.*, at App. 0101 to 0114.

Importantly, and as is readily apparent from his expert report, Mr. Solomon's expert opinion on increased liability damages to the Receivership Entities is based entirely on the books and records of the Breitling entities themselves – primarily their bank account statements – and **not** on information received from investors through the Receivership claims process. Solomon report, App. 0101 to 0114. Mr. Solomon's expert opinions on damages are therefore based entirely on the perspective of the Breitling entities, and not on the perspective of (or information provided to the Receiver by) the Breitling investors. *Id.*

The day prior to the Receiver producing his expert disclosures, the SEC issued its Order in the Matlock Proceeding, in which (similar to Solomon's findings contained in his expert report) the SEC found that Matlock - and through him, Rothstein Kass - violated various accounting standards and also violated Section 10A of the Securities Exchange Act. See SEC August 13, 2020 Order in the Matlock Proceeding, attached as Appendix Exhibit "F", App. 0119 to 0127 (the "SEC Matlock Order"). As a consequence of Matlock and Rothstein Kass' conduct, the SEC has permanently barred Matlock from auditing publicly traded companies. *Id.*, at App. 0126.

C. Defendants' Discovery Fishing Expeditions

Despite the overwhelming evidence of Defendants misconduct, as laid out in the Solomon expert report and as demonstrated by the SEC Matlock Order, Defendants and their counsel continue to churn and burn through discovery in this case, casting multiple fishing nets in an apparent attempt to try and find something – anything – that will help them. To date, Defendants have issued roughly a dozen document production subpoenas to third parties demanding that they produce all of their documents that have anything to do with Breitling, including all of their

communications with the Receiver. Defendants and their counsel have even issued a document production subpoena to the SEC demanding, *inter alia*, all of the SEC's communications with the Receiver - whether they have any relevance to the instant case or not.

On August 28, 2020 Defendants served the Receiver with a new request for production in which they demand that the Receiver produce *all the same documents* that they requested from third parties via Defendants' various third-party subpoenas. For example, Defendants request that the Receiver produce ***all*** of his communications with 14 former Breitling employees and agents (and/or their counsel) as well as with the SEC since he was appointed Receiver – irrespective of whether the communications relate to Defendants or their audits of the Breitling entities.[4] See Defendants' Second Request for Production of Documents ("2nd RFP") Requests numbers 32 and 33, attached as Appendix Exhibit "C", at App. 0026 to 0027.

When coupled with the Defendants' renewed Motion to Compel the Receiver to produce all of his past (and future) communications with Breitling investors since he was appointed Receiver in 2017 and presumably through trial [ECF No. 67], Defendants basically seek to compel the Receiver to produce all communications he has had with anyone concerning Breitling since he was appointed Receiver.

Furthermore, and consistent with Defendants' transparent attempt to gain access to virtually everything the Receiver has done as the Court-appointed Receiver in the SEC Action, Defendants have also requested production of drafts of a witness declaration the Receiver's

[4] As discussed in the Certificate of Conference, *supra*, the Receiver's counsel conferred with counsel for Defendants in an attempt to get Defendants to narrow the requests contained in their 2nd RFP to seek only the Receiver's communications related to Defendants or the allegations in this case, but Defendants' counsel only agreed to cosmetically narrow the requests such that they would still require the Receiver to produce essentially every communication the Receiver has had with the 14 former Breitling employees and agents and the SEC since he was appointed Receiver 3 years ago. See Snyder Declaration, at ¶8, App. 0016-0017.

counsel prepared for use in the SEC Action as part of the Receiver's Supplemental Submission in Support of this Motion to Approve Proposed Plan of Distribution (SEC Action, ECF No. 538), as well as copies of the Receiver's notes of his interviews with basically anyone connected with Breitling which, besides being irrelevant to the instant case, also constitute his attorney work product since the Receiver is an attorney and appears as such in pleadings in the SEC Action. See Defendants' 2nd RFP, Requests numbers 34e, 35e, and 41, App. 0027 to 0028.

For the reasons articulated below, the Court should grant the Receiver the protective relief he requests herein.

D. The Court Should Grant the Receiver Protection

The Court should grant the Receiver protection from Defendants' abusive and overreaching discovery requests because they inflict undue burden and expense on the Receiver and because the discovery requests fail the proportionality test mandated by Rule 26(b) given (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. See e.g., *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016).

To put Defendants' document requests *vis a vis* the above prongs of the proportionality test in context, the issues that will be tried to a jury in this case include questions of:

a. Whether Defendants were negligent or grossly negligent in their audits of the Breitling entities in 2013-2014;

b. What damages were sustained by the Breitling entities as a result of Defendants' negligence or gross negligence;

c. Whether members of Breitling management, principally Chris Faulkner, breached their fiduciary duties to the Breitling entities by causing the entities to violate securities laws and commit fraud as well as by misappropriating or misusing funds belonging to the entities;

d. What damages were sustained by the Breitling entities as a result of Breitling's management's breaches of their fiduciary duties;[5]

e. Whether Defendants knowingly participated in the breaches of fiduciary duties committed by Breitling's management through their work on, and issuance of, Defendants' two audit opinions for Breitling in 2013-2014.

With that context, the Receiver addresses each category of document requests separately below.

1. Receiver's Communications with former Breitling Employees and Agents

With Requests 32 and 33 of Defendants' 2nd RFP, Defendants seek to require the Receiver to produce all of his e-mails and other communications with 14 former Breitling employees and/or agents or their counsel – whether or not they relate to Defendants or the claims made against Defendants in this case. Of those 14 targets, Defendants have already issued document subpoenas and/or deposition subpoena *duces tecum* requiring the production of all their Breitling-related

[5] If a jury finds that Defendants participated in breaches of fiduciary duty by Breitling's former management, then Defendants will be held jointly and severally liable for the damages caused by Breitling's former management, including Faulkner, *i.e.*, the causation runs from the damages caused by Faulkner and his cohorts, not directly by Defendants. *See, e.g., Heat Shrink Innovs., LLC v. Medical Extrusion Tech.-Texas, Inc.*, 2014 WL 5307191, at *8 (Tex. App.—Fort Worth, Oct. 16, 2014, pet. denied) (defendant who knowingly participates in a breach of fiduciary duty is jointly and severally liable for *damages caused by the breach*). *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007); *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969);).[5] *Janvey v. Proskauer Rose LLP*, 2015 WL 11121540, at *7 (N.D. Tex. Jun. 23, 2015); *Troice v. Proskauer Rose LLP*, 2015 WL 1219522, at *10 (N.D. Tex. Mar. 4, 2015), *rev'd on other grounds*, 816 F.3d 341 (5th Cir. 2016).

documents, including all their communications with the Receiver, to ten of them. Snyder Declaration, at ¶7, App. 0016.[6]

Defendants' requests for these Receiver communications constitute nothing more than a "fishing expedition" and the requests fail the proportionality test mandated by Rule 26(b). The requests are not tailored to this case and the documents requested are not relevant and would not assist a jury in answering the questions that will be presented to the jury at trial, as described above.

Because Defendants have already subpoenaed these same documents from the majority of the targeted third parties, Defendants have the same access to this information as the Receiver. Moreover, the requests would require the Receiver to expend his limited time and Receivership Estate resources searching through 3 years' worth of his e-mails to locate responsive documents, if any even exist, at significant cost to the Receivership Estate, all for the apparent purpose of providing Defendants an opportunity to try and find out if there might be something relevant there – which is the very definition of a "fishing expedition". As such these requests are overly burdensome and the burden is disproportionate to any speculative relevance arguments that Defendants might be able to muster. Taylor Declaration, at ¶¶ 7-9, 16-20, App. 0007, 0010-0012. Defendants cannot demonstrate that the requested communications will lead to any information of probative value that advances the claims or defenses at issue in this case. As such, the burden and expense of forcing the Receiver to search for all these communications far outweigh their likely benefit in terms of potential (and entirely speculative) relevance. See e.g., *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016). The Receiver requests that the Court grant him protection

[6] Defendants have issued document subpoenas or deposition subpoenas duces tecum to the SEC, Vinson & Elkins, Jeremy Wagers, Parker Hallam, Chris Williford, Steven Plumb, Scheef & Stone, Scott Cox, David Kovacs, Beth Handkins, and Rick Hoover. *Id.*

from having to respond to Requests 32 and 33 of the Defendants' 2nd RFP with respect to the 14 former Breitling employees/agents and/or their counsel.

2. Receiver's Communications with the SEC

Also included within Requests 32 and 33 of Defendants' 2nd RFP, Defendants seek to require the Receiver to produce all his e-mails and other communications with the SEC since his appointment as Receiver in 2017. Defendants have also served a subpoena on the SEC requesting the exact same documents.[7]

Defendants' request for all the Receiver's communications with the SEC constitutes nothing more than a "fishing expedition" and the requests fail the proportionality test mandated by Rule 26(b). Just as with the former Breitling employees and agents, Defendants' requests are not tailored to this case and the documents requested are not relevant and would not assist a jury in answering the questions that will be presented to the jury at trial.

Moreover the requests would require the Receiver to expend his limited time and Receivership Estate resources searching through 3 years' worth of his e-mails to locate responsive documents at significant cost to the Receivership Estate, all for the apparent purpose of providing Defendants an opportunity to try and find out if there might be something relevant there – which is the very definition of a "fishing expedition". Taylor Declaration, at ¶¶ 7-9, 16-20, App. 0007, 0010-0012. Defendants cannot demonstrate that the requested SEC communications will lead to any information of probative value that advances the claims or defenses at issue in this case. See e.g., *Ciuffitelli v. Deloitte & Touche LLP*, 2018 U.S. Dist. LEXIS 225087 at *26-32 (D. Oregon 2018) (denying defendant accounting firm's motion to compel communications between SEC Receiver and investor counsel because the defendant could not demonstrate how such

[7] Snyder Declaration, at ¶7, App. 0016.

communications were relevant to the claims and defenses in the case). As such, the burden and expense of forcing the Receiver to search for all his communications with the SEC far outweigh their likely benefit in terms of potential (and entirely speculative) relevance. See e.g., *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016).

The Receiver requests that the Court grant him protection from having to respond to Requests 32 and 33 of the Defendants' 2nd RFP with respect to the Receiver's communications with the SEC.

3. Receiver's Communications with Breitling Investors

Defendants previously moved to compel the Receiver to produce, in response to Request Number 31 from Defendants' First Request for Production ("1st RFP") all of his e-mail communications with Breitling investors since his appointment in 2017 [ECF No. 39].[8] Magistrate Judge Rutherford ordered the Receiver to produce some investor e-mails that he had already segregated into a separate file [ECF No. 57], but denied the remainder of Defendants' request (without prejudice) via her Order dated June 29, 2020 [ECF No. 64] in which she noted that the "*Receiver represents that his damages are not based on any of the documents Rothstein Kass seeks*".

Having now received the Solomon expert report, Defendants have moved once again to compel the Receiver to produce all his communications with the roughly 1,300 Breitling investors since his appointment in 2017 – and it is evident that Defendants want to impose a continuing obligation on the Receiver to produce, on a rolling basis, all communications he receives from Breitling investors into the future, particularly as the Receiver begins to process investor claims

[8] See Request No. 31 of Defendants' 1st RFP, attached as Appendix Exhibit "D", App. 0042.

filed with the Receivership in the SEC Action.[9] Defendants argue that they need to see all those communications because the communications *may* have some bearing on, or provide a means for Defendants to "test", Solomon's expert opinions on the increased rescission liability damages to the Breitling entities.

Defendants' arguments miss the mark and are a blatant attempt to muddy the waters and confuse the issues. As evidenced by the Solomon expert report, Solomon calculated the increased rescission liability damages to the Breitling entities from an accounting perspective ***based on the entities' own accounting books and records*** (which Defendants audited) and specifically the entities' bank records -- and solely from the viewpoint of the entities themselves -- ***not*** the investors. Solomon makes this abundantly clear in his report. See Solomon Report, at App. 0101-0114. Indeed, Solomon specifically states that he is only calculating increased rescission liabilities to the entities, ***not*** investor damages. *Id.*, at ¶128, App. 0112.

Yet Defendants now argue that they need all the Receiver's communications with the Breitling investors so that they can, in essence, measure *the investors' individual damages*. That is not what Solomon has measured and Defendants' arguments mask an attempt to confuse the issues through apples to oranges comparisons.

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[9] On April 28, 2020, the District Court approved the Receiver's Plan of Distribution and on May 11, 2020, the Court entered its Order Implementing Plan of Distribution ("Implementation Order") (SEC Action, ECF No. 542). Upon entry of the Implementation Order the Receiver initiated communication with more than 1,300 potential claimants. Because of the complexity of the claims process and the analysis of documents connected to the claims, it has been necessary for the Receiver to engage an outside firm, Pannell Kerr Forster of Texas, P.C. ("PKF"), to handle the associated clerical work. At the outset, the 1,300+ claimants were supplied with an 8-page claim form which requires each claimant to submit significant supplemental documentation to the Receiver. To date, only approximately 130 claims have been submitted to PKF and some of those are incomplete and require supplementation. There are in excess of 100 instances where claims forms have not even been received by potential claimants because of outdated addresses of record. Even after claims are submitted, significant communication with claimants is anticipated in order to reconcile the Receivership's records with information submitted by them as prescribed in the Implementation Order. See Taylor Declaration at ¶14, App. 0009.

Contrary to Defendants' arguments, and consistent with the Receiver's arguments to Judge Rutherford that led to her June 29, 2020 Order, nowhere in his report does Solomon indicate that his damages calculations are based on claims filed by investors with the Receiver as part of the Receivership claims process or based on communications between the Receiver and investors. In fact, all four of Solomon's increased liability damages models are premised on time periods (December 19, 2013 through June 2016 at the latest) that pre-date the appointment of the Receiver and pre-date even the filing of the SEC's original Complaint against Breitling. See Solomon Report, at ¶¶ 125-128, App. 0111-0112. Thus, the more relevant information to "test" Solomon's damages calculations would be investor transactions and associated communications with the Breitling entities during the time frames measured by Solomon (December 19, 2013 through June 2016) – ***not*** communications with the Receiver after his appointment in 2017. Defendants already possess all the historical Breitling investor communication and transaction information from 2013 through June 2016 that are in the Receiver's possession, custody or control.

Defendants also argue that they need the investor communications because they found one example of an alleged discrepancy. But, contrary to their arguments, Defendants found that discrepancy in Breitling's ***own banking records*** and <u>not</u> within any of the investor communications the Receiver produced to Defendants per the Court's Order [ECF 57]. Defendants' own argument about this purported discrepancy therefore underscores the Receiver's position – Defendants have the ability to "test" and rebut the Receiver's increased rescission liability damages models based on the <u>same</u> information relied upon by Solomon to calculate said damages models: the Breitling entities' own accounting and financial records for the time periods addressed by Solomon (December 2013 to June 2016).

As clearly demonstrated by the one discrepancy highlighted by Defendants in their Motion, since the entirety of Solomon's increased liability damage model is based on the Breitling entities' own accounting and banking records, Defendants have plenty of ways to "test" Solomon's damage model because they likewise possess all of Breitling's accounting and banking records (they were the auditors of Breitling's financials after all and have been defending their audits of Breitling for the last 6 years) and Defendants have proven their ability to "test" and to rebut Solomon's damages models by producing their own damages rebuttal expert report on September 21, 2020. As a result, Defendants' demand for all of the Receiver's communications with Breitling investors since 2017 and into the future is overly burdensome and disproportional to the needs of the case. *Perez v. Boecken*, 2019 U.S. Dost. LEXIS 176150 (W.D. Tex. – San Antonio 2019) at *14 (denying discovery requests and finding defendants could test and refute plaintiffs' expert opinions through their own rebuttal expert opinion).

Defendants also argue that they need access to all of the Receiver's communications with Breitling investors because some of these investors may be entitled to certain tax deductions. But that argument only underscores that the Receiver's increased liability damages models are separate and distinguishable from investor damages because it is the individual investors whose individual damages may be affected by such tax breaks. And while the Receiver may – through his claims approval process in the SEC Action – take some of those tax advantages into account when allowing or disallowing investor claims, that does not alter or affect the proper book value accounting for the increased rescission liability damages to the Breitling entities as described in the Solomon report.

In the end, what Defendants and their counsel are really after is a "free pass" to insert themselves into the Receiver's claims and distribution process in the SEC Action, blow up the

current Scheduling Order deadlines and trial date in this case, and spend the remainder of the Defendants' eroding insurance policy proceeds probing every single one of the 1,300 Breitling investors' claims filed with the Receivership. Allowing Defendants to stick their noses in the Receiver's claims process and gain access to the 1,300 Breitling investors' confidential information (including tax information) so they can "test" Solomon's damages models -- which are solely based on the Breitling entities' accounting books and records and targeted to specific time periods that pre-date the establishment of the Receivership itself -- would be disproportional to the importance of the issues at stake in the action and overly burdensome and wasteful of the Receivership's scant resources, and that burden wholly outweighs any likely benefit to the resolution of this dispute. Taylor Declaration at ¶¶ 15-20, App. 0009-0012.

4. Receiver's Drafts of Witness Declaration in the SEC Action

Defendants have also requested production of drafts of a witness declaration the Receiver's counsel prepared for use in the SEC Action as part of the Receiver's filings to in support of his Motion to Approve Proposed Plan of Distribution. To wit, Defendants request copies of drafts of the Declaration of Scott Cox (the "Cox Declaration"), which Declaration the Receiver filed as an exhibit in support of his Receiver's Supplemental Submission in Support of Motion to Approve Proposed Plan of Distribution (SEC Action, ECF No. 538). See Defendants' 2nd RFP, Requests numbers 34e, and 35e, at App. 0027 to 0028.

As a preliminary matter, the drafts of a proposed witness declaration prepared by an attorney in anticipation of litigation are protected by the attorney work product privilege. The work product doctrine protects from discovery materials prepared by an attorney in anticipation of litigation. FED. R. CIV. P. 26(b)(3); *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979). Qualified protection extends to documents and tangible things including a lawyer's

research, analysis of legal theories, mental impressions, **notes, and memoranda of witnesses' statements**. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) (emphasis added). The party who asserts work product protection must show that the materials warrant work product protection by establishing the following elements: (1) the materials sought are documents or tangible things; (2) the materials sought were prepared in anticipation of litigation or for trial; (3) the materials were prepared by or for a party's representative; (4) if the party seeks to show that the material is opinion work product, that party must show that the material contains the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. *See Ferko v. NASCAR*, 218 F.R.D. 125, 134-136 (E.D. Tex. 2003). The Fifth Circuit has stated that the protection "can apply where litigation is not imminent, 'as long as the primary motivating purpose behind the creation was to aid in possible future litigation.'" *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (citations omitted)).

The Fifth Circuit has recognized "opinion work product" and noted that "some courts have provided an almost absolute protection for such materials." *In re Int'l Sys. and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982) (citing *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *In re Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981)). *See also Robinson v. Texas Auto. Dealers Ass'n*, 214 F.R.D. 432, 441 (E.D. Tex. 2003), *vacated in part on other grounds*, 2003 U.S. Dist. LEXIS 10598, 2003 WL 21911333 (5th Cir. Jul. 25, 2003) ("A court cannot order production of opinion work-product absent a showing of even higher necessity, which is a rare situation if it exists at all."); *Conoco Inc. v. Boh Bros. Const. Co.*, 191 F.R.D. 107, 118 (W.D. La. 1998) ("[O]pinion work product becomes subject to disclosure when (1) 'mental impressions are at issue in a case and the need for the material is compelling' and (2) pursuant to the crime-fraud exception to discovery.") (internal citations omitted)

Examples of opinion work product include notes and memoranda created by an attorney or his agent, regarding witness interviews, because they contain mental impressions. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) ; *Baker v. GMC (In re GMC)*, 209 F.3d 1051, 1054 (8th Cir. 2000). Investigatory reports that contain summaries of witness interviews are also opinion work product because the reports are "suffused" with the investigator's mental impressions and conclusions. *Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 585 (S.D. Tex. 1996).

The Receiver's counsel in the SEC Action prepared the drafts of the Cox Declaration in anticipation of litigation, specifically litigation the Receiver anticipated in the SEC Action regarding the approval of the Receiver's Plan of Distribution, which, as approved by the Court, recognized a single class of investors including both royalty and working interest investors. Taylor Declaration, at ¶10, App. 0007-0008. The drafts of the Cox Declaration were prepared by the Receiver's counsel in conjunction with interviews of Mr. Cox as a witness. *Id.* As a result, the drafts of the Cox Declaration are shielded from discovery by the attorney work product doctrine.

Furthermore, the Cox Declaration has little to no relevance to this case. It was filed in the SEC Action and not in this case, and Defendants have already deposed Mr. Cox in this case and used the final, signed Cox Declaration as an exhibit in his deposition. Snyder Declaration, at ¶ 9, App. 0017. Therefore, Defendants' request for drafts of the Cox Declaration is utterly superfluous, and Defendants cannot demonstrate that the drafts of the Cox Declaration will lead to any information of probative value that advances the claims or defenses at issue in this case. See e.g., *Areizaga v. ADW Corp.*, 314 F.R.D. 428, 435 (N.D. Tex. 2016). The Receiver requests that the Court grant him protection from having to respond to Requests numbers 34e and 35e of the Defendants' 2nd RFP with respect to the drafts of the Cox Declaration.

5. Receiver's Notes of Interviews with Breitling Witnesses

Further consistent with Defendants' transparent attempt to gain access to virtually everything the Receiver has been doing as the Court-appointed Receiver in the SEC Action, Defendants have also requested production of the Receiver's notes of his interviews with some 20 witnesses (basically anyone connected with Breitling) which, besides being irrelevant to the instant case, also constitute the Receiver's attorney work product. See Defendants' 2nd RFP, Request number 41, at App. 0028 to 0029. Of the 20 witnesses listed by Defendants, the Receiver only has interview notes or memorandums for five of the witnesses. Taylor Declaration, at footnote 1, App. 0008.

As described above, the attorney work product doctrine protects attorneys' notes of witness interviews. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991). The Receiver, who is an attorney and appears and acts as his own counsel in the SEC Action, has taken notes of his interviews with various Breitling witnesses, including several of the ones listed in Defendants 2nd RFP request number 41, as part of his investigatory role as Receiver and in anticipation of litigation either in the SEC Action or with a view towards possibly bringing actions against third parties. Taylor Declaration, at ¶12, App. 0008. The Receiver's notes of witness interviews clearly constitute his work product and are shielded from discovery.

Furthermore, the Receiver's notes of witness interviews taken in the SEC Action have little or no relevance to this case. Discovery closes in less than 60 days and Defendants have already deposed (or will soon depose) most of the key witnesses in this case – including 12 of the 20 witnesses listed in their Request number 41. Snyder Declaration, at ¶11, App. 0017. Therefore, Defendants' request for the Receiver's notes of witness interviews once again constitutes overreach and overkill by Defendants, who cannot demonstrate (beyond rank speculation) that

such notes will lead to any information of probative value that advances the claims or defenses at issue in this case. See e.g., *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016). The Receiver requests that the Court grant him protection from having to respond to Request number 41 of the Defendants' 2nd RFP.

WHEREFORE, PREMISES CONSIDERED, the Receiver requests that the Court grant this Motion and issue a Protective Order granting the Receiver protection from having to respond to Requests 32, 33, 34e, 35e and 41 of Defendants' 2nd RFPs, as well as Request No. 31 from Defendants 1st RFP.

Respectfully submitted,

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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 September 25, 2020 via ECF notification.

/s/ Edward C. Snyder
Edward C. Snyder

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

(PROPOSED) ORDER GRANTING
PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

On this date came on to be considered Plaintiff Thomas L. Taylor III ("Receiver") Motion for Protective Order pursuant to FRCP 26(c) (the "Motion"). After considering the Motion, the Court is of the opinion that the Motion should be, and it is hereby Granted.

IT IS HEREBY ORDERED that the Court grants this Motion and hereby issues a Protective Order granting the Receiver protection from having to respond to Requests 32, 33, 34e, 35e and 41 of Defendants' 2nd RFPs, as well as Request No. 31 from Defendants 1st RFP.

SO ORDERED this ___ day of September, 2020.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE