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

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

**PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED MOTION TO COMPEL DOCUMENT PRODUCTION AND BRIEF IN SUPPORT**

NOW COMES Plaintiff Thomas L. Taylor III ("Receiver"), solely in his capacity as temporary Receiver for the Breitling group of companies, and files this Response to Defendants' Renewed Motion to Compel Document Production [ECF No. 67] (the "Motion") and Brief in Support, and would show the Court the following:

## I. INTRODUCTION

The Receiver files this Response subject to the Receiver's Motion for Protective Order [ECF No. 69] (the "Motion for P.O.") which is currently pending before the Court. The Receiver hereby adopts and incorporates herein the arguments and evidence he presented in support of his Motion for P.O. (including in the Appendix filed in support of the Receiver's Motion for P.O. [ECF No. 70]), and requests that the Court, to the extent that it may entertain oral argument on these matters, combine the oral arguments for Defendants' Motion and the Receiver's Motion for P.O. in the same hearing.

This is the continuation of the discovery dispute Defendants initiated in April of this year when they filed their initial Motion to Compel [ECF No. 39] the Receiver to produce all of his communications with the roughly 1,300 Breitling investors since he was appointed Receiver in 2017.[1] 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*".

Now Defendants have come back to Court to insist that the Receiver burden the Receivership Estate with increased costs and expense by renewing their demand that the Court order the Receiver to search for and produce all of his communications with Breitling investors. Even worse, Defendants have now, through their Motion, made it abundantly clear that what they really want is an opportunity to snoop around in the Receiver's claims and distribution process in the separate SEC Action[2] - which has barely begun - including obtaining access to all information (apparently including investor tax information) submitted, or to be submitted in the future, to the Receiver by the over 1,300 Breitling investors as part of the Receiver's claims and distribution process.

Defendants' defend their proposed fishing expedition into the Receiver's claims and distribution process by baselessly arguing that they need access to all of the investor claims information filed (and to be filed) with the Receiver in the SEC Action in order to be able to "test" one of the Receiver's two damages models contained in the Receiver's expert witness report -

[1] Per the Court's Scheduling Order (as amended) [ECF No. 33], discovery in this case closes on November 16, 2020.

[2] *SEC v. Faulkner et al.*, Case No. 3:16-CV-1735-D (the "SEC Action").

while at the same time arguing that said damage model is invalid as a matter of law.[3] But the Receiver's expert's opinions on damages is not based on or related in any way to the Receiver's claims and distribution process in the SEC Action, or on any claims formally filed with the Receiver by Breitling investors, or on any other form of investor communications with the Receiver. And as evidenced by the recently produced opinion of their own expert witness on damages, Defendants have proven that they don't need access to all of the investor claims information in order to "test" or rebut or defend against the Receiver's damage model. For these reasons, and because Defendants' document requests do not satisfy the proportionality test under FRCP Rule 26(b)(1) and impose undue and unnecessary burdens on the Receiver, the Court should deny the Motion.

## II. ARGUMENTS AND AUTHORITIES

Having now received the Receiver's expert witness Saul Solomon ("Solomon")'s report on damages, Defendants move once again to compel the Receiver to produce all his communications with the roughly 1,300 Breitling investors since his appointment in 2017 and also seek to impose a continuing obligation on the Receiver to produce, apparently on a rolling basis, all communications he receives from Breitling investors into the future as the Receiver begins to receive and process investor claims filed with the Receivership in the SEC Action.[4] Defendants

[3] Motion, at footnote 3. Defendants are wrong. The Fifth Circuit has recently acknowledged that an SEC receiver may sue third parties for "increased liabilities" incurred by the receivership entities that were used as part of a fraud scheme, which is in line with decisions by other federal Circuit Courts of Appeal. *See, Zacarias v. Stanford Int'l Bank, Ltd*., 945 F. 3d 883, 899 (5th Cir. 2019) (holding that Receiver's claims for increased liability damages are damages to the receivership entities, not to investors). See also, *Janvey v. Alguire*, 847 F.3d 231, 242 (5th Cir. 2017) ("Expanding the number of defrauded investors in the Bank merely expanded the Bank's ultimate liabilities and increased the injury to the Bank. . . .").

[4] 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

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, pertinent portions of which are attached hereto as **Exhibit "A"**, 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 ¶¶ 104-132, App. 0005 to 0019. Indeed, Solomon specifically states that he is only calculating increased rescission liabilities to the entities, ***not*** investor damages. *Id.*, at ¶128, App. 0017.

Yet Defendants now argue that they need all the Receiver's communications with the Breitling investors so that they can measure *the investors' individual damages* as well as delve into the reasons individual investors invested with Breitling. Motion, at p. 6 (arguing that Defendants' need the investor communications to determine, *inter alia*, "what information the investors relied on in choosing to invest"). Solomon has not measured individual investor damages, and the bases for individual investors' decisions to invest with Breitling is not an issue

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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 Declaration of Thomas L. Taylor, attached as **Exhibit "B",** at ¶14, App. 0025.

in this case.[5] Defendants' arguments mask an attempt to confuse the issues through apples to oranges comparisons.

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. 0016-0017. Thus, the more relevant information to "test" Solomon's damages calculations would be pre-Receivership 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]. Thus Defendants' own argument about this purported discrepancy underscores the Receiver's position

[5] See Receiver's Motion for P.O., ECF No. 69, at pps. 11-12.

that Defendants already have the ability to "test" and rebut the Receiver's increased rescission liability damages models based on the ***same*** 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).

Moreover, Defendants have further proven their ability to "test" and to rebut Solomon's damages models by producing their own rebuttal expert report on damages. See Rebuttal Expert Report of Dr. Stephen Prowse, CFA, attached hereto as **Exhibit "C"**, App. 0030 to 0068. 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. Dist. 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); *Areizaga v. ADW Corp*., 314 F.R.D. 428, 435 (N.D. Tex. 2016) (discussing the standards for the proportionality test mandated by Rule 26(b), including considerations of 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).

Moreover, to the extent that Defendants wish to attack the reliability of Mr. Solomon's damages methodologies by arguing that the Receiver is relying "solely on records both he and the SEC claim are the basis of a fraud",[6] they can do so via a *Daubert* challenge and at trial through vigorous cross examination based on the types of discrepancies Defendants allege they have

[6] Motion at p. 4.

discovered within the Breitling accounting and financial records. As the U.S. Supreme Court made clear in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579,125 L. Ed. 2d 469, 113 S.Ct. 2786 (1993), "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Primrose Operating Co. v. Nat'l Am. Ins.*, 382 F.3d 546, 562 (5th Cir. 2004) (quoting *Daubert*, 113 S.Ct. at 2798).

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 rescission liability damages model is separate and distinguishable from investor damages because it is the Breitling investors themselves 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 a fishing expedition within the Receiver's claims and distribution process in the SEC Action which, if allowed by the Court, will blow up the current Scheduling Order deadlines and April 2021 trial date in this case and result in the further wasting of the Receivership's scant resources as well as further erosion of the remainder of Defendants' dwindling insurance policy proceeds while Defendants' counsel spend the next year probing every single piece of paper submitted to the Receiver by the 1,300 Breitling investors as part of the Receivership claims process. 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, would force further delays in the final resolution of this case, would be 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, attached as Exhibit "B", at ¶¶ 15-20, App. 0025 to 0028. Defendants' request for all of the Receiver's past and future communications with the approximately 1,300 Breitling investors fails the proportionality test and, as such, the Motion should be denied.

Respectfully submitted,

*/s/ Edward C. Snyder*
**EDWARD C. SNYDER**
State Bar No. 791699
esnyder@casnlaw.com
**CASTILLO SNYDER, P.C.**
700 N. St. Mary's, Suite 1560
San Antonio, TX 78205
210-630-4200 (main)
210-630-4210 (facsimile)

***Attorneys for Plaintiff***
***Thomas L. Taylor, III***

**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 October 7, 2020 via ECF notification.

*/s/ Edward C. Snyder*
**Edward C. Snyder**