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' OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

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Defendants file this Opposition to Plaintiff's Motion for Protective Order as follows.

I. INTRODUCTION

Plaintiff hopes for a huge verdict in this case, but is totally disinterested in allowing the Defendants to exercise their procedural rights or conduct reasonable discovery. In his mind, Plaintiff appears to believe that his case is so strong (it is not) based on his own expert's one-sided and self-serving report that any of the Defendants' efforts to defend this case or take discovery are a waste of his time and designed only to churn fees.[1]

Plaintiff complains that performing essential, routine tasks for litigation, *e.g* producing relevant documents, would "distract" him from his other responsibilities. *See* App. to Motion for Protective Order at App 0011, Decl. of Thomas Taylor ("Taylor Decl.") ¶ 18 (Dkt. #70). Plaintiff now demands that the Court help him avoid these "distractions" and deprive Defendants of critical and relevant information related to his damages theory and his interactions with key witnesses and parties in this case. To this end, he has repeatedly misrepresented the procedural and factual record, has launched *ad hominem* attacks on Defendants, and has filled his motion for protective order ("Motion") with the same conclusory statements he admits cannot prove the need for such a protective order. The Court should not countenance this behavior.

Plaintiff cannot meet his burden to prove the need for a protective order. First, Defendants have only requested relevant information relating to Plaintiff's damages theory and to key deponents and witnesses in this case. Second, Plaintiff has not articulated any burden—let alone an undue one—in responding to Defendants' discovery requests, other than using the same conclusory

[1] Plaintiff conveniently fails to note that Defendants have filed three expert reports, which conclude that Plaintiff suffered no damages from Defendants' conduct. However, Defendants do not intend to litigate the merits of their case in a discovery motion, and therefore are not submitting their reports to the Court.

statements of burden that he previously backtracked from in his briefing on Defendants' original motion to compel. Third, Defendants' requests seek relevant information that is proportional to the needs of the case. Plaintiff has demanded tens of millions of dollars in damages from Defendants and has propounded on Defendants nearly the exact same discovery requests to which he now objects.

Further, as Plaintiff has noted, discovery ends on November 16, 2020, one month from the filing of this motion. The end of discovery increases rather than decreases the importance of receiving responsive documents and information as soon as possible. Plaintiff's imputation of improper motives to Defendants in seeking relevant information for their defense has no basis in fact and is offensive and unwarranted. Finally, Defendants are only seeking non-privileged information or information for which they have a compelling need. Because Plaintiff cannot meet his burden and prove the need for a protective order, the Court should deny his motion.

II. BACKGROUND

This litigation stems from Breitling Oil and Gas Corporation ("BOG"), Breitling Royalties Corporation ("BRC"), and Breitling Energy Corporation's ("BECC") (collectively, "Breitling") alleged fraudulent activities. Defendants conducted audits of Breitling over a seven-month period from October 2013 until May 2014. During their audits, Defendants properly reported potential issues occurring at the companies to Breitling's management and board of directors. On August 11, 2016, over two years after Defendants ceased performing services for Breitling, the United States Securities and Exchange Commission ("SEC") filed suit against Breitling, related entities, and key company personnel for various securities violations. First Am. Compl., *SEC v. Faulkner et al.*, Case No. 3:16-CV-1735-D (Dkt. #22). On August 14, 2017, this Court appointed Plaintiff as temporary receiver over the assets of the Breitling entities.

Order Appointing Temporary Receiver, *SEC v. Faulkner et al.*, Case No. 3:16-CV-1735-D (Dkt. #108).

A. Related Cases and Actions

The SEC began investigating Breitling in January 2011. At the end of 2014, following the end of their audits, Defendants testified to and produced documents to the SEC as part of its investigation of Breitling. Following their testimonies and production of documents to the SEC at the end of 2014, Defendants had limited contact with the SEC until the middle of 2017, when Defendants again provided testimony. Shortly after these testimonies and the appointment of the Plaintiff as receiver, several former shareholders of Bering Exploration Corporation ("Bering"), the entity that had merged with BOG and BRC to form BECC, filed suit against Rothstein, Kass & Company, PLLC ("Rothstein Kass PLLC") in Texas State Court (the "*Jinsun* Action.") in November 2017. Contrary to Plaintiff's representations, this was the first time that Rothstein Kass enjoyed the ability to subpoena third-parties or to otherwise conduct discovery to defend itself. However, this discovery was still limited by the rules of state court and the relevant facts in that action.[2]

Plaintiff incorrectly insinuates that the SEC's Breitling investigation bears on Defendants' culpability in this action. To this end, he has made three critical misrepresentations regarding Defendants' interactions with the SEC: (1) that Mr. Matlock has litigated an administrative proceeding before the SEC, (2) that the SEC instituted a permanent bar against Mr. Matlock, and (3) that the SEC found any misconduct by Rothstein Kass. First, after two years of formal investigation, without any admission of wrongdoing by Mr. Matlock, the SEC instituted a settled proceeding with Brian Matlock on August 13, 2020 —because it was settled, the proceeding was concluded on the day it was instituted. App. at 569, Ex. P. The SEC found

[2] The *Jinsun* action is currently stayed by order of this Court.

that Mr. Matlock violated Section 10A of the Exchange Act by failing to properly identify *potential* illegal conduct. It did not find any other GAAS or GAAP violations concerning the Breitling audits. Further, the SEC did *not* impose a permanent bar on Mr. Matlock. Mr. Matlock may reapply to practice before the Commission after only one year, which is not permissible under permanent bars. *Id.* Defendants noted this misrepresentation to Plaintiff, who refused to correct it. App. at 7, Ex. A. Plaintiff further insinuated that the SEC found that Rothstein Kass violated accounting standards and Section 10A of the Securities Act. Motion at 9. This is false. In fact, the SEC terminated its investigation into Rothstein Kass without any findings of wrongdoing. App. at 10, Ex. B. Plaintiff's misrepresentations are both material and prejudicial and are intended to improperly influence the Court's view of Defendants. *See Franklin v. Law Firm of Simon, Eddins & Greenstone, L.P.*, No. 3:10-CV-1581-D (BK), 2011 U.S. Dist. LEXIS 20002 (N.D. Tex. Feb. 28, 2011) (upholding recommendation to file amended complaint removing provocative information). Indeed, even if Plaintiff's misrepresentations about the SEC's investigation were accurate, they would still be inadmissible to prove Defendants' liability. *See Beck v. Cantor, Fitzgerald & Co., Inc.* 621 F.Supp. 1547, 1565-6 (N.D. Ill. 1985) (finding that under Fed. R. Evid. 408 and 410 party's "acquiescence in the SEC's opinion" was not admissible to prove that auditors' financial statements were false or improper); *see also United States v. Cook*, 557 F.2d 1149, 1151-5 (5th Cir. 1977) (holding that admission of SEC injunctive consent decrees under Fed. R. Evid. 404 was in error because of minimal probative value and substantial danger of unfair prejudice).

B. The *Taylor* Case

Plaintiff filed his original complaint against Defendants on September 3, 2019, over two years after he was originally appointed as receiver. The Court dismissed half of Plaintiff's

counts and reduced one of the two remaining counts, leaving the Plaintiff with two causes of action to pursue: gross negligence and participation in breaches of fiduciary duty. Dkt. #34.

The parties first began engaging in discovery on November 21, 2019, when Plaintiff served his First Set of Requests for Production on Rothstein Kass. Plaintiff served 41 requests for production in this set, excluding the 17 subparts to one request, and effectively asked for all of Defendants' communications and documents related in any way to Breitling or to this case. *See* App. at 20-4, Ex. C (asking for all documents relating to the allegations in Plaintiff's complaint, all documents relating to work performed for the Breitling entities, etc.) The Plaintiff's requests look strikingly similar to Defendants' requests that he now objects to: the parties' communications with several key witnesses, including Malone Bailey, Scheef & Stone, Vinson & Elkins, Jeremy Wagers, Rick Hoover, Beth Handkins, Parker Hallam, Michael Miller Rodriguez, Chris Williford, and Steven Plumb. *Compare id.* at 21-22, Ex. C Requests No. 10, 13 *with* Motion at 12-13. The Plaintiff has also served 18 Interrogatories, 227 Requests for Admission, and an additional 27 requests for production, including requests for all of Defendants' communications with the SEC related to Breitling – another request that he now objects to when asked for the same. *See* App. at 26-77, Exs. D & E; Motion at 14-15. Defendants have responded to all of these discovery requests.

On February 28, 2020, Rothstein Kass PLLC served its First Set of Requests for Production, 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" ("Investor Communications."). Plaintiff objected to this Request and Rothstein Kass PLLC subsequently filed a motion to compel seeking production of communications responsive to its request (Dkt. #39). In his joint report for the motion to compel, Plaintiff argued

that the Investor Communications would not contain relevant information and that production of the documents would constitute an undue burden by requiring Plaintiff to expend "hundreds of hours" and "tens of thousands" of dollars. *See* Joint Report at 7-13 (Dkt. #51). The Court disagreed and ordered the Plaintiff to produce documents responsive to Request No. 31 that had been previously segregated by the Plaintiff or his assistant by June 12, 2020. June 2, 2020 Order ("June 2 Order") (Dkt. #57). After Rothstein Kass identified further responsive documents and requested these responsive records be produced, Plaintiff again refused, this time on the new grounds that he had always segregated the Investor Communications and had produced them, and that searching for other responsive documents would be overly burdensome and cost "thousands of dollars." *See* App. at 237-8, Ex. F.

On June 29, 2020, the Court sustained the Plaintiff's relevance objection, noting that the Plaintiff "represents that his damages are not based on any of the documents Rothstein Kass seeks." June 29 Order at 2 (Dkt #64). The Court stated, however, that expert reports would be forthcoming on August 14, 2020, and that "if it appears by the report of the Receiver's damages experts that the damages calculation *does* rely on investors' claims against the Receivership Estate, then Rothstein Kass may renew its motion prior to the close of discovery." *Id.* As described further below, Plaintiff's expert report (the "Solomon Report") plainly relies on investor claims as a source of his alleged damages. Rothstein Kass thereafter renewed its motion.

On August 28, 2020, Rothstein Kass PLLC served its second set of Requests for Production on Plaintiff, seeking in relevant part (i) all documents related to 15 deponents or potential deponents in the case, including Plaintiff's communications with them ("Request 32") (ii) all communications with the attorneys of the same deponents ("Request 33"), (iii) any draft

declarations of a deponent, Mr. Scott Cox, used by Plaintiff in the *SEC v. Faulkner* case ("Requests 34e and 35e"), and (iv) documents related to any interviews conducted by Plaintiff of certain key witnesses ("Request 41"). App. at 248-51, Ex. G. Despite the relevance of these witnesses, Plaintiff objected to these requests, and the parties subsequently met and conferred. App. at 255-7, Ex. H. Defendants offered to limit Requests 32 and 33 to documents and communications concerning four categories relevant to this case: (1) opportunities for the receiver to potentially recover from other parties, (2) the defendants or facts of this case, i.e. *Taylor v RK*, (3) assets or liabilities in the receivership, and (4) potential culpability of third parties for increased liabilities of the receivership entities. *Id.* Categories (1) and (4) are relevant because Plaintiff has chosen to pursue claims against other parties for similar conduct as Defendants and related to the same underlying facts. *See* First Am. Compl., *Taylor v. Scheef & Stone et al*., No. 3:19-cv-02602-D (N.D. Tex.) (Dkt. #7). Similarly, category (3) is relevant because Plaintiff's own damages theory is based in part on a calculation of liabilities versus assets in the Receivership. Further, to avoid concerns of privilege, Defendants also offered to limit Requests 34e and 35e to drafts of the declaration exchanged with "anyone other than the receiver or receiver's counsel." *Id.* Plaintiff rejected these concessions and filed the instant Motion.

III. ARGUMENT

As this Court has held, "the 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). *See* April 23, 2020 Order at 2-3 (Dkt. #42). As Plaintiff notes, the party seeking a protective order bears the burden of proving the order is necessary. *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (citation omitted).

Conclusory or stereotyped statements do not suffice to prove such a need. *Id.* Plaintiff must prove good cause and a specific need for protection, and must show that Defendants' discovery causes "annoyance, embarrassment, oppression, or undue burden or expense." *Anzures v. Prologis Texas I LLC*, 300 F.R.D. 316, 317 (W.D. Tex. 2012); *Wright v. Csabi (In re Wright)*, 568 B.R. 770, 776 (Bankr. S.D. Tex. 2017) (citing Fed. R. Civ. P. 26(c)(1)). Plaintiff is unable to do so.

A. The Investor Communications Contain Relevant Information That is Not Unduly Burdensome to Produce and is Proportional to the Needs of the Case

i. The Investor Communications are Relevant to Plaintiff's Damages Theory

Relevance is broadly construed. *SEC v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006). A request for discovery should be considered relevant "if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D.Tex. 2005) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001)). The parties may obtain discovery "regarding *any* nonprivileged matter that is relevant to any party's claim or defense…" Fed. R. Civ. P. 26(b)(1) (emphasis added). "Relevant information encompasses 'any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Merrill*, 227 F.R.D. at 470 (N.D. Tex. 2005) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978)). If the discovery appears relevant, the objecting party bears the burden of establishing lack of relevance. *Id.*

As detailed in Defendants' previous motion to compel and its renewed motion to compel, the Investor Communications contain critical information on Plaintiff's damages theory. Despite Plaintiff's protestations to the contrary, the Solomon Report relies on thinly disguised investor claims. In relevant part, Solomon has posited one of his two damages theories as "(1)

the increased liabilities that were sustained by the Receivership Estate" ("Increased Liability Theory"). *See* App. at 317-8, Ex. I. Solomon describes the Increased Liability Theory as follows:

> "The Increased Liabilities Damages calculation is comprised of the following (1) amounts received by the Breitling entities from investors, less (2) refunds and/or disbursements to investors, less (3) the value of any remaining assets held by the Receivership Estate."

Id. at 318. In other words, Plaintiff's damages theory is based on the amount of money investors invested into Breitling and allegedly lost, minus any returns they received – the same calculation that will be used for the "net -out-of –pocket loss" for claims in the Receivership. *See SEC v. Faulkner*, No. 3:16-CV-1735-D, 2020 WL 2042339, at *1 (N.D. Tex. Apr. 28, 2020) ("An Investor Claimant's 'net out-of-pocket loss' would be calculated as the total amount invested in or through the Offering Entities less any amounts, or the value of any assets, received—and retained--with respect to the investment (e.g, payment or assets transferred from a Receivership entity . . .)"). Solomon has impermissibly repackaged investor claims as "increased liabilities," even if he claims otherwise. *See Reneker v. Offill*, No. 3:08-CV1394-D, 2012 WL 2158733 at *6 (N.D. Tex. June 14, 2012) (Fitzwater, C.J.) ("*Reneker IV*") (holding that investor losses and liabilities to receivership entities were not distinct from one another and were impermissible as damages theory).

To distract from this impermissible damages theory, Plaintiff insinuates that any information *other* than what his expert relied on, *e.g* Breitling's books and records, is irrelevant. This is incorrect. The scope of relevance is not so narrow, and relevance is not limited to the documents that one party has chosen to rest its case on. *See Merrill*, 227 F.R.D. at 470 (a discovery request is relevant is there is *any* possibility that the information may be relevant to the claim or defense of a party). If it were, each party would simply limit "relevance" to whatever

facts and documents were most beneficial for it. In fact, Plaintiff is attempting to do just that by claiming that Defendants can simply use Breitling's books and records to test Solomon's theory.

Plaintiff claims that because Solomon's damages theory is based on time-periods stretching from December 19, 2013 through June 2016, the "more" relevant investor communications would be in this period.[3] This argument misses the mark. The relevant Investor Communications are the ones in which the investors assert their claims in the receivership—and the underlying factual basis for them—that inform and create the same investor claims Solomon is using for his Increased Liabilities theory. Without these claims in the receivership, Solomon's damages are purely speculative, as he would otherwise be pursuing rescission liabilities for individuals who are not actually demanding rescission from the receivership. Investor Communications detailing the time of investors' investment, the amount invested, which properties they invested in, whether they were transferred into other properties, and so on, both create and inform the investor claims critical for Solomon's damages theory and allow Defendants to test its veracity.[4] *See* App. at 361-3, Exs. J & K. Solomon has already acknowledged that testing the investors' investment into and returns from Breitling is critical to his damages theory. His report specifically notes that "…BRG further tested Veritas' identification of investor deposits and disbursements, which has *a direct impact on BRG's calculation of damages*." App. at 325, Ex. I (emphasis added). The Investor Communications are relevant to this end.

[3] Solomon's time-periods suffer from critical weaknesses, most notably that he assumes without evidence that the SEC did not have enough information to bring a claim until a certain date and that Defendants' withdrawal from their audit would immediately stop any fraud at Breitling.
[4] Indeed, communications from investors on whether they were transferred to other properties and had knowledge of such transfers is a key issue in the merits of the case, not just the damages theory. *See* App. at 361, Ex. J; First Am. Compl. ¶ 51 (Dkt #45).

Plaintiff's admission that he has only received 130 claims in the Receivership out of the 1300 investors he is seeking "increased liabilities" for underscores Solomon's overreach and the relevance of investor communications to defend against it. *See* Motion at 16, n.9. Plaintiff's "increased liabilities" damages must be limited to the 130 investors actually pursuing claims and creating potential liabilities for the receivership. Otherwise, Plaintiff is pursuing purely speculative "increased liabilities" relating to 1100 plus investors who never in fact pursued claims that created liabilities. Breitling's books and records would never reveal this fact, however—only the Investor Communications and Plaintiff's admission would do so.

Further, information on investor claims allows Defendants to test other weaknesses in Solomon's theory, such as his failure to account for "clawbacks" from "net winner" investors, *e.g* those investors who received more in return from their investments than they originally invested, or his failure to account for investors' tax deductions that offset their losses. Plaintiff's claims that investor tax deductions are separate from Breitling's liabilities is unavailing. The Increased Liability theory is simply investor losses and claims under a different name; any offsets that investors received affects the rescission liabilities Plaintiff claims for his damages. Plaintiff cannot demonstrate that the Investor Communications are irrelevant, and, accordingly, his motion for a protective order to avoid producing them should be denied.

ii. Plaintiff's Shifting and Conclusory Representations of Burden are Unavailing

Plaintiff's shifting explanations for why producing Investor Communications would be burdensome are conclusory and therefore inadequate. *See SEC. 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). After originally claiming that it would cost tens of thousands of dollars and take "hundreds of hours to produce Investor

Communications," Plaintiff changed course and stated that he had a usual practice to segregate Investor Communications, and that they had all been produced. *Compare* App. to Joint Report at 46 (Dkt. #52), Decl. of Thomas Taylor III, ¶ 15 (stating review and production of Investor Communications would take "potentially" hundreds of hours and approximately cost "tens of thousands of dollars. . . .") *with* App. at 238, Ex. F ("[The Receiver] is unaware of any other responsive documents . . . to the Receiver's knowledge they have produced all investor communications."). Now Plaintiff has retreated towards his original position and claims that producing the Investor Communications, along with the rest of Defendants' requested documents, would "potentially" cost tens of thousands of dollars – the same amount he originally claimed producing just the Investor Communications would cost.[5] *Compare* App. to Joint Report at 46 (Dkt. #52), Decl. of Thomas Taylor III, ¶ 15 (producing Investor Communications would "potentially" take "literally hundreds of hours" and "come at an approximate cost of potentially tens of thousands of dollars") *with* Thomas Decl., ¶ 18 (finding and producing responsive documents to *all* of Defendants' discovery requests would "potentially" take "literally hundreds of hours" and cost "potentially tens of thousands of dollars.")

Plaintiff offers no detail as to why this would be the case. His affidavit does not articulate the volume of documents responsive to Defendants' requests, provide information on his firm's hourly rates, or articulate why reviewing and producing documents would take "hundreds of hours." Instead, he only notes the hours and costs that could "potentially" arise in responding to Defendants' requests. *See* Thomas Decl., ¶ 18. Yet he asks the Court and Defendants to take him at his word that complying with Defendants' discovery requests would

[5] Plaintiff has not articulated *any* burden in producing the draft declarations or his interview notes, and so the only burden measured is in producing the Investor Communications and Plaintiff's communications with Breitling personnel and the SEC.

be burdensome and "distract" him from his other duties as the receiver. *Id*. But Plaintiff chose to bring this case, not Defendants, and he may not claim without proof that complying with his obligations and producing relevant documents unduly burdens him—the fact that such production may "distract" him is not relevant. Further, while Plaintiff repeatedly invokes the "over 1300 investors" he may have communications with as a possible source of burden—without ever specifying the volume of communications with these investors—his Motion also states that only 130 claimants have actually brought claims in the Receivership. *See* Motion at n. 9. Moreover, he previously claimed that he has a "usual protocol" of segregating Investor Communications, and so any burden of producing the documents should be minimal. App. at 238, Ex. F.

iii. Producing the Investor Communications is Proportional to the Needs of the Case

Like his claims of burden, Plaintiff offers only conclusory statements that production of the Investor Communications would be disproportional to the needs of the case. This is not enough to warrant a protective order. *Areizaga v. ADW Corp.*, 314 F.R.D. 428, 435 (N.D. Tex. 2016) (party objecting on proportionality must come forward with specific information showing the discovery request is not proportional under Fed. R. Civ. P. 26(b) when considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to information, parties' resources, importance of the discovery, and whether the burden in responding outweighs the benefit of the discovery).

First, Plaintiff has provided no "specific information" on how the burden in producing the Investor Communications outweighs the benefit to Defendants because he has not articulated *any* burden. Instead, he claims the information is of no benefit to the Defendants because it is irrelevant. But, his own admissions and damages analysis belie that claim. Plaintiff is seeking in

excess of $50 million in damages related to thousands of investors who have not submitted claims in the receivership. This would not be reflected in Breitling's books and records, but would only be revealed by the Investor Communications. Plaintiff's reliance on a subset of relevant documents to develop his damages theory does not render documents contradicting or testing that theory irrelevant, and he may not claim that producing such documents is disproportional to the needs of the case simply because he did not rely on them himself.

Second, Plaintiff has provided no information on how his resources would be affected by production of the documents. Instead, he has only claimed generally that producing documents would "potentially" cost "tens of thousands of dollars" from the Plaintiff's "scant" resources. This is not enough to prove that Defendants' requests are disproportional to the needs of the case or to prove the necessity of a protective order.

Finally, Defendants' requests are proportional to the amount in controversy. Plaintiff is seeking tens of millions of dollars in damages from Defendants, yet he claims that the "potentially tens of thousands of dollars" that it would allegedly cost to produce the responsive documents to *all* of Defendants' discovery requests is disproportional. Indeed, Plaintiff has stated his intent to recover from Rothstein Kass damages caused to Breitling before Defendants were even engaged for their audit, and for the damages caused by Breitling's management, not Defendants. *See* Motion at 12, n. 5; App. at 579, Ex. Q (Plaintiff's counsel stating he could recover damages pre-dating Defendants' involvement). Even assuming that Plaintiff's alleged costs of producing documents are accurate, this cost is hardly disproportionate to the recovery Plaintiff seeks. To distract from this, Plaintiff has opted to malign Defendants and insinuate that their refusal to simply settle for whatever he demands and their pursuit of documents to defend themselves from his claims is an attempt to expend Defendants' remaining insurance policies.

Plaintiff's claims are unprofessional and highlight his inability to provide specific support as to how Defendants' discovery requests impose an undue burden or are disproportional to the needs of the case.

B. Plaintiff's Communications with Breitling Personnel and the SEC are Relevant, Not Burdensome to Produce, and Proportional to the Needs of the Case

i. Plaintiff's Communications With Deponents in this Case are Plainly Relevant

Plaintiff cannot seriously contend that his communications with deponents and their counsel in this case are irrelevant. Defendants have requested Plaintiff's communications with 15 deponents or potential deponents in this case, including employees, management, or other professionals associated with Breitling, and with the SEC. ("Witness Communications.") Plaintiff has already acknowledged the relevance of these witnesses by including nine of them as persons with knowledge of relevant facts in his initial disclosures. *See* App. at 366-70, Ex. L. Plaintiff has alleged that several of these deponents, including Chris Faulkner, Jeremy Wagers, and Rick Hoover, are responsible for the underlying breaches of fiduciary duty that Defendants allegedly participated in and he has stated his intent to recover joint and several damages from Defendants' for these individuals' conduct. *See* Motion at 12, n.5. Because Plaintiff bases his allegations against Defendants on the underlying fraud at Breitling and its continuation over the years preceding and following Defendants' time providing services to the company, he cannot complain that information related to Breitling is irrelevant simply because it is not circumscribed to Defendants specifically. *See id*. (arguing that causation runs from the damages caused by Breitling's management, "not *directly* by Defendants.") (emphasis added); App. at 579, Ex. Q. The remaining deponents were involved in or are aware of the alleged fraudulent activities at Breitling that Plaintiff claims Defendants were negligent in failing to detect or stop.

Accordingly, all of these deponents have relevant information to this case which will be reflected in their communications with Plaintiff. *See Merrill*, 227 F.R.D. at 470 (N.D. Tex. 2005).

Further, Plaintiff's communications with the other Breitling employees and consultants are relevant because he has drafted at least one of their declarations, Mr. Scott Cox's, that he has since used to support his claims. *See* App. at 345, Ex. I (documents relied on by Solomon listing Appendix in Support of Receiver's Supplemental Submission in Support of His Motion to Approve Proposed Plan of Distribution and to Establish Procedures to Determine and Disallow Final Claims (Dkt. #539) ("Supplemental Submission App."), which includes the declaration of Scott Cox). Given that Plaintiff has relied on declarations from other deponents in this case, his communications with these witnesses are relevant and may reveal critical information on the witnesses' potential biases. *See* App. at 346, Ex. I. (Solomon relying on "APP 0001-2046", aka SEC's Appendix in Support of *Ex Parte* Motion for Temporary Restraining Order, *SEC v. Faulkner et al,* No. 3:16-cv-01735-D (Dkt. # 105) which includes declarations of Parker Hallam, Beth Handkins, and Michael Miller).

Further, Plaintiff has placed his communications with the SEC at issue in this case through his expert report. Solomon calculated damages for distinct time-periods he opines mark when the SEC could have stopped any fraud or illegal acts occurring at Breitling. App. at 319-320, Ex. I at ¶ 108. The SEC's communications with Plaintiff, which likely includes information on the scope of the SEC's investigation, when the SEC learned certain information and from whom, and potential targets of further lawsuits are all relevant to the SEC's investigation and its effect on Plaintiff's damages. Plaintiff's reliance on *Ciuffitelli*, an unpublished, out-of-circuit case that did not involve a party-receiver's communications with the SEC but instead investor-plaintiff's communications with a receiver, does not change this. *See Ciuffitelli v. Deloitte &*

Touche LLP, 2018 U.S. Dist. Lexis 225087 at *26-32 (D. Ore. 2018). Given the broad scope of relevance, Plaintiff must produce the Witness Communications. *Merrill*, 227 F.R.D. at 470 (N.D. Tex. 2005).

ii. Plaintiff's Admissions Show There is No Undue Burden in Producing the Witness Communications and Their Production is Proportional to the Needs of this Case

Plaintiff makes the same conclusory statements of burden for producing Witness Communications that he makes for the Investor Communications, and his lack of specificity again dooms his ability to establish undue burden. *See* Taylor Decl. at 11, ¶ 18 (claiming producing *all* responsive documents would be burdensome); *Brady,* 238 F.R.D. at 437. But Plaintiff has also already admitted that he has no communications with nine of the parties in Defendants' Request No. 32, and minimal communications with four others. *See* App. at 376-7, Ex. M. Likewise, he does not have any communications with seven of the deponents' counsel and minimal communications with six others. *Id.* at 377-8. Accordingly, his burden in producing responsive documents is negligible.[6] He has not articulated the volume of responsive documents for the remaining witnesses or why producing the communications would be a burden. Further, while he complains that producing Witness Communications for this limited pool over the past three years would cause him an undue burden, he has demanded that Defendants produce the communications with the same parties over a three year period as well. *Compare* App. at 21, Ex. C Requests No. 10, 13, & App. at 34, Ex. D Request No. 1, (seeking all documents and communications with Malone Bailey, Scheef & Stone, Vinson & Elkins, Christopher Faulkner, Jeremy Wagers, Rick Hoover, Beth Handkins, Parker Hallam, Michael Miller Rodqieuz, Gilbert Steedley, Christopher Williford, Steven Plumb, Leonard Ivins, Kevan

[6] Plaintiff filed his Motion on September 25, 2020 without informing Defendants of the alleged lack of responsive documents. Five days later, on September 30, 2020, he filed his responses to Defendants' requests for production.

Casey, Jerry Walters, and the SEC) with App. at 248-9, Ex. G (seeking all communications with substantially the same parties). In fact, Plaintiff has demanded Defendants produce their communications with the SEC related to Breitling or the SEC Investigation over the past *seven* years while simultaneously contending that production of his own communications with the SEC over three years is burdensome. *See* App. at 34, Ex. D Request No. 1. Plaintiff's reliance on conclusory statements of burden is insufficient to establish his need for a protective order. *Brady*, 238 F.R.D. at 437; *In re Terra Int'l*, 134 F.3d at 306.

Given his inability to provide specific information on any burden in producing documents, Plaintiff cannot show that Defendants' requests are disproportional to the needs of the case.[7] *Areizaga*, 314 F.R.D. at 435. Plaintiff's communications with the SEC contain critical information on the SEC Investigation, which he has placed at issue in this case through his expert's damages theories. Further, his communications with the other witnesses reveal potential biases as well as other sources of information and coordination between the parties. Further, the fact that Defendants issued subpoenas to the witnesses has no bearing on the importance of the Witness Communications. Defendants are entitled to seek and to obtain discovery from Plaintiff, the actual party to this case, even if the documents may exist elsewhere. In addition, Defendants have not served or received responses from all of these parties, and there is no guarantee that the parties will have preserved their correspondence with Plaintiff or will produce it. Because he is unable to provide more than conclusory statements of burden and disproportionality, Plaintiff has failed to establish his need for a protective order related to the

[7] Like his proportionality analysis for Investor Communications, Plaintiff also fails to define his level of resources or to take into account the proportionate burden of producing the documents as compared to the amount in damages he is seeking.

Witness Communications. *In re Terra Int'l*, 134 F.3d at 306. The court should deny Plaintiff's motion.

C. Scott Cox's Draft Declarations Filed by Plaintiff are Relevant and Not Privileged

i. Scott Cox's Draft Declarations are Relevant to Overselling and Plaintiff's Interactions with Mr. Cox

The Plaintiff's drafts of Mr. Cox's declarations are relevant to this case. Mr. Cox served as a "landman" for Breitling and helped manage its various properties. He has filed multiple declarations to support Plaintiff's and the SEC's position in the related *SEC v. Faulkner* case, including one stating that while performing his duties at Breitling, he learned about Breitling's alleged overselling of properties and reported it to management. *See* Supplemental Submission App., *SEC v. Faulkner*, No. 3:16-cv-1735-D. Breitling's overselling and its management's awareness of this issue is of critical importance in this case and directly relates to Plaintiff's claims. First Am. Compl. at 8, ¶ 19. The fact that Mr. Cox's declarations were filed in the *SEC v. Faulkner* action, as opposed to this one, is of no consequence because the underlying issues in the declaration relate directly to Plaintiff's allegations in this case. Further, Solomon relied on declarations filed in the *SEC v. Faulkner* action, including one of Mr. Cox's declarations. *See* App. at 345, Ex. I (documents relied on by Solomon listing Supplemental Submission App., which includes the declaration of Scott Cox). Plaintiff's drafting of any declarations for Mr. Cox to file on Plaintiff's behalf is relevant both to the proof Plaintiff may offer to support his claims and to Mr. Cox's potential biases. Likewise, any changes in the drafts of the declarations will reveal the veracity of the final product, as well as which facts or opinions Mr. Cox could *not* sign

off on. The drafts of the declarations are relevant, and must be produced.[8] *See Merrill*, 227 F.R.D. at 470.

ii. Plaintiff's Draft Declarations Exchanged with Third-Parties are Not Privileged

Plaintiff may not rely on the work-product privilege to shield drafts of Mr. Cox's declarations from discovery. As Defendants made clear to Plaintiff, they are not seeking Plaintiff's internal drafts of Mr. Cox's declarations, but rather any drafts exchanged *with* Mr. Cox or his attorneys. App. at 255, Ex. H. Plaintiff has waived any privilege by exchanging the drafts with Mr. Cox, a third-party witness. *Helen of Troy Ltd. v. John Paul Mitchell Sys. Inc.*, No. EP-05-CA-365-FM, 2007 WL 1858819 at *7 (W.D. Tex. 2007) ("A party may waive the work product privilege's protection by…intentionally disclosing the material to third parties . . . ."). In fact, Plaintiff's objections are moot, because he has already agreed to produce all communications with Mr. Cox, which naturally includes any draft declarations exchanged between the parties. *See* App. at 376-7, Ex. M Request No. 32.[9] Moreover, Plaintiff has waived any claim to work-product protection by treating the declarations "in a manner that substantially increases the likelihood that [Defendants] will come into possession of the material." *Ferko v. Nat'l Ass'n For Stock Car Auto Racing, Inc.*, 219 F.R.D. 396, 400-401 (E.D. Tex. 2003). Further, Plaintiff has been in regular contact with Mr. Cox and does not share a common legal interest with him. *Id.* at 403 (holding work-product privilege was waived because information was exchanged with a "nominal adversary" who did not share a common legal interest with

[8] Plaintiff claims that producing the draft declarations would not be proportional to the needs of the case, but does not list any burden in producing what is likely a very limited number of drafts exchanged between the parties. Likewise, he again does not address his level of resources or the proportional burden to him as compared to the amount in controversy. As such, this argument fails.

[9] Plaintiff chose to stand on his objections to producing communications between himself and Mr. Cox's attorneys. App. at 378, Ex. M Request No. 33.

plaintiff, and plaintiff and third-party had been in regular contact with one another). Given this waiver of privilege, Plaintiff must produce the draft declarations exchanged with Mr. Cox.

D. The Interview Notes are Relevant and Defendants have Demonstrated a Compelling Need for Them

i. Plaintiff's Interviews of Key Witnesses and Breitling Personnel Contain Relevant Information

Prior statements of key witnesses are plainly relevant, even if relevance was not construed broadly. *Merrill*, 227 F.R.D. at 470. Plaintiff has stated that he only has interview notes or memorandum for five witnesses: Scott Cox, David Kovacs, Jeremy Wagers, Jonathan Huberman, and CFO Suite.[10] *See* Taylor Decl. App. 008 n. 1; App. 381-2, Ex. M Request No 41. Plaintiff contends that because Defendants have deposed or intend to depose "most of the key witnesses" in the case, they have no need of these notes. But the existence of other sources of information does not eliminate the relevance of these individuals/groups or their prior statements. Each of the five witnesses listed above has relevance to this suit, as they either worked for or helped control Breitling and learned about the key issues in this case while doing so. Further, the interviews are important given the passage of time on this case. Witnesses have been unable to recall critical facts and issues that occurred nearly a decade ago. *See* App. at 398, Ex. N at 56:25-57:03. Interviews and testimonies taken previously, particularly when the witnesses' memories may have been more clear, are therefore important and should be produced. Plaintiff's protests of irrelevance have no merit, and his failure to mention *any* burden in producing the notes undermines any claims that producing the notes is disproportionate to the

[10] Plaintiff excluded Mr. Cox, Mr. Huberman, Mr. Kovacs, and the CFO Suite from his initial disclosures under Fed. R. Civ. P. 26(a), despite the fact that he now admits he interviewed several of them. Document review has revealed that some of these witnesses, most notably CFO Suites, may have also brought knowledge of Breitling's alleged fraud to the company's attention, which has bearing on Defendants' statute of limitations defenses.

needs of the case. *Areizaga*, 314 F.R.D. at 435 (party must bring specific information showing requested discovery is disproportionate to the needs of the case).

ii. Defendants Have a Compelling Need for the Interview Notes Because of the Passage of Time

Even if Plaintiff's notes of his interviews are protected by work-product privilege, Defendants still have a compelling need for them. If a party is able to demonstrate a compelling need for the materials protected by the work-product privilege, then the Court may order production of opinion-work product. *United States ex rel. Wall v. Vista Hospice Care*, 319 F.R.D. 498, 501 (N.D. Tex. 2016). Previous depositions have revealed that because of Plaintiff's delay in bringing this case, numerous witnesses are unable to recall key events and issues. *See* App. at 398, Ex N at 56:25-57:03 (Breitling's general counsel claiming he cannot recall Defendants informing him about overselling); App. at 506, Ex. O at 62:06-25 (Breitling's audit committee chairman unable to recall conversations between him and Defendants). Some witnesses, including Jeremy Wagers, Breitling's general counsel and a key witness, have even demonstrated difficulty in recalling events related to Breitling that they testified to in the previous year. *See* App. at 428, Ex. N at 177:23-179:07 (Mr. Wagers unable to recall a document he testified about one year previously). The knowledge of Breitling's employees, management, and board members is of critical importance in this case both for establishing Defendants' proper behavior in informing management and board members of the issues at Breitling and for statute of limitations purposes. Given the inability of witnesses to properly recall the events surrounding Breitling, Plaintiff's notes of his interviews with witnesses is essential for creating a proper record. Defendants have a compelling need for these documents, and they must be produced.

IV. CONCLUSION

For the aforementioned reasons Defendants respectfully request that the Court deny Plaintiff's motion for protective order and order him to produce responsive documents to Defendants' requests.

Dated: October 16, 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 October 16, 2020 via ECF notification.

/s/ Nicolas Morgan
NICOLAS MORGAN