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' REPLY IN SUPPORT OF RENEWED MOTION TO COMPEL DOCUMENT PRODUCTION

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DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO COMPEL DOCUMENT PRODUCTION

Defendants file this Reply in Support of their Renewed Motion to Compel Document Production as follows.

I. INTRODUCTION

Plaintiff's Response to Defendants' Renewed Motion to Compel ("Response") neither refutes the relevance of Defendants' requested discovery nor establishes that producing the requested information is unduly burdensome. Instead, Plaintiff recycles his unfounded assertions that Defendants seek discovery for improper motives. In doing so, he ignores the nature and magnitude of the damages sought in this case. Plaintiff's attempt to recover for "increased liabilities" to the Receivership from investor payments and disbursements places his communications with investors ("Investor Communications") squarely at issue. Further, because the claimed amount of these alleged damages is tens of millions of dollars, the cost of producing those communications is proportional to the case. Plaintiff has only passingly referenced his alleged undue burden in producing the Investor Communications and has opted to rely on the same conclusory statements that failed to support his Motion for Protective Order ("Motion for P.O."). The burden of demonstrating irrelevance, undue burden, and disproportion rests with the party resisting discovery. Because Plaintiff has not met this burden, the Court should grant Defendants' Renewed Motion, and order that all Investor Communications be produced.

II. 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).

a. **The Investor Communications Contain Relevant Information on Plaintiff's Damages Theory**

As if mere repetition makes it so, Plaintiff reprises the mantra from his Motion for P.O. that Investor Communications are not relevant because he is not seeking to recover damages based on investor claims. But Plaintiff's expert report (the "Solomon Report") lays bare that investor claims are precisely what the Plaintiff posits as a basis for damages. Solomon measures "the increased liabilities that were sustained by the Receivership Estate" as the result of "(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." ("Increased Liability Theory"). App. at 63-4, Ex. A. In other words, Plaintiff's damages theory is based on the amount of money investors invested into Breitling 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 Plaintiff 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).

Nevertheless, Plaintiff contends that Investor Communications are not relevant because his damages expert only used Breitling's books and records to develop his damages model. This is simply wrong. 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 v. Waffle House*, *Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005) (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.

Contrary to Plaintiff's argument, Solomon's sole reliance on Breitling's books and records does not render any other information irrelevant. Rather, the limited information used by Solomon yields two particular results that highlight just why Investor Communications are vital to defending against Plaintiff's claims. First, by looking only at Breitling financials, Solomon includes as "increased liabilities" every investment (with certain adjustments) made in each of his damages periods, ***regardless*** of whether the particular investor has or could make a claim against the Receivership. Second, by looking at investments solely from Breitling's perspective, Solomon fails to account for interest transfers, net-winner investors, and tax benefits that would reduce any investor claim against the Receivership – and potentially eliminate it entirely. The potential effect on recoverable damages is substantial.

Plaintiff appears to concede that at least ***some*** Investor Communications are relevant, but argues that the time period for production should be restricted to the years for which Solomon calculates damages. Response at 5. The argument misses the mark, because more recent Investor Communications are those most likely to yield information about whether investments between 2013 and 2016 translate to actual investor claims – and thus liabilities – of the Receivership.

The Court's May 11, 2020, Order Implementing Plan of Distribution ("Implementation Order"), establishes October 30, 2020 as the Claim Bar Date. Implementation Order, *SEC v. Faulkner*, *et al.*, No. 3:16-cv-1735-D (N.D. Tex) (Dkt. #542). Thus, the receivership entities' actual liabilities (as opposed to the theoretical and speculative liabilities calculated by Mr. Solomon) have not yet been established. *Id*. According to the Implementation Order, "the estates of the Receivership Entities shall be forever discharged from any indebtedness or liability to any [and] all parties that are not Potential Claimants," and "the estates of the Receivership Entities shall be forever discharged from any indebtedness or liability to the Potential Claimants, and the Potential Claimants shall not be permitted to receive any distribution, except with respect to their Final Claim Amounts as expressly provided for under the Plan." *Id*. at 2. Mr. Solomon does not know, and makes no attempt to identify, which of his "increased liabilities" damages are or will be discharged by the Implementation Order.

In fact, although Plaintiff seeks "increased liabilities" damages associated with 1300 investors, he admits to receiving only 130 claims in the Receivership to-date. *See* Response at 3-4, n.4. Plaintiff's "increased liabilities" damages must be limited to the investors actually pursuing claims and creating potential liabilities for the receivership—any other potential claims not pursued are "forever discharged." Breitling's books and records—by themselves—would never reveal this fact, however.

Investor Communications in which the investors assert their claims in the receivership—and the underlying factual basis for them—are thus highly relevant. They will either support or undermine whether the simple receipts and disbursements reflected in Breitling's books and records in fact create an "increased liability." Absent visibility into the receivership claims process, Solomon's damages calculations are purely speculative: investors with "on the books"

net out-of-pocket losses who never make a legitimate claim in the receivership estate are not actual liabilities for the receivership and should not be included as a measure of damages.

Similarly, 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, will tend to prove or disprove whether or not a net out-of-pocket investor actually increased the liabilities of the receivership.[1] *See* App. at 107-9, Exs. B & C. 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 71, Ex. A (emphasis added). Even Solomon and the Plaintiff appear to concede—as they must—that not every net out-of-pocket investor reflected on Breitling's books and records has a legitimate claim against the receivership estate and, accordingly, does not result in an increased liability to the receivership estate. The Investor Communications are relevant to the parties' and the Court's determination of these issues.

Further, information on investor claims will permit Defendants and the Court 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. Inexplicably, Plaintiff asserts that investor tax deductions will not impact his "increased liabilities" damages amount. Response at 7. However, in connection with his plan of distribution as approved by the court in *SEC v. Faulkner*, Plaintiff takes the opposite position.

[1] 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 107, Ex. B; First Am. Compl. ¶ 51 (Dkt #45).

Faulkner, 2020 WL 2042339, at *10 (" . . . to the extent some Investor Claimants have benefited from tax-related write-offs or deductions to date, the Receiver can take these benefits into account when calculating the Investor Claimants' 'net out-of-pocket losses' . . ."). At least in one forum, Plaintiff concedes that he will not be paying investors for net out-of-pocket losses to the extent of tax-related write-offs. But in this case he appears to suggest the issue is irrelevant even though investor tax deductions will clearly impact the actual liabilities of the receivership estate. Plaintiff's Increased Liability Theory is simply investor losses and claims under a different name; any offsets that investors received will impact receivership liabilities, and will therefore impact Plaintiff's damages in this case.

Plaintiff's reference to *Daubert* further highlights the importance of the Investor Communications. As Plaintiff notes, Defendants may attack Mr. Solomon's methodologies, including his reliance on the books and records he claims are a basis of a fraud, through *Daubert* challenges. But to do so, Defendants must be armed with the very "contrary evidence" that Plaintiff wants to deny Defendants: the Investor Communications. *See Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence. . . are the traditional and appropriate means of attacking shaky but admissible evidence.") Plaintiff has avoided production of these documents long enough to prevent Defendants from using them at Solomon's deposition six days from now, but he cannot continue to do so and deny Defendants the evidence necessary to prove the weaknesses in Solomon's report through a *Daubert* challenge.

b. **Plaintiff Has Again Failed to Articulate Any Undue Burden in Producing the Responsive Documents and Cannot Show They Are Disproportional to the Needs of this Case**

As in his Motion for P.O., Plaintiff has failed to articulate any undue burden posed by producing the Investor Communications or explain how any such burden is disproportional to the

needs of the case. *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); *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). Plaintiff has insufficiently and only passingly addressed these issues in his Response, resting instead on the conclusory statements in his declaration and claiming that because Defendants have already designated a rebuttal expert, the Investor Communications are unnecessary. Response 6-8. Plaintiff continues to fail in his efforts to establish undue burden under these standards.

First, as discussed in Defendants' Opposition to Plaintiff's Motion for P.O., Plaintiff has continually changed his representations regarding the purported burden in producing Investor Communications. Plaintiff has shifted from claiming that producing the Investor Communications would take "hundreds of hours" and "tens of thousands of dollars" to claiming that he always segregated Investor Communications and had produced them all. *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 113, Ex. D ("[The Receiver] is unaware of any other responsive documents . . . to the Receiver's knowledge they have produced all investor communications."). Now he has retreated to his original position and claims that producing the Investor Communications, along with the rest of Defendants' requested documents from their

separate document requests, would "potentially" cost tens of thousands of dollars—the same amount he originally claimed producing only the Investor Communications would cost. *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* App. to Response (Dkt. #72), Decl., of Thomas Taylor III ("Taylor 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 has again provided no evidence that would prove any burden, let alone an undue one, in producing the Investor Communications. He does not articulate the volume of responsive documents, his hourly rates, or why reviewing and producing documents he previously claimed were already segregated under his "usual protocol" would take hundreds of hours. App. at 113, Ex. D. Likewise, he repeatedly invokes the "over 1300 investors" he *may* one day have communications with while simultaneously admitting that only 130 investors have actually pursued claims in the Receivership. Response at 2-3, n. 4. This is not enough to prove any burden in producing the documents, let alone an undue one. Plaintiff's declaration shows that his only "burden" in producing the Investor Communications is that he believes complying with his discovery obligations is a "distract[ion]." Taylor Decl., ¶ 18. This is not enough to prove undue burden or to show that producing the documents is disproportional to the needs of the case.

Plaintiff has also provided no information on how his resources would be affected by production of the documents and has failed to consider the amount in controversy in this case. Plaintiff provides only unsupported assertions that production would "potentially" cost "tens of

thousands of dollars" and would cut into his "scant" resources, all while he is seeking tens of millions of dollars in damages from Defendants. *See* App. at 9-10, Ex. A (Solomon providing total damages calculation); Taylor Decl. ¶¶ 8, 18. But even if Plaintiff's vague, unsupported cost estimates were accurate, they would hardly be disproportional to the amount in controversy.

Finally, Plaintiff's reliance on *Perez v. Boecken* is misguided. Response at 6. The Court in *Perez* held that the discovery requests were disproportional to the needs of the case because (a) the court refused to extend the holding from a separate case and deem the requested information relevant in the personal injury context, (b) the discovery was sought from non-party medical providers to challenge the plaintiff's damages on a "tangential" issue, and (c) the requested information was not necessary because nearly the same information was publicly available. *Perez v. Boecken*, SA-19-CV-00375-XR, 2019 U.S. Dist. LEXIS 176150 at *7-14 (W.D. Tex. Oct. 10, 2019). In contrast here, the Investor Communications are plainly relevant (for all the reasons discussed above) and can only be obtained from Plaintiff. Plaintiff is unable to meet his burden to prove undue burden and disproportionality, and he must be ordered to produce the Investor Communications.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court order Plaintiff to produce responsive documents to their requests.

Date: October 21, 2020

By: */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 21, 2020 via electronic mail.

/s/ Nicolas Morgan
NICOLAS MORGAN