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 REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

NOW COMES Plaintiff Thomas L. Taylor III ("Receiver"), solely in his capacity as temporary Receiver for the Breitling group of companies, and files this Reply Brief in Support of his Motion for Protective Order pursuant to FRCP 26(c), ECF No. 69 (the "Motion"), and would show the Court the following:

I. INTRODUCTION

Defendants bizarrely appear to treat the Receiver as if he were a percipient fact witness who was around during the time periods relevant to this case and involved in the underlying facts of the case, as opposed to a Court-appointed Receiver and arm of the Court. For example, Defendants seek to equate their own requests for production from the Receiver of his communications with certain witnesses (and with the SEC) with the Receiver's requests for production from Defendants of their communications with certain witnesses *during the time that Defendants were performing audits of the Breitling entities*.[1] Defendants' Opposition, ECF No. 75, at p. 5. Any communications the Receiver has had with witnesses related to the Breitling entities as part of his overall investigative activities obviously occurred after his appointment as Receiver in 2017. And the Receiver's voluminous communications with the SEC staff regarding mundane issues related to the administration of the Receivership Estate have no relevance to the claims and defenses in this case.

The bottom line is that the Defendants are being sued based on their work for Breitling that occurred prior to the institution of the Receivership. The Receiver had never even heard of Breitling until shortly before he was appointed Receiver in 2017. Therefore, his communications

[1] The Receiver has also more recently requested production of documents evidencing Defendants' communications with the SEC related to the SEC's administrative action against Defendant Matlock, but that is because said SEC administrative action is based on Matlock's misconduct with regard to Defendants' audits of the Breitling entities in 2013-2014.

with witnesses and with the SEC *after* he was appointed Receiver in 2017 are not relevant to Defendants' responsibility for the two "clean" audit opinions they issued for Breitling in 2014.

The Receiver's Motion for Protective Order should be granted because, as detailed below and in the Motion, Defendants have failed to satisfy the proportionality test and Defendants' discovery requests constitute a blatant "fishing" expedition and lack any solid basis for relevancy.

Finally, the Receiver is compelled to respond to the Defendants' suggestion that the Receiver has somehow misrepresented to the Court the result of the SEC's administrative action against Defendant Brian Matlock. Defendants argue to the Court that the SEC did *not* impose a "permanent bar" on Mr. Matlock's ability to audit publicly traded companies. Yet recently produced correspondence between Defendants' counsel and the SEC staff regarding the negotiation of the resolution of the Matlock administrative proceeding reveals that counsel for Defendants himself referred to the bar as a "***permanent 102(e) bar***". See April 16, 2020 e-mail from Nicolas Morgan to Jeffrey Cohen at the SEC (filed under seal as ECF No. 81); see also Declaration of Thomas Taylor, at ¶ 5-6, App. 0006-0007 (testifying that the SEC Order is a permanent bar with a right to reapply after one year, which application can be denied). And the plain language of the SEC Order included in the Appendix to the Receiver's Motion [ECF No. 70] also makes clear that the SEC found that Rothstein Kass violated Section 10A(b)(1)(A)(i) of the Exchange Act and Regulation S-X Rule 2-02(b)(1). *See* SEC Order, at p. 2-3, Motion App. 120-121 ("*RK…engaged in improper professional conduct, and RK violated…Section 10A(b)(1)(A)(i) of the Exchange Act, by failing to take appropriate steps in relation to potential illegal activity on the part of Breitling and its management*") and p. 7, Motion App. 125 ("*Matlock caused RK's violations of Section 10A(b)(1)(A)(i)"*, and *"Matlock caused RK to violate Regulation S-X Rule 2-02(b)(1) when RK issued the Breitling audit report stating that it conducted the audit in*

accordance with PCAOB standards when, in fact, it had not"). The Receiver did not misrepresent anything to the Court.

II. ARGUMENTS AND AUTHORITIES

A. Investor Claims Communications

Defendants continue to argue that they are entitled to an ongoing production of all of the Receiver's communications with former Breitling investors because such information is "critical" to one of the Receiver's damages model. This is simply not true.

First, the Receiver's increased rescission liability damages model, as conceived by Saul Solomon of Berkeley Research Group ("BRG") in his expert witness report, is based on the Database created by the SEC of the Breitling Entities' bank account and other financial records (the "SEC Database"), as supplemented by the "Sowards Database" of investor funds flow information and Breitling financial and banking records,[2] and as further supplemented by the "BRG Database" of additional investor funds flow information (collectively the "SEC/Sowards/BRG Data"). See Solomon Report, at ¶¶ 109-125, Motion App. 0104-0112, ECF No. 70. Importantly, the Receiver's increased rescission liability damages model is not based on the Receiver's claims process, which is currently underway in the separate SEC Action[3] but is not completed.

Second, and as ordered by the Court in its Order Implementing Plan of Distribution in the SEC Action, as part of his claims process the Receiver will be providing all "Potential Claimants" notice in writing of a "notional claim amount" as calculated by the Receiver, which "notional claim

[2] The Court has previously relied on the data and information provided by Rodney Sowards of Veritas in the SEC Action. *SEC v. Faulkner*, 2020 WL 2042339 (N.D. Tex. 2020) (order approving Receiver's plan of distribution).

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

amount" will become the "Final Claim Amount" unless disputed by the Potential Claimants with supporting documentation. Order Implementing Plan of Distribution, ECF No. 542 in the SEC Action. The Receiver will be utilizing and relying on the "SEC/Sowards/BRG Data" as his baseline of "notional claim amounts" for the potential Breitling claimants. See Taylor Declaration at ¶ 4, App. 006. The Receiver's position is that it would be counter-intuitive to believe that any Breitling investor will contest his "notional claim amounts" unless they believe the claim dollar amount should be higher. If that is the case, then such a discrepancy would only serve to increase the rescission liability damages calculated by Mr. Solomon.

Thus because the baseline for the Receiver's claims determinations is based on the exact same SEC/Sowards/BRG Data as Solomon's increased rescission liability damages model, it is not "critical" for Defendants to receive production of ***all*** of the Receiver's communications with Breitling investors, including all future communications and documentation submitted as part of the Receiver's ongoing claim process. Defendants' request is not proportional to the needs of the case because Defendants already have the SEC/Sowards/BRG Data and their request, if granted, would unduly burden the Receivership Estate and delay the ultimate resolution of this case.[4] The Court has "broad powers and wide discretion to determine the appropriate relief in an equity receivership" and "to shape equitable remedies necessary to protect the estate",[5] and the Receiver requests that the Court exercise its discretion to provide the Receiver with the protection he requests.

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[4] As the Receivership Court overseeing the Receiver's activities with respect to the Receivership Estate, the Court is intimately familiar with the Receiver's available resources and commitments and the burden the Defendants' requests would impose on the administration of the Estate.

[5] *SEC v. Stanford Int'l Bank Ltd*., 927 F. 3d 830, 840 (5th Cir. 2019).

B. Receiver's Communications with Witnesses

Defendants continue to argue that the Receiver should be required to produce all of his e-mails and other communications with 14 former Breitling employees and/or agents or their counsel – *regardless of whether or not they relate to Defendants or the claims made against Defendants in this case*. As the Receiver pointed out in his Motion, Defendants have already issued document subpoenas and/or deposition subpoena *duces tecum* requiring the production of all their Breitling-related documents to the majority of said witnesses.

Defendants' response does nothing to further enlighten the Court on how the requests constitute anything more than a "fishing expedition".[6] Instead Defendants merely point out that the Receiver listed many of the witnesses as fact witnesses in his initial disclosures. The Receiver does not deny that the witnesses are fact witnesses, he merely denies that he has had any meaningful or relevant communications with any of them *vis a vis* this case.[7] Once again, Defendants seem to lose sight of the fact that the Receiver himself *is <u>not</u> a percipient fact witness in this case*, and that any communications he may have had with the witnesses in his capacity as Receiver – all of which occurred after the relevant time period (2103-2015) at issue in this case - have nothing to do with this case. Because Defendants' requests are not tailored to this case and the documents requested are not relevant to this case and would not assist a jury in answering the questions that will be presented to the jury at trial, the Court should grant the Receiver protection

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[6] Indeed, the principal basis for Defendants' insistence on production of these witness communications is best summed up in the one line from their Opposition to the Receiver's Motion: *"...all of these deponents have relevant information to this case <u>which will be reflected in their communications with Plaintiff</u>"*. Defendants' position is speculative and utterly baseless.

[7] Defendants have also shamelessly taken to misrepresenting to the Court that a declaration (the "Cox declaration") that the Receiver used solely in support of his plan of distribution in the SEC Action also supports Mr. Solomon's expert report, merely because said declaration was included as one of multiple documents (including, most importantly, the Sowards Declaration) attached to the Receiver's Appendix in support of his Supplemental Submission related to the plan of distribution – which Appendix *generally* was listed by Mr. Solomon as a document he reviewed in conjunction with his expert report. See Defendants' Opposition, ECF No. 75, at p. 16. Mr. Solomon does not refer to or rely on the Cox declaration anywhere in his expert report.

from this request so that he does not have to waste his valuable time (and Estate assets) searching through his thousands of e-mails related to Breitling since his appointment in 2017.

C. Receiver's Communications with the SEC

As with the witness communications, Defendants continue to demand that the Receiver produce all of his communications with the SEC since his appointment in 2017 because said communications "likely" have some bearing on the Receiver's damages models. But as evidenced by the Solomon expert report, the Receiver's damages models are premised on four different analysis time periods ***all of which pre-date the appointment of the Receiver***. See Solomon report, Motion App. [ECF No. 70] at App. 0112-0113. As a result, none of the Receiver's communications with the SEC after his appointment in 2017 are in any way relevant to the SEC's investigation of Breitling during the relevant damage model time periods of 2013 to 2016.

And while Defendants complain that the Receiver has made a similar request on Defendants, that is because Defendants obviously were around and involved in the relevant facts and wrongdoing during the relevant time periods, and the SEC initiated an administrative action against Defendant Matlock as a result of Defendant Matlock's conduct with regard to Defendants' audits of Breitling in 2013-2014. The Receiver requested documents related to that administrative action because said documents are directly related to the Receiver's claim against Defendants herein.

In contrast, Defendants arguments as to the relevance of the Receiver's post-appointment communications with the SEC amount to pure conjecture and speculation, such as their conclusory assertion that the Receiver's "*communications with the SEC contain critical information on the SEC Investigation*" and that the Receiver's "*communications with the other witnesses reveal potential biases as well as other sources of information and coordination with the parties*."

Opposition at p. 18. Defendants cite to no evidence to support any of their assertions and arguments, thereby once again proving that these requests are designed more to harass the Receiver and constitute nothing but a baseless fishing expedition.

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

Defendants have also requested production of drafts of the Cox Declaration the Receiver's counsel prepared for use in the SEC Action as an exhibit in support of the Receiver's Supplemental Submission in Support of Motion to Approve Proposed Plan of Distribution (SEC Action, ECF No. 538). Once again Defendants misrepresent to the Court that the Cox Declaration also supports Mr. Solomon's expert report, merely because said declaration was included as one of multiple documents (including, most importantly, the Sowards Declaration) attached to the Receiver's Appendix in support of his Supplemental Submission related to the plan of distribution - which Appendix *generally* was listed by Mr. Solomon as a document he reviewed in conjunction with his expert report. Defendants' Opposition, at p. 20. Mr. Solomon does not refer to or rely on the Cox Declaration anywhere in his expert report.

But that misrepresentation notwithstanding, the Receiver has agreed to produce to Defendants the drafts of the Cox Declaration that the Receiver's counsel exchanged with counsel for Mr. Cox such that the Court need not decide this issue. The Receiver will continue to stand on his objections and seek the Court's protection from producing his counsel's internal drafts of the Cox Declaration based on the attorney work product privilege as it pertains to witness statements. FED. R. CIV. P. 26(b)(3); *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979); *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) (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).

E. Receiver's Notes of Interviews with Breitling Witnesses

Defendants continue to insist that the Receiver produce his attorney interview notes for five witnesses. The Receiver stands on his objection and request for protection from such requests based on the attorney work product doctrine, which 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 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. The Receiver's notes of witness interviews clearly constitute his work product and are shielded from discovery.

Moreover, the Defendants' arguments that they have a compelling need for the Receiver's notes because, *e.g.*, former Breitling General Counsel Jeremy Wagers could not remember in his recent deposition what he testified to in his prior deposition, ring hollow precisely because that is the entire point for having depositions in the first place – to capture a witness' testimony and then use the deposition testimony to refresh the witness' memory at trial if he has trouble remembering the truth. The fact that the cited witnesses have already been deposed or are soon to be deposed weighs in favor of the Court granting the Receiver's request for protection of his attorney work product. Of the five persons cited by Defendants, one (Wagers) has been deposed 5 times now (including in this case)[8] in the various Breitling-related cases, another (Scott Cox) has already been deposed by Defendants in this case, and Defendants are poised to depose two of the other three in the next 3 weeks.

[8] Indeed the Receiver's only notes concerning Jeremy Wagers are notes he took during his on the record deposition of Mr. Wagers, which deposition was transcribed and Defendants have a copy.

As a result, there is no reason to allow Defendants to invade the Receiver's work product and the Receiver requests that the Court grant him protection from having to respond to said requests.

WHEREFORE, PREMISES CONSIDERED, the Receiver requests that the Court grant the Motion and issue a Protective Order granting the Receiver protection from having to respond (with the exception of drafts of the Cox Declaration shared with Cox's counsel) 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 October 30, 2020 via ECF notification.

/s/ Edward C. Snyder
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