

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

SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
PLAINTIFF,)	
)	
v.)	Civil Action No. 3:17-cv-00420-L
)	
PATRICK O. HOWARD; HOWARD)	
CAPITAL HOLDINGS, LLC; AND)	
OPTIMAL ECONOMICS CAPITAL)	
PARTNERS, LLC,)	
)	
DEFENDANTS.)	

**DEFENDANT PATRICK O. HOWARD’S BRIEF IN OPPOSITION TO RECEIVER’S
MOTION TO SHOW CAUSE**

I. SUMMARY

Defendant Patrick O. Howard (“Mr. Howard”) respectfully submits this Response in Opposition to the Receiver’s fatally flawed Motion to Show Cause [ECF No. 56] (the “Receiver’s Motion”) and Brief in Support thereof [ECF No. 57] (the “Receiver’s Brief”). The Court should deny the Receiver’s Motion as to Mr. Howard because: (1) it lacks basic factual foundation; (2) it is premised on alleged conduct that is not prohibited by this Court’s Order Appointing Receiver; and (3) it seeks draconian remedies without providing Mr. Howard with any meaningful discovery. The Receiver’s Motion also should be rejected because it, and the litigation it has caused, is an unnecessary drain on limited Receivership assets that could otherwise be preserved for investors. It is not in the best interest of the investors that the Receiver’s Motion was filed and it is not in the investors’ best interests that this litigation should continue.

II. FACTUAL BACKGROUND

On February 14, 2017, the Staff of the United States Securities and Exchange Commission (the “Staff”) moved this Court, *ex parte*, for an Order Appointing Receiver (“Order”). See Pl’s Mtn. for Prelim. Inj., Ex Parte TRO, Asset Freeze, Appointment of a Receiver and Other Emergency and Ancillary Relief, ECF No. 5. The Staff’s request was granted the same day. See Ex Parte Order Granting Mot. to Appoint Receiver, ECF No. 10; Ex Parte Order Granting TRO, Asset Freeze, and Other Emergency and Ancillary Relief, ECF No. 12. On February 27, 2017, the Receiver sent notice to counsel for Mr. Howard alleging that on February 17, 2017, Mr. Howard did not comply with the Order. The Receiver stated, “Mr. Howard appears to have directed an employee to execute a contract.” See Receiver’s Initial Status Report, Ex. 2, at 2, ECF No. 40-2. In the February 27 notification letter the Receiver added, “Howard continues to make false representations to employees with the apparent intent that the communications be transmitted to investors.” See Receiver’s Initial Status Report, Ex. 2, at 2, ECF No. 40-2. On April 11, 2017, the Receiver sent another notice to Mr. Howard’s counsel stating that Mr. Howard “was involved in sending” a letter to investors containing false statements, but did not provide Counsel with any factual support for the accusations.

The Receiver now moves this Court to find Mr. Howard in civil and criminal contempt of the Order based on its interpretation of two pieces of evidence: (1) an April 8, 2017 email that the Receiver concedes was “organized and sent by [Dovile] Soblinskas,” a former employee of, and current investor in Optimal Economics Capital Partners, LLC (“Optimal Economics”); and (2) an April 10–13, 2017 text message conversation in which Mr. Howard responded to questions posed by Optimal Economics investor Andrea Venezia. See Receiver’s Brief at 8, 16–17, ECF 57. The Receiver claims these two communications establish, by clear and convincing evidence, that Mr.

Howard violated this Court's order by interfering with the Receivership. *See* Receiver's Brief at 20–21, ECF No. 57.

The Receiver also reaches back to its two earlier complaints that Mr. Howard allegedly violated the Order – neither of which is supported by any evidence. First, the complaint raised on February 27 that Mr. Howard directed an employee on February 17, 2017 to execute a contract on behalf of Optimal Economics. The Receiver provides no facts or details regarding how the employee was allegedly directed by Mr. Howard or how this direction was communicated. *See* Receiver's Brief at 20–21, ECF No. 57. Second, the complaint raised on February 27 that Mr. Howard made false representations to employees with the “apparent intent” that the communications be transmitted to investors. The Receiver has not identified any dates of these communications, the method of communication or identity of the involved parties. *See* Receiver's Brief at 20–21, ECF No. 57.

III. ARGUMENTS & AUTHORITIES

A. **The Receiver's Motion Fails to Establish by Clear and Convincing Evidence that Mr. Howard Should be Held in Contempt**

The Receiver bears the burden of proving whether a party should be held in civil contempt. To succeed, the Receiver must establish by “clear and convincing evidence” that a party violated “a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.” *See Waste Mgmt. of Washington, Inc. v. Kattler*, 776 F.3d 336, 341 (5th Cir. 2015) (citing *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013)). Clear and convincing evidence is “that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact

finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.”
In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992).

The Receiver alleges that Mr. Howard violated the Order’s provision that restrains and enjoins recipients of the Order from hindering, obstructing, or otherwise interfering with the Receiver in the performance of his duties. *See* Receiver’s Brief at 5–6, ECF No. 57. This claim is meritless and should be rejected. The Receiver fails to offer evidence of how Mr. Howard has hampered his ability to fulfill his duties, and instead, relies on mere conclusory statements that do not satisfy the “clear and convincing” evidentiary standard. *See Killian v. Quarterman*, No. 3:05-CV-1742-L, 2008 WL 4167506, at *3 (N.D. Tex. Sept. 9, 2008) (concluding that pointing to conflicting testimony and arguing its categorization as evidence “is conclusory and a far cry from being clear and convincing evidence.”). The Receiver claims, without any evidentiary support, that “the conduct by the Respondents has caused some of the investors to be lulled into thinking the Receiver, the SEC and Court are not trustworthy and there is money and value in the Receivership Estate that does not exist.” *See* Receiver’s Brief at 24, ECF 57. The Receiver concedes he “speaks with investors almost every single day.” *Id.* Yet despite these almost daily conversations, the Receiver does not offer any evidence that Mr. Howard caused any such thinking or that the Receiver was hindered, obstructed or interfered with such that the Receiver could not perform his duties. Consequently, the Receiver fails to satisfy the clear and convincing evidentiary standard as to whether investors have been confused or that the Receiver has, in any way, been prevented from carrying out his job. *See Travelhost Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (concluding that the definition of clear and convincing evidence which should apply in the contempt context is “that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. . . .”).

1. The April 10 – 13, 2017 Text Messages & April 8 Email Communication

The text message exchanges between Mr. Howard and Ms. Venezia are not evidence of Mr. Howard's interference with the Receiver. The Receiver has not provided facts to demonstrate anything other than the possibility that at some point, Mr. Howard became aware of the April 8, 2017 email to Optimal Economics' investors. The Receiver offers no support for the allegations that Mr. Howard might have been involved in the email's drafting or dissemination. Rather, the Receiver draws inferences without sufficient factual underpinnings and misconstrues Mr. Howard's shorthand text messages to fit the Receiver's narrative of events. This evidence does not meet the "clear and convincing" standard, as it does not constitute "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations," but is rather speculative and vague. *See Travelhost*, 68 F.3d at 961.

The Receiver acknowledges that he met with both Dovile Soblinskas and Christine Horne on March 21, 2017. *See* Receiver's Brief at 7–8, ECF No. 57. The Receiver states in his Brief that he informed Ms. Horne (and presumably Ms. Soblinskas) that "[Ms. Horne] was not authorized to send any communications that were not truthful to any investors." *See* Receiver's Brief at 8, ECF No. 57. Importantly, the Receiver did not state that Ms. Horne or Ms. Soblinskas were outright prohibited from communicating with investors, but could only do so if truthful. *Id.* Thus, the Receiver appears to have permitted them to communicate with investors. Mr. Howard's statement "I told Dovile to include you in the initial group" is not inconsistent with any statements by the Receiver to Ms. Soblinskas or Ms. Horne. Mr. Howard's statement "I think there is an email or number on that letter" similarly is not inconsistent with the Receiver's statements at the March 21 meeting. In addition to the Receiver's admission that he permitted Ms. Horne and Ms. Soblinskas to communicate with investors, the Order does not prevent communication among

current or former Optimal Economics employees and the Order does not prohibit current or former Optimal Economics employees from communicating with investors. *See infra*, Part B.

The Receiver characterizes Mr. Howard's statement "I had to be absent until now because obviously that would be good for me" as evidence that the email communication advanced his personal interests, but fails to demonstrate how said advancement of Mr. Howard's personal interests contravenes the Order. The Receiver fails to consider that Mr. Howard's comment could have related to something wholly separate from the Receivership or the Order. Even in a light most favorable to the Receiver, however, Mr. Howard's text message does not violate the Order.

Further, the Receiver ignores, in the very same text message, evidence of Mr. Howard's lack of involvement in the email communication or any other contact he initiated with investors. That absence is further supported by Ms. Venezia's statement that she had not "heard from you [Mr. Howard] in forever." In fact, on the face of the text messages, Ms. Venezia initiated contact with Mr. Howard – he did not initiate contact, and was not prevented by the Order from answering her inquiries. Rather than evaluate the full factual picture, the Receiver cherry picks facts to support his misguided theory. Like the prior insufficient evidence, the Receiver also fails to carry his burden in this instance.

Additionally, the Receiver interprets Mr. Howard's text message stating "I cannot be involved in that effort...but she's working with my attorneys" as evidence that Mr. Howard was indirectly involved in the email communication to investors. The Receiver assumes impropriety without offering any support. There are no restrictions placed on Mr. Howard (or his attorneys) to understand, investigate and hopefully limit Mr. Howard's financial exposure in the next phase of this litigation. Indeed, it is proper for Mr. Howard to explain to Ms. Venezia that communication related to the Receivership and related action is being handled by his attorneys.

Again, without factual support, the Receiver construes Mr. Howard's statement to fit within his narrative of an overarching scheme. The Receiver failed to supply evidence that satisfies the clear and convincing standard.

2. The Additional Allegations of Contempt

The Receiver further alleges that on February 17, 2017, Mr. Howard directed an employee to sign a contract on Optimal Economics behalf, but does not provide additional specifics, such as how the employee was directed, or identify a provision of the Order specifically violated by the alleged conduct. *See* Receiver's Brief at 21, ECF 57. Additionally, the Receiver argues that Mr. Howard made statements to former employees "with the apparent intent" those communications be shared with investors. *Id.* In civil contempt proceedings, "the question is not one of intent but whether the alleged contemnors have complied with the court's order." *See Jim Walter Res., Inc. v. Int'l Union, United Mine Workers of Am.*, 609 F.2d 165, 168 (5th Cir. 1980). The Receiver, again, does not provide factual support for these conclusory allegations. Without such support, the Receiver is patently unable to present proof which rises to the level of creating within the trier of fact's mind "a firm belief or conviction as to the truth of the allegations." *See Travelhost Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995).

Thus, as with the allegations regarding the April 8 email communication, the Receiver fails to carry his burden.

B. The Order Does Not Prohibit the Alleged Conduct

The Motion cannot survive because the Order does not prohibit Mr. Howard from contacting investors. "No contempt liability may attach if a party does not violate a definite and specific order of the court." *See Waste Mgmt. of Washington, Inc. v. Kattler*, 776 F.3d 336, 343 (5th Cir. 2015) (citing *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir.

2013)). The Receiver concedes as much. The relief he seeks includes modification of the Order to prohibit Mr. Howard and others from contacting investors. Instead of filing a straightforward Motion to Amend the Order to seek clarification and to add proposed limitations, the Receiver is prematurely seeking contempt where none is warranted. If any of the Motion is permitted to go forward, it should be limited to the Receiver's requests that the Court "Modify the order to restrain and enjoin...from communicating in any manner written, oral, or otherwise, with any investor or third party, directly or indirectly, about the Receivership Entities and/or the Receivership." *See* Receiver's Motion at 3, ECF No. 56.

C. The Court Should Permit Mr. Howard to Take Discovery

Mr. Howard has not moved the Court for leave to take discovery because the Receiver's Motion fails to present any facts establishing that Mr. Howard violated the Order. If, however, the Court considers granting the Receiver's request for civil contempt against Mr. Howard, Mr. Howard respectfully requests, and should be entitled to take expedited discovery.

The Receiver alleged that Mr. Howard violated the Order in connection with three separate instances of conduct, but has not provided sufficiently detailed support. Rather, the Receiver included only self-serving and limited exhibits, without context, or particulars. If the Court is willing to consider the Receiver's allegations, then for Mr. Howard to sufficiently oppose the serious (but baseless) contempt accusations raised by the Receiver, Mr. Howard needs access to full documents and witnesses. Not only does the Receiver's deficient presentation of facts not meet the clear and convincing standard, it also prevents Mr. Howard from providing a full and robust response to allegations raised against him. Additionally, the Receiver's Affidavit fails to report how he was harmed or how much time was spent addressing that "harm," nor does he detail how he was prohibited from or interfered with in his communications with investors. Absent these

seemingly necessary facts, the Receiver either needs to be deposed to allow for a proper response, or the motion must be withdrawn or dismissed.

The Receiver's Motion is further flawed by its impermissible reliance on "group pleading." Without factual support, the Motion groups Mr. Howard in with allegations that do not refer to any later-alleged three-categories of conduct of Mr. Howard, but rather are broad and imprecise. For instance, the Receiver's Brief alleges, "Respondents asked each legitimate investor for a pledge of \$500 to cover legal fees..." but does not provide any factual support to connect this allegation to Mr. Howard. *See* Receiver's Brief at 2, ECF No. 57.

There are numerous other examples of this imprecise pleading, which only increases the necessity of proper discovery to illuminate which accusations raised by the Receiver factually pertain to Mr. Howard and thus require a response. Without more particularized factual allegations, Mr. Howard is unable to demonstrate substantial compliance with the Order, or whether mitigating circumstances exist such that the Court should withhold the exercise of its contempt power. *See Little Tchefuncte River Ass'n v. Artesian Util. Co., Inc.*, 155 F. Supp. 3d 637, 657 (E.D. La. 2015) ("Once the movant has shown a prima facie case, the burden falls on the violating party to show either mitigating circumstances that might cause the district court to withhold the exercise of its contempt power, or substantial compliance with the consent order.") (citing *Whitfield v. Pennington*, 832 F.2d 909, 914 (5th Cir. 1987) (internal quotation marks omitted)).

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, Mr. Howard respectfully requests that this Court deny the relief sought in the Receiver's Motion to Show Cause and grant all other such relief at law or equity to which Mr. Howard may be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, a copy of the foregoing has been filed with the United States District Court for the Northern District of Texas, using the electronic case filing system of the Court and served on all counsel of record through the ECF system of the Court.

s/ Barrett Howell

Barrett R. Howell