

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 MOTION TO STRIKE RECEIVER'S  
OMNIBUS RESPONSE AND BRIEF IN SUPPORT THEREOF**

**I. SUMMARY**

Defendant Patrick O. Howard (“Mr. Howard”) respectfully submits this Motion to Strike Mr. Howard’s privileged and confidential attorney-client communications from the Receiver’s Omnibus Response to Howard’s, Hornes,’ and Scherer’s Responses to Court’s Order to Show Cause Order [ECF No. 81] (the “Receiver Omnibus Response”). Exhibits A and B to the Receiver Omnibus Response, which are cited and discussed at length therein, contain Mr. Howard’s confidential, attorney-client privileged joint defense communications that appear to have been improperly disclosed and shared with the Receiver by Dovile Soblinskas (“Soblinskas”) without Mr. Howard’s waiver and consent. Accordingly, for the reasons set forth herein, Mr. Howard respectfully requests that the attorney-client protected joint defense communications in Exhibits A and B are stricken from the record, the Receiver be instructed to return or destroy all of the attorney-client privileged joint defense communications.

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 April 19, 2017, the Receiver moved this Court to find Mr. Howard in civil and criminal contempt of the Order. *See* Receiver’s Motion, ECF No. 56. Mr. Howard submitted a brief in opposition to the Receiver’s Motion to Show Cause, asking the Court to deny the motion because: (1) it lacks basic factual foundation; (2) it is premised on alleged conduct that is not prohibited by the Court’s Order Appointing Receiver; and (3) it seeks draconian remedies without providing Mr. Howard with any meaningful discovery. *See* Howard Brief, ECF No. 69. Additionally, Mr. Howard’s Brief noted that the Receiver’s motion is an unnecessary drain on the limited Receivership assets and not in the best interest of the investors.

Subsequently, the Receiver filed the Receiver Omnibus Response [ECF No. 81] and asserts, among other things, that certain “recently discovered and evidence and testimony” support the Receiver’s allegations of misconduct on the part of Mr. Howard. This “evidence and testimony” include an email and testimony revealing the contents of privileged communications between Mr. Howard and his legal counsel. *See* Exhibits A (the “McCarthy Email”) and B (“Soblinskis Testimony”), Receiver Omnibus Response. It appears that the Receiver obtained the privileged contents of the McCarthy Email and Soblinskis Testimony from Soblinskis, in connection with Soblinskis’ agreement with the Receiver to settle and cooperate with the

Receiver's litigation against Mr. Howard and others and in violation of a joint defense agreement between Mr. Howard and Soblinskis.

Beginning at least on February 17, 2017, when Soblinskis informed Mr. Howard that she potentially would be included in this, or related, litigation by the Receiver and continuing through at least May 22, 2017, a joint defense agreement was in place that included both Mr. Howard, along with his counsel at Bracewell, and Soblinskis, along with her counsel, James Bell. As such, Mr. Howard and Soblinskis were operating and communicating pursuant to a joint defense/common interest privilege, which cannot be waived by one party without the consent of the other parties in the joint defense agreement. (*See* attached Exhibit A). Neither Mr. Bell nor Ms. Soblinskis ever notified Mr. Howard or his counsel that Soblinskis was leaving this joint defense agreement nor did she or her counsel seek permission to disclose any communications that occurred in the course of that agreement.

## **II. ARGUMENTS & AUTHORITIES**

### **A. The Privileged Material in the Receiver's Omnibus Response Must be Struck and the Receiver Should Not be Permitted to Rely on Improperly Obtained Privileged Material in Support of its Motion to Show Cause**

It is well established that, in the context of the joint defense privilege, the term "co-defendant" is broadly construed and encompasses shared communications ". . . to the extent that [the communications] concern common issues and are intended to facilitate representation in possible subsequent proceedings." *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604–05 (N.D. Tex. 1981) (citation omitted). The essential elements of the joint defense privilege are: (1) that the co-defendants exchanged the information in confidence; and (2) such communication was for the limited purpose of assisting in their common cause.

Here, joint conferences undertaken between Mr. Howard, Mr. Howard's counsel, counsel for Soblinskis, and with Soblinskis while she was seeking representation were confidential, concerned common issues, and were held in confidence, are privileged and intended to facilitate representation in proceedings involving the SEC and the Receiver. *In re Santa Fe*, 272 F.3d at 710 ("communications between co-defendants in actual litigation and their counsel . . . [and] communications between potential co-defendants and their counsel" are protected under the common legal interest extension of the attorney-client privilege). At the time of the privileged communication, both Mr. Howard and Soblinskis were the subject of threatened litigation by the Receiver, which ultimately became ripe with the Receiver's Motion and both had a natural and common interest in consulting about the SEC investigation and their defense. Accordingly, Soblinskis' disclosure of these communications, and the Receiver's reliance thereon, was inappropriate and must be struck.

### **III. CONCLUSION**

WHEREFORE, for the reasons set forth herein, Mr. Howard respectfully requests that this Court: (1) strike from the record any reference to the Privileged McCarthy Email and the Privileged Testimony; (2) direct that the Receiver immediately return the Privileged McCarthy Email and all copies to Mr. Howard's counsel and must cease immediately any further dissemination of its content and the content of the Privileged Testimony; and (3) grant all other such relief at law or equity to which Mr. Howard may be justly entitled.

[signature page to follow]

Respectfully Submitted,

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**ATTORNEYS FOR DEFENDANT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 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*

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Barrett R. Howell

**CERTIFICATE OF CONFERENCE**

I hereby certify that the undersigned counsel has left voice messages with opposing counsel and has not heard back from them. Therefore, we assume they are opposed to this Motion.

*s/ Barrett Howell*

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Barrett R. Howell