

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 SEAL AND BRIEF IN SUPPORT THEREOF**

**I. SUMMARY**

Pursuant to Federal Rules of Civil Procedure 5.2(d), and Local Rule 79, Defendant Patrick O. Howard (“Mr. Howard”) respectfully moves this Court for an Order Sealing the proceedings, pleadings and orders related to and stemming from the Receiver’s Omnibus Response to Howard’s, Horne’s, and Scherer’s Responses to Court’s Show Cause Order [ECF No. 81] (“Receiver’s Omnibus Response”) and Appendix in Support of Receiver’s Omnibus Response [ECF No. 82] (“Receiver’s Omnibus Appendix”). A seal on these pleadings and related documents is necessary to properly and effectively protect the public consumption of attorney-client protected joint defense communications, as identified in Defendant Howard’s Motion to Strike [ECF 85] (“Motion to Strike”). These communications contain such information that may, and should, be considered confidential, sensitive, and/or identifying information, as contemplated by the Federal Rules of Civil Procedure 5.2 and Local Civil Rule 79. It is therefore imperative that the Court seal

these documents, including all exhibits and responses, related to the Receiver's Omnibus Response and Receiver's Omnibus Appendix.

## II. BRIEF IN SUPPORT OF MOTION TO SEAL

The court holds an inherent power to seal all or part of its records, though the "courts of this country recognize a general right to inspect and copy judicial records and documents." *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). The public's common law right, however, is not absolute. *Id.* When considering whether to seal judicial records and documents, a court must "balance the factors favoring secrecy against the common law presumption of access." *In re Supplement Spot, LLC*, No. 06-35903-H4-11, 2009 WL 2006834, at \*10 (Bankr. S.D. Tex. July 8, 2009) (quoting *Bank of Am. Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986)). This decision is best left to the discretion of the trial court, and is to be exercised "in light of the relevant facts and circumstances of the particular case." *See Nixon*, 435 U.S. at 599.

As outlined and discussed in the Motion to Strike, the Receiver's Omnibus Response and its Exhibits A and B contain Mr. Howard's confidential, attorney-client privileged joint defense communications. Joint-defense communications are protected by the attorney-client privilege. *See In re Santa Fe*, 272 F.3d 705, 710 (5th Cir. 2001) ("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).

The attorney-client communications and related confidential information disclosed by the Receiver in the Receiver's Omnibus Response and Receiver's Omnibus Appendix are protected by the attorney-client privilege, and should not be made available to the public. The Receiver's Omnibus Response and Appendix are neither sealed nor redacted, and thus the allegations and

privileged communications contained therein stand to negatively impact Mr. Howard's interests in maintaining the confidentiality of the attorney-client relationship and the future candidness of discussions between Mr. Howard and his counsel. Furthermore, the public would not be harmed by the sealing of the Receiver's Omnibus Response, nor would they be uniformed about the proceedings given the narrowly tailored relief requested here. Defendant Howard's substantial interest in maintaining the privacy and confidentiality of attorney-client communications outweighs the non-absolute public right to open judicial records.

### **III. PRAYER FOR RELIEF**

For the foregoing reasons, Mr. Howard respectfully requests that the Court enter an order sealing the Receiver's Omnibus Response [ECF No. 81] and the Receiver's Omnibus Appendix, including exhibits identified as Exhibits A and B [ECF No. 82, RAPP 1-2, 3-20 respectively], and any future pleadings, responses, motions, memoranda and all other filings related to the Receiver's Omnibus Response and Receiver's Omnibus Appendix. Alternatively, Howard respectfully requests that the Court enter an order requiring the Receiver to redact the portions of the Receiver's Omnibus Response [ECF No. 81] and Receiver's Omnibus Appendix ECF No. 82] which include protected attorney-client communications. Mr. Howard also requests all other relief to which he is entitled in law and equity.

Respectfully Submitted,

BRACEWELL LLP

By: s/ Brandon McCarthy

Barrett R. Howell

State Bar No. 24032311

Barrett.Howell@bracewell.com

Brandon N. McCarthy

State Bar No. 24027486

Brandon.McCarthy@bracewell.com

1445 Ross Avenue, Suite 2100

Dallas, Texas 75202

Telephone: (214) 468-3800

Facsimile: (800) 404-3970

and

Philip J. Bezanson, admitted *pro hac vice*

Washington Bar No. 50892

701 Fifth Avenue, Suite 6200

Seattle, Washington 98104

Telephone: (206) 204-6206

Facsimile: (800) 404-3970

Phil.Bezanson@bracewell.com

**ATTORNEYS FOR DEFENDANT  
PATRICK O. HOWARD**

**CERTIFICATE OF CONFERENCE**

Counsel for the defendant has made a reasonable attempt to confer with counsel for the Receiver. Counsel has left a voicemail, which has gone unanswered, regarding this Motion and the relief sought. Presumably, the Receiver is opposed to the relief sought in this Motion.

s/ Brandon McCarthy

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Brandon McCarthy

**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 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/ Brandon McCarthy

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Brandon McCarthy