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

SECURITIES AND EXCHANGE COMMISSION,	)	
PLAINTIFF,	)	
v.	)	**Civil Action No. 3:17CV-420- L**
PATRICK O. HOWARD; HOWARD CAPITAL HOLDINGS, LLC; AND OPTIMAL ECONOMICS CAPITAL PARTNERS, LLC,	)	
DEFENDANTS.	)	

RECEIVER'S RESPONSE IN OPPOSITION TO DEFENDANT PATRICK HOWARD'S DOCKET ENTRIES 85, 86, 90, 91 AND UNFILED LETTER TO COURT RELATING TO SHOW CAUSE ORDER AND REQUEST FOR FEES

KIMBERLY M. J. SIMS
State Bar No. 24046167
ksims@palterlaw.com

PALTER STOKLEY SIMS PLLC
8115 Preston Rd., Suite 600
Dallas, Texas 75225
Telephone: (214) 888-3106
Facsimile: (214) 888-3109

ATTORNEY FOR RECEIVER
W. CRAIG STOKLEY

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Receiver W. Craig Stokley (the "Receiver") files this Response in Opposition to the following documents filed by Defendant Patrick Howard ("Howard"): (a) *Howard's Motion to Strike Receiver's Omnibus Response and Brief in Support Thereof*, filed on June 9, 2017 [Dkt. 85] (the "Motion to Strike"); (b) *Howard's Affidavit in Support of His Motion to Strike Receiver's Omnibus Response and Brief in Support*, filed on June 12, 2017 [Dkt. 86] (the "Howard Affidavit"); (c) *Howard's Motion for Expedited Discovery and Brief in Support Thereof*, filed on June 16, 2017 [Dkt. 90] (the "Motion for Expedited Discovery"); (d) *Howard's Motion to Seal and Brief in Support Thereof*, filed on June 20, 2017 [Dkt. 91] (the "Motion to Seal") (collectively, "Howard's Motions"); and (e) the unfiled *Letter from McCarthy to Judge Lindsay*, dated June 12, 2017 (the "McCarthy Letter"), and, in support thereof, would respectfully show the Court as follows:

I. SUMMARY OF RELEVANT BACKGROUND FACTS

On February 26, 2017— just twelve (12) days after this Court appointed the Receiver in this case [Dkt. 10] and after Howard agreed to judgment as to liability on the securities fraud claims against him in this case [Dkt. 17] – Howard's counsel, Brandon McCarthy ("McCarthy"), sent his email to Howard and a third-party stating his plan to "create havoc" for the Court's receiver and closed the email by stating that "Winter is coming for Mr. Stokley [the Receiver]." The email expressly contemplates Howard (the perpetrator of securities fraud in this case) further defrauding the very victims of his securities fraud (legitimate investors) into hiring certain counsel to carry out Howard's objective to "create havoc" and "hopefully jettison" the Court's Receiver.

Meanwhile, oblivious to Howard's and his counsel's plans to "create havoc" for the Receiver, "jettison" him, and have "winter come" for him, the Receiver was carrying out his duties as ordered by the Court and documented in various status reports contained in the Court's record. Dkt. 40 (Receiver's Initial Status Report); Dkt. 60 (Receiver's Quarterly Status Report).

Then, on April 10, 2017, the Receiver learned that an email was sent on April 8, 2017 from an anonymous address oecapitalpatnersinvestors@gmail.com to all of the legitimate investors. *See* Dkt. Nos. 57-58 (evidence attached to Brief and Appendix in Support of Motion to Show Cause); Dkt. No. 81-82 (Omnibus Response and Appendix in Support). The email was riddled with false, inaccurate, and misleading information in an effort to band these legitimate investors together in support of its stated goal: "removal of the receivership [to] allow our investment team [*i.e.*, Howard] to at least finish out our contracts" ("April 8 Email"). *Id.* The April 8 Email purports to come from fellow similarly-situated legitimate investors, but the email was really organized, written, and spearheaded at the direction of Howard and his former employees. *Id.*

After investigating the available facts and evidence surrounding the April 8 Email, it was

clear to the Receiver that the perpetrators of the securities fraud were seeking to further defraud their victims to advance their own interests. *Id.* Consequently, the Receiver filed his Motion to Show Cause, Brief, and Appendix in support. *See* Motion to Show Cause [Dkt. 56-57]. The Motion to Show Cause is substantiated by sworn testimony and evidence demonstrating that Howard, among other former employees, should be found to be in contempt of the Court's Order Appointing Receiver. *Id.* The Court then ordered Howard, and the other Respondents to show cause why they should not be held in contempt, and provided the Receiver an opportunity to respond to any attempted showing by Howard and the other Respondents. *See* Dkt. 59 (Show Cause Order).

Inexplicably, Howard failed to respond with any evidentiary support showing cause why he was not in contempt. *See* Dkt. 69 (Howard's Response). Instead, Howard's Response was limited to collateral attacks asserting the Motion to Show Cause lacked foundation, and that the Show Cause Order did not prohibit the conduct described in the Motion to Show Cause. *Id.*

Dovile Soblinskas ("Soblinskas") – after engaging two sets of counsel who were referred to her by Howard's counsel[1] – finally obtained independent counsel, Ramon Rodriguez, who appeared in this case on May 25, 2017. *See* Dkt. 72. Soblinskas and her new counsel met with the Receiver on May 27 and again on May 30, where Soblinskas provided facts to the Receiver related to the contempt issues as well as non-privileged communications relevant to the April 8, 2017 email. The information provided by Soblinskas is detailed in her affidavit dated May 30, 2017, and accompanying exhibits. *See* Dkt. 82 at 7-29. Soblinskas' sworn testimony confirms the facts set forth in the Receiver's Motion to Show Cause, and provides more supporting detail. It states:

[1] First, Soblinskas informed the Receiver on April 11, 2017, that she was represented by Robert Castle (whom was referred to her by Howard's counsel Barrett Howell). Then, James Bell notified the Receiver on April 27, 2017 that he represented Soblinskas. Bell then filed his agreed emergency motion to withdraw as counsel on May 22, 2017. Mr. Rodriguez appeared on behalf of Soblinskas on May 25, 2017.

- Howard's counsel, Barrett Howell, suggested to me that I could, and there was nothing prohibiting me from, attempting to band together investors to challenge the SEC's receivership of OE Capital Partners (the 'Receivership'). Howard's counsel Barrett Howell told me that if I could get a majority of the investors to jointly challenge the Receivership, it could be successful in removing the Receivership.

- After receiving this information from Howard's counsel Barrett Howell, I then endeavored to identify an initial core group of investors who would participate with me in our effort to remove the Receivership.

- Howard helped me identify some people who could be included in the initial core group of investors. Howard attended meetings and telephone conference calls with myself and investors where the investors involvement in the effort to retain counsel to remove the Receivership was discussed.

- The affidavit details two in-person meetings in Dallas with investors, one in-person meeting in Austin with an investor, and a teleconference with an investor where Soblinskas stated that "the information communicated in the April 8, 2017, email is the same information that was discussed in these in-person meetings . . . and teleconference". As demonstrated in the Motion to Show Cause, this information was fraudulent and misleading. *Id.*

It was not until May 27, 2017, when Soblinskas provided the McCarthy Email to the Receiver, that the Receiver became aware of the McCarthy Email and that Howard and his counsel planned from the very beginning to carry out the very scheme that was the subject of the Receiver's Motion to Show Cause (which the Receiver had filed several weeks earlier).

The McCarthy Email is an email string containing two emails. *See* Dkt. 82 at p. 5. The first email is from McCarthy – one of Howard's attorneys and a partner at Bracewell – that was sent on February 26, 2017 at 10:32 a.m. *Id.* The email is addressed to Howard, but it copies another Dallas attorney named James Bell who does not represent Howard. *Id.* On February 26, 2017, when the email was sent, Bell: (a) had never met Soblinskas; (b) was not Howard's attorney; and (c) was not engaged to represent anyone in connection with this matter. *Id.*; *see also* **Exhibit A** ("Soblinskas Decl.") ¶¶ 7, 8 [**APP. 2**]. At that point, Bell was not counsel to any party in this case and instead a third-party to the communication.

The second email in the email string was sent on March 4, 2017. Specifically, Howard forwarded the first email from McCarthy to third-party Soblinskas and no one else. Dkt. 82 at p. 5; Soblinskas Decl. ¶ 6 [**APP. 2**]. When Soblinskas received this email, it was the first time she had ever been provided with Bell's name. Soblinskas Decl. ¶ 8 [**APP. 2**]. Soblinskas was not represented by any counsel at this time, and in particular was not represented by Bell, McCarthy, or either of their law firms. *Id*.¶¶ 7, 17 [**APP. 2-3**].

The words written by Howard's attorney McCarthy, coupled with the conduct they engaged in thereafter, which has been well-documented and evidenced in the Receiver's Motion to Show Cause, Omnibus Response, and accompanying briefs and appendices, confirms and reinforces the need for an order holding Howard in contempt. To that end, the Receiver included the McCarthy Email in its Omnibus Response filed on June 2, 2017.

One full week after the Receiver filed its Omnibus Response with the McCarthy Email attached, Howard's counsel began filing a series of motions seeking various forms of relief. Then McCarthy sent an un-filed letter to the Court attempting to justify and/or explain his conduct.

On June 9, 2017, Howard filed a motion to strike the Receiver's Omnibus Response and Brief in Support. Dkt. 85. On June 12, 2017, Howard filed an affidavit in support of the Motion to Strike that contains one substantive paragraph setting forth legal conclusions. Dkt. 86. On June 12, 2017, McCarthy sent an unfiled letter to the Court that further demonstrated his own misconduct. *See* **Exhibit B** (McCarthy Letter) [**APP. 4-5**]. On June 16, 2017, Howard filed a motion for expedited discovery without setting forth any cause, much less good cause, for the discovery purportedly required. Dkt. 90. On June 20, 2017 – nearly three weeks after the McCarthy Email was placed on the public filing system – Howard filed a motion to seal the documents containing the McCarthy Email. Dkt. 91. These motions/letters/filings are hereinafter referred to collectively

as the "Howard Filings."

In an effort to streamline the disorderly docket created by the Howard Filings that all relate to the same factual and legal issues, and to save costs incurred by the Receivership Entities to respond, this Brief responds to all of the Howard Filings in one single response.

II. ARGUMENT AND AUTHORITIES

The Court should deny any and all relief sought by the Howard Filings for the following reasons. First, the McCarthy Email is not a confidential privileged communication or subject to any protection under Fifth Circuit precedent construing the federal common legal interest doctrine. Second, because the McCarthy Email is not privileged, the Motion to Strike and Motion to Seal are moot and, therefore, should be denied. Third, because Howard has failed to show good cause as to why it needs further discovery from the Receiver (including a basis for his request to take the Receiver's deposition), Howard's Motion for Expedited Discovery should be denied.

A. The McCarthy Email Is Not Privileged Under Any Theory.

As an initial matter, because this is a federal question case, federal law governs the attorney-client and common legal interest privilege issues. See *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc*., 218 F.R.D. 125, 133 (E.D. Tex. 2003) ("In cases where a federal question exists, the federal common law of attorney-client privilege applies even if complete diversity of citizenship is also present."); *see also Smith v. Smith*, 154 F.R.D. 661, 671 (N.D.Tex.1994).

As set forth below, there are at least **eight (8) independent reasons**, each of which alone shows why the McCarthy Email is not protected by any attorney-client privilege or federal law related to the common legal interest doctrine.

1. Reason #1 – The McCarthy Email copied a third party when it was originally sent and is, therefore, not privileged.

It is black letter law that an otherwise attorney-client privileged communication is not

privileged if it is made in the presence of a third party. *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976) ("It is vital to a claim of privilege that the communication have been made and maintained in confidence. . . . Thus courts have refused to apply the privilege to information that the client intends his attorney to impart to others, . . . or to communications made in the presence of third parties . . . .") (citations omitted); *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971) ("The communications between defendant and Kelly were not privileged, since third persons were present at the time the communications were made."); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 134 (E.D. Tex. 2003) (citing *In re Auclair*, 961 F.2d 65, 69 (5th Cir.1992).

Applying this fundamental principle here, the McCarthy Email, on its face, was not even privileged when it was first sent on February 26, 2017, because it copies a third party – James Bell. Bell was not co-counsel to Howard. He was truly a third party to the attorney-client relationship between Howard and McCarthy/Bracewell. In fact, in the McCarthy Email itself, McCarthy was openly discussing a scenario where Bell might in the future represent a third-party investor group. While McCarthy's motives for that representation were improper (*i.e.*, he was hoping James Bell would advance his client's interests to "jettison" the Court's receiver, and "create havoc" for the Court's Receiver), any legitimate representation by Bell of investors could not be aligned with Howard. Because a third party was copied on McCarthy's Email, any claim Howard may have to the communication being privileged is without merit.

Further, the party seeking to invoke the attorney-client privilege has the burden of establishing the existence of an attorney-client relationship and the confidential nature of the communication. *In re Grand Jury Proceedings*, 680 F.2d 1026, 1029 (5th Cir. 1982) ("The party who invokes the attorney-client privilege has the burden of establishing both the existence of an

attorney-client relationship and the confidential nature of the communication."). None of the Howard Filings even attempt to meet this burden. Specifically, the Howard Filings do not make any evidentiary showing establishing the McCarthy Email was (1) confidential and (2) an attorney-client privileged communication. Had Howard attempted to do so, it would reveal that the communication copied Bell and it was never confidential to begin with. For this reason alone, all of the Howard Filings can be denied.

2. Reason #2 – Even if the McCarthy Email was initially privileged, any such privilege was later waived by Howard on March 4, 2017 when he forwarded the McCarthy Email to Soblinskas.

Even if the McCarthy Email was privileged on February 26, 2017, when it was sent to Howard and third-party Bell, Howard waived any privilege when he sent the McCarthy Email to another third party (Soblinskas) on March 4. *See Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir.1999) ("When relayed to a third party that is not rendering legal services on the client's behalf, a communication is no longer confidential, and thus it falls outside the reaches of the privilege."); *see also In re Royce Homes, LP*, 449 B.R. 709, 724 (Bankr. S.D. Tex. 2011) ("Under federal common law, a party can waive the attorney-client privilege in two ways—by voluntarily disclosing privileged communications or by inadvertently disclosing those communications to third parties. . . . [D]isclosure inconsistent with an intent that communications remain confidential waives the privilege. Voluntary disclosure is simply defined as voluntarily disclosing or offering or producing privileged communications to a third party without objection."). Soblinskas was a third party who was not rendering legal services on Howard's behalf. Soblinskas Decl. ¶ 18 [**APP. 3**]. As such, when Howard voluntarily disclosed the McCarthy Email to her (by forwarding that email to Soblinskas), the McCarthy Email was certainly no longer confidential at that point, and it falls outside the reaches of the attorney client privilege.

3. The McCarthy Email does not qualify for protection from waiver based on any applicable theory of a "Joint Defense" or "Common Legal Interest" between Howard and his attorney and Soblinskas and her attorney.

The Howard Filings improperly argue that the McCarthy Email is protected by a so-called "joint defense privilege." There is no such thing as the "joint defense privilege" in the Fifth Circuit. Instead, federal courts have construed an exception to the waiver of attorney-client privilege communications. *See United States v. Impastato*, No. CRIM A 05-325, 2007 WL 2463310, at *4 (E.D. La. Aug. 28, 2007) ("The 'joint defense' privilege, sometimes called the 'common interest' or 'community of interest' rule is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party."). This exception is referred to as the "common legal interest" doctrine. *Id.* Under this doctrine, "privilege is not waived when the client discloses a protected communication to a third party who has a common legal interest with the client." *See e.g.*, *Mediostream, Inc. v. Microsoft Corp.*, No. 2:08-CV-369-CE, 2010 WL 11485121, at *1 (E.D. Tex. June 1, 2010). In the Fifth Circuit, "the two types of communications protected under the [common legal interest] privilege are: (1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel." *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (internal citations omitted). In this case, Howard's attempt to apply the common legal interest doctrine to the McCarthy Email is belied by both the facts and the law for several independent reasons.

a. Reason #3 – Howard cannot establish the existence of a "joint defense agreement."

Howard cannot establish the existence of a "joint defense agreement." Soblinskas and Howard never agreed to be in a joint defense agreement – written, oral, or otherwise. Soblinskas Decl. ¶ 14 ("I have never been and I am not currently in any 'joint defense agreement', 'common

interest agreement', or any other similar type of agreement, with Howard, James Bell, or any attorneys at Bracewell. The first time I had heard anyone claim that was a 'joint defense agreement' was in . . . June 2017") [**APP. 3**]. While no written agreement is required in order to trigger application of the common legal interest doctrine, there must at least be a meeting of the minds between the parties and an agreement to pursue a joint legal strategy. *See Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 287 (4th Cir. 2010) (stating that "[t]he common interest doctrine requires a meeting of the minds"). If there is no evidence of such an agreement, then the doctrine does not apply. *See, e.g.*, *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415–16 (S.D.N.Y. 2004) ("BDO's argument fails in several respects. In order to invoke the common interest doctrine, it is not enough merely to show, as the doctrine's name might suggest, that BDO and Jenkens had interests in common. Nor is it sufficient to show that they shared concerns about potential litigation. BDO must show a 'cooperative and common enterprise towards an identical legal strategy.' . . . That is, BDO must show some agreement, whether formal or informal, written or unwritten, to pursue a joint legal defense. To do so, BDO must show some meeting of the minds between the parties. In addition, BDO must show that the particular communication at issue was disclosed in connection with the joint legal defense. BDO has not met either burden."); *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003) ("In order then for documents and communications shared amongst these litigants to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy. . . . It is obviously prudent nonetheless to have a joint defense memorialized in writing. Too often the vagaries of an oral agreement cloud and pollute the true intent of the parties, especially when the parties claiming the privilege must establish that there was in fact an agreement and that the specific communication was protected thereunder."); *see*

also In re Grand Jury Proceedings, 156 F.3d 1038, 1043 (10th Cir. 1998) (holding that an intervenor failed to establish the elements of a joint-defense privilege where, inter alia, there was no evidence of a joint-defense agreement, express or implied).

Here, Soblinskas unequivocally testifies that she had not even ever heard of such an agreement until Howard raised it in the Howard Filings. Soblinskas Decl. at ¶ 14 ("I have never been and am not currently in any 'joint defense agreement', 'common interest agreement', or any other similar type of agreement, with Howard, James Bell, or any attorneys at Bracewell.") [**APP. 3**]. Further, she testified that "I have not agreed to any joint defense agreement with Howard and his counsel" and "I do not believe that Howard and I have common legal interests." *Id.* ¶ 16 [**APP. 3**]. While Soblinskas' detailed factual affidavit establishes there was no joint defense agreement, it certainly establishes she had no meeting of the minds with Howard regarding any such agreement.

Rather than provide a detailed factual affidavit, Howard's two-paragraph affidavit makes a conclusory assertion that an agreement existed, the affidavit is not competent evidence because it contains only legal conclusions and no facts within Howard's personal knowledge. Howard's affidavit states the following:

> Starting on February 17, 2017, I was in a joint defense agreement with Dovile Soblinskas, our counsel, and potential counsel. I never authorized Ms. Soblinskas to share privileged communications. Ms. Soblinskas never withdrew.

Dkt. 86 at ¶ 2. These are legal conclusions – likely written by lawyers and not the words of a lay person. The law does not permit an affiant to merely make legal conclusions in their affidavit to establish a common interest agreement. *Sheet Metal Workers Intern. Ass'n v. Sweeney,* 29 F.3d 120, 125 (4th Cir. 1994) (conclusory statements in affidavit insufficient to establish existence of common interest privilege); *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 390 (M.D.N.C.

2003), aff'd, 1:00CV1262, 2012 WL 1565228 (M.D.N.C. Apr. 30, 2012) (granting motion to compel allegedly privileged documents and stating that "conclusory assertions" regarding the existence of a common legal interest between the parties was insufficient to show entitlement to the joint defense/common interest rule).

Soblinskas, on the other hand, testifies that no such understanding was ever reached between herself Howard or Howard's counsel.

It should be noted that no written joint defense agreement exists. Howard's Motion to Strike strangely implies the existence of a written joint defense agreement. It says: "Mr. Howard and Soblinskas 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 in the joint defense agreement. (See attached Exhibit A)." Dkt. 85 at 3. However, the Motion to Strike did not attach any "Exhibit A." *Id.* Soblinskas' counsel thereafter asked Howard's counsel "Can you please provide me with an executed copy of the joint defense agreement" to which Howard's counsel responded: "As you might have experienced, joint defense agreements are rarely committed to writing. I recommend you confer with your client's prior counsel. Thank you and take care." **Exhibit C** (Rodriguez Email) [**APP. 6-8**]. Then, several days later, Howard filed "Affidavit of Patrick O. Howard In Support of His Motion To Strike Motion To Strike (sic) Receiver's Omnibus response and Brief in Support." Dkt. No. 86. Apparently, instead of a written joint defense agreement setting out terms set out in Howard's Motion to Strike, the attachment filed the following week was merely a self-serving affidavit stating legal conclusions as discussed above. In sum, no joint defense agreement existed, and as evidenced by Soblinskas testimony, there was certainly no meeting of the minds regarding such an agreement.

b. Reason #4 – It was legally impossible for Soblinskas to enter into a joint defense agreement on February 26, 2017 or March 4, 2017 because Soblinskas was not represented by counsel on those dates.

The common legal interest doctrine does not apply to the McCarthy Email because Soblinskas was not represented by counsel at the time it was sent. *See, e.g.*, *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001), aff'd, 284 F.3d 236 (1st Cir. 2002) (rejecting application of CLI doctrine to shield communication from disclosure where not all parties were represented by counsel, reasoning that "[u]nder the strict confines of the common-interest doctrine, the lack of representation for the remaining parties vitiates any claim to a privilege.") (*citing* Restatement § 76(1) cmt. d ("A person who is not represented by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement"); 2 Weinstein's Fed. Evid. § 503.21[2], at 503–68 ("The [common-interest] privilege applies to communications made by the client or client's lawyer to a lawyer representing another in a matter of common interest."); *State Farm Mut. Auto. Ins. Co. v. Hawkins*, No. 08-10367, 2010 WL 2287454, at *7 (E.D. Mich. June 4, 2010) ("After the underlying communication is determined to be privileged, the common interest exception's other requirements must be met, e.g., the communication must be related to a common litigation interest. The requirement that there be an underlying privileged communication is the reason that the common interest exception should not apply to unrepresented parties: 'A person who is not represented by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement.'" (*citing* Restatement § 76 cmt. d.).

It is undisputed that Soblinskas had not retained counsel on March 4, 2017, when the email was sent. Soblinskas Decl. ¶ 7 ("At the time the McCarthy Email was sent to me I had not retained any attorney to represent me.") [**APP. 2**]. To be sure, Soblinskas did not retain James Bell until April 20, 2017. *Id.* ¶ 12 ("On April 20, 2017, I retained attorney James Bell to represent me in

connection with responding to the Receiver's Motion to Show Cause.") [**APP. 3**]. In fact, the very first time Soblinskas even knew the name James Bell was on March 4, 2017 so there is no way they could have had a joint defense agreement on that day. *Id.* ¶ 8 ("I had not heard about James Bell until the day the McCarthy Email was sent to me on march 4, 2017. I did not retain James bell at that time.") [**APP. 2**]. Therefore, because Soblinskas was not represented by counsel on February 26, 2017, or March 4, 2017, under applicable law, Soblinskas could not have entered into a joint defense or common-interest agreement with Howard and his attorneys related to the McCarthy Email.

c. Reason #5 – Common-Interest agreements cannot apply retroactively to prior communications.

Moreover, common-interest agreements apply to communications made **after** the agreement is reached between the parties and all attorneys, and do not operate to shield communications prior to the joint defense agreement. *Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010) ("The common-interest doctrine does have limitations. First, the doctrine applies only when all attorneys and clients have agreed to take a joint approach in the matter at issue. It is not necessary that parties express this agreement in writing; so long as the parties clearly and specifically agree to the joint venture in some manner, the doctrine will apply. Communications made before an agreement to proceed jointly are not privileged."); *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 17 (D.D.C. 2005) (finding the joint defense privilege did not apply to communications made prior to the date on which the joint defense agreement was entered, stating that, "generally, a joint defense privilege begins on the date the agreement was executed."). As such, any assertion by Howard that James Bell entered into an agreement on Soblinskas behalf after he was hired, but that applied to prior communications, such agreement cannot be used retroactively. Moreover, Soblinskas was not aware of any such agreement, and did not provide Bell authorization to enter

into any such agreement. Soblinskas Decl. at ¶ 16 ("I have not agreed to any joint defense agreement with Howard or his counsel. If an understanding was reached to that effect between James Bell and Bracewell, I had no knowledge of the agreement and James Bell was not authorized to enter into that agreement on my behalf.") [**APP. 3**]. In sum, because Soblinskas was not represented by counsel when the McCarthy Email was sent, it is impossible under applicable law for her to have been in a common-interest agreement even if one was subsequently entered into on a later date.

d. Reason #6 – The Common Legal Interest Doctrine Does Not Apply To Communications Between The Non-Lawyer Clients Without Lawyer's Present.

Even if somehow a common-interest agreement existed, the common legal interest doctrine does not apply to Howard's forwarding of the McCarthy Email to Soblinskas. Under Fifth Circuit precedent, the common legal interest doctrine only protects communications where an attorney is a party (recipient or declarant) to the communication. *See, e.g.*, *Mediostream, Inc. v. Microsoft Corp.*, No. 2:08-CV-369-CE, 2010 WL 11485121, at *2 (E.D. Tex. June 1, 2010). In other words, the common legal interest doctrine does not extend privilege status to communications between two non-attorneys. *Id.* For example, in *Mediostream*, the plaintiff sought production of an internal legal memorandum from the defendant. *Id.* at *1. The memo was prepared by a third-party's attorney for the third party's review and, to that end, the memo was sent by the third party's attorney to one of the third party's non-attorney employees. *Id.* The non-attorney employee of the third party then proceeded to forward the memo to several non-attorney employees of the defendant company. *Id.* Both the defendant company and the third party objected to producing the memo to the plaintiff arguing that they had a common legal interest and, therefore, the memo was privileged. *Id.* at *1-2. The Court cited Fifth Circuit authority and rejected the defendant's and

third party's argument, as follows:

> Fifth Circuit cases analyzing the question of common legal interest suggest that the doctrine applies only when co-defendants jointly seek legal advice from counsel. *See Santa Fe Int'l*, 272 F.3d at 710 (explaining that the doctrine protects "communications between potential co-defendants *and their counsel*") (emphasis added); *In re Auclair*, 961 F.2d 65, 70 (5th Cir. 1992) (holding that a presumption of common interest applies "when more than one person *seeks consultation with an attorney on a matter of common interest*") (emphasis added). "The attorney-client privilege is waived if the confidential communication has been disclosed to a third party unless made to attorneys for co-parties in order to further a joint or common interest...." *Aiken v. Tex. Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 623 (E.D. Tex. 1993). Even assuming the doctrine is broader in patent cases, *see In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1391 (Fed. Cir. 1996) (holding that the common interest doctrine applies to communications between the patentee and his licensee), the Norris memo was transferred between two non-lawyer employees; the memo was not disclosed in the context of ASUSTek and Nero jointly seeking legal advice. Therefore, the court finds that the common interest doctrine does not apply.

Id. at *2 (emphasis in original). Here, the McCarthy Email was forwarded from Howard to Soblinskas – two non-attorneys. As such, the March 4, 2017 forwarding of the McCarthy Email by Howard to Soblinskas is not a communication that can even be protected by the common interest doctrine.

e. Reason #7 – Soblinskas and Howard do not have a common legal interest as required in the Fifth Circuit to invoke the common legal interest doctrine.

Soblinskas and Howard do not have a "common legal interest" as that term is narrowly construed in the Fifth Circuit. Indeed, a "mere awareness" that one's questionable conduct might someday result in litigation is not enough. The communication must be sent in order to prepare for future litigation. *See, e.g., United States v. Newell*, 315 F.3d 510, 525–26 (5th Cir. 2002) ("Communications between potential codefendants and their counsel are only protected if there is 'a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might someday result in litigation.' Thus, a cognizable common legal interest does not exist if a group of individuals seeks legal counsel to avoid conduct that might

lead to litigation, but rather only if they request advice to 'prepar[e] for future litigation.'"); *see also id.* at 526 ("Gianakos sought advice to protect herself and her employees from possible—not imminent—civil or criminal action. Gianakos is not claiming that an investigation had commenced or that there was a threat of prosecution at the time she consulted Trapp. We see no common legal interest between herself, Cooper, and the other GA employees at the time Gianakos disclosed Trapp's advice to Cooper. It follows that Gianakos waived her personal privilege by communicating Trapp's advice to her employees.").

Here, there is no evidence that on March 4, 2017 there was any future litigation in which Soblinskas and Howard had a common interest or were aligned. In fact, on that date, Soblinskas never received a subpoena from the SEC, and was not aware of any other investigations related to her. Soblinskas Decl. at ¶ 15 [**APP. 3**]. She did not believe that she was ever targeted to be a named defendant in the above-referenced case by the SEC, and was not named as a defendant in any litigation. *Id.* [**APP. 3**]. On the other hand, Howard was interviewed by the SEC on several occasions, and was a named defendant in this securities fraud case filed by the SEC. *Id.* [**APP. 3**]. In fact, by February 26, 2017, Howard had already agreed to a judgment against him on liability for the fraud alleged by the SEC. Dkt. 17. There was no future litigation in which they could have a common interest.

f. Reason #8 – The Howard Filings alone betray faulty reasoning.

Howard's Motion to Strike standing alone contradicts the existence of a joint defense agreement. Howard claims that "[b]eginning at least on February 17, 2017" and through "at least May 22, 2017," there was a joint defense agreement in place that included Howard, Bracewell attorneys, "and Soblinskas, along with her counsel, James Bell." Dkt. 85 at 3. This statement is demonstrably false on its face. First, the McCarthy Email shows that Soblinskas did not even know

James Bell's name until March 4, 2017. This begs the question – how could James Bell and Soblinskas have an agreement on February 17, 2017 (the date Howard falsely claims the agreement was entered) or on February 26, 2017 (the date the McCarthy Email was originally sent) or on March 4, 2017 (the date the McCarthy Email was forwarded to Soblinskas) when Soblinskas did not even know or ever have any communications with Bell until after all of those events occurred? The truth is Soblinskas only briefly retained Bell from April 20, 2017 until May 21, 2017. Soblinskas Decl. at ¶¶ 12-13 [**APP. 3**]. As such, there is no way that Soblinskas and James Bell could have been a party to an agreement during times when they did not even know each other.

B. For The Reasons That The McCarthy Email Is Not Privileged, The Oral Communications Described In Soblinskas' Affidavit Are Also Not Privileged.

To the extent that any of the Howard Filings can be interpreted as complaining about Soblinskas' sworn testimony about what Howard's counsel told her, those statements are likewise not privileged or subject to any common interest for the same reasons as the McCarthy Email. Namely, Soblinskas testified that Howard's counsel told her between March 21, 2017 and April 11, 2017, the following: "there was nothing prohibiting [Soblinskas] from, attempting to band together investors to challenge the SEC's receivership of OE Capital Partners" and "if [Soblinskas] could get a majority of the investors to jointly challenge the Receivership, it could be successful in removing the Receivership." Dkt. 82 at 8. First, those statements were made before Soblinskas ever retained any counsel. Soblinskas Decl. ¶ 10 [**APP. 2**]. They were <u>not</u> made between an attorney and client as Soblinskas was not represented by Bracewell. *Id.* ¶ 17 [**APP. 2**]; see legal discussion at Section II.A.3.b. Most importantly, as established above, there was never any joint defense agreement in place. See discussion in Section II.A.3.a. And, even if a joint defense agreement was entered into after Soblinskas retained counsel on April 20, 2017, it could not apply to prior statements under applicable law. *See* discussion in Section II.A.3.c.

C. The Motion To Strike And Motion To Seal Are Moot.

As set forth above, there is no competent evidence that would suggest that the McCarthy Email or any related testimony involving the McCarthy Email is privileged or otherwise shielded from disclosure in this lawsuit. Accordingly, the Receiver's use of the email is proper. Therefore, Howard's Motion to Strike [Dkt. 85] and Howard's Motion to Seal [Dkt. 91] should be denied.

D. There Is No Good Cause For Granting The Motion for Expedited Discovery

Howard's motion for expedited discovery is nothing more than a continuation of the stated purpose contained in the McCarthy Email – to "create havoc" for this Court's receiver. Indeed, Howard's motion does not provide the Court with any good cause, does not provide the Court with any proposed discovery, and is sought after the Court's ordered deadline for Howard to show cause why he should not be held in civil contempt. Most obvious, however, is that Howard is the one with all of the relevant information as to his own personal contemptuous conduct. Nevertheless, Howard has not provided one iota of evidence to show cause why he should not be held in civil contempt – no affidavit, not text messages, no emails, nothing.

Under Fifth Circuit precedent, expedited discovery is permitted with permission of the Court only upon a showing of good cause. *Fiduciary Network, LLC v. Buehler*, No. 3:15-CV-0808, 2015 WL 11120985, at *1 (N.D. Tex. Mar. 23, 2015) ("[T]his Court and other courts within the Fifth Circuit utilize a 'good cause' standard") (Lynn, J.); *Digital Generation, Inc. v. Boring*, No. 3:12-CV-0329-L-BK, 2012 WL 12872463, at *2 (N.D. Tex. Mar. 5, 2012) ("Expedited discovery is permitted with permission of the Court upon a showing of good cause.") (Toliver, J.); *St. Louis Grp., Inc. v. Metals & Additives Corp.*, 275 F.R.D. 236, 240 (S.D. Tex. 2011) ("Several district courts within the Fifth Circuit have expressly utilized the 'good cause' standard when addressing [requests for expedited discovery].") (Hacker, Mag. J.).

The burden of showing good cause is on the party seeking the expedited discovery. *St. Louis Grp.*, 275 F.R.D. at 240. Good cause exists where "the need for expedited discovery in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id.* at 239 (quotation omitted). Thus, the Court must examine the request "on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Id.* (quotation omitted). Courts commonly consider the following factors in determining whether good cause exists to order expedited discovery: (1) whether a motion for a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose of the requested discovery; (4) the burden on the defendant of the requested discovery; and (5) how far in advance of the typical discovery process the request was made. *Id.* n.4.

On April 28, 2017, the Court ordered the following:

> Because the motion seeks two forms of contempt – civil and criminal – the court will consider the civil contempt issues (items numbered 1, 4-6 listed as requested relief in the Receiver's Motion) through written submission unless otherwise ordered. After consideration of the written submissions on civil contempt, the court will determine whether it will consider the request for criminal contempt (items number 2 and 2 listed as requested relief in the Receiver's Motion), and if so, set an evidentiary hearing upon appropriate notice.

Dkt. 59. As such, the only thing currently being considered by the Court is civil contempt which the Court expressly told the parties would be considered upon written submissions. The Order then ordered Howard to file a written brief showing cause why he should not be held in civil contempt of the court's order as alleged, documented, and requested by the Receiver . . . no later than May 19, 2017.

Howard filed his written submission in response to the Court's order on May 19, 2017, but never sought any discovery before that date. Howard failed to respond with any evidentiary support showing cause why he was not in contempt – not even an affidavit or declaration explaining his

conduct. Rather, Howard's "showing" was limited to collateral attacks asserting the motion to show cause lacked factual foundation, and that the Court's Order Appointing Receiver did not prohibit Howard from engaging in the conduct described in the Receiver's motion. The Show Cause Order relates to Howard's personal conduct – not the conduct of the Receiver. It relates to whether Howard caused people to harass and interfere with the receivership, and whether Howard was involved in making fraudulent communications to the very victims of his own admitted securities fraud scheme. It does not relate to what the Receiver knows and does not know about Howard's own conduct. Notably, Howard could not even provide a factual affidavit stating that he was not involved in the April 8, 2017 email, or any other factual statements to show that he did not violate the Court's order.

It appears that Howard's strategy in requesting expedited discovery in an attempt to further his collateral attacks on the Receiver's evidence. In reality, Howard has been provided with plenty of opportunity to show the Court why he should not be held in contempt and has failed to do so. Further, the evidence used in the Receivers' motion to show cause were Howard's own text messages, affidavit testimony about Howard's involvement in the contemptuous conduct, and other evidence to which Howard has personal knowledge and can speak about.

Importantly, Howard's Motion did not provide any proposed discovery requests so the Court cannot even evaluate the breadth, purpose, or burden of the discovery. However, on June 29, 2017, just one day before this response was due, Howard's counsel caused a set of discovery requests to be served on the Receiver. Notably, they were hand-delivered with a deadline of only five days (the day after Independence Day). The purpose of the discovery clearly is to further harass the Receiver and continue McCarthy's stated purpose to "create havoc" for this Court's Receiver as evidenced by the fact that the requests are not aimed at information relevant to

Howard's contemptuous conduct that is the subject of the Court's Show Cause Order.

In sum, Howard has not made any showing of good cause for expedited discovery, is not even entitled to discovery from the Receiver in this case, and has not provided the Court with anything that would demonstrate the nature of the discovery requests, their purpose, or the burden on the Receiver. Accordingly, Howard's motion for expedited discovery should be denied.

E. The McCarthy Letter Contains Inaccuracies That Must Be Cleared Up.

McCarthy sent an unfiled letter directly to the Court on June 12, 2017, regarding the McCarthy Email discussed above. While McCarthy's stated reason for not filing it with the Court's filing system is that he did not want another pleading filed in response to the Receiver's allegations about the McCarthy Email, McCarthy nevertheless subsequently filed three more documents on that same subject– an affidavit of Howard, a motion for expedited discovery, and a motion to seal. The McCarthy Letter, therefore, is attached hereto as **Exhibit B** to complete the record [**APP. 4-5**].

The second paragraph of the McCarthy Letter states that the Receiver filed an "inflammatory one-sided conspiracy theory that is defamatory, inaccurate, incomplete, manipulates, and leaves out context of the communications referenced." However, neither the McCarthy Letter nor any of the Howard Filings provide what context was left out. Presumably, if there was context that needed to be provided, McCarthy and Howard would have provided it.

The third paragraph contains an outright false statement – "the attorneys recommended were not hired." The record in this case demonstrates the exact opposite – the McCarthy Email recommends that Howard refer James Bell whom briefly appeared in this Court on behalf of Soblinskas. The fourth paragraph incorrectly states that the McCarthy Email was privileged – as demonstrated in detail above, such a statement is not supported by the facts and applicable law

here. In that same paragraph, McCarthy states that "the means by which the Receiver acquired this information will be addressed later in a proper filing with the court." As demonstrated in detail herein, there was nothing improper about the filing of the McCarthy Email.

In the sixth paragraph, McCarthy omits many portions of his email in an effort to give an entirely false impression about his actual intent. In truth, the email states as follows:

> I saw Phil's email to you. I agree. If they do ask for counsel, I would direct them to James Bell. Cc'd above. He is the one I recommend would be best to help protect the investor interest and **hopefully lose/jettison the receiver** in the future (after we get all of the SEC stuff settled). **He is very very good in this area and can create havoc for the receiver** if need be. Just wanted to get that lined up for when the time comes. And **winter is coming for Mr. Stokley**.

Dkt. 82 at 5 (emphasis added).

Next, McCarthy's statement about recommending competent counsel to "bring true facts to light" "present them to the Court" and "give the Court the opportunity to evaluate whether the continued use of a receiver acting improperly, would be positive for all" is entirely inconsistent with the fact that Howard agreed to a judgment as to liability for securities fraud just three days prior. Howard's involvement in directing his victims to take certain actions has nothing to do with bringing true facts to light. In fact, it accomplishes the exact opposite by further defrauding the very victims of the securities fraud which he agreed to liability upon. If Howard somehow thought he did was not liable for securities fraud, he should not have agreed to the judgment against him.

Finally, any attempt by McCarthy to justify his words as mere attorney-speak to make his client feel like he was "fighting hard for [him]" so Howard "gets the sense that [he] cares, is outraged as well, and is fighting" is revealing in light of the facts that existed at that time. Indeed, just three days earlier, Howard and McCarthy agreed to judgment as to liability for securities fraud claims against Howard. If creating havoc for the Receiver was something McCarthy thought his

client "needed to hear" at the time, then it only serves to emphasize their improper motives.

F. The Court Should Award The Receivership Estate Its Attorneys' Fees.

Each of the bare-bones Howard Filings relate to the McCarthy Email, are frivolous, and appear to be a continuation of McCarthy's stated strategy in this case – to create havoc. While it does not take much effort for Howard's counsel to file two-and-three-page motions, in piecemeal form, containing no evidentiary support and making inaccurate and incomplete legal arguments, in order for the Receiver to respond appropriately to clear up the messy record created by these ill-advised filings, the Receiver's counsel must research the law and demonstrate the many deficiencies contained in the Howard Filings. Rule 11 exists for exactly this purpose. Rule 11 requires the attorney filing litigation documents to certify that the documents: (1) are not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 528 (5th Cir. 2016). Upon a finding that a party has violated Rule 11, the court may impose sanctions to such an extent sufficient to deter repetition of similar conduct. *See Barrett-Bowie v. Select Portfolio Servicing Inc.*, 631 Fed.Appx. 219, 221 (5th Cir. 2015). Sanctions may include nonmonetary directions; an order to pay a penalty to the court; and/or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorneys' fees and other expenses directly resulting from the violation. *See Marlin v. Moody Nat. Bank, N.A.*, 533 F.3d 374, 378 (5th Cir. 2008).

On June 12, 2017, before Howard filed any of the Howard Filings, and in an effort to avoid unnecessary costs associated with responding to Howard's frivolous claim of privilege related to

the McCarthy Email, the Receiver directly advised Howard's counsel in writing as follows:

> I received your voicemail a few minutes ago seeking to confer on a motion to strike evidence attached to my June 2, 2017 filing that you contend to be "privileged joint defense" communications. As I expect you know, such a filing (1) has no merit under applicable law and the facts here; (2) will do nothing more than bring additional attention o your client and your partners contemptuous conduct; and (3) will cost the Receivership money. However, should you wish to file such an ill-advised motion, be advised that I will seek any costs associated with responding to be paid by your client and your law firm directly.

Exhibit D (Receiver's Email) [**APP. 9-10**]. Howard's counsel nevertheless proceeded to file the ill-advised motions.

As such, in an effort to save costs, the Receiver is responding to all the Howard Filings and letters with this one omnibus filing, and requesting that the Court consider awarding the Receivership Estate its costs and fees associated with responding to Howards frivolous motions and order Howard and McCarthy's law firm to pay those costs upon appropriate application to the Court proving the actual amount of such fees.

III. CONCLUSION AND PRAYER FOR RELIEF

The Receiver requests that the Court Deny (a) Howard's Motion to Strike Receiver's Omnibus Response and Brief in Support Thereof, filed on June 9, 2017 [Dkt. 85], (b) Howard's Motion for Expedited Discovery and Brief in Support Thereof, filed on June 16, 2017 [Dkt. 90], and (c) Howard's Motion to Seal and Brief in Support Thereof, filed on June 20, 2017 [Dkt. 91] (collectively, the "Howard Filings").

In addition, the Receiver requests that the Court order Howard's attorneys to pay to the Receivership Estate a sum equal to the amount of the fees incurred in responding to the Howard Filings, after an appropriate Application to this Court setting out the actual amount incurred, and for such other and further relief to which the Receiver may show himself justly entitled.

Dated: June 30, 2017.

Respectfully submitted,

KIMBERLY M. J. SIMS
State Bar No. 24046167
ksims@palterlaw.com

PALTER STOKLEY SIMS PLLC
8115 Preston Rd., Suite 600
Dallas, Texas 75225
Telephone: (214) 888-3106
Facsimile: (214) 888-3109

ATTORNEY FOR RECEIVER
W. CRAIG STOKLEY

CERTIFICATE OF SERVICE

On June 30, 2017, I electronically filed the foregoing document via the Court's CM/ECF filing system, which will send a notice of electronic filing to all CM/ECF participants. I further certify that I served a true and correct copy of the foregoing document and the notice of electronic filing via UPS and electronic mail on all non-CM/ECF parties and/or their counsel.

KIMBERLY M.J. SIMS