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

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

DEFENDANT PATRICK O. HOWARD'S REPLY TO RECEIVER'S RESPONSE IN OPPOSITION TO HOWARD'S MOTION TO STRIKE, MOTION FOR EXPEDITED DISCOVERY, AND MOTION TO SEAL

I. SUMMARY

The Court should grant Defendant Patrick Howard's Motion to Strike and Motion to Seal because the Receiver obtained privileged materials that he should never have received. Then he made the privileged materials public in support of his meritless contempt petition. The Receiver's position that the materials are not privileged is supported by little more a scattershot of objections that all miss the target. *See* Receiver's Response in Opposition to Defendant Patrick Howard's Docket Entries 85, 86, 90 and 91 and Unfiled Letter to Court Related to Show Cause Order and Request for Fees, ECF No. 92 ("Receiver's Response"). So, Mr. Howard's Motions to Strike and to Seal should be granted.

The Court should also grant Mr. Howard's Motion for Expedited Discovery. The entire basis for the Receiver's contempt motion is that some harm has befallen the Receiver – yet the

Receiver has not demonstrated the quantum of the harm.[1] Mr. Howard and the Court cannot meaningfully address the Receiver's empty allegations without discovery to understand what (and whether) anything untoward has actually happened that is inconsistent with the Order Appointing Receiver. At the moment, the Receiver's request for contempt seems grounded in the Receiver's discovery that some people who had been affiliated with Optimal Economics Capital Partners, LLC ("OE Capital") were concerned that the Receiver was not acting in the best interests of the OE Capital Investors and that they felt the need to assess what legal options, if any, were available to them. If the Receiver believed that "5 cents on the dollar was an optimal return," then perhaps OE Capital Investors should have been informed and been able to consult with counsel. *See* Respondent, Christine Horne's Supplemental Response In Opposition to Receiver's Motion to Show Cause – Affidavit of Fact of Christine Horne ("Horne Affidavit") at 3, ECF No. 87-1.[2]

The Receiver's Response continues to ignore that the Receiver bears the burden to establish contempt of court. He has not presented clear and convincing evidence that he was harmed, or that Mr. Howard was prohibited from communicating with *extremely* concerned investors.[3] *See* Horne Affidavit at 3–4, ECF No. 87-1 (stating that Horne was contacted by investors who, a month after his appointment, had not been contacted by the Receiver); *see also* Affidavit of Patrick Howard, ¶ 9, 14, Appendix ("App.") 3, 5 ("Howard Affidavit"). Separately, the Receiver's notion

[1] The Receiver does not allege that anyone has limited his ability to manage the affairs of OE Capital or limit his ability to engage with OE Capital investments.
[2] Ms. Horne also states: "When I heard that, I was shocked, as I knew these investments were real and could yield much higher returns than Mr. Stokley believed was a good return." *See* Horne Affidavit, at 3, ECF No. 87-1
[3] The Order Appointing Receiver does not restrict Mr. Howard from communicating with OE Capital investors. *See* Howard's Brief in Opposition at 7-8, ECF No. 69. The Receiver filed a motion to modify the Order Appointing Receiver to prevent Mr. Howard from communicating with investors at the same time he filed the Motion for Contempt. *See* Receiver's Motion to Show Cause at 3, ECF No. 56. Mr. Howard has not opposed the Receiver's request to modify the Order Appointing Receiver and contends that the Receiver's requested modification would have been sufficient and that the additional litigation prompted by the Contempt Motion could have been avoided.

that Mr. Howard's communications with his counsel amount to perpetuating a fraud has no grounding in reality or in the text of the privileged materials that the Receiver improperly relies upon.

II. ARGUMENTS & AUTHORITIES

A. The Court should grant Mr. Howard's Motion to Strike and Motion to Seal because Receiver relied on communications protected by the Common-Interest Doctrine

The Receiver's Response relies on inapplicable non-controlling case law from other circuits. In the Fifth Circuit, the "joint defense privilege[4] extends the attorney-client privilege to any third party made privy to privileged communications if that party has a common legal interest with respect to the subject matter of the communication." *See Aiken v. Texas Farm Bureau Mut. Ins. Co*., 151 F.R.D. 621, 624 (E.D. Tex. 1993) (citing *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992)).

In the Fifth Circuit, common interest includes "shared communications between various co-defendants, actual or potential, and their attorneys, prompted by threatened or actual, civil or criminal proceedings, 'to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.'" *Id.; In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981). The doctrine traditionally is applied in two situations. First, when more than one person receives advice from the same attorney on a matter of common interest. *See Hodges, Grant & Kaufman v. U.S. Gov't*, 768 F.2d 719, 720 (5th Cir. 1985). Second, when a privileged communication is disclosed to a non-client. *Id.* In some circumstances, disclosure to a person who is not a joint client but has a common interest with the client will not break the privilege. *See Aiken*,

[4] Courts in the Fifth Circuit refer to the doctrine as both the common-interest doctrine and the joint-defense privilege. *See, e.g., Nieman v. Hale*, No. 3:12-CV-2433-L-BN, 2013 WL 6814789, at *2 (N.D. Tex. Dec. 26, 2013).

151 F.R.D. at 623; *In Re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). Protected common-interest communications are: (1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel. *See Santa Fe*, 272 F.3d at 710.[5] A common interest is present when 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." *Id.*

The February 26, 2017 email from Mr. McCarthy to Mr. Howard, cc'ing Mr. Bell, is a classic privileged communication between a lawyer, his client and a potential lawyer for an unrepresented potential co-party. At the time, Mr. Howard and Ms. Soblinskas both had been threatened with potential legal action by the Receiver and both were concerned that the Receiver might harm the investors' long-term interests. *See* Howard Affidavit at ¶ 5–7, App. 2–3. The presence of Mr. Bell on the email communication from Mr. McCarthy does not destroy the attorney-client privilege, because as of February 26, 2017, Mr. Bell was operating under a joint defense agreement in anticipation that he might be retained by Ms. Soblinskas. *See* Howard Affidavit at ¶ 10, App. 4; *see also* Appendix in Support of Receiver's Response at APP_6, ECF No. 93 (email communication between Mr. Rodriguez (current counsel for Soblinskas), and Mr. Bezanson, in which Mr. Bezanson suggests to Mr. Rodriguez: "As you might have experienced, joint defense agreements are rarely committed to writing. I recommend you confer with your client's prior counsel [Mr. Bell].").[6] Because the parties to Mr. McCarthy's email all believed the communication to be privileged, it should be struck from the Receiver's pleadings. *See In re*

[5] The term "potential" has not been clearly defined. *Id*.
[6] It is unclear whether Mr. Rodriguez spoke with Mr. Bell or why the substance of that conversation is absent from the Receiver's Response.

Auclair, 961 F.2d 65, 68 (5th Cir. 1992) (concluding that where multiple potential clients meet with an attorney regarding possible representation, the potential clients do not waive the attorney-client privilege because of the presence of the other prospective clients).[7]

The Receiver's Response also misapplies the common-interest doctrine to Mr. Howard's forwarding Mr. McCarthy's email to Ms. Soblinskas on March 4, 2017. In fact, the common-interest doctrine encompasses and protects communications between potential parties to a litigation. The Fifth Circuit suggests but does not require that the communication must be only between attorneys. *See Santa Fe Int'l*, 272 F.3d at 710. Here, Mr. Howard was sharing with Ms. Soblinskas a communication regarding potential, future litigation in which Mr. Howard and Ms. Soblinskas would be and were, at the time of the communication, aligned and possessed a common-interest. *See* Howard Affidavit at ¶ 10–12, App. 4

Mr. Howard was under the impression, following communications with Ms. Soblinskas, that the Receiver was poised to initiate litigation against them. *See* Howard Affidavit at ¶ 5–11, App. 2–4. This satisfies the requirements that "there must be a palpable threat of litigation at the time of the communication. . . ." *See Santa Fe*, 272 F.3d at 711. Mr. Howard believed, and Ms. Soblinskas should have genuinely believed, on or after February 21, 2017, that they faced potential litigation in their capacity as former management of OE Capital.

Mr. Howard and Ms. Soblinskas also considered – by Ms. Soblinskas's admission – that following her discussions with the Receiver regarding the value of OE Capital assets, that they might seek court intervention to protect the investors from a hasty liquidation. The common-

[7] Howard's attorneys and Soblinskas's potential attorney are permitted to share work product, e.g., mental impressions, opinions, and strategy about a case without waiving privilege. *See In re Marketing Investors Corp.*, 80 S.W.3d 44, 47 (Tex. App.– Dallas 1998) (original proceeding). Instead of filing the McCarty email without consulting with counsel for Mr. Howard, the Receiver could have submitted it for *in camera* review.

interest doctrine does not apply *only* to potential co-defendants, but rather covers more generally "communications between two parties." *See Nieman v. Hale*, No. 3:12-CV-2433-L-BN, 2013 WL 6814789, at *2 (N.D. Tex. Dec. 26, 2013); *see also, In re LTV Sec. Litig.*, 89 F.R.D. at 604 ("For the purposes of the joint defense privilege, the term co-defendant is broadly construed."). Mr. Howard's and Ms. Soblinskas's posture as potential litigants bestows the privilege on their shared communications to the extent that they concern common issues and are intended to facilitate representation in possible, subsequent proceedings. *See In re LTV Sec. Litig.*, 89 F.R.D. 595 at 604.

The Receiver's own pleadings belie his theory that there was no common-interest between Mr. Howard and Ms. Soblinskas. The Receiver accused both Mr. Howard and Ms. Soblinskas of working together to undermine his authority and to interfere with his duties (in realty, to the extent that they were working together, it was to protect OE Capital Investors). *See* Receiver's Motion to Show Cause at 20–21, ECF No. 57. Now he posits that Ms. Soblinskas and Mr. Howard did not share a common interest. The Receiver's flip-flopping positions are untenable.[8]

Additionally, the Affidavit of Dovile Soblinskas contains communications between Ms. Soblinskas and attorneys for Mr. Howard. *See* Affidavit of Dovile Soblinskas at RAPP_5, ECF No. 82. These conversations are covered by the common-interest doctrine. *See Auclair*, 961 F.2d at 68; *see also* Howard Affidavit at ¶ 10, App. 4 (describing Ms. Soblinskas's request for an attorney). These communications, and reliance on these communications by the Receiver, impermissibly intrude into the privilege protected by the common-interest doctrine.

[8] Ms. Soblinskas's Declaration includes her denial that she and Mr. Howard had a common interest. *See* Appendix in Support of Receiver's Response at APP _3, ECF No. 93. Her denial is inconsistent with her statements and her behavior following the Receiver's appointment and emerged only after she was threatened with criminal sanctions by the Receiver. Her motivation and the statements in her affidavit are proper areas to explore during a deposition.

B. The Court Should Grant Mr. Howard's Motion for Expedited Discovery

The Receiver's conclusory opposition to Mr. Howard's Motion for Expedited Discovery is meritless. Good cause for granting discovery exists where "the need for expedited discovery in consideration of the administration of justice, outweighs the prejudice to the responding party." *St. Louis Grp., Inc. v. Metals and Additives Corp., Inc. et al.*, 275 F.R.D. 236, 239 (S.D. Tex. 2011). A 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.*[9]

Expedited discovery is warranted here in order for Mr. Howard to effectively and robustly oppose the serious contempt accusations raised by the Receiver.[10] Mr. Howard needs full access to documents and witnesses, particularly those documents in the possession of, and testimony from, affiants Dovile Soblinskas and W. Craig Stokley. The Receiver has not presented facts that support vital components of his contempt theory: there is no evidence that the Receiver was harmed, how much time was spent addressing that "harm," nor how the Receiver was prohibited from or interfered with his communications with investors. The Receiver, to establish civil contempt, bears the burden of establishing by clear and convincing evidence, that Mr. Howard 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). Mr. Howard's request for expedited discovery is reasonable, particularly considering the relief sought in the Receiver's

[9] Additionally, courts commonly consider the following factors in determining whether 'good cause' exists to order expedited discovery: '(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.'" *See St. Louis Group,* 275 F.R.D. at 239-240.

[10] *See* Howard's Brief in Opposition to Receiver's Motion to Show Cause, Part III. C [ECF 69] and Howard's Motion for Expedited Discovery [ECF 90].

Motion to Show Cause and the circumstances surrounding the Receiver's acquisition of attorney-client communications.

The Court has ordered a written response to the civil contempt sought in the Receiver's Motion to Show Cause, and after considering those written submissions, will determine whether it will consider the request for criminal contempt, and if so, set an evidentiary hearing upon appropriate notice. *See* Order, ECF No. 59. As the Court is likely aware, the procedures in criminal contempt proceedings "have come to mirror those used in ordinary criminal cases." *See U.S. Equal Emp't Opportunity Comm'n v. Univ. of Louisiana at Monroe*, No. CV-05-1158, 2016 WL 917331, at *3 (W.D. La. Mar. 8, 2016) (quoting *Young v. United States ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 808 (1987)) (citation and internal quotation marks omitted). These procedures, and rights, include "the appointment of a neutral or disinterested attorney to prosecute the case, the presumption of innocence, the beyond-a-reasonable-doubt burden of proof, right against self-incrimination, notice of the charges, a reasonable opportunity to respond to the charges, the assistance of counsel, and the right to call witnesses." *Id.* If the Court intends to grant the civil relief sought in the Receiver's Motion to Show Cause, and then consider the criminal relief sought, Mr. Howard is entitled to discovery of the facts underlying the charges against him in order to have a reasonable opportunity to respond, as compelled by due process protections. *See In re Stewart,* 571 F.2d 958, 964 (5th Cir. 1978) (concluding that contempt proceedings must comply with basic and elementary constitutional requirements of due process).

Additionally, Mr. Howard's Motion for Expedited Discovery adequately describes the type of discovery sought and the purpose that discovery would serve. Namely, "to assess the merit of the alleged wrongful conduct so that evidence at a potential contempt hearing can be presented efficiently and effectively, and so that the relief can be targeted precisely." *See* Howard's Motion

for Expedited Discovery at 2, ECF No. 90. Finally, the burden on the Receiver to respond to the proposed discovery is not overly burdensome, as it largely relates to the Receiver's ongoing duties. Presumably, the Receiver keeps adequate records of his activities, and can therefore respond with relative ease to the discovery sought by Mr. Howard. Thus, granting Mr. Howard's Motion for Expedited Discovery is not unduly prejudicial or burdensome for the Receiver, and if any burden exists, does not outweigh Mr. Howard's interest in presenting a full defense to the charges laid against him in the Receiver's Motion to Show Cause and related filings.

C. The Court Should Reject the Receiver's Request for Fees

The Receiver's Response requests that the Court consider awarding the Receivership Estate costs and fees. *See* Receiver's Response at 25, ECF No. 92. The request fails not only procedurally, but is patently absurd and inappropriate, as this current litigation is all the Receiver's making. After he failed to communicate with OE Capital Investors and then revealed that he believed that 5 cents on the dollar was an optimal return for investors, former OE Capital managers and some investors assessed their options to preserve investor value. The Receiver's litigious overreaction followed.

First, Rule 11 requires that a motion for sanctions must be made separately from any other motion. *See Marlin v. Moody Nat. Bank, N.A.*, 533 F.3d 374, 379 (5th Cir. 2008) (stating "Rule 11. . .is clear: [a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)."). Here, the Receiver did not comply with the requirements of Rule 11, because the Receiver combined his request for fees premised on a Rule 11(b) violation with the remainder of his Response brief. Thus, the Receiver's request fails to conform to the procedural requirements and should not be granted. *See Marlin,* 533 F.3d at 378–79 ("[I]mposing Rule 11 sanctions without notice and hearing would constitute an

abuse of discretion by the district court.") (internal citations omitted).

Second, the Receiver's request for fees is a problem of his own making. There is no conspiracy to interfere with the Receiver's administration of his duties. Rather, to the contrary, there is a need to ensure that the Receiver preserves, and does not destroy, investor value. For instance, as Ms. Horne's Affidavit demonstrates, she was "shocked" by the Receiver's statement that "5% return was above average," as she "knew these investments were real and could yield much higher returns than Mr. Stokley believed was a good return." *See* Horne Affidavit at 3, ECF No. 87-1.

Further, Ms. Horne's Affidavit establishes that almost *two months* after the Receiver had been appointed, investors had yet to be contacted and as such, were contacting Ms. Horne, Mr. Howard and others for information regarding their investments. *See* Horne Affidavit at 4-5, ECF No. 87-1 (stating "the Receiver had not yet communicated with investors that were calling Horne . . . ."); *see also* Howard Affidavit at ¶ 9, 14, App. 3, 5 (stating that individuals had asked why they had not heard anything from the Receiver). The Receiver's own inaction spurred the contact from multiple investors, and rather than ignore the questions posed by investors, Mr. Howard and others were forced to explain to investors the status of the Receivership. The Receiver attempts to shift the blame for his inaction onto Mr. Howard, alleging conspiracy and interference with his duties. In fact, the Receiver's behavior spurred the conduct he now complains of and seeks to shift the blame for, and – incredulously – also seeks attorney's fees.

III. CONCLUSION

Mr. Howard respectfully requests that the Court grant Mr. Howard's Motion to Strike, Motion for Expedited Discovery, and Motion to Seal, and deny the Receiver's Request for Attorney's Fees.

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 SERVICE

I hereby certify that on July 14, 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*
Brandon McCarthy