

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 16-24678-CIV-COOKE/TORRES

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

ONIX CAPITAL, LLC, and
ALBERTO CHANG-RAJII,

Defendants, and

DEEP OCEAN LLC, et. al.,
NEXT CAB VENTURES LLC,
NEXT CALL VENTURES LLC,
NEXT CHAT VENTURES LLC,
NEXT PAY VENTURES LLC,
NEXT TRACK VENTURES LLC, and
PROGRESSIVE POWER LLC,

Relief Defendants.

**ORDER ON LIQUIDATOR'S MOTION FOR PROTECTIVE ORDER AND
RECEIVER'S MOTION TO COMPEL INTERVENOR TO PRODUCE ALL
DOCUMENTS REQUESTED IN RECEIVER'S SUBPOENA AND TO
AUTHORIZE RECEIVER TO ISSUE SUBPOENAS IN FURTHERANCE OF
HER DUTIES UNDER RECEIVERSHIP ORDER**

This matter is before the Court on Liquidator's Motion for Protective Order (the "Motion"). [D.E. 89]. The Liquidator, Carlos Antonio Parada Abate, seeks a protective order from Receiver's subpoena because he alleges that she is not authorized to conduct discovery (or, alternatively, that the scope of her discovery

should be limited so as to shield him from subpoenas). As part of the Receiver's response to the motion, the Receiver also filed her Cross-Motion to Compel [D.E. 92] the Liquidator to produce documents demanded in Receiver's subpoena. For the reasons that follow, Liquidator's Motion and Receiver's Motion are hereby **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

In November 2016, the Securities and Exchange Commission ("S.E.C.") filed this action against Onix Capital, LLC and Relief Defendants as entities run for the purpose of furthering a securities fraud scheme perpetuated by Alberto Chang-Rajii ("Chang-Rajii"), who fled to Malta in the spring of 2016. [D.E. 1].

The Court appointed Melanie Damian as Receiver of Onix Capital, LLC and the Relief Defendants in its Endorsed Order on March 28, 2017. [D.E. 78]. It entered the Receivership Order on April 4, 2017. [D.E. 84]. The Receivership Order does not explicitly grant the Receiver the power to serve subpoenas on other parties, and it limits the Receiver's jurisdiction to U.S.-based assets. *Id.* The Receivership Order does, however, charge Receiver with a broad range of powers and responsibilities, including the powers to "manage the . . . assets . . . of Onix [Capital, LLC] and the Relief Defendants located within the United States," the duty to "marshal and safeguard" the assets of Onix Capital, LLC and Relief Defendants, and charges her to "[i]nvestigate the aforementioned assets, documents, and other items to ascertain the identity of any additional investors, debtholders, or other persons located within the United States[.]" [D.E. 84, ¶¶ 2-7].

The Receivership Order also requires the Receiver to cooperate with Liquidator by notifying him of any assets located internationally and assist him with recovery of any such assets. [D.E. 84, ¶ 8]. In turn, the Order also requires other persons to “[c]ooperate with and assist the Receiver with carrying out the responsibilities and powers outlined in this Order.” [D.E. 84, ¶ 18].

On April 7, 2017, Receiver served a Subpoena *Duces Tecum* to Produce Documents (the “Subpoena”) to Liquidator demanding, among other things, documents reflecting financial records and communications made among Liquidator and others concerning Onix Capital, LLC and Relief Defendants. [D.E. 89-1]. Liquidator returned its Response and Objections to the Receiver’s Subpoena *Duces Tecum* to Produce Documents, objecting to each subpoena request. [D.E. 89-3].

Liquidator filed his Motion for Protective Order, arguing that Receiver did not have the power to issue subpoenas at all. [D.E. 89]. Alternatively, Liquidator objected on grounds of burden and proportionality, privilege, and scope of the requests. *Id.* In her Response, Receiver argued that her responsibility to identify assets, investors, and debtholders made subpoena power necessary to conduct a thorough investigation, and further disputed Liquidator’s objections as meritless. [D.E. 92]. Liquidator’s Reply stated that Receiver does not need subpoena power to fulfill her duties, but that if the Court was to find that she has subpoena power, that the Court should order it to disclose documents which are “tailored in accordance with” the list of objections it served in response to Receiver’s Subpoena. [D.E. 93, p. 3]; [D.E. 89-3].

On May 1, 2017, this Court found good cause to permit Liquidator to refrain from complying with Receiver's Subpoena until it made a ruling on Liquidator's Motion for Permission to File Involuntary Bankruptcy Petition. [D.E. 81]. On this date the Report and Recommendation issued on that Motion, which recommends Denial of the Motion. As a result, the pending dispute is ripe for adjudication.

II. CHANGES TO THE RECEIVERSHIP ORDER

The Receivership Order outlines a broad range of powers and responsibilities, which may not be fully accomplished without the ability to issue subpoenas. [D.E. 84]. Therefore, the Court is contemporaneously Recommending that the following change shall be made to the Receivership Order [D.E. 84], which will be placed after paragraph 13 of the Receivership Order:

Immediately upon entry of this Order, the Receiver may take depositions upon oral examination of parties and non-parties subject to seven (7) business days' notice. In addition, the Receiver may issue subpoenas for documents, things and electronically stored information to non-parties calling for production within one week of service, subject to the protections of Fed.R.Civ.P. 45. The Receiver also shall be entitled to serve interrogatories, requests for the production of documents and electronically stored information, and requests for admissions. The parties shall respond to such discovery requests in accordance with the Federal Rules of Civil Procedure. Service of discovery requests shall be sufficient if made upon the parties by facsimile or overnight courier. Depositions may be taken by telephone or other remote electronic means;

III. ANALYSIS

Liquidator must produce documents responsive to Receiver's Subpoena but only in accordance with the provisions set forth below. The Court may grant a Protective Order in accordance with Federal Rule of Civil Procedure 26(c)(1)(A)

forbidding disclosure or discovery if there is good cause to “protect a party from . . . undue burden or expense[.]” Fed. R. Civ. P. 26(c)(1)(A). Upon considering the record on the motion, a protective order is warranted in part.

A. Burden and Proportionality

Liquidator argues that Receiver’s Subpoena would be unduly burdensome and disproportionate for three reasons: (1) Liquidator would face difficulty and expense attempting to conduct targeted searches of his online database of documents because Chang-Rajii set up entities with similar names; (2) some of the documents Liquidator may produce may have already been produced to Receiver by the S.E.C.; and (3) Liquidator objects to producing documents which are already publicly filed, even if they may have been filed in other countries.

If a producing party objects to a search term for digitally-stored documents that it believes to be unduly burdensome, then it has an obligation to explain the objection, point to evidence supporting such an objection, and, if asked, offer specific search terms which “address[] the concerns while still retrieving as many of [the] relevant documents targeted by the disputed search terms as possible.” *L-3 Commc’ns Corp. v. Sparton Corp.*, 313 F.R.D. 661, 670 (M.D. Fla. 2015).

Here Liquidator has adequately met that burden and shown that conducting a search for Onix Capital, LLC and Relief Defendants would be unreasonable because Chang-Rajii often named entities after one another (i.e. Onix Capital, S.A., Onix Capital, Ltd., Deep Ocean Offshore, Inc., Next Cab Ventures Offshore, Inc.), and Liquidator points to evidence of time and expense that is put into maintaining

thousands of documents relating to such entities on an online database. *Id.* In any event, Receiver expresses an interest in working with Liquidator so as to narrow the language of search terms to conduct an appropriate search, and may, upon request, ask Liquidator to suggest terms which may produce the most relevant, sought-after documents. *Id.* Therefore, to fulfill his obligation to resolve any disputes in good faith under Rule 37(a)(1) and Local Rule 7.3(a)(3), Liquidator must offer Receiver suggestions of specific search terms if asked and must make a good faith attempt to work with her to craft more appropriate search terms. *Id.*; Fed. R. Civ. P. 37(a)(1); S.D. Fla. L.R. 7.3(a)(3). Once the parties identify appropriate search terms, Liquidator must search the online database and produce documents responsive to Receiver's Subpoena, subject of course to the conditions and limitations of this Order.

With regard to objections (2) and (3), Liquidator need neither produce documents that were already served to Receiver by the S.E.C. nor documents that are already publicly available. Liquidator must, however, cooperate with the Receiver and suggest where relevant documents may be located. The Receivership Order was tailored to ensure that Receiver cooperates with Liquidator to recover any international assets she identifies, and Liquidator must reciprocate by cooperating with the Receiver to ensure that both parties are able to identify and marshal assets efficiently and effectively.

Though this ruling largely disposes of many of the discovery issues raised by the parties, we proceed with specific analysis of other matters raised by the parties.

B. Privilege

1. Work-Product Privilege

Liquidator may claim work-product privilege for materials prepared in anticipation of litigation in the instant proceeding from after the date of his appointment as Liquidator. He must, however, produce materials prepared in the ordinary course of Onix Capital, LLC and the Relief Defendants' business, such as financial records and relevant communications that were not prepared "with an eye toward litigation." *Hickman v. Taylor*, 429 U.S. 495, 511 (1947). Documents prepared in anticipation of litigation may be protected from disclosure by work-product doctrine under Federal Rule of Civil Procedure 26(b)(3). Fed. R. Civ. P. 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial or for another party or its representative . . ."); *see also Hickman*, 429 U.S. at 511 (finding that work-product doctrine encompasses materials including "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs," which are prepared "with an eye toward litigation[.]"). Materials which are not prepared in anticipation of litigation but are instead drafted or created in the ordinary course of business are discoverable. *Holbourn v. NCL (Bahamas) Ltd.*, 305 F.R.D. 685, 687 (S.D.Fla. 2014) (citing *Schulte v. NCL (Bahamas) Ltd.*, No. 10-23265-CIV, 2011 WL 256542, at *2 (S.D.Fla. Jan. 25, 2011)) (finding that surveillance videos were created in the ordinary course of business and therefore not protected by work-product doctrine).

The party withholding documents bears the burden of proving that the documents are privileged. *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 698 (S.D. Fla. 2007).

Liquidator need only to produce non-privileged documents responsive to Receiver's Subpoena which deal specifically with Onix Capital, LLC, Relief Defendants, or their U.S.-based assets, creditors, and investors. Liquidator may claim work-product privilege for documents and communications produced after his appointment as liquidator of Onix Capital, S.A. so long as those documents and communications were prepared in anticipation of litigation. *Hickman*, 429 U.S. at 511. Other documents, such as financial statements and corporate records, or relevant communications which were not prepared in anticipation of litigation must be produced to Receiver. *Holbourn*, 305 F.R.D. at 687. It is upon Liquidator to show that any withheld documents or communications responsive to Receiver's Subpoena are privileged. *Milinazzo*, 247 F.R.D. at 698. But given the burden imposed on the Liquidator to produce documents in a case where it is in effect aligned with the interests of the Receiver, we see no reason why the Liquidator should not be permitted to prepare a categorical privilege log to the extent the Liquidator is withholding compliance with the subpoena on privilege grounds.

Moreover, Local Rule 26.1(e)(2)(C) exempts the disclosing party from logging work-product material created after commencement of the action. S.D. Fla. L.R. 26.1(e)(2)(C). Liquidator does not need to log work-product material created after his appointment as the liquidator of Onix Capital, S.A.

2. Attorney-Client Privilege

Liquidator may also withhold communications made between himself and his counsel based upon attorney-client privilege. The privilege cloaks communications made between a client and his attorney from discovery made for the purpose of giving or receiving legal advice. *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 583 (S.D. Fla. 2013). Liquidator need not produce any communications pertinent to Onix Capital, LLC or Relief Defendants made for the purpose of seeking legal advice between himself and his counsel in the United States. *Id.* Withheld communications based upon the attorney-client privilege made prior to Liquidator's appointment as liquidator of Onix Capital, S.A. may also be logged in a categorical privilege log. Of course, communications made between himself and his attorneys in other international proceedings are beyond the scope of this case and this Order.

3. Common Interest Privilege

Communications between Liquidator and counsel for the Putative Petitioners is subject to a common interest privilege. "[T]he common-interest privilege applies when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities." *In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 805 n.4 (Bankr. S.D. Fla. 2010). Here, the common-interest privilege applies to communications made between counsel for Liquidator and Putative Petitioners as well as counsel for Liquidator and Joint Liquidators. *Id.*

C. Scope

Documents and communications which relate to assets of Onix Capital, LLC and Relief Defendants located outside the United States, as well as communications with investors or creditors of Onix Capital, LLC or Relief Defendants that are not relevant to Onix Capital, LLC or Relief Defendants, are beyond the scope of this case. Communications made by Liquidator to general audiences, such as press releases or reports filed in proceedings, are also beyond the scope of this case.

Intervenor must, however, supplement any production as additional U.S.-based creditors and investors of Onix Capital, LLC and Relief Defendants are identified so as to ensure that Receiver is able to account for all investors and creditors of Onix Capital, LLC and Relief Defendants within the United States.

IV. CONCLUSION

In light of the above, it is hereby ordered that Liquidator's Motion for Protective Order be **GRANTED IN PART** and **DENIED IN PART**. Receiver has the ability to subpoena other parties. As to discovery from the Liquidator, the Liquidator shall work with Receiver to identify the search terms that will produce documents responsive to Receiver's Subpoena subject to the conditions and limitations of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of July, 2017.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge