

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC., d/b/a PAR FUNDING, *et al*,

Defendants

**DEFENDANT JOSEPH COLE BARLETA'S OPPOSITION
TO THE RECEIVER'S MOTION TO COMPEL**

Defendant Joseph Cole Barleta files the instant Opposition to the Receiver's Motion to Compel Mr. Barleta to comply with the Receiver's requests for information.

The Receiver emailed counsel on February 21, 2022 and on March 9, 2022 and requested that Mr. Barleta provide information from 2016 through the present about whether he may have an ownership interest in 10 categories of assets including real estate; stocks, bonds and securities; bank accounts; safe deposit boxes; automobiles; indebtedness owed to Cole; partnerships and other business interests; trusts; other property; and disposal of property." (Ex. 2 and 3 of Receiver's Motion to Compel)

Mr. Barleta objects to providing any of the information requested on the basis of his Fifth Amendment privilege. As the Court may be aware, the United States Attorney's Office in Philadelphia has a criminal investigation into the very same facts that were the subject of the

SEC case herein. Mr. Barleta squarely possesses a Fifth Amendment right not to produce documents involving a testimonial action. As the Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976) recognized, the Fifth Amendment protects against document production where compliance contains communicative aspects including confirmation of the existence, authenticity and possession of documents and a determination that the documents are responsive to the requests. Similarly, the Supreme Court in *United States v. Hubbell*, 530 U.S. 27 (2000) addressed what type of document requests are testimonial in nature. In *Hubbell*, the Court held that the act of producing a large number of documents in response to a non-specific subpoena was sufficiently testimonial to implicate the Fifth Amendment since “the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions.” The Court rejected the government’s “foregone conclusion” assertion and distinguished *Fisher*.

The decision of the 11th Circuit in *In re Grand Jury Subpoena Duces Tecum*, 670 F. 3d 1335, 1344 (11th Cir. 2011), set forth the difference between *Fisher* and *Hubbell*. In *Fisher*, the IRS sought to obtain voluntarily prepared documents the taxpayers had given to their attorneys. The Supreme Court observed that the existence and location of the papers were a foregone conclusion and the taxpayer adds little or nothing to the sum total of the government’s information by conceding that he in fact has the papers. For these reasons, the Court found that the act of production doctrine did not apply.

In *Hubbell*, however, the government obtained a court order granting immunity to Hubbell, who had invoked his Fifth Amendment privilege to a grand jury subpoena requesting 11 categories of documents. The grand jury obtained the documents and thereafter issued an indictment. Hubbell moved to dismiss the indictment because the government could not convict

him without the immunized produced documents. The district court agreed and dismissed the indictment because the government could not show it had knowledge of the documents from a source, independent of the documents themselves. The Supreme Court affirmed the dismissal. The *Hubbell* Court stated that the facts fell plainly outside of the “foregone conclusion” rationale since the government had not shown it had prior knowledge of the existence or whereabouts of the documents produced. The *Hubbell* Court further noted that the government could not cure the deficiency by arguing “that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in the subpoena.” *In re Grand Jury Subpoena* at 1344, quoting *Hubbell*, 530 U.S. 27, 44-45.

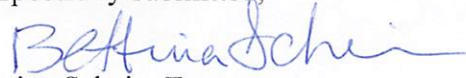
Hubbell is similar to the facts herein. The Receiver has requested that Mr. Barleta provide all documents he may have identifying all assets that he has owned from 2016 through the present. The Receiver has not met his burden to show that the documents exist and are in the possession of Mr. Barleta. Indeed, to the contrary, the Receiver’s request for all documents that fall within its ten categories of assets in which Mr. Barleta may have a personal or business ownership interest, make clear the fact that the Receiver does not know if any documents exist in response to any of the ten categories. A response by Mr. Barleta could thus provide the Receiver with knowledge of the existence, location and authentication of documents or may require even the preparation of documents. It requires Mr. Barleta to utilize thought processes and to assemble and produce documents, which is violative of his Fifth Amendment right. The Supreme Court in *Hubbell* made clear that when a response requires the use of one’s mind to identify, assemble and produce documents, it is testimonial in nature because it tells the government of the existence, location and the sources of the information provided.

The Receiver's reliance upon *Sallah v. Worldwide Clearing LLC*, 855 F. Supp.2d 1364 (S.D. Fla. 2012), is misplaced. The *Sallah* case concerns the appointment of a Receiver after a settlement agreement between defendants and plaintiffs. The Receiver there was seeking to compel discovery. The *Sallah* court noted that the requests at issue – which included all communications between defendants and others; depositions taken of witnesses; and all corporate documents – were not protected by the act of production doctrine because the Receiver was aware of the documents and could even obtain these documents from someone other than the defendant.

In contrast to *Sallah*, the Receiver here concedes that he does not know whether Mr. Barleta has any of the documents requested or, for that matter, has any of the assets about which he is seeking information. Whether Mr. Barleta may have any of these personal or business documents would require him to confirm that documents do exist, are in his possession, and are authentic. This testimonial compulsion is precisely what the act of production doctrine protects against. *See Fisher*, 425 U.S. at 410 (1976); *See also United States v. Greenfield*, 831 F.3d 106 (2d Cir. 2016) (Second Circuit vacated the district court's order enforcing a subpoena on the grounds that compelled production of documents would violate the Fifth Amendment right of the person compelled to produce the documents.)

Accordingly, Mr. Barleta asserts his Fifth Amendment right not to produce the documents which may exist in response to the Receiver's questions. Accordingly, it is respectfully submitted that the instant Motion to Compel should be denied in all respects. Should the Court be inclined to grant the Receiver's motion, it is respectfully requested that the Court grant a stay pending appeal to the Circuit Court.

Respectfully submitted,



Bettina Schein, Esq.
565 Fifth Avenue, 7th Floor
New York, New York 10017
(212) 880-9417
bschein@bettinascheinlaw.com
/s/ Bettina Schein
BETTINA SCHEIN
Admitted Pro Hac Vice

Andre G. Raikhelson, Esq.
301 Yamato Road, Suite 1240 Boca
Raton, FL 33431 Telephone:
(954) 895-5566
arlaw@raikhelsonlaw.com
Local Counsel for Joseph Cole Barleta
/s/ Andre G. Raikhelson
ANDRE G. RAIKHELSON
Florida Bar No. 123657