STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Carebourn Capital, L.P., More Capital, LLC,

Plaintiffs,

v.

Darkpulse, Inc., Standard Registrar & Transfer Company, Inc.,

Defendants,

Darkpulse, Inc.,

Third-Party Plaintiff,

v.

Chip A. Rice,

Third-Party Defendant.

ORDER ON CAREBOURN PARTIES' MOTION FOR DISPOSITIVE RELIEF AND DARKPULSE, INC.'S MOTION TO COMPEL

Court File No.: 27-CV-21-1173

This matter came on before the Court on November 22, 2021, for Plaintiff/Third-Party Defendant Carebourn Capital, L.P. and Chip A. Rice's motions for declaratory judgment, for summary judgment, and dismissal, as well as Defendant/Counterclaim Plaintiff Darkpulse, Inc.'s motion to compel discovery.

Lee Hutton, III, Esq. and Kyle Hahn, Esq., appeared as counsel for Carebourn Capital, L.P. ("Carebourn") and Chip A. Rice ("Rice") (collectively "Carebourn Parties").

Eric Benzenberg, Esq., Marjorie Santelli, Esq., and Jason Asmus, Esq., appeared as counsel for Darkpulse, Inc. ("Darkpulse").

Based on the pleadings and arguments of counsel, including the entire record and proceedings herein, the Court issues the following Order as follows:

CAREBOURN'S MOTION FOR JUDGMENT

1. In this litigation, the Court has previously issued an Order Denying [Carebourn's Request for a] Temporary Restraining Order, Order Denying [Carebourn's Renewed Motion for] Temporary Restraining Order, and an Order Granting Standard Registrar and Transfer Company, Inc's Motion to Dismiss Amended Complaint (which is currently subject to reconsideration

pursuant to the Order Granting Request for Leave to Move for Reconsideration). Now, Carebourn Parties bring a new motion, entitled "Motion for Declaratory Judgment, Dismissal of All Claims Against Carebourn Capital, L.P. and Chip Rice, and Summary Judgment Against Darkpulse, Inc."[1]

2. **Declaratory Judgment.** Initially, the Court notes that "Declaratory Judgment" is a form of substantive relief that is available if a party prevails in a civil action. Minn. R. Civ. P. 57. It is not a type of motion or form of interim relief.

3. **Dismissal of All Claims.** To the extent Carebourn Parties seek "Dismissal of All Claims" against them, the Court notes that this motion is also procedurally improper. Defenses to a claim shall be asserted in the responsive pleading (answer) except that certain defenses shall be made by motion. Minn. R. Civ. P. 12.02. Included in those defenses that may be made by motion is failure to state a claim upon which relief can be granted. *Id.* A motion asserting such defenses by motion "shall be made before pleading." *Id.*

4. Carebourn and Rice have already filed their answer to Darkpulse's claims against them. Under Rule 12, Carebourn Parties have waived their right to bring a motion under Rule 12.02(e).

5. **Summary Judgment.** Summary judgment is appropriately granted when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. In determining a summary judgment motion, the Court must view evidence in the light most favorable to the party opposing the motion. See *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Summary judgment is "inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citing *Illinois Farmers Ins. Co. v. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978)). On a motion for summary judgment, the district court's function "is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *Id.* (citing *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981)). "[T]he court must not weigh the evidence on a motion for summary judgment." *Id.* (citing *Murphy v. Country House, Inc*., 240 N.W.2d 507, 512 (Minn. 1976); *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995)). Mere denials, general assertions, and speculation are insufficient to raise an issue of material fact. *Gutbrod v. Cty. of Hennepin*, 529 N.W.2d 720, 723 (Minn. Ct. App. 1995).

6. "When the nonmoving party has been allowed only minimal discovery and the information that party needs to survive summary judgment is in the moving party's sole possession, summary judgment may be premature." *U.S. Bank Nat. Ass'n v. Angeion Corp*., 615 N.W.2d 425, 433-34 (Minn. Ct. App. 2000) (discussing *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins. Co*., 958 F.2d 836, 838-39 (8th Cir. 1992); *Hennepin Broad. Assocs. v. American Fed'n of Television & Radio Artists*, 301 Minn. 508, 511, 223 N.W.2d 391, 394 (1974)). The "[r]elative availability of evidence to the parties is a circumstance to be considered in determining what should be required for making a submissible case." *Id.* (quoting *Spencer v. Kroger Co*., 941 F.2d 699, 704 (8th Cir. 1991)).

[1] As this case's background has been set forth in prior orders, the Court has not included the case's background.

7. When a party has shown it cannot present facts essential to justify its opposition, the court may (a) defer consideration of the motion or deny it; (b) allow additional time to obtain the information or take discovery; or (c) issue any other appropriate order. Minn. R. Civ. P. 56.04. Relief under the Rule should be "liberally granted" when the non-moving party has shown it was diligent in seeking discovery and whether the non-moving party has a good-faith belief that material facts will be uncovered. *Rice v. Perl,* 320 N.W.2d 407, 412 (Minn. 1982).

8. Here, Darkpulse has been diligent in seeking discovery in this matter. The other portion of the hearing on this motion was a motion by Darkpulse to compel compliance with its discovery requests. This discovery covers a number of documents relating to items pertinent to the issue of whether Carebourn is in the business of being a broker-dealer that would be subject to registration requirements under the Securities Exchange Act of 1934 (the "Act") and for which the right of rescission may apply.

9. As set forth below, Darkpulse has propounded legitimate discovery requests pertinent to the issues that Carebourn has not complied with. Considering summary judgment on the grounds Carebourn Parties assert is not appropriate at this juncture.

10. In any event, disputed issues of material fact preclude summary judgment. Carebourn Parties' argument for summary judgment is premised on the position that the Court can determine at this stage as a matter of law that Darkpulse is not an "unwilling innocent" party with standing to seek rescission. The Supreme Court raised the issue of the Act rendering contracts void as against an "unwilling innocent party." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 387-88 (1970). The phrase was raised in a discussion noting that the *violating* party of the Act could not deny its obligations by claiming a contract was a nullity, but rather than the "interests of the victim" are protected by allowing that party to have the right to rescind. *Id.* Parties transacting with unregistered brokers and dealers are the class of person intended to be protected by the Act. *Eastside Church of Christ v. Nat'l Plan Inc*., 391 F.2d 357, 362 (5th Cir. 1968).

11. Carebourn also makes factual assertions that the Court should interpret the record as a matter of law as demonstrating that Darkpulse was the party that approached Carebourn for financing, and that it knew from the beginning of negotiations that Carebourn was not registered. In short, the factual record in this matter on these contentions is not uncontested. Carebourn Parties have not demonstrated that the record is undisputed that Darkpulse was acting as an active, essential and knowing participant in illegal activity in a "clearly mutual, simultaneous, and relatively equal" transaction. *Palmer v. Thomson v. McKinnon Auchincloss, Inc.*, 474 F. Supp. 286, 289 (D. Conn. 1979).

12. Darkpulse effected securities transactions by converting debt into shares of Darkpulse and acting to sell it into the public market. It "shall be unlawful" for any broker or dealer to use interstate commerce "to effect any transactions in, or to induce or attempt to purchase or sale of, any security." Act § 78o(1). It is not just the fulfillment of a contract term in violation of any act that is void, but taking acts to form (effect) or induce or attempt to purchase or sale of any security. *Id.* Carebourn's argument that Section 29(b) does not apply because the obligations are not illegal to perform is unavailing. Contracts that could have been performed without violating the Act are voidable if in fact they are performed in violation of the Act. *Edgepoint Capital Holdings, LLC v. Apothecare Pharmacy, LLC*, 6 F.4th 50, 59 (1st Cir. 2021).

13. Carebourn has reported that Rice is the sole employee, officer, and director of Carebourn. Accordingly, issues of material fact concerning his liability as a control person remain.

14. Carebourn also suggests that Darkpulse's rescission claim is untimely under the limitations period. However, authority suggests that a violation of Section 15(a) of the Securities Exchange Act occurred with each transaction effectuated in Darkpulse securities. *See UFCW Local 1500 Pension Fund v. Mayer*, Case No. 16-cv-00478-RS, 2016 WL 6122458 (N.D. Cal. Oct. 19, 2016); *see also Lawrence v. Richman Group of Connecticut, LLC*, 407 F. Supp.2d 385, 389 n. 7 (D. Conn. 2005) (Section 78cc limitations period did not apply to violation of broker-dealer registration requirements, and application of that period would lead to "absurd result" of letting unregistered broker to wait to file suit on illegal contract until after the expiration of the Section 78cc statute of limitations).

15. With respect to Darkpulse's state law claim under Minn. Stat. § 80A.76(j)(1) (mandating an action be commenced within one year after the violation of the broker dealer registration statute occurred), even under that limitations period, actionable activity occurred within the timeframe. Carebourn requested the conversion of debt into shares on September 1, 2020. The Counterclaim was asserted on August 31, 2021.

DARKPULSE'S MOTION TO COMPEL[2]

16. **Discovery Standard.** Parties may obtain discovery about any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs of the case. Minn. R. Civ. P. 26.02(b). Discovery may be limited to protect a party from annoyance, embarrassment, oppression, or undue burden or expenses. Minn. R. Civ. P. 26.03(a).

17. Rule 37 of the Minnesota Rules of Civil Procedure governs motions to compel. Section (d) provides for expenses and sanctions in the event a motion to compel is granted or denied. "If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion…to pay the moving party reasonable expenses incurred in making the motion, including attorney fees." Minn. R. Civ. P. 37(d)(1).

18. Carebourn suggests it complied with the discovery requests in dispute, yet also contends that it should not have to respond to discovery regarding other transactions it entered into besides those with Darkpulse. The Court does not find this argument persuasive. Darkpulse has asserted that the transactions with Carebourn at issue are subject to potential rescission based on Carebourn's alleged activities as an unregistered broker-dealer. As the Court has addressed in previous Orders, examining this issue involves a broader consideration of a party's conduct and business dealings. *See generally SEC v. Almagarby*, 479 F. Supp. 3d 1266 (S.D. Fla. 2020) (analyzing defendant's conduct, business dealings, and securities transactions, and finding as a matter of law that defendant acted as an unregistered dealer in violation of the Act); *see also SEC*

[2] Carebourn's responsive memoranda to the motion to compel was untimely pursuant to Minn. Gen. R. Prac. 115.04. Under the Rules, the Court has the discretion to determine that untimely materials should not be considered and that the motion is unopposed. Minn. Gen. R. Prac. 115.06. Under the circumstances, the Court will consider Carebourn's submission.

v. Fierro, 2020 BL 494185, at *7 n.3 (D.N.J. Dec. 18, 2020) (listing nondispositive, but insightful factors articulated in a SEC No-Action Letter that indicate whether one is a "dealer"). The SEC Investigative Action seeks similar information, presumably for the same reason. Darkpulse's requests seek the same information sought by the SEC in connection with its investigation of Carebourn's potential violation of Section 15(a). *See U.S. Securities and Exchange Commission v. Carebourn Capital, LP et al*, Case No. 1:2020cv07162, ECF No. 6 (Decl. of Charles J. Kerstetter, Assistant Regional Director of the SEC Chicago Regional Office) at ¶ 7 (N.D. Ill. 2021) ("Investigative Action").

19. Carebourn asserts that it should not have to comply with the discovery requests because Darkpulse's arguments for rescission are undercut by *EMA Fin., LLC v. NFusz, Inc.*, 509 F. Supp. 3d 18 (S.D.N.Y. 2020) and *LG Capital Funding, LLC v. ExeLED Holdings, Inc.*, 2018 BL 441031 (S.D.N.Y. Sept.28, 2018). Setting aside that Carebourn is asking the Court to essentially decide the merits via its untimely submission in response to a motion to compel, the Court notes that authority undercuts Carebourn's assertion as to the weight of these cases. Multiple courts have held that a transaction in securities with an unregistered dealer is unlawful as made. *See, e.g., Berckeley Inv. Grp, Ltd. v. Colkitt,* 455 F.3d 195, 205 (3d Cir. 2006) (remanding to address violation in formation of contract even after dismissal of "as performed" violation); *Eastside Church of Christ v. Nat'l Plan Inc.*, 391 F.2d 357, 362 (5th Cir. 1968) (contract that was unlawful "as made" by unregistered dealer voided).

20. <u>*Requests for Production*</u>. Darkpulse asserts Carebourn has failed to produce documents responsive to many of its Requests for Production ("RFP"), including Requests 11-17 and 29. (Mem. Law. Supp. of Darkpulse's Mtn. to Compel, 7-8.)

21. RFP 11 requests "Documents sufficient to disclose Carebourn Capital, L.P.'s annual income and all sources of income." *Id.* Carebourn has provided a responsive spreadsheet prepared in response.

22. RFP 12 requests "Documents sufficient to disclose Carebourn Partners LLC's annual income and sources of all income." Carebourn has not responded, claiming it is not relevant as the request relates to a non-party. However, at this stage, the income and sources of an affiliated company—the general partner of Carebourn—may lead to the discovery of admissible evidence. If such information is held by Carebourn Parties, it is discoverable.

23. RFP 13 requests "[f]or every transaction in securities that required an Opinion Letter, provide a copy [of] such Opinion Letter, identify each attorney or law firm and their respective address and telephone number that was retained by Carebourn for the purpose of writing an opinion letter." Carebourn asserts it has provided the letters in its possession.

24. RFP 14 requests Carebourn to produce "[a]ll Documents relating to any purchase, sale, or transfer of any Issuer's Securities, including account statements and profit and loss statements, title transfer records, payment records, and data downloads." RFPP 15 requests Carebourn to produce "[f]or each sale, short sale, or purchase of any Issuer's stocks on the open market, produce documents identifying the: (i) date of each transaction; (ii) time of each transaction; and (iii) the share and dollar amount of each transaction." Carebourn claims no such documents exist, on the basis that it "does not purchase securities, but receives them as repayment

in lieu of repayment in cash for the loans it gives issuers." However, Carebourn's business model does appear to entail the potential sale of such securities it receives as repayment on loans. Such documents are responsive.

25. RFP 16 requests Carebourn to produce "[a]ll Documents concerning all domestic and foreign brokerage accounts, bank accounts, or other financial accounts in the name of Carebourn Capital, L.P., or for its benefit, or under its control, including but not limited to, opening or authorization documents and periodic or other statement." Carebourn asserts it provided the bank records held in its name at Highland Bank. The documents in fact were redacted except for showing items related to Carebourn's wire to Darkpulse. Carebourn omitted providing any brokerage accounts without justification.

26. RFP 17 requests Carebourn to produce "[a]ll Documents relating to any actual or potential Agreements between Carebourn Capital, L.P. and any Issuer, including but not limited to loan Agreements, Convertible Transactions, Issuer Transactions, financing, promissory notes, warrant Agreements, and options and option agreements, including all executed copies and drafts of such Agreement." Carebourn's response suggest it has not produced all documents relating to transactions besides the Darkpulse transactions. To the extent Carebourn is objecting that other transactions are not relevant, that is an insufficient basis at this stage to not cooperate in discovery.

27. RFP 29 requests Carebourn to produce "IRS Tax Form 1099s, Schedules D and Form 8949 and any corresponding worksheets, attachments, or statements relating to the acquisition, purchase, and sale of Darkpulse stock or stock from any Issuer." Carebourn asserts that such documents are not relevant, and then states, "please find documents in folder to SEC from Carebourn." To the extent that responsive documents have not been provided, they should be produced.

28. Darkpulse also points to RFP 27, which requested all transcripts of sworn testimony in the SEC action *United States SEC v. Carebourn Capital et al.,* Case No. 20-cv-07162, in the United States District Court for the Northern[3] District of Illinois. It is known that testimony has been provided, included that from Chip Rice on August 17, 2020. Carebourn asserts it has no such transcript.

29. *Interrogatories*. Darkpulse propounded interrogatories aimed at determining other parties that introduced Carebourn to any issuer that engaged with it in a convertible note transaction (Interrogatory 6), and the means by which Carebourn lets others know it is in the business of purchasing convertible securities (Interrogatory No. 7). In response, Carebourn has asserted that "Chip Rice on behalf of Carebourn conducted his own due diligence" and that "others" just know [it is in the business of purchasing securities] as "Carebourn does not market on social media, send advertising flyers, or does any commercial related campaigning." (Carebourn's Response to Interrogatory 6.)

30. These answers appear to be at odds with information in the SEC's Complaint in U.S. District Court which asserts that Carebourn "paid several independent contractors to assist them in locating, negotiating, and managing" convertible securities transactions with other public

[3] The request itself referenced the Southern District of Illinois. From the other information in the request, the identity of the case inquired about would be obvious to Carebourn.

issuers. (Nov. 1, 2021, Benzenberg Decl., Ex. 11, ¶ 18.) Darkpulse's assertions that these discovery responses must be false because the SEC has alleged otherwise, does not demonstrate by itself that the answers are false or information is being withheld. Darkpulse has the ability to pursue discovery of individuals that may have information, including depositions of Carebourn. If the record eventually demonstrates Carebourn's assertions in its interrogatory answers are false, it will bear the consequences, including the potential for lessened credibility with the factfinder, the prospect of negative inference for providing knowingly false discovery answers, or otherwise.

31. *Fees and Costs.* If the Court grants a motion to compel, "the court shall, after affording an opportunity to be heard, require the party…whose conduct necessitated the motion…to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees. Minn. R. Civ. P. 37.01(d). The exceptions to this requirement are if a moving party failed to make a good faith effort to obtain the discovery without court action, or the opposing party's position was substantially justified, or "other circumstances make an award of expenses unjust." *Id.*

32. The record reflects that Darkpulse attempted to resolve the discovery disputes with Carebourn prior to bringing the motion. Carebourn's positions with respect to certain discovery requests were not substantially justified. It simply refused to provide certain categories of documents. Under the circumstances, an award of attorney's fees and costs is appropriate.

ORDER

1. Carebourn Parties' Motion for Declaratory Judgment, Dismissal of All Claims Against Carebourn Capital, L.P. and Chip Rice, and Summary Judgment Against Darkpulse, Inc. is DENIED.

2. Darkpulse's motion to compel is GRANTED IN PART and DENIED IN PART.

   a. Within 14 days from the date of this Order, Carebourn shall produce all nonprivileged responsive documents responsive to Requests for Production 12, 13, 14, 16, and 17.

   b. Except as granted herein, Darkpulse's motion to compel is DENIED.

   c. Darkpulse shall submit a Rule 119 affidavit setting forth its costs and fees incurred in connection with the successful portions of its motion to compel within 14 days of this Order. Carebourn may respond to that submission to the extent it objects to any claimed portion of the costs and fees requested as unreasonable within 21 days of this Order.

BY THE COURT:

Robben, Patrick
Jud District Court Judge
Feb 15 2022 11:09 AM

Dated: February 15, 2022

Patrick D. Robben
Judge of District Court