DATE FILED: December 1, 2020 4:57 PM
FILING ID: 3E78C9179A213
CASE NUMBER: 2019CV33770

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
TUNG CHAN, Securities Commissioner for the State of Colorado, Plaintiff, v. MARK RAY; REVA STACHNIW; CUSTOM CONSULTING & PRODUCT SERVICES, LLC; RM FARM & LIVESTOCK, LLC; MR CATTLE PRODUCTION SERVICES, LLC; SUNSHINE ENTERPRISES; UNIVERSAL HERBS, LLC; DBC LIMITED, LLC, Defendants.	**▲COURT USE ONLY▲**
Attorneys for Court-appointed Receiver Gary Schwartz: John A. Chanin, #20749 Katherine A. Roush, #39267 FOSTER GRAHAM MILSTEIN & CALISHER, LLP 360 South Garfield Street, Suite 600 Denver, Colorado 80209 Phone: (303) 333-9810 Fax: (303) 333-9786 Email: jchanin@fostergraham.com; kroush@fostergraham.com	Case Number: 19CV33770 Division: 209

RECEIVER'S MOTION TO COMPEL JPMORGAN CHASE BANK, N.A. TO RESPOND TO SUBPOENA *DUCES TECUM*

Gary Schwartz ("Receiver"), Court-appointed Receiver for the Assets of Defendants Mark Ray ("Ray"), Custom Consulting & Product Services, LLC, RM Farm & Livestock, LLC, MR Cattle Production Services, LLC, Sunshine Enterprises, Universal Herbs, LLC, DBC Limited, LLC (collectively, the "Receivership Defendants"), moves this Court for entry of an Order compelling J.P.Morgan Chase Bank, N.A. ("Chase") to produce documents in response to a subpoena *duces tecum* served upon Chase (the "Subpoena"), and states as follows.

INTRODUCTION

On March 10, 2020, the Receiver served the Subpoena on Chase, which generally sought documents and communications relating to Chase's monitoring and supervision of bank accounts held by Ray and his entities, and relating to Chase's internal policies and procedures relating to anti-money laundering, fraud detection, account supervision, employee training and supervision, and hold periods for deposits. *See* **Exhibit 1** (Subpoena). These documents are necessary and relevant to the Receiver's duties in two respects. First, these documents are necessary to investigate and evaluate Chase's expected secured claim against the Receivership Estate for $8 million and to determine whether Ray's grant of a security interest to Chase was a fraudulent transfer. Second, the documents are necessary to investigate and evaluate whether the Estate should pursue any potential affirmative claims against Chase on behalf of the victims of the Ponzi scheme, such as for aiding and abetting the Ponzi scheme and negligently supervising the accounts and its own employee.

Chase objected to the production of documents requested under Request Nos. 2 – 9 of the Subpoena, arguing generally that the Receiver does not have authority to request these documents because he does not have standing to pursue affirmative claims. For the reasons set forth below, Chase should be directed to produce the responsive documents to Request Nos. 2 - 9 in full.

CONFERRAL

Counsel for the parties have conferred extensively regarding this motion. Chase objects to the relief requested in this motion.

FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2019, David Cheval, then-Acting Securities Commissioner for the State of Colorado (the "Commissioner"), filed his Complaint for Injunctive and Other Relief against Ray and the Ray Entities.[1] The Plaintiff is now Securities Commissioner Tung Chan.

On September 30, 2019, this Court entered an order (the "Order") appointing Mr. Schwartz as Receiver of "assets of any kind or nature whatsoever related in any manner to Ray's direct or indirect solicitation of or sale of securities of [Receivership Defendants]." Order at pgs. 1-2. The Order directs and charges the Receiver to "take immediate control and possession of the Estate, and to hold the Estate for this Court *in custodia legis*." Order at ¶ 3. The Receiver's duty is to "operate, manage, maintain, protect, and preserve the Estate, subject to the supervision and exclusive control of this Court, for the benefit of the creditors and owners of the Estate." *Id.*[2]

In order to carry out his duties, the Order grants the Receiver the broad powers and authority "usually held by receivers and reasonably necessary to accomplish the purpose of [the] Receivership." *Id.* at 3. This includes the power and authority to "investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties" and to "institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary." *Id*. at 5(m) and 5(v). Furthermore, to carry out those functions, the Receiver may "issue such subpoenas or subpoenas *duces tecum*…as necessary and appropriate under Rules 26 and 28 through 34, C.R.C.P."

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[1] On that same date, the U.S. Securities and Exchange Commission filed a parallel action in U.S. District Court for the District of Colorado. *SEC v. Ray et al*, Case No. 19-cv-02789-DDD-NYW. The federal case is stayed pending the completion of the Receivership.

[2] The District Court entered a second Order on November 4, 2019 that brought additional assets into the Estate.

As detailed in the Complaint, this case involves a cattle-trading Ponzi scheme perpetrated by Ray and the entities he controlled. Since at least 2014, Ray raised tens of millions of dollars from investors. Ray promised these investors high rates of return, usually over short periods of times. The Ponzi scheme also involved the offer and sale of unregistered securities in the form of investment contracts and promissory notes that Ray advertised to investors, some of whom were unsophisticated, primarily through word of mouth. Ray and his co-conspirators executed the Ponzi scheme by moving huge amounts of money quickly through his many bank accounts, from one entity to another, and from one investor to another. On February 20, 2020, Ray pled guilty to a one-count federal Information charging conspiracy to commit wire fraud and bank fraud in connection with the Ponzi scheme alleged in this action. U.S. District Court for the C.D. of Illinois, Case No. 20-cr-40007.

During the height of the Ponzi scheme, on August 2, 2018, Ray opened seven Chase bank accounts – three checking accounts for Custom Consulting, two checking accounts for MR Cattle, a personal checking account, and a personal savings account (the "Ray Accounts"). Previously, Ray had multiple bank accounts for himself and his entities at Key Bank and BBVA Compass, but those accounts had been closed by those banks due to suspicious activity. Between August 2, 2018 and October 31, 2018, a staggering amount of money flowed through the Ray Accounts -- more $172 million[3] in investor funds were deposited, and more than $167 million were transferred out. On many days, more than $10 million would flow through the Ray Accounts, either to/from investors or to/from Ray's entities. None of this banking activity,

[3] As discussed below, $10.6 million of those deposits were later dishonored and returned to Chase unpaid.

including the volume, frequency, and timing of these transfers, was consistent with a legitimate cattle trading, cattle feeding, or ranching business. By the time Chase finally stopped all activity in the Ray Accounts at the end of October, it had allowed an $8,018,821.77 overdraft to develop.

On December 26, 2018, in an effort to recoup its $8 million overdraft, Chase entered into a "Forbearance and Settlement Agreement" between Mark Ray, Chase and Joe Porter (an investor in the Ponzi Scheme who co-owned cattle with Ray) ("Forbearance Agreement"). *See* **Exhibit 2** (Forbearance Agreement without exhibits). Pursuant to the Forbearance Agreement, Chase agreed to delay filing suit against Ray to give him time to repay the overdraft. In exchange, Ray granted Chase a security interest in essentially all his assets and his entities' assets, including his accounts, property, chattel paper, intellectual property, cattle, etc. *See* **Exhibit 3** (UCC Financing statement). Ray promptly defaulted, and based on this Agreement, Chase now claims a secured interest in the Estate for approximately $8 million.

During the course of the Receiver's investigation into the assets and liabilities of the Estate, the Receiver has developed evidence (through witness interviews, document review, and forensic analysis of the Ray Accounts) indicating that Chase, in its administration and supervision of the Ray Accounts, may have aided and abetted the operation and execution of the Ponzi scheme and may have violated multiple rules, regulations, and internal procedures relating to detecting suspicious activity, anti-money laundering, know-your-customer, Regulation CC (relating to hold periods for deposit items), conflict of interest, account opening procedures, account monitoring procedures, employee training and supervision, and others. Chase routinely provided Ray with preferential treatment and allowed him to write checks and send wires from

the Ray Accounts without sufficient cleared funds in those accounts, thereby facilitating the Ponzi scheme.

For example, Chase and its employees habitually released holds on his accounts early and in some cases, even funded transfers of money from Ray's accounts (necessary because the money to be transferred had not yet come from the sending bank). The purpose of such holds - which render the newly-deposited funds inaccessible until the hold is lifted – is to permit the bank to validate the deposit and collect the funds from the transferring bank. Once the bank has collected the funds, it will release the hold. By shortening these hold periods Chase permitted Ray to transfer money that was not there and execute the Ponzi scheme.

Perhaps more importantly, the Receiver has learned that the personal banker who opened and then serviced the Ray Accounts ("Chase Personal Banker") was in a substantial conflict of interest position during Ray's entire relationship with Chase. In January 2018, the Chase Personal Banker invested $41,000 with Ray, purportedly to purchase an interest in show cattle at the National Western Stock Show. Ray promised a high rate of return in approximately two weeks. Ray defaulted on that payment, and over the next several months, he became increasingly difficult to contact about repayment. Then, on August 2, 2018, Ray showed up at the Chase Personal Banker's branch and opened seven bank accounts. For the next three months, Ray's debt remained outstanding and the Chase Personal Banker had a clear incentive to ensure that Ray was given preferential treatment and that his purported businesses prospered. Apparently, Chase did not have adequate supervision and/or policies and procedures in place to prevent this type of conflict of interest.

Making the conflict even more apparent during these three months, Ray made multiple cash payments to the Chase Personal Banker, ostensibly as partial repayments and loans but more accurately called bribes. On numerous occasions, Ray would leave brown paper bags filled with $500 in cash at his marijuana dispensary, Universal Herbs, for the Chase Personal Banker to pick up.

To corroborate these cash payments, the Receiver hired an investigator who spoke at length to the Universal Herbs employee ("UH Employee") who facilitated the payments to the Chase Personal Banker at the behest of Ray. The UH Employee was a signatory on at least some of the Chase accounts and frequently made deposits and transfers out of those accounts at the direction of Ray. The UH Employee explained that, at Ray's direction, he would frequently leave brown paper bags filled with $500 in cash for the Chase Personal Banker to pick up. The UH Employee also provided his text messages with Ray, in which Ray directs the UH Employee to give "500 to [Chase Personal Banker]," frequently asked the UH Employee to make deposits with the Chase Personal Banker specifically, and often asked if there were any "holds" on deposits and transfers.

The Chase Personal Banker further explained that Chase gave the Ray Accounts "preferential treatment" in part by shortening hold periods on deposits and, in some cases, even "fronting" a transfer out when Ray did not have sufficient funds in his account. The Chase Personal Banker explained that his superiors at Chase knew of and encouraged him to extend this preferential customer service, in part, because Chase classified Ray as a "Platinum" customer due to the large dollar volumes in his accounts and the amount of additional services and products that Chase could sell to him. However, by the end of October 2018, a Chase vice-

president had reviewed the activity in the Ray Accounts and the purported underlying businesses, and he began asking questions about the preferential treatment.

The forensic accounting analysis likewise reveals multiple red flags and areas of concern that Chase knew or should have known contemporaneously. The amounts, frequency, and timing of the deposits and transfers were not consistent with legitimate cattle trading, cattle feeding, or ranching business. That alone should have raised alarm bells. In August, more than $70 million in investor funds flowed through the Ray Accounts and more than $24 million in funds were transferred between the Ray Accounts. In September, more than $85 million in investor funds flowed through and more than $36 million were transferred between accounts. By October, the amounts were more than $170 million and more than $35 million.

The balances in the Ray Accounts fluctuated wildly. For example, in one three-day period in August, one account had ending balances of $1.1 million, $25,177, and then $2.7 million. One account had a negative ending daily balance on three occasions. Additionally, Ray made multiple cash deposits in amounts like $9,900, just below the $10,000 threshold to file a Currency Transaction Report.

Predictably, this massive check-kiting activity in aid of the Ponzi scheme came crashing down. On October 23, 24, and 25, Ray deposited $10.4 million in checks from a Henderson State Bank account held by Nate Kolterman. Ray had previously co-opted this account for use in his scheme. On October 29, 30, and 31, all those deposits were dishonored by Henderson State Bank, ultimately resulting in an $8 million overdraft at Chase. It turns out Henderson State Bank had closed Kolterman's account on October 26 because of suspicious activity.

Based on this and other evidence, the Receiver has reason to believe that Chase knew or should have known of Ray's fraudulent activity when, two months later, it took a security interest in all his and his entities' assets, thereby providing a basis to avoid that security interest as a fraudulent transfer. Further, the Receiver has reason to believe that Chase may have aided, abetted, and facilitated the Ponzi scheme by failing to follow rules, regulations, and internal policies and procedures relating to detecting suspicious activity, anti-money laundering, know-your-customer, Regulation CC, hold periods, conflict of interest, account opening procedures, account supervision, employee training and supervision, and others. The Receiver also has reason to believe that Chase may have negligently supervised the Ray Accounts and the Chase Personal Banker, and that Chase missed or ignored various "red flags" and indicia of fraudulent or suspicious activity in the Ray Accounts. All this evidence may provide a basis to disallow Chase's impending claim against the Estate and to assert potential affirmative claims against Chase on behalf of the victims of the Ponzi scheme, both directly and under the doctrine of *respondeat superior.*

Accordingly, the Receiver served Chase with the Subpoena on March 10, 2020[4]. In relevant part, the Subpoena sought the following documents:

> 2. All documents and communications relating to any internal monitoring and investigations of or concerning Mark D. Ray, Custom Consulting & Product Services, LLC; RM Farm and Livestock, LLC; MR Cattle Production Services, LLC; Sunshine Enterprises; Universal Herbs, LLC; DBC Limited, LLC, Reva Stachniw, and Ronald Throgmartin (collectively, the "Mark Ray Parties"), and any account(s) held by the Mark Ray Parties, including without limitation all anti-money laundering or fraud alerts, red flags or reports.

[4] The Receiver has sent multiple subpoenas to Chase seeking bank records related the Defendant entities and other investors, and Chase has provided response documents to those requests.

3. All policies and procedures relating to check processing, the availability of funds following deposit, exception holds, large deposit exception holds, overdrafts, and the prevention of overdrafts.

4. All policies and procedures relating to Regulation CC and compliance with Regulation CC, including without limitation training records for the employees responsible for any account held by Mark Ray/the Mark Ray Parties.

5. All policies and procedures relating to anti-money laundering and the detection of fraud, check-kiting, and suspicious activity.

6. All documents you either received or produced in the case titled J.P. Morgan Chase Bank, N.A. v. Henderson State Bank, Case No. 4:18-cv-03171-RGK-SMB, filed in the United States District Court for the District of Nebraska.

7. All communications with Henderson State Bank relating to the above captioned proceeding.

8. All documents and communications relating to the Forbearance and Settlement Agreement dated December 26, 2018 between you, Mary Ray, Custom Consulting and Product Services, LLC, MR Cattle Production Services, LLC, and Joseph S. Porter.

9. All documents and communications relating to the Purchase, Partial Assignment and Assumption Agreement dated June 21, 2019 between you and Joseph S. Porter.

See Ex. 1**.**

Chase served its objections to these requests on April 1, 2020. *See* **Exhibit 4** (Chase Objection). In addition to standard, boilerplate objections claiming the requests are overbroad, and disproportionate, Chase claimed that the requests seek irrelevant information because the requested information "has nothing to do with marshalling funds and distributing those funds to creditors," (according to Chase, the extent of the Receiver's authority) but instead, are solely for the purpose of exploring affirmative claims against Chase. Chase argues that "the Receiver has no standing to bring such claims and therefore no authority or basis to seek the information it is requesting from Chase" in the Requests. Ex. 4.

Chase and the Receiver have met and conferred on these requests multiple times and have been unable to reach a resolution. Therefore, the Receiver is proceeding with its motion to compel

LEGAL STANDARD

Rule 26(b) of the Colorado Rules of Civil Procedure defines the scope of discovery as including "any matter, not privileged, that is relevant to the claim or defense of any party, and proportional to the needs of the case." Colo. R. Civ. P. 26(b)(1). The information sought through discovery need not be admissible at the trial, so long as it is "relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence." *Silva v. Basin W., Inc.*, 47 P.3d 1184, 1188 (Colo. 2002). To obtain such information in discovery, a party may issue a subpoena to a non-party witness to compel that witness to produce documents or appear and testify at a deposition. *See* Colo. R. Civ. P. 45(a)(1)(A)(III).

It is well established that courts must employ a liberal discovery standard in keeping the spirit and purpose of the discovery rules. *See id.* at 1188; *see also Bond v. Dist. Court, In & For Denver Cty.*, 682 P.2d 33, 40 (Colo. 1984). If an objection to production is made, at any time on notice to the subpoenaed person and other parties, "the party issuing the subpoena may move the issuing court for an order compelling production." Colo. R. Civ. P. 45(c)(2)(C). And, Rule 45(f) permits "[t]he issuing court to hold in contempt a person [or entity] who, having been served, fails without adequate excuse to obey the subpoena." Colo. R. Civ. P. 45(f).

ARGUMENT

I. It is Within this Receiver's Authority and Power to Issue a Subpoena to Chase.

As an initial matter, it should be undisputed that the Receiver has the authority to issue subpoenas, including the Subpoena to Chase. The Order explicitly grants the Receiver broad power

to issue subpoenas. See Order at ¶ 5(w) (granting the Receiver the power to "issue such subpoenas . . . as necessary and appropriate."). The Order also explicitly grants the Receiver certain investigatory and prosecutorial powers. *See Id. at* ¶ 5(m) (granting the Receiver power to "investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties"); and ¶ 5(v) (granting the Receiver power to "institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary").

The measure of a receiver's power is derived from the scope of the court's order of appointment. *Francis v. Camel Point Ranch, Inc.*, 2019 WL 3227058, at *2 (Sept. 19, 2019). And under an appointing order, the receiver "generally has the exclusive right to bring or defend suits for or against the corporation." *Id.*

The Receiver's authority here is also derived from the Colorado Commissioner of Securities and the broad remedial provisions of the Colorado Securities Act ("CSA"). In any action brought under Section 602 of the Act, the Securities Commissioner may include a claim for damages, restitution, disgorgement, or "other equitable relief on behalf of some or all of the persons injured by the act or practice constituting the subject matter of the action." In this capacity, the Receiver's role goes beyond merely managing the entities in receivership; he is also tasked with investigating, marshalling, protecting, recovering, and distributing the Estate assets to Ray's victims and creditors, including avoiding fraudulent transfers of Estate assets and prosecuting affirmative claims against third parties.

Thus, based on the specific delegations of authority in the Order and the broader delegation of authority expressed in the CSA, the Receiver has the power to issue subpoenas as necessary and

appropriate to investigate both potential claims against the assets of the Estate and potential affirmative claims the Estate may prosecute on behalf of the victims.

II. The Requested Documents are relevant to the Receiver's mandate to protect and preserve the Estate

The subpoenaed documents are relevant and necessary to investigate and evaluate any claim Chase is expected to assert against the Estate relating to the $8 million overdraft and relating to the purported grant of a security interest in assets that are now part of the Estate. Specifically, the documents relate to whether the grant of the security interest may be avoided as a fraudulent transfer and whether the underlying claim should be disallowed as a matter of law and equity due to Chase's apparent participation in the underlying Ponzi scheme.

A. The requested documents are relevant to whether Chase's secured claim against the Estate may be avoided as a fraudulent transfer

As to whether the grant of the security interest may be avoided as a fraudulent transfer, it is well settled that receivers have standing to assert fraudulent transfer claims under Uniform Fraudulent Transfer Act in Ponzi scheme cases. *E.g.*, *Wing v. Dockstader*, 482 F. App'x 361, 363, *2-3 (10th Cir. 2012) ; *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008) *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995); *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009) (citing cases).

In Colorado, a fraudulent transfer occurs "if the debtor made a transfer with an actual intent to hinder, delay, or defraud any creditor, or, in the alternative, without receiving a reasonably equivalent value in exchange for the transfer or obligation." *See* C.R.S. § 38–8–105(1)(a), (1)(b). Additionally, every transfer in furtherance of a Ponzi scheme is presumptively

fraudulent. *Klein v. Cornelius*, 786 F.3d 1310, 1320 (10th Cir. 2015) ("And because Ponzi schemes are insolvent by definition, we presume that transfers from such entities involve actual intent to defraud" in UFTA cases). Filing a UCC-1 statement is a transfer under the Colorado Uniform Fraudulent Transfer Act ("CUFTA"). *See* C.R.S. § 38-8-102(13); *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485, 491 (Colo. App. 2001) (filing the UCC-1 statement was a transfer under CUFTA).

Here, Chase claims it has a secured, $8 million claim against the Estate due to the Forbearance Agreement it entered into with Ray in December 2018. Chase perfected its security interest in Ray's assets shortly after Chase learned that Ray was unable to repay the overdraft. At the time, Chase was certainly aware that Ray had other creditors considering his inability to repay his $8 million overdraft. Further, at that time, Chase was or should have been well aware of the suspicious activity in the Ray Accounts, and even engaged in litigation with Henderson State Bank. The requested documents are necessary, in part, to evaluate what Chase knew and when it knew it. At the very least, these issues merit an investigation to determine whether the UCC-1 filing is a fraudulent transfer that can be avoided, thereby preserving millions of dollars for the benefit of the victims. Thus, the documents requested by the Subpoena are relevant to the Receiver's duty to protect the Estate from Chase's potentially fraudulent secured claim against the Estate.

B. The requested documents are relevant to whether Chase's underlying claim should be disallowed as a matter of law and equity due to Chase's own negligence and/or misconduct.

In this case, as discussed above, the Receiver was appointed at the behest of Colorado's Securities Commissioner pursuant to the broad remedial and equitable provisions of the Colorado Securities Act ("CSA"). In any action brought under Section 602 of the Act, the Securities

Commissioner may include a claim for damages, restitution, disgorgement, or "other equitable relief on behalf of some or all of the persons injured by the act or practice constituting the subject matter of the action." In light of that, per the Order, the Receiver has express, equitable duties to marshal, recover, protect, and ultimately distributed the assets of the Estate to Ray's victims. *See* Order at ¶¶ 5(h)(Receiver is given power to "operate, manage, maintain, protect, and preserve the Estate"); and 5(l) (Receiver has authority to "establish, with prior Court approval, a claims administration procedure for assertion and resolution of claims affecting the Estate"). As such, the Receiver is obligated to protect the Estate from claims that arose out of the claimant's own participation in the underlying Ponzi scheme.

The Receiver's evidence that Chase ignored or shortened holds on Ray's accounts and that the Chase Personal Banker managing the Ray Accounts was conflicted suggests that that Chase's overdraft is due in whole or in part to Chase's own negligence and/or misconduct, including its failure to provide proper supervision. Chase's potential violation of various rules, regulations, and its own policies and procedures likely contributed to Ray's overdraft.

The documents the Receiver seeks via his subpoena--Chase's policies and procedures regarding employee conflicts of interest, fraud detention, Regulation CC, check processing and holds, Chase's own internal monitoring (or lack thereof) of the Mark Ray accounts, and information surrounding the forbearance agreement—go directly to whether Chase ignored its own policies and procedures *vis a vis* the Ray accounts, and whether Chase's own actions or inactions contributed to Chase's claim against the Estate. They are relevant to the Receiver's duties to protect the Estate under the Order.

III. The Documents Requested in the Subpoena are Relevant to Determining Chase's Potential Liability.

Finally, the requested information is relevant to the Receiver's investigation into Chase's own potential liability *to* the Estate. Under the Order, the Receiver's role extends beyond merely managing the entities in receivership; but also encompasses investigating and prosecuting claims of the Estate against third parties and bringing claims reasonably necessary to protect the Estate. *See Order at* ¶¶ 5(m) and 5(v) (granting the Receiver the power and authority to "investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties" and to "institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary.").

Numerous courts have found that a receiver—particularly one appointed in an equitable capacity such as the Receiver here—is not limited to bringing claims that the entities in receivership could have brought but may also bring claims against third parties who aided and abetted the Ponzi scheme. *See Moratzka v. Morris* (*In re Senior Cottages of Am., LLC*), 482 F.3d 997, 1002 (8th Cir. 2007) (trustee has standing to assert professional negligence claims); *Marion v. TDI Inc.*, 591 F.3d 137, 148-9 (3rd Cir. 2010) (receiver had standing to bring aiding and abetting claims); *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 237 (7th Cir. 2003) (receiver had standing bring claim for negligent supervision); *Bell v. Kaplan*, No. 3:14CV352, 2016 WL 815303, at *3 (W.D.N.C. Feb. 29, 2016) (receiver had standing to sue the attorney who helped create the corporate entities used to perpetrate the Ponzi scheme for malpractice).

For example, in Colorado, a claim of aiding and abetting requires that the defendant knowingly participated in the underlying breach or violation. *Sender v. Mann*, 423 F. Supp. 2d 1155, 1175 (D. Colo. 2006). The knowledge element is satisfied if the defendant is "generally

aware of his role as part of an overall illegal or tortious activity ..." and knowingly and substantially assists the principal violation. *Id*.

Based on the evidence in the Receiver's possession thus far regarding the Chase Personal Banker and Chase's white-glove treatment of Mark Ray, it is plausible to assume that Chase was generally aware of the illegal activities of their own employee and or at the least failed to properly supervise that employee. In the least, this claim merits an investigation to determine whether there was potential wrongdoing by Chase at the expense of the Estate—for which the Receiver has a duty to protect. *See* Order at 5(v). The documents requested by the Subpoena are relevant to this duty.

CONCLUSION

The information requested in document requests 2- 9 in Receiver's Subpoena served on Chase dated March 19, 2020 is within the permissible scope of authority as set forth in this Court's Order, C.R.C.P. 26, CRCP 45, the CSA, as well as relevant case law.

WHEREFORE, the Receiver respectfully requests the Court order Chase to produce all documents in response Request nos. 2-9 to the Subpoena and to award such further relief as the Court deems proper.

DATED this 1st Day of December, 2020.

FOSTER GRAHAM MILSTEIN & CALISHER, LLP

By: */s/ Katherine A. Roush*
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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the foregoing **RECEIVER'S MOTION TO COMPEL JPMORGAN CHASE BANK, N.A. TO RESPOND TO SUBPOENA DUCES TECUM** upon all parties herein and to counsel for JPMorgan Chase Bank through the Colorado Courts E-Filing System or via email this this 1st Day of December, 2020, addressed as follows:

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