

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202</p>	
<p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Court-appointed Receiver Gary Schwartz:</i> John A. Chanin, #20749 Katherine A. Roush, #39267 Jason M. Spitalnick, #51037 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; jspitalnick@fostergraham.com</p>	<p>Case Number: 19CV33770 Division: 209</p>
<p style="text-align: center;">RECEIVER’S MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA <i>DUCES TECUM</i></p>	

Gary Schwartz (“Receiver”), Court-appointed Receiver for Defendants Mark Ray (“Ray”), Reva Stachniw, Custom Consulting & Product Services, LLC, RM Farm & Livestock, LLC, Mr. Cattle Production Services, LLC, Sunshine Enterprises, Universal Herbs, LLC, and DBC Limited,

LLC moves this Court for entry of an order compelling Bellco Credit Union (“Bellco”) to produce documents in response to a subpoena *duces tecum* served upon Bellco (the “Subpoena”).¹

BACKGROUND

The Action and the Order Appointing Receiver. This action arises out of a fraudulent investment scheme (i.e., Ponzi scheme) perpetrated by Mark Ray and his associates. At the request of the Colorado Securities Commissioner, 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 Appointing Receiver at pgs. 1-2. The Order grants Mr. Schwartz the broad powers and authority “usually held by receivers and reasonably necessary to accomplish the purpose of [the] Receivership.” *Id.* at 3. More specifically, the Order grants Mr. Schwartz 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.” *Id.*

The Subpoena. Pursuant to the Order, the Receiver served Bellco with the Subpoena in March 2020. The Subpoena contains five narrowly tailored requests for documents:

1. 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

¹ **Certificate of conferral.** Undersigned counsel has conferred with counsel for Bellco. Bellco opposes the relief requested in this motion.

Mark Ray Parties, including without limitation all anti-money laundering or fraud alerts, red flags or reports.

2. 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.
3. 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.
4. All policies and procedures relating to anti-money laundering and the detection of fraud, check-kiting, and suspicious activity.
5. Any internal investigations regarding DeEtte Martitz in the last three years.

See Subpoena (a copy of which is attached hereto as Exhibit 1).

LEGAL STANDARD

The discovery rules in the Colorado Rules of Civil Procedure “should be construed liberally to effectuate the full extent of their truth-seeking purpose.” *Cameron v. Dist. Ct. In & For First Jud. Dist.*, 565 P.2d 925, 928 (Colo. 1977) (citations omitted). “[I]n close cases the balance must be struck in favor of allowing discovery.” *Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Ct. For City & Cty. of Denver*, 718 P.2d 1044, 1046 (Colo. 1986).

The broad scope of the discovery permitted by the Rules is encapsulated in Rule 26’s authorization of discovery of “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). That breadth applies equally to subpoenas propounded under Rule 45. See *Watson v. Reg’l Transp. Dist.*, 762 P.2d 133, 141 n. 12 (Colo.1988). Information sought through discovery, including by way of non-party subpoenas, 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).

ARGUMENT

I. The Subpoena Complies with Rule 45 and was Properly Served.

The Subpoena complies with the procedural requirements of Rule 45. *See* Colo. R. Civ. P. 45(a)(1)(A). The Subpoena states that it is issued from this Court; identifies the title and case number of this action; commands Bellco to produce designated documents; identifies the Receiver and his counsel; provides the required information for attorneys of record; and includes the text required by Rule 45(c). *See* Ex. A.

The Subpoena was also properly served pursuant to Rule 45(b).

II. The Receiver is Entitled to Broad Discovery.

Rule 26(b)(1) provides, in pertinent part:

[P]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

The scope of permissible inquiry for a non-party subpoena duces tecum under Rule 45 is the same as for party discovery under Rule 26. *See* *Watson*, 762 P.2d at 141 n. 12 (citing *Keplinger v. Va. Elec. & Power Co.*, 537 S.E.2d 632, 641–42 (W. Va. 2000) (“Rule 45 is subject to all of the discovery provisions, including, but not limited to, the scope of discovery outlined in [Rule 26], which permits discovery only of matters that are relevant to the subject matter involved in the pending action, not privileged, and are, or are likely to lead to the discovery of, admissible evidence.”)).

The central inquiry under Rule 26(b)(1) is whether the discovery sought “is relevant to the claim or defense of any party[.]” Bellco’s contention, conveyed during conferral, is that “the

Subpoena does not seek information relevant to any actual claim or defense the Receiver could maintain against Bellco.” In view of the permitted breadth of discovery and the Receiver’s mandate, that position does not withstand scrutiny.

“A receiver is an officer of the trial court exercising jurisdiction over a receivership estate.” *Midland Bank v. Galley Co.*, 971 P.2d 273, 276 (Colo. App. 1998). The order of appointment of a receiver is the measure of the receiver's power.² *Id.*; *Francis v. Camel Point Ranch, Inc.*, 2019 COA 108M, ¶ 8, (Colo. App. 2019) (“The measure of a receiver's power is derived from the scope of the court's order of appointment.”). Under an appointing order, the receiver “generally has the exclusive right to bring or defend suits for or against the corporation.” *Id.*

The Order entered by this Court recognizes and enshrines the Receiver’s broad authority to investigate and prosecute claims (including by issuing subpoenas) for the benefit of the Estate, its owners, and its creditors:

- First, the Order directs and empowers the Receiver to “operate, manage, maintain, protect, and preserve the Estate . . . for the benefit of creditors and owners of the Estate.” Order ¶ 3.

² The Receiver’s authority is further 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.

- Second, the Order authorizes the Receiver to “investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties.” Order ¶ 5(m).
- Third, the Order permits the Receiver to “institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary.” Order ¶ 5(v).
- Finally, the Order explicitly empowers the Receiver to “issue such subpoenas or subpoenas duces tecum, interrogatories, and/or requests for production of documents as necessary and appropriate[.]” Order ¶ 5(w).

Those express grants of authority mean that information sought by a subpoena issued by the Receiver is “relevant to the claim or defense of any party” in this action if it is relevant to (1) the operation, management, maintenance, protection, or preservation of the Estate or (2) the investigation or prosecution of claims or actions the Receiver deems reasonably necessary. Judged by that appropriate standard, the information sought by the Subpoena is relevant.

III. The Subpoena Requests Relevant Documents That Are Reasonably Limited In Scope and Not Otherwise Available.

The five requests for documents in the Subpoena can be categorized as follows: (1) documents pertaining to Bellco’s monitoring and/or investigation of accounts that are part of the Estate; (2) Bellco’s policies and procedures related to pertinent banking and compliance issues; and (3) documents reflecting internal investigations of Bellco employee DeEtte Martitz, who Mark Ray bribed with cash and other things of value while he was banking at Bellco. Each category is “relevant” for Rule 26 purposes because each concerns the investigation or prosecution of Estate claims or actions the Receiver deems reasonably necessary.

Take, for instance, one or more potential claims the Receiver may bring asserting that Bellco aided and abetted some aspect of Ray’s Ponzi scheme.³ Bellco’s position is that, to state such a claim, the Receiver would have to allege “both actual knowledge of the unlawful activity and substantial assistance in the scheme.” The Colorado Supreme Court has not yet decided whether proof of actual knowledge is required to establish liability for aiding and abetting common law fraud; Bellco relies in conferral on a sole federal district court case predicting what the Colorado Supreme Court might do. Other courts faced with similar questions have found that actual knowledge is not required to establish aiding and abetting liability. *See, e.g., RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015) (“To establish scienter, the plaintiff must demonstrate that the aider and abettor had actual or constructive knowledge that their conduct was legally improper.”) (quotation marks omitted) (emphasis added). But even assuming, *arguendo*, that the Receiver would have to plead actual knowledge to state a claim, the document requests in the Subpoena are precisely tailored to enable the Receiver to investigate Bellco’s knowledge and, therefore, support aiding and abetting claims against Bellco.

DeEtte Martitz is a (current or former) Bellco employee who took cash bribes from Mark Ray in return for providing favorable treatment with respect to accounts affiliated with Ray. In other words, at least one Bellco employee had actual knowledge of Ray’s Ponzi scheme and aided in

³ Numerous courts have found that a receiver or trustee may specifically bring claims against third parties who aided and abetted a 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).

furthering the scheme. Documents pertaining to that employee's knowledge are undoubtedly relevant to the Receiver's investigation of potential claims against Bellco. Similarly, documents pertaining to Bellco's monitoring of the accounts will directly address who else at Bellco was made aware (and thus had actual or imputed knowledge) that Ray was operating a Ponzi scheme. Finally, Bellco's pertinent policies and procedures can identify whether Bellco employees (including potentially employees whose knowledge can be attributed to Bellco itself) did in fact provide favorable treatment to accounts affiliated with Ray, and thus whether Bellco provided substantial assistance to Ray's scheme.

Whether a potential aiding and abetting claim (or any other claim) will ultimately be successful though is not the applicable standard under Rule 26. (If the Receiver had to prove a claim before bringing it, it would undermine and render superfluous the grants of investigatory power in the Order.) The standard, which must be interpreted and applied liberally, is relevance—in particular, whether the documents sought by the Subpoena are relevant to the Receiver's investigation of potential claims. Because the requests in the Subpoena are specifically tailored to permit the Receiver to investigate elements of claims the Receiver is entitled to bring, the answer is yes and the Court should compel Bellco to produce the subpoenaed documents.

Moreover, the requested documents are in Bellco's exclusive possession. In light of that, there are two ways the Receiver might obtain the documents—by the Subpoena or by commencing an action and obtaining the documents in discovery. The former option is obviously superior from the perspectives of judicial and litigant economy.

CONCLUSION

The information requested by the Receiver's Subpoena served on Bellco 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 Bellco to produce all documents in response to the Subpoena and to award such further relief as the Court deems proper.

DATED this 20th day of September, 2021.

FOSTER GRAHAM MILSTEIN & CALISHER, LLP

By: /s/ Katherine A. Roush
John A. Chanin, #20749
Katherine A. Roush, #39267
Jason M. Spitalnick, #51037

Attorneys for Court-appointed Receiver Gary Schwartz

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021 a true and correct copy of the foregoing **RECEIVER'S MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA DUCES TECUM** was electronically filed and served on all parties of record via the Colorado Court E-Filing System.

I further certify that on September 20, 2021 a true and correct copy on the foregoing **RECEIVER'S MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA DUCES TECUM** is being posted to the Receiver's website at www.rayreceivership.com.

/s/ Lucas Wiggins _____
Lucas Wiggins, Paralegal

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202</p>	
<p>DAVID S. CHEVAL, Acting Securities Commissioner for the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>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,</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Court-appointed Receiver Gary Schwartz:</i> 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</p>	<p>Case Number: 19CV33770</p> <p>Division: 209</p>
<p>SUBPOENA TO PRODUCE</p>	

TO: Bellco Credit Union, c/o Daniel R. Kampen, 7600 E Orchard Rd, Ste 400N, Greenwood Village, CO, 80111

You are ordered to:

A. Produce the following data and documents now in your possession, custody or control:

1. 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.

2. 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.
3. 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.
4. All policies and procedures relating to anti-money laundering and the detection of fraud, check-kiting, and suspicious activity.
5. Any internal investigations regarding DeEtte Martitz in the last three years.

Place of Production: Foster Graham Milstein & Calisher, LLP, 360 S. Garfield St., 6th Floor, Denver, CO 80209.

Date and time of production: Unless otherwise agreed to in writing by all parties and privilege holder or holders and the person subpoenaed, production must be made no sooner than 14 days from the date of service of this subpoena and no later than **April 9, 2020 at 5:00 p.m.**

Notice form:

If this subpoena is served for production of records or a tangible thing, see the attached important notice which sets out portions of Colorado Rule of Civil Procedure 45 concerning protections for subpoenaed persons and the requirements for production of records and tangible things.

Identity of parties:

The following are the names of the parties in this action and the names, addresses, phone numbers and e-mail addresses of the attorneys for the parties and of any parties who have entered appearances without an attorney:

Name:	Address:	Telephone:	Email Address:
Attorneys for Attorneys for Plaintiff David S. Cheval, Acting Securities Commissioner: Robert W. Finke, First Assistant Attorney General	Colorado Attorney General’s Office Ralph L. Carr Judicial Building 1300 Broadway, 8th Floor Denver, CO 80203	(720) 508-6000	robert.finke@coag.gov janna.fischer@coag.gov v

EXHIBIT 1

Janna K. Fischer, Assistant Attorney General			
Attorneys for Defendants Mark Ray, Custom Consulting & Product Services, LLC, MR Cattle Production Services, LLC, Universal Herbs, LLC and DBC Limited, LLC: John A. Hutchings Daniel W. Carr Adam P. Stapen	Dill Dill Carr Stonbraker and Hutchings PC 455 Sherman Street, Suite 300 Denver, Colorado 80203	(303) 777-3737	dancarr@dillanddill.com jhutchings@dillanddill.com astapen@dillanddill.com
Attorneys for Defendants Reva Stachniw; RM Farm & Livestock, LLC; and Sunshine Enterprises: Alan Stewart Thompson Donald F. Samuel Robin N. Loeb	Lohf Shaiman Jacobs Hyman and Feiger PC 950 South Cherry St., Suite 900 Denver, CO 80246 Garland, Samuel & Loeb 3151 Maple Drive, N.E. Atlanta, Georgia 30305	(303) 753-9000 (404) 262-2225	athompson@lohfshaiman.com dfs@gsllaw.com rnl@gsllaw.com
Attorneys for Ski Park Avenue, LLC, Amanda Holland Halstead	Mills Halstead & Zaloudek, LLC 600 17th Street, Suite 2800S Denver, CO 80202	(303) 226-5861	ahh@mshzlaw.com
Attorneys for Darrel J. Clark, Jr., Angela Schmitz	Angela Schmitz Robinson & Henry, P.C. 7555 East Hampden Avenue, Suite 600 Denver Colorado 80231	303-688-0944	angie@robinsonandhenry.com
Attorneys for Gary M. Schwartz in his capacity as Court-appointed Receiver: John A. Chanin Katherine A. Roush	Foster Graham Milstein & Calisher, LLP 360 South Garfield St. 6th Floor Denver, CO 80209	(303) 333-9810	jchanin@fostergraham.com ; kroush@fostergraham.com

The party and the party's attorney who are serving this subpoena: John A. Chanin and Katherine A. Roush, Foster Graham Milstein & Calisher, LLP on behalf of Gary M. Schwartz in his capacity as Court-appointed Receiver.

DATED this 19th Day of March, 2020.

FOSTER GRAHAM MILSTEIN & CALISHER, LLP

By: /s/ Katherine A. Roush
John A. Chanin, #20749
Katherine A. Roush, #39267

*Attorneys for Court-appointed Receiver Gary
Schwartz*

AFFIDAVIT OF SERVICE

I declare under oath that, I am 18 years or older and not a party to the action and that I served the attached Subpoena on _____ (Person named in this Subpoena or name of agent served) in _____ (County) _____ (State) on _____ (date) at the following location: _____

Check one:

- By handing it to a person identified to me as _____ or by leaving it with the named person who refused service.
- I attempted to serve the person named in this subpoena on _____ occasions but have not been able to locate the named person.

Check one:

- Private process server
- Sheriff, _____ County

Fee \$ _____ Mileage \$ _____

Signature of Process Server

Name (Print or type)

My Commission Expires: _____
Notary Public /Deputy Clerk Date

WAIVER OF SERVICE

I hereby waive Personal Service and accept service of this subpoena by mail/fax. _____

Signature Date

Phone Day: _____

Phone Evening: _____

**NOTICE TO SUBPOENA RECIPIENTS
(when production of records or tangible things is sought)**

Protecting a Person Subject to a Subpoena. (required by Colorado Rule of Civil Procedure 45(c))

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney’s fees, on a party or attorney who fails to comply.

(2) **Command to Produce Records or Tangible Things.**

(A) **Attendance Not Required.** A person commanded to produce records or tangible things need not attend in person at the place of production **unless also commanded to attend for a deposition, hearing, or trial.**

(B) **For Production of Privileged Records.**

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107.or from the records custodian for that person, which records pertain to services performed by or at the direction of that person (“privileged records”), such a subpoena must be accompanied by an authorization signed by the privilege holder or holders or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder in such privileged records, including an appropriate means of notice to the privilege holder or holders or whether any objection to production may be resolved by redaction.

(ii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena.

(C) **Objections.** Any party or the person subpoenaed to produce records or tangible things may submit to the party issuing the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials. The objection must be submitted before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, the party issuing the subpoena shall promptly serve a copy of the objection on all other parties. If an objection is made, the party issuing the subpoena is not entitled to inspect, copy test or sample the materials except pursuant to an order of the court from which the subpoena was issued. If an

objection is made, at any time on notice to the subpoenaed person and the other parties, the party issuing the subpoena may move the issuing court for an order compelling production.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On motion made promptly and in any event at or before the time specified in the subpoena for compliance, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to attend a deposition in any county other than where the person resides or is employed or transacts his business in person. or at such other convenient place as is fixed by an order of court;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion made promptly and in any event at or before the time specified in the subpoena for compliance, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific matters in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order attendance or production under specified conditions if the issuing party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

Duties in Responding to Subpoena. (required by Colorado Rule of Civil Procedure 45(d))

(1) Producing Records or Tangible Things.

- (A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and
- (B) If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* Unless the subpoena is subject to subsection (c)(2)(B) of this Rule relating to production of privileged records, a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) make the claim expressly; and
- (ii) describe the nature of the withheld records or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.