DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff: TUNG CHAN, Securities Commissioner for the State of Colorado, v. **Defendants:** 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,	▲ **COURT USE ONLY** ▲
Attorneys for Third-Party Respondent Bellco Credit Union Name: Steve Gutierrez, Reg. No. 23208 Brian Neil Hoffman, Reg No. 32999 Hannah E. Armentrout, Reg No. 53990 Address: HOLLAND & HART LLP 555 17th Street, Suite 3200 Denver, CO 80202-3921 Phone No.: 303.295.8000 Fax No: 303.295.8261 E-Mail: sgutierrez@hollandhart.com bnhoffman@hollandhart.com hearmentrout@hollandhart.com	Case No. 19CV33770 Div: 209 Ctrm:
RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA DUCES TECUM	

Third-party Bellco Credit Union ("Bellco") opposes Gary Schwartz's (the "Receiver") Motion to Compel Bellco to Respond to Subpoena *Duces Tecum* ("Motion") and respectfully requests that the Court deny the Motion in its entirety.

The Motion oversteps the Receiver's limited authority. The Motion and the underlying subpoena that it seeks to enforce do not seek information related to the preservation of the receivership estate, nor do they seek information related to a possible claim that the Receiver

could actually maintain against Bellco on behalf of the receivership estate. Moreover, the subpoena's requests are impermissibly burdensome, intrusive, and in one case unlawful. Because the Motion improperly seeks to enforce a subpoena that exceeds both the Receiver's specified powers in this matter and the Colorado Rules of Civil Procedure, it should be denied.

Bellco previously informed the Receiver of its overreach more than eighteen months ago when the Receiver first sent the subpoena. Because Bellco nevertheless now has to bear the cost and burdens of responding to the Motion, Bellco respectfully requests that the Court grant Bellco its costs and fees for responding to the Motion under C.R.C.P. 45(c)(1).

PROCEDURAL BACKGROUND

This action arises out of a cattle Ponzi scheme perpetrated by Defendant Mark Ray and carried out through a variety of companies that collapsed in March 2019. *See* Complaint, 2019CV33770 (Sept. 30, 2019), ¶ 11. The Colorado Securities Commissioner filed a complaint against Mr. Ray and his collaborators, obtained injunctive relief, and first secured appointment of the Receiver in September 2019 (the Receiver's appointment was later supplemented).

The Complaint alleges that Mr. Ray perpetrated a far-reaching scheme that actively deceived numerous individuals and entities. Relevant to this briefing, the Complaint alleges that Mr. Ray and his co-defendants undertook efforts to actively "evade detection by the fraud departments of the banks" with which defendants maintained accounts. *Id.* ¶ 49; *see also id.* ¶¶ 12, 16, 47, 50. Mr. Ray and two of his entities maintained accounts with Bellco for less than five months, between September 2018 and February 2019 (the "Ray Accounts").

During 2020, Bellco, multiple times, cooperatively provided assistance and information to the Receiver about transactions and funds that occurred in the Ray Accounts. On March 19,

2020, however, the Receiver served a subpoena *duces tecum* on Bellco seeking far-reaching information about Bellco's internal policies and procedures irrespective of any relevance to the Ray Accounts and without any date limitation, as well as intrusive information about a former Bellco employee even if unrelated to the Ray Accounts ("Subpoena"). Bellco timely objected to the Subpoena by letter dated April 14, 2020 (attached as Exhibit A) and further explained certain of its objections in detail by letter dated May 11, 2020 (attached as Exhibit B). The Receiver did not further pursue the matter thereafter for well over a year, until the Receiver suddenly (and without re-conferral or prior notice to Bellco) filed the Motion seeking to enforce the Subpoena.

ARGUMENT

I. THE SUBPOENA EXCEEDS THE LIMITED SCOPE OF THE RECEIVER'S AUTHORITY

The Motion agrees that the Court's orders of appointment define the scope of the Receiver's authority. *See, e.g., Midland Bank v. Galley Co.,* 971 P.2d 273, 276 (Colo. App. 1998) (reversing grant of summary judgment for receiver); *NationsBank of Ga. v. Conifer Asset Mgmt. Ltd.,* 928 P.2d 760, 764 (Colo. App. 1996) (reversing judgment exceeding receivership scope). The Receiver's authority is thus limited to that enumerated in the Court's September 30, 2019 and November 4, 2019 orders ("Orders").

The Orders generally provide the Receiver with the authority to "operate, manage, maintain, protect, and preserve the Estate, subject to the supervision and exclusive control of this Court, for the benefit of creditors and owners of the estate," and to issue certain subpoenas to do so. Orders, ¶¶ 3, 5(w). The Orders also make abundantly clear that the Receiver exercises its authority standing in the shoes of, and acting on behalf of, the Estate itself – Mr. Ray and the

businesses that he controlled. For example, and as relevant to this briefing, the Orders specify that the Receiver may:

- "investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties;" ¶ 5(m) (emphasis added);
- "institute, prosecute, and continue the prosecution of such legal actions [of the Estate] as the Receiver deems reasonably necessary, including:
    - to collect accounts and debts, enforce agreements relating to the Estate…
    - to recover possession of the Estate from persons who may now or in the future be wrongfully possessing or occupying the Estate, or any part thereof…
    - bring such actions as may be necessary, in the judgment of the Receiver, to set aside any transfer, conveyance, encumbrance or lien affecting all or any portion of the Estate, . . ." ¶ 5(v) (emphasis and brackets added).

The Receiver thus lacks the authority to assert claims that would not be available to the Estate itself, or to pursue assets over which the Estate holds no valid claim.[1] *See, e.g., Sender v. Kidder Peabody & Co*., 952 P.2d 779, 781 (Colo. App. 1997) (holding trustee stands in shoes of debtor and may assert debtor's claims, but not claims of creditors or third parties).

The scope of permissible discovery by the Receiver is likewise limited. "[P]arties do not have an unlimited right to discovery of all available information." *Gateway Logistics, Inc. v. Smay*, 302 P.3d 235, 239 (vacating portion of trial court's order granting motion to compel). Rather, a subpoena *duces tecum* may only seek information "regarding any matter, not

[1] The Motion (at 5, note 2 (first two sentences)) purports to usurp for the Receiver broader powers and authorities that are held by the Colorado Securities Commissioner. That position runs contrary to Colorado law, which provides that the Court – not the Receiver self-designating itself with powers held by the Colorado Securities Commissioner – defines the Receiver's authority. *See, e.g., Midland Bank*, 971 P.2d at 276; *NationsBank*, 928 P.2d at 764. The Motion (at 5, note 2 (last sentence)) concedes the overreach, admitting that the Receiver's duties are in fact limited to actions concerning the Estate's assets and the Estate's claims against third parties.

privileged, that is relevant to the claim or defense of any party." C.R.C.P. 26(b)(1); *see also* C.R.C.P. 45(a)(1)(C). A subpoena recipient's "nonparty status [is] a factor that weighs against disclosure because the nonparty does not have an interest in the outcome of the litigation." *Gateway Logistics*, 302 P.3d at 240. The Receiver's authority to issue third-party subpoenas is therefore limited to only those seeking discovery into claims that would be available to the Estate itself, or to the pursuit of assets over which the Estate has a valid claim.

The Subpoena oversteps these limits. It does not seek any information relating to claims that the Receiver could assert for the Estate or that concern protection of Estate assets. For example, the Subpoena does not seek information about the opening of the Ray Accounts, any transactions in those accounts, or any remaining account balances. In fact, Bellco already provided such information to the Receiver months ago. The Motion also does not argue the Subpoena seeks information relevant to any supposed improper diversion of the Estate's assets by Bellco (there was none). Nor does the Motion argue the Subpoena seeks information concerning any possible claim that the former Bellco account holders within the Estate could actually assert against Bellco about their accounts.[2]

II. THE RECEIVER COULD NOT MAINTAIN AN AIDING-AND-ABETTING CLAIM AGAINST BELLCO

The Motion argues that the Subpoena's requests relate to a solitary "potential claim[]" – that Bellco somehow aided and abetted "some aspect of" Mr. Ray's fraudulent scheme. Motion

[2] For example, the Subpoena largely seeks information about Bellco's internal policies and procedures. Yet the Motion does not argue that Bellco violated any of the particular policies or procedures with respect to the Ray Accounts. And even if it did, account holders do not have direct claims for violation of internal policies and procedures. So, the information requested by the Subpoena is irrelevant to any possible claim that the Receiver could maintain for the Estate.

at 7-8. Bellco did not. In any event, the Receiver could not maintain its potential aiding and abetting claim against Bellco for two reasons.

A. The *In Pari Delicto* Doctrine Bars the Receiver From Maintaining an Aiding-and-Abetting Claim Against Bellco

Under the *in pari delicto* doctrine, a participant in illegal, fraudulent, or inequitable conduct cannot recover from another (alleged) participant in that conduct. *See, e.g.*, *Sender*, 952 P.2d at 781-82 (holding *in pari delicto* barred trustee over defunct Ponzi scheme from asserting aiding-and-abetting and breach of fiduciary duty claims against financial institutions). Therefore, even if Bellco had somehow joined Mr. Ray and his scheme (Bellco did not), the *in pari delicto* doctrine bars the Receiver – which stands in the shoes of Mr. Ray and his scheme (the Estate) – from asserting aiding-and-abetting claims against the alleged fellow-schemer. *Id.*

The Motion's own cited authority demonstrates that the *in pari delicto* doctrine would bar the aiding-and-abetting claim proposed by the Receiver. For example, in *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 231 (7th Cir. 2003), the Seventh Circuit affirmed dismissal of a receiver's claims "seeking tort damages from [a] Bank for its actions regarding the accounts" involved in a fraud scheme, but "not seeking to recover diverted funds from the Bank," because such claims were barred by the *in pari delicto* doctrine due to the rule "that the receiver stands precisely in the shoes of the corporations for which he has been appointed." Similarly, the Eighth Circuit, in *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1005 (8th Cir. 2007), observed that *in pari delicto* bars a trustee's claim against a third-party for harm to a debtor when the debtor's agents colluded in the alleged wrongful conduct). Numerous other courts have likewise ruled that receivers/trustees appointed over defunct fraudulent schemes are barred from asserting similar aiding-and- abetting claims because of the *in pari delicto* doctrine.

See, e.g., Sender, 952 P.2d at 781-82 (collecting authority); *Myatt v. RHBT Fin. Corp.*, 635 S.E.2d 545, 548 (S.C. Ct. App. 2006) (affirming summary judgment granted for bank because *in pari delicto* barred a receiver's aiding-and-abetting and other claims against bank).

Because the Subpoena solely seeks information related to a potential claim that the Receiver is legally barred from asserting against Bellco, the Subpoena fails to comply with C.R.C.P. 45(a)(1)(C) and 26(b)(1) (only permitting discovery of relevant information) and the Motion should be denied.

B. The Complaint Belies, and the Subpoena's Requests Would Not Support, an Aiding-and-Abetting Claim, Even if that Claim Were Not Barred Outright

As noted, the Motion claims the Subpoena seeks information concerning a hypothetical claim that Bellco knowingly and substantially assisted in Mr. Ray's fraud. Yet the Complaint filed in this matter alleges that the opposite occurred – that Mr. Ray and collaborators misled banks and credit unions (including Bellco). The Complaint alleges that Mr. Ray and his collaborators undertook active efforts "to evade detection by the fraud departments of the banks" and to "hide [Mr. Ray's] activities and to give the illusion that he was engaged in actual" profitable business. Complaint ¶¶ 47, 49. The Motion therefore effectively asks the Court to ignore the operative pleading in this case and allow discovery into contrary matters.

The Motion counters that a former Bellco employee "took cash bribes from Mark Ray in return for providing favorable treatment" with respect to his accounts. Motion at 7. If true, such activities are patently beyond the scope of her former employment with Bellco – indeed, those activities reflect a wholesale abandonment of her employment obligations to Bellco – and thus could not possibly be attributed to the credit union. *See, e.g.,* Colo. Jury Inst.-Civ. 8:8 and 8:13. The Motion does not identify any particular facts indicating otherwise and nor could it. The

Receiver's pure conjecture – that maybe somebody at Bellco possibly knew something about that – does not justify burdening third-party Bellco with the Subpoena's requests.

Moreover, the Subpoena seeks information insufficient to prove an aiding-and-abetting fraud claim. In Colorado, this claim requires, among other things, proof of actual knowledge of the unlawful activity and substantial assistance. *See Stat–Tech Liquidating Trust v. Fenster*, 981 F. Supp. 1325, 1339–40 (D. Colo. 1997) (concluding that "reckless or negligent conduct does not provide a legal basis for a claim of aiding and abetting under [Colorado securities law] or common law"). The Motion, relying on a lone Delaware decision, argues that mere constructive knowledge of the fraud should suffice. The *Stat-Tech* decision, however, is the only Colorado case located by the Receiver or Bellco to rule on the requisite state of mind, and it concluded that Colorado law requires actual knowledge. The matters sought by the Subpoena – primarily, Bellco's internal policies and procedures – would not provide proof of any actual knowledge of Mr. Ray's fraud (or of a former employee's acceptance of bribes).[3] Nor would mere non-compliance with a policy, if that even happened, alone be sufficient to prove substantial assistance to the fraud.

In short, even if the Receiver's "potential claim[]" of aiding-and-abetting were not legally barred, any such claim would be flatly contradicted by the Complaint's allegations and the Subpoena's requests do not actually seek information necessary to support the requisite elements of any such claim anyway. The Motion should thus be denied for these additional reasons. That

[3] Only the Subpoena's first request comes even close to seeking information that theoretically might concern Bellco's actual knowledge. Yet the Motion does not provide any factual basis for seeking such information – pure hypothetical speculation is not sufficient basis to issue a third-party subpoena and any such allegation would directly contradict the Complaint.

the Subpoena was issued and objected to over a year ago, but the Motion was only just filed, further demonstrates the Subpoena's irrelevance to this receivership matter.

III. THE SUBPOENA ALSO IS OVERBROAD AND UNDULY BURDENSOME

Even taken at face value, the Subpoena's requests are so overbroad and unduly burdensome that they are impermissibly intrusive to a third-party. *See, e.g.,* C.R.C.P. 45(c) (requiring subpoena issuer to take reasonable steps to avoid imposing undue burden). For example:

- Subpoena requests #2, 3, and 4 seek "all policies and procedures relating to" thirteen different broad subject matter areas,[4] but without any limitation or relevance to the Ray Accounts. As noted, the Receiver cannot claim, on behalf of the account holders, an alleged violation of the policies and procedures, and the Motion does not argue that this occurred in any event. These requests also lack any date limitation.

- Subpoena request #3 is also ambiguous in that it seeks training records "for the employees responsible for any account held by Mark Ray/the Mark Ray Parties," but it is not clear which employees this means. All Bellco employees are in some way "responsible" for Bellco accounts.

- Subpoena request #5 seeks information about "any internal investigation regarding DeEtte Martitz in the last three years," which could impermissibly apply to matters having no relation to the Ray Accounts. Plus, the requests could overbroadly apply to investigations in which Ms. Martitz only tangentially participated (*e.g.,* as a witness). Nor is this request limited to non-privileged investigations.[5]

- Subpoena request #1 seeks "all" documents and communications "relating to" Bellco's internal monitoring or investigations of the Ray Accounts. This request

[4] The thirteen subject matter areas are check processing, the availability of funds following deposit, exception holds, large deposit exception holds, overdrafts, the prevention of overdrafts, Regulation CC, compliance with Regulation CC, training records, anti-money laundering, the detection of fraud, the detection of check-kiting, and the detection of suspicious activity.

[5] Bellco asserts and does not waive the protections of the attorney-client privilege and work product doctrine. If ordered to respond to the Subpoena, Bellco will make any privilege objections in more detail in a privilege log.

could cover an overwhelming amount of information that may largely encompass entirely irrelevant matters (*e.g.,* overall lists of accounts, general policies, etc.).

- Subpoena request #1 also illegally demands production of any suspicious activity reports ("SARs") that may have been submitted as part of Bellco's anti-money laundering and anti-fraud monitoring. Yet multiple statutes and Financial Crimes Enforcement Network (FinCEN) regulations require financial institutions to maintain the strict confidentiality of any SARs, even of the existence of any SARs, and impose civil and criminal liability for violations of that obligation. *See, e.g.,* 31 U.S.C. §§ 5318(g)(2), 5321, and 5322; *see also* Dep't of Treasury, FinCEN Advisory, SAR Confidentiality Reminder for Internal and External Counsel of Financial Institutions, (FIN-2012-A002, March 2, 2012).

Moreover, the Subpoena (and Motion) also ignore Bellco's legitimate interest in ensuring confidentiality for its internal account monitoring policies and practices, as well as information about individual personnel. "When determining whether, and the extent to which, information sought to be discovered should be protected from disclosure, relevancy is not the end of the inquiry." *Williams v. Dist. Court*, 866 P.2d 908, 912 (Colo. 1993). Courts weigh a party's interest in maintaining the confidentiality of records to determine whether disclosure is appropriate. *See id.* Bellco's internal policies and procedures and account monitoring details are not typically subject to scrutiny by account holders or other private third parties, much less former account holders who actively sought to subvert those policies as alleged in the Complaint here (or persons standing in those former account holders' shoes). Nor does Bellco typically publicize information about internal personnel matters to former account holders. Plus, as stated, federal law expressly prohibits disclosure of several of the matters sought by the Subpoena. The Motion and Subpoena would undercut third-party Bellco's legitimate interests in both complying with federal law and protecting the confidentiality of these matters, which could create legal liabilities and impact the overall effectiveness of Bellco's monitoring efforts going forward.

The Subpoena's overbreadth and lack of specificity further highlight that it and the

Motion are speculative and baseless, as detailed above. Bellco, a third-party to these proceedings, should not be forced to engage in such far-reaching and intrusive discovery.

IV. BELLCO SHOULD BE AWARDED ITS FEES AND COSTS

"[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." C.R.C.P. 45(c). The Receiver sent the Subpoena to Bellco early last year – in March 2020 – and Bellco promptly objected and explained the Receiver's overreach. Nevertheless, after delaying for over a year, the Receiver ignored that prior notice and filed the Motion seeking to enforce the Subpoena in its entity. The Motion does not provide any new law or facts to justify the Subpoena. Yet, as Bellco explains in this response and explained over a year before to the Receiver, the Subpoena (and Motion) suffer from numerous flaws. Bellco should be awarded its fees and costs under C.R.C.P. 45(c)(1).

CONCLUSION

For any of the reasons described above, Bellco respectfully requests that the Court deny the Receiver's Motion and award Bellco its fees and costs under C.R.C.P. 45(c)(1).

Dated October 15, 2021.

Respectfully submitted,

s/ Brian Neil Hoffman
Steve Gutierrez
Brian Neil Hoffman
Hannah E. Armentrout
HOLLAND & HART LLP
Attorneys for Third-Party Respondent Bellco Credit Union

CERTIFICATE OF SERVICE

I certify that on October 15, 2021 a true and correct copy of the foregoing document was electronically filed and served on all parties of record via the Colorado Court E-Filing System.

/s Anne Tupler

17470278_v8

EXHIBIT A

Steven M. Gutierrez
Partner
Phone (303) 295-8531
Email sgutierrez@hollandhart.com

April 14, 2020

BY EMAIL

John A. Chanin (jchanin@fostergraham.com)
Katherine A. Roush (roush@fostergraham.com)
Foster Graham Milstein & Calisher
360 South Garfield Street
Suite 600
Denver, CO 80209
Attorneys for Court Appointed Receiver, Gary Schwartz

Re: Response to Subpoena to Third Party, Bellco Credit Union, Under C.R.C.P. 45 / Case No. 19CV33770 (Denver, Colorado)

Dear John and Katherine:

We write in response to your March 19, 2020 third-party subpoena ("Subpoena") issued to Bellco in *David S. Cheval v. Mark Ray et al,* Case No. 19CV33770 (Denver, Colorado) ("Lawsuit"). As you know, Holland & Hart LLP represents Bellco Credit Union ("Bellco") in this matter.

As a preliminary matter, during our call on April 2, 2020, we agreed to extend Bellco's time to respond to the Subpoena until on or before Thursday, April 16, 2020. The below-stated objections to the document requests contained in the Subpoena (the "Requests") are thus timely under Colo. R. Civ. P. 45(c)(2)(C).

Bellco objects to the Subpoena for the reasons detailed below and reserves all rights relating to this matter, including but not limited to the right to move to quash the Subpoena and/or seek a protective order. Pursuant to the Colorado Rules of Civil Procedure, including but not limited to Rule 45, and other governing rules and case law (the "applicable Rules"), Bellco's objections to the Subpoena and its Requests are as follows:

1. Bellco objects to the Subpoena and each of its Requests as exceeding the powers and authorities granted to the Receiver in this action in the Order dated Nov. 4, 2019. The Subpoena seeks information concerning Bellco's internal processes concerning which the Estate

would have no potential claim or cause of action. The Receiver Estate concerns the remains of "a cattle Ponzi scheme perpetrated by Mark Ray and various entities that he controls" which scheme the Stipulating Defendants perpetrated using various bank accounts. Complaint for Injunctive and Declaratory Relief (filed 9/30/19), ¶ 11. The Complaint does not allege that Bellco in any way knowingly participated in, or aided or abetted, the Stipulating Defendants' scheme. Yet information about Bellco's internal controls, policies, and procedures are not typically available to accountholders and the Receiver is no different.

2. Bellco objects to the Subpoena to the extent that it calls for the production of documents which constitute proprietary information, trade secrets and/or other confidential, research, development or commercial information of Bellco. Such documents have been developed at great expense to and effort by Bellco and their disclosure would be competitively harmful to Bellco. No confidentiality stipulation provides adequate protection for their production. Further, such documents are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence. Therefore, proprietary documents will not be produced.

3. Bellco objects to the Subpoena to the extent that it seeks to impose obligations on Bellco beyond what is required under the applicable Rules.

4. Bellco objects to the Subpoena to the extent that it calls for the production of any documents that are not in the actual possession, custody, or control of Bellco.

5. Bellco objects to the Subpoena to the extent that it is overly broad, unduly burdensome, and oppressive.

6. Bellco objects to the Subpoena to the extent that it calls for information that is not relevant to the Lawsuit or that is not reasonably calculated to lead to the discovery of admissible evidence.

7. Bellco objects to the Subpoena to the extent that it seeks information available from the parties to the Lawsuit, such that Bellco, a non-party to this Lawsuit, should not be put through the time and expense of producing documents where the parties could obtain the information from each other or from their own files.

8. Bellco objects to the Subpoena to the extent that it is overbroad and/or unduly burdensome, including, without limitation, to the extent that it seeks "all" documents concerning the subject matters referenced therein.

9. Bellco objects to the Subpoena to the extent that it purports to impose an obligation to preserve and/or produce any documents or information that is newly created or received after the receipt of the Subpoena, because efforts to preserve and/or produce such

documents or information would interfere unduly with the performance of ongoing professional services and also would impose an undue burden and require an unreasonable expense, which Bellco, as a non-party to the Lawsuit, is not required to undertake.

10. Bellco objects to the Subpoena to the extent it purports to impose upon Bellco an obligation to preserve any documents or electronically stored information ("ESI"). Due to the deficiencies in the Subpoena noted herein, Bellco is currently unable, without undue burden and expense, to determine what documents or information should, pursuant to the terms of the Subpoena, be preserved or maintained outside of Bellco's record retention policies (which include the preservation of working papers and certain tax materials for certain periods of time), if any. Moreover, even if Bellco were able to ascertain which categories of documents or information to preserve for the Subpoena, because of the defects in the Subpoena, efforts to preserve such documents or information would require an undue burden and unreasonable expense, which Bellco, as a non-party to the Lawsuit, is not required to undertake pursuant to the applicable Rules.

11. Bellco objects to the Subpoena to the extent that it seeks the production of electronically stored documents in their native form. Production of documents, including ESI, in native form prevents Bellco from adequately labeling and controlling its production. If and when Bellco produces documents, including ESI, pursuant to the Subpoena, Bellco will produce such documents, including ESI, in a reasonably useable form within the meaning of the applicable Rules, specifically, producing in hard-copy format or in single-page TIFF format, with load files demarcating document boundaries.

12. Bellco objects to the Subpoena to the extent that it purports to impose an obligation to produce voicemails, text messages, or instant messages on the ground that efforts to preserve and/or produce such documents would require an undue burden and unreasonable expense that Bellco, a non-party to the Lawsuit, is not required to undertake.

13. Bellco objects to the Subpoena to the extent that it purports to require the production of documents which are protected by the attorney-client privilege, the work product doctrine, the accountant-client privilege, or any other applicable privilege, rule, or duty of confidentiality which precludes or limits production or disclosure of information therein. Inadvertent disclosure of information subject to any privilege does not waive the privilege as to other information or documents regarding the same subject or content.

14. Bellco objects to the Subpoena to the extent that it purports to require Bellco to produce documents related to individuals, entities, and/or clients that are not at issue in the Lawsuit and/or are not parties to the Lawsuit, documents related to work unrelated to the subject matter of the Lawsuit, or documents relating to other actions.

15. Bellco objects to the Subpoena to the extent that it seeks documents that are outside of a reasonable time period.

16. Bellco objects to the Subpoena on the grounds that the time in which Bellco is demanded to produce documents is insufficient and impractical.

17. Bellco objects to producing the materials sought by the Subpoena in the absence of its client's prior written commitment to pay for all reasonable costs of production, including the cost of processing electronic documents.

In making the above objections, Bellco is not suggesting or implying in any way that it possesses information responsive to the Subpoena. Bellco expressly reserves the right to amend, expand, or delete any part of the objections stated herein. Citations or references to particular definitions, instructions, rules of construction, or requests do not constitute a waiver of any and all objections that Bellco has, or may interpose in the future, to any definitions, instructions, rules of construction, and/or requests not cited herein.

Please be advised that Bellco objects to the entirety of the Subpoena for the reasons herein and reserves all rights relating to this matter, including but not limited to the right to move to quash the Subpoena and/or seek a protective order.

Sincerely yours,

Steven Gutierrez
of Holland & Hart LLP

14483647_v4

EXHIBIT B

HOLLAND&HART LLP

Steven M. Gutierrez
Partner
Phone (303) 295-8531
Email sgutierrez@hollandhart.com

May 11, 2020

BY EMAIL

John A. Chanin (jchanin@fostergraham.com)
Katherine A. Roush (roush@fostergraham.com)
Foster Graham Milstein & Calisher
360 South Garfield Street, Suite 600
Denver, CO 80209
Attorneys for Court Appointed Receiver, Gary Schwartz

Re: Response and Objections to Subpoena to Third Party, Bellco Credit Union, Under C.R.C.P. 45 / Case No. 19CV33770 (Denver, Colorado)

Dear John and Katherine:

I write regarding the Receiver's March 19, 2020 third-party subpoena (the "Subpoena") issued in *David S. Cheval v. Mark Ray et al.*, Case No. 19CV33770 (Denver, Colorado) (the "Lawsuit") to Bellco Credit Union ("Bellco"); Bellco's April 14, 2020 objections to the Subpoena; your April 29, 2020 response to Bellco's objections; and our May 7, 2020 telephone conversation regarding these matters.

Bellco continues to object to the Subpoena's requests as beyond the Receiver's authority. As an initial matter, the April 29 letter overstates the scope of the Receiver's authority. The April letter claims that the Receiver's authority "is derived from the Colorado Commissioner of Securities and the broad remedial provisions of the Colorado Securities Act." In truth, the Receiver's authority is defined by the Court's September 30, 2019 order appointing the Receiver (the "Order"); and the Receiver may exercise only those powers provided by that Order. *See, e.g., NationsBank of Ga. v. Conifer Asset Mgmt. Ltd.*, 928 P.2d 760, 764 (Colo. App. 1996). ("[t]he court's order of appointment is the measure of a receiver's power").

Under the Order, the Receiver may "investigate and prosecute, as appropriate, claims and causes of action *of the Estate* against third parties," (Order at ¶ 5(m) (emphasis added)) and may issue subpoenas and discovery requests in accordance with the Colorado Rules of Civil Procedure to that end (Order at ¶ 5(w)). The Receiver thus effectively stands in the shoes of Mr. Ray and the alter-ego shell companies that he controlled when pursuing claims—not the Colorado Commissioner of Securities, and not the victims of Mr. Ray's scheme. *See, e.g.,*

Sender v. Kidder Peabody & Co., 952 P.2d 779, 782 (Colo. App. 1997) (holding trustee stands in shoes of debtor and may assert debtor's claims, but not claims of creditors or third parties).

Yet the Subpoena seeks information that is not relevant to a potential claim or defense that the Estate could successfully maintain against Bellco. The Subpoena does not seek information about the opening of Mr. Ray's (and his shell companies') accounts in September 2018, copies of documents from transactions in those accounts, or disposition of the remaining account balances once Bellco froze them in February 2019. The Receiver does not suggest that Bellco somehow failed to comply with the account membership agreement between Mr. Ray, his shell companies, and Bellco. Nor does the Receiver suggest that Bellco improperly misappropriated any of the funds in the Estate's accounts. Such matters (if they actually had happened) might theoretically support a claim that an accountholder, and thus the Estate, could assert against Bellco, but the Subpoena does not pursue any such path.

Rather, the Subpoena seeks information about Bellco's internal policies, procedures, and monitoring of Mr. Ray's (and his shell companies') accounts at Bellco. This information, according to the Receiver's April 29 letter, is sought because the Receiver is empowered to bring claims against those who aided and abetted Mr. Ray's Ponzi scheme. Assuming the Receiver can make such a claim against Bellco (which Bellco contests), such requested information can only relate to evidence of recklessness or negligence, which is not enough to support evidence of aiding and abetting. *See, e.g., Stat–Tech Liquidating Trust v. Fenster*, 981 F. Supp. 1325, 1339–40 (D. Colo. 1997); *see also* COLO. REV. STAT. §11-501-604(5)(c). To succeed on an aiding and abetting claim, it is not enough to demonstrate reckless or negligent conduct, since aiding and abetting requires proof of both actual knowledge of the unlawful activity and substantial assistance in the scheme.

There is no indication that Bellco had actual knowledge and all signs indicate that Bellco could not have acted with actual knowledge. The Complaint initiating this matter conceded that Mr. Ray actively worked to "hide his activities and to give the illusion that he was engaged in actual" profitable business, and thus he "was able to evade detection by the fraud departments of the banks." Compl. ¶¶ 47, 49. The Colorado Securities Commissioner thus already concluded that the banks and credit unions that Mr. Ray used (including Bellco) were affirmatively kept in the dark and misled by Mr. Ray and his scheme.

The Receiver's April 29 Letter provides further evidence exonerating Bellco from possible aiding and abetting liability. The Receiver claims to have evidence indicating that a Bellco (former) employee "regularly took bribes from Mark Ray – in the form of 'brown paper bags filled with cash' – in exchange for providing favorable treatment to Mark Ray and his accounts." If true, this former employee's wrongdoing for her own personal gain cannot be attributed to Bellco. *See, e.g.*, Colo. Jury Inst.-Civ. 8:8 and 8:13. Acceptance of a personal bribe clearly falls outside of the scope of employment with Bellco and shows that the former employee lacked any intent to benefit Bellco. *See id.* The Receiver rightly notes that this evidence raises serious questions that this individual may have herself aided and abetted the scheme on her own.

The matters sought by the Subpoena – Bellco's internal policies, procedures, and account monitoring – are thus of no import. If the Colorado Securities Commissioner and the Receiver are right – both Mr. Ray (and his shell companies) and a former Bellco employee concealed their activities from Bellco. Bellco thus could not possibly have aided and abetted their actions, no matter what Bellco's internal policies, procedures, and monitoring provided. Bellco should not be forced to comply with the Subpoena to produce immaterial information.

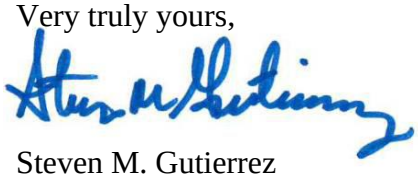
Moreover, even if the Estate could maintain a claim against Bellco in connection with Mr. Ray's scheme, that claim would be barred by the *in pari delicto* doctrine. This doctrine provides that a participant in illegal, fraudulent, or inequitable conduct cannot recover from another (alleged) participant in that conduct. *See, e.g.*, *Sender*, 952 P.2d at 782 (affirming summary judgment for defendants when *in pari delicto* barred claims). If Bellco somehow had joined Mr. Ray and his scheme (Bellco did not), the Receiver – standing in the place of Mr. Ray and his schemers – is barred from asserting claims against the supposed fellow-schemers.

Authority cited in the Receiver's April letter demonstrates application of the *in pari delicto* doctrine. For instance, the Seventh Circuit in *Knauer v. Jonathon Roberts Fin. Grp., Inc*., 348 F.3d 230, 231 (7th Cir. 2003) affirmed dismissal of claims asserted against third-parties "that derived no benefit from the embezzlements, but that were allegedly party to blame for their occurrence," because such claims were barred by the *in pari delicto* doctrine. *See also Marion v. TDI Inc*., 591 F.3d 137, 148 n.17 (3d Cir. 2010) (noting that suit on behalf of debtor corporation against third parties might be vulnerable to the defense of *in pari delicto*, when remanding for entry of judgment in defendants' favor on other groups); *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1005 (8th Cir. 2007) (observing *in pari delicto* can bar a claim by a trustee against a third party for harm to a debtor when the debtor's agents colluded in the alleged wrongful conduct).

Put simply, the Subpoena does not seek information relevant to any actual claim or defense the Receiver could maintain against Bellco; it appears to be a fishing expedition only intended to harass Bellco. Bellco should not be forced to endure the undue expense, effort, and distraction of responding to the Subpoena, particularly because it seeks the confidential information of a non-party. Bellco respectfully requests that the Receiver withdraw the Subpoena.[1]

[1] In making its objections, Bellco is not suggesting or implying in any way that it possesses information responsive to the Subpoena. Bellco expressly reserves the right to amend, expand, or delete any part of the objections stated herein. Citations or references to particular definitions, instructions, rules of construction, or requests do not constitute a waiver of any and all objections that Bellco has, or may interpose in the future, to any definitions, instructions, rules of construction, and/or requests not cited herein.

Very truly yours,



Steven M. Gutierrez
of Holland & Hart LLP

14608013_v3