DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: October 22, 2021 1:50 PM FILING ID: 9AF0834DA0643 CASE NUMBER: 2019CV33770
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▲**
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RECEIVER'S REPLY IN SUPPORT OF MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA *DUCES TECUM*	

The Receiver, through undersigned counsel, replies in support of his Motion to Compel as follows.[1]

INTRODUCTION

Bellco purports to justify its refusal to produce documents responsive to the Subpoena by arguing that the Subpoena exceeds the scope of the Receiver's authority. However, Bellco's

[1] Capitalized terms not defined herein are used as defined in the underlying motion.

argument ignores applicable law, seeks to artificially limit the broad scope of third-party discovery, and invokes mistaken assumptions about the claims the Receiver is investigating on behalf of the Estate. The Court should grant the motion to compel in its entirety and permit the Receiver to continue to investigate possible claims on behalf of the Estate and for the benefit of victims of Mark Ray's Ponzi scheme.

ARGUMENT

I. The Receiver's Potential Claims are Not Barred by the *In Pari Delicto* Doctrine.

Bellco asserts that the *in pari delicto* doctrine bars the Receiver from maintaining an aiding-and-abetting claim against Bellco. (Resp. § II.A.) That assertion is wrong as a matter of law.

"The leading case on receivers and the *in pari delicto* defense is Judge Posner's decision in *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.1995)." *Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 141 (D. Mass. 2008). In *Scholes*, a Ponzi schemer ran his fraudulent scheme through three corporations. The court-appointed receiver brought claims on behalf of the corporations and the district court granted summary judgment in the receiver's favor. On appeal, the Seventh Circuit rejected the argument that the *in pari delicto* doctrine bars claims brought by a receiver. Judge Posner reasoned: "The appointment of the receiver removed the wrongdoer from the scene." *Scholes*, 56 F.3d at 754. He added: "[T]he defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id*. (citations omitted). In other words, because the creation of a receivership both removes the actual wrongdoer (i.e., the Ponzi schemer) from control of the receivership entities and empowers the receiver to recover funds on behalf of investors in the scheme, it is illogical and inequitable to consider the receiver (as opposed to the now-removed schemer) *in pari delicto*.

The Ninth Circuit reached a nearly identical conclusion the same year *Scholes* was decided. *See F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver").

State and federal courts across the country have adopted the reasoning underlying *Scholes* and *F.D.I.C. v. O'Melveny*. *See Interactive Brokers, LLC v. Barry for Osiris Fund Ltd. P'ship*, 457 N.J. Super. 357, 364, 199 A.3d 829, 833 (N.J. App. Div. 2018) (*in pari delicto* doctrine does not deprive receiver of standing to pursue aiding-and-abetting claim); *Ashmore for Wilson v. Dodds*, 262 F. Supp. 3d 341, 350 (D.S.C. 2017) (equity receiver over Ponzi scheme entities has standing to pursue claims against third parties); *Colonial BancGroup Inc. v. PricewaterhouseCoopers LLP*, No. 2:11-CV-746-BJR, 2017 WL 4175029, at *6 (M.D. Ala. Aug. 18, 2017) (rejecting *in pari delicto* defense because pre-receivership wrongdoing not attributable to innocent receiver); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 192 (5th Cir. 2013) (rejecting argument that *in pari delicto* doctrine prohibited receiver from suing on behalf of entities used by Ponzi schemer); *Hodgson v. Kottke Assocs., LLC*, No. CIV.A 06-5040, 2007 WL 2234525, at *7 (E.D. Pa. Aug. 1, 2007) (rejecting application of *in pari delicto* doctrine based on logic that, once the principal wrongdoer has been removed from controlling a corporation, equitable considerations dictate that a trustee or receiver may seek to recover funds on behalf of the corporation in the interests of innocent investors).

The authority cited by Bellco cannot overcome the logic of *Scholes* and the numerous decisions adopting that logic. Bellco relies primarily on *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006). (Resp. § II.A.) But *Sender* pertained not to a receiver, but to a trustee appointed by a Bankruptcy Court. *Id*. At 1159. Bellco's Response misleadingly elides the fact that the *Sender* court's pertinent holding was limited to the specific circumstance of a bankruptcy trustee "bringing claims on behalf of a debtor acting under [11 U.S.C. § 541]." The Tenth Circuit has expressly held that

section 541 limits a trustee's standing to bring causes of action. *See In re Hedged-Invs. Assocs., Inc.*, 84 F.3d 1281, 1285 (10th Cir. 1996). It follows that the principle underlying the holding in *Sender* is not applicable to receivership because it is predicated on a specific statutory limitation in the Bankruptcy Code. "[U]nlike bankruptcy trustees, receivers are not subject to the limits of section 541." *See Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 358 (3d Cir. 2001). This distinction between receivership and trusteeship also undermines Bellco's reliance on *In re Senior Cottages of Am., LLC*, 482 F.3d 997 (8th Cir. 2007).

The other two cases cited by Bellco—*Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 231 (7th Cir. 2003) and *Myatt v. RHBT Fin. Corp.*, 635 S.E.2d 545, 548 (S.C. Ct. App. 2006)—permitted application of the *in pari delicto* defense against receivers bringing tort claims rather than seeking to recover diverted Ponzi scheme funds via fraudulent transfer claims. But Bellco's reliance on those decisions is misplaced because the Receiver may well bring fraudulent transfer claims against Bellco in any potential future litigation. *See, e.g., Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N, 2015 WL 13034513, at *6 (N.D. Tex. Apr. 21, 2015) (declining to dismiss fraudulent transfer claims brought against bank to recover fees because "a mere intermediary of an account transfer may nevertheless be held liable as a transferee of the fees associated with the account transfers."). In other words, Bellco's assumption that the only claim the Receiver might bring is an aiding-and-abetting claim is incorrect.

II. The Subpoena Does Not Exceed the Scope of the Receiver's Authority.

As Bellco implicitly concedes in its Response, the scope of permissible discovery under a Rule 45 subpoena *duces tecum* to a nonparty is the same as for party discovery under Rule 26. *See Watson v. Reg'l Transp. Dist.*, 762 P.2d 133, 141 n. 12 (Colo. 1988), Resp. at 4-5. That is, the Receiver may properly subpoena information from third parties "regarding any matter, no

privileged, that is relevant to the claim or defense of any party." *See id.* Here, the Orders Appointing Receiver explicitly grant the Reviver the power to "investigate and prosecute, as appropriate, claims and causes of action of the Estate against third parties." Orders ¶ 5(m). Thus, the Subpoena, which is expressly seeking documents to "investigate" claims against a third party (Bellco), falls squarely within the Receiver's authority.

Indeed, this Court has already found that a subpoena substantively identical to the Subpoena at issue here is within the Receiver's authority. In December 2020, the Receiver moved to compel a nearly identical subpoena it had served on JPMorgan Chase Bank, making the same arguments made here. *See* Motion to Compel filed December 1, 2020. Judge Gerdes granted the motion in full, "find[ing] the Motion to Compel should be granted." *See* Order dated December 2, 2020.

III. The Subpoena Requests Relevant Documents that Would Support Claims the Receiver is Empowered to Bring.

Bellco still tries to avoid the broad scope of permissible discovery in this case by arguing that the Subpoena "does not seek any information relating to claims that the Receiver could assert for the Estate[.]" (Resp. at 5.) Bellco's entire argument rests on the assumption that the "only" claim the Receiver could assert against Bellco is a "solitary" claim that "Bellco somehow aided and abetted 'some aspect' of Mr. Ray's fraudulent scheme." *Id.* This is incorrect, and even if it *were* correct, the Receiver is not barred from asserting such a claim.

First, the Receiver is in no way limiting potential claims it may bring against Bellco to one "aiding and abetting" fraud claim. Receivers routinely bring claims against financial institutions involved in Ponzi schemes and assert a variety of claims. For example, in *Fine v. Sovereign Bank*, the plaintiff, the receiver for an entity used for a Ponzi scheme by its sole owner, sued the bank through which the scheme was run on multiple different theories. No. 06CV11450-NG, 2008 WL 11388693, at *4 (D. Mass. Nov. 26, 2008) (denying bank's summary judgment motion due to

contested issues of fact). In particular, the receiver sued the bank for aiding and abetting breach of fiduciary duty, negligence, and conversion on notice of breach of fiduciary duty. *Id.* Here, the Receiver is investigating possible claims, including, but not limited to, aiding and abetting fraud, fraudulent transfer, negligence, and other torts.

Second, and as argued above, the *in pari delicto* defense does not bar the Receiver's aiding and abetting claim (or other possible claims). And Bellco's assertion that the Subpoena "seeks information insufficient to prove an aiding and abetting fraud claim" (Resp. at 8) is simply wrong. For example, the Subpoena seeks all documents related to Bellco's internal monitoring of the accounts used for the Ponzi scheme, any investigations into the employee who was taking bribes from Mark Ray, and all policies and procedures relating to check processing, account holds, anti-money laundering, fraud detection, and compliance with federal regulations. These documents go directly to (1) what Bellco knew or should have known and (2) whether Bellco's actions in handling Mark Ray's accounts violated its own policies and procedures.

Regardless, it is premature to litigate the merits of possible future claims that the Receiver may bring against Bellco. The question before the Court is not whether the Receiver's possible claims against Bellco pass Rule 12 muster. The question is whether the Subpoena requests documents relevant to the investigation or prosecution of claims or actions the Receiver deems reasonably necessary. The answer is undoubtedly yes. Not only was an employee of Bellco accepting bribes from Mark Ray, but the account activity itself is suspicious. For example, in November 2018, the total funds flowing into and out of the Bellco accounts was approximately $1.4 million. Just two months later, the total funds into and out of the same accounts had jumped to around $15 million. The Receiver has subpoenaed Bellco to investigate whether these facts support

a claim against Bellco, as the Receiver does not know what Bellco knew or did not know of its employee's bribes or Mark Ray's check-kiting activity.

Finally, Bellco's overbroad and unduly burdensome arguments fall flat. Counsel for the Receiver already conveyed a willingness to work with Bellco to address such concerns, *i.e.* by agreeing to more limited date ranges. That offer still stands. To the extent Bellco claims that the Subpoena requests documents it cannot produce (e.g., suspicious activity reports (SARs)), of course the Receiver understands that Bellco will so state in any responses and objections it serves. As to Bellco's concerns over confidentiality, there has long been a Protective Order in place in this action which expressly applies to third-party productions. *See* Stipulated Protective Order, dated March 16, 2020, at ¶ 1. ("Any document, . . . or other information obtained, either in hard copy, electronically, or otherwise, through discovery . . may be designated as "Confidential" by any party, including third parties[.]"). Thus, Bellco may avail itself of the Protective Order to shield documents it deems confidential from public scrutiny. Finally, according to its website, Bellco has over $5 billion in assets and over 340,000 members. It is a sophisticated and highly regulated financial institution with an established infrastructure for responding to discovery requests. The small burden Bellco will have to bear in responding to the Subpoena is more than warranted under the circumstances.

IV. The Court should deny Bellco's request for fees

After Bellco objected to the Subpoena in its entirety, counsel for the Receiver participated in multiple conferrals regarding the Subpoena, including letter, emails and more than one phone call. Nevertheless, Bellco continued to refuse to produce any documents responsive to the Subpoena and instead requested the Receiver "withdraw" the subpoena. *See* Ex. B to Response. After waiting some time to determine whether the investigation could proceed without requiring a further

production by Bellco, per Rule 45(2)(C) the Receiver conferred once again with Bellco regarding his intent to move to compel and filed the instant motion. (Notably Bellco does not suggest that it lacked notice of this motion, because it had notice.) As argued above and in the Motion, the Subpoena is within the scope of the Receiver's authority and seeks relevant documents within the scope of discovery. The Court should grant the motion and deny Bellco's specious request for fees.

CONCLUSION

WHEREFORE the Receiver respectfully requests that the Court grant its motion to compel and grant such other relief as the Court deems just and proper.

DATED this 22nd day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2021a true and correct copy of the foregoing **RECEIVER'S REPLY IN SUPPORT OF 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 the 22nd day of October, 2021 a true and correct copy on the foregoing **RECEIVER'S REPLY IN SUPPORT OF 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