

DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	
Plaintiff(s) DAVID S CHEVAL ACTING SECURITIES COMMISS et al v. Defendant(s) MARK RAY et al.	
DATE FILED: November 9, 2021 9:54 AM CASE NUMBER: 2019CV33770	
△ COURT USE ONLY △	
Case Number: 2019CV33770 Division: 209 Courtroom:	
ORDER RE: RECEIVERS MOTION TO COMPEL BELLCO CREDIT UNION TO RESPOND TO SUBPOENA DUCES TECUM	

The motion/proposed order attached hereto: SET FOR HEARING.

The parties, along with non-party Bellco Credit Union, are directed to contact the courtroom clerk and set this matter for a discovery dispute hearing. Setting times are Tuesday, Wednesday, and Thursday from 10:00 a.m. until 12:00 p.m.

Issue Date: 11/9/2021



ALEX C MYERS
District Court Judge

<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

Attachment to Order - 2019C-033710