UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

COR CLEARING, LLC, a Delaware limited liability company,

Applicant,

v. Case No. 4:16-MC-00013-RH-CAS

INVESTORSHUB.COM, INC., a Florida corporation,

Respondent.
_____/

INVESTORSHUB.COM, INC.'S CORRECTED MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS IN RESPONSE TO SUBPOENA
(correcting scrivener's error at p. 3, ¶1 & p. 6, ¶1)

Applicant COR Clearing, LLC ("*COR*") urges this Court to trample on the established First Amendment rights of anonymous speakers based on COR's urgent entreaties that their identities are critical to COR's ability to pursue its fraud and unjust enrichment claims. However, COR's arguments lack legal and factual substantiation, contradict the pleadings on which those claims supposedly rest and are belied by COR's own counsel's record statements. Simply put, the nonparty speakers targeted by COR are not, and have never been, the subject of the underlying complaint, whether as named or fictitious defendants. Their identities are neither relevant nor material to such litigation nor will COR's ability to pursue

claims alleged in such litigation be hindered by nondisclosure (as further evidenced by the judgment recently entered against the primary defendant in that case). COR cannot satisfy the heightened standard that applies to subpoena seeking to unmask anonymous speakers, much less the "exceptional case" standard applicable when such speakers are not parties – fictitious or otherwise - to the case. Because this Court's decision will serve as a final disposition of the entirety of the matter before this Court, Respondent's opposition stands apart from the more routine non-dispositive motions that typify subpoena matters. Consequently, the weighty First Amendment concerns threatened by COR's subpoena should persuade this Court to uphold the strong protections afforded to anonymous speakers in proceedings attempting to force disclosure of their identities. Indeed, if those identities are revealed, the consequences to such speakers are immediate, permanent and irreversible. Thus, as to the nonparty speakers, this Court's decision has the potential to be not only procedurally, but *constitutionally*, dispositive.

I. Introduction

InvestorsHub.com, Inc. ("*iHub*") owns and hosts an Internet website (http://investorshub.advfn.com) (the "*Website*") that serves as a forum for hundreds of thousands of members to discuss insights, information and opinions related to a variety of investment-related topics, including publicly-traded companies, using a discussion platform that includes tens of thousands of electronic message boards

("*Boards*"). The Website and Boards are accessible to the public and operate as a true marketplace of ideas. Users can post comments on the Boards and read and respond to comments posted by others and may communicate anonymously under user or screen names.

COR seeks to compel iHub to disclose the identity, account information and other detailed personal information regarding thirty-five (35) nonparty individuals (the "*Posters*") who have chosen to communicate anonymously on one or more online message boards maintained by iHub. COR contends that the identities of these nonparty Posters are "highly relevant and material" to its claims in the underlying litigation in Nebraska, *COR Clearing, LLC v. Calissio Resources Group, Inc., et al.*, Case No. 8:15-cv-00317-LES-FGS (D. Neb.) (the "*Litigation*"). However, COR's arguments in support of its Motion to Compel are flatly contradicted by its own statements - both in the complaint (the "*Complaint*") filed on August 26, 2015 in the Litigation and in by express statements by COR's attorney in papers filed in the Litigation.

Even if this Court accepted COR's mischaracterization of the claims in the Litigation, COR's Motion to Compel equally distorts the content and significance of the handful of statements attributed to the Posters offered as "evidence" and fails to justify the forced identification of even one of the Posters, much less the wholesale intrusion into protected rights of all of Posters advocated by COR.

II. Background and Procedural History

By way of background, iHub offers a brief summary of the relevant factual and procedural background of the Litigation and the Subpoena that is the subject of COR's Motion to Compel.

A. The Litigation

The Complaint alleges claims against three (3) defendants: Calissio Resources Group, Inc. ("*Calissio*"), its former Chief Executive Officer, Adam Carter ("*Carter*"), and Signature Stock Transfer, Inc. ("*Signature*"). The Complaint alleges that after publicly announcing a program to buy back its shares, Calissio and Carter issued press releases in which they announced the declaration of a dividend on stock existing as of a certain date (the "*Eligible Stock*"), then issued a large amount of ineligible stock ("*Ineligible Stock*"). (doc. 1, Exh. C at 4-5). The Ineligible Stock then accounted for eighty (80%) of all outstanding stock. *Id*. at 62-63. As part of the publicly announced "buyback program," Calissio then re-purchased the Ineligible Stock at a lower price than the Eligible Stock would have cost. *Id*. at 5-6. By also allegedly misrepresenting the dividend-eligibility of the Ineligible Stock, Calissio "then reaped the rewards of its fraud by collecting dividends on the dividend-ineligible Shares." *Id*. at 68. COR makes similar allegations in the section entitled "Calissio's Scheme to Defraud Shareholders." *Id*. at 4-5. The Complaint seeks damages against Carter, Calissio and Signature on

theories of unjust enrichment and fraud and includes a demand for injunctive relief. *Id*. at 13. Although the caption includes a reference to "Does 1-50," the Complaint asserts no claims against any parties other than Calissio, Carter and Signature and expressly limits the term "Defendants" to those three defendants. The Complaint does not include any claims against unknown or fictitious defendants, either as "John Doe" or "unknown" or otherwise.

B. The Subpoena

On December 17, 2015, iHub was served with a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (the "*Subpoena*") demanding production of documents, including two (2) categories relating to information or communications posted or transmitted electronically by users of one or more of iHub's message boards:

> Documents sufficient to identify the identity of individuals, businesses, and/or entities tied to or otherwise associated with accounts which have made any electronic submission (of any kind) relating to Calissio [Resources Group, Inc.] (e.g., by electronically posting information on the Calissio Resources Group, Inc. board, found online at http://investorshub.advfn.com/Calissio-Resources-Group-Inc-CRGP-25199/) from January 1, 2015 to present.
>
> All documents related to or referencing the individuals identified in Request No. 1, including, but not limited to, documents referencing address, phone number, or other contact number, complaints relating to those individuals, communications with or about those individuals, documents relating email addresses, and like documents.

(doc. 1, Exh. B). In summary, COR demanded that iHub identify *each and every* person who has posted *anything* via the Website that related to defendant Calissio, including all posts to the iHub Board dedicated to the discussion of Calissio Resources Group, Inc. (the "*Calissio Board*"), from January 1, 2015 to date. (doc. 1, Exh. B).[1] iHub served a timely objection to the Subpoena and the parties engaged in a brief discussion regarding same. (doc. 1, Exh. D, E).

On February 19, 2016, COR proposed to "narrow" the scope of the Subpoena to a list of fifty-four (54) Posters (the "*February List*") (doc. 1, Exh. E). COR alluded to a handful of undated and unsourced quotes it attributed to seven (7) of the Posters as its *sole* support for its demand that iHub unmask all fifty-four (54) Posters, arguing that they evidenced that all fifty-four (54) Posters "were unjustly enriched by the fraudulent scheme (that is, they are one of the Calissio stockholders who received dividend payments to which they were not entitled, which dividend payment was deducted from COR Clearing, LLC's account); in some instances, the individuals may have even actively participants in the fraud." *Id.* No other support was offered for COR's demand that iHub disclose account

[1] The Subpoena also commanded iHub to produce all documents pertaining to communications between iHub and any other person or entity, including its attorneys, relating to the parties to the Litigation, as well as the underlying transactions. The Motion to Compel does not focus on these latter categories - understandably - as they generally duplicate subpoenas issued to brokers, clearing companies and other intermediaries who were involved in the transaction on which the Litigation is based.

information – not for the seven (7) Posters supposedly quoted and not for the remaining sixty (60) Posters. COR offered no explanation or evidence supporting its claim that the discussion on the Calissio Board of widely publicized matters regarding Calissio was somehow actionable. Then, as now, COR simply relied upon its sweeping and unsupportable conclusions that those isolated remarks are clear evidence of fraud and wrongdoing.

After the undersigned explained that COR's response did not alter iHub's position on the compelled disclosure of the account information, *see* Exhibit A (March 21, 2016 e-mail from S. Bunch to M. Hilgers), the Motion to Compel followed, together with, for the first time, the "sample posts" attached to the Motion to Compel.[2](doc. 1, Exh. F). Oddly enough, however, the names of almost half of the remaining sixty (60) Posters above disappeared from the list, despite COR's claim that they all had either admitted to being unjustly enriched or had actively promoted the fraud. Simultaneously, eight (8) new names were added. No explanation has been offered for these substantial changes, referred to only parenthetically in its Motion to Compel as "some modifications." (doc. 1 at 8).

[2] Exhibit A to the Motion to Compel identified as the February List "with some modifications," actually deleted almost half of the Posters from the February list while adding numerous new names, some of whom first posted in the days leading up the filing of the Motion, i.e., March 22, 2016 and April 13, 2016. Characterizing the information demanded by COR at any point in time as a "moving target" is an understatement. For purposes of clarity, the list of Posters included in Exhibit A will be referred to herein as the "*Current List*."

III. Applicable Standard

A. Rule 45

Federal Rule of Civil Procedure 45 governs discovery of nonparties by subpoena. The scope of the discovery that can be requested through a subpoena under Rule 45 is the same as the scope under Rule 34, which in turn is the same as under Rule 26(b). *See* Fed. R. Civ. P. 45 Advisory Comm.'s Note (1970); Fed. R. Civ. P. 34(a). Rule 26(b) allows a party to obtain discovery concerning any non-privileged matter that is relevant to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). In recognition of important First Amendment rights inherent in pseudonymous and anonymous speech and the chilling effect that subpoenas would have on lawful commentary and protest, efforts to enlist the power of the courts to discover the identities of anonymous speakers are subject to a qualified privilege. *See, e.g.*, *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901, 906 (N.D. Cal. 2010).

B. Constitutional Right to Speak Anonymously

The United States Supreme Court consistently has recognized that the First Amendment protects the right to speak anonymously. *See Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*,

362 U.S. 60 (1960). The Eleventh Circuit further has recognized the serious chilling effect that subpoenas seeking to identify anonymous speakers can have on dissenters and the corresponding First Amendment interests implicated thereby. *See, e.g., Fed. Election Comm. v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284-85 (11th Cir. 1982); *Ealy v. Littlejohn,* 569 F.2d 219, 226-30 (5th Cir. 1978).

These rights equally apply to speech on the Internet, recognized as a public forum of preeminent importance by virtue of its ability to enable any individual who wants to express his or her views the opportunity to reach other members of the public hundreds or even thousands of miles away, at virtually no cost. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997). Indeed, "[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001). District courts within the Eleventh Circuit also have recognized the right to speak anonymously on the Internet. *See Rich v. City of Jacksonville*, Case No. 3:09-cv-454-J-34MCR (M.D. Fla. Mar. 2010) (law enforcement officer's use of subpoena to unmask anonymous blogger who criticizing officer's church supported Section 1983 claim based on violation blogger's right to communicate anonymously).

Indeed, courts nationwide have recognized the threat to the First Amendment right to speak anonymously posed by the use of civil discovery to

compel the disclosure of a speaker's identity. *See, e.g., Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) ("*Cahill*"); *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001) ("*Dendrite*"). "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *2theMart.com*, 140 F. Supp. 2d at 1093. Likewise, another district court observed in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Id. at 578.

C. Threshold for Unmasking Anonymous Speakers

Recognizing the important constitutional issues implicated by compelled disclosure of identifying information regarding anonymous speakers, virtually all courts addressing this issue have reached general consensus: the party seeking

disclosure must make a substantial legal and factual showing supporting a meritorious claim against the speaker before a court will unmask an anonymous or pseudonymous Internet speaker, but even more so when trying to "out" nonparty speakers like those COR is now seeking to unmask. These courts also often impose a requirement that the party seeking disclosure provide notice to the anonymous speakers and an adequate opportunity to respond. COR fails to satisfy its burden under any standard employed.

1. Heightened Standard for Compelled Identification of Anonymous Parties

This consensus has arisen primarily from two (2) earlier decisions, *Dendrite* and *Cahill*. Under the *Dendrite* standard, a plaintiff seeking to compel the disclosure of the identity of "John Doe" defendants must (a) make reasonable efforts to give the defendant speakers notice and an opportunity to defend their anonymity; (b) specifically identify the allegedly actionable speech or conduct; (c) state a claim against each defendant speaker based on each statement; (d) produce competent evidence supporting the claims; and (e) satisfy the court that the balance of potential harm to plaintiff outweighs the damage caused to defendant speakers from the destruction of their constitutionally protected right to anonymous speech. The *Cahill* standard likewise requires competent evidentiary support before such discovery will be permitted.

Although neither the Eleventh Circuit nor the Eighth Circuit (the circuit wherein the Litigation lies) has addressed the proper standard to apply[3], federal district courts repeatedly have followed *Cahill*, *Dendrite*, or some variation or combination of either or both standards, including district courts within the Eighth Circuit. *See East Coast Test Prep LLC v. Allnurses.com, Inc.*, No. _____, 2016 WL 912192, at *4-*5 (D. Minn. Mar. 7, 2016); *Fodor v. Doe*, 30 Media L. Rep. 1862 (D. Nev. Apr. 27, 2011) (required an evidentiary showing followed by express balancing of harms caused to competing interests); *Koch Indus. v. Does 1-25*, Case No. 2:10CV1275DAK, 2011 W.L. 1775765 (D. Utah May 9, 2011); *SaleHoo Group v. Doe*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010); *In re Baxter*, Case No. 01–00026–M, 2001 W.L. 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (not choosing between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Zherka v. Bogdanos*, Case No. 10–223–CV (S.D.N.Y. Feb. 24, 2009); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205,

[3] Although several district courts in the Eleventh Circuit have addressed motions to quash subpoenas to unmask "John Doe" and "Jane Doe" defendants under Section 512(h) of the Digital Millennium Copyright Act in cases alleging illegal downloading, the undersigned has found no district court opinions in non-copyright cases, much less any cases involving attempts to unmask anonymous nonparty speakers. This case does not present the predicament presented in many copyright cases because the identification of the Posters in this Litigation will have no bearing on COR's ability to move forward with its claims in the case.

1216 (D. Nev. 2008); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress); *Best Western Int'l v. Doe*, Case No. CV–06–1537–PHX–DGC, 2006 W.L. 2091695 (D. Ariz. July 25, 2006) (five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005) (required evidentiary showing followed by express balancing magnitude of harms caused to competing interests); *McMann v. Doe*, 460 F. Supp. 2d 259, 268 (D. Mass. 2006); *Alvis Coatings v. Does 1-10*, Case No. 3L94 CV 374-H, 2004 W.L. 2904405 (W.D.N.C. Dec. 2, 2004) (ordering identification only after considering a detailed affidavit about how certain comments were false).

2. "Exceptional Case" Standard for Unmasking Nonparty Speakers

Importantly, the standards above developed in the context of subpoenas seeking to identify *parties* to the matter who are identified in the pleadings pseudonymously as "John Doe" or "Jane Doe," or even "Unknown Defendants," and against whom allegations of wrongdoing are pleaded. However, the burden on the party seeking to compel disclosure is even *greater* when trying to unmask online speakers who, like the Posters here, are *not* parties to the case. Courts confronted with this issue, including a district court in the Eighth Circuit, have

required an even *higher* showing: i.e., the party seeking disclosure must demonstrate that the subpoena was issued in good faith, the identifying information is directly and materially relevant to a core claim or defense in the case and information sufficient to establish or to disprove the claim or defense is unavailable from any other source. *See, e.g.*, *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010); *Sedersten v. Taylor*, Case No. 09-3031-CV-S-GAP, 2009 W.L. 4802567 (W.D. Mo. Dec. 9, 2009); *2TheMart.com*, 140 F. Supp. 2d at 1095; *Enterline v. Pocono Med. Ctr*., 751 F. Supp. 2d 782, 787 (M.D. Pa. 2008). "This makes sense because litigation can, in most circumstances, go forward without the disclosure of the identity of nonparty witness." *Sedersten*, 2009 W.L. 4802567, at *2. In denying such a motion to compel, the *Sedersten* court reviewed the various standards applied by other courts and determined that "a party seeking disclosure must clear a higher hurdle where the anonymous poster is a nonparty" before adopting the four-part test above. *Id.* (citing *2TheMart.com*, 140 F. Supp. 2d at 1095). Noting that the speaker's identity was cumulative and "add[ed] little" to the issue in that case, *Sedersten* further concluded that "this is not the exceptional case that warrants disclosure of an anonymous speaker's identity." *Id*.

COR acknowledges the applicability of this standard by reciting each of the elements (doc. 1 at 13-14) but fails to explain how the disclosure of identities of these nonparty Posters is directly and materially relevant to any core claim *actually*

pleaded against the parties in the Litigation. Counsel for iHub previously raised this issue in its objection but COR has chosen to ignore it in its entirety. Instead, COR simply mischaracterizes the claims and parties in the Litigation, arguing that the Litigation seeks "to recover funds that were unlawfully debited to its account and *unjustly paid to Calissio shareholders (including those who posted on InvestorHub.com)*." (doc. 1 at 12). However, this statement is grossly inaccurate because COR has never pleaded any claims against any shareholders, fictitiously or otherwise. The only parties to the Litigation are Calissio, Carter and Signature, or, as the Complaint expressly defines them, "the Defendants." (doc. 1, Exh. C at 1, 10).

In its Complaint, COR describes in great detail the alleged fraud underlying the Litigation and on which the Subpoena is based. COR identifies the alleged wrongdoers as Calissio, Carter and Stock, asserting that they engaged in a "calculated scheme to defraud" perpetrated on COR and others by issuing dividend-ineligible stock and receiving improper dividend payments on such stock (which has been referred to herein as the "Ineligible Shares"). (doc. 1, Exh. C at 1-2, 4-8, 11-12). According to COR, the fraud was allegedly perpetrated by taking advantage of a "weakness in the dividend payment system of the third-party Depositary Trust Clearing Corporation ("DTCC")." *Id*. at 1. COR alleges that it was the DTCC that assessed and paid due bills on Ineligible Shares and debited

COR's accounts for the funds, which were improperly received and retained by Calissio. (doc. 1, Exh. C at 2-3). According to COR, "DTCC paid dividends *to Calissio* on all shares in its system – including the *80% of shares that were issued after the June 30, 2015 record date that were not eligible*." (doc. 1, Exh. C at 6) (emphasis added). COR continues: "This obviously created a scenario where *Calissio was being paid dividends* on the basis of shares that were not dividend-eligible, causing a *windfall to Calissio and its affiliates*, and a loss to the sellers." *Id*. (emphasis added).

Nowhere in the pleadings does COR allege that any Calissio shareholders, much less any Posters who COR insists must be Calissio shareholders, were involved, knowingly or otherwise, in the alleged fraudulent activity, except as "victims" according to the Complaint. (doc. 1, Exh. C at 1, 12). In fact, as noted, COR previously took the opposite position when it was in it best interests to rebut any potential harm to the shareholders (thus, allegedly the Posters):

> … COR Clearing does not assert *any* claims against Calissio shareholders. To the contrary, as discussed above, COR Clearing asserts a valid claim against Calissio (and the other Defendants) because its fraudulent scheme caused DTCC to erroneously transfer funds from COR Clearing's accounts to purchasers who were not entitled to receive dividends.

Exhibit B at 6 (Omnibus Reply by COR Clearing in Support of Motion to Appoint Limited Purpose Receiver, *COR Clearing, LLC v Calissio Resource Group, Inc., et al.*, Case No. 8:15-cv-00317-LES-FGS (doc. 51) (emphasis in original) (internal

citation omitted). However, once its Motion to Appoint a "Limited Purpose" Receiver was denied, COR embarked upon an entirely new path: once designed to smear previously described "defrauded" Calissio shareholders as wrongdoers. Notwithstanding this apparent new strategy, COR has never amended its pleadings to set forth these allegations or otherwise add claims against any shareholder defendants, fictitiously or otherwise. Moreover, COR offers no proof that any shareholders, much less any nonparty Posters asserted by COR to be shareholders, actually received any Calissio dividends, whether on Eligible or Ineligible Shares, were involved in any wrongdoing, or otherwise should be deprived of their constitutional rights to speak anonymously or why iHub, also a nonparty, should be forced to turn over identifying information regarding its members.

Instead of addressing the complete absence of allegations against the Posters, COR has chosen to inaccurately characterize the proceedings below so as to suggest that the Posters *are actually defendants*. Less subtly in the Litigation, and in yet another example of the lack of good faith presented in these discovery matters, COR *expressly* mischaracterized the legal status of the Posters in response to TD Ameritrade's opposition to a subpoena for customer records just last week: "Second, the information sought is highly relevant to COR Clearing's other claims. COR Clearing has also alleged that the Defendants, *including Does 1-50, were unjustly enriched* by Calissio's scheme. Id. at ¶¶ 53-60." Exhibit C at 4 (COR

Clearing's Reply Brief in Support of Motion to Compel Production of Documents and Things in Response to Subpoena, *COR Clearing, LLC v. Calissio Resource Group, Inc., et al.*, Case No. 8:15-cv-00317-LES-TDT (Apr. 9, 2016) (doc. 111) (citation in original; emphasis added). This is a gross misstatement of the pleadings because, as explained *infra*, the only mention of any "Doe" defendants in the Complaint, whether expressly or by implication, is in the *caption* and there are no allegations of any kind against unknown defendants in the statement of the claim or elsewhere within the Complaint. Indeed, iHub initially raised this very issue in its Objection to the Subpoena in December, specifically objecting that that:

> [T]he Complaint does not include any allegations against the Posters. Although the style of the Complaint includes "Does 1-50", there are no other references to any "Does" elsewhere in the Complaint. In fact, COR Clearing expressly stated that "it does not assert *any* claims against Calissio shareholders." (doc. 51 at 6 (emphasis in original)). Nor do the pleadings refer to any Posters or InvestorsHub.com message board, much less any alleged wrongful or actionable conduct by any Posters. The Complaint is utterly bereft of any allegation that would support the breach of InvestorsHub.com's Privacy Policy and the sweeping violations of the constitutional right to anonymous speech of the more than one thousand (1,000) Posters.

(doc. 1, Exh. D at 5). COR's persistent mischaracterization of the pleadings thereafter in this and other proceedings, as recently as last week in the ongoing discovery dispute with TD Ameritrade, *supra*, is inexplicable. What is clear, however, is that the Posters are not and have never been parties to this case and no allegations have been made against them. See, e.g., *Lundgren v. McDaniel*, 814

F.2d 600, 605 n2 (11th Cir. 1987) (although required by Rule 10, the caption "is – in and of itself-of little significance"). *Accord Marsh v. Butler County*, 268 F.3d 1014, 1023-24 at n4 (11th Cir. 2001).

IV. COR Cannot Justify the Compelled Destruction of Posters' Constitutional Right to Anonymous Speech

Reviewing the pleadings together with the Motion to Compel results in the inevitable conclusion that COR has not satisfied any part of heightened threshold requirements for compelling the disclosure of anonymous speakers, be they parties or nonparties.

A. COR Has Not Demonstrated Good Faith

COR's conduct evidences the very absence of good faith, to the Posters, to iHub, and to this Court. Without making any effort to give notice to any Posters, COR initially demanded that iHub "unmask" every person who has communicated on any iHub message board in any way about the Litigation, the parties, various nonparties, etc. Although now loosely claiming to "focus" on shareholders, COR simply pursued anyone who made comment on iHub platform that could possibly refer to the Litigation, to the parties, or dividends in general, whether shareholders or not. After "narrowing" the target list in February, COR presented this Court with a "modified" list that in reality only included a small number of the aliases originally targeted, while simultaneously seeking attorney's fee on the grounds that iHub had "refused" to produce the requested items.

On one hand, COR insists that the identities of these Posters are "critical" to its case; yet its ever-changing list of target Posters suggests that its definition of "critical" bears little resemblance to the term as employed by the courts. COR's lack of good faith is also demonstrated by the express statements of its counsel in the Litigation noted above that "COR Clearing does not assert *any* claims against Calissio shareholders." *See* Exhibit B at 6 (emphasis in original). Notably, this assurance was offered in response to concerns raised by Calissio shareholders and other in the Litigation that the appointment of a limited purpose receiver selected by COR could be detrimental to the interests of the unrepresented nonparty shareholders. COR's conduct is simply inconsistent with the notion of "good faith."

B. Posters' Identities Are Neither Relevant nor Material to the Litigation

As discussed, *supra*, the Complaint does not include even the barest of allegations against any entities or individuals other than Calissio, Carter, and Signature. Other than the sole reference in the caption to "John Does 1-50," there are no allegations as to any such individuals or entities in the Complaint. Indeed, the Complaint consistently depicts the Calissio shareholders as victims of the fraud, not perpetrators or beneficiaries:

> Calissio's feigned mistake hardly serves to conceal what the facts show to be its conscious effort to *deceive its shareholders* into selling their shares of Calissio stock back to the company unaware that DTCC would charge them for the amount of a dividend on shares not

> so entitled, and then to claim substantial, yet unwarranted, dividends from unwary sellers and their clearing firms, such as COR Clearing.

(doc. 1, Exh. C at 2) (emphasis added). Likewise, COR's Complaint repeatedly alleges that *Calissio* reaped the full benefits of $4 million in improper dividends on the Ineligible Shares amounting to eighty percent (80%) of the outstanding shares. Nevertheless, COR now argues this Court that the targets of that Complaint actually are the shareholders, i.e., the "victims" who were "defrauded," and who apparently owned the other twenty per cent (20%) of the outstanding stock. COR disingenuously then asserts that the Litigation seeks to "remedy a harm caused by Defendants Calissio, Adam Carter, and Signature Stock Transfer, Inc. ("Signature"), *as well as Doe Defendants who participated in or were unjustly enriched by the fraud*," (doc. 1 at 3) (emphasis added), and that the purpose of the Litigation is "to recover funds that were unlawfully debited to its account *and unjustly paid to Calissio shareholders (including those who posted on InvestorsHub.com)*." (doc. 1 at 12) (emphasis added). However, the pleadings simply do not support this verbal sleight-of-hand.

As noted above, there are *no allegations* against any John Doe defendants, whether Calissio shareholders or otherwise, in the Complaint and the sole reference to any "John Doe" is in the case caption. However, "although captions provide helpful guidance to the court, they are not determinative as to the parties to the action or the court's jurisdiction." *Lundgren v. McDaniel*, 814 F.2d 600, 605

n.2 (11th Cir. 1987) (although required by Rule 10, the caption "is – in and of itself-of little significance"). *Accord Marsh v. Butler Cnty.*, 268 F.3d 1014, 1023-24 at n4 (11th Cir. 2001); *Williams v. Bradshaw*, 459 F.3d 846, 849 (8th Cir. 2006); *McReynolds v. Cotton States Ins.*, Case No. 2:05 CV 232 MEF, 2005 W.L. 2146034, at *3 (M.D. Ala. 2005) (individuals identified only in caption *and served* are not considered defendants "absent an amendment to the Complaint"). Moreover, as noted earlier, this very assertion was expressly disavowed by COR's counsel in response to shareholder opposition to appointing a receiver in the Litigation: "COR Clearing does not assert *any* claims against Calissio shareholders." *See* Exhibit B at 6 (emphasis in original).

The issue before this Court is whether COR has demonstrated an adequate basis for these anonymous, nonparty speakers to be stripped of such anonymity by an exercise of government power. COR repeatedly argues that each of the Posters published statements evidencing that they received dividends to which they were not entitled and some Posters "actively promoted Calissio and the fraudulent scheme." *See, e.g.*, doc. 1 at 2 ("messages indicating that they were *unjustly enriched by Calissio's fraudulent scheme*. That is, they appear to have received dividends to which they were *not entitled*, which dividends were wrongfully debited from COR Clearing"); *Id*. at 8 ("*each* had posted one or more messages that *evidenced they were unjust enriched…or actively promoted* the scheme"); *Id*.

at 11 ("individuals who *may have conspired* with Calissio and Adam Carter in perpetrating the fraud" and "those persons …, *all of which have been identified as having posted one or more messages suggesting that they were, in fact, a recipient* of the dividends …"). However, COR's endless repetition of non-existent, unsubstantiated claims in its Motion to Compel does not remedy the absence of such claims in the governing pleadings or alter statements by COR's own counsel in the Litigation flatly denying that COR was making any such claims. Nor has COR alleged in any pleading that any persons other than Calissio, Carter and Signature – much less any Poster - promoted the alleged fraud.

Even setting aside the complete absence of such claims in the pleading, COR has failed to explain how Posters "actively promoted" the fraud, whether by comments posted *months* after the alleged fraud occurred, or by statements encouraging investors to buy or hold onto Calissio stock – actions that could only *thwart* Calissio's allegedly fraudulent scheme to undervalue its outstanding stock so that it could reacquire it at *lower* prices. Nor has COR offered actual evidence or facts in support of these "claims." COR's "support" does not remotely approach the higher standard that courts have required to unmask anonymous speakers whose First Amendment rights are at issue, particularly nonparty speakers.

In fact, COR obliquely references the discrepancy in its own Motion to Compel, claiming that while the Complaint "focuses on the fraud perpetrated by

Calissio and Adam Carter, these entities disappeared once their fraud came to light. It is thus becoming increasingly clear that if COR Clearing wants to be made whole, it will need to rely upon the unjust enrichment claim in its Complaint and will need to trace where the funds wrongfully withdrawn from its accounts ultimately ended up." (doc. 1 at 12-13). However, the unjust enrichment claim, like all other claims in the Complaint, is only against Calissio, Carter and Signature. The use of Rule 45 to obtain pre-litigation discovery against the nonparty shareholders fails to meet *any* relevance requirement, much less the heavier burden here.

C. COR Has Offered No Evidence Supporting Its Claims of Unjust Enrichment or Wrongdoing by Any Posters

Even if this Court accepted the impossible premise that the Litigation includes claims against any Calissio shareholders, the factual inadequacies of COR's "showing" as to the Posters are patent. Specifically, COR specifically asserts that each of these individuals has posted statements via the Website evidencing either (a) their unjust receipt of dividends to which they were not entitled or (b) their active participation in the fraudulent scheme that forms the basis for Complaint. This claim does not bear up under closer review. To the extent that a handful of posts loosely refer to "dividends," COR has offered no evidence to support its argument that everyone who posted any comment, remark or query to

the Calissio Board mentioning a dividend thereby must be deemed (a) a shareholder of (b) Calissio (c) who received (d) improperly issued dividends (e) on Ineligible Stock (f) under consideration in the Litigation. Even under normal circumstances, such a leap would be strained; under these circumstances, COR's illogical vault crosses well into the realm of the ridiculous. The posts (many of which do not even mention dividends) demonstrate at most that some of the Posters were aware of what anyone who know who happened to read the press releases and other public announcements about the buyback program, the dividend declaration, the alleged "glitch" and the resulting regulatory activity.

COR's argument that the Posters should be unmasked because they "actively perpetrated the fraud" has even less support in fact or theory. According to the Complaint, Calissio, Carter, and Signature perpetrated a fraud of omission by remaining *silent* about the new shares, "notifying no one outside their inner circle of conspirators." doc. 1, Exh C at 5. Calissio thereby allegedly benefitted because it was able to "purchase shares in Calissio's buyback program for *substantially less* than the dividend payable on each share." (doc. 1, Exh C at 6) (emphasis added). COR now claims that it "seeks to identify individuals who may have conspired with Calissio and Adam Carter in perpetrating the fraud." (doc. 1 at 11). However, the Complaint asserts no claims for conspiracy and certainly no claims for conspiracy with unnamed or unidentified co-conspirators. Indeed, the sole

conspiracy reference in the Complaint alludes to a *closed* conspiracy: "Instead, Calissio, Carter, and Transfer Agent kept this issuance silent, notifying no one outside their inner circle of conspirators." (doc. 1, Exh C at 5).

Moreover, COR fails to identify any statements by any Posters that could have "actively promoted the scheme" to which *only* Calissio, Carter, and Signature were allegedly privy. Nor does COR explain how any Posters "actively promoted the scheme" (to purchase back stock at value significantly less than Eligible Stock) by (a) by encouraging others to buy stock or hold it, not to sell it (PinkPantherStocks, Berkshire_Agent) (doc. 1, Exh. F at 34-57), (b) or by posting a *single* comment several months *after* the alleged fraudulent scheme occurred and months after the Complaint was filed (stock_king5508, caseyryan1986) (doc 1, Exh. F at 58-59). COR fails to offer any support for its casual attempts to smear as alleged co-conspirators Posters whose sole offense apparently is to disagree with the manner in which the Litigation has been conducted.

D. COR Has Alternative Sources to Trolling Message Boards

Even if the pleadings included a claim against Calissio shareholders, any basis for seeking identifying information on Calissio shareholders, would only extend to those who received ineligible dividends. The "no alternative source" requirement has its origin in libel cases addressing the qualified privilege not to reveal anonymous sources: In such cases, courts require that the party seeking

disclosure demonstrate that "all other means of proving the issue have been exhausted." *See, e.g., Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009). In the event that COR ultimately pleads any claim against any shareholders (notwithstanding the current pleadings alleging that Calissio was the actual beneficiary of such ill-gotten gains), COR admittedly has access to much more accurate and less constitutionally invasive methods of identifying those shareholders (if any) who were supposedly unjustly enriched by the dividends on the Ineligible Stock. COR requested and received the complete list of the sixty-seven (67) member firms that completed the transactions with the DTCC and can subpoena account records directly from such firms. Indeed, COR has begun issuing and litigating such subpoenas in the Litigation (against TD Ameritrade) and in other jurisdictions against other firms such as e*Trade and National Financial Services. *See, e.g., COR Clearing, LLC v. Calissio Resource Group, Inc., et al.*, Case No. 8:15-CV-317 (doc. 94); *COR Clearing, LLC v. e*Trade Clearing, LLC*, Case No. 2:15-cv-8980-JMV-JBC (D.N.J. 2015); *COR Clearing, LLC v. National Financial Services, LLC*, Case No. 2:15-cv-08981-JLL-JAD (D.N.J. 2015).

COR instead complains that this is not convenient enough, claiming that "it is not economically feasible to serve and seek to enforce 67 different subpoenas…." (doc. 1 at 14). However, the relevant inquiry is not whether COR will be more or less inconvenienced in obtaining the information it seeks without

violating constitutional rights but whether alternative sources have been exhausted. COR acknowledges the availability and ongoing use of such sources and makes no claim of exhaustion.[4] Indeed, just last week, in response to TD Ameritrade's opposition to COR's demands for its customer files in the Litigation, COR argued that the "customer information sought by the subpoena, however, is quite narrow (and has already been produced by several other third-parties, who are similarly-situated to TDAC and recognize its relevance to the underlying dispute." Exhibit C at 9.

As noted above, however, the Complaint does not include even a single allegation that any person or entity other than Calissio, Carter and Signature was involved in any way in the alleged fraudulent scheme. Nor has COR offered anything beyond rampant speculation and wild leaps in illogic in its attempt to cobble together a theory in support of its attempt to "out" a group of nonparty Posters. Thus, any perceived inefficiency in pursuing individual subpoenas to the member firms involved in the relevant transaction must surely yield to the compelling interest in protecting the recognized constitutional rights of nonparties who have not been connected in any way to the Litigation.

[4] COR also complains that "[e]ven if one can piece together some of those who were unjustly enriched via subpoenas to broker-dealers, these subpoena responses will not aid in identifying those may have been active participants in the fraudulent scheme by their public promotion of Calissio." (doc. 1 at 14). Again, the Complaint does not make such allegations and pre-litigation discovery is not a proper use of Rule 45.

V. Fees

iHub has been required to retain the services of the undersigned counsel and to pay reasonable attorney's fees and expenses in order to defend against the Motion to Compel (in addition to the underlying Subpoena). Pursuant to Federal Rules of Civil Procedure 37(a)(5)(B) and 45(d), iHub respectfully asks this Court to award it the expenses it has incurred in this matter, including its reasonable attorney's fees and costs.

VI. Conclusion

The reality of the situation appears to be one of failed strategies: being apparently unable to retrieve dividends paid to Calissio on the Ineligible Stock (eighty percent (80%) of outstanding stock), COR now turns its focus on the shareholders associated with remaining twenty percent (20%), which, by its own pleadings, was Eligible Stock. Whether or not such a theory ultimately might prevail is irrelevant because it has not been pleaded and the shareholders have not been sued. COR simply cannot justify its attempts to so cavalierly and broadly violate the constitutional rights of the anonymous speakers included in its ever-changing list of targeted Posters. COR has offered no legitimate basis, whether or not supported by evidence or pleading, to so broadly disregard the constitutional interests opposing the compelled identification of these nonparty Posters. iHub

respectfully submits that this Court should reject COR's attempt to enlist judicial assistance in this attempt to so grossly abridge the Posters' constitutional rights.

WHEREFORE, InvestorsHub.com, Inc. respectfully requests that the Court deny COR Clearing, LLC's Motion to Compel Production of Documents and Things and to award it.

CERTIFICATE OF COMPLIANCE WITH RULE 7.1

Pursuant to Pursuant to N.D. Fla. Loc. R. 7.1(F), counsel for Respondent InvestorsHub.com, Inc. hereby certifies that the Corrected Memorandum of Law in Opposition to Applicant's Motion to Compel Production of Documents and Things in Response to Subpoena included herein contains fewer than 8,000 words.

Dated: May 9, 2016

Respectfully submitted,

By: /s/ Susan Tillotson Bunch
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Attorneys for InvestorsHub.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this **9th** day of **May, 2016,** I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Counsel of Record:

D. Ty Jackson
GRAYROBINSON, P.A.
Florida Bar No.: 41216
301 S. Bronough Street, Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
E-mail: ty.jackson@gray-robinson.com

By: /s/ Susan Tillotson Bunch
Susan Tillotson Bunch

Exhibit A

From: Susan Tillotson Bunch
Sent: Monday, March 21, 2016 1:33 PM
To: 'Michael Hilgers'
Subject: RE: COR Clearing/Investorshub

Michael:

I apologize for the delay in responding. However, while I appreciate your perspective as previously outlined, it does not change iHub's position on the compelled disclosure of account information.

Susan Tillotson Bunch
Thomas & LoCicero PL
Focused on Business Litigation, Media and IP Law
Member of The National Association of Minority and Women Owned Law Firms, Inc. (NAMWOLF®)

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601 S. Boulevard, Tampa, FL 33606
Current Promotions Intake Form

Tampa | South Florida

From: Michael Hilgers [mailto:mhilgers@hilgersgraben.com]
Sent: Monday, March 21, 2016 11:27 AM
To: Susan Tillotson Bunch
Subject: RE: COR Clearing/Investorshub

Susan,

I have called and sent several emails, none of which have received any response.

Can you discuss this matter this week? Please let me know if you can confer so I can properly include that in our motion.

Thanks,
Mike

HILGERS GRABEN PLLC
(402) 218-2103 (direct) | (402) 916-0892 (cell)

HILGERS | GRABEN

From: Michael Hilgers
Sent: Thursday, March 10, 2016 8:14 AM
To: 'Susan Tillotson Bunch' <sbunch@tlolawfirm.com>
Subject: RE: COR Clearing/Investorshub

Susan,

I am following up on the below. Do you have time to discuss?

Thank you,
Mike

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(402) 218-2103 (direct) | (402) 916-0892 (cell)

HILGERS | GRABEN

From: Michael Hilgers
Sent: Friday, February 19, 2016 1:26 PM
To: 'Susan Tillotson Bunch' <sbunch@tlolawfirm.com>
Subject: COR Clearing/Investorshub

Susan,

I appreciate your time discussing this subpoena. We have gone back and looked in some detail both to the allegations in the complaint and the posts made on investorhub's website.

First, we think our requests are narrowly tailored to the allegations in the complaint.

Attached to this email is a copy of the complaint in *COR Clearing, LLC v. Calissio Resources Group, Inc., Adam Carter, Signature Stock Transfer, Inc., and Does 1-50*, Case No. 15-317, which is presently pending in the United States District Court for the District of Nebraska. As explained therein, Calissio Resources Group, Inc. ("Calissio") and its affiliates engaged in a fraudulent scheme by exploiting a weakness in the Depositary Trust Clearing Corporation's ("DTCC") dividend payment system. More specifically, Calissio surreptitiously issued hundreds of millions of share of Calissio stock after declaring a dividend on all common shares outstanding prior to the issuance.

It and others then repurchased these newly-issued shares (which were not entitled to a dividend), relying upon the DTCC's dividend payment system to fail to distinguish between those shares entitled to dividends and those not so entitled. As a result of the DTCC's dividend payment system, Calissio and others who purchased the newly-issued shares were unjustly enriched through their receipt of dividends to which they were not entitled and millions of dollars were debited from COR Clearing, LLC's account to cover these dividend payments.

In short, as a result of the fraudulent scheme, millions of dollars were debited from COR Clearing, LLC's account to pay dividends to Calissio shareholders to whom no dividends were due. In the pending litigation, COR Clearing seeks to recover the money it lost due to this fraudulent scheme; among other claims, COR Clearing, LLC's complaint alleges a claim for unjust enrichment through which it seeks to recover the dividend amounts that were wrongfully paid to Calissio shareholders.

Through the subpoena, COR Clearing, LLC seeks identification of the following users of the Calissio Resources Group Inc. board found on InvestorHub's website at http://investorshub.advfn.com/Calissio-Resources-Group-Inc-CRGP-25188/):

janice shell
cantbelieveit
Homebrew
BONESPUR
Shazbat
CCaptain
TEXASOIL
meikodog
sidedraft
50chuck
Lufrance
A.L._is_retired
mythologist
stockypimpins
J-Bo
mtorruiso
LUGEMEISTER
supermandwc
misiu143
Imokhopeur
DiamondFire
sutter silver
johnet
drum3171
denny_usa
skyflight
matt2234
Mr Pennypacker
Jugas
porty
jep2343
halbaag

Shakey88
lubberboy
SHEEPWOLF
Joshua329
freebies
sunspotter
pennies_talk_too
MagicMarvin
Mr Clutch
casyryan1986
BEANPOLE
REIVAX
slicetrader
nwar
halbroke1
stock king5508
CASH IS K1N6
mjzrsb
gwenlady
DABLACKHAMMER
harmanepa
CJAKE1

These particular individuals were identified as each has posted one or more message that evidences they were unjustly enriched by the fraudulent scheme (that is, they are one of the Calissio stockholders who received dividend payments to which they were not entitled, which dividend payment was deducted from COR Clearing, LLC's account); in some instances, the individuals may have even actively participants in the fraud. Below are examples of some of the posts:

porty posts: "This fraud paid me a hefty dividend. I wish all stocks were frauds like this."

Homebrew posts: "Good News: Dividend released. Bad News: Not much left to discuss with the dried up shell of a scam."

BONESOUR posts: "What? Mansion? I have every intention of retiring after todays windfall. If you keep replying, I will own Uzbekistan. Go CRGP"

misiu143 posts: "Actually I had 44,000.00 doll dividend."

denny_usa posts: "Finally 67k withheld from hold! Happy moments J"

Mr. Clutch posts: Right….my $44k dividend was pretty nice. Good luck, friend….$CRGP"

caseyryan1986 posts: "Its ok everything will work out for the loyal longs, we have supplied facts and some people choose not to believe, but we know whats going on behind closed doors. In time this ticker, Adam Carter and shareholders will get the final laugh. I know whats coming and its great."

As COR Clearing seeks to recover money that was unjustly debited from its account and paid to Calissio shareholders, the identification of the unjustly enriched shareholders is central to its claims.

Further, COR Clearing also seeks information relating to those individuals who associated with Mr. Carter and Calissio's fraud, and may have been a part of the fraudulent scheme. There are those posters who through their promoting of the CRGP stock after the fraud (e.g., caseyryan1986), strongly appear to be part of defendant Calissio's scheme.

Do you have some time next week to discuss?

Thank you,

Mike

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Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

COR CLEARING, LLC, a Delaware limited liability company, Plaintiff, v. CALISSIO RESOURCES GROUP, INC., a Nevada corporation; ADAM CARTER, an individual; SIGNATURE STOCK TRANSFER, INC., a Texas corporation; and DOES 1-50. Defendants.	**Case No. 8:15-cv-00317-LES-FG3** **PLAINTIFF COR CLEARING, LLC'S OMNIBUS REPLY TO RESPONSES TO EXPEDITED MOTION FOR ORDER APPOINTING LIMITED PURPOSE RECEIVER**

In accordance with this Court's Order (Dkt. 28), several third parties have submitted responses to Plaintiff COR Clearing, LLC's Expedited Motion for Order Appointing Limited Purpose Receiver (Dkt. 20-22). Out of the 67 DTCC member firms that received notice of COR Clearing's Motion, only one—TD Ameritrade Clearing, Inc. ("TDAC")—submitted a response *in opposition to* the Motion. (Dkt. 41.) Likewise, only eight individual Calissio shareholders, out of hundreds or even thousands, submitted responses in opposition to the Motion (collectively with TDAC, the "Objectors"). (Dkt. 25-27, 32-35, 40, 48.) In addition, KCG Americas LLC ("KCG") submitted a response requesting that the Court provide the receiver (if appointed) with certain instructions, but otherwise "defer[red] to the Court on whether the standards for appointing a Receiver have been met." (Dkt. 36.) Lastly, Alpine Securities Corporation ("Alpine"), another DTCC member firm, submitted a response *in support of* COR Clearing's Motion. (Dkt. 43.)

The Objectors' primary argument against the appointment of a limited receiver is that penny-stock speculators who had no knowledge of Calissio's fraudulent scheme would be harmed because they would have to return the dividend payments that they already received. (*See* Dkt.

25-27, 32-35, 40-41.) However, regardless of whether or not these speculators were "innocent," they are not entitled to keep dividend payments that they never should have received in the first place. Indeed, it is undisputed that the dividends here were erroneously paid, and that Calissio engaged in fraudulent conduct to set it in motion. (*See, e.g.*, Dkt. 41 at 3 (TDAC admitting that, due to Calissio's fraudulent scheme, "investors were credited with dividends that . . . should not have been credited to them").) Yet, none of the responses submitted by the Objectors addresses the illegality of the dividend issuance, nor do they assert any legal basis or authority for their retention of such fraudulently-issued dividends. For this reason alone, the Court should reject the arguments made by opportunistic purchasers and firms who wish to keep dividend payments (and related brokerage fees) that were wrongfully issued and to which they have no legal right to retain.

Rather, for the reasons discussed below and in the Motion, the circumstances here warrant the appointment of a limited receiver for Calissio for the sole purpose of directing The Depository Trust & Clearing Corporation ("DTCC") to make post-payable adjustments to reverse Calissio's dividend distribution. The appointment of a receiver will restore the marketplace to the *status quo ante*—i.e., the state of affairs in place immediately before Calissio made a fraudulent and illegal dividend distribution. Indeed, the immediate appointment of a limited receiver is the *only* remedy available to correct the fraud that Calissio has perpetrated on the marketplace. Moreover, appointment of a receiver must be made on an ***expedited*** basis because DTCC will not make an adjustment if requested after 90 days following the payment date—i.e., November 13, 2015. Accordingly, this Court should grant COR Clearing's Motion and appoint a receiver.

ARGUMENT

I. THE IMMEDIATE APPOINTMENT OF A LIMITED RECEIVER IS WARRANTED IN THIS CASE

As discussed in COR Clearing's Motion, the appointment of a receiver "lies within the

sound discretion of the district court 'where necessary to protect the interest and where it is obvious . . . that those who have inflicted serious detriment in the past must be ousted.'" *U.S. Commodity Futures Trading Comm'n v. Yellowstone Partners, Inc.*, No. 5:10-CV-85-FL, 2014 WL 619478, at *3 (E.D.N.C. Feb. 18, 2014) (quoting *SEC v. Bowler*, 427 F.2d 190, 198 (4th Cir. 1970)). In determining whether to appoint a receiver, courts in the Eight Circuit consider several factors, including: (1) the validity of the claim by the party seeking appointment; (2) the probability that fraudulent conduct has occurred or will occur to frustrate the claim; (3) the imminent danger that property will be concealed, lost, or diminished in value; (4) the inadequacy of legal remedies and the lack of a less drastic equitable remedy; and (5) the likelihood that appointing the receiver will do more good than harm. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-17 (8th Cir. 1993).

Here, the Objectors do not dispute that Calissio engaged in fraudulent conduct that frustrates COR Clearing's claims in this lawsuit, or that COR Clearing's funds are in immediate danger of being lost. Each of these factors must, therefore, weigh in favor of appointing a receiver. (*See* Dkt. 21 at 17-19.) Rather, the Objectors contend that (1) COR Clearing does not have a valid claim, (2) appointing a receiver will do more harm than good, and (3) there are other available legal remedies. As discussed below, each of these arguments fails.

A. COR Clearing Has a Valid Claim

COR Clearing has an undeniably valid claim for the illegal dividend payments that Calissio caused DTCC to erroneously transfer from COR Clearing's accounts to shareholders who were not entitled to receive dividends in the first place. *See Am. Express Travel Related Servs. Co. v. Forest Lake Ford, Inc.*, No. 08-CV-00138, 2008 WL 227800, at *2-3 (D. Minn. Jan 24, 2008) (appointing receiver, in part, because plaintiffs had stated valid potential claim). Indeed, the Clerk

of this Court has already entered default against Calissio (Dkt. 19), and thus the factual allegations of the Complaint, aside from those relating to the amount of damages, must be taken as true. *See* Fed. R. Civ. P. 8(b)(6). Further, even if default had not been entered against Calissio, the evidence cited in support of the Motion demonstrates that COR Clearing has a valid claim. (*See* Dkt. 21 at 4-11, 16-17.) Thus, the validity of COR Clearing's claim in this action is not subject to reasonable dispute.

Despite this showing, the Objectors wrongly argue that COR Clearing does not have a valid claim because (1) all Calissio shareholders who held shares until the ex-dividend date were eligible to receive a dividend, and (2) certain shareholders purportedly received the dividend in good faith. (*See* Dkt. 25, 33.)

1. Shares Purchased After the Record Date Are Not Dividend Eligible

Some of the Objectors assert that COR Clearing does not have a valid claim because "all stockholders who held shares in [Calissio] until the ex-dividend date were eligible to receive the dividend." (Dkt. 25 at 2; *see also* Dkt. 48 at 2.) However, the premise underlying this argument—that "the record date is irrelevant"—is demonstrably false. (*Id.*) As explained below, a security purchased *after* the record date is not eligible to receive a dividend.

To determine whether a shareholder is eligible to receive a dividend, the Court must examine two critical dates: (1) the record date, and (2) the ex-dividend date. *See Karathansis v. THCR/LP Corp.*, No. 06-1591(RMB), 2007 WL 1234975, at *4 (D.N.J. Apr. 25, 2007) ("[u]nder the [Uniform Practice Code], the proper recipient of a distribution is determined by reference to two dates, the 'record date' and the 'ex-dividend date.'"). The *record date* is the cut-off date to determine which shareholders are entitled to receive a dividend. *Id.* (record date means the "date fixed by . . . issuer for the purpose of determining the holders of equity securities . . . entitled to receive dividends . . . or any other distribution"). The *ex-dividend date*, on the other hand, is the

date on which a security that is eligible for a dividend no longer trades with its dividend. *Id.*

Typically, the ex-dividend date is two business days before the record date. *See* FINRA Rule 11140. However, in certain situations, FINRA can set a later ex-dividend date. For example, FINRA Rule 11140(b)(2) provides that the ex-dividend date is the first business day after the payable date "[i]n respect to cash dividends . . . which are 25% or greater of the value of the subject security[.]" FINRA Rule 11140(b)(2). In either case, if a *dividend-eligible* stock is sold before the ex-dividend date, the buyer is entitled to receive the dividend. *Karathansis*, 2007 WL 1234975, at *4 ("a holder of a security after the record date but before the ex-date, which would normally be entitled to receive the right to receive the dividend, would lose that right to the buyer"). If, however, the *dividend-eligible* stock is sold on or after the ex-dividend date, the seller receives the dividend.[1] *Id.*

Accordingly, the Calissio shares obtained by COR Clearing's customers Nobilis Consulting LLC ("Nobilis") and Beaufort Capital Partners ("Beaufort")—all of which were issued *after* the June 30, 2015 record date—were necessarily not eligible to receive dividends. (*See* Dkt. 21 at 7-8.) Since these shares were not dividend-eligible, no dividend payment was owed by the sellers to the purchasers, and consequently COR Clearing's accounts should not have been debited for over $4 million in connection with the dividend distribution. COR Clearing, therefore, has an unmistakably valid claim for these funds.

2. DTCC Erroneously Transferred Funds from COR Clearing's Account to Shareholders Not Entitled to Receive the Dividend

Two of the objectors, TDAC and Oscar Whitley, contend that COR Clearing does not have a valid claim against "innocent shareholders who received the dividend in good faith." (Dkt.

[1] *See generally* SEC Office of Investor Education and Advocacy, Ex-Dividend Dates: When Are You Entitled to Dividends (October 23, 2014), http://www.sec.gov/answers/dividen.htm.

33 at 4; *see also* Dkt. 41 at 12.) This argument fails for two reasons.

First, this argument is based on a false premise because COR Clearing does not assert *any* claims against Calissio shareholders. (*See* Dkt. 1.) To the contrary, as discussed above, COR Clearing asserts a valid claim against Calissio (and the other Defendants) because its fraudulent scheme caused DTCC to erroneously transfer funds from COR Clearing's accounts to purchasers who were not entitled to receive dividends.

Second, as discussed below, *none* of Calissio's shareholders were entitled to receive a dividend because the dividend distribution was both fraudulent and illegal.

B. The Appointment of a Receiver Will Do More Good Than Harm

Appointing a receiver for the limited purpose of instructing DTCC to reverse Calissio's fraudulent and illegal dividend distribution will do far more good than harm. *See SEC v. Quan*, No. 11–723 ADM/JSM, 2012 WL 1516977, at *7 (D. Minn. Apr. 30, 2012) (approving appointment of receiver where there was a "strong likelihood" that receiver would do more good than harm by ensuring neutrality in distribution of funds). The receiver would ensure that the funds wrongfully taken from COR Clearing and the other victims of Calissio's dividend fraud are returned. Indeed, for the reasons discussed below, the *only* way to reverse the harm done to Calissio's victims is to appoint a receiver to direct DTCC to make post-payable adjustments.

The Objectors, nonetheless, contend that the appointment of a receiver will do more harm than good because "innocent" shareholders who had no knowledge of Calissio's fraudulent scheme would be required to return the dividend payments that they already received. (*See* Dkt. 25-27, 32-35, 40-41, 48.) This argument, however, should be rejected because, whether or not Calissio's shareholders had knowledge of Calissio's fraudulent scheme, they were not entitled to receive any dividend payments in the first place. Indeed, even TDAC—the sole brokerage firm that submitted

a response in opposition to the Motion—*admits* that, due to Calissio's fraudulent scheme, "***investors were credited with dividends that . . . should not have been credited to them***." (Dkt. 41 at 3.) Tellingly, none of the Objectors address the legality of the dividend, nor do they assert any legal basis or authority for their retention of fraudulently-issued dividends.

As discussed below, Calissio's dividend distribution was both fraudulent and illegal. Thus, reversing the dividend distribution will do more good than harm because it will return the funds wrongfully taken from the victims of Calissio's fraud, rather than rewarding opportunistic penny-stock speculators who wish to keep dividends that were improperly paid and to which they have no legal right to retain. As such, the Court should appoint a receiver for the limited purpose of instructing DTCC to make post-payable adjustments to reverse the dividend distribution.

1. The Dividends Were Paid as Part of Calissio's Fraudulent Scheme

As COR Clearing established in its Motion, the record strongly indicates that Calissio has engaged in a fraudulent scheme to defraud the marketplace through an illegal dividend distribution. (*See* Dkt. 21 at 6-11.) Specifically, Calissio intentionally flooded the market with shares of its stock that were not dividend-eligible, knowing full well that DTCC would nonetheless collect and pay dividends on these shares. As a result, Calissio and its shareholders as of August 19, 2015 received millions of dollars in improperly paid dividends that DTCC collected from unsuspecting selling shareholders and their brokerage firms, such as COR Clearing and Alpine. (*See id.* at 17.) Once Calissio's fraud was discovered, Calissio's President, Adam Carter, attempted to deceive COR Clearing and others by claiming that the erroneous dividend distribution resulted from a "glitch." (*See id.* at 9-10.) Mr. Carter then vanished into thin air after disclosing that he was "in a remote location . . . in Mexico." (*Id.*)

Indeed, a recent investigation conducted by COR Clearing has uncovered that Calissio is nothing more than a sham. Contrary to Calissio's misrepresentations, its purported office space

and officers and directors do not even exist (at least not in the form put forth by Calissio). (*Id.* at 10-11.) Likewise, Calissio now only operates in the unregulated gray market, which consists of a distribution channel that, while legal, is unofficial and unpoliced. (*Id.*) Tellingly, Calissio did not even make an appearance in this case, leading to an entry of default against it. (Dkt. 19.)

Therefore, it is clear that the sole purpose of Calissio's dividend distribution was to defraud the marketplace, including clearing firms like COR Clearing and Alpine that bore the brunt of the fraud when their accounts were improperly debited for millions of dollars by DTCC. Based on these facts, which are set forth in greater detail below, the appointment of a receiver for the limited purpose of instructing DTCC to make post-payable adjustments reversing Calissio's fraudulent dividend distribution is both necessary and warranted. *See, e.g., Chase Manhattan Bank, N. A. v. Turabo Shopping Center, Inc.*, 683 F.2d 25, 27 (1st Cir. 1982) (affirming appointment of receiver where defendant engaged in "unfair and arguably fraudulent" conduct).

a. Calissio's Fraudulent Scheme

On September 30, 2010, Calissio issued a large number of shares at a cost basis of $.01. On June 1, 2015, Calissio "announce[d] that its Board of Directors has authorized a share repurchase program of up to $1.5 million of the Company's outstanding common shares." (Dkt. 22-1 ¶ 3, Ex. B.) Under this "stock repurchase program, [Calissio was] authorized to repurchase, from time-to-time, shares of its outstanding common stock in the open market." (*Id.*) Between then and August 21, 2015, Calissio announced that it had purportedly repurchased "158,865,114 shares for [a] total of USD$588,448.00." (Dkt. 22-1 ¶ 4, Ex. C.) At the same time, Calissio had scheduled a dividend payment for August 17, 2015, in which Calissio announced a cash dividend of $0.011 per common share of the Company, "to be paid to the holders of the issued and outstanding Common Shares as of the close of business on June 30, 2015." (Dkt. 22-1 ¶ 5, Ex. D.)

What Calissio failed to disclose in its multiple press releases, however, was that *after* June 30, 2015, it had issued hundreds of millions of new shares of common stock in connection with the conversion of convertible debt previously issued by Calissio. (Dkt. 22-11 ¶ 18.) These new shares—which were ineligible for the dividend due to the timing of when they were issued—totaled approximately *four times* the number of shares outstanding as of the record date of June 30th. (*Id.*) Because the new shares were issued after the record date, they necessarily were *not* eligible for the dividends attached to the previous shares. (Dkt. 22-11 ¶ 17.)

Nonetheless, DTCC paid dividends on *all* shares on its system. (Dkt. 22-11 ¶ 10.) This resulted in two massive errors that took money belonging to others out of their accounts and into the accounts of Calissio and other parties who were not entitled to it. First, DTCC paid dividends on shares that were *not* dividend eligible in amounts grossly exceeding both the announced size of the dividend program and the amounts deposited by Calissio with DTCC for distribution. Second, as it admitted in a press release, Calissio itself re-purchased over 158 million shares before the ex-dividend date and wrongfully took ownership of the dividend funds attached to shares it repurchased. (Dkt. 22-1 ¶ 4, Ex. C.) Essentially, Calissio defrauded the market by discreetly issuing shares of Calissio stock that were not dividend-eligible and then buying back those shares, knowing that DTCC's normal course of action is to collect from companies like COR Clearing and pay to Calissio and its affiliates, as the current holders of the shares, dividends on all shares in its system without verifying whether all of the shares or the recipients were actually eligible.

Between July 29, 2015, and August 19, 2015, Nobilis, through its broker J.H. Darbie & Co. ("Darbie")—an independent broker dealer who settles trades through COR Clearing—obtained over 327 million shares of stock in Calissio through a conversion of debt to equity. (Dkt. 22-11 ¶ 11.) All 327 million of these shares were issued after the record date of June 30th, and

therefore Nobilis was not entitled to receive a dividend on any of these shares, as none was owed to it. (*Id.*) Darbie, on behalf of Nobilis, sold more than 277 million of these shares on the open market, and therefore some of these directly or indirectly back to Calissio as a result of Calissio's repurchase program. Because Nobilis determined that no dividend rights attached to its shares, Nobilis sold its shares to the open market and therefore in large part back to Calissio for only $700,000. (*Id.* at ¶ 12.) Calissio also perpetrated this fraud against another customer of Darbie's with a COR Clearing account, Beaufort. (*Id.*)

On August 20 and 21, 2015, DTCC debited COR Clearing for over $3.3 million in respect of these erroneous due bills assessed on the shares sold by Nobilis and another $690,000 for erroneous due bills assessed on Beaufort's shares—significantly more than the amount Nobilis or Beaufort received for their shares. (Dkt. 22-11 ¶ 13.) DTCC made this debit against its member firm COR Clearing, who custodies the customer accounts entering the trades on behalf of Darbie for both Nobilis and Beaufort. (*Id.*) However, because no dividends were ever to be received for these shares by these former shareholders, the debit was improperly assessed.

b. Calissio Admits the Dividends Were Paid in Error and That It Was Not Entitled to the Dividends It Received From DTCC

On August 25, 2015, having been alerted that Nobilis, Darbie, and COR Clearing were aware of Calissio's fraudulent dividend scheme, Defendant Adam Carter, Calissio's president, sent a number of e-mails to these impacted parties, admitting that no dividend payments had been received and thus did not need to be returned by Nobilis, and asserting that DTCC's collection of the money from COR Clearing was a mistake. For instance, on August 25, he told Michael Yarmish of Darbie and a representative of Nobilis:

> As you are aware there has been a huge glitch/error on how the dividend was supposed to be paid out. We are currently in conversations with DTCC and will be resolving this issue over the next couple of days. There is absolutely no reason for closing your

> clients [*sic*] account as they are not at fault here. Once again this was a problem created by FINRA and not your client Nobilis Consulting LLC.

(Dkt. 22-11 ¶ 14, Ex. E.) Later that day, he then told Carlos Salas, CEO of COR Clearing, much the same thing:

> As you are aware there has been a huge glitch/error on how the dividend was supposed to be paid out. We are currently in conversations with DTCC and will be resolving this issue over the next couple of days.

(Dkt. 22-11 ¶ 15, Ex. F.) After more pressing by Mr. Salas, Carter delayed by purportedly reporting, "Unfortunately we can't make any decisions until DTCC gives us a concrete answer on how this problem that they created can be resolved." (*Id.*)

Then, on August 28, 2015, Carter told Jason Bogutski, president of Defendant Signature Stock Resources ("Signature"), "[w]e sent both wires to COR yesterday (Nobilis/Beaufort) but now with this lawsuit our lawyers have advised us not to proceed and we requested an immediate stop on both transfers." (Dkt. 22-1 ¶ 6, Ex. G.) He then attached purported proof that the wires, in the amount of approximately $3 million, had been initially sent to Nobilis. (*Id.*)

In retrospect, these assurances that Calissio would properly unwind the erroneous transaction were likely false, and it is apparent that Carter made false statements to buy himself time to leave the country. Tellingly, on August 28, Carter told Bogutski that he was "in a remote location at our mining property in Mexico," and then later told Mr. Salas,

> You should have been more patient and waited for funds to be sent out as I discussed with your people. Instead, you carelessly jumped the gun and filed a lawsuit against Calissio. There will be no funds to COR. Our legal counsel has advised us not to send you any further wires. Good luck with the lawsuit.

(Dkt. 22-11 ¶ 16, Ex. H.) Carter then cut off all contact with everyone, including Signature, and disappeared; the purported counsel he referred to has never been identified or surfaced. (Dkt. 22-

1 ¶ 9.) Indeed, it appears that the purported wire transfer that Carter "cancelled" may have been a fake.

c. Calissio's Shadow Existence

Since the filing of the Complaint, it has been revealed that Calissio is essentially a ghost corporation, and that during its known existence it only disappeared further into the unregulated markets each day. Indeed, it appears that it is a fly-by-night operation set up for the sole purpose of defrauding the marketplace, and Adam Carter, the purported president, may not even exist.

First, addresses attributed to Calissio in Las Vegas have turned out to be false and/or non-existent. (Dkt. 22-9 ¶¶ 2-3.) Second, even the directors and executives listed for Calissio appear to be either entirely made up or, at the very least, residents of countries other than the United States. (Dkt. 22-10 ¶¶ 3-8.) Calissio also has no real estate holdings in the United States. (*Id.* ¶ 10.)

Calissio also keeps shifting its identity and receding further from the regulated markets. Calissio was formerly called Amarium Technologies, an entity against which an investor obtained a judgment for $2.25 million in 2008. (*Id.* ¶ 9.) This demonstrates that once Calissio got caught in its scheming, it changed identities again to more easily defraud more victims.

Along with changing its identity, Calissio announced that it "will become a privately held company and its shares will no longer be listed on the OTC Markets." (Dkt. 22-1 ¶ 7, Ex. I.) This means that Calissio had now completely changed to a system that avoids any regulatory scrutiny that previously existed through the OTC markets, and it will now wholly operate on the gray market, which consists of distribution channels which may be legal but are unofficial and unpoliced.

Significantly, Calissio's website, www.calissioresources.com, no longer contains any information. And, relevant to this case, Calissio never made any appearance in this case or

responded to the allegations against it, leading to an entry of default. (Dkt. 19.)

Importantly, Jason Bogutski, president of Signature—transfer agent for Calissio—also informed counsel for COR Clearing that he had never met Adam Carter before and that he could no longer reach Carter once Carter stopped corresponding with COR Clearing. (Dkt. 22-1 ¶ 9.) Moreover, Calissio's agent for service of process, Clark Agency LLC, recently resigned, leaving Calissio without any tangible address or presence in the United States. (*See* Declaration of Michael T. Hilgers, Ex. A.)

Based on the above results of COR Clearing's investigation, it is clear that Calissio is a sham corporation. Consequently, it can be reasonably assumed that Calissio's ill-gotten funds from COR Clearing and its customers are now out of the United States and thus out of the reach of COR Clearing and this Court, all as a part of Defendants' fraudulent scheme. Thus, the only possible remedy here is for a receiver acting on behalf of Calissio to instruct DTCC to make post-payable adjustments to reverse the fraudulent dividend distribution.

2. Calissio's Dividend Distribution Was Illegal

In addition, Calissio's dividend distribution was improper as a matter of law because Calissio had insufficient assets and earnings from which to pay a dividend. Under Nevada law,[2] a corporation cannot issue a dividend if, after making the distribution:

> (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or (b) Except as otherwise specifically allowed by the articles of incorporation, the corporation's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the corporation were to be dissolved at the time of distribution, to satisfy the preferential rights upon dissolution of stockholders whose preferential rights are superior to those receiving the distribution.

[2] Calissio is a Nevada corporation with its principal place of business in Las Vegas, Nevada. (Dkt. 1 ¶ 11.)

Nev. Rev. Stat. § 78.288(2); *see also* 8 Del. C. § 170(a) ("The directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends upon the shares of its capital stock either: (1) Out of its surplus . . . ; or (2) In case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year.").[3] In other words, a corporation cannot make a dividend distribution to its shareholders if it would render the corporation insolvent or the corporation's assets would be less than its liabilities. This rule has been enacted to protect unsecured creditors from a situation where, like here, a dividend distribution "relieves the corporation of assets that could (and perhaps should) be used to further corporate purposes (rather than merely the purposes of the shareholders who receive the dividend) or to pay the creditors what is owed them." Law of Fraudulent Transactions § 5:30 (2015).

Here, the record demonstrates that Calissio is a sham corporation that lacked sufficient assets or earnings to make the dividend distribution. As discussed above, Calissio's office space, operations, and management appear to be fictitious, and it now claims to only exist in the gray market. Further, it has come to light that as of August 31, 2015, Calissio never funded the dividend for its newly issued shares, making it clear that Calissio did not have adequate assets or earnings from which to make the distribution. (*See* Dkt. 43 at 7.) Finally, it is undisputed that Calissio now owes COR Clearing and others, such as Alpine, millions of dollars to account for the funds that DTCC erroneously debited from their accounts in connection with the dividend distribution. But Calissio has expressly refused to make these parties (who now stand as creditors—including COR as a judgment creditor) whole, and its president has since fled the country and cut off all ties with

[3] Nevada courts look to Delaware law for guidance on issues of corporate law. *See, e.g.*, *In re Computer Sciences Corp. Derivative Litig.*, 244 F.R.D. 580, 585 (C.D. Cal. 2007) ("Nevada courts look to Delaware law for guidance on issues of corporate law.") (citations omitted).

COR Clearing and other interested parties.

Accordingly, it is clear that Calissio made an unlawful dividend distribution that is now subject to reversal.

3. Principles of Equity Favor the Appointment of a Receiver

TDAC, the sole brokerage firm Objector, also argues that principles of equity weigh against the appointment of a receiver because (1) Calissio's shareholders "are bona fide purchasers," and (2) "COR and its clients primarily made this loss possible." (Dkt. 41 at 13-16.) TDAC's arguments are cynical and should be rejected for the following reasons.

First, Calissio's shareholders cannot be considered "bona fide purchasers" here because dividends are not "purchased for value." *See, e.g., U.S. v. Timley*, 507 F.3d 1125, 1130-31 (8th Cir. 2007) (an element of the bona fide purchaser defense is that "the interest was acquired as a bona fide purchaser *for value*") (emphasis added). A dividend is a distribution of a portion of company earnings, not an asset that shareholders purchase for a stated value. Indeed, as TDAC itself explains, the rationale behind the bona fide purchaser defense "is to protect the bona fide purchaser so that he can sell what he has purchased." (Dkt. 41 at 11.) Since shareholders cannot "sell" a dividend distribution, they cannot claim to be bona fide purchasers of a dividend. It is no surprise then that TDAC has provided no authority to support its assertion that recipients of a dividend distribution can qualify as bona fide purchasers. Moreover, it is important to consider that the Calissio shares purchased prior to the ex-dividend date *all transacted for less than the cash value of the "dividend" per share*. Thus, the parties to the transaction were either unaware that a dividend would be paid on the shares or the "innocent" purchasers believed they were taking advantage of unwary sellers and buying a cash dividend at a fraction of the value, which dividend payment was likely to be paid from the sellers' personal assets. These are not the actions of bona fide purchasers.

Second, COR Clearing and its customers have not "primarily made this loss possible." Indeed, TDAC itself admits that there is no evidence that COR, Nobilis, and Beaufort were involved in Calissio's fraudulent scheme. (Dkt. 41 at 4.) TDAC also admits that, due to Calissio's fraudulent scheme, shareholders "were credited with dividends that . . . should not have been credited to them." (*Id.* at 3.) Thus, it cannot be disputed that Calissio—not COR, Nobilis, or Beaufort—fraudulently caused DTCC to collect and pay an unlawful dividend distribution to its shareholders, leaving COR Clearing with millions of dollars in damages.

Moreover, TDAC fails to provide any legal basis for its assertion that COR Clearing should be the party held liable for damage caused by Calissio's fraudulent scheme. In essence, TDAC is asking this Court to shift the risk of loss from individuals and entities who accepted the risk of investing in a disreputable and speculative penny stock,[4] to COR Clearing, a clearing and settlement firm whose sole involvement in this transaction was providing clearing services to its customers who transacted with Calissio. There is simply no legal or factual support for this position, since the investors and brokerage firms—not COR Clearing—took on the risks inherent in dealing with a shadow company that trades over-the-counter. In fact, the only legally tenable position is the one advanced by COR Clearing, namely that Calissio did not lawfully issue dividends, and therefore they must all be reversed.[5] TDAC's argument to the contrary is no more

[4] As the SEC has acknowledged, "penny stocks are generally considered speculative investments. Consequently, *investors in penny stocks should be prepared for the possibility that they may lose their whole investment (or an amount in excess of their investment if they purchased penny stocks on margin).*" http://www.sec.gov/answers/penny.htm (emphasis in original).

[5] Further, COR Clearing's right as a creditor of Calissio takes higher priority than any shareholder claim to the dividend distribution. *See, e.g., Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 408 (7th Cir. 2011) ("The priority that lenders enjoy in bankruptcy (and likewise in receiverships) over owners is a function of the difference in their relation to the enterprise. Lenders bear less risk because they have the first claim on the borrower's assets in the event of insolvency, and they pay for this by surrendering all upside risk to the borrower's owners (who in that way are compensated for bearing more downside risk than the creditors). The creditors' priority in bankruptcy mirrors the contractual allocation of risk and reward between creditors and shareholders.").

than the cynical suggestion that COR deserves to be the victim of a fraud because it did not foresee the highly unusual circumstances of this novel crime.

C. COR Clearing Has No Other Available Remedy

As discussed in the Motion, COR Clearing's *only* available remedy is the immediate appointment of a limited receiver for the sole purpose of directing DTCC to make post-payable adjustments to reverse Calissio's dividend distribution. (Dkt. 21 at 18-19.) Indeed, as a result of Calissio's concealment of funds and refusal to participate in these legal proceedings, any other remedy against Calissio would be wholly inadequate—no funds or other assets of Calissio currently exist that are reachable by an order of this Court. *See Aviation Supply Corp.*, 999 F.2d at 317 (finding that defendants' refusal to answer questions or participate in legal proceedings made all legal remedies unavailable); *see also Stonebridge Bank v. Nita Properties, LLC*, No. CIV. 09-5145 RBK/JS, 2011 WL 2173771, at *2 (D.N.J. June 1, 2011) (granting appointment of a receiver where other available legal remedy was unlikely to fully compensate plaintiff for losses).

Nonetheless, the Objectors assert that "[t]here are several other more appropriate legal remedies and less drastic equitable remedies that COR Clearing could take in order to be made whole," such as pursuing the funds through DTCC. (Dkt. 33 at 5.) However, as Alpine explains in its response in support of the Motion, DTCC has not provided its member firms with any viable remedy. (Dkt. 43 at 13-14.) Rather, DTCC has made clear that it believes it has no responsibility for Calissio's improper distribution, and that aggrieved parties, such as COR Clearing and Alpine, could seek the appointment of a receiver to request on Calissio's behalf that DTCC make post-payable adjustments. (*Id.*; *see also* Dkt. 22-1 ¶ 11.) Thus, the instant Motion is the result of

productive discussions with DTCC.[6]

Accordingly, the appointment of a receiver to direct DTCC to reverse Calissio's dividend distribution is the only relief available to ensure that COR Clearing and other victims of Calissio's fraud are made whole. Moreover, appointment of a receiver must be made on an ***expedited*** basis because DTCC will not make an adjustment if requested after 90 days following the payment date—i.e., November 13, 2015. (Dkt. 21 at 3-4.)

II. THE OBJECTORS' ADDITIONAL ARGUMENTS ALSO FAIL

A. The Appointment of a Receiver Is Not a Final Judgment

Objector TDAC contends that "the relief sought by the Receiver Motion is, in effect, a final judgment." (Dkt. 41 at 12-13.) However, the appointment of a limited purpose receiver would not render a final judgment in COR Clearing's favor. Rather, the receiver would simply stand in Calissio's shoes and cause the company to instruct DTCC to reverse the improper dividend distribution—an action that Calissio itself admitted is warranted under the circumstances. (*See* Dkt. 21 at 9.) Much like recent cases where a receiver has been appointed to take over an alleged Ponzi scheme, a receiver is necessary here to protect participants in the marketplace who were harmed by a company's fraudulent actions. *See, e.g.*, *Janvey v. Brown*, 767 F.3d 430, 433 (5th Cir. 2014) (discussing district court's appointment of a receiver over entities involved in a Ponzi scheme); *Wiand v. Morgan*, 919 F. Supp. 2d 1342, 1347 (M.D. Fla. 2013) (referring to receiver appointed to deal "with the aftermath of a massive Ponzi scheme"). Moreover, nothing COR Clearing is asking the court to do would limit or infringe the rights of any non-party against Calissio.

[6] In addition, COR Clearing has made efforts to resolve this dispute through both the SEC and FINRA. Although the regulators have not yet taken any corrective action, they demonstrate that COR Clearing has been proactive in trying to reach resolution with the relevant regulatory bodies.

Nor can it be argued that this is an "extraordinary remedy" under the circumstances. (*See* Dkt. 41 at 12-13.) To the contrary, DTCC's policies and procedures permit it to make adjustments to these transactions:

> DTC has a standing practice to only allocate monies upon receipt from the paying agent, trustee and/or issuer. On occasion, after crediting participants with a dividend or interest payment, DTC may have to create a post allocation rate change which may result in either additional credit or a debt to your account. Reasons for this include but are not limited to, an error on the part of DTC, the paying agent, trustee or issuer or a change in the principal factor or rate on a CMO/ABS security.
>
> DTC accommodates paying agent requests to approve these types of post-payable adjustments where the adjustments are within [90] calendar days from the initial payment.

(Dkt. 22-1, Ex. A at 32.) However, DTCC's "standing practice" is to only make these post-payable adjustments upon the request of the issuer or the party acting on behalf of the issuer. Thus, since Calissio's president, Adam Carter, has disappeared, a receiver must be appointed to stand in the shoes of the company to direct DTCC to make these post-payable adjustments.

B. The Proposed Receiver Would Be a Neutral Party

One of the Objectors argues that a receiver would not be a neutral party here because COR Clearing would be "instructing the receiver . . . to act in COR's best interest." (Dkt. 33 at 1-3.) This is not the case. The proposed receiver—Ronald F. Greenspan, Esq., an internationally respected finance and business reorganization professional with 25 years of diverse, hands-on experience—would be acting on behalf of all victims of Calissio's fraudulent scheme. Indeed, COR Clearing was not the only party injured by Calissio's scheme, and it would not be the sole beneficiary of the receiver's actions.

Since Calissio's dividend should not have been distributed in the first place, the receiver would merely be reversing the damage Calissio has caused the marketplace. In other words, the

receiver will restore the marketplace to the *status quo ante*—the state of affairs in place immediately before a fraudulent company (Calissio) purportedly issued dividends (which it had no legal right to do). Thus, contrary to the Objectors' concerns, there is no possibility that COR Clearing, or any other member firm, will be allocated funds that it is not entitled to receive. Rather, COR Clearing will receive the funds improperly debited from its account by DTCC in connection with Calissio's fraudulent and illegal dividend distribution. The same is true for other injured parties, such as Alpine—DTCC will credit their accounts with the exact amounts that were debited for the dividend transaction. The appointment of a receiver would only lead to DTCC returning the funds that should never have been taken in the first place.[7]

Moreover, the proposed receiver would be independent from COR Clearing and other member firms, as receivers function as officers of the Court. The receiver will be paid from funds that DTCC is holding from the issuer, not COR Clearing, and he will act on Calissio's behalf to undo the damage from Calissio's fraud, not specifically to benefit COR Clearing or any other party. Notably, the decision to seek a receiver was not made by COR Clearing alone, but rather in cooperation with DTCC. (*See* Dkt. 22-1 ¶ 11.)

C. Non-Parties Have No Right to Discovery in this Action

TDAC's novel and unsupported assertion that it should be afforded "the opportunity to conduc[t] discovery relating to the facts of this case" should be rejected. (Dkt. 41 at 17.) TDAC has provided no legal basis or authority to support its position that *non-parties* should be given the right to conduct discovery in opposition to COR Clearing's Motion, which would be contrary to standard legal procedure. *See* Fed. R. Civ. P. 26(b) ("the scope of discovery is as follows: *Parties*

[7] For this reason, the Court should also reject KCG's request that the Court order the receiver (if appointed) to conduct an accounting "to insure that proper amounts for any possible post-payable adjustments are provided to DTCC." (*See* Dkt. 36.) An accounting is unnecessary because, as described above, reversal of the dividend distribution will necessarily return the proper amounts to the accounts from which the dividends were taken.

may obtain discovery regarding any no privileged matter that is relevant to any *party's* claim or defense . . .") (emphasis added). Indeed, TDAC admits that such discovery "would not normally be required prior to the appointment of a receiver." (Dkt. 41 at 16.) What is more, the Clerk of this Court has already entered default against Calissio (Dkt. 19), and so discovery is unnecessary because the factual allegations of the Complaint, aside from those relating to the amount of damages, must be taken as true. *See* Fed. R. Civ. P. 8(b)(6).

D. Post-Allocation Adjustments Are Appropriate Here

TDAC incorrectly argues that "[r]emedying a fraud perpetrated on the market is not contemplated as a reason to institute a charge-back." To the contrary, DTCC's policies and procedures permit it to "create a post allocation rate change" for reasons that "include *but are not limited to,* an *error* on the part of [DTCC], the paying agent, trustee or *issuer*." (Dkt. 22-1, Ex. A at 32 (emphasis added).)

Here, it is undisputed that Calissio's dividend distribution was made in error. Indeed, Calissio's president has already admitted that "there has been a huge glitch/error on how the dividend was supposed to be paid out." Likewise, TDAC itself admits that, due to Calissio's fraudulent scheme, "investors were credited with dividends that . . . should not have been credited to them." (Dkt. 41 at 3.) Moreover, as referenced in the Motion, counsel for COR Clearing has engaged in discussions with DTCC regarding the best method to remedy Calissio's fraud by way of the requested receiver. (Dkt. 21 at 12-13.) Significantly, DTCC has cooperated with COR Clearing and has submitted no objections in connection with the Motion.

E. COR Clearing Should Not Be Required to Post a Bond

Lastly, TDAC contends that COR Clearing should be required to post a $4 million bond because Calissio's shareholders "may have claims against Calissio (and potentially others) for

some if not all of that amount." (Dkt. 41 at 19-20.) This argument falls flat, however, because COR Clearing should not be required to post a bond to satisfy potential claims that shareholders may have "against Calissio." Rather, since there is no dispute that COR Clearing is entitled to the funds that were wrongly debited from its accounts, no bond is necessary.

CONCLUSION

For the reasons above and those set forth in the Motion, the Court should grant COR Clearing's request for the appointment of Ronald F. Greenspan, Esq. as a limited purpose receiver to instruct DTCC to make post-payable adjustments in accordance with DTCC's policies and procedures.

Dated: November 3, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of November 2015, a true and correct copy of the foregoing was filed via the Court's CM/ECF System, and was served on all counsel of record.

s/ Michael T. Hilgers

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

COR CLEARING, LLC, a Delaware limited liability company, **Plaintiff,** **vs.** **CALISSIO RESOURCES, GROUP, INC., a Nevada Corporation; ADAM CARTER, an individual; SIGNATURE STOCK TRANSFER, INC., a Texas corporation; and DOES 1-50,** **Defendants.**	**Case No. 8:15-cv-00317-LES-FG3** **PLAINTIFF COR CLEARING, LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS IN RESPONSE TO SUBPOENA**

The facts pertinent to this motion are undisputed. COR Clearing has been grievously and unjustifiably harmed by a fraud perpetuated by Defendant Calissio Resources, Group, Inc.—nearly $4 million was wrongly taken from its accounts and erroneously distributed to brokers and their customers. COR Clearing has filed a lawsuit to remedy that harm, and this Court has permanently enjoined Calissio from disposing its ill-gotten gains. TDAC admits that it has credited a portion of these improperly-obtained funds to its customers and likewise admits that it knows the identity of those customers. TDAC thus has both information relating to the identity of individuals who received COR Clearing's funds, and information relating to TDAC's customers' transactions concerning Calissio shares and the dividend payments at issue. This information is highly relevant to COR Clearing's claims, as well as ensuring compliance with the Court's permanent injunction, and was properly requested by COR Clearing through its validly issued subpoena.

TDAC's arguments in its opposition to COR Clearing's subpoena are smokescreens that do not withstand close inspection. TDAC first contends that the identity of its customers who received the improper distributions is irrelevant. But that information is the very definition of

relevant because it speaks directly to how much of the improper dividend was funneled back to Calissio through related entities that might have traded through TDAC, and because it identifies third-parties that were unjustly enriched by Calissio's scheme and from whom funds must be recovered to remedy the harm caused to COR Clearing.

TDAC also contends, without support, that the subpoena is overbroad, unduly burdensome, and vague; but TDAC has not submitted a single affidavit that would substantiate its counsel's bare assertion that the subpoena is overbroad or would impose any kind of undue burden on TDAC. Indeed, the fact that TDAC has located the responsive information belies its argument that COR Clearing's subpoena is overly burdensome or vague. Lastly, TDAC argues that its customers' privacy concerns outweigh COR Clearing's need for the information. But this argument is unavailing. A protective order has been entered in this case, and that order is plainly sufficient to protect TDAC's customers' privacy.

Ultimately, TDAC has no basis for its refusal to produce information responsive to COR Clearing's lawfully issued subpoena. TDAC has not and cannot establish that the subpoena is overbroad or exceeds the bounds of fair discovery, or that it somehow violates the privacy of TDAC's customers. Accordingly, the Court should compel TDAC to comply with COR Clearing's subpoena.

I. The Documents Sought are Highly Relevant.

In opposing COR Clearing's motion to compel, TDAC first argues that it should not be compelled to produce customer identity information responsive to COR Clearing's subpoena because that information is irrelevant. *See* TD Ameritrade Clearing, Inc.'s Brief in Opposition to COR Clearing, LLC's Motion to Compel [hereinafter, the "TDAC Brief"], Dkt. No. 103, at 5-7. TDAC appears to base its irrelevancy argument on the assertions that TDAC's customers are not

"bad actors" who were "knowingly involved" in Calissio's fraudulent scheme, *see id.* at 6, and that the identity of TDAC's customers is not "necessary for COR to pursue its fraud claim against Defendants." *See id.* at 7. But these arguments improperly narrow the scope of "relevancy" and ignore the fundamental nature of COR Clearing's claims in this case.

"'Broad discovery is an important tool for the litigant, and so relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'" *Powers v. Credit Mgmt. Servs.*, No. 8:11CV436, 2013 WL 1156447, at *2 (D. Neb. March 20, 2013) (quoting *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1039 (8th Cir. 2011) (internal quotations omitted). "Relevant means 'any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Id.* (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). Within this legal framework, the customer information sought by COR Clearing is clearly relevant.

First, the information is highly relevant both to prosecuting COR Clearing's fraud claims and to ensuring compliance with the Court's order permanently enjoining Calissio from "disposing of the amount Calissio charged in due bills to COR Clearing." *See* Judgment, Dkt. No. 109, at *3. Calissio profited from its illegal scheme by repurchasing shares of its own stock, and then improperly causing a dividend to be paid on due bills attached to those shares. *Id.*; *see also* Complaint for Damages and Injunctive Relief, Dkt. No. 1, at ¶¶ 27-30. Importantly, Calissio not only repurchased those shares directly, but also through various affiliate entities that acted as conduits for sending the ill-gotten gains back to Calissio. *Id.*

Without compliance of the subpoena against TDAC, COR Clearing has no way of identifying the those affiliate entities that purchased Calissio stock during the relevant time period, and thus would be deprived of information critical both to COR Clearing's claims in this lawsuit

(and its ability to remedy the significant harm done to it) and to ensuring compliance with the Court's permanent injunction. Only by knowing the identity of the purchasers of Calissio stock, including the identity of those who purchased the stock through TDAC, can COR Clearing determine how much money was funneled back to Calissio. The limited data TDAC agrees to disclose excludes the critical information needed to identify these Calissio affiliates—i.e., their names.

Second, the information sought is highly relevant to COR Clearing's other claims. COR Clearing has also alleged that the Defendants, including Does 1-50, were unjustly enriched by Calissio's scheme. *Id.* at ¶¶ 53-60. COR Clearing's unjust enrichment claim does not require that a purchaser of Calissio stock knowingly participated in Calissio's fraudulent scheme or was otherwise a "bad actor." *See, e.g., Bel Fury Invs. Group, L.L.C. v. Palisades Collecton, L.L.C.*, 814 N.W.2d 394, 400 (Neb. Ct. App. 2012) (setting forth elements of unjust enrichment cause of action under Nebraska law). Rather, all that is required is that the purchaser received funds rightly belonging to COR Clearing. *Id.* Again, TDAC's customer information is the only way to identify those who might have been unjustly enriched by Calissio's scheme. Moreover, the only way to determine how much Calissio itself was unjustly enriched is for COR Clearing to discover the identity of the non-Calissio affiliated TDAC customers who received the improper dividend. Consequently, the identity of TDAC's customers "bears on" and "reasonably could lead to other matter that could bear on" issues "that [are] or may be in the case." *See Powers*, 2013 WL 1156447, at *2.

Finally, TDAC appears to contend that the information is not relevant because COR Clearing sought to reverse due bill payments as to member firms, but not necessarily shareholders. TDAC's objection is ironic. It was TDAC that objected to COR Clearing's motion to appoint a

receiver—had that motion been granted, determining the identity of the individuals unjustly enriched would have been unnecessary and this motion would not be before the Court. It is only because TDAC obtained its objected-to relief—i.e., a denial of the motion to appoint the receiver, with the power to reverse the due bill payments—that COR Clearing is forced to subpoena the member firms to determine the identity of the individuals and entities enriched by the erroneous due bill payments and identify those involved with Calissio's scheme. TDAC objected to relief that would have mooted the need for this motion, and TDAC cannot now use that result to bar COR Clearing's remaining avenue for relief.

II. COR Clearing's Document Requests are not Overly Broad or Vague.

TDAC next argues that the requests are overly broad, unduly burdensome, or vague. *See* TDAC Brief at 7-11. But TDAC offered no evidence or affidavits to support this assertion, and a review of COR Clearing's six document requests shows that the each is narrow tailored to seek information directly relevant to this case.

The first four requests in COR Clearing's subpoena do not seek a comprehensive document production as to any subject matter, but instead seek only documents "sufficient" to identify discrete sets of information. *See Aristocrat Techs. v. International Game Tech., Inc.*, No. 5:06-CV-3717, 2009 WL 1331095, at *2 (N.D. Cal. May 13, 2009) (finding that offer of documents "sufficient to show" relevant information was acceptably narrower than request for "all documents relating to" that relevant information). Request No. 1 seeks documents "sufficient to identify" the individuals or entities to which TDAC sold or transferred Calissio stock between June 30, 2015 and August 19, 2015 and Request No. 2 seeks documents "sufficient to show" specific information about the identified individuals and their transactions (for example, the date and amount of each such sale or transfer and the issue date of the shares).

TDAC's objections to Request Nos. 1 and 2 are premised on the argument that the requests are vague and that they seek irrelevant documents. *See* TDAC Brief at 8. But TDAC has been apparently been able to locate the requested information, *see id.* at 12-13, which belies any argument that the requests are vague. TDAC's argument that the requests seek irrelevant information is similarly unavailing. As shown in Part I. above, however, the transaction information related to improper dividend payments is highly relevant to the claims in this lawsuit.

Request Nos. 3 and 4 are similarly narrow. These two requests are directed at identifying those individuals and entities who wrongfully benefited from Calissio's fraudulent scheme. Specifically, Request No. 3 seeks documents "sufficient to identify" the TDAC customers who received any transfer, payment, debit, or credit relating to their ownership, possession or control of Calissio stock and Request No. 4 seeks documents "sufficient to show" specific information about the identified individuals and their Calissio transactions (for example, the date and amount of the payments they received). Again, the customer and transaction information related to these transactions is central to allowing COR Clearing to identify those customers of TDAC who received Calissio dividends to which they were not entitled (dividends that have been wrongfully debited from COR Clearing's accounts).

TDAC asserts that Request Nos. 3 and 4 are overbroad in that they could be construed to encompass individuals who received payments relating to their ownership of Calissio stock prior to the alleged fraud. That information, however, is also relevant to COR Clearing's claims. Because the fraudulent transfers were of an insolvent company, ***all*** of the payments relating to the due bills are void. *See* Reply, Dkt. No. 51, at *13-14. Therefore, ***anyone*** who received a payment during the limited window was unjustly enriched.

Finally, Request Nos. 5 and 6, while somewhat broader than the other requests, seek information clearly relevant to this lawsuit. Those requests seek all communications and documents TDAC might have concerning Calissio, its president Adam Carter, its transfer agent Signature, Calissio stock, Calissio dividends, and the payment of due bills related to Calissio, as well as those communications and documents TDAC might have regarding the underlying lawsuit, COR Clearing and Alpine (another clearing and settlement firm that, like COR Clearing, was a victim of Calissio's fraud). In the weeks and months following the improper due bill payments and institution of this action, firms like TDAC were in direct communication with DTCC regarding the circumstances of the dividend and the associated due bills, and those discussions shed light on DTCC's and the member firms' procedures, the scope of Calissio's fraud, and responses to the Calissio scheme. To the extent TDAC has such information, it is directly relevant to COR Clearing's claims and should be produced.

TDAC opposes these requests on four grounds. First, TDAC claims that these requests might encompass privileged communications. *See* TDAC Brief at 10. But this objection is a red herring. The mere fact that a request for production might encompass some privileged documents does not justify withholding non-privileged documents as well. Fed. R. Civ. P. 34(b)(C). And TDAC has not provided any log of the allegedly responsive privileged documents it is withholding, as required by Fed. R. Civ. P. 26(b)(5).

Second, TDAC objects to these requests on the grounds that COR Clearing should obtain the responsive information from Calissio. *See* TDAC Brief at 10. But as the Court is aware, Defendants Calissio and Adam Carter have not appeared to defend this case, and Calissio has defaulted. *See* Judgment, Dkt. No. 109. Furthermore, COR Clearing has requested similar information from Defendant Signature Stock Transfer, but that defendant does not appear to have

the necessary customer and transaction information. Consequently, COR Clearing is unable to obtain the requested information from those defendants through discovery and must instead look to third-parties, like TDAC, for the relevant information.

Third, TDAC claims that the customer and third-party identity information sought by these requests is irrelevant. *See* TDAC Brief at 10-11. As shown above, however, the identity of TDAC's customers and others who might have been unjustly enriched at COR Clearing's expense is directly relevant to COR's claims. *See supra* Part I.

Finally, TDAC objects to the fact that these requests encompass communications that took place outside the specific time period between the record date and the ex-dividend date. *See* TDAC Brief 11. As explained above, however, because the fraudulent transfers were of an insolvent company, ***all*** of the payments relating to the due bills are void. Therefore, ***anyone*** who received a payment during the limited window was unjustly enriched. It thus follows that communications related to such transfers are relevant, even if they did not occur between June 30th and August 19th.

In sum, TDAC has not submitted a single affidavit or any other evidence that would support an assertion that responding to the subpoena would impose any undue burden on TDAC, and has not established that the subpoena is overly broad or vague. *Oleson v. Kmart Corp.*, 175 F.R.D. 550, 565 (D. Kan. 1997) ("The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.") As set forth above, the subpoena seeks documents that are highly relevant to the underlying litigation, including documents that will allow COR Clearing to identify those that have been unjustly enriched by the fraudulent scheme. TDAC, by contrast, has submitted nothing that suggests responding to the subpoena would impose any significant burden on TDAC's resources,

much less an undue burden. Therefore, the Court should compel TDAC to respond to COR Clearing's requests.

III. Privacy Interests do not Outweigh Benefits of Production.

TDAC's final effort to resist its obligation to respond to COR Clearing's subpoena is an argument that the privacy interests of its customers outweigh the benefit to COR Clearing of obtaining the customer identity information. *See* TDAC Brief at 11-12. While TDAC's opposition asserts that the subpoena is somehow unfair because it requires the production of confidential information, there is already a protective order in place in the underlying litigation pursuant to which TDAC can designate appropriate documents as confidential or highly confidential. TDAC's brief fails to even acknowledge the protective order, and does not offer any argument that it is insufficient to protect TDAC's customer's privacy interests. Consequently, this argument is unavailing. *Lubrication Techs., Inc. v. Lee's Oil Serv., LLC*, No. CIV. 11-2226 DSD/LIB, 2012 WL 1633259, at *13 (D. Minn. Apr. 10, 2012) (explaining that protective order is adequate protection against disclosure of highly sensitive information).

Moreover, the only purportedly confidential information that TDAC identifies with any specificity in its opposition is customer information. The customer information sought by the subpoena, however, is quite narrow (and has already been produced by several other third-parties, who are similarly situated to TDAC and recognize its relevance to the underlying dispute). Specifically, the customer information sought is limited to basic information identifying the customers who traded in Calissio during the pertinent period or who were beneficiaries of the fraud and to information pertaining to these customers' Calissio stock, dividends and trades. The subpoena does not seek overall account balances and it does not seek any information about any other stock these customers may own, or any other aspect of their portfolios. This identifying

information sought includes basic information such as name, residential contact information, and business contact information; it does not seek information that is likely to be sensitive (such as social security numbers or financial information unrelated to Calissio trades). *See Hardie v. National Collegiate Athletic Ass'n*, No. 13CV346, 2013 WL 6121885, at *3 (S.D. Cal. Nov. 20, 2013) (compelling production of third parties' personal identification information and finding that while third parties have a privacy interest in such information, "that interest is not particularly sensitive").

TDAC's opposition does not cite any case in which a Court has allowed a party to withhold the type of information sought here, nor does it cite any statute that would justify TDAC's continual refusal to produce customer information. Given the scope of the customer information being sought and its relevance to the underlying suit, there is no valid basis for TDAC's refusal to produce this information.

IV. Conclusion

For the foregoing reasons, COR Clearing respectfully requests that the Court grant COR Clearing's motion to compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of April, 2016, a true and correct copy of the foregoing was filed via the Court's CM/ECF System, and was served on all counsel of record.

s/Michael T. Hilgers
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