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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Peter S. Davis, as Receiver of DenSco
Investment Corporation, an Arizona
corporation,

Plaintiff,

v.

Clark Hill PLC, a Michigan limited
liability company; David G. Beauchamp
and Jane Doe Beauchamp, husband and
wife,

Defendants.

No. CV2017-013832

**PLAINTIFF'S NOTICE OF
LODGING OF EXCERPTS OF
MENAGED'S DEPOSITION UNDER
RULE 5.4(g)**

(Assigned to the
Honorable Daniel Martin)

Pursuant to Rule 5.4(g) of the Arizona Rules of Civil Procedure, Plaintiff Peter Davis, as Receiver of DenSco Investment Corporation ("the Receiver"), gives notice that excerpts of the deposition of Yomtov Scott Menaged are lodged with the Court.

I. BACKGROUND

The Receiver cited excerpts of Menaged's deposition as part of the Receiver's 10/18/2019 Reply and Cross-Response in support of his Motion for Partial Summary Judgment on Defendants' Affirmative Defense of In Pari Delicto (the "In Pari Delicto Brief"). The deposition excerpts are cited in the In Pari Delicto Brief as "CSOF Ex. 3,"

1 but the Receiver did not attach the deposition excerpts to the brief because the brief was
2 a public filing and Menaged had, at his deposition in federal prison, attempted to
3 designate his entire deposition Confidential under the protective order in this case.

4 The Receiver disputed Menaged's attempt to designate his entire deposition
5 Confidential. The Receiver's counsel made clear, at the deposition, that only specific
6 portions of the deposition may be designated Confidential and only to the extent
7 allowed by law. To resolve the dispute over Menaged's attempted Confidentiality
8 designation, the Receiver filed a Motion to Declare Menaged's Attempted
9 Confidentiality Designation Ineffective (the "Confidentiality Motion") on 12/11/2019.

10 The Receiver initially intended to wait until the Court ruled on the
11 Confidentiality Motion before filing, on the public record, the excerpts of Menaged's
12 deposition cited in the In Pari Delicto Brief. (*See Confidentiality Motion at 2*
13 (*explaining this intent*)). This was because the Receiver thought the Confidentiality
14 Motion would be resolved quickly. After all, Defendants had previously filed excerpts
15 of Menaged's deposition on the public record, so the Receiver expected that Defendants
16 would not oppose, and might even join, the Confidentiality Motion. (*See*
17 *Confidentiality Motion at 5 (explaining this expectation)*).

18 Recently, however, Defendants' counsel asked the Receiver's counsel to have
19 until January 17, 2020, to respond to the Confidentiality Motion. This request suggests
20 that the Confidentiality Motion will not be resolved as quickly as the Receiver initially
21 thought. And in the meantime, the Receiver wishes for the Court to have access to all
22 information relevant to the In Pari Delicto Brief. Thus, the Receiver has today lodged
23 with the Court the deposition excerpts cited as part of the In Pari Delicto Brief. (*See*
24 *Plaintiff's Controverting Statement of Facts and Additional Facts, filed 10/18/2019, at*
25 *¶¶ 92, 110, 113–15, 119, 122–25, 130, and CSOF Ex. 3 (citing deposition excerpts)*).

26 **II. EFFECT OF LODGING**

27 Rule 5.4(g)(3) provides that when a party seeks to file a document and there is
28 an unresolved question about a confidentiality designation for the document, the party

1 seeking to file must “lodge” the document and file and serve a “notice of lodging” that
2 summarizes the dispute and sets forth the submitting party’s position. The Receiver
3 has already summarized the dispute and set forth his position in the Confidentiality
4 Motion, which was served on Defendants and mailed to Menaged in federal prison.

5 Rule 5.4(g)(4) provides that within 14 days after the notice of lodging is served,
6 the person who produced the document—in this case, Menaged—must file and serve
7 either (a) a notice withdrawing his confidentiality designation, or (b) a motion to seal
8 and a supporting memorandum that meets the requirements of Rule 5.4(d). Otherwise
9 the Court may enter an order making the document part of the public record. Because
10 Defendants have asked to have until January 17 to respond to the Confidentiality
11 Motion, the Receiver is fine with Menaged having until that same day to respond to the
12 present Notice of Lodging.

13 The Receiver has mailed to Menaged a copy of this Notice of Lodging, along
14 with the deposition excerpts cited as part of the In Pari Delicto Brief. (See Letter from
15 Receiver’s Counsel to Menaged dated 12/20/2019, attached as **Exhibit 1.**)

16 **III. GOOD FAITH CONSULTATION**

17 Ordinarily, Rule 5.4(g)(2) requires that, before filing a notice of lodging, the
18 party seeking to file the notice must engage in good faith consultation with the person
19 who produced the document at issue—in this case, Menaged.

20 The Receiver asks that the Court deem this requirement satisfied here, because
21 (1) the Receiver’s counsel already made clear at Menaged’s deposition that, contrary to
22 Menaged’s attempt to designate his entire deposition Confidential, only specific
23 portions of the deposition may be designated Confidential and only to the extent
24 allowed by law, (2) Menaged failed to specify which portions of his deposition are
25 Confidential as required by the protective order in this case, rendering impossible any
26 meaningful consultation beyond what was discussed at the deposition, (3) the Receiver
27 has already mailed Menaged the Confidentiality Motion, which sets forth the
28 Receiver’s position, (4) the Receiver has also mailed Menaged the present Notice of

1 Lodging, along with the deposition excerpts cited as part of the In Pari Delicto Brief,
2 and is fine with Menaged having until January 17 to respond under Rule 5.4(g)(4), and
3 (5) in-person communication with Menaged is difficult because he is in federal prison.

4 RESPECTFULLY SUBMITTED this 20th day of December, 2019.

5 OSBORN MALEDON, P.A.

6
7 By /s/Joshua M. Whitaker
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15 This document was electronically filed
16 and copy delivered*/e-served via the
17 AZTurboCourt eFiling system
18 this 20th day of December, 2019, on:

19 Honorable Daniel Martin*
20 Maricopa County Superior Court
21 101 West Jefferson, ECB-412
22 Phoenix, Arizona 85003

23 John E. DeWulf
24 Marvin C. Ruth
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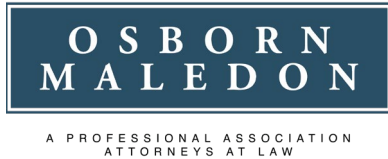
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29 /s/Karen McClain

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EXHIBIT 1



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December 20, 2019

VIA FIRST-CLASS MAIL

Yomtov Scott Menaged, # 74322-408
FCI Safford
Federal Correctional Institution
P.O. Box 9000
Safford, Arizona 85548

Re: *Peter Davis, Receiver of DenSco v. Clark Hill PLC and David G. Beauchamp*
Case No. CV 2017-013832

Dear Mr. Menaged:

As you may recall, you were deposed in the case listed above on September 23 and 24, 2019. I am one of the lawyers representing the Receiver of DenSco in this case.

During your deposition, you designated your entire testimony as confidential, rather than identifying specific portions of your testimony that the law allows to be treated as confidential. Last week we filed with the Court, and mailed you, a motion asking the Court to enter an Order that your attempted confidentiality designation was ineffective and that the transcript of your deposition is not subject to the protective order that has been entered in this case.

Today we filed with the Court the enclosed notice of lodging, pursuant to Rule 5.4(g) of the Arizona Rules of Civil Procedure. Also enclosed are the excerpts of your deposition that we have lodged with the Court.

Sincerely,

Joshua M. Whitaker

JMW/klm
Enclosures
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