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**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

ARIZONA CORPORATION
COMMISSION,

Plaintiff,

vs.

DENSCO INVESTMENT
CORPORATION, an Arizona
corporation,

Defendant.

No. CV2016-014142

**PETITION NO. 47:
REQUEST TO DIRECT RECEIVER TO
HONOR SUBROGATION RIGHTS RE:
ANY PAYMENTS MADE BY
CHITTICK ESTATE TO BRINKMAN
AND HAFIZ**

(Assigned to the Honorable
Teresa Sanders)

Hearing: December 14, 2017 11:00 a.m.

(Peter S. Davis – Appointed Receiver)

The Chittick Family Trust (the “Chittick Trust”) and the Estate of Denny J. Chittick, Deceased (“Chittick Estate”) hereby petition the Court to direct the Receiver to honor subrogation rights of the Chittick Estate to the extent that the Chittick Estate makes payments to either the Robert Brinkman Family Trust, Robert Brinkman, Trustee (“Brinkman”), or Nihad Hafiz (“Hafiz”) in satisfaction of their claims filed against the Chittick Estate in the Probate Court.

1 **BACKGROUND FACTS**

2 Approximately 60 investors, including Brinkman and Hafiz, filed notices of claims
3 with the Chittick Estate relating to the financial loss suffered in connection with their
4 investment in DenSco Investment Corporation (“DenSco”). All were denied. Shortly
5 thereafter, 58 of those claimants either assigned their claims to the Receiver or abandoned
6 them, presumably predicated on the belief that the correct path to obtain relief was
7 through the Receivership.¹ As will be made clear, the refusal of Brinkman and Hafiz to
8 either assign their claims or abandon them now must place them in a dilemma.

9 Investors were not required to press claims in the Chittick Estate. In fact, doing so
10 appeared not only to be unnecessary but unwise. The Receiver established a procedure in
11 this Court for investors to file claims for financial loss relating to their investment in
12 DenSco. Pursuant to this Court’s March 29, 2017 *Order Re Petition No. 19 – Order*
13 *Establishing Procedures for Adjudication of Claims* (“3/29/17 Claims Order”), the
14 Receiver established a claims procedure for (i) the filing of investor claims; (ii) the
15 evaluation of those claims; (iii) a claimant’s right to challenge any reduction or condition
16 placed on an investor’s claim; and (iv) a methodology for payment of approved claims
17 (“Approved Claims”) in such a manner that would assure equal treatment for all
18 investors. No investor was required to look to the Receivership for recompense.
19 However, if they did so, there was the following explicit provision in the claims
20 procedure that prevented a claimant from obtaining relief disproportionate to the payouts
21 to other Approved Claims (referred to as “the anti-double dipping” provision):

22 **6. REDUCTION OF CLAIMS BY AMOUNTS RECEIVED**

23 As part of his recommendation on each claim, the Receiver shall
24 identify the amounts, if any, that should be offset or deducted from the

25

¹ The Receiver also filed a \$46 million claim against the Chittick Estate which too was denied.
26 However, the parties have agreed to extend the time for prosecuting the Receiver’s claim while
they discuss settlement.

1 claim or paid to [sic]² the Receiver and the reasons for such
2 recommendations. The Receiver shall reduce and offset against any
3 claim, the amount of funds received by the Claimant from any third
party arising out of Claimant's investments with DenSco.

4 3/29/17 Claims Order, p. 6.

5 Brinkman elected to submit a claim with the Receiver in the amount of \$372,359.
6 The Receiver allowed Brinkman a claim of only \$244,444.45. Although he had the right
7 to do so, Brinkman elected not to contest the reduction or otherwise appeal the reduction
8 of his claim. After the expiration of the time period to dispute the Receiver's
9 determination, the Receiver filed a recommendation with this Court for confirmation of
10 Approved Claims. See Petition No. 37. Without any objections, this Court subsequently
11 confirmed the Receiver's recommendation which included the reduced Brinkman claim.

12 Hafiz likewise elected to file a claim with the Receiver for payment of his
13 investment loss in DenSco. His claim was for \$290,000³ which was allowed by the
14 Receiver and confirmed by this Court without objection.⁴

15 Pursuant to the recently filed Petition No. 41, the Receiver proposed a first interim
16 distribution, the amount of which would equal approximately 14% of each investor's
17 Approved Claim. The Chittick Trust filed an objection to Petition No. 41 insofar as it
18 authorized the Receiver to make distributions to Brinkman and Hafiz while they were
19

20 ² The word "to" obviously should be "by".

21 ³ As has been noted, Hafiz has not explained why he filed a petition against the Chittick Estate
22 claiming an investment loss of \$500,000.

23 ⁴ The undersigned assumes, consistent with their notices of Probate Court claims, that Brinkman
24 and Hafiz sought interest as well. The 3/29/2017 Claims Order expressly states that there will be
25 no interest accrual post-Receivership but is silent as to pre-receivership interest not paid.
26 However, it is the undersigned's further understanding, from discussions with counsel for the
Receiver, that in determining the amount of a claim, any pre-Receivership interest paid to a
claimant had the effect of reducing the claim, effectively treating such interest payment as a
return of principal.

1 continuing to press their claims against the Chittick Estate in Probate Court. The basis
2 for the objection is straightforward. The Chittick Trust believes that once Brinkman and
3 Hafiz elected to seek recompense through the Receivership, they had effectively elected
4 their remedy and cannot also proceed in the Probate Court. The Chittick Trust further
5 asserted that in no event can the Receiver make any disbursements to Brinkman or Hafiz
6 while they are pursuing Probate Court relief because to do so violates the “anti-double
7 dipping” provision.

8 The 3/29/17 Claims Order explicitly provided that had Brinkman and Hafiz first
9 obtained monetary relief against the Chittick Estate and then sought payment from the
10 Receiver, their Approved Claim and the payment from the Receiver thereon would
11 necessarily be reduced (or perhaps eliminated entirely). The objection merely pointed
12 out that Brinkman and Hafiz could undercut the “anti-double dipping” provision by
13 “gaming the system,” *e.g.*, holding off adjudication of their Probate Court claims until
14 they had secured all their allotted payments from the Receiver.

15 The Receiver’s *Reply to the Objection to Petition No. 41* confirms that treating all
16 investors in *pari passu* was and is central to the Receivership, and that the timing of third
17 party payments with respect to a claimant’s DenSco investment should not dictate what
18 recompense a claimant can or should receive. The language of the Receiver in his Reply
19 is significant:

20 The purpose of [the anti- double dipping] provision of the DenSco
21 claims process is to ensure integrity in the Receiver’s attempts to
22 distribute recovered funds to DenSco creditors on an equal pro-rata
23 percentage basis among all approved DenSco creditors. The
24 requirement that a DenSco creditors claim is reduced by any amount
25 received from third parties is so material to the DenSco claims process,
that the proof of claim form contains a box which must be “checked”
that the claimant has not received monies from a third party.

26 The Brinkman Family Trust and Nihad Hafiz identified in their

1 proof of claim forms filed with the Receiver that they had not received
2 any funds from third parties. However, *the Brinkman Family Trust*
3 *and Nihad Hafiz failed to advise that they had advanced claims in the*
4 *Probate Proceeding and had elected to take no action to litigate their*
5 *claims, indefinitely.*

6 . . .

7 The Receiver agrees with the Chittick Family Trust and
8 recommends that payment of any interim distribution to the Brinkman
9 Family Trust and Nihad Hafiz be deferred indefinitely until Brinkman
10 Family Trust and Nihad Hafiz have completed all efforts to recover
11 funds from the Estate of Chittick in the Probate Proceeding.

12 . . .

13 While Brinkman Family Trust and Nihad Hafiz have not
14 contested the Court's determination of their respective creditor claims in
15 the Receivership, the Brinkman Family Trust and Nihad Hafiz have
16 advanced much larger and potentially unsubstantiated claims in the
17 Probate Proceeding. . . . [T]o allow the payment of an interim
18 distribution to the Brinkman Family Trust and Nihad Hafiz with the
19 possibility that the Brinkman Family Trust and Nihad Hafiz may
20 recover anything in the Probate Proceeding could cause an excess
21 distribution to the Brinkman Family Trust and Nihad Hafiz, obligating
22 the Receiver in later stages of the administration of the Receivership
23 case to seek to claw back a previously paid interim distribution to the
24 Brinkman Family Trust and Nihad Hafiz to ensure that these two
25 DenSco creditors are not unjustly enriched to the detriment of the other
26 111 creditors.

Receiver's Reply to Objection to Petition No. 41, pps.6-8 (emphasis supplied).

The Estate has a pending Motion for Summary Judgment in Probate Court with respect to the Brinkman and Hafiz probate court claims, a fact that has some relevance to the relief being now requested.

In its Motion for Summary Judgment, the Chittick Estate argues that the Brinkman and Hafiz claims fail as a matter of law since they lack standing to assert them. In substance, the Motion asserts that, pursuant to the principle of judicial estoppel and the

1 doctrine of claim preclusion, neither Brinkman nor Hafiz can assert a claim in the Probate
2 Court against the Estate for damages in a higher amount than that to which they were
3 granted (and did not contest) in this Court. In addition, it is argued that they are barred
4 from maintaining an action in the Probate Court against the Chittick Estate seeking the
5 same damages as those they are seeking in the Receivership Court.⁵

6 While the withholding of distributions otherwise payable to Brinkman and Hafiz
7 while they pursue Probate Court claims is a necessary first step to insuring *pari passu*
8 treatment across all investors, there is another situation that requires attention. If
9 Brinkman or Hafiz were granted allowed Probate Court claims **and if** the Chittick Estate
10 were to make payments with respect to such claims, then the Chittick Estate must be
11 subrogated to those payments from the Receivership Estate that would have otherwise
12 been paid to Brinkman and Hafiz but for the “anti-double dipping” provision.

13 This is the obvious conclusion when one starts with the proposition that the
14 Receiver is committed to pay all investors in *pari passu*. Thus, if the Chittick Estate
15 pays, though the Probate Court, some or all of what the Receiver would otherwise have
16 been required to pay to Brinkman and Hafiz the payments otherwise payable to them by
17 the Receiver cannot be paid to them because of the “anti-double dipping” provision.

18 The recognition of the Chittick Estate’s subrogation right preserves both the letter
19 and spirit of the 3/29/17 Claims Order. Brinkman and Hafiz are not disadvantaged since
20 they obtain the amount of their respective Approved Claims – but no more – albeit part
21 may be paid by the Chittick Estate and part by the Receiver. *Pari passu* treatment of all
22 investor Approved Claims is preserved with subrogation. And subrogation simplifies the

23 ⁵ There is no allegation by Brinkman or Hafiz that they suffered any losses other than in
24 connection with their investment in DenSco. Thus, their claims in Probate Court are clearly
25 derivative, predicated solely on the fact that Denny Chittick controlled DenSco. Since the
26 damages and their underlying predicate are identical in both proceedings, neither Brinkman nor
Hafiz has explained why they believe they have the right to claim damages in excess of those
which they have agreed to in this Court.

1 administration of Approved Claims for the Receiver.

2 Wherefore, the Chittick Trust and the Chittick Estate jointly request that the Court
3 enter an order recognizing the subrogation rights of the Chittick Estate as more fully set
4 forth in the proposed Order lodged concurrently herewith.

5 RESPECTFULLY SUBMITTED this 8th day of December, 2017.

6
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8 By: /s/ James F. Polese (#003451)

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15 ELECTRONICALLY FILED with
16 the Court this 8th day of December,
17 2017, and copies e-mailed to the following:

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7
8 And to all other persons listed on the
9 attached Master Service List

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26
P. Meloserdoff

MASTER SERVICE LIST

Arizona Corporation Commission vs. DenSco Investment Corporation

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

CV2016-014142

(Revised November 20, 2017)

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