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8
9 **SUPERIOR COURT OF ARIZONA**
10 **COUNTY OF MARICOPA**

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

13 Plaintiff,

14 v.

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

17 Defendants.

No. CV2017-013832

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR A
SANCTIONS FOR LATE
DISCLOSURE OF THE
"IRREGULARITIES EMAIL"**

(Assigned to the Honorable Daniel Martin)

18 Plaintiff's Motion for a Sanction for Late Disclosure of the "Irregularities Email" (the
19 "Motion") gives truth to the adage that to a man with a hammer, everything looks like a nail.

20 We know that Yomtov Menaged is serving a 17-year jail sentence for defrauding
21 DenSco out of more than \$30 million. We know that Denny Chittick, DenSco's principal,
22 repeatedly violated his promises to his investors and spent more than a year jeopardizing
23 DenSco's business through reckless lending practices, all without alerting his lawyers to any
24 issues. We know that what the Receiver refers to as the First Fraud was complete by the time
25 Chittick finally reached out to Clark Hill's David Beauchamp in January 2014. And we know
26 Clark Hill had no role in, and was not aware of, the Second Fraud, which Menaged perpetrated

1 on a willing DenSco with the help of his banks from January 2014 until Chittick's death.

2 Nevertheless, Plaintiff asserts, among other things, that Mr. Beauchamp, a lawyer with
3 a sterling 35 year track record of providing securities counsel to companies around the State
4 and across the Country, (i) counseled DenSco (which had been making regular securities
5 disclosures to its investors under Mr. Beauchamp's guidance for more than a decade) that it
6 could raise money without disclosing any of DenSco's issues with Menaged for some
7 indefinite amount of time, (ii) conspired with Menaged and Chittick to harm DenSco and its
8 investors, (iii) agreed to sit idly by for two years to allow DenSco time to continue violating
9 disclosure laws (notwithstanding the lack of a single communication from Mr. Beauchamp to
10 that effect), and then, (iv) after Chittick committed suicide and Chittick's sister asked for help,
11 used that opportunity to purportedly try and cover-up his prior purported cover-up (all while
12 providing information to investors, the Receiver, Chittick's estate, and the Arizona
13 Corporation Commission). Those matters are not at issue here, but as the Court and a jury will
14 see, it is a remarkably cynical view of Mr. Beauchamp and his conduct.

15 Apparently, that level of cynicism for Clark Hill extends to Clark Hill's counsel as well.
16 The Receiver now accuses undersigned counsel of intentionally withholding unfavorable
17 evidence, an accusation he levied for the first time in the Motion, without so much as a phone
18 call. As Clark Hill has argued, and the Court has determined, the Motion and its subject matter
19 were covered by the Court's dispute resolution procedures set forth in its April 4, 2018 Order.
20 The Order required that the Receiver first meet-and-confer by phone or in person with Clark
21 Hill, then seek guidance from the Court, before burdening the Court with a sanctions motion.
22 For whatever reason, the Receiver instead chose to sit on this serious accusation for months,
23 before making an oblique reference to a forthcoming demand for sanctions through the
24 mediator at the November 25, 2019 mediation, and then filing the instant Motion without any
25 attempt to engage counsel.

1 Had the Receiver followed the Court's protocol, Clark Hill would have explained to
2 both the Receiver and the Court, that the untimely production was inadvertent. *See* Declaration
3 of Marvin Ruth attached as Exhibit A. The Irregularities Email--a request for advice from in-
4 house counsel regarding the treatment of firm clients who had invested in DenSco and who
5 may seek legal advice after learning about Chittick's death--was marked privileged during a
6 document review that took place prior to the filing of the lawsuit. After a later review, counsel
7 determined the document was not privileged, but unknowingly failed to tag the document in
8 its database for production. Counsel nevertheless proceeded as if the document had been
9 produced and provided it to its standard of care expert, which, unfortunately, is how the
10 Receiver ultimately learned about it. *Id.*

11 Counsel takes its disclosure obligations seriously. Discovery in this matter has been
12 robust, with the parties producing of more than 172,614 documents, totaling more than 357,000
13 pages. Throughout this litigation, we have endeavored to be as timely and transparent with our
14 disclosures as possible, and we regret that an oversight delayed production of the email in
15 question. The delay in disclosure, however, was inadvertent, and opposing counsel will suffer
16 no prejudice, having had access to the document for more than a year prior to trial. Had the
17 Receiver required or requested additional discovery as a result of the Irregularities Email, that
18 is something that could have been discussed during the required meet-and-confer. Based on
19 the Receiver's Motion, however, even those remedial measures are unnecessary. Instead, the
20 Receiver has taken this opportunity to influence the Court's perception of the case by smearing
21 counsels' credibility and arguing the merits of the Receiver's legal position (i.e., whether Clark
22 Hill terminated DenSco as a securities client or not).

23 Bottom line, where the lack of disclosure was inadvertent and there is no prejudice,
24 there are no grounds for sanctions. The Court should reject the Receiver's request to instruct
25 the jury that counsel failed to timely disclose the information, an instruction that would imbue
26 an otherwise unremarkable email with far more significance than it deserves. If the

1 Irregularities Email is truly “devastating” to Clark Hill’s case, as the Receiver asserts, then the
2 jury will be able to reach that conclusion on its own.

3 **I. The late disclosure was inadvertent.**

4 The Receiver asserts, based on a scant evidence, that both Clark Hill and counsel have
5 engaged in a pattern of intentional discovery abuse. The record reflects otherwise.

6 **A. Clark Hill produces hard copy of DenSco file to Receiver; the**
7 **“irregularities email” was not part of the file.**

8 On August 29, 2016, shortly after his appointment, the Receiver requested from Clark
9 Hill “the entire contents of your firm’s attorneys’ files relating to the representation of DenSco,
10 paid for directly by the [sic] DenSco or by others.” Mot., Exh. 5 at 4. As many attorneys do,
11 David Beauchamp, the lead lawyer for DenSco, kept those files in hardcopy. On October 13,
12 2016 (a mere six weeks after the request was made), Clark Hill produced exactly what the
13 Receiver requested. It handed over six bankers boxes of DenSco files to the Receiver. Mot.,
14 Exh. 6. Those documents were produced after Clark Hill’s local general counsel, Mark
15 Sifferman, directed Mr. Beauchamp to “have all the DenSco files gathered, and I went through
16 them.” Exh. B, Sifferman Depo. Tr. at 89:5-14. While the Receiver suggests that this
17 production may somehow have been intentionally incomplete, the production included all
18 attorney-client communications placed in the file, notes of attorney-client telephone
19 communications, notes of communications with Menaged, research memos, draft and final
20 forbearance agreements, draft private offering memoranda, and post-suicide investor
21 communications, among other things, for *all* of the DenSco matters in Clark Hill’s possession,
22 including the Business Wind Down file Clark Hill opened after Mr. Chittick’s death. Mot. at
23 Exh. 6.

24 That this production of the DenSco files did not include the Irregularities Email is not
25 noteworthy, nor does it evidence a “larger pattern...of trying to shield harmful information
26 from disclosure.” Critically, at the time the Receiver made his initial demand for Clark Hill’s

1 DenSco files the Receiver had not yet hired special counsel to investigate claims against Clark
2 Hill. The Receiver had not yet issued any reports suggesting he was investigating claims
3 against Clark Hill. There was no accusation from the Receiver that Clark Hill had not
4 terminated DenSco, or that Mr. Beauchamp counseled his client to break the law, or that Mr.
5 Beauchamp's post-suicide communications to DenSco investors were actually an attempt to
6 shield Clark Hill from further investigation. It would be more than six months before the
7 Receiver hired Osborn Maledon as special counsel, and more than a year before Osborn
8 Maledon filed a Complaint against Clark Hill.¹

9 In other words, there was no reason for Clark Hill to make a conscious determination,
10 one way or the other, that an email from David Beauchamp to its in-house counsel should have
11 made its way into the Business Wind Down file and been produced in response to the
12 Receiver's inquiry. Nor was there any reason for Clark Hill to immediately conduct an
13 expensive and exhaustive electronic search of every document that may have somehow related
14 to DenSco. The suggestion that Clark Hill sought to hide a document to protect against claims,
15 and to avoid undermining defenses, that neither the Receiver nor Clark Hill would raise for
16 more than a year, lacks any factual or evidentiary basis whatsoever. Clark Hill gathered up its
17 files related to its representation of DenSco, and provided it to the Receiver. No one at Clark
18 Hill hid anything.

21 ¹ Clark Hill was aware that Chittick had levied what counsel for the Chittick estate described
22 as "wild allegations" in various suicide letters, wherein Mr. Chittick attempted to cast blame
23 for DenSco's demise on everyone but himself. Those include allegations that (a) Chittick had
24 disclosed, and his investors had blessed, his reckless practices of lending money directly to his
25 borrowers and devoting significant amounts of DenSco's portfolio to loans to Menaged
26 (categorically untrue), (b) Chittick had risked his own money to try and save the company
(categorically untrue--Chittick actually looted millions from the company), and (c) his lawyers
abandoned 35 years of experience and professional conduct and counseled Chittick that he
could put off making securities disclosures indefinitely (untrue, and the subject of this
litigation).

1 **B. Undersigned counsel inadvertently produces the Irregularities Email later**
2 **than intended, and in a more confusing fashion than intended.**

3 **1. Before the Receiver files his complaint, Clark Hill reviews the**
4 **Irregularities Email and marks it privileged.**

5 On June 22, 2017, after Osborn Maledon had been appointed as special counsel, but
6 before a complaint had been filed, the Receiver asked undersigned counsel to supplement the
7 production to include all electronic communications. In response, Clark Hill engaged in the
8 massive undertaking of gathering all the emails of the relevant Clark Hill custodians,
9 conducting searches on those documents, and then producing those documents to the Receiver
10 on a rolling basis. The Receiver dismissively asserts “Defendants produced various additional
11 documents” in response to the demand for supplementation. That is an understatement.
12 Between June 22, 2017, the date of the demand, and October 16, 2017, the date the Receiver
13 filed his complaint, counsel produced more than 13,000 pages of documents from Clark Hill’s
14 electronic files.

15 The Irregularities Email was first loaded into Clark Hill’s database on August 14, 2017.
16 In the email, Mr. Beauchamp (i) wrote to his managing partner, Darrell Davis, and his associate
17 general counsel, Mark Sifferman, (ii) informed them of Mr. Chittick’s suicide, (iii) explained
18 that investors in DenSco were “likely to start calling when the word gets out” about Denny’s
19 death, (iv) noted that some of those investors may be firm clients, and (v) asked “is there
20 something I should do to set up internal procedures at the firm.” *See* Mot. at Exh. 1. On its
21 face, the email appears to seek legal guidance from the firm’s associate general counsel
22 regarding the manner in which the firm should handle both the death of a sole proprietor client,
23 and the potential inquiries from that company’s investors, who may also be firm clients.
24 Consequently, the email was marked as privileged on August 29, 2017.²

25 ² Notably, at this time, the Receiver had not yet filed a complaint, had not yet alleged that Mr.
26 Beauchamp’s post-suicide conduct was somehow actionable, and had not yet alleged that Clark
Hill had failed to terminate DenSco as a client. In fact, the Receiver did not start setting forth
the theory that Clark Hill never terminated DenSco in order to aid and abet Chittick’s breaches
of fiduciary duty until he submitted his 3rd Supplemental Disclosure Statement in May 2018.

1 **2. Clark Hill determines Irregularities Email is not privileged, neglects**
2 **to re-tag the document in the database for production.**

3 In August 2018, Clark Hill did a secondary review of various documents, including the
4 Irregularities Email. Internal records make clear that questions were raised at this time whether
5 the document was in fact privileged. It also clear from the record that (a) the document was
6 tagged as “Responsive” on August 16, 2018, although the “Privilege” tag remained but that (b)
7 at some point thereafter, undersigned counsel treated the document as if it were no longer
8 privileged and as if it had been produced, notwithstanding that the Privilege tag was never
9 removed in the database (and thus, the document was not swept up in any subsequent
10 productions). Counsel is unable to reconstruct the precise timeline as to when it determined
11 that the Irregularities Email was not privileged, but counsel marked the document as potentially
12 relevant to Clark Hill’s expert witnesses, and it was ultimately one of hundreds of documents
13 provided to standard of care expert Scott Rhodes. At the time, counsel was under the mistaken
14 impression that all of the documents it was reviewing and producing to its experts had been
15 disclosed to opposing counsel; at no point did counsel provide its experts with materials it had
16 deemed privileged.

17 **3. Clark Hill produces the Irregularities Email after it is identified in**
18 **the Rhodes expert report**

19 The Rhodes expert report identified documents on which he relied by document
20 number. On April 25, 2019, after Clark Hill produced the Rhodes expert report, Osborn
21 Maledon pointed out that many of the documents identified in the report were identified by a
22 DOCID number, not a Bates number, and asked that Clark Hill identify those documents by
23 Bates Number.

24 The lack of a proper bates number for various documents was not surprising, because
25 the Receiver had repeatedly produced documents without bates numbers. For example, on
26 March 18, 2018, the Receiver provided Clark Hill with over 96,000 documents totaling more
than 330,000 pages without Bates numbers. Those documents largely (if not entirely)

1 consisted of email communications from Chittick and Menaged’s electronic devices. When
2 Clark Hill loaded those documents into its database, they were each assigned a generic DOCID
3 prefix. This was the only identifier used for those documents until March 15, 2019, when
4 Clark Hill reproduced all of those documents back to the Receiver with Bates stamps to
5 indicate the source of the document. In the interim, however, documents identified solely with
6 a DOCID number were provided to experts and used in depositions. Consequently, the fact
7 that a document had a DOCID number (rather than a proper Bates Stamp), was not itself a red
8 flag that the document had not been produced. Furthermore, undersigned counsel had hired a
9 new paralegal, Tim Pompa, in November 2018, who was then assigned to this matter. Mr.
10 Pompa believed that most, if not all, DOCID labeled docs had either been produced or were
11 already in Plaintiff’s possession, based on the mistaken belief that those documents had
12 previously been provided to Clark Hill by the Receiver.

13 Clark Hill responded to the Receiver’s request the very next day. Clark Hill provided a
14 chart cross-referencing each DOCID labeled document listed in the Rhodes report to include
15 the corresponding Bates number. *See* Mot. at Exh. 14. *Three* documents did not appear to
16 have a corresponding bates number, including the Irregularities Email. Given the prevalence
17 of the DOCID numbers and the desire to get the information into the Receiver’s hands, counsel
18 did not pay particular attention to the fact that the Irregularities Email did not already have a
19 separate Bates number. Instead, Clark Hill immediately Bates labeled and produced a copy of
20 each of those three documents.

21 Contrary to the Receiver’s suggestion, counsel did not hide the Irregularities Email in
22 an avalanche of other documents. Instead, Mr. Pompa highlighted the document in the cover
23 email and included the document in a separate production the day after the Receiver requested
24 the information. *Id.* As Mr. Pompa stated in his cover letter to opposing counsel, “in the event
25 [the three bolded] documents are not in your possession, we have shared them via secure file
26

1 transfer link.” Mot. at Exh. 14. The link contained *only those three documents*, including the
2 Irregularities Email.

3 This Irregularities Email was, therefore, in the Receiver’s possession seven months
4 before the Receiver first drew attention to it in a November 2019 mediation, eight months
5 before filing this Motion, and six months before the October 18, 2019 discovery cut-off.

6 **II. The “Irregularities Email” does not deserve the significance the Receiver seeks to**
7 **attribute to it.**

8 The Receiver repeatedly asserts that Clark Hill’s termination of DenSco as a securities
9 client is a post-receivership lie conjured up by Mr. Beauchamp. Through that prism, the
10 Receiver then views every communication involving Mr. Beauchamp that does not mention
11 termination as proof of the fact it did not happen. The Motion is largely an attempt to rehash
12 the Receiver’s views on that issue.

13 Contrary to the Receiver’s argument, however, the record amply supports the fact that
14 Clark Hill terminated DenSco in May 2014. For one, the fact of termination is corroborated by
15 Clark Hill partner Daniel Schenck, who worked on the DenSco forbearance agreement with
16 Mr. Beauchamp in early 2014 when Mr. Schenck was an associate. Mr. Schenck testified that
17 Mr. Beauchamp informed him, sometime after Mr. Schenck produced a draft private offering
18 memorandum for Mr. Chittick to review, that (a) Clark Hill had terminated DenSco as a
19 securities client because Mr. Chittick refused to provide disclosures to his investors, (b) Mr.
20 Chittick was seeking new securities counsel, and that (c) Clark Hill would consequently
21 finalize the Forbearance Agreement to allow for an orderly transition of the file to new counsel,
22 which is why Clark Hill performed limited clean-up work on the agreement in June and July
23 2014. Exh. C, Schenck Depo. Tr. at 111:5-113:23, 115:11-20.

24 The termination is also evidenced by Clark Hill’s legal invoices, which reflect
25 substantial securities work before the mid-May termination (over 23 hours by both Mr.
26 Beauchamp and Mr. Schenck the first two weeks in May) *and no work thereafter*, except for

1 the cleanup work on the forbearance agreement Mr. Schenck acknowledged. Further, and
2 directly contrary to the purported existence of an attorney-client relationship, there are no
3 phone calls, text messages, or emails between Mr. Beauchamp and Mr. Chittick from summer
4 of 2014 until early 2016.³ At that point, DenSco re-engaged Clark Hill to represent the
5 company with respect to an audit by the Arizona Department of Financial Institutions
6 (“AFDI”) to determine if DenSco needed to be licensed as a mortgage broker. *See* Exh. D,
7 Defendants Initial Disclosure Statement at 15-16. This was a task that Clark Hill had
8 previously performed many times for DenSco.

9 Further, given that lack of communication, there is no evidence, and the Receiver has
10 not alleged otherwise, that Clark Hill was privy to DenSco’s financial situation after finalizing
11 the Forbearance Agreement, or that Clark Hill had any insight into, or awareness of, DenSco’s
12 business with Menaged. In fact, the Receiver has acknowledged, as he must, that Clark Hill
13 had no knowledge of the Second Fraud. In this context, the Irregularities Email takes on even
14 less significance.

15 Nevertheless, the Receiver asserts that the email gives lie to Clark Hill’s assertion that
16 it terminated DenSco as a securities client, in a manner that is “devastating to Clark Hill’s
17 defense.” Hardly. First, the Receiver exclaims that Beauchamp “confirmed in the email that,
18 as of July 2016, DenSco was a ‘client.’” Mot. at 4. The Receiver did not need the Irregularities
19 Email for that. Clark Hill has *admitted* it since the onset of the litigation. In its very first
20 March 9, 2018 Disclosure Statement, Clark Hill made clear that in March 2016, *almost two*
21 *years after Clark Hill had terminated DenSco*, Clark Hill was re-engaged by DenSco with
22
23

24 ³ The only exception is an email that Mr. Beauchamp sent to Mr. Chittick in March 2015 asking
25 to Mr. Chittick to meet for lunch. The meaning of that email is, of course, disputed. But the
26 Receiver has so frequently and misleadingly quoted from this email that Clark Hill attaches
the entire email hereto for the Court’s consideration as Exh. E. The email does not suggest
that Mr. Beauchamp was still DenSco’s lawyer at the time, nor does it suggest that Mr.
Beauchamp was checking in on DenSco for securities disclosure purposes.

1 respect to the AFDI audit. *See* Exh. D. Clark Hill’s production of firm invoices also made
2 clear that it continued to work on this matter for DenSco into June 2016.

3 The Receiver then argues that because Mr. Beauchamp did not mention termination
4 when asked if the fund had an “irregularities,” that this is proof that there was no termination.
5 That ignores all context. Mr. Beauchamp had *no* insight into DenSco’s business after finalizing
6 the Forbearance Agreement more than two years earlier, and had *no* knowledge of DenSco’s
7 subsequent business with Menaged, let alone the Second Fraud. There is no evidence to the
8 contrary. As such, it is not surprising that Mr. Beauchamp would state that he was “not...aware
9 of” any “irregularities” with the DenSco fund (in an email sent the very day he found out about
10 the suicide), because Mr. Beauchamp was not aware of the state of DenSco’s business at that
11 time *at all*.

12 In short, the Irregularities Email does not deserve the significance the Receiver seeks to
13 attribute to it. The requested sanctions, however, would imbue the document with unwarranted
14 significance.

15 **III. There is no basis for sanctions under the Rules of Civil Procedure or relevant**
16 **case law.**

17 Ariz. R. C. P. 37(c)(1) expressly makes prejudice to the opposing party a key element
18 in determining whether a sanction is warranted. Here, as the Receiver himself acknowledges,
19 “the Receiver now has the email and may use it at trial.” Mot. at 9. The Receiver may use the
20 document to cross-examine Clark Hill’s witnesses, and the Receiver’s experts are free to rely
21 on the document in presenting their opinions. Further, the Receiver will have had the email
22 for more than a year before trial, and had ample opportunity to conduct additional discovery if
23 such discovery was warranted by the Irregularities Email. The Receiver did not seek such
24 additional discovery.

25 The sanctions rules also expressly provide that the Court must find that the offending
26 party acted with intent. Rule 37(g), incorporated into 37(c)(1) by reference, requires that the

1 Court make a “finding that the party acted with intent to deprive another party of the
2 information” before it can issue sanctions. Rule 37(d) likewise allows a court to impose
3 appropriate sanctions, but only “[i]f a party or attorney *knowingly* fails to make a timely
4 disclosure of damaging or unfavorable information required under Rule 26.1...” Again, here,
5 undersigned counsel initially concluded that the Irregularities Email was privileged. That
6 determination was reasonable and made in good faith. Counsel then subsequently determined
7 that it was not sufficiently clear that Mr. Beauchamp was seeking legal advice to render the
8 communications privileged, yet failed to properly tag the document such that it would timely
9 be disclosed.

10 Consequently, where the Receiver will be able to prosecute his case without any
11 prejudice, and make use of a document whose late disclosure was inadvertent, there are no
12 grounds for sanctions. *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3rd. Cir.1995)
13 (concluding that sanctions were not warranted where there was no bad faith, and the party
14 seeking sanctions had access to the undisclosed information “well before trial”); *Hirpa v. IHC*
15 *Hospitals, Inc.*, 149 F.Supp.2d 1289, 1294 (D. Utah 2001) (finding that a failure to disclose is
16 “harmless when there is no prejudice to the party entitled to the disclosure”); *In re Frank*
17 *Santora Equip. Corp.*, 256 B.R. 354, 369 (Bankr. E.D.N.Y. 2000) (concluding that there was
18 a genuine dispute as to whether the relevance of the undisclosed evidence could have been
19 ascertained earlier in the proceedings, and that there was no prejudice as a result of the untimely
20 disclosure).

21 **IV. Conclusion**

22 In light of the argument above, Clark Hill, Mr. Beauchamp, and undersigned counsel
23 respectfully request that the Court deny the Motion.

1 DATED this 29th day of January, 2020.

2
3 **COPPERSMITH BROCKELMAN PLC**

4 By: /s/ Marvin C. Ruth

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Exhibit A

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8
9 **SUPERIOR COURT OF ARIZONA**
10 **COUNTY OF MARICOPA**

11 Peter S. Davis, as Receiver of DenSco
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13 Plaintiff,

14 v.

15 Clark Hill PLC, a Michigan limited liability
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16 Beauchamp, husband and wife,

17 Defendants.

No. CV2017-013832

**DECLARATION OF MARVIN RUTH
IN SUPPORT OF DEFENDANTS'
RESPONSE TO PLAINTIFF'S MOTION
FOR A SANCTIONS FOR LATE
DISCLOSURE OF THE
"IRREGULARITIES EMAIL"**

(Assigned to the Honorable Daniel Martin)

18 I, Marvin Ruth, declare under penalty of perjury as follows:

19 1. I am over 21 years of age and I am a resident of the State of Arizona.

20 2. I am an attorney with the law firm of Coppersmith Brockelman, PLC. I
21 represent Clark Hill PLC and Mr. David G. Beauchamp in the above-captioned proceeding.
22 I make this declaration based on my personal knowledge of the facts or review of the
23 pertinent records.

24 3. Upon information and belief, Clark Hill produced a hard copies of its DenSco
25 files to the Receiver on or about October 13, 2016, prior to the appointment of special
26

1 counsel or the filing of a complaint against Clark Hill. Once Osborn Maledon was
2 appointed, it reproduced those documents to counsel at DIC0000001-0011917.

3 4. On or about June 22, 2017, opposing counsel requested that Clark Hill
4 supplement the production that Clark Hill had previously provided to the Receiver for
5 DenSco Corporation.

6 5. In conjunction with Clark Hill, counsel identified the proper custodians for the
7 electronic documents, then implemented a search protocol to pull all documents related to
8 DenSco. In reviewing documents for production in the above-captioned matter, we use a
9 cloud-based eDiscovery software called Relativity. Relativity is set up to allow counsel
10 team to tag documents with various labels. Those labels include, among other things,
11 “responsive,” “non-responsive,” and “privileged.”

12 6. Starting on August 14, 2017, we started making a rolling production of Clark
13 Hill’s electronic DenSco documents to opposing counsel. The Receiver did not file his
14 complaint against Clark Hill and Mr. Beauchamp until October 16, 2017. By that point, we
15 had produced more than 13,000 pages of electronic documents to the Receiver.

16 7. The Motion concerns an email, which the Receiver has termed the
17 “Irregularities Email,” that was sent from Mr. Beauchamp to Mark Sifferman and Darrell
18 Davis on August 14, 2016. Mr. Davis was the managing partner for Clark Hill’s Scottsdale
19 office. Mr. Sifferman was the local general counsel for Clark Hill’s Scottsdale office.

20 8. In the Irregularities Email, Mr. Beauchamp informed Mr. Sifferman and Mr.
21 Davis of Mr. Chittick’s suicide, explained that investors in DenSco were “likely to start
22 calling when the word gets out” about Denny’s death, noted that some of those investors
23 may be firm clients, and asked “is there something I should do to set up internal procedures
24 at the firm.”

25 9. After reviewing the Irregularities Email, I marked the Irregularities Email as
26 “privileged” in Relativity on August 14, 2017. In my estimation, based on my initial

1 review, the email appeared to seek legal advice from Clark Hill's local general counsel
2 regarding the manner in which the firm should handle the death of a client, and the manner
3 in which the firm should handle inquiries from that client's investors, some of whom may
4 also be firm clients.

5 10. In August 2018, I performed a secondary review of certain documents,
6 including the Irregularities Email.

7 11. On August 16, 2018, I marked the Irregularities Email as "responsive" in the
8 Relativity database. The "privileged" tag remained, however. It is unclear when exactly
9 counsel team made the determination that the Irregularities Email was not privileged. It is
10 also unclear whether counsel team determined on August 16, 2018 that the Irregularities
11 Email was not privileged, and had simply failed to correctly tag the document.

12 12. Counsel cannot reconstruct precisely when counsel team determined that the
13 Irregularities Email was not privileged.

14 13. At some point on or after August 16, 2018, however, counsel team made the
15 determination that the Irregularities Email did not rise to the level of an attorney-client
16 privileged conversation. The Irregularities Email was subsequently included with various
17 other produced documents and included as part of a review for production to Clark Hill's
18 experts. It was determined based on this review that the document should be provided to
19 Mr. Scott Rhodes. At the time, counsel team were under the impression that all of the
20 documents it was reviewing and producing to its experts had been disclosed to opposing
21 counsel.

22 14. Counsel team mistakenly believed that the Irregularities Email had been
23 produced.

24 15. At the time the document was provided to Mr. Rhodes, and at the time Mr.
25 Rhodes submitted his expert report, the Irregularities Email was identified by a generic
26 DOCID number. The DOCID number is an internal identifier used for documents that did

1 not have another identifier, such as a Bates number. Thus, it could apply to documents that
2 had been produced but had not been marked, as well to documents that had not been
3 produced, and thus, had not been marked.

4 16. Thousands of relevant and produced documents were marked with DOCID
5 numbers for a significant time. For example, on March 18, 2018, the Receiver provided
6 Clark Hill with over 96,000 documents totaling more than 330,000 pages that did not have
7 Bates numbers. Those documents largely (if not entirely) consisted of email
8 communications from Chittick and Menaged's electronic devices. When Clark Hill loaded
9 those documents into its database, they were each assigned a generic DOCID prefix. This
10 was the only identifier used for those documents until March 15, 2019, when Clark Hill
11 reproduced all of those documents back to the Receiver with Bates stamps to indicate the
12 source of the document. In the interim, however, such documents identified solely with a
13 DOCID number were provided to experts and used in depositions.

14 17. Coppersmith Brockelman hired a new paralegal, Mr. Timothy Pompa, in
15 November 2018, who was then assigned to this matter. At the time, the firm had been
16 without a paralegal for some time.

17 18. Counsel failed to immediately produce the Irregularities Email to opposing
18 counsel once counsel determined that the document was not privileged. That mistake was
19 inadvertent.

20 19. I certify under penalty of perjury that the foregoing is true and correct.
21

22 Dated this 29th day of January, 2020.

23 s/ Marvin Ruth
24 Marvin Ruth
25
26

Exhibit B

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,

vs.

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

Defendants.

NO. CV2017-013832

VIDEOTAPED DEPOSITION OF MARK SIFFERMAN

Phoenix, Arizona
August 31, 2018
9:32 a.m.

REPORTED BY:
KELLY SUE OGLESBY, RPR
Arizona CR No. 50178
Registered Reporting Firm R1012

PREPARED FOR:

MARK SIFFERMAN, 8/31/2018

1 discussed, I wanted to make sure that you knew what I am
2 being told to do.

3 Do you see that?

4 A. Yes.

5 Q. Is Mr. Beauchamp's statement of the instructions
6 or advice he received from you accurate?

7 A. Not completely. My memory is that Gammage &
8 Burnham wanted a copy of all the files or they wanted us
9 to digitize them, and I said we are not going to pay for
10 digitizing the files.

11 I don't remember -- I don't remember talking to
12 David about his review of the files or any limitation on
13 his review. I told him to have all the DenSco files
14 gathered, and I went through them.

15 Q. Well, we will get to that in a second, but did
16 you -- did you tell -- did you finish answering? I didn't
17 want to cut you off.

18 A. I did, but -- and I didn't tell him, I don't
19 remember telling him to make copies of the portions of the
20 file that I needed to protect against a securities claim.

21 Q. Take a look at Exhibit 468, if you would,
22 please, Mr. Sifferman.

23 Exhibit 468 is an email that Mr. Merritt sent to
24 Mr. Beauchamp on September 23, and he is responding to the
25 exhibit we just looked at with respect to Mr. Beauchamp

MARK SIFFERMAN, 8/31/2018

1 A. No.

2 Q. You did not.

3 Did you ever meet with Mr. Anderson?

4 A. No.

5 Q. Did you speak with Mr. Anderson about delivering
6 the files to him?

7 A. I don't think so.

8 MR. STURR: Okay. I don't think I have any
9 other questions for you, Mr. Sifferman. Thank you.

10 MR. DeWULF: Thank you.

11 VIDEOGRAPHER: The time is 12:00 p.m. We are
12 ending the deposition with media two.

13 MR. DeWULF: We will read and sign.

14 (12:00 p.m.)

15

16

17

MARK SIFFERMAN

18

19

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22

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25

MARK SIFFERMAN, 8/31/2018

1 BE IT KNOWN that the foregoing proceeding was
2 taken before me; that the witness before testifying was
3 duly sworn by me to testify to the whole truth; that the
4 questions propounded to the witness and the answers of the
5 witness thereto were taken down by me in shorthand and
thereafter reduced to typewriting under my direction; that
the foregoing is a true and correct transcript of all
proceedings had upon the taking of said deposition, all
done to the best of my skill and ability.

6 I CERTIFY that I am in no way related to any of
7 the parties hereto nor am I in any way interested in the
outcome hereof.

8
9 ☒ [X] Review and signature was requested.
10 ☐ [] Review and signature was waived.
11 ☐ [] Review and signature was not requested.

12 I CERTIFY that I have complied with the ethical
13 obligations in ACJA Sections 7-206(F)(3) and
14 7-206-(J)(1)(g)(1) and (2).

15 Kelly Sue Oglesby
16 Kelly Sue Oglesby
17 Arizona Certified Reporter No. 50178

9/9/2018

Date

18 I CERTIFY that JD Reporting, Inc. has complied
19 with the ethical obligations in ACJA Sections
20 7-206(J)(1)(g)(1) and (6).

21 JD REPORTING, INC.
22 Arizona Registered Reporting Firm R1012

9/9/2018

Date

Exhibit C

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,

vs.

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

Defendants.

NO. CV2017-013832

VIDEOTAPED DEPOSITION OF DANIEL ALLEN SCHENCK

Phoenix, Arizona
June 19, 2018
9:05 a.m.

REPORTED BY:
KELLY SUE OGLESBY, RPR
Arizona CR No. 50178
Registered Reporting Firm R1012

PREPARED FOR:

DANIEL ALLEN SCHENCK, 6/19/2018

1 private offering memorandum you drafted?

2 A. As I sit here today, I don't know. And part of
3 it could have been I didn't know if the practices were
4 changing or not. Again, this was a first draft.

5 Q. Did Mr. Beauchamp ever come to you and tell you
6 he had terminated DenSco as a client?

7 A. Yes.

8 Q. When did he do that?

9 A. It probably was within a week or a couple weeks
10 at least -- I'm trying to frame up -- after this initial
11 draft was, I think gave it to David, and then I think he
12 then was working with Denny on, you know, starting to fill
13 it in more and to update it with the correct information
14 and such. It was around that time period.

15 Q. So you think -- we know from your billing
16 records that you gave it to Mr. Beauchamp on May 14th, so
17 you think within one week, by May 21st, Mr. Beauchamp came
18 to you and said we are terminating DenSco as a client?

19 MR. DEWULF: I think that's a
20 mischaracterization of what he said, Counsel. I'll object
21 to form.

22 MR. CAMPBELL: Let him say -- he can correct me
23 if I'm wrong.

24 THE WITNESS: Okay. I would say it was probably
25 within days or weeks after that. I don't -- I can't

DANIEL ALLEN SCHENCK, 6/19/2018

1 pinpoint when it was.

2 Q. (BY MR. CAMPBELL) Days or weeks?

3 A. Yeah.

4 Q. How many times have you terminated a client?

5 A. Me? Only a handful of times.

6 Q. How many times has a partner come to you and
7 said we are terminating a client, cease work?

8 A. Just a handful of times.

9 Q. What are Clark Hill's procedures when a client
10 is terminated?

11 A. I don't know that there are actually set
12 procedures on -- firm-wide on how to do that.

13 Q. Do you terminate work?

14 A. Since this, I have done a couple of that, yeah.

15 Q. So once Mr. Beauchamp came and talked to you,
16 you did no further work on the case?

17 A. No, I don't think that would be accurate.

18 Q. How can you terminate a client and do no further
19 work for them and then continue working for them?

20 A. Well, I think on this particular situation, I
21 think we understood that we were no longer representing
22 them and going to continue this, but that it would be
23 handed off to another counsel.

24 So we were trying essentially to put it in the
25 best shape possible so that the new counsel that was going

DANIEL ALLEN SCHENCK, 6/19/2018

1 to get it would kind of see the road map of what still
2 needed to be done.

3 And so, you know, more work was probably done,
4 maybe not on the POM, but maybe on the Forbearance
5 Agreement, that, you know, just for ourself. I don't know
6 if I even billed for it or was told to bill for it or we
7 wrote it off, but there was more work that was done just
8 trying to make it in better shape to hand it off to the
9 next counsel.

10 Q. Let me see if I have this right.

11 A. Okay.

12 Q. The reason Mr. -- did Mr. Beauchamp tell you the
13 reason he was terminating the client?

14 A. Yeah. It was over the POM issues, that Denny
15 was not going to make the amendments -- that wasn't going
16 to amend the POM, or at least, you know, work with us to
17 amend it and -- or was going to try to get someone else to
18 do it or something, as though he didn't like already, in
19 the first draft, the issues we were spotting, he thought
20 it was not what he was going to prepare to do. And then
21 because of that said, well, for us to work on this, we are
22 going to have to do at least this, that's in this first
23 draft.

24 Q. I'm confused.

25 MR. DeWULF: I'm sorry?

DANIEL ALLEN SCHENCK, 6/19/2018

1 Q. (BY MR. CAMPBELL) Did you have a conversation
2 with Mr. Beauchamp that it would be securities fraud if
3 Mr. Chittick were to raise monies without a new POM?

4 MR. DEWULF: Object to form.

5 THE WITNESS: I don't know if he used those
6 exact words, but I do remember -- my understanding from
7 conversations with Mr. Beauchamp was that this needed to
8 be done, and if it wasn't done, then, yeah, it would be
9 noncompliant or maybe a securities violation, and that's
10 why we were insisting that something -- that it be done.

11 Q. (BY MR. CAMPBELL) All right. And then he came
12 to you and told you we are terminating our work for
13 DenSco?

14 A. Yes. But, again, the timing of it, it's -- I'm
15 not sure if I misspoke or misunderstood your question
16 before. That was after the POM was amended and after
17 Mr. Beauchamp had talked to Denny about it and Denny said
18 he was not going to follow our advice regarding the POM.

19 Q. This is all what Mr. Beauchamp told you?

20 A. Correct.

21 Q. Did you ask Mr. Beauchamp if he wrote a letter
22 setting all this out to Mr. Chittick?

23 A. I don't recall asking him that.

24 Q. Did you tell Mr. -- or talk to Mr. Beauchamp
25 about maybe it would be a good idea if we put this in

DANIEL ALLEN SCHENCK, 6/19/2018

1 A. Not on page 6, no.

2 Q. There is nothing in here about the dispute about
3 wiring money to the borrowers?

4 A. Not on page 6, no.

5 Q. There is nothing in here that wiring money to
6 the borrowers resulted in the fraud that resulted in the
7 Forbearance Agreement. True?

8 MR. DeWULF: Object to form.

9 THE WITNESS: Not on page 6.

10 Q. (BY MR. CAMPBELL) Is it somewhere else?

11 A. I -- to be honest, I don't know what this --
12 everything that's in this, like, 50-, 60-page document, I
13 can't recall what is or isn't in here right now.

14 MR. CAMPBELL: We don't have any further
15 questions.

16 MR. DeWULF: All right. Thanks.

17 VIDEOGRAPHER: The time is 3:24 p.m. This
18 concludes the deposition with media six.

19 (Deposition Exhibits No. 1 through 102 were
20 marked for identification.)

21 (3:24 p.m.)
22
23

24 -----
DANIEL ALLEN SCHENCK
25

DANIEL ALLEN SCHENCK, 6/19/2018

1 BE IT KNOWN that the foregoing proceeding was
2 taken before me; that the witness before testifying was
3 duly sworn by me to testify to the whole truth; that the
4 questions propounded to the witness and the answers of the
5 witness thereto were taken down by me in shorthand and
thereafter reduced to typewriting under my direction; that
the foregoing is a true and correct transcript of all
proceedings had upon the taking of said deposition, all
done to the best of my skill and ability.

6 I CERTIFY that I am in no way related to any of
7 the parties hereto nor am I in any way interested in the
outcome hereof.

8
9 ☐ Review and signature was requested.
10 ☐ Review and signature was waived.
11 ☒ Review and signature was not requested.

12 I CERTIFY that I have complied with the ethical
13 obligations in ACJA Sections 7-206(F)(3) and
14 7-206-(J)(1)(g)(1) and (2).

15 Kelly Sue Oglesby 7/3/2018
16 Kelly Sue Oglesby Date
17 Arizona Certified Reporter No. 50178

18 I CERTIFY that JD Reporting, Inc. has complied
19 with the ethical obligations in ACJA Sections
20 7-206(J)(1)(g)(1) and (6).

21 JD REPORTING, INC. 7/3/2018
22 Arizona Registered Reporting Firm R1012 Date
23
24
25

Exhibit D

1 John E. DeWulf (006850)
Marvin C. Ruth (024220)
2 Vidula U. Patki (030742)
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3 2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
4 T: (602) 224-0999
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5 jdewulf@cblawyers.com
mruth@cblawyers.com
6 vpatki@cblawyers.com

7 *Attorneys for Defendants*

8
9 **SUPERIOR COURT OF ARIZONA**
10 **COUNTY OF MARICOPA**

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

13 Plaintiff,

14 v.

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

17 Defendants.

No. CV2017-013832

**DEFENDANTS' INITIAL RULE 26.1
DISCLOSURE STATEMENT**

18 Defendants Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp
19 (collectively, "Defendants") provide this initial disclosure statement according to Arizona
20 Rule of Civil Procedure 26.1. Defendants reserve the right to amend or supplement this
21 disclosure statement as discovery progresses.

22 This case is in its infancy and thus the content of this disclosure statement is
23 preliminary and subject to supplementation, amendment, explanation, change and
24 amplification. Because the parties have just commenced discovery, there may be
25 information, documents, and materials related to the various allegations and defenses set forth
26 in the pleadings of which Defendants are presently unaware. Defendants note that they do

1 to be accompanied with a cover letter or other communication highlighting the major
2 material changes, including the double lien issue and resulting workout agreement, to ensure
3 that investors were fully informed. Mr. Chittick, however, refused to provide the necessary
4 information to complete the POM and refused to approve the description of the workout or
5 the double lien issue, despite his prior acknowledgement that he would need to make full
6 disclosure to all of his investors about DenSco (as he had been doing through POMs and
7 newsletters since 2003).

8 In May 2014, Mr. Beauchamp handed Mr. Chittick a physical copy of the draft POM
9 and asked him what Mr. Chittick's specific issues were with the disclosure. Mr. Chittick
10 responded that there was nothing wrong with the disclosure, he was simply not ready to make
11 any kind of disclosures to his investors at this stage. Mr. Beauchamp again explained that
12 Mr. Chittick had no choice in the matter and that he had a fiduciary duty to his investors to
13 make these disclosures. Mr. Chittick would not budge. Faced with an intransigent client
14 who was now acting contrary to the advice Mr. Beauchamp was providing, and with concerns
15 that Mr. Chittick may not have been providing any disclosures to anyone since January 2014,
16 Mr. Beauchamp informed Mr. Chittick that Beauchamp and Clark Hill could not and would
17 not represent DenSco any longer. Mr. Beauchamp also told Chittick that he would need to
18 retain new securities counsel, not only to provide the proper disclosure to DenSco's
19 investors, but to protect DenSco's rights under the forbearance agreement. Mr. Chittick
20 suggested that he had already started that process and was speaking with someone else.

21 Thereafter, Mr. Beauchamp and Clark Hill ceased providing DenSco with securities
22 advice. Mr. Chittick accepted that, but asked that Mr. Beauchamp clean up some small issues
23 with the forbearance agreement before ending the relationship entirely. Other than
24 addressing those small forbearance agreement issues in June and July, Clark Hill stopped
25 working with DenSco or Mr. Chittick in any capacity until 2016, when Mr. Chittick
26 requested that Mr. Beauchamp assist with a very limited issue involving an audit by the

1 Arizona Department of Financial Institutions - work Mr. Beauchamp had previously
2 performed for DenSco and that Mr. Chittick characteristically believed could be done most
3 cost-effectively by Mr. Beauchamp rather than by a new lawyer with no background on the
4 issue.

5 **G. Menaged continues to perpetrate fraud on DenSco, which only grows in**
6 **scale.**

7 During the time that he represented it regarding securities matters, Mr. Beauchamp (a)
8 repeatedly advised DenSco that it had to make full disclosure to its investors and then
9 terminated his relationship as securities counsel for DenSco when DenSco refused, (b)
10 explained that DenSco would need to retain new counsel after Mr. Beauchamp withdrew to
11 provide proper disclosures and monitor the forbearance, and (c) repeatedly reminded Mr.
12 Chittick that he needed to fund loans directly to a trustee or escrow company, rather than to
13 the borrower. Mr. Chittick ignored Mr. Beauchamp's advice. It is unclear if DenSco ever
14 engaged or even talked to new counsel. It appears Mr. Chittick never issued an updated POM,
15 a fact which could not have gone unnoticed by DenSco's sophisticated investors, who had
16 gotten used to regular updates from DenSco, not only through updated POMs, but through
17 monthly newsletters and periodic investor meetings. It is quite clear that Mr. Chittick
18 continued to loan funds directly to Menaged in direct contravention of Mr. Beauchamp's
19 repeated advice.

20 Nevertheless, the brazen scope of Menaged's efforts to defraud DenSco was not
21 foreseeable. After several years of bilking DenSco and others out of millions of dollars,
22 Menaged was eventually arrested. The United States Department of Justice first charged
23 Menaged with defrauding various banks through his purported furniture stores. Menaged used
24 fabricated receipts of purchases made at the furniture store to obtain credit from banks using
25 the names of, and personal identification information of, individuals who had recently died.
26 He would then incur millions of dollars in fraudulent charges on those fake

1 9. All pleadings, filings, minute entries, orders and judgments.

2 10. All deposition or hearing transcripts in the above captioned litigation.

3 11. All transcripts from any Section 341 creditor meetings, Rule 2004 examinations,
4 depositions, or hearings in Yomtov Menaged's bankruptcy pending in the United
5 States Bankruptcy Court for the District of Arizona at 2:16-bk-04268.

6 Defendants reserves the right to supplement the list of documents that may be relevant
7 as information becomes available.

8 **X. INSURANCE AGREEMENTS.**

9 Not applicable.

10
11 DATED this 9th day of March, 2018.
12

13 **COPPERSMITH BROCKELMAN PLC**

14
15 By: 

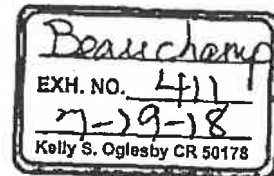
16 John E. DeWulf
17 Marvin C. Ruth
18 Vidula U. Patki
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
Attorneys for Defendants

19
20 **ORIGINAL** mailed and emailed this
9th day of March, 2018 to:

21 Colin F. Campbell, Esq.
22 Geoffrey M. T. Sturr, Esq.
23 Joshua M. Whitaker, Esq.
OSBORN MALEDON, P.A.
2929 N. Central Ave., Suite 2100
24 Phoenix, AZ 85012-2793
Attorneys for Plaintiff

25 
26

Exhibit E



From: Denny
To: Beauchamp, David G.
Subject: Re: How are You?
Date: Friday, March 13, 2015 7:58:31 PM

Sure, give me some options on when to meet

Sent from my iPad

On Mar 13, 2015, at 7:53 PM, Beauchamp, David G. <DBeauchamp@ClarkHill.com> wrote:

Denny:

I would like to meet for coffee or lunch (at no charge to you) so we can sit down and talk about how things have progressed for you since last year. I also would like to listen to you about your concerns, and frustrations with how the forbearance settlement and the documentation process was handled. I have thought back to it a lot and I have second guessed myself concerning several steps in the overall process, but I wanted to protect you as much as I could. When I felt that your frustration had reached a very high level, I stopped calling you about how things were going so that you did not feel I was just trying to add more attorneys fees. I planned to call you after about 30 days, but then I let it slip all of last year because I kept putting it off. I even have tried to write you several different emails. but I kept erasing them before I could send them.

I acknowledge that you were justifiably frustrated and upset with the expense and the how the other lenders (and Scott at times) seemed to go against you as you were trying to get things resolved last year for Scott. I have tried to let time pass so that we can discuss if you are willing to move beyond everything that happened and still work with me. If not, I would like you to know that I still respect you, what you have done and I would like to still consider you a friend. You stood up for Scott when he needed it and I truly believe it was more than just a business decision on your part.

Hopefully, you will respond to this email and we can try to talk and catch up.

All the best, David

David G. Beauchamp

CLARK HILL P.C.

14850 N Scottsdale Rd | Suite 500 | Scottsdale, Arizona 85254
480.684.1126 (direct) | 480.684.1166 (fax) | 602.319.6602 (cell)
dbeauchamp@clarkhill.com | www.clarkhill.com

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