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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 **REPLY IN SUPPORT OF PLAINTIFF'S MOTION THAT PLAINTIFF HAS MADE A PRIMA FACIE CASE FOR PUNITIVE DAMAGES** (Assigned to the Honorable Daniel Martin) (Oral Argument Requested)

Clark Hill's Response uses a great deal of text to fight the facts, urging that its gloss of certain facts would defeat a case for liability or punitive damages. There are many disputed facts, and, at the end of the day, a jury will resolve disputed facts. The Court's role here is different. Does the Receiver present sufficient facts that, if resolved by the jury in the Receiver's favor, would justify a claim for punitive damages. The Court does not resolve facts but determines whether there is a prima facie case to go to the jury.

Clark Hill makes two factual assertions that are key to the prima facie punitive damages claim and determining Clark Hill's role in aiding and abetting breaches of fiduciary duties: (1) that Beauchamp advised DenSco it could not take any investor money without making full disclosure and believed DenSco (through Chittick) made adequate disclosures to investors in and after January 2014; and (2) that Clark Hill fulfilled its mandatory ethical duty to withdraw from the representation in May 2014 when Clark Hill admits that it knew Chittick was selling securities without making material disclosures in a new Private Offering Memorandum. (*See* Response at 6 (arguing that oral advice of necessary disclosures shows there is not evidence of knowledge); at 7 (arguing that Clark Hill lacked knowledge of breach and did not assist in the breach because Clark Hill terminated representation when it learned of the breach); at 11 (arguing that Clark Hill cannot have assisted because "Beauchamp advised DenSco that it must disclose the double-lien issue" and "Chittick understood this advice"). This Reply focuses on these issues because Clark Hill's defense hinges on these assertions to dispute two elements of the underlying aiding and abetting claim: They argue their facts show that Clark Hill lacked knowledge of DenSco's breach of fiduciary duty and that Clark Hill did not assist in the breach of fiduciary duty.

If there are facts from which a jury can conclude that Clark Hill did *not* advise DenSco to stop raising money without full disclosure, and that Clark Hill did *not* withdraw from representing DenSco when it learned Chittick was causing DenSco to

sell securities without full disclosure in a new Private Offering Memorandum, those facts are sufficient for a prima facie case on punitive damages.

The Receiver contends that the jury will find that Beauchamp's and Clark Hill's version of facts on these issues (among others) are based on after-the-fact untruths that Clark Hill and Beauchamp invented after Mr. Chittick's suicide, when they knew serious liability claims may be coming, all part of a pattern of concealment of their total disregard of the rights of DenSco. (*See* Receiver SOF ¶¶ 263-64, 350-361.) The version of facts on which Clark Hill depends lacks credible evidence, much less evidence sufficient to conclusively rebut the Receiver's prima facie case for punitive damages.

If the jury agrees with the Receiver on these issues, then there is no doubt it could also reasonably find that the Receiver has proven its case for punitive damages. These acts and many others demonstrate how Clark Hill and Beauchamp substantially aided in Chittick's misconduct, disregarded blatant conflicts of interest between Chittick and DenSco, and "consciously disregard[ed] the unjustifiable substantial risk of significant harm" to DenSco. *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132 (App. 1995) (holding that evidence of a conscious disregard for client's rights, exposure of client to unjustifiable risks of liability, and concealment of conflict of interest were sufficient to show an "evil mind").

I. It is clear there is a prima facie case that Beauchamp failed to advise Chittick that DenSco could *not* take additional investor funds without full disclosure and that DenSco, at Chittick's direction, was in fact raising funds without full disclosure.

Clark Hill contends that Beauchamp (1) orally advised Chittick that DenSco could not sell securities (including rolling over existing, expiring promissory notes) without full disclosure of material facts, and (2) reasonably believed that Chittick was making full disclosure because Chittick told him he was. They concede the significance of the jury believing these assertions, arguing that these facts show that Beauchamp lacked knowledge that Chittick was breaching fiduciary duties he owed

DenSco by causing the Company to sell securities without proper disclosure. (Response at 6-7; *id.* at 11 (arguing that Beauchamp could not have assisted in DenSco's violation of securities law because "the defendant had no knowledge his client was raising money without disclosure").

The evidence set forth in the Receiver's Statement of Facts is more than enough to establish a prima facie case that Clark Hill's version of events is incorrect, and that Beauchamp was well aware that Chittick was causing DenSco to sell securities to investors without full disclosure, and that Beauchamp worked to protect Chittick (an officer who was breaching fiduciary duties he owed DenSco) rather than DenSco (his actual client), in securities law violations that exposed DenSco to ever mounting financial exposure. *See Hyatt Regency*, 184 Ariz. at 132 ("evil mind" established by evidence that in representing conflicted parties, lawyer "consciously disregarded" one party's rights and exposed that party "to unjustifiable risks of" liability).

Clark Hill's case depends on Beauchamp's deposition testimony. Clark Hill asserts: "[d]uring this time [January – February 2014], Mr. Chittick assured Mr. Beauchamp that he was making the necessary disclosures to investors providing new or rollover funds on an as-needed basis, and that he had informed a select group of investors about the double lien issue and the workout plan." (*See* DSOF ¶ 70.) The only evidence cited for that assertion is Beauchamp's deposition.

Clark Hill's litigation-era contention does not line up with the contemporaneous facts. There is this January 12, 2014 email exchange, where Chittick tells Beauchamp he "spent the day contacting every investor that has told me they want to give me more money," and that he will raise millions, and Beauchamp responds:

On Jan 12, 2014, at 9:33 PM, "Beauchamp, David G." <DBeauchamp@ClarkHill.com> wrote:

Denny:

Thank you for the update. You should feel very honored that you could raise that amount of money that quickly.

I will outline a few thoughts tomorrow and get back to you. Do you know the terms that Scott is having to give his investor?

Best, David

(Receiver SOF Ex. 129 (excerpt).) Rather than ask how Chittick could raise so much after disclosing the troubling circumstances of his improper and risky lending practices, or *anything* about the disclosures, Beauchamp congratulates Chittick for being able to extract so much, and continues helping him with the forbearance.

And there is Chittick's corporate journal, in which he writes in January 2014 that "I can raise money according to Dave." In February—well ***after*** the January 12 email above, and long after the only existing Private Offering Memorandum (POM) had expired—that Beauchamp "is telling me I have to tell my investors," and later in February that he and Beauchamp "talked about telling my investors; we are going to put that off as long as possible so that we can improve the situation as much as possible." (Receiver SOF Ex. 82 at RECEIVER_000045, 49, 51.) There is more, of course, laid out in the Receiver's Statement of Facts, but just these examples show that Clark Hill's actual conduct was different than it claims.

The Response states (at 7) that the January 12 email is "consistent" with Beauchamp advising that money could be raised with adequate disclosures. Suffice to say that the Receiver believes the jury will disagree, especially given that Chittick's email nowhere references disclosures. In any event, this explanation only underscores that the Receiver has made out a prima facie case—the jury can decide whether Clark Hill's story is believable.

As for the corporate journals, Clark Hill argues (at 7-8) that they should be ignored as "inadmissible." As shown in the Receiver's response to Defendants' motion in limine on that topic, among other things, these journal entries are plainly admissible under Rule 806 to impeach Clark Hill's use of Chittick as an out-of-court declarant. (*See* 6/28/2019 Response to Defendants' Mot. in Limine at pp. 4-5 and 12-13.)

Moreover, Clark Hill's suggestion that the various "red flags" that Beauchamp ignored do not show knowledge is unpersuasive. That argument ignores what Beauchamp ***knew***—not just what he failed to investigate. For example, the January 2014 demand letter on its face tells Beauchamp that Chittick ***already*** was not following

the 2011 POM and was already creating millions in exposure for DenSco as a result. (*See, e.g.*, Receiver SOF ¶ 172.)

II. There is no dispute that Clark Hill had a mandatory duty to withdraw in 2014, and the Receiver has made a prima facie showing that Clark Hill did not withdraw but instead helped Chittick in deliberate disregard of DenSco's interests.

The Response also concedes that the jury must believe that Clark Hill terminated its representation of DenSco in May 2014, since Clark Hill claims to have learned then that Chittick was causing DenSco to engage in securities fraud (*see* Response at 7 (arguing that alleged fact of withdrawal proves lack of knowledge of breaches of fiduciary duties)), and could not have continued representing DenSco once it learned of that fact. *See* Ariz. R. Sup. Ct. 42, ER 1.2(d) ("A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."); ER 1.16 (requiring lawyer to "withdraw from representation . . . if . . . the representation will result in violation of the Rules . . . or other law"); ER 4.1 ([A] lawyer shall not knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . .").

If a jury finds that Clark Hill did not, in fact terminate its representation of DenSco in May 2014, then the jury can only conclude that Clark Hill aided and abetted Chittick's breaches of the fiduciary duties he owed DenSco by causing DenSco to sell securities in violation of securities laws before and after May 2014.

Although Clark Hill argues its version of the facts, the Receiver has more than enough evidence to present to the jury the question of whether Clark Hill actually withdrew from representing DenSco. There is simply no corroborating evidence that Clark Hill withdrew. Rather than withdraw, Clark Hill agreed with Chittick to stop drafting a new POM, and gave DenSco a year or more to work out of its financial hole before making any disclosures to investors. (Receiver SOF ¶¶ 283-304.) If a jury reaches that conclusion, it can decide whether to impose punitive damages on Clark Hill for aiding and abetting Chittick's breaches of fiduciary duties owed DenSco, by causing

DenSco to continue selling securities in violation of securities law and taking other actions that were not in the Company's interest.

A. No documents support Defendants' story about withdrawal.

As fleshed out in the Receiver's Statement of Facts, the evidence shows that Clark Hill has not a shred of evidence for the termination—no note to the file, no email, no memo—other than the inconsistent self-serving statements made following Chittick's suicide and during this litigation. (*See* Receiver SOF ¶¶ 350-361; *see also* Receiver SOF Ex. 6 (Beauchamp Dep.) at p. 197:13-21 (testifying that Chittick told him "don't bother" sending a letter when asked why "there was not a single piece of writing in May of 2014" regarding termination).) The Receiver contends that is so because it did not occur.

In the Response, Clark Hill makes the illogical argument (at 9) that the lack of documentation of termination is not "clear and convincing" evidence of non-withdrawal. That is, Clark Hill contends that the Receiver needs to show documents to prove that some event did ***not*** take place. But it is Clark Hill who has asserted that some secret and undocumented termination took place without so much as a note to the file. The Receiver submits that Defendants' testimony on that point is simply not credible and, rather, is part of a pattern of concealment of their involvement with Chittick's breaches of duty owed to DenSco.

Moreover, the record shows that the absence of any documentation in this particular context is unusual and telling. Scott Rhodes, Clark Hill's expert and a former risk manager for a large law firm, concedes that when a matter has been completed, the best practice is that the client should be informed by a written communication. (*See* **Reply Ex. A** (Rhodes Dep.) at p. 33:6-24); *see* R. Mallen, Legal Malpractice (2019 ed.) at § 2.45 (a written disengagement letter is the best practice to resolve doubts about whether the attorney client relationship ceased). Neil Wertlieb states that based on custom and practice, "I would have expected under these circumstances that the Defendants would have communicated the fact of their withdrawal in writing to Mr.

Chittick, and would have also had some form of internal documentation with him." Wertlieb Report at page 24.

In fact, beyond merely documenting the withdrawal, this is the type of situation where a lawyer should make a so-called "noisy" withdrawal. (*See* **Reply Ex. A** (Rhodes Dep.) at pp. 96:21-101:18 (agreeing that Clark Hill could have made a "noisy" withdrawal if DenSco is committing securities fraud)). Clark Hill could contact investors to reveal the withdrawal and that investors should not rely on any POM prepared by Clark Hill/Beauchamp. (*Id.* at pp. 99:14-100:21.) *See* ER 1.2 Comment 11 ("In some cases withdrawal alone might be insufficient . . . In extreme cases, a lawyer may be required to disclose information relating to the representation to avoid being deemed to have assisted in the client's crime or fraud."); ER 1.13(c)(2) (If a violation is "reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation"). This is the "extreme" case. DenSco is selling securities using an outdated POM that Beauchamp prepared, and that Beauchamp knows is both expired and materially inaccurate. Although the parties' experts dispute whether a noisy withdrawal was ***required*** here, Clark Hill's failure to make a noisy withdrawal (and, indeed, the apparent failure to even consider it internally) is a fact from which the jury can infer there was no withdrawal at all.

The jury can also infer there was no withdrawal from the absence of documentation for other reasons. Beauchamp took notes of telephone calls with clients (and when Clark Hill believes they are helpful, they have cited them). There is not one contemporaneous note of a termination. In addition, Clark Hill continued to work on the forbearance agreement after the alleged termination, and continued to send bills with the same cover letter. The file has no mention of termination, and Clark Hill's file on the POM was never closed. Beauchamp says he talked with the general counsel, but the general counsel has no recollection of a discussion. Where the circumstances of securities fraud cry out for the lawyer to document the withdrawal, and to spell out what

the client is supposed to do to comply with the law in bold face type, the lack of a writing is a significant evidentiary fact

B. The documents corroborate that there was no withdrawal.

The deposition testimony on which Clark Hill relies cannot stand up to the documentary evidence the jury will receive. Beauchamp testified that he verbally advised Chittick about required disclosures and then terminated Clark Hill's representation of DenSco in a conversation with Chittick, and that Chittick acknowledged the termination, telling Beauchamp "don't bother, don't send me a letter." (*See* Receiver SOF Ex. 6 at p. 197:18-21.) But that claim, which is not supported by any document in Clark Hill's file, is at odds with Chittick's near-daily Corporate Journal and pre-suicide letters. (*See, e.g.*, Receiver SOF Ex. 136 at RECEIVER_0000 (2/21/2014 entry stating "I talked to Dave . . . We talked about telling my investors; we are going to put that off as long as possible so that we can improve the situation as much as possible"); Receiver SOF Ex. 38 (Iggy Letter) ("I talked my attorney in to (sic) allowing me to continue without notifying my investors. Shame on him."); Receiver SOF Ex. 138 (Investor Letter) ("David blessed this course of action."). These statements are admissible under Ariz. R. Evid. 806 to impeach statements that Beauchamp says Chittick made to him.

Beauchamp's conduct is also relevant evidence that the jury can consider. In March 2015—ten months after the alleged termination—Beauchamp emailed Chittick to invite him to lunch, an unusual request from a lawyer who now claims to have terminated the representation because Chittick refused to follow his advice. Beauchamp asked to meet to see "how things have progressed" and to "listen to your concerns and frustrations with how the forbearance settlement . . . was handled." He explained, "I second guessed myself concerning several steps in the overall process, but I wanted to protect you as much as I could." Beauchamp said, "I 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." (*See* Receiver SOF Ex. 135.) The email says nothing about

terminating a client who wouldn't follow advice, but instead praises Chittick for his actions.

Instead of confirming a 2014 withdrawal, this evidence shows that Clark Hill gave Chittick a year to work things out without a new POM or other adequate disclosure to investors. (*See, e.g.*, Receiver SOF Ex. 136 at RECEIVER_000102 (Corporate Journal entry stating "I got an email from Dave my attorney wanting to meet. **He gave me a year to straighten stuff out. We'll see what pressure I'm under to report now**.") (emphasis added).) Clark Hill's response (at 9-10) is conclusory: "the March 2015 email . . . is also not clear and convincing evidence that Mr. Beauchamp did not terminate the relationship in May 2014, nor does it warrant the conclusion that multiple attorneys are lying under oath." Maybe a jury will agree with Clark Hill's trial-testimony explanation. But the Receiver is entitled to have that question decided by the jury.

C. Daniel Schenck's testimony—offered to corroborate Beauchamp—is of little help to Clark Hill, and does not change that the evidence should go to the jury.

Looking for anything to corroborate Beauchamp's deposition, Clark Hill turns to the associate who worked with Beauchamp from time to time, Daniel Schenck. Clark Hill states (at 9) that "Schenck testified that Clark Hill terminated its representation of DenSco with regard to securities work in May 2014." It is no wonder they summarize rather than quote him. After testifying that Beauchamp told him they were "terminating" DenSco, he later testified on further reflection that he did not recall whether Beauchamp used the word "terminate the client or not," and it was not clear to him whether the firm was ceasing work on the POM or withdrawing from representation altogether. (*See* **Reply Ex. B** (Schenck Dep.) at pp. 118-121.)

This is weak corroboration. Schenck had no conversations with the client on the topic and was not part of the supposed conversations between Beauchamp and Chittick regarding termination. Instead, he was told to stop work on the POM and then told to continue other work on the forbearance agreement. This is consistent with what the

Receiver submits occurred: Clark Hill agreed to help Chittick dig out of his hole by delaying work on the POM while he knew Chittick continued causing DenSco to violate securities laws in breach of its fiduciary duties to investors.

III. There is ample evidence of Defendants' "evil mind."

The Response also contends that the Receiver cannot prove that Defendants acted with an "evil mind." The Reply will not engage in a tit-for-tat on the evidence on this point; the Statement of Facts presents ample evidence to allow a jury to find that Beauchamp and Clark Hill "engaged in aggravated and outrageous conduct with an evil mind" that caused greater harm. *Hyatt Regency*, 184 Ariz. at 132. As set out in the Motion and Statement of Facts, the jury can reasonably conclude that Beauchamp's actions helping with the forbearance agreement, failing to adequately advise DenSco and insist on full disclosure while money was being raised, failing to withdraw and instead giving Chittick even more time to execute the forbearance agreement, all while knowing that DenSco had violated and was violating its duties to investors, were all done "deliberately" and while "consciously disregarding the unjustifiable substantial risk of significant harm" to DenSco. *Hyatt Regency*, 184 Ariz. at 132.

The failure to withdraw in particular, despite the clear and apparent conflict of interest between Chittick and DenSco, and Chittick's clear failure to follow advice, is more than negligence. The failure to withdraw while continuing to help protect Chittick with the forbearance agreement was "so reckless and irresponsible that such conduct . . . constituted a gross departure from the standard of care." Wertlieb Report at 63. In other words, Beauchamp left his duties to DenSco behind and deliberately committed himself to protecting Chittick's and his own interests, hoping against all reason that Chittick could dig DenSco out of its hole by disregarding securities laws and continuing lax lending practices. This is just the sort of outrageous conduct by a lawyer that gives rise to punitive damages. *See Hyatt Regency*, 184 Ariz. at 132-33 (finding evidence sufficient to show an "evil mind" when lawyer represented conflicted parties without a

waiver, "consciously disregarded" one of the party's rights, concealed the conflict until it was too late).

Finally, the Response's arguments that the post-suicide conduct is irrelevant is unpersuasive. The post-suicide conduct—representing the Estate of Chittick and DenSco despite obvious conflicts, concealing the conflict, colluding with Estate lawyers to stall and conceal documents from the Receiver—is relevant, and is an additional ground on which the jury could award punitive damages. It shows that Beauchamp was willing to disregard DenSco's interests to protect his own and Clark Hill's. The jury should be allowed to determine if this conduct is outrageous and done with an "evil mind."

IV. Conclusion.

For the foregoing reasons, the Court should grant the Receiver's motion.

RESPECTFULLY SUBMITTED this 27th day of June, 2019.

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EXHIBIT A

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 SCOTT RHODES

Phoenix, Arizona
May 15, 2019
9:05 a.m.

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

Q. Okay. Under the Rules of Evidence, we can either read learned treatises into evidence, sometimes judge's allow the actual text to come in. But let me just read it to you. This is the first paragraph of Section 2:45.

"When a matter has been completed, the client should be so informed by written communication. This is sometimes inappropriately referred to as a 'disengagement' letter, which is the term that used to describe the premature termination of a representation, a topic discussed below. A better description of such a communication is a closed-file letter, also known as an end-of-engagement letter. The letter also should confirm that the client is not seeking further advice or representation regarding the concluded matter."

Did I read that correctly?

A. You did, yes.

Q. And that's certainly a best practice?

A. It is, and especially in the subject matter of the chapter, which is stated at the top, Preventing and Mitigating Legal Malpractice Claims.

Q. Right. And a risk manager at a law firm would certainly be aware of this. True?

A. Yes, I agree.

Q. All right.

rule, right --

A. That's correct.

Q. -- on what they have to do?

A. Yes.

Q. Because you want them to be good lawyers. True?

A. That's correct.

Q. All right. So you say first you have to look at subsection (b), "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interests of the organization," right?

A. Yes, that's -- and then I have to go on, because that rule is so long that it took several slides to fit it all in.

Q. All right. So you go to Exhibit No. 60 or 62, then, or page 62, and you talk about an "up the ladder" approach. Why don't you just describe for me what the ER 1.3 "up the ladder" approach is.

A. Sure. First of all, in the dense language that

you just read that's in this rule, it's actually one of the most poorly drafted rules of them all, it's just so dense, but if all of those things are met, so the lawyer knows that a constituent is intending to act in violation of the law or engage in illegal activity, or has already started and refuses to stop, or has already committed an act, and then it goes on from there. And also the lawyer has to know that the end result of that must be a potential substantial injury to the organization.

If you get through all of that part, then the lawyer has some things the lawyer has to do. And number one, which is why I referred back to ER 1.2 earlier, number one is under ER 1.2 is you consult with, you counsel that person, and you say either don't do that thing or stop doing it or fix what you have done.

If you try that, if the lawyer tries that and fails, then there -- you trigger what's called the "up the ladder" approach. And so that "up the ladder" approach is you see if there is somebody in a superior position to the bad actor to whom the lawyer can go and reveal the issues as they exist, the problem, the -- the conduct that's at issue, and ask that person, who has a superior authority, please use your authority to stop this or rectify it or fix the problem.

If that person refuses, then you see if there is

another rung in the ladder to go above that person's head. And then you continue to do that until you get to the highest level.

Q. And then turn to page 65.

A. Yes.

Q. "What if going up the ladder doesn't work?"

A. Right.

Q. Then you go back to the rule, right?

A. You do, to subsection (c).

Q. So describe for me what you do, pursuant to your PowerPoint here, if that doesn't work, going up the ladder.

A. Well, there are a couple things again, and this -- this rule is so dense, but let's say you have gone to the highest level within the organization and it hasn't worked. Then, in very unhelpful language, it says the lawyer shall do what the lawyer reasonably believes is in the best interests of the company in that situation. That can include -- it's discretionary, it's not mandatory, but that can include a disclosure of relevant information, if necessary, even if that would have violated the duty of confidentiality otherwise, ethical rule 1.6.

Q. All right.

A. And just to finish that thought, if the lawyer takes that rather extreme step of nobody in this

organization is listening to me, this conduct is ongoing, it's not mandatory, but if the lawyer decides I'm going to now disclose, the rule says you can only disclose the minimum amount necessary in order to accomplish the -- the objective.

Q. Let me give you a hypothetical.

A. Sure.

Q. Assume DenSco is going to commit securities fraud. Assume that DenSco is going to sell securities and give the buyer a 2011 Private Offering Memorandum prepared by Clark Hill that fails to disclose material facts.

Are you with me so far?

A. I am, yeah.

Q. And Mr. Beauchamp sends out an email to all the investors that he is aware of saying: I have withdrawn from representation. You should not rely on the 2011 Private Offering Memorandum that Clark Hill prepared in making any decisions.

Authorized by the rule?

MR. DeWULF: Can I have that back? I was trying to write them all down.

(The requested portion of the record was read.)

MR. DeWULF: Object to form.

THE WITNESS: To me, your question implies that Mr. Beauchamp knows that there are material

misrepresentations in the -- the 2011 Private Offering Memorandum has become materially false, and he knows that, which -- because that's why he is sending this letter.

Q. You have understood my question correctly.

A. Then with that clarification, yes, that's what's called a noisy withdrawal. That's the term that we use, and it's stated in a comment to the rules, that sometimes it typically happens in a securities context with a publicly traded corporation or entity where disclosures have been made to the Security and Exchange Commission that has the lawyer's name on it, and it's called a disavowal letter where the lawyer writes to the SEC and says I disavow my signature on such and such a document, which in the world of publicly traded corporations, I understand is very noisy. It gets investors' attention.

Your hypothetical is a little bit unusual in the sense that this is not in the SEC domain. It's Private Offering Memorandum, but it's the same concept. What it's basically saying is: I -- we prepared the Private Offering Memorandum. I have determined that I -- I no longer stand beside it.

Q. Is the noisy withdrawal sort of the equivalent of a public lawyer being a whistleblower sort of, or is that something entirely different?

A. Actually, I think there is a big difference

there. Because 1.13, as I pointed out before, says that whether or not Rule 1.6 permits such disclosure can happen, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury, and then goes on to say that the disclosure has to be to the minimum extent necessary, which -- and that explains why these disavowal letters are very short. All they say is I'm removing my signature from something. They don't say why. And that's the minimum nec -- extent necessary portion of it. At least that's how it's been interpreted.

So I think I have forgotten your question, but -- oh, a whistleblower to me implies that somebody is doing a lot more than that. They are going in and they are sitting down with someone saying I want to tell you all of the things I have discovered about my client or --

Q. So it's more than a noisy withdrawal?

A. More than a noisy withdrawal.

Q. Okay. Let me just see if there is something more on here.

So let's turn to paragraph or page 69 of your PowerPoint, and you talk about an ER 1.13 safety net.

What are you referring to here?

A. Well, not surprisingly, sometimes when a lawyer for an organization is caught in this quandary of knowing

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 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:

Q. You did do work, along with Mr. Beauchamp, on the Forbearance Agreement.

A. Is that a question?

Q. In June and July of 2014. Do you recall that?

A. Yeah, I do recall doing some more work on trying to clean up and wrap up the Forbearance Agreement. Again, trying to get ready to hand off to next counsel.

Q. Did Mr. Beauchamp come to you and say: We are not going to represent him on the POM, but we are going to continue to represent him on the Forbearance Agreement?

A. Like I said -- like I said, I don't recall that specificity with it. I do recall that we were not going to represent him with the POM, and I think I inferred from that that we weren't going to be working on other matters as well as he was hiring new counsel for everything, but then later on I was asked to do some cleanup work on the Forbearance Agreement.

Q. Well, I'm confused what Mr. Beauchamp told you.

Are you saying --

A. I'm saying I don't recall exactly what he told me.

Q. Okay. Well, do you recall exactly, sir --

A. No.

Q. -- that he said: We are terminating DenSco as a client?

A. As a client, as an across-the-board client, I don't recall that.

Q. Because you know that in truth and in fact, you continued to do work on the Forbearance Agreement, right?

A. Yeah, we later on did some more work on the Forbearance Agreement.

Q. Did he come to you and say: We just can't do anything more on the POM. Stop working on the POM?

A. Yeah. I wasn't doing more work on the POM. I was waiting for -- but, yeah, we are not doing any more work on the POM. It's not that I had, like, pending work or was continuing to work. I was waiting for a response on some of these questions and then would work on the next version of the draft.

Q. So he came to you and said: Just don't do any more work on the POM. There is going to be no next version?

A. I don't think he put it that way, but that we were not going to be representing him anymore with the POM at least.

Q. All right. But you were going to continue to represent them with respect to the workout part of it, the Forbearance Agreement?

A. I think I've answered that.

MR. DeWULF: Object to form.

THE WITNESS: I think I have answered that a couple of times, that I didn't -- I inferred that, but I didn't know.

Q. (BY MR. CAMPBELL) I'm sorry. You inferred that, but --

A. That I didn't know for sure what -- what we were going to do, work for them in the future, if anything. If the work that we were ceasing to do is limited just to the POM, or would we not do any work for them altogether, at that point in time was not clear to me.

Q. Let's go back to Exhibit 13. Actually, excuse me. Exhibit 12.

A. 12?

Q. 12.

Exhibit 12 is the billing memos for June, right?

A. Correct.

Q. And you will see that on the -- for the invoice for the workout of lien issue, both you and Mr. Beauchamp continued to bill time to the client in June of 2014, right?

A. Correct.

Q. And then if you turn to Exhibit No. 13, this is through July, you and Mr. Beauchamp continued to bill time to DenSco through July 15th, 2014. True?

A. Correct.

Q. And then actually turn to Exhibit No. 14. And here we are going to jump ahead to April of 2016, and you will see that Mr. Beauchamp is again representing DenSco, commencing in March of 2016?

MR. DeWULF: Object to form.

THE WITNESS: I see that there is a bill to DenSco for April of 2016.

Q. (BY MR. CAMPBELL) Were you aware that Mr. Beauchamp had started representing DenSco again in March of 2016?

A. I don't recall knowing that.

Q. Well, do you know he was representing DenSco up till the time of Mr. Chittick's death?

A. No.

MR. DeWULF: Object to form.

Q. (BY MR. CAMPBELL) Just so I'm clear, because you have told me that sometimes you don't have a recollection --

A. Correct.

Q. -- you do not have a recollection whether he used the word terminate the client or not, correct?

MR. DeWULF: Object to form.

THE WITNESS: Refer -- I do not have a recollection of using those words like that, no. He may have, but I don't recall it today.