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SUPERIOR COURT OF ARIZONA

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 **DEFENDANTS' REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE USE OF DOCUMENTS IDENTIFIED IN PLAINTIFF'S RULE OF EVIDENCE 807(b) NOTICES** (Assigned to the Honorable Daniel Martin)

In responding to the Motion in Limine to Preclude Use of Documents Identified in Plaintiff's Rule of Evidence 807(b) Notices (the "Motion"), the Receiver does not quibble with the appropriate standard to determine admissibility under Rule 807, which demands "exceptional guarantees of trustworthiness" for the proffered statements such that "adversarial testing would add little to their reliability." Motion at 6-7. Nor does the Receiver dispute that the Letters were written on the eve of Chittick's suicide and under extreme duress, or that they include patent lies intended to shield Chittick from blame for his poor business decisions. *Id.* at 7-11. The Receiver also does not dispute that the Letters and Journals are often vague, inconsistent, lack sufficient detail, and omit material information, particularly information that would tend to cast Chittick in a bad light. *Id.* at 11-16.

Instead, the Response largely asserts that (1) the Motion is premature notwithstanding the expansive discovery already obtained and the Receiver's reliance on these statements in support of his substantive motions, (2) other evidentiary rules outside the scope of the Motion may apply, and (3) the Letters and Journals corroborate the "existing evidence that Clark Hill did not terminate DenSco," a reformulation of the issue that is precisely backwards. The question is not whether the Receiver's interpretation of Chittick's statements corroborates his theory of the case, but whether other evidence imbues the documents with an exceptional guaranty that the hearsay is trustworthy.

The Court can determine now, before trial, that the Journals and Letters are not admissible pursuant to the catchall hearsay exception. That is the evidentiary issue raised in the Motion, and the Court has all the information it needs to determine that the Journals and Letters do not meet Rule 807(a)'s stringent requirements.

I. It is not premature to determine the evidentiary issue raised in the Motion in Limine.

The Receiver submitted his first Notice stating his intent to rely on the Rule 807 residual hearsay provision within weeks of Defendants filing their Answer. Since then, the parties have produced and reviewed tens of thousands of pages of documents (including communications involving Mr. Beauchamp, Chittick, Menaged, and DenSco's investors) and attended the

depositions of dozens of witnesses, including Mr. Beauchamp's and three other Clark Hill attorneys. There is no remaining discovery to be done regarding the legal advice Defendants provided DenSco.

Further, the Receiver has filed a substantive motion that relies on the Journals and Letters. On April 12, 2019, the Receiver filed a Motion for Determination that Plaintiff Has Made a Prima Facie Case for Punitive Damages (the "Punitive Damages Motion"). In support of that motion, the Receiver asserts that Defendants advised Chittick not to disclose material information to investors, advised him to continue lending money directly to Menaged, and failed to terminate the attorney-client relationship thereby aiding Chittick's breach of his fiduciary duty. Those allegations all rely heavily on statements and purported omissions in the Journals and Letters. *See e.g.*, Punitive Damages Motion at 10, 13, 15-16; Plaintiff's SOF in Support of Punitive Damages Motion at ¶¶ 277, 281, 283, 295, 303-304, 318, 325-329. The Punitive Damages Motion is also supported by the Receiver's expert's report, which is likewise premised in part on the Journals and Letters. *See e.g.* Exh. A to Punitive Damages Motion at footnotes 65, 82, 87, 96-98, 107, 108, 249. In short, the admissibility of those documents, and the statements regarding Defendants' advice therein, is directly at issue *now* and the information necessary to corroborate (or not) those statements is already in the hands of the parties. Although the documents are inadmissible *in toto*, this Reply will focus on the allegations regarding Defendants' advice that the Receiver uses to justify punitive damages.

II. The journals and suicide letters are not admissible pursuant to Rule 807

A. The Letters are still not admissible under Rule 807

In support of the punitive damages motion, the Receiver argues that Defendants caused the Second Fraud, asserting that "Beauchamp later advised Chittick that DenSco could continue wiring money to Menaged, trusting Menaged to pay the loan proceeds to a Trustee, so long as Menaged provided written confirmation that he had done so." Punitive Damages SOF at ¶ 318. There are no emails (either with Beauchamp or Menaged), notes, memos, or

any other documentation that would support that claim. Notably, the Receiver does not cite to any. Instead, the Receiver cites *solely to Chittick's Letters*, and his assertions that:

- "I talked to Dave about this in January [2014] and he was in agreement with it as long as I received copies of checks and receipts showing that I was paying the trustee." *Id.* at ¶ 318(a), and
- "All the other lenders wouldn't lend to him. I needed to make money now more than ever before. We went to Dave, and he gave me some constraints on how we were to operate…I received copies of checks made out to trustees, receipts from the trustees." *Id.* at ¶ 318(b).

But again, there is nothing to corroborate these statements and the Receiver does not identify any. Not even the "business" diaries, which the Receiver asserts constitute a regular record of business activity, make any mention of this alleged advice.

The Receiver also relies on the Letters to argue that Beauchamp advised DenSco that it could raise investor funds without making material disclosures:

- Beauchamp "let me get the workout signed[,] not tell the investors[,] and try to fix the problem," *Id.* at ¶ 326
- I "talked Dave …into allowing me to continue without notifying my investors. Shame on him." *Id.* at ¶ 327
- "Dave…negotiated the work out agreement and endorsed the plan." *Id.* at ¶328.
- "Dave blessed this course of action." *Id.* at ¶ 325.

Once again, there is nothing to corroborate these allegations of a desperate man, who was trying to "justify [his] actions]" (Ex. C at 24426) prior to taking his life—not in the hundreds of email communications between Chittick and Mr. Beauchamp and not in the thousands of communications between Chittick and Menaged. This, despite several communications between Chittick and Menaged regarding DenSco's disclosure obligations.

Further, and as set forth in the Motion, the Letters as a whole are demonstrably untrustworthy.[1] Chittick used the Letters to blame his investors for his poor business decisions, claiming he had informed them about his reckless lending practices and that he had obtained their approval to hand Menaged half of DenSco's money. Those are blatant fabrications, which the Receiver does not dispute. Motion at 9. Thus, although the Receiver acknowledges Chittick lied when he claimed his investors blessed his reckless lending, he nevertheless wants this Court to find Chittick's subsequent claim that his lawyer blessed his reckless lending to be truthful enough for the jury to consider as evidence. It is not.

Chittick also used the Letters to assert that he had done everything in his power to save DenSco, including giving DenSco all of his free money. That is also a blatant fabrication. Motion at 11. To the contrary, Chittick attempted to save his investment in his sinking ship starting in 2014, by removing millions of dollars from DenSco. *Id.* The Receiver does not dispute that these assertions are false.[2] He does, however, ask the Court to ignore that lie as well, while focusing on the similarly uncorroborated allegations about Chittick's lawyer.

The bottom line is that additional evidence will not change the circumstances under which the Letters were created: pre-suicide in a effort to control the narrative. The Letters are

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[1] Chittick also notes in the Journals and Letters, among other things, that his mind is going "crazy" and is "unclear," that he can "barely think straight," and that his writing is "incoherent." *See* Motion at 7-8, n. 5, 6. Not surprisingly, suicide letters are inherently untrustworthy. *See id*. at 9; *People v. Shortridge*, 480 N.E.2d 1080, 1084 (Ct. App. N.Y. 1985) (father's mental and emotional stability were rather dubious, not the least by reason of his own admission…and his committing suicide within days of his writing the letters…there can be no doubt that admission of the father's letters, and other conversations, as declarations against penal interest would have constituted an abuse of discretion on the part of the trial court).

[2] Indeed, the Receiver filed a notice of claim against Chittick's estate asserting that Chittick committed fraud and breached fiduciary duties by taking millions of his money out of DenSco while it was insolvent. *See* Exh. A.

categorically untrustworthy and parsing them sentence by sentence during trial is unnecessary and impractical. The Court should preclude their admission under Rule 807.

B. The Journals are still not admissible under Rule 807

The Receiver utilizes the Journals to accuse Mr. Beauchamp of advising Chittick he could raise money from DenSco's investors for years without disclosing DenSco's failings. For example:

- February 7, 2014, "I was on the phone with David and [Menaged] off and on…Now David is telling me I have to tell my investors." Punitive Damages SOF at ¶ 277.
- March 11, 2014, "David changed and said now I have to tell my investors."
- July 2, 2014, "we are making progress, just too damn slow, but I'm sure much quicker than David expected us to." *Id.* at ¶ 295(a);
- July 25, 2014, "my time is running out on updating my private placement memorandum and notifying my investors." *Id.* at ¶ 295(b);
- July 31, 2014, "As long as David doesn't bug me, I feel like we are doing the right thing." *Id.* at ¶ 295(c)
- March 13, 2015, "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." *Id.* at ¶ 301
- March 25, 2015, "[Dave] was thrilled to know where we were at…He said he would give me 90 days….I'm going to slow down the whole memorandum process too. Give us as much time as possible to get things in order." *Id.* at ¶ 303[3]

As set forth in the Motion, these entries are incomplete (they fail to set forth documented advice Beauchamp actually provided, but that Chittick ignored), self-serving (at no point does Chittick log an explanation for his decision to lend more than $30 million to Menaged, or explain the various schemes he and Menaged put in place to make money), vague (it is impossible to determine what Chittick may have meant by several of these entries), inconsistent, and

[3] Similar additional ambiguous accusations and omissions are included in the Notices. *See e.g.*, First Notice at ¶ 7 – "I can raise money according to Dave"; at ¶ 10 – "I emailed and call[e]d David, he approved."

uncorroborated. Motion at 12-16. There is no evidence to suggest Beauchamp told Chittick he could take his investors' money for a year without making any disclosures, and the Receiver does not offer any. Absent such corroboration, these hearsay statements cannot be presented as evidence.[4]

The Receiver makes one attempt to demonstrate corroboration. He submits a lengthy recitation of all the facts that purportedly demonstrate Defendants failed to terminate the attorney-client relationship with DenSco, and thereby aided and abetted Chittick's ongoing breaches of fiduciary duty. Response at 2-4, 7-9. As part of his "evidence," the Receiver cites to Chittick's March 13 and March 24, 2015 journal entries regarding a lunch meeting between Mr. Beauchamp and Chittick:

- March 13, 2015, "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."
- March 24, 2015, "I had lunch with Dave Beauchamp. I was nervous he was going to put a lot of pressure on me. However, he was thrilled to know where we were at and I told him by April 15th, we'll be down to 16 properties…and by the end of June we hope to have all the retail houses sold by then…He said he would give me 90 days. I just hope we can sell them all by then…I'm going to slow down the whole memorandum process too. Give us as much time as possible to get things in better order."

The Receiver argues that these entries are evidence that Beauchamp never fired DenSco, and that there is "unquestionable corroboration" because Beauchamp admits a meeting took place during which he asked how the work out under the forbearance agreement was progressing. Resp. at 8. The Receiver, however, is not proposing to use these entries to establish whether a meeting took place; Mr. Beauchamp has acknowledged that from the start. Instead, the Receiver wants use these entries because of the statements, express and implied, that Beauchamp purportedly advised Chittick he could wait a year before making disclosures to

[4] While the Receiver claims that Mr. Beauchamp's testimony is likewise "uncorroborated," *the Receiver can cross examine Mr. Beauchamp* as to his communications. Defendants are not afforded that same opportunity with respect to Chittick's self-serving accusations.

investors. There is nothing, however, to corroborate *that* allegation. There is not even a prior journal entry suggesting such an arrangement, and Mr. Beauchamp has categorically denied it.[5] To the contrary, to the extent the journals can be believed, Beauchamp told Chittick in February that he needed to disclose to investors (Beauchamp has consistently testified that he made clear to Chittick from the beginning that he needed to disclose to DenSco investors, and that he could not raise money until he did so). Instead, the Receiver's argument is essentially that the Receiver does not believe Mr. Beauchamp terminated the relationship, and the Journal entries are consistent with that belief. Resp. at 5. But that is not the test for admissibility.

The Receiver argues that the journal entry must be true because Chittick had no reason to lie in his "business" diary. *See e.g.*, Resp. at 9. For one, and as set forth in the Motion, having "no reason to lie"," does "not amount to a circumstantial guarantee of trustworthiness." Motion at 7 n.4 (citing cases). But of course, Chittick had every reason to shape the truth. Chittick knew Menaged had double-liened properties with DenSco funds starting in 2012. Yet Chittick did nothing to secure his investor's money. Instead, he lent Menaged extraordinary sums in direct contravention of the promises DenSco made to its investors. As the Receiver himself has asserted, Chittick committed fraud by violating his promises to his investors, then raising money from them "*despite his actual knowledge of the fraud by Menaged*." *See* Receiver's Notice of Claim attached hereto as Exh. A. It does not take a leap of faith to see that Chittick would attempt to evade that reality in a secret diary that is almost exclusively focused on Chittick's increasing shame that his own poor business practices led to DenSco's demise. The Journal and its entries are not admissible under Rule 807.

[5] The Receiver also claims this allegation is supported by contemporaneous emails, but the only one the Receiver cites to is an email where Chittick writes to Menaged that "I figure it's a miracle he left me alone this long." That statement, however, could also be read to support Defendants' testimony that Beauchamp fired a friend that he had as a client for a decade, and was now checking on him. Defendants understand that the Receiver disagrees with that interpretation, but that is precisely why litigants cannot introduce uncorroborated hearsay into evidence.

III. Evidentiary Rules 803(6)-(7) and 804(b)(3) are inapplicable

The Receiver argues that various other evidentiary rules may allow for some limited use of the Journals and Letters. While those evidentiary rules are outside the scope of the relief requested in the Motion—a finding that the Journals and Letters are untrustworthy—the Court may still dispose of several of these newly proffered hearsay exceptions right now.

A. The Journals are not admissible as business records pursuant to Rule 803(6)-(7).

For the Journals to be admissible as a "business record," Plaintiff must show:

> (A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The Journals fail on all counts. Most critically, in order to qualify for the 803(6) hearsay exception, the conditions in Rule 803(6)(A)-(C) *must* be met and those conditions *must* be shown "by the testimony of the custodian or another qualified witness." Ariz. R. Evid., Rule 803(6)(D); *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 360–61, 701 P.2d 851, 856–57 (App. 1985) (the records must be introduced through the testimony of a custodian who can be cross-examined concerning the methods of preparation, the qualifications of the preparer, and other relevant matters.") Absent such testimony, there is "no rational basis on which the trial court could evaluate the accuracy and trustworthiness of the reports." *Id.*; *see also State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 n.1 (1982) (business records exception did not apply because there was no supporting testimony from a qualified witness).

Here, there is no witness who can testify that the conditions in subsections (A)-(C) of Rule 803(6) are met. The Receiver argues that metadata might show the location and time the

journal entries were made. Resp. at 13. No such metadata has been disclosed, however, and even if such metadata existed, there is still no one with actual knowledge to testify as to what purported "business" information was recorded, or what type of information Chittick chose to include or omit and why, etc.

That is fatal, because, on their face, the Journals are not "business" records. While Chittick may have regularly written *something*, the Journals, unlike the records at issue in *McPartlin* (cited by Receiver at 15-16 of the Response), are not impartial records of business meetings, calls, or transactions. Instead, the Journals are haphazard, often vague, and subjective personal reflections regarding Chittick's involvement with Menaged, more akin to a personal diary than a business record.[6] Absent testimony regarding the nature of the Journals' creation, the business record exception does not apply.[7]

[6] For example, the Receiver correctly points out that some of the journal entries concern the amounts DenSco received from investors or loaned to a particular borrower on a given day. Resp. at 13. The Journals, however, do not regularly record these transactions, it is unclear why some are and some are not, and in any event, there is more probative evidence regarding DenSco's transaction history—DenSco's Quickbooks records.

[7] As set forth in the Motion, Defendants have made a sufficient showing under 803(6)(E) that the "source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Arizona courts have recognized that "[t]rustworthiness is the cornerstone of Rule 803 exceptions to the hearsay rule." *State v. Bass*, 198 Ariz. 571, 579, 12 P.3d 796, 804 (2000) (excluding evidence under the excited utterance subsection because the hearsay witness "possessed good reason and motive to remove responsibility for the accident from herself and to deflect it elsewhere … [t]he credibility of the hearsay witness was thus in question due to her possible responsibility in causing the accident.").

B. The Journals and Letters are not admissible as statements against interest pursuant to Rule 804(b)(3).

The Receiver mistakenly asserts that certain statements made by Chittick in the Journals and Letters are statements against Chittick's pecuniary interest, and thus fall within the Rule 804(b)(3) hearsay exception.

For one, the Letters are suicide notes, and the contents of suicide notes are not admissible statements against interest because the declarant knows at the time he is writing them that he will not personally face any pecuniary or penal ramifications due to his imminent death. *See U.S. v. Angleton*, 269 F. Supp. 2d 878, 889 (S.D. Tex. 2003) (notes written just before declarant's suicide would not subject declarant to criminal liability so exception did not apply); *U.S. v. Lemonakis*, 485 F.2d 941, 957 n. 24 (D.C. Cir. 1973) (suicide note inadmissible, and stating that the penal interest "is an interest of no moment to a dead man"); *U.S. v. Crowder*, 848 F. Supp. 780, 781–82 (M.D. Tenn. 1994) (statements by terminally ill patient not statements against interest where defendant knew he would not live long enough to suffer consequences from statements). Because Chittick was actively planning his suicide at the time he crafted the Letters, the Letters are not subject to the Rule 804(b)(3) hearsay exception.

Further, while Plaintiff's argument (at 15) does not specify the portions of the Journals and Letters that are purportedly against Chittick's interest, most of the statements regarding Defendants that Plaintiff seeks to admit are an attempt to deflect blame to others, including Beauchamp. Plaintiff cites (at 7) *Williamson* and *Crawford*, both of which narrowly construed Rule 804(b)(3) to admit only the portions of confessions that were actually inculpatory. Chittick's vague assertions, however, that his lawyer "blessed" or "endorsed" certain undefined "plan[s]" or "action[s]", or that Beauchamp told him "I can raise money," are not actually inculpatory. It is simply not against Chittick's interest to point the finger at Beauchamp to clear himself. Rule 804(b)(3) does not save Chittick's uncorroborated accusations regarding Defendants' alleged legal advice.

C. The Journals and Letters are not admissible under Rule 705

The Receiver also argues (at 14) that he will be permitted to ask Defendants' experts on cross-examination why they did not rely on inherently unreliable documents in forming their opinions, on the basis that Rule 705 requires an expert to disclose the underlying facts and data on which the opinion is based. However, where an expert has only read, but does not necessarily rely on, a document in forming an opinion, that material is not admissible pursuant to Rule 705. *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 400, 949 P.2d 56, 60 (App. 1997) (rejecting "attempt[] to introduce substantive evidence under the guise of impeachment." As *Cervantes* noted and cautioned, "t]hrough their proposed cross-examination of [the expert], defendants essentially were attempting to elicit hearsay evidence of facts for substantive purposes, when those facts were not relevant to that expert's area of expertise or opinions." *Id*. at 401, 949 P.2d at 61. Defendants acknowledge that a ruling on this issue is premature, pending the testimony of the experts.[8] Plainly, however, an expert's review of a document does not give the Receiver the ability to put otherwise prejudicial hearsay statements before the jury.

IV. Conclusion

The Defendants respectfully request that the Court rule that the Journals and Letters identified in the Notices (and the excerpts therefrom) are not admissible under the residual hearsay exception in Rule 807(a). The Defendants also request that the Court rule that the Journals and Letters are not admissible as statements against interest under Rule 804(b)(3) or business records under Rule 803(6)-(7).

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[8] Defendants likewise acknowledge that it is premature for the Court to consider whether portions of the Journals and Letters may be admissible for a non-hearsay purpose or under Rule 806. Of course, the statements may still be inadmissible pursuant various other evidentiary rules, including Rule 403 ("court may exclude relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice"). Again, the Motion was limited to Rule 807.

DATED this 29th day of August, 2019.

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