

1 **GUTTILLA MURPHY ANDERSON**

2 **Ryan W. Anderson** (Ariz. No. 020974)
3 5415 E. High St., Suite 200
4 Phoenix, Arizona 85054
5 Email: randerson@gamlaw.com
6 Phone: (480) 304-8300
7 Fax: (480) 304-8301

8 Attorneys for the Receiver

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

ARIZONA CORPORATION)
COMMISSION,)

Plaintiff,)

v.)

DENSCO INVESTMENT)
CORPORATION, an Arizona)
corporation,)

Defendant.)

Cause No. CV2016-014142

REPLY IN SUPPORT OF

PETITION NO. 48

PETITION FOR RECONSIDERATION)
OF THE ORDER APPOINTING)
RECEIVER WITH RESPECT TO)
ALLEGED JOINT ATTORNEY CLIENT)
PRIVILEGE)

(Assigned to the
Honorable Teresa Sanders)

Peter S. Davis, as the court appointed Receiver of DenSco Investment Corporation (“Receiver”), respectfully submits the following memorandum to respond to the arguments made by the Chittick Estate in its Response and Sur-Response to Petition No. 48.

1 **I. The Receivership Order Gave the Receiver the Unqualified Right to File This**
2 **Petition.**

3 The Estate argues that the Receiver is unable to object to the Privilege Provision of
4 the Court’s Order Appointing Receiver because he has allegedly waived his right to do so.
5 Response at 5-6.

6 But as the Receiver noted in the Petition, the Order Appointing Receiver expressly
7 authorized the Receiver “to apply to this Court . . . for issuance of such other orders as may
8 be necessary and appropriate,” such as the pending request that the Court revisit the Privilege
9 Provision of that Order. Petition at 5. There is no time limitation for such applications, nor
10 could there be, since the Receiver is “a ministerial officer of the court who acts under the
11 appointing court’s authority,” *Mahni v. Foster ex. Rel. County of Maricopa*, 234 Ariz. 522,
12 527, ¶ 19, 323 P.2d 1173, 1178 (App. 2014), and is entitled to seek periodic guidance from
13 the Court.

14 The Estate’s reliance on Rule 46 of the Rules of Civil Procedure is misplaced. That
15 rule is part of the rules applicable to trials (Rules of Civil Procedure, Section VI, Rules 38-
16 53) and “merely abolishes the unnecessarily formalistic procedure of requiring counsel to
17 take an ‘exception’ to rulings and orders of the Court [during trial] to preserve an objection
18 for appeal.” Daniel J. McAuliffe & Shirley J. McAuliffe, *Arizona Civil Rules Handbook*
19 (2017 ed.) at 598. It has no application here.

20 This Court’s review of the Privileged Provision of the Order Appointing Receiver is
21 especially warranted because, as the Petition established, and the Estate does not dispute,
neither Judge Bustamante nor the ACC had a meaningful opportunity to consider, much less

1 critically assess, the Estate’s claim that a joint privilege existed. Petition at 2-3. The claim
2 was made in the Estate’s written “Recommendations Re Receiver and Attorney/Client
3 Privilege” (the “Recommendations”), which was handed to Judge Bustamante and the
4 ACC’s counsel at the outset of the August 18, 2016 hearing, and was the subject of only
5 passing discussion during the hearing, most of which was devoted to the selection of a
6 receiver. Moreover, the Receiver had not been appointed when those discussions occurred.

7 **II. The Privilege Provision of the Order Appointing Receiver Impedes the Receiver’s**
8 **Ability to Pursue Claims Against Clark Hill and Beauchamp.**

9 The Estate claims to be “puzzled” by the Receiver’s filing of the Petition and disputes
10 the Receiver’s contention that the Privilege Provision of the Order Appointing Receiver
11 impedes his pursuit of claims against Clark Hill and Beauchamp. Response at 2.

12 But as the Petition explained, the Privilege Provision of the Order Appointing
13 Receiver effectively requires Special Counsel to obtain the Estate’s consent to disclose in
14 litigation privileged communications that DenSco had with Beauchamp and the law firms
15 with which he was affiliated. Petition at 5, ¶ 14. One of the claims Special Counsel is
16 pursuing is a claim that Clark Hill and Beauchamp aided and abetted Denny Chittick breach
17 fiduciary duties owed DenSco. The Privilege Provision is an impediment to the Receiver’s
18 pursuit of that claim because it gives the Estate, which as noted below disputes that Chittick
19 breached his fiduciary duties to DenSco, the ability to impede the claim by asserting that
20 relevant documents are subject to a joint privilege and cannot be used to support the claim.
21

1 The impact of the Privilege Provision on the Receiver’s pursuit of claims against
2 Clark Hill and Beauchamp did not become evident until after Special Counsel prepared and
3 filed a complaint on October 17, 2017. It was only then that Special Counsel reviewed the
4 Estate’s privilege log, which asserted that virtually *all* communications Beauchamp had with
5 Chittick regarding DenSco are subject to an alleged joint privilege, which the Estate claims
6 the Receiver cannot waive without the Estate’s permission.¹

7 The Receiver timely brought this Petition to remove the impediment created by the
8 inclusion of the Privilege Provision in the Order Appointing Receiver. If the Privilege
9 Provision is not removed from the Order, Special Counsel will have to regularly confer with
10 the Estate about whether specific documents are covered by the alleged joint privilege and, if
11 no agreement can be reached, seek relief from this Court. That would both impede the
12 pursuit of the Receiver’s claims against Clark Hill and Beauchamp and unnecessarily burden
13 this Court.

14 **III. The Petition Identified Two Fatal Deficiencies in the Estate’s Joint Privilege**
15 **Argument that the Estate Failed to Address in its Response and Sur-Response.**

16 As the Petition noted, the joint privilege argument that the Estate presented to Judge
17 Bustamante rested on the Estate’s factual contention that “Chittick retained Beauchamp on
18 behalf of both DenSco *and* himself in his individual capacity.” Petition at 6 (quoting
19 Recommendations at 5:22-23) (emphasis in original). The Estate’s legal argument rested

20 ¹ To cite just one example of the breadth of the Estate’s “joint privilege” claim, the
21 Estate’s privilege log includes Exhibit D to the Petition, Clark Hill’s September 15, 2016
engagement letter, even though that letter states that Clark Hill was only representing
DenSco *and expressly disclaimed any separate representation of Chittick.*

1 exclusively on Section 75(1) of the Restatement (Third) of the Law Governing Lawyers.
2 Petition at 6-7 (citing Recommendations at 6:9-21).

3 **A. The Estate Has No Evidence That DenSco, Chittick, Beauchamp and his**
4 **Various Law Firms Each Understood and Agreed that DenSco and**
5 **Chittick Were “Co-Clients.”**

6 The Petition demonstrated that the Estate’s claim that “Chittick retained Beauchamp
7 on behalf of both DenSco *and* himself in his individual capacity” was at odds with evidence
8 the Receiver has obtained since August 18, 2016. Petition at 7-9. That evidence included an
9 August 10, 2016 letter Beauchamp wrote to the ACC in which he expressly denied ever
10 having represented Chittick, and Clark Hill’s September 2013 engagement letter, which
11 similarly identified DenSco as the firm’s only client and disclaimed any representation of
12 Chittick. *Id.* at 8-9.

13 In its Response, the Estate points to the Beauchamp declaration the Estate attached to
14 the Recommendations. Response at 4. But the declaration does not support the Estate’s
15 claim to Judge Bustamante that “Chittick retained Beauchamp on behalf of both DenSco *and*
16 himself in his individual capacity.” Rather, the Declaration merely confirms that Chittick, as
17 DenSco’s sole employee, retained Beauchamp to prepare securities offerings that DenSco
18 issued to its investors, and that the private offering memoranda Beauchamp prepared
19 “routinely stated that [he] was acting as counsel for not only DenSco but its president Mr.
20 Chittick and that [he] was not the counsel for any investors who were all urged to seek
21 separate counsel.” Beauchamp Declaration, Exhibit 5 to Recommendations, attached as
Exhibit B to Petition, ¶¶ 2, 4.

1 As the Petition noted, neither the declaration nor any other evidence the Receiver has
2 obtained meets the requirement, set forth in comment c to Restatement § 75, that a “co-client”
3 relationship be proven by evidence that two clients “have expressly or impliedly agreed to
4 common representation in which confidential information will be shared.” Petition at 9.²

5 The Estate did not present such evidence in its Response and Sur-Response – either in
6 the form of a supplemental declaration from Beauchamp or a written confirmation of the
7 alleged joint representation – because no such evidence exists. Instead, the Estate shifts
8 course and attaches documents purportedly evidencing Chittick’s subjective belief that he
9 was represented by Beauchamp in his individual capacity. But that evidence is beside the
10 point and need not be considered by the Court because it does not support the claim the Estate
11 made to Judge Bustamante – that DenSco, Chittick, Beauchamp and his various law firms all
12 understood and agreed that DenSco and Chittick, in his individual capacity and not as an
13 officer of DenSco, were “co-clients.”

14 **B. Even if the Estate Could Prove that DenSco and Chittick In His Individual**
15 **Capacity Were Once “Co-Clients,” it Can No Longer Rely on Restatement**
16 **§ 75, Because the Interests of the Receiver and the Estate Have Been**
17 **Adverse Since December 2016.**

18 The Court does not need to make a factual determination now as to whether DenSco
19 and Chittick, in his individual capacity, were in fact “co-clients,” as the Estate told Judge
20 Bustamante. That is because the sole legal authority the Estate relied upon in asking that the

21 ² The statement in Beauchamp’s declaration that, as part of his retention by DenSco to prepare securities offerings, he prepared documents which referenced advice he may have given Chittick in his capacity as DenSco’s president, does not evidence an agreement to jointly represent DenSco and Chittick in his individual capacity.

1 Privilege Provision to be included in the Order Appointing Receiver – Restatement § 75(1) –
2 is no longer applicable.

3 In its August 2016 Recommendations, the Estate relied on Restatement § 75(1) for the
4 proposition that “one co-client may *not* waive the privileged for communications relating to
5 the other co-client without prior consent.” Petition at 7 (quoting Recommendations at 6:9-
6 15). But as the Petition pointed out, Restatement § 75(2) provides that the joint privilege for
7 co-clients is inapplicable “in a subsequent adverse proceeding between them.” *Id.* As
8 comment e states, “in the absence of an agreement with co-clients to the contrary, each co-
9 client may waive the privilege with respect to that co-client’s own communications with the
10 lawyer, so long as the communication relates only to the communicating and waiving client.”
11 Because the interests of the Receiver and the Estate have been, and continue to be, adverse,
12 Restatement § 75(1) no longer provides a legal basis for the Privilege Provision. *Id.* at 10.

13 The interests of the Receiver and the Estate have been adverse since at least December
14 2016. That is when the Receiver filed a claim in probate court which asserted, inter alia, that
15 Chittick breached fiduciary duties owed DenSco when, after learning in November 2013 that
16 Scott Menaged had defrauded DenSco, he caused DenSco to continue accepting money from
17 investors and make additional loans to Menaged and his related entities. The Estate has
18 disputed that claim and formally denied it in February 2017. Although the Receiver and the
19 Estate have reached a settlement, the interests of the Receiver and the Estate remain adverse,
20 since the Receiver continues to allege, through Special Counsel, that Chittick breached
21

1 fiduciary duties owed Chittick and was aided and abetted by Clark Hill and Beauchamp in
2 doing so.

3 In short, the legal authority for the Privilege Provision of the Order Appointing
4 Receiver, Restatement § 75(1), has been inapplicable since at least December 2016, given the
5 adversity between the Receiver and the Estate. Under the express terms of Restatement §
6 75(2), the Receiver is free to waive any “joint privilege,” even if the Estate could prove that a
7 co-client relationship once existed, which the Estate cannot. The Privilege Provision is thus
8 superfluous and should be stricken. The Estate failed to address the Receiver’s argument in
9 its Response or Sur-Response and should be deemed to have conceded this point.

10 **IV. Conclusion.**

11 The Court should grant the Petition and strike the Privileged Provision from the Order
12 Appointing Receiver because the Privileged Provision was expressly premised on
13 Restatement § 75(1), which is no longer applicable, even if the Estate could present evidence
14 establishing that DenSco and Chittick in his individual capacity were, in fact, “co-clients.”
15 Granting the Petition will remove an unnecessary impediment to the Receiver’s ability to
16 pursue claims against Clark Hill and Beauchamp. Doing so would not compromise the
17 Estate’s ability to protect from disclosure any privileged communications Chittick may have
18 had with Beauchamp in his individual capacity. As the Petition noted, and the Estate does not
19 dispute, the Estate may do so by identifying and claiming as privileged documents evidencing
20 Chittick’s communications with Beauchamp that were made in Chittick’s individual capacity
21 and not in his capacity as an officer and director of DenSco. Petition at 10 (citing

MASTER SERVICE LIST

Arizona Corporation Commission v. DenSco Investment Corporation
IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
CV2016-014142
(Revised December 20, 2017)

The Honorable Teresa Sanders
Maricopa County Superior Court
East Court Building
101 West Jefferson, Room 811
Phoenix, Arizona 85003

Wendy L. Coy
Arizona Corporation Commission
1300 West Washington
Phoenix, AZ 85007-2929
wcoy@azcc.gov
Attorney for Plaintiffs

Peter S. Davis, Receiver
Densco Receivership
Simon Consulting, LLC
The Great American Tower
3200 North Central, Suite 2460
Phoenix, Arizona 85012

James F. Polese
Christopher L. Hering
Gammage & Burnham, P.L.C.
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004
JPolese@gblaw.com
Attorney for the Estate of Denny Chittick
and Densco Investment Corporation

Ryan W. Anderson
Guttilla Murphy Anderson, P.C.
5415 East High St., Ste. 200
Phoenix, Arizona 85054
randerson@gamlaw.com
Attorney for the Receiver

Steven D. Nemecek
Steve Brown & Associates
1414 East Indian School
Suite 200
Phoenix, Arizona 85014
snemecek@sjbrownlaw.com
Attorney for Chapter 7
Trustee Jill H. Ford

Elizabeth S. Fella
Quarles & Brady, LLP
One S. Church Avenue,
Suite 1700
Tucson, Arizona 85701
elizabeth.fella@quarles.com
Attorney for Claimants

Carlos M. Arboleda
Arboleda Brechner
4545 East Shea Boulevard, Suite 120
Phoenix, Arizona 85028
carboleda@abfirm.com
Attorney for PAJ Fund, I, LLC

Sanford J. Germaine
SANFORD J. GERMAINE, PC
4040 East Camelback Road, Suite 110
Phoenix, Arizona 85018
sgermaine@germaine-law.com
Attorney for Transamerican Capital,
LLC

Yomtov Scott Menaged
USM number: 74322408
CAFCC
P.O. Box 6300
Florence, Arizona 85132

Daniel J. Goulding
General Counsel
Quality Loan Service Corp.
411 Ivy Street
San Diego, California 92101
dgoulding@qualityloan.com
Counsel for Quality Loan Service Corp.