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8 Attorneys for the Receiver

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

10 IN AND FOR MARICOPA COUNTY

11 ARIZONA CORPORATION  
12 COMMISSION,

Plaintiff,

v.

13 DENSCO INVESTMENT  
14 CORPORATION, an Arizona  
15 corporation,

Defendant.

Cause No. CV2016-014142

PETITION NO. 102

PETITION FOR ORDER TO APPROVE  
THE ENGAGEMENT OF OSBORN  
MALEDON, P.A. TO REPRESENT THE  
RECEIVER AS SPECIAL COUNSEL

(Assigned to the Honorable John Hannah)

16 Peter S. Davis, as the court appointed Receiver, respectfully petitions the Court for an  
17 Order approving the engagement of Osborn Maledon, P.A., as Special Counsel to the  
18 Receiver, as follows:

19 1. On August 18, 2016, this Court entered its *Order Appointing Receiver*, which  
20 appointed Peter S. Davis as Receiver of DenSco Investment Corporation (“Receivership  
21 Order”).

2. During the administration of the Receivership, the Receiver determined that  
DenSco held significant claims against financial institutions including JP Morgan Chase  
Bank, N.A and U.S. Bank N.A for their participation in a scheme to defraud DenSco.

1           3.     The Receivership Order authorizes the Receiver to, among other things,  
2 employ attorneys and other professionals that are necessary and proper for the collection,  
3 preservation and maintenance of the Receivership Assets. [See ¶16 of the Receivership  
4 Order]

5           4.     On October 18, 2017, the Court approved the engagement agreement between  
6 the law firm of Bergin, Frakes, Smalley & Oberholtzer, PLLC (“Bergin Frakes”) as Special  
7 Counsel to the Receiver. [See Order Re: Petition No. 36.] Under the terms of the  
8 engagement agreement between the Receiver and Bergin Frakes, Bergin Frakes agreed to be  
9 compensated on a contingency fee basis with a sliding scale for the potential contingency  
10 fee. Specifically, Bergin Frakes would be compensated Thirty-three and one-third percent  
11 (33.33%) of any gross recovery between \$00.00 and \$6,000,000.00; Twenty-Five percent  
12 (25%) of any gross recovery between \$6,000,000.00 and \$12,000,000.00; Fifteen percent  
13 (15%) of any gross recovery between \$12,000,000.00 and \$20,000,000.00; and ten percent  
14 (10%) of any gross recovery above \$20,000,000.00.

15           5.     On August 16, 2019, Bergin Frakes filed a lawsuit on behalf of the Receiver  
16 entitled *Davis v. U.S. Bank, N.A., et al*, Case No. CV2019-011499, Ariz. Super., Maricopa  
17 County (the “Lawsuit”) to prosecute DenSco’s claims against U.S. Bank, Chase Bank and  
18 others. Currently, the Lawsuit has entered the discovery phase of litigation with Answers to  
19 the Lawsuit being filed recently.

20           6.     The Receiver has determined that the prosecution of the Lawsuit would benefit  
21 from the expertise of the lawyers (and other professionals) at Osborn Maledon, P.A., which

1 has significant experience in the area of civil litigation and previously served as the  
2 Receiver's Special Counsel in the DenSco receivership. The Receiver has therefore  
3 determined that Osborn Maledon, P.A. should substitute for Bergin Frakes as his counsel in  
4 the Lawsuit and prosecute the Lawsuit to conclusion.

5 7. Osborn Maledon, P.A., has agreed to serve as Special Counsel pursuant to the  
6 terms of the Engagement Agreement as set forth in Exhibit 'A'. Pursuant to the Engagement  
7 Agreement, Osborn Maledon, P.A., will substitute for Bergin Frakes in prosecuting the  
8 Lawsuit on a contingency fee basis. Specifically, Osborn Maledon, P.A., has agreed to be  
9 compensated thirty-three and one-third percent (33.33%) of any gross recovery prior to the  
10 filing of a joint pretrial statement; and forty percent (40%) of any gross recovery after the  
11 filing of a joint pretrial statement and the setting of a trial date.

12 8. The Receiver believes that the contingency fee is reasonable in light of the  
13 substantial experience of the professionals at Osborn Maledon, P.A. and the status of the  
14 Lawsuit.

15 9. Pursuant to the terms of the engagement agreement between the Receiver and  
16 Bergin Frakes, should the Lawsuit be concluded by settlement or a judgment in the  
17 Receiver's favor, the Receiver shall pay to Bergin Frakes a fee that fairly represents the  
18 value of Bergin Frakes legal services, taking into account all the facts and circumstances,  
19 including the fee specified in the engagement agreement between the Receiver and Bergin  
20 Frakes, the status of the litigation at the time of the termination, and the pro rata division of  
21 time between Bergin Frakes and Osborn Maledon, P.A.

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WHEREFORE, the Receiver respectfully requests that the Court enter an order:

1. Appointing the law firm of Osborn Maledon, P.A., as special counsel to the Receiver; and
2. Approving the engagement agreement with the law firm of Osborn Maledon, P.A., attached as Exhibit “A”;

Respectfully submitted this 21st day of October 2020.

GUTTILLA MURPHY ANDERSON, P.C.

/s/Ryan W. Anderson  
Ryan W. Anderson  
Attorneys for the Receiver

2359-001(410171)

# **EXHIBIT A**

**FEE AGREEMENT  
OSBORN MALEDON, P.A.**

The law firm of OSBORN MALEDON, P.A. (“Attorneys”), agrees to represent Peter S. Davis, as Receiver of DenSco Investment Corporation (hereinafter “DenSco”), in pursuing through trial or settlement claims DenSco has asserted against Chase Bank and US Bank in Maricopa County Superior Court Case, Davis vs U.S Bank et al No. CV 2019-011499. Attorneys will substitute in and replace the law firm of Bergin, Frakes, Smalley and Oberholzer PLLC in that action.

**1. Contingent Fee.** Attorneys shall be paid a contingent fee. Client agrees to pay and assign to Attorneys:

(1) Thirty-three and one third percent (33 1/3%) of any gross recovery prior to the filing of a joint pretrial statement; and

(2) Forty percent (40%) of any gross recovery after the filing of a joint pretrial statement and the setting of a trial date.

The term “gross recovery” shall mean actual receipt by Client (or its representatives) of the proceeds of a settlement, a court or arbitration award and/or a jury verdict; and the gross recovery is “obtained” either on receipt or on the date on which there is an enforceable settlement agreement with any Defendant or other relevant person or entity.

Any award of attorneys’ fees, if allowed and ordered by the Court, will be included in calculating the gross recovery.

Except as provided in Paragraph 8 below, attorneys’ fees, expenses and costs will be payable only out of recovery, and if no recovery is obtained, no fees or costs shall be payable to Attorneys.

Attorneys agree that any recovery shall be paid to the Receiver, and Receiver shall pay any attorneys’ fees and costs directly to the Attorneys upon approval by the Court.

Client agrees that the attorneys’ fee calculated shall be a lien on any amount recovered, by settlement or otherwise.

Attorneys acknowledge that pursuant to Client’s Fee Agreement with the law firm of Bergin, Frakes, Smalley and Oberholzer PLLC, a fee will be owed to the law firm of Bergin, Frakes, Smalley and Oberholzer PLLC and any amounts paid to the law firm of Bergin, Frakes, Smalley and Oberholzer PLLC shall be paid from the Attorney’s Contingent Fee as set forth above.

**2. Approval by Court.** Attorneys acknowledge that as a Court-supervised Receivership, any payment of attorneys’ fees and costs must be approved by the Court. Attorneys will co-operate with the Receiver in any petition for fees and costs.

**3. Appeal.** Attorneys shall respond to any appeal or special action filed by an adverse party. Attorneys shall initiate any appeal or special action requested by the Receiver.

**4. Expenses.** Under the ethical rules governing lawyers and lawsuits in Arizona, Attorneys are allowed to, and hereby agree to, advance the expenses of representation. Expenses advanced by Attorneys, and not otherwise reimbursed to Attorneys, for example by a recovery of taxable costs, shall be deducted from Client's share of the amount recovered. If nothing is recovered, then Client shall not have to reimburse Attorneys for any expenses advanced.

Attorneys agree to work directly with Client regarding selection of expert witnesses, setting schedules and tasks for expert witnesses, along with budgets and reviews.

**5. Expenses includes Taxable Costs.** In the event that the case is litigated to a judgment, Client may, if the Client prevails, recover "taxable costs." Taxable costs include such items as filing fees, and the costs of depositions, subpoenas, etc. Any taxable costs recovered shall be used to reimburse Attorneys for the taxable costs and expenses which they have advanced in the course of the litigation, and will not become part of the gross amount recovered.

**6. Withdrawal.** Attorneys may withdraw as counsel for Client at any time upon giving reasonable notice. This Agreement may also be terminated at any time by Client before settlement or ultimate recovery after reasonable notice to Attorneys.

If this Agreement is terminated by Attorneys for no cause before settlement or ultimate recovery, no fees shall be payable to Attorneys. In the event that Attorneys withdraw for good cause, then the Attorneys shall be paid, from any recovery the Receiver should ultimately obtain, their ordinary hourly rates for work performed up to the time of their withdrawal. If Client and Attorneys cannot agree on the issue of good cause, then that issue shall be determined in a single arbitrator arbitration conducted according to the commercial arbitration rules of the American Arbitration Association, in confidential proceedings. The result of the Arbitration will be submitted to the Court for approval, and the parties agree that the Court may review the result as to the reasonableness of the hourly fees awarded.

If this Agreement is terminated by Client before settlement or ultimate recovery, Client agrees to pay to Attorneys from any recovery ultimately obtained a fee that fairly represents the value of Attorneys services, taking into account all the facts and circumstances, including the fee specified in this agreement, the status of the litigation at the time of the termination, and the pro rata division of time between Attorneys and any subsequent law firm. If disputed, that fee shall be set by the Court.


**7. Settlement.** No settlement shall be binding without the consent of Client, and the approval of the Court.

**8. Requirement of Reasonableness and Court approval.** Pursuant to ER 1.5, Rule 42, Rules of the Arizona Superior Court, Attorneys will review any fees to assure that the fees are reasonable in light of the factors set forth in ER 1.5, and will adjust their fees to the extent necessary to assure that they are reasonable and comport with ER 1.5.


Pursuant to the Receivership Order, the Court must approve the reasonableness of all attorneys' fees and costs and expenses. No attorneys' fees, costs or expenses shall be paid until approved by the Receiver and the Court.

**9. Retention of Documents.** In the course of the representation, Attorneys are likely to come into possession of copies or originals of documents or other materials belonging to Client or others. Once the particular matter to which those materials relate has been concluded, Attorneys will have no further responsibility to maintain such materials unless expressly agreed otherwise. If Client has not sought the return of such materials within one year of the closing of the matter to which such materials relate, Attorneys may destroy such materials in accordance with their normal file retention policies.

Dated this 15th day of October, 2020.

  
\_\_\_\_\_  
Peter S. Davis, Receiver

OSBORN MALEDON P.A.

  
By \_\_\_\_\_  
Colin F. Campbell

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