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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

**PLAINTIFF'S CONTROVERTING  
STATEMENT OF FACTS AND  
ADDITIONAL FACTS, IN  
OPPOSITION TO DEFENDANTS'  
CROSS-MOTION FOR SUMMARY  
JUDGMENT ON *IN PARI DELICTO***

(Assigned to the Honorable  
Daniel Martin)

(Oral Argument Requested)

1 Pursuant to Rule 56(c) of the Arizona Rules of Civil Procedure, the Receiver  
2 responds to Defendants' Statement of Facts in Support of their Response and Cross-  
3 Motion for Summary Judgment on *In Pari Delicto*, by:

- 4 · Identifying which of Defendants' 59 fact paragraphs are controverted, precluding  
5 summary judgment in favor of Defendants (CSOF ¶¶ 1-59), and  
6
- 7 · Identifying additional facts that further establish a genuine dispute, precluding  
8 summary judgment in favor of Defendants (CSOF ¶¶ 60-144).

9 These fact disputes pertain only to Defendants' motion for summary judgment, not the  
10 Receiver's motion for partial summary judgment. This is because the Receiver's motion  
11 raises a pure legal question (*Can in pari delicto bar the Receiver from presenting his*  
12 *damages claims to a jury?*) whereas Defendants' motion raises a fact-intensive question  
13 (*Does in pari delicto bar the Receiver from presenting his damages claims to a jury?*).  
14

15 **PLAINTIFF'S CONTROVERTING STATEMENT OF FACTS**

16 (CSOF ¶¶ 1-59)

17 **DSOF ¶ 1:** DenSco Investment Corporation ("DenSco") is a company that was  
18 solely owned and managed by Denny Chittick. DenSco began operations in 2001 and  
19 operated continually until Mr. Chittick's suicide in late July 2016. DenSco did not have  
20 any directors, officers, or employees other than Mr. Chittick. DSOF Exh. 1, 2011  
21 DenSco Private Offering Memorandum at BC\_002921 and BC\_002960.  
22

23 **Receiver's Response (CSOF ¶ 1): Undisputed.**

24 **DSOF ¶ 2:** Denny Chittick worked at Insight Enterprises, Inc. for 10 years,  
25 holding positions in finance and accounting, and culminating in position of Senior Vice  
26 President and Chief Information Officer when he left the company in 1997. DSOF Exh.  
27 1, 2011 POM at BC\_002960.  
28

1           **Receiver’s Response (CSOF ¶ 2): Controverted in part.** The statement in  
2 DSOF ¶ 2 slightly mischaracterizes the evidence. According to the evidence cited in  
3 DSOF ¶ 2, Chittick worked at Insight Enterprises, Inc. for “nearly 10 years.” See DSOF  
4 Exh. 1, 2011 POM at BC\_002960.

5           **DSOF ¶ 3:** DenSco focused on the “hard money lending” business in Arizona.  
6 DenSco made high interest short-term loans to borrowers, who used DenSco’s funds to  
7 buy residential properties. The purchasers generally improved the properties (with  
8 physical improvements or by placing renters in them) and then “flipped” them quickly  
9 at a profit. DSOF Exh. 1, 2011 DenSco Private Offering Memorandum at BC\_002924.

10           **Receiver’s Response (CSOF ¶ 3): Undisputed.**

11           **DSOF ¶ 4:** DenSco financed its business by raising money from investors.  
12 DenSco issued general obligation notes at interest rates that varied depending on the  
13 maturity date. The notes were not directly tied to or secured by any specific properties  
14 DenSco was financing, or by any other security. DSOF Exh. 1, 2011 DenSco Private  
15 Offering Memorandum at BC\_002945.

16           **Receiver’s Response (CSOF ¶ 4): Undisputed.**

17           **DSOF ¶ 5:** DenSco made certain representations to its investors, many of which  
18 were included in Private Offering Memoranda that DenSco provided to its investors  
19 every other year. Those representations included, among other things, that DenSco  
20 intended to minimize risk by (1) not lending more than 10-15% of its portfolio to any  
21 one borrower and (2) ensuring that its loans would be secured by a first position deed of  
22 trust on the property the borrower purchased. DSOF Exh. 1, 2011 DenSco Private  
23 Offering Memorandum at BC\_002957.

24           **Receiver’s Response (CSOF ¶ 5): Controverted.** The Receiver disputes that  
25 DenSco provided Private Offering Memoranda (POMs) to investors “every other year.”  
26 Although DenSco provided POMs to investors in 2003, 2005, 2007, 2009, and 2011, it  
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1 did not provide POMs to investors thereafter. This was because DenSco relied on its  
2 counsel, Beauchamp, to draft POMs, and Beauchamp failed to do this after 2011, despite  
3 knowing that many of the representations in the 2011 POM became untrue and therefore  
4 exposed DenSco to civil and criminal liability. *See* CSOF ¶¶ 62-84, 85-86 below.  
5 Instead of drafting an updated POM and ensuring that DenSco made adequate  
6 disclosures to investors, Beauchamp advised Chittick to have DenSco continue raising  
7 money from investors and enter into an arrangement with Menaged that would delay  
8 disclosures to investors and cover up Beauchamp’s own negligence in failing to draft an  
9 updated POM. *See* CSOF ¶¶ 87-115 below.

10 The Receiver does not dispute that the 2011 POM, which is the only evidence  
11 cited in DSOF ¶ 5, contained the two specific representations identified in DSOF ¶ 5,  
12 *See* DSOF Exh. 1, 2011 DenSco Private Offering Memorandum at BC\_002957. The  
13 Receiver affirmatively asserts that the 2011 POM contained other representations as  
14 well, including that DenSco intended to minimize risk by having a loan to value ratio of  
15 50% to 65%. *See id.* The Receiver affirmatively asserts that Beauchamp was aware of  
16 these and other representations in the 2011 POM and was aware that they became  
17 untrue, yet did not draft an updated POM and instead advised Chittick to have DenSco  
18 pursue a course of action that violated those representations and delayed further  
19 disclosures to investors. *See* CSOF ¶¶ 62-115 below.

20 **DSOF ¶ 6:** Rather than provide the funds for a borrower to purchase money at  
21 a trustee’s sale directly to the trustee, DenSco chose to fund its loans directly to its  
22 borrowers, including Yomtov Menaged and his entities. DSOF Exh. 2, January 7, 2014  
23 email from Chittick to Beauchamp at CH\_0005791.

24 **Receiver’s Response (CSOF ¶ 6): Controverted in part.** The statement that  
25 DenSco funded its loans directly to “its borrowers” is ambiguous. If the statement  
26 means that DenSco funded *all* its loans directly to *all* its borrowers, the Receiver  
27 disputes the statement, and the evidence cited in DSOF ¶ 6 does not support it. *See*  
28

1 DSOF Exh. 2, January 7, 2014 email from Chittick to Beauchamp at CH\_0005791. If,  
2 however, the statement merely means that DenSco funded *some* of its loans directly to  
3 *some* of its borrowers, including Menaged, the Receiver does not dispute it.

4  
5 **DSOF ¶ 7:** DenSco’s form of mortgage expressly stated that DenSco was  
6 delivering its funds payable only to the trustee. DSOF Exh. 3, Jan. 21, 2014 email from  
7 Chittick to Schenk attaching loan documents at CH\_0001418.

8 **Receiver’s Response (CSOF ¶ 7): Controverted in part.** The statement in  
9 DSOF ¶ 7 slightly mischaracterizes the evidence. According to the evidence cited in  
10 DSOF ¶ 7, DenSco’s form of mortgage simply stated that DenSco was delivering funds  
11 “as evidenced by check payable to” the trustee. *See* DSOF Exh. 3, Jan. 21, 2014 email  
12 from Chittick to Schenk attaching loan documents at CH\_0001418.

13 The Receiver affirmatively asserts that Beauchamp was aware of the statements  
14 made in DenSco’s form of mortgage because Beauchamp had advised DenSco regarding  
15 its lending practices and documents. *See CSOF Ex. 2* (Wertlieb report) at 14; *see also*  
16 CSOF ¶ 127 below.

17 **DSOF ¶ 8:** Prior to DenSco, Chittick worked with Scott Gould and Robert  
18 Koehler at a hard money lender called Real Estate Equity. Gould and Koehler mentored  
19 Chittick in hard money lending. DSOF Exh. 4, Gould Depo. Tr. at 50:23-51:19; DSOF  
20 Exh. 5, Koehler Depo. Tr. at 41:6-42:20, 43:16-44:8.

21 **Receiver’s Response (CSOF ¶ 8): Objection: Irrelevant. Also:**  
22 **Controverted in part.** The statements in DSOF ¶ 8 mischaracterize the evidence.  
23 According to the evidence cited in DSOF ¶ 8, Chittick did not “work” “at” Real Estate  
24 Equity. He was an investor in that entity, not an employee. *See* DSOF Exh. 4, Gould  
25 Depo. Tr. at 50:14-51:16; DSOF Exh. 5, Koehler Depo. Tr. at 41:6-42:25.

26 Gould and Koehler, in contrast, were employees. To the extent they “mentored”  
27 Chittick, they were not providing legal advice or even assisting a co-worker. They were  
28

1 showing an investor how the business worked from their perspective. *See* DSOF Exh.  
2 4, Gould Depo. Tr. at 50:23-51:19; DSOF Exh. 5, Koehler Depo. Tr. at 41:23-43:22.

3  
4 **DSOF ¶ 9:** Scott Gould was a consultant for DenSco from approximately 2001,  
5 when DenSco was formed, through 2008. DSOF Exh. 4, Gould Depo. Tr. at 23:5-24:13;  
6 30:16-24.

7 **Receiver’s Response (CSOF ¶ 9): Objection: Irrelevant.** The Receiver  
8 affirmatively asserts that the transactions relevant to this lawsuit occurred after 2008,  
9 when, according to DSOF ¶ 9, Gould was no longer a consultant for DenSco. Moreover,  
10 Gould was not a lawyer and was not providing legal advice. Gould described his  
11 “consulting relationship” with Chittick in the early 2000s as simply “exposing Denny  
12 [Chittick] to different opportunity.” *See* DSOF Exh. 4, Gould Depo. Tr. at 24:6-8.

13 The Receiver affirmatively asserts that providing legal advice was Beauchamp’s  
14 role, not Gould’s. *See, e.g.*, CSOF ¶ 62 below, and citations therein. And Beauchamp  
15 did provide legal advice, which Chittick followed. *See, e.g.*, CSOF ¶¶ 115, 133 below.

16 **DSOF ¶ 10:** Scott Gould worked with DenSco to increase the diversity of its  
17 borrower base. This was a “heavy part of [Gould’s] guidance to DenSco” because he  
18 “really thought that diversification was so important.” DSOF Exh. 4, Gould Depo. Tr.  
19 at 50:6-13.

20 **Receiver’s Response (CSOF ¶ 10): Objection: Irrelevant.** The Receiver  
21 affirmatively asserts that the transactions relevant to this lawsuit occurred after 2008,  
22 when, according to DSOF ¶ 9, Gould was no longer a consultant for DenSco. Moreover,  
23 Gould was not a lawyer and was not providing legal advice. Gould specified that the  
24 reason he thought “diversification was so important” was simply that one “never  
25 know[s] who was going to die when and what happens.” *See* DSOF Exh. 4, Gould  
26 Depo. Tr. at 50:6-13.

1           The Receiver affirmatively asserts that providing legal advice was Beauchamp’s  
2 role, not Gould’s. *See, e.g.*, CSOF ¶ 62 below. And Beauchamp did provide legal  
3 advice, which Chittick followed. *See, e.g.*, CSOF ¶¶ 115, 133 below.

4           **DSOF ¶ 11:** Scott Gould, who had a prior issue with regulatory bodies regarding  
5 disclosure issues, conveyed the importance and significance of compliance with  
6 regulatory bodies and securities laws with “everyone I’ve dealt with,” including Chittick  
7 and Koehler. DSOF Exh. 4, Gould Depo. Tr. at 72:12-24.

8           **Receiver’s Response (CSOF ¶ 11): Objection: Irrelevant, vague, and**  
9 **incomplete.** The Receiver affirmatively asserts that the transactions relevant to this  
10 lawsuit occurred after 2008, when, according to DSOF ¶ 9, Gould was no longer a  
11 consultant for DenSco. Moreover, Gould was not a lawyer and was not providing legal  
12 advice. Moreover, the evidence cited in DSOF ¶ 11 does not specify what Gould told  
13 Chittick or whether they ever discussed any particular securities laws. DSOF Exh. 4,  
14 Gould Depo. Tr. at 72:12-24.

15           The Receiver affirmatively asserts that providing legal advice—especially on the  
16 subject of compliance with securities laws—was Beauchamp’s role, not Gould’s. *See,*  
17 *e.g.*, CSOF ¶ 62 below. And Beauchamp did provide legal advice, which Chittick  
18 followed. *See, e.g.*, CSOF ¶¶ 115, 133 below.

19           **DSOF ¶ 12:** Scott Gould discussed with Chittick the importance of disclosure  
20 of material information to investors and Chittick understood the importance of making  
21 such disclosures and complying with securities laws. DSOF Exh. 4, Gould Depo. Tr. at  
22 72:18-73:7.

23           **Receiver’s Response (CSOF ¶ 12): Objection: Irrelevant, vague, and**  
24 **incomplete.** The Receiver affirmatively asserts that the transactions relevant to this  
25 lawsuit occurred after 2008, when, according to DSOF ¶ 9, Gould was no longer a  
26 consultant for DenSco. Moreover, Gould was not a lawyer and was not providing legal  
27 advice. Moreover, the evidence cited in DSOF ¶ 12 does not specify what Gould told  
28

1 Chittick, whether they ever discussed any particular types of disclosures, whether they  
2 ever discussed any particular securities laws, or whether they ever discussed any of the  
3 particular loan transactions that underlie this lawsuit. DSOF Exh. 4, Gould Depo. Tr.  
4 at 72:18-73:7.

5 The Receiver affirmatively asserts that providing legal advice was Beauchamp's  
6 role, not Gould's. *See, e.g.*, CSOF ¶ 62 below. And Beauchamp did provide legal  
7 advice, which Chittick followed. *See, e.g.*, CSOF ¶¶ 115, 133 below.

8  
9 **DSOF ¶ 13:** During the time Scott Gould was consulting with DenSco, Chittick  
10 understood the importance of maintaining a diverse borrower base, conducting proper  
11 due diligence on its collateral, and ensuring first position lien priority through using  
12 proper lending procedures, including lending purchase money to the fiduciary trustee,  
13 rather than the borrower. DSOF Exh. 4, Gould Depo. Tr. at 73:10-82:4.

14 **Receiver's Response (CSOF ¶ 13): Objection: Irrelevant, vague, and**  
15 **incomplete. Also: Controverted in part.** The Receiver affirmatively asserts that the  
16 transactions relevant to this lawsuit occurred after 2008, when, according to DSOF ¶ 9,  
17 Gould was no longer a consultant for DenSco. Moreover, Gould was not a lawyer and  
18 was not providing legal advice. Moreover, the evidence cited in DSOF ¶ 13 does not  
19 specify what Gould told Chittick about the topics listed in DSOF ¶ 13. *See* DSOF Exh.  
20 4, Gould Depo. Tr. at 73:10-82:4.

21 The Receiver affirmatively asserts that providing legal advice—including on the  
22 subject of lending practices and documents—was Beauchamp's role, not Gould's. *See,*  
23 *e.g.*, CSOF Ex. 2 (Wertlieb report) at 14; CSOF ¶ 62 below. And Beauchamp did  
24 provide advice on those topics, which Chittick followed. *See, e.g.*, CSOF ¶¶ 127-33  
25 below.

26 Moreover, the statement in DSOF ¶ 13 mischaracterizes the evidence. The  
27 evidence cited in DSOF ¶ 13 – which are 10 pages of Gould's deposition – does not  
28 state that Chittick “understood the importance of . . . ensuring first position lien priority

1 through using proper lending procedures, including lending purchase money to the  
2 fiduciary trustee, rather than the borrower.” *See* DSOF Exh. 4, Gould Depo. Tr. at  
3 73:10-82:4.

4  
5 **DSOF ¶ 14:** Robert Koehler and his hard money lending entity RLS physically  
6 took their loan funds directly to the trustee to finance the purchase of property. He does  
7 not ever provide the funds directly to the borrower to purchase the property. DSOF Exh.  
8 5, Koehler Depo. Tr. at 16:15-25.

9 **Receiver’s Response (CSOF ¶ 14): Undisputed.**

10 **DSOF ¶ 15:** Koehler discussed his lending procedures with Chittick. DSOF  
11 Exh. 5, Koehler Depo. Tr. at 18:23-25.

12 **Receiver’s Response (CSOF ¶ 15): Objection: Irrelevant, vague, and**  
13 **incomplete. Also: Controverted in part.** The statement in DSOF ¶ 15 does not specify  
14 the timing or content of any discussions between Koehler and Chittick regarding lending  
15 practice. Moreover, Koehler was not a lawyer and was not providing legal advice.

16 The Receiver affirmatively asserts that providing legal advice—including on the  
17 subject of lending practices and documents—was Beauchamp’s role, not Koehler’s.  
18 *See, e.g.*, CSOF Ex. 2 (Wertlieb report) at 14; CSOF ¶ 62 below. And Beauchamp did  
19 provide advice on those topics, which Chittick followed. *See, e.g.*, CSOF ¶¶ 127-33  
20 below.

21 Moreover, the statement in DSOF ¶ 15 mischaracterizes the evidence. The  
22 evidence cited in DSOF ¶ 15 – which are three lines of Koehler’s deposition – does not  
23 state that Koehler discussed his lending procedures with Chittick. *See* DSOF Exh. 5,  
24 Koehler Depo. Tr. at 18:23-25.

25 **DSOF ¶ 16:** Koehler was not aware that Chittick was lending money by  
26 providing the loan funds directly to his borrowers, rather than a trustee. DSOF Exh. 5,  
27

1 Koehler Depo. Tr. at 18:8-16. As an investor in DenSco, Koehler would have been  
2 upset had he known. *Id.*

3 **Receiver’s Response (CSOF ¶ 16): Undisputed.**

4 **DSOF ¶ 17:** Providing loans funds directly to the trustee, rather than a borrower,  
5 is a common place procedure for hard money lenders. Koehler did not need legal advice  
6 to understand that this was the proper way to provide financing to borrowers, and would  
7 have expected Chittick to understand that. DSOF Exh. 5, Koehler Depo. Tr. at 20:3-16.  
8

9 **Receiver’s Response (CSOF ¶ 17): Objection: Irrelevant and incomplete.**

10 **Also: Controverted in part.** Whether Koehler needed legal advice to understand  
11 proper lending practices is irrelevant to whether Chittick needed it. Moreover, the  
12 Receiver affirmatively asserts that providing legal advice—including on the subject of  
13 lending practices and documents—was Beauchamp’s role, not Koehler’s. *See, e.g.,*  
14 CSOF Ex. 2 (Wertlieb report) at 14; CSOF ¶ 62 below. And Beauchamp did provide  
15 advice on those topics, which Chittick followed. *See, e.g.,* CSOF ¶¶ 127-33 below.

16 Moreover, the statement in DSOF ¶ 17 that providing loan funds directly to the  
17 trustee is “a common place procedure” is not supported by the evidence cited in DSOF  
18 ¶ 17. *See* DSOF Exh. 5, Koehler Depo. Tr. at 20:3-16.

19 **DSOF ¶ 18:** Hard money lenders shared tips via e-mail regarding the problems  
20 associated with “kiting deeds of trust,” i.e., the problem associated with borrowers  
21 borrowing money from multiple lenders for the same property and then giving each  
22 lender a deed of trust while telling each lender that it is the only lender. Chittick received  
23 that information. DSOF Exh. 6, September 22, 2011 email chain between lenders,  
24 including DenSco, regarding deed of trust “kiting.”

25 **Receiver’s Response (CSOF ¶ 18): Controverted in part.** The statement in

26 DSOF ¶ 18 that hard money lenders “shared tips via e-mail regarding the problems  
27 associated with ‘kiting deeds of trust’” exaggerates the evidence. In the email cited in  
28 DSOF ¶ 18, a hard money lender simply mentions that a certain practice could open up

1 a greater possibility of “kiting” deeds of trust, which he says “was somewhat prevalent  
2 in the mid 70’s and the late 80’s.” See DSOF Exh. 6, September 22, 2011 email chain.

3  
4 **DSOF ¶ 19:** Gregg Reichman and AFG learned in September 2012 that  
5 Menaged had placed deeds of trust in favor of AFG and DenSco on multiple properties.  
6 DSOF Exh. 7, Reichman Depo. Tr. at 65:15-66:21; DSOF Exh. 8, 9-21-12 email from  
7 Chittick to Menaged (Exh. 487); DSOF Exh. 9, 9-21-12 emails between Reichman and  
8 Menaged (Exh. 488); DSOF Exh. 10, 9-24-12 email from Chittick to Menaged.

9 **Receiver’s Response (CSOF ¶ 19): Controverted in part.** Although the  
10 Receiver does not dispute the statement in DSOF ¶ 19, the Receiver disputes any  
11 inference that because Gregg Reichman and AFG discovered the double lien issue in  
12 September 2012, Chittick should have likewise discovered, investigated, or resolved it.

13 The Receiver affirmatively asserts that Chittick was the only employee of a busy  
14 operation and therefore relied heavily on his legal counsel, David Beauchamp. See  
15 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp could have  
16 discovered the issue discovered by Gregg Reichman and AFG. Indeed, when  
17 Beauchamp learned of the *Freo* lawsuit in June 2013, he was put on notice of the issue  
18 discovered by Gregg Reichman and AFG, yet failed to investigate or otherwise properly  
19 advise DenSco. See CSOF ¶¶ 70-79 below.

20 **DSOF ¶ 20:** Reichman eventually determined that Menaged had pledged twelve  
21 separate deals to both AFG and DenSco, and recorded competing deeds of trust with  
22 respect to AFG and DenSco on twelve properties. DSOF Exh. 7, Reichman Depo. Tr.  
23 at 69:3-5, 70:23-73:5; DSOF Exh. 10, 9-24-12 email from Chittick to Menaged (Exh.  
24 491); DSOF Exh. 11, 9-24-12 email from Reichman to Menaged.

25 **Receiver’s Response (CSOF ¶ 20): Controverted in part.** Although the  
26 Receiver does not dispute the statement in DSOF ¶ 20, the Receiver disputes any  
27 inference that because Gregg Reichman and AFG discovered the double lien issue in  
28 September 2012, Chittick should have likewise discovered, investigated, or resolved it.

1           The Receiver affirmatively asserts that Chittick was the only employee of a busy  
2 operation and therefore relied heavily on his legal counsel, David Beauchamp. *See*  
3 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp could have  
4 discovered the issue discovered by Gregg Reichman and AFG. Indeed, when  
5 Beauchamp learned of the *Freo* lawsuit in June 2013, he was put on notice of the issue  
6 discovered by Gregg Reichman and AFG, yet failed to investigate or otherwise properly  
7 advise DenSco. *See* CSOF ¶¶ 70-79 below.

8           **DSOF ¶ 21:** Reichmann contacted Chittick to alert him about the double-liening  
9 issue. DSOF Exh. 7, Reichman Depo. Tr. at 67:8-68:8, 75:6-76:17. Reichman told  
10 Chittick that AFG was in superior lien position on all of those properties. DSOF Exh.  
11 7, Reichman Depo Tr. at 85:25-86:6, 99:18-100:8.

12           **Receiver's Response (CSOF ¶ 21): Controverted in part.** The Receiver  
13 disputes any inference that because Gregg Reichman communicated to Chittick about  
14 the double lien issue, Chittick personally should have taken steps at that time beyond  
15 what he did, which included confronting Menaged. *See* DSOF Exh. 7, Reichman Depo.  
16 Tr. at 75:6-23.

17           The Receiver affirmatively asserts that Chittick was the only employee of a busy  
18 operation and therefore relied heavily on his legal counsel, David Beauchamp. *See*  
19 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp could have  
20 discovered the issue discovered by Gregg Reichman and AFG. Indeed, when  
21 Beauchamp learned of the *Freo* lawsuit in June 2013, he was put on notice of the issue  
22 discovered by Gregg Reichman and AFG, yet failed to investigate or otherwise properly  
23 advise DenSco. *See* CSOF ¶¶ 70-79 below.

24           **DSOF ¶ 22:** Reichman testified that he never gives a borrower control over the  
25 financing being provided, because it is impossible to control what the borrower then  
26 does with the money. Instead, Reichman sends the loan funds directly to the trustee.  
27  
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1 This ensures the money is used for the proper purpose and that AFG is properly secured  
2 on the loan. DSOF Exh. 7, Reichman Depo. Tr. at 20:14-22:1.

3 **Receiver's Response (CSOF ¶ 22): Undisputed.**

4 **DSOF ¶ 23:** At the end of 2012, DenSco had approximately \$4.65 million  
5 outstanding loans to Mr. Menaged's entities. At the end of 2013 DenSco had increased  
6 its outstanding loans to Mr. Menaged's entities to more than \$28 million, more than half  
7 of DenSco's loan portfolio. DSOF Exh. 12, 4/5/19 D. Perry Expert Report at 9.

8 **Receiver's Response (CSOF ¶ 23): Controverted in part.** The statements in  
9 DSOF ¶ 23 are not supported by the evidence cited. The evidence cited in DSOF ¶ 23  
10 – page nine of an expert report – does not specify the amount of DenSco's outstanding  
11 loans to Menaged's entities at the end of 2012. *See* DSOF Exh. 12, 4/5/19 D. Perry  
12 Expert Report at 9. Nor does it specify the amount of DenSco's outstanding loans to  
13 Menaged's entities at the end of 2013 or what percentage of DenSco's portfolio those  
14 loans were. *See id.*

15  
16 **DSOF ¶ 24:** In November 2013, Mr. Menaged told Mr. Chittick that entities  
17 owned by him had double liened additional properties with loans from both AFG and  
18 DenSco. According to Mr. Menaged, his wife had become critically ill and he had  
19 turned the day-to-day operations of his companies over to his cousin. The cousin  
20 requested loans for the same property from multiple lenders, and both lenders recorded  
21 deeds of trust. The cousin then absconded with the funds lent to Mr. Menaged's entities.  
22 DSOF Exh. 13, Receiver's Dec. 23, 2016 Status Report at 7-9; DSOF Exh. 2, January  
23 7, 2014 email from Chittick to Beauchamp. The Receiver refers to this as the First  
24 Fraud. According to the Receiver, the First Fraud cost DenSco more than \$14.3 million.  
25 *Id.*

26 **Receiver's Response (CSOF ¶ 24): Undisputed.**

1           **DSOF ¶ 25:** Without any attorney advice, Mr. Menaged and Mr. Chittick  
2 reached an agreement regarding a “workout plan” to resolve the double liens in  
3 November 2013. Mr. Chittick and Mr. Menaged agreed to partner together to  
4 “wholesale” properties and jointly address the double liens by paying off all loans  
5 subject to double liens. DSOF Exh. 2, January 7, 2014 email from Chittick to  
6 Beauchamp.

7           **Receiver’s Response (CSOF ¶ 25): Controverted.** The Receiver disputes any  
8 inference that Menaged and Chittick “reached an agreement” to resolve the double liens  
9 in November 2013, or that such an agreement was reached “[w]ithout any attorney  
10 advice.” The evidence cited in DSOF ¶ 25—an email from Chittick to Beauchamp on  
11 January 7, 2014—merely states that Chittick and Menaged had by that time sketched  
12 out “a plan” to resolve the issue. *See* DSOF Exh. 2. Indeed, the reason Chittick emailed  
13 Beauchamp on January 7, 2014 was to seek Beauchamp’s help and advice on the matter.  
14 *See id.*

15           Over the ensuing months, Beauchamp played a central role in negotiating,  
16 drafting, revising, and finalizing an actual agreement between Chittick and Menaged—  
17 first as a non-binding “Term Sheet,” and then an official “Forbearance Agreement.” *See*  
18 CSOF ¶¶ 116-126, 129, 131 below.

19           **DSOF ¶ 26:** To obtain the additional funds necessary to pay off these loans,  
20 DenSco agreed to loan Mr. Menaged an additional \$1 million, and Mr. Menaged agreed  
21 to contribute \$4-\$5 million from the liquidation of other assets. *Id.*; DSOF Exh. 14,  
22 DenSco and Menaged Term Sheet.

23           **Receiver’s Response (CSOF ¶ 26): Controverted in part.** The Receiver does  
24 not dispute that an agreement between DenSco and Menaged was eventually reached.  
25 But the Receiver disputes any inference that they reached an agreement outside of  
26 Beauchamp’s involvement. The Receiver affirmatively asserts that, over the course of  
27 several months, Beauchamp played a central role in negotiating, drafting, revising, and  
28

1 finalizing an actual agreement between Chittick and Menaged—first as a non-binding  
2 “Term Sheet,” and then an official “Forbearance Agreement.” See CSOF ¶¶ 116-126,  
3 129, 131 below.

4  
5 **DSOF ¶ 27:** By late November 2013, DenSco had already begun implementing  
6 the workout plan with Mr. Menaged, lending funds to Mr. Menaged on the \$1 million  
7 line of credit. DSOF Exh. 15, Receiver Analysis of \$1 million workout loan.

8 **Receiver’s Response (CSOF ¶ 27): Controverted in part.** The Receiver does  
9 not dispute that an agreement between DenSco and Menaged was eventually reached.  
10 But the Receiver disputes any inference that they reached an agreement outside of  
11 Beauchamp’s involvement. The Receiver affirmatively asserts that, over the course of  
12 several months, Beauchamp played a central role in negotiating, drafting, revising, and  
13 finalizing an actual agreement between Chittick and Menaged—first as a non-binding  
14 “Term Sheet,” and then an official “Forbearance Agreement.” See CSOF ¶¶ 116-126,  
15 129, 131 below.

16 Moreover, the Receiver disputes any inference that, since DenSco “had already  
17 begun” working with Menaged, Beauchamp played no significant role in the process.  
18 Had Beauchamp advised DenSco to change course, DenSco would have followed  
19 Beauchamp’s advice, just like DenSco had done before. See CSOF ¶¶ 115, 133.

20 Moreover, the timeframe of the statement in DSOF ¶ 27 is not supported by the  
21 evidence. The evidence cited in DSOF ¶ 27 shows loans from DenSco beginning in  
22 mid-December 2013, not late November 2013. See DSOF Exh. 15, Receiver Analysis  
23 of \$1 million workout loan.

24 **DSOF ¶ 28:** On January 6, 2014, Bob Miller, an attorney with Bryan Cave sent  
25 Mr. Chittick a letter on behalf of various lenders (the “Bryan Cave Demand Letter”).  
26 The letter asserted that the lenders had advanced purchase money loans directly to  
27 trustees to buy more than 50 properties out of foreclosure, and had recorded deeds of  
28 trust to evidence their first position security interest. DenSco, however, had likewise

1 recorded mortgages evidencing its purchase money loans for the same properties.  
2 DSOF Exh. 16, Jan 6, 2014 email from Chittick to Beauchamp attaching Bryan Cave  
3 demand letter.

4 **Receiver's Response (CSOF ¶ 28): Undisputed.**

5 **DSOF ¶ 29:** The Bryan Cave Demand Letter (1) asserted that DenSco's claimed  
6 interest was a "practical and legal impossibility since . . . only the Lenders provided the  
7 applicable trustee with certified funds supporting the Borrowers purchase money  
8 acquisition for each of the Properties," (2) demanded that DenSco subordinate its  
9 alleged interests to their interests, and (3) threatened to bring claims for fraud, negligent  
10 misrepresentation, and wrongful recordation. *Id.* at CH\_0000830.

11 **Receiver's Response (CSOF ¶ 29): Undisputed.**

12 **DSOF ¶ 30:** On January 6, 2014, Mr. Chittick sent the Bryan Cave letter to Mr.  
13 Beauchamp with a request for Mr. Beauchamp to "read the first two pages." *Id.*

14 **Receiver's Response (CSOF ¶ 30): Objection: Incomplete.** Chittick's email  
15 to Beauchamp says "read the first two pages, then give me a call." DSOF Exh. 16, Jan  
16 6, 2014 email from Chittick to Beauchamp attaching Bryan Cave demand letter.

17 **DSOF ¶ 31:** The next day, Mr. Chittick emailed Mr. Beauchamp and explained  
18 that an issue with Mr. Menaged's cousin and sick wife had led to the double liens,  
19 repeating the story told by Mr. Menaged. DSOF Exh. 2, January 7, 2014 email from  
20 Chittick to Beauchamp.

21 **Receiver's Response (CSOF ¶ 31): Controverted in part.** The description in  
22 DSOF ¶ 31 minimizes the evidence. Chittick's email to Beauchamp did not just mention  
23 "an issue" with Menaged's cousin, but stated that Menaged's cousin had, among other  
24 things, "started to steal money" by posing as Menaged and "absconded with the funds."  
25 DSOF Exh. 2, January 7, 2014 email from Chittick to Beauchamp.

1           Moreover, the Receiver affirmatively asserts that Beauchamp had been put on  
2 notice of the double lien problem in June 2013, and then again in December 2013  
3 according to Defendants, but had failed to investigate or otherwise follow up. *See* CSOF  
4 ¶¶ 70-82 below.

5           **DSOF ¶ 32:** Mr. Chittick vouched for Mr. Menaged, representing, “I’ve been  
6 lending to Scott Menaged through few different LLC’s and his name since 2007. [I]’ve  
7 lent him 50 million dollars and [I]’ve never had a problem with payment or issue that  
8 hasn’t been resolved.” *Id.* at CH\_0005790.

9           **Receiver’s Response (CSOF ¶ 32): Controverted in part.** The Receiver does  
10 not dispute that Chittick made the statement described in DSOF ¶ 32 in his email to  
11 Beauchamp. But the Receiver disputes any inference that this was the first time  
12 Beauchamp was on notice of actions by Menaged or his entities. The Receiver  
13 affirmatively asserts that Beauchamp had been put on notice of the double lien problem  
14 in June 2013, and then again in December 2013 according to Defendants, but had failed  
15 to investigate or otherwise follow up. *See* CSOF ¶¶ 70-82 below.

16           **DSOF ¶ 33:** Mr. Chittick’s representations regarding Menaged failed to mention  
17 that Mr. Menaged had been double liening properties secured by DenSco’s funds since  
18 September 2012. *Id.*

19           **Receiver’s Response (CSOF ¶ 33): Controverted in part.** The Receiver does  
20 not dispute that Chittick’s email to Beauchamp did not specify how long the double lien  
21 issue had been occurring. But the Receiver disputes any inference that Chittick  
22 knowingly or intentionally omitted relevant information in his communications with  
23 Beauchamp.

24           The Receiver affirmatively asserts that Chittick was the only employee of a busy  
25 operation and therefore relied heavily on his legal counsel, David Beauchamp. *See*  
26 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp had been put on  
27 notice of the double lien problem in June 2013, and then again in December 2013  
28

1 according to Defendants, but had failed to investigate or otherwise follow up. *See* CSOF  
2 ¶¶ 70-82 below.

3  
4 **DSOF ¶ 34:** Mr. Chittick's representations regarding Menaged also failed to  
5 mention that DenSco had lent Menaged \$31 million in 2013 alone, and had \$28.5  
6 million in outstanding loans to Menaged as of the end of 2013, a large portion of which  
7 were more than six months past due. A significant number of these past due loans were  
8 made in 2012. DSOE Exh. 13, Receiver's December 23, 2016 Status Report at 19.

9 **Receiver's Response (CSOF ¶ 34): Controverted in part.** The Receiver does  
10 not dispute that Chittick's email to Beauchamp did not specify the loan amounts  
11 identified in DSOE ¶ 34. But the Receiver disputes any inference that Chittick  
12 knowingly or intentionally omitted relevant information in his communications with  
13 Beauchamp.

14 The Receiver affirmatively asserts that Chittick was the only employee of a busy  
15 operation and therefore relied heavily on his legal counsel, David Beauchamp. *See*  
16 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp had been put on  
17 notice of the double lien problem in June 2013, and then again in December 2013  
18 according to Defendants, but had failed to investigate or otherwise follow up. *See* CSOF  
19 ¶¶ 70-82 below.

20 **DSOF ¶ 35:** Mr. Beauchamp began helping DenSco document the terms of  
21 DenSco and Mr. Menaged's agreement in a term sheet that was later expanded upon and  
22 formalized in a Forbearance Agreement. The term sheet documented the workout plan  
23 already agreed to and implemented by DenSco and Mr. Menaged. The key points of the  
24 agreement included:

- 25 a. Mr. Menaged agreeing to pay off any shortfall on the loans as the double-  
26 encumbered properties were sold or refinanced by borrowing \$1 million from  
27 a third party and liquidating assets worth \$4-5 million;

- 1 b. Mr. Menaged agreeing to obtain a \$10 million life insurance policy naming  
2 DenSco as the beneficiary;
- 3 c. Mr. Menaged admitting that the DenSco loans were secured by deeds of trust  
4 that were intended to be in a first lien position; and
- 5 d. DenSco agreeing to loan up to \$1 million to Mr. Menaged for purposes of  
6 purchasing and flipping or renting additional properties, with all profits used  
7 to pay off the loans on the double-encumbered properties.

8 DSOF Exh. 14, DenSco and Menaged Term Sheet.

9 **Receiver's Response (CSOF ¶ 35): Controverted.** The Receiver disputes  
10 DSOF ¶ 35 to the extent it states that the Term Sheet drafted by Beauchamp reflected a  
11 plan "already agreed to and implemented" by DenSco and Menaged. In reality, although  
12 Chittick and Menaged had sketched out a "plan" to resolve the double lien issue,  
13 Chittick then came to Beauchamp for help and advice, and Beauchamp played a central  
14 role in negotiating, drafting, revising, and finalizing the content of the Term Sheet and  
15 the eventual Forbearance Agreement. *See* CSOF ¶¶ 116-126, 129, 131 below.

16 The Receiver further disputes DSOF ¶ 35 to the extent it states that Beauchamp's  
17 role in the Term Sheet and Forbearance Agreement process was "helping DenSco." In  
18 reality, Beauchamp's role was helping himself by covering up his prior failure to update  
19 the 2011 POM and failure to investigate red flags. *See* CSOF ¶¶ 93, 124-126, 131  
20 below. Had Beauchamp been helping DenSco, then upon learning of the depth of the  
21 problems with Menaged in January 2014, he would have and should have advised  
22 Chittick to stop raising funds immediately, cease all business with Menaged, and update  
23 the POM to disclose the problems with Menaged immediately, along with other material  
24 facts concerning DenSco's business. He did not. *See* CSOF ¶¶ 120-121 below.

25 **DSOF ¶ 36:** After finalizing the term sheet, Mr. Beauchamp began working on  
26 the parties' Forbearance Agreement and believed it could be completed in a few weeks.  
27  
28

1 DSOF Exh. 17, Jan. 21, 2014 emails between Chittick and Beauchamp regarding  
2 forbearance agreement.

3 **Receiver’s Response (CSOF ¶ 36): Controverted in part.** The Receiver  
4 disputes DSOF ¶ 36 to the extent it suggests that Beauchamp merely “work[ed] on the  
5 parties’ Forbearance Agreement” when, in reality, Beauchamp played a central role in  
6 negotiating, drafting, revising, and finalizing the content of the Forbearance Agreement  
7 over the course of several months. *See* CSOF ¶¶ 116-126, 129, 131 below.

8 **DSOF ¶ 37:** The Forbearance Agreement addressed the following points:

- 9
- 10 a. Mr. Menaged identified the facts that led to the double lien issue and the scope  
11 of the issue.
  - 12 b. Mr. Menaged acknowledged his obligation to discharge the liens of the other  
13 lenders.
  - 14 c. Mr. Menaged and his entities agreed to pay off the double-encumbered loans  
15 by liquidating additional assets, renting or selling real estate, recovering  
16 stolen funds, and obtaining \$4.2 million in outside financing.
  - 17 d. Mr. Menaged agreed to provide additional security and guarantees, including  
18 a \$10 million life insurance policy naming DenSco as beneficiary; and
  - 19 e. DenSco agreed to extend additional financing to Mr. Menaged (and defer the  
20 collection of interest on defaulted loans) for purposes of purchasing and  
21 flipping or renting additional properties, with all profits used to pay off the  
22 loans on the double-encumbered properties.

23 DSOF Exh. 18, Forbearance Agreement.

24 **Receiver’s Response (CSOF ¶ 37): Controverted.** The exhibit cited in DSOF  
25 ¶ 37 – DSOF Exh. 18 – is not the Forbearance Agreement. A copy of the Forbearance  
26 Agreement can be found at Receiver Punitive Damages SOF Ex. 113.

27 The Receiver also disputes DSOF ¶ 37 because it is an incomplete and one-sided  
28 summary of a lengthy document. For example:

- 1       · Contrary to the summary in DSOF ¶ 37: The Forbearance Agreement merely  
2       required Menaged to “use good faith efforts” to liquidate other assets.  
3       (§ 6(A))
- 4       · Contrary to the summary in DSOF ¶ 37: The Forbearance Agreement merely  
5       required Menaged to “use good faith efforts” to pay off loans of other lenders  
6       on the double-encumbered properties within nine months. (§ 6(H))
- 7       · The summary in DSOF ¶ 37 fails to mention: The Forbearance Agreement  
8       required DenSco to increase loan amounts on double-encumbered properties  
9       up to “120% of the loan-to-value (LTV) ratio.” (§ 7(A))
  - 10       ○ Beauchamp knew this provision of the Forbearance Agreement violated  
11       what DenSco had told its investors. *See* CSOF ¶ 5 *supra*.
- 12       · The summary in DSOF ¶ 37 fails to mention: The Forbearance Agreement  
13       included a Confidentiality provision. (§ 18)
  - 14       ○ The purpose of the provision was to limit disclosures, including  
15       disclosures to investors, and to protect Menaged and Chittick, not DenSco.  
16       *See* CSOF ¶¶ 124-125 below.

17               **DSOF ¶ 38:** Mr. Chittick wrote to Mr. Menaged regarding the efforts to draft a  
18 Forbearance Agreement, and asked if Mr. Menaged had “put a call in to [his attorney]  
19 to get him on the phone with [Mr. Beauchamp] and pound through” what Mr. Chittick  
20 referred to as “their language arts assignment.” DSOF Exh. 19, Feb. 3, 2014 email from  
21 Chittick to Menaged at CH\_REC\_MEN\_0027814.

22               **Receiver’s Response (CSOF ¶ 38): Objection: Vague and incomplete.** The  
23 Receiver does not dispute that the language quoted in DSOF ¶ 38 appears in the email  
24 cited. But it is unclear from that email whether Chittick was talking about the  
25 Forbearance Agreement, and it is unclear what he meant by “language arts assignment.”  
26 *See* DSOF Exh. 19, Feb. 3, 2014 email from Chittick to Menaged at  
27 CH\_REC\_MEN\_0027814.

1           The Receiver affirmatively asserts that, for Beauchamp, the Forbearance  
2 Agreement was more than just a “language arts assignment.” Beauchamp played a  
3 central role in negotiating, drafting, revising, and finalizing the content of the  
4 Forbearance Agreement over the course of several months. *See* CSOF ¶¶ 116-126, 129,  
5 131 below.

6           **DSOF ¶ 39:** Mr. Chittick later wrote that he had directed Mr. Beauchamp to  
7 “make some concenssions [sic] that you and I agreed to. . . .” DSOF Exh. 20, Feb. 5,  
8 2014 email from Chittick to Menaged at CH\_REC\_MEN\_0027482.

9           **Receiver’s Response (CSOF ¶ 39): Objection: Vague and incomplete.** The  
10 Receiver does not dispute that the language quoted in DSOF ¶ 39 appears in the email  
11 cited. But it is unclear from that email exactly which “concenssions” Chittick was  
12 talking about and whether they were ever added to the formal agreement. *See* DSOF  
13 Exh. 20, Feb. 5, 2014 email from Chittick to Menaged at CH\_REC\_MEN\_0027482.

14           The Receiver affirmatively asserts that Beauchamp played a central role in  
15 negotiating, drafting, revising, and finalizing the content of the Forbearance Agreement  
16 over the course of several months. *See* CSOF ¶¶ 116-126, 129, 131 below.

17           **DSOF ¶ 40:** Regarding revisions to the draft Forbearance Agreement, Mr.  
18 Chittick stated “after any changes we agree to and make, david will amek [sic] them  
19 them [sic]. I tell david to send it to jeff, you tell jeff, the terms are agreeable between  
20 us, and they can only fix the spelling!” DSOF Exh. 21, Feb. 7, 2014 email from Chittick  
21 to Menaged at CH\_REC\_MEN\_0027218.

22           **Receiver’s Response (CSOF ¶ 40): Objection: Vague and incomplete.** The  
23 Receiver does not dispute that the language quoted in DSOF ¶ 40 appears in the email  
24 cited. But it is unclear what Chittick was referring to and whether the revision process  
25 he described ever actually happened. *See* DSOF Exh. 21, Feb. 7, 2014 email from  
26 Chittick to Menaged at CH\_REC\_MEN\_0027218.  
27

28

1           The Receiver affirmatively asserts that Beauchamp’s work on the Forbearance  
2 Agreement was more than just “fix the spelling.” Beauchamp played a central role in  
3 negotiating, drafting, revising, and finalizing the content of the Forbearance Agreement  
4 over the course of several months. *See* CSOF ¶¶ 116-126, 129, 131 below.

5           **DSOF ¶ 41:** Mr. Chittick again emailed Mr. Menaged regarding his frustration  
6 with Mr. Beauchamp for wanting to know what Mr. Menaged’s “points of contention”  
7 were with respect to the draft Forbearance Agreement. Mr. Chittick complained that  
8 “attorneys’ sole purpose is to self perserverance [sic].” DSOF Exh. 22, Feb. 15, 2014  
9 email from Chittick to Menaged at CH\_REC\_MEN\_0026580.

10           **Receiver’s Response (CSOF ¶ 41): Objection: Vague and incomplete.** The  
11 Receiver does not dispute that the language quoted in DSOF ¶ 41 appears in the email  
12 cited. But it is unclear what Chittick meant by: “Attorneys sole purpose is to self  
13 perseverance.” *See* DSOF Exh. 21, Feb. 7, 2014 email from Chittick to Menaged at  
14 CH\_REC\_MEN\_0027218.

15           The Receiver submits that the following inferences, among others, can be drawn  
16 from that statement (and must be drawn in the Receiver’s favor for purposes of  
17 Defendants’ motion for summary judgment):

- 18           · Beauchamp’s sole purpose in working on the Forbearance Agreement was to  
19 protect himself, not DenSco.  
20           · Beauchamp was doing a bad job in working on the Forbearance Agreement.  
21           · Beauchamp was wasting DenSco’s money in working on the Forbearance  
22 Agreement.  
23

24           **DSOF ¶ 42:** Mr. Chittick and Mr. Menaged also complained amongst  
25 themselves that “these lawyers are trying to prevent progress” and increase their fees.  
26 Mr. Chittick asserted that in the interim, “we solved another. What [sic] 20% of the  
27 problem.” DSOF Exh. 23, Feb. 14, 2014 email from Chittick to Menaged at  
28 CH\_REC\_MEN\_0026600.

1           **Receiver’s Response (CSOF ¶ 42): Objection: Vague and incomplete.** The  
2 Receiver does not dispute that the language quoted in DSOF ¶ 42 appears in the email  
3 cited. But it is unclear what Chittick meant in the email. *See* DSOF Exh. 23, Feb. 14,  
4 2014 email from Chittick to Menaged at CH\_REC\_MEN\_0026600.

5           The Receiver affirmatively asserts that Beauchamp’s work on the Forbearance  
6 Agreement was more than just “trying to prevent progress.” Beauchamp played a  
7 central role in negotiating, drafting, revising, and finalizing the content of the  
8 Forbearance Agreement over the course of several months. *See* CSOF ¶¶ 116-126, 129,  
9 131 below.

10           **DSOF ¶ 43:** On February 11, 2014, Mr. Chittick told Mr. Menaged, “I’ve not  
11 taken any new investors, so if I do, I have to disclose a lot to them, which is all about  
12 you.” DSOF Exh. 24, Feb. 11, 2014 email from Chittick to Menaged.

13           **Receiver’s Response (CSOF ¶ 43): Objection: Vague and incomplete. Also:**  
14 **Controverted in part.** The Receiver does not dispute that the language quoted in DSOF  
15 ¶ 43 appears in the email cited. But it is unclear what Chittick meant when he said “I’ve  
16 not taken any new investors,” and in particular, what timeframe Chittick was talking  
17 about, and whether Chittick was merely talking about asking additional *people* to invest  
18 (as opposed to asking for additional *investments*, or rolling over prior notes, from people  
19 who had already invested). *See* DSOF Exh. 24, Feb. 11, 2014 email from Chittick to  
20 Menaged.

21           The Receiver disputes any inference that Chittick was not raising money from  
22 investors at that time. The Receiver affirmatively asserts that Chittick was raising  
23 money from investors at that time without having issued an updated POM or otherwise  
24 made adequate disclosures, and that this was all being done with Beauchamp’s  
25 knowledge and blessing. *See* CSOF ¶¶ 85-101 below.

26           **DSOF ¶ 44:** DenSco continued to loan funds directly to Menaged through 2016.  
27 DSOF Exh. 12, Perry Expert Report at 4-5.  
28

1           **Receiver’s Response (CSOF ¶ 44): Controverted in part.** The evidence cited  
2 in DSOF ¶ 44 – pages 4-5 of an expert report – do not appear to have been included in  
3 Defendants’ exhibits. *See* DSOF Exh. 12, Perry Expert Report at 4-5.

4           **DSOF ¶ 45:** On May 28, 2014, Menaged forwarded Chittick a message from  
5 his bank explaining the bank had changed the transaction limit for wire transfers  
6 involving Menaged’s accounts, but that the bank “may revoke access to transactions at  
7 any time due to potential fraud ...” Chittick responded that “I guess they heard about  
8 us.” DSOF Exh. 25, May 28, 2014 email between Chittick and Menaged.

9           **Receiver’s Response (CSOF ¶ 45): Objection: Vague and incomplete.** The  
10 Receiver does not dispute that the language quoted in DSOF ¶ 43 appears in the email  
11 cited. But it is unclear what Chittick meant when he said “I guess they heard about us.”  
12 *See* DSOF Exh. 25, May 28, 2014 email between Chittick and Menaged.

13           The Receiver submits that the following inferences can be drawn from that  
14 statement (and must be drawn in the Receiver’s favor for purposes of Defendants’  
15 motion for summary judgment):

- 16           · The reference to “potential fraud” in the message Menaged forward to  
17 Chittick was just boilerplate language, and Chittick was making an offhand  
18 joke in response.
- 19           · If Chittick was not making a joke and was instead referring to an actual fraud,  
20 then he was referring to the Forbearance Agreement that Beauchamp had  
21 played a central role in negotiating, drafting, revising, and finalizing over the  
22 course of several months, all while encouraging Chittick to raise more money  
23 from investors without making the requisite disclosures. *See* CSOF ¶¶ 97-  
24 115, 116-126, 129, 131 below.

25           **DSOF ¶ 46:** On August 21, 2015, Chittick expressed frustration that DenSco’s  
26 \$30 million balance with Menaged has not gone down and admitted he “can’t get new  
27 investors [because] I can’t give them the documentation that is necessary” and that “I  
28

1 **am in so many violations with my current investors it's nuts."** Despite those issues,  
2 Chittick told Menaged that he had nevertheless "tried raising more money" from his  
3 friends and family and hoped he could squeeze more money out of the "Utah guys."  
4 DSOF Exh. 26, Aug. 22, 2015 email between Chittick and Menaged.

5 **Receiver's Response (CSOF ¶ 46): Controverted in part.** The Receiver does  
6 not dispute that the language quoted in DSOF ¶ 46 appears in the email cited. *See* DSOF  
7 Exh. 26, Aug. 22, 2015 email between Chittick and Menaged. But the Receiver disputes  
8 any inference that the lack of disclosure to investors is attributable primarily to Chittick  
9 and not Beauchamp.

10 The Receiver affirmatively asserts that Chittick was the only employee of a busy  
11 operation and therefore relied heavily on his legal counsel, David Beauchamp. *See*  
12 CSOF ¶¶ 60-61 below. The Receiver further asserts that Beauchamp had (1) failed to  
13 update the POM to investors despite knowing that it contained untrue statements,  
14 (2) encouraged Chittick to have DenSco continue raising money from investors despite  
15 the lack of disclosures, and (3) continued to represent DenSco even in August 2015  
16 when Chittick made the statements quoted in DSOF ¶ 46. *See* CSOF ¶¶ 62-84, 85-115,  
17 124-126, 135-137 below. Indeed, after completing the Forbearance Agreement,  
18 Beauchamp gave Chittick "a year" to straighten things out instead of insisting that he  
19 make disclosures to investors. *See* CSOF ¶¶ 110-111, 113-115 below. And then  
20 Beauchamp met with Chittick again, and gave him another "90 days" instead of insisting  
21 that he make disclosures to investors. *See* CSOF ¶¶ 112-115 below.

22 **DSOF ¶ 47:** Chittick told Menaged in his August 21, 2015 email that he was  
23 altering his financial records to "keep my accountant happy." *Id.*

24 **Receiver's Response (CSOF ¶ 47): Objection: Vague and incomplete. Also:**  
25 **Controverted in part.** The Receiver does not dispute that the language quoted in DSOF  
26 ¶ 47 appears in the email cited. But the language quoted in DSOF ¶ 47 has been plucked  
27 from the middle of a long meandering email (*see* DSOF Exh. 26, Aug. 22, 2015 email  
28

1 between Chittick and Menaged, at CH\_REC\_CHI\_0042852), and it is unclear what  
2 Chittick meant by “keep my accountant happy” and, in particular, whether he was  
3 referring to altering financial records.

4 In any event, the Receiver disputes any inference that Chittick’s financial status  
5 was attributable primarily to him and not Beauchamp. The Receiver affirmatively  
6 asserts that Chittick was the only employee of a busy operation and therefore relied  
7 heavily on his legal counsel, David Beauchamp. See CSOF ¶¶ 60-61 below. The  
8 Receiver further asserts that Beauchamp, upon learning of the depth of the problems  
9 with Menaged in January 2014, should have advised Chittick to stop raising funds  
10 immediately, cease all business with Menaged, and update the POM to disclose the  
11 problems with Menaged immediately, along with other material facts concerning  
12 DenSco’s business. He did not. See CSOF ¶¶ 120-121 below. Instead, Beauchamp  
13 (1) failed to update the POM to investors despite knowing that it contained untrue  
14 statements, (2) encouraged Chittick to have DenSco continue raising money from  
15 investors despite the lack of disclosures, and (3) continued to represent DenSco even in  
16 August 2015 when Chittick made the statement quoted in DSOF ¶ 47. See CSOF ¶¶ 62-  
17 84, 85-115, 124-126, 135-137 below. Indeed, after completing the Forbearance  
18 Agreement, Beauchamp gave Chittick “a year” to straighten things out instead of  
19 insisting that he make disclosures to investors. See CSOF ¶¶ 110-111, 113-115 below.  
20 And then Beauchamp met with Chittick again, and gave him another “90 days” instead  
21 of insisting that he make disclosures to investors. See CSOF ¶¶ 112-115 below.

22  
23 **DSOF ¶ 48:** On February 15, 2014, upset at his attorney, Mr. Beauchamp, for  
24 wanting to know what Menaged’s “points of contention” were with respect to the draft  
25 Forbearance Agreement, Mr. Chittick complained that “attorneys’ sole purpose is to self  
26 perserverance [sic].” DSOF Exh. 27, Feb. 15, 2014 email from Chittick to Menaged.

27 **Receiver’s Response (CSOF ¶ 48): Objection: Vague and incomplete.** The  
28 Receiver does not dispute that the language quoted in DSOF ¶ 47 appears in the email

1 cited. But it is unclear what Chittick meant by: “Attorneys sole purpose is to self  
2 perseverance.” See DSOF Exh. 27, Feb. 15, 2014 email from Chittick to Menaged at  
3 CH\_REC\_MEN\_0027218.

4 The Receiver submits that the following inferences can be drawn from that  
5 statement (and must be drawn in the Receiver’s favor for purposes of Defendants’  
6 motion for summary judgment):

- 7 · Beauchamp’s sole purpose in working on the Forbearance Agreement was to  
8 protect himself, not DenSco.
- 9 · Beauchamp was doing a bad job in working on the Forbearance Agreement.
- 10 · Beauchamp was wasting DenSco’s money in working on the Forbearance  
11 Agreement.

12 **DSOF ¶ 49:** In 2016, DenSco raised more than \$1.7 million from investors.  
13 DSOF Exh. 28, Summary of DenSco investments for 2016.

14 **Receiver’s Response (CSOF ¶ 49):** It is unclear what Defendants mean by  
15 “raised.” If Defendants mean that DenSco solicited and obtained additional funds, then  
16 Exhibit 28 does not show that, or explain that. Exhibit 28 is a spreadsheet of “Investor  
17 Balances” on December 31, 2015 and June 30, 2016. The document shows that in the  
18 aggregate, for the investors listed, the investors’ balances increased by approximately  
19 \$1.7 million over that period. It is not clear from Exhibit 28 whether those amounts  
20 reflect additional investments provided, interest accrued, or otherwise.

21 **DSOF ¶ 50:** On December 9, 2016, the Receiver filed a notice of claim against  
22 the estate of Denny Chittick. DSOF Exh. 29, Notice of Claim against Chittick Estate.

23 **Receiver’s Response (CSOF ¶ 50): Undisputed.**

24 **DSOF ¶ 51:** In the Notice of Claim, the Receiver asserted that Chittick was  
25 guilty of common law fraud, misrepresentation, and breach of fiduciary duty because  
26 Chittick, and thus DenSco, among other things: (i) failed to institute or follow proper  
27  
28

1 management and control of DenSco’s business operations in part, by directly funding  
2 loans to Menaged, (ii) continued “to accept monies for investors into DenSco,” then  
3 lending that money out to Menaged, “despite his actual knowledge of the fraud by  
4 Menaged”, (iii) prepared false and inaccurate financial records, thereby artificially  
5 increasing DenSco’s tax liability and misleading DenSco’s accountant, who was also an  
6 investor, and (iv) allowed Chittick to loot millions of dollars from DenSco starting as  
7 early as December 2014], after DenSco had been rendered insolvent. *Id.*

8 **Receiver’s Response (CSOF ¶ 51): Controverted in part.** The Receiver  
9 disputes DSOF ¶ 51 to the extent it purports to summarize the Receiver’s Notice of  
10 Claim; the Receiver refers to that document for its contents.

11 The Receiver further disputes the statement in DSOF ¶ 51 that, because Chittick  
12 took certain actions as asserted in the Notice of Claim, “thus DenSco” took those same  
13 actions for purposes of Defendants’ present motion for summary judgment. As the  
14 Receiver explains in the concurrently filed response/reply (at 6-8), one of the reasons *in*  
15 *pari delicto* does not apply against a Receiver is that the Receiver represents innocent  
16 creditors and is thus distinct from any previous wrongdoer.

17 The Receiver further disputes any inference that Chittick’s actions as asserted in  
18 the Notice of Claim place DenSco at equal or greater fault as Beauchamp, who had  
19 special fiduciary duties and unique knowledge as legal counsel for DenSco. *See, e.g.,*  
20 CSOF ¶¶ 60-61 below.

21 The Receiver further disputes any inference that the assertions regarding  
22 Chittick’s actions in the Notice of Claim were deemed true or not true by a fact finder.

23 **DSOF ¶ 52:** In the Notice of Claim, the Receiver asserted that on or about  
24 December 31, 2014, Chittick (i) transferred all of the funds in his DenSco 401(k) plan  
25 (\$359,609.00) to an account at Vanguard; (ii) liquidated all of the funds in his DenSco  
26 Defined Benefit Plan (\$1,817,243.03), all of which were invested in DenSco, to a  
27 certificate of deposit at an FDIC insured bank, at a time when that investment was  
28

1 worthless; (iii) converted \$1,448,460.49 from his personal investment in DenSco, into  
2 DenSco stock, the caused DenSco to make distributions to him in the amount of  
3 \$555,000 by the redeeming the stock, which was worthless at the time; and (iv) caused  
4 DenSco to transfer \$120,000 in cash distributions to Chittick from January 31, 2014 and  
5 December 26, 2014, at a time when DenSco was insolvent, all of which left DenSco  
6 with less money to pay investors. *Id.* at 2-4.

7 **Receiver's Response (CSOF ¶ 52): Controverted in part.** The Receiver  
8 disputes DSOF ¶ 52 to the extent it purports to summarize the Receiver's Notice of  
9 Claim, which speaks for itself.

10 The Receiver further disputes any inference that Chittick's actions as asserted in  
11 the Notice of Claim place DenSco at equal or greater fault as Beauchamp, who had  
12 special fiduciary duties and unique knowledge as legal counsel for DenSco. *See, e.g.,*  
13 CSOF ¶¶ 60-61 below.

14 The Receiver further disputes any inference that the assertions regarding  
15 Chittick's actions in the Notice of Claim were deemed true or not true by a fact finder.

16 **DSOF ¶ 53:** Pursuant to the Notice of Claim, Chittick's fraud cost DenSco  
17 \$43,947,819.61. *Id.* at 6.

18 **Receiver's Response (CSOF ¶ 53): Controverted in part.** The Receiver  
19 disputes DSOF ¶ 53 to the extent it purports to summarize an assertion in the Receiver's  
20 Notice of Claim, which speaks for itself.

21 The Receiver further disputes any inference that Chittick's actions as asserted in  
22 the Notice of Claim place DenSco at equal or greater fault as Beauchamp, who had  
23 special fiduciary duties and unique knowledge as legal counsel for DenSco. *See, e.g.,*  
24 CSOF ¶¶ 60-61 below.

25 The Receiver further disputes any inference that the assertions regarding  
26 Chittick's actions in the Notice of Claim were deemed true or not true by a fact finder.  
27

1           **DSOF ¶ 54:** On August 8, 2017, the Receiver’s counsel wrote a letter to Judge  
2 Sanders, who is presiding over the DenSco receivership, wherein he summarized the  
3 allegations against DenSco by concluding that “DenSco...also was operating as a Ponzi  
4 investment scheme *while intentionally misleading its investors*, as to its financial  
5 solvency.” DSOF Exh. 30, Receiver’s letter to Judge Sanders.

6           **Receiver’s Response (CSOF ¶ 54): Controverted in part.** The Receiver does  
7 not dispute that the language quoted in DSOF ¶ 54 appears in the letter cited. *See* DSOF  
8 Exh. 30, Receiver’s letter to Judge Sanders. But the Receiver disputes the statement in  
9 DSOF ¶ 54 that the language quoted in that letter was a “summar[y] [of] the allegations  
10 against DenSco.”

11           The Receiver further disputes any inference that Chittick’s actions place DenSco  
12 at equal or greater fault as Beauchamp, who had special fiduciary duties and unique  
13 knowledge as legal counsel for DenSco. *See, e.g.*, CSOF ¶¶ 60-61 below.

14           **DSOF ¶ 55:** In a sample demand letter to one of DenSco’s investors whom the  
15 Receiver deemed a net winner under DenSco’s Ponzi scheme, the Receiver stated,  
16 among other things, that:

- 17           a. the investors had to return the “profits you received from [DenSco’s]  
18           *fraudulent scheme*, regardless of whether you knew or had reason to know  
19           that the scheme was *illegal*.”  
20           b. “proof of the existence of a Ponzi scheme *showed that there was actual*  
21           *intent to defraud...*”  
22           c. there was “clear and satisfactory evidence of an ‘actual intent to hinder,  
23           delay or defraud any creditor of the debtor’ ...,” that “one can infer an intent  
24           to defraud future undertakers from the mere fact that an individual was  
25           running a Ponzi scheme, because no other reasonable inference is possible”  
26           and that “the orchestrator of the scheme [Chittick] must know all along,  
27

1 from the very nature of his activities, that investors at the end of the line  
2 will lose their money.”

3 DSOF Exh. 31, Receiver’s demand letter to Ponzi winner.

4 **Receiver’s Response (CSOF ¶ 55): Controverted in part.** The Receiver  
5 disputes that the language quoted in subpoint “a” of DSOF ¶ 55 appears anywhere in  
6 the demand letter cited. *See* DSOF Exh. 31, Receiver’s demand letter to Ponzi winner.

7 The Receiver does not dispute that the language quoted in subpoint “b” of DSOF  
8 ¶ 55 appears in the demand letter cited. *See* DSOF Exh. 31, Receiver’s demand letter  
9 to Ponzi winner, at 2. But the Receiver affirmatively asserts that the language has been  
10 taken out of context. In the demand letter, this language appears in a parenthetical as  
11 part of a citation of a District of Arizona case, not a description of DenSco. *See id.*

12 The Receiver does not dispute that the language quoted in subpoint “c” of DSOF  
13 ¶ 55 appears in the demand letter cited. *See* DSOF Exh. 31, Receiver’s demand letter  
14 to Ponzi winner, at 2. But the Receiver affirmatively asserts that the language has been  
15 taken out of context. In the demand letter, this language appears as a description of the  
16 law, both under statute and case law, not as a description of DenSco. *See id.*

17 The Receiver further disputes any inference that Chittick’s actions as asserted in  
18 the Notice of Claim place DenSco at equal or greater fault as Beauchamp, who had  
19 special fiduciary duties and unique knowledge as legal counsel for DenSco. *See, e.g.,*  
20 CSOF ¶¶ 60-61 below.

21 The Receiver further disputes any inference that Chittick’s actions place DenSco  
22 at equal or greater fault as Beauchamp, who had special fiduciary duties and unique  
23 knowledge as legal counsel for DenSco. *See, e.g.,* CSOF ¶¶ 60-61 below.

24 **DSOF ¶ 56:** The Receiver states in his Disclosure Statement that Chittick “had  
25 been grossly negligent in managing DenSco’s loan portfolio, by not complying with the  
26 terms of the Mortgage, which called for DenSco to issue a check payable to the Trustee,  
27 and instead wiring money to Menaged, trusting Menaged to actually use those funds to  
28

1 pay a Trustee.” DSOF Exh. 32, Receiver’s 6th Supplemental Disclosure Statement at ¶  
2 215.

3 **Receiver’s Response (CSOF ¶ 56): Controverted in part.** The Receiver does  
4 not dispute that the language quoted in DSOF ¶ 56 appears in the Disclosure Statement  
5 cited. DSOF Exh. 32, Receiver’s 6th Supplemental Disclosure Statement at ¶ 215. But  
6 the Receiver disputes any inference that Chittick’s actions place DenSco at equal or  
7 greater fault as Beauchamp, who had special fiduciary duties and unique knowledge as  
8 legal counsel for DenSco. *See, e.g.*, CSOF ¶¶ 60-61 below. The Receiver affirmatively  
9 asserts that Beauchamp’s conduct was egregious, as described at length in CSOF ¶¶ 62-  
10 143 below.

11 **DSOF ¶ 57:** In January 2014, Menaged started requesting loans from DenSco  
12 for properties Menaged never actually purchased. After the First Fraud, Chittick would  
13 wire money directly to Menaged’s bank account. Menaged would then get a cashier’s  
14 check issued to the trustee of a trustee’s sale, email a picture of the cashier’s check to  
15 Chittick, then immediately redeposit the check into his account. Menaged would then  
16 provide Chittick with a falsified trustee’s sale receipt, all to convince Chittick that  
17 DenSco’s funds had actually been used to purchase property. The Receiver refers to  
18 this fraud as the Second Fraud. According to the Receiver, DenSco lent Menaged more  
19 than \$730 million as part of the Second Fraud, which ultimately cost DenSco more than  
20 \$28 million. DSOF Exh. 13 at 9-10.

21 **Receiver’s Response (CSOF ¶ 57): Objection: Incomplete. Also:**  
22 **Controverted in part.** The Receiver does not generally dispute that Chittick engaged  
23 in the conduct described in DSOF ¶ 27. But the Receiver affirmatively asserts that  
24 Chittick engaged in this conduct after, and as a result of, receiving advice from  
25 Beauchamp. *See* CSOF ¶¶ 127-33 below. The Receiver therefore disputes any  
26 inference that Chittick’s actions place DenSco at equal or greater fault as Beauchamp,  
27  
28

1 who had special fiduciary duties and unique knowledge as legal counsel for DenSco.  
2 *See, e.g.*, CSOF ¶¶ 60-61 below; *see also* CSOF Ex. 2 (Wertlieb report) at 14.

3  
4 **DSOF ¶ 58:** The Receiver states in his Disclosure Statement that Defendants  
5 were negligent in their representation of DenSco, by allegedly failing to provide proper  
6 advice regarding DenSco’s disclosure obligations in 2013 and 2014, failing to advise  
7 DenSco as to proper business procedures in light of Menaged’s fraud, and advising  
8 DenSco that it could raise money without making full disclosures, among other things.  
9 DSOF Exh. 32 at pp. 95-96. The Receiver further asserts in Count 2 of his Complaint  
10 that Defendants purportedly aided and abetted Chittick’s breach of his fiduciary duty to  
11 DenSco by allegedly failing to force DenSco to change its business practices, failing to  
12 force DenSco to hire more employees, failing to investigate Menaged, and failing to  
13 force DenSco to make adequate disclosures while allowing DenSco to sell additional  
14 promissory notes, among other things. *Id.* at pp. 100-101.

15 **Receiver’s Response (CSOF ¶ 58): Objection: Incomplete. Also:**  
16 **Controverted in part.** The Receiver disputes DSOF ¶ 58 to the extent it purports to  
17 summarize assertions in the Receiver’s Disclosure Statement, which speaks for itself.  
18 *See* DSOF Exh. 32 at pp. 95-96, 100-101. The Receiver affirmatively asserts that the  
19 Receiver’s Disclosure Statement is well over one hundred pages long and contains  
20 numerous allegations about Defendants’ conduct that are not fairly captured in the one-  
21 paragraph summary in DSOF ¶ 58. The Receiver specifically disputes DSOF ¶ 58 to  
22 the extent it suggests that the Receiver’s claims against Defendants arise from a failure  
23 to “force” DenSco to do anything.

24 **DSOF ¶ 59:** On June 27, 2014, Chittick and Menaged exchanged emails  
25 commenting that they hoped Chittick was “not meeting with an investor who is looking  
26 for the [POM] Haha”. DSOF Exh. 33.

27 **Receiver’s Response (CSOF ¶ 59): Objection: Incomplete. Also:**  
28 **Controverted in part.** The Receiver disputes any inference that the lack of disclosure

1 to investors is attributable primarily to Chittick and not Beauchamp. The Receiver  
2 affirmatively asserts that Chittick was the only employee of a busy operation and  
3 therefore relied heavily on his legal counsel, David Beauchamp. See CSOF ¶¶ 60-61  
4 below. The Receiver further asserts that Beauchamp (1) failed to update the POM to  
5 investors despite knowing that it contained untrue statements, (2) encouraged Chittick  
6 to have DenSco continue raising money from investors despite the lack of disclosures,  
7 and (3) continued to represent DenSco even when Chittick and Menaged exchanged the  
8 emails described in DSOF ¶ 49. See CSOF ¶¶ 62-84, 85-115, 124-126, 135-137 below.  
9 Indeed, after completing the Forbearance Agreement, Beauchamp gave Chittick “a  
10 year” to straighten things out instead of insisting that he make disclosures to investors.  
11 See CSOF ¶¶ 110-111, 113-115 below. And then Beauchamp met with Chittick again,  
12 and gave him another “90 days” instead of insisting that he make disclosures to  
13 investors. See CSOF ¶¶ 112-115 below.

14 The statement in DSOF ¶ 59 also mischaracterizes the evidence. In the email  
15 cited in DSOF ¶ 59, it is Menaged, not Chittick, who comments that he hopes Chittick  
16 is “not meeting with an investor who is looking for the [POM] Haha.” See DSOF Exh.  
17 33.

18  
19 **PLAINTIFF’S ADDITIONAL STATEMENT OF FACTS**

20 **(CSOF ¶¶ 60-144)**

21 As noted in the Receiver’s response to the cross-motion (at 10-11), regardless of  
22 how Defendants characterize DenSco’s conduct, the Court must compare the conduct  
23 of the parties (assuming the defense can apply at all in Arizona to bar claims from the  
24 jury). That is because, even if both parties participated in the wrong, “the party more  
25 at fault cannot employ the doctrine of *pari delicto* to shield his deliberate invasion of  
26 the rights of the former.” *In re Bill Johnson’s Restaurants, Inc.*, 255 F. Supp. 3d 927,  
27 934 (D. Ariz. 2017).

28

1           Accordingly, to avoid unnecessary duplication, the Receiver hereby incorporates  
2 the Plaintiff’s Statement of Facts in Support of Motion for Determination That Plaintiff  
3 Has Made a Prima Facie Case for Punitive Damages for Aiding and Abetting Breach  
4 of Fiduciary Duty filed on April 12, 2019. That motion is fully briefed and is currently  
5 pending.

6           In addition, for certain additional facts below, the Receiver will refer to the  
7 paragraphs and exhibits cited therein from those statements of fact as “**Receiver**  
8 **Punitive Damages SOF ¶ \_\_.**” Additional exhibits containing supporting evidence for  
9 additional facts are cited as “**CSOF Ex. \_\_.**”

10           **60.**    DenSco was a high-risk client for several reasons. DenSco operated in a  
11 highly regulated business in which it raised money from investors and in turn used that  
12 money to make mortgage loans. In addition, DenSco handled high volumes of investor  
13 money—by the date of the 2011 Private Offering Memorandum (POM), DenSco had  
14 funded more than \$300 million in loans. At the same time, DenSco was operated  
15 entirely by Mr. Chittick, without backup. As the Receiver’s standard of care expert  
16 explains, “[t]he volume of business being conducted . . . and the responsibilities of a  
17 single individual to adequately manage that business, are quite striking.” For Clark  
18 Hill’s part, because of the one-man shop, there was a significant risk of confusion as to  
19 the identity of Defendants’ client. **CSOF Ex. 2** (Wertlieb Report) at 40-49.

20           **61.**    In those circumstances, a securities attorney’s duties required Beauchamp  
21 to take a more active role in advising than would be necessary without those high-risk  
22 factors. This means that Defendants should have done much more monitoring and  
23 counseling than would otherwise be the case, “maintain clear documentation of advice  
24 provided and actions taken,” and be prepared to notice and react quickly to “red flag”  
25 warnings of problems. **CSOF Ex. 2** (Wertlieb Report) at 49-50.

26           **Assertion that Defendants lacked knowledge or complicity before January 2014**

27           Defendants contend that they were in the dark and played no role in DenSco’s  
28 failures to adhere to its lending practices with Menaged until January 2014, “after other

1 lenders threatened to sue and after DenSco and Menaged had already put in place a  
2 joint venture to ‘solve’ the issue.” (Cross-Motion at 9 (citing DSOF ¶¶ 28-30).)  
3 Additional facts dispute this contention.

4 **62.** Beauchamp had been DenSco’s securities lawyer since 2003. He drafted  
5 the POMs that DenSco issued to investors approximately every two years from 2003-  
6 2011. Receiver Punitive Damages SOF ¶¶ 12-15.

7 **63.** From that work, Beauchamp would have seen that by the time he drafted  
8 the 2011 POM, DenSco’s investment and loan volume had grown massively (from 124  
9 loans in 2003 to being on pace for more than 700 in 2011), even though DenSco was  
10 still being operated solely by Chittick. Receiver Punitive Damages SOF ¶¶ 31-36.

11 **64.** Beauchamp would have known at the time that the 2011 POM, would  
12 expire by its own terms on July 1, 2013. Receiver Punitive Damages SOF ¶¶ 26-28,  
13 39.

14 **65.** Beauchamp also knew that significant amounts of investor money would  
15 “roll over” into new promissory notes. Beauchamp knew that most investors purchased  
16 two-year promissory notes, and that the vast majority of DenSco’s investors “rolled  
17 over” their investments by buying new promissory notes rather than redeem the  
18 matured notes. Receiver Punitive Damages SOF ¶¶ 19-20.

19 **66.** In March 2013, Chittick asked Beauchamp meet to begin work preparing  
20 an updated POM. They didn’t meet until May 9, 2013. Receiver Punitive Damages  
21 SOF ¶¶ 52.

22 **67.** Although he took some preliminary steps to prepare a new POM between  
23 May and July 2013, he did not begin drafting a new POM. He also did not conduct due  
24 diligence that a reasonable securities would have done to prepare a new POM for an  
25 entity issuing hundreds of loans. Receiver Punitive Damages SOF ¶¶ 37-39, 52-57.

26 **68.** Beauchamp also did some limited work on an updated POM in July and  
27 August 2013, after the 2011 POM expired. Receiver Punitive Damages SOF ¶ 45.

28

1           **69.** At that time, he was also preoccupied with changing law firms.  
2 Beauchamp had been an attorney at another firm, Bryan Cave, but was asked to leave  
3 in June 2013. He ultimately left in August 2013 when he started at Clark Hill. Receiver  
4 Punitive Damages SOF. Receiver Punitive Damages SOF ¶¶ 46- 51.

5           **70.** On June 14 2013, Chittick sent Beauchamp an email that copied  
6 Menaged. The email gave notice of a lawsuit (the *Freo* complaint) against DenSco and  
7 Menaged (through his business) alleging that Menaged had double-liened a property.  
8 The complaint (part of which was attached) alleged that DenSco’s lien was subordinate.  
9 Receiver Punitive Damages SOF ¶¶ 79-82

10           **71.** In the June 14 email, Chittick also stated that Menaged’s attorney was  
11 “working on it” and that Chittick wanted to “piggy back with his attorney to fight it,”  
12 and that Menaged’s company would “pay the legal fees to fight it.” Chittick asked  
13 Beauchamp to “talk to his attorney.” Receiver Punitive Damages SOF ¶ 80.

14           **72.** In the excerpt of the *Freo* complaint Beauchamp received, he would see  
15 allegations that Menaged’s company had (in March 2013) purportedly acquired the  
16 property at a trustee’s sale and then “attempted to encumber the property with deeds of  
17 trust to Active [Funding Group] and DenSco.” That is, Menaged’s company had tried  
18 to put two different liens on the same property. Receiver Punitive Damages SOF ¶ 88.

19           **73.** The *Freo* complaint put Beauchamp on notice that the 2011 POM was  
20 materially misleading because DenSco was not following the “proper method and  
21 procedures for funding a loan,” including conducting due diligence to review and verify  
22 documentation and exercising appropriate care in loaning money. Receiver Punitive  
23 Damages SOF ¶¶ 89-91.

24           **74.** Beauchamp knew this would be material to DenSco’s investors. In a June  
25 14, 2013 email, he told Chittick, “we will need to disclose this in the POM.” Receiver  
26 Punitive Damages SOF ¶ 85.

27           **75.** Nevertheless, Beauchamp’s billing records at Bryan Cave reflect that he  
28 did very little work on the matter. In litigation disclosure statements, however,

1 Beauchamp has contended that he did much more, including that he “advised Mr.  
2 Chittick . . . that Mr. Chittick needed to fund DenSco’s loans directly to the trustee . . .  
3 rather than provide loan funds directly to the borrower . . . .” This is an admission that  
4 Beauchamp knew in June 2013 that the 2011 POM was materially misleading.  
5 Receiver Punitive Damages SOF ¶¶ 92-93.

6 **76.** Beauchamp did not conduct any follow up investigation about the  
7 allegations in the *Freo* complaint; had he done so, he would have easily learned  
8 (through simple searches on the recorder’s website) that Menaged had clearly borrowed  
9 money from DenSco and another lender, using the same property as security, and then  
10 personally signed both deeds of trust before a notary. Receiver Punitive Damages SOF  
11 ¶¶ 96-99.

12 **77.** Although Chittick told Beauchamp that DenSco would “piggy back” on  
13 Menaged’s legal defense, Beauchamp did not advise DenSco against this course of  
14 action even though there was a clear conflict of interest between DenSco and its  
15 borrower who had double-liened the property.

16 **78.** Despite being aware of the *Freo* lawsuit and admitting they “will need to  
17 disclose this in the POM,” Beauchamp did not update the POM. Receiver Punitive  
18 Damages SOF ¶¶ 100-112.

19 **79.** Even though by July 2013 Beauchamp knew that (1) the 2011 POM was  
20 expired; (2) the 2011 POM materially incorrect as of July 1, 2013; and (3) significant  
21 amounts of investor notes would be rolling over in the months after the POM expired,  
22 Beauchamp never advised DenSco to stop selling promissory notes pending a new,  
23 accurate POM. Receiver Punitive Damages SOF ¶¶ 113-117.

24 **80.** On December 18, 2013, Chittick emailed Beauchamp, asking him where  
25 the updated POM was because an investor had asked about it. Beauchamp still had not  
26 drafted one. Receiver Punitive Damages SOF ¶ 131-136.

27 **81.** Clark Hill and Beauchamp claim that during the December 18 call,  
28 Chittick told Beauchamp that some Menaged properties had the same double-liening

1 issue, where DenSco loans were subject to a second deed of trust competing for priority  
2 with DenSco's deed of trust." They also claim that Beauchamp told Chittick during the  
3 call that Chittick still needed to update the POM. No document in the record  
4 corroborates the content or existence of this call. Receiver Punitive Damages SOF ¶¶  
5 137-145.

6 **82.** If the conversation happened, Beauchamp did not do anything to update  
7 the POM or do any investigation for DenSco's benefit in response to learning that  
8 DenSco had more double-lien problems with the same borrower.

9 **83.** During litigation, Clark Hill and Beauchamp have blamed Chittick for  
10 their failure to do anything to prepare a new POM. In deposition, Beauchamp stated  
11 that he did not update the POM because Chittick instructed him not to, as a condition  
12 of signing Clark Hill's engagement letter after Beauchamp transferred in September  
13 2013. There is no documentation corroborating Beauchamp's testimony. Receiver  
14 Punitive Damages SOF ¶¶ 149-152.

15 **84.** If the jury believes Beauchamp and Clark Hill, then by going along with  
16 Chittick's instruction, Defendants substantially assisted Chittick in breaching his duties  
17 to DenSco in 2013 because Defendants knew the POM was expired and inaccurate but  
18 DenSco was continuing to raise investor money, and millions in notes were rolling over.  
19 Receiver Punitive Damages SOF ¶¶ 156-160.

20  
21 **Assertion that Chittick/DenSco knew their disclosure obligations, regardless of**  
22 **Defendants' legal advice.**

23 Defendants contend in their cross-motion (at 8) that "it cannot reasonably be  
24 disputed that DenSco understood its disclosure obligations," and was "aware of the  
25 promises they made to investors through the POMs and otherwise," regardless of the  
26 legal advice given about disclosures. Additional facts dispute this contention.

27 **85.** As set forth in the Receiver Punitive Damages SOF, by January 8, 2014,  
28 Beauchamp had received clear evidence that Chittick had breached his fiduciary duties

1 to DenSco, exposed DenSco to substantial losses, mismanaged DenSco's loan  
2 portfolio, and failed to comply with lending practices disclosed in the 2011 POM. It  
3 would have also been obvious that the problems centered on DenSco's loans to  
4 Menaged entities, and that Menaged's explanation for the problems were implausible.  
5 Receiver Punitive Damages SOF ¶¶ 161-195.

6 **86.** This knowledge is in addition to what was known before January 2014,  
7 including that DenSco was continuing to raise funds with an expired and inaccurate  
8 2011 POM.

9 **87.** At that point, Beauchamp had an obligation to meet with Chittick  
10 (without Menaged present) to confirm relevant facts, and advise him, as DenSco's  
11 President, of the actions DenSco needed to take and the consequences to DenSco if it  
12 failed to do so. **CSOF Ex. 2** (Wertlieb report) at 40, 55, 62-63.

13 **88.** Among other things, Beauchamp needed to tell Chittick that DenSco  
14 needed to stop raising funds immediately, cease all business with Menaged, and update  
15 the POM to disclose the problems with Menaged immediately, along with other  
16 material facts concerning DenSco's business. **CSOF Ex. 2** (Wertlieb report) at 57-67.

17 **89.** If DenSco would not do those things, Clark Hill and Beauchamp needed  
18 to first threaten to terminate the representation and, if DenSco would still not follow  
19 this advice, actually terminate the representation. **CSOF Ex. 2** (Wertlieb report) at 57,  
20 67.

21 **90.** Beauchamp did not give this advice. Instead, he met with Chittick and  
22 Menaged on January 9, 2014. As set out in the Receiver Punitive Damages SOF at ¶¶  
23 208-212. Beauchamp learned at the meeting that DenSco faced an even larger exposure  
24 from Chittick's mismanagement, and that Chittick wanted to pursue a "work out" plan  
25 with Menaged.

26 **91.** For several months at that point, Beauchamp was well aware that Chittick  
27 was causing DenSco to sell securities to investors without disclosing material  
28

1 information. The “work out” plan, as it existed, depended on this continuing for the  
2 foreseeable future.

3 **92.** Clark Hill and Beauchamp advised Chittick that DenSco could continue  
4 to raise money from investors while Chittick pursued the “work out” plan. Clark Hill  
5 and Beauchamp also allowed Chittick to delay issuing an updated POM. Menaged  
6 stated that Beauchamp asked Chittick “how long we thought we could get this whole  
7 resolved. Denny said less than a year . . . Beauchamp asked how we would keep this  
8 from investors for that long a period of time.” Receiver Punitive Damages SOF ¶¶ 214,  
9 263-295; **CSOF Ex. 3** (Menaged Dep.) at 318:4-319:5.

10 **93.** Clark Hill and Beauchamp—who never updated the POM and knew for  
11 months funds were being raised based on an inaccurate, expired POM—saw the “work  
12 out” plan as an opportunity to cover up the past negligence and potentially mitigate  
13 their exposure. Receiver Punitive Damages SOF ¶ 215.

14 **94.** Clark Hill and Beauchamp have claimed that, starting at the January 9,  
15 2014 meeting, they advised Chittick that DenSco could not take new money without  
16 full disclosure, DenSco could not roll over existing investments without full disclosure,  
17 and that DenSco needed to update its POM. Receiver Punitive Damages SOF ¶¶ 263.

18 **95.** They have also claimed that, before late April or early May 2014, he  
19 believed that DenSco was making necessary disclosures to investors orally.

20 **96.** The support for this contention is Beauchamp’s testimony. All other  
21 evidence indicates that Beauchamp and Clark Hill knew and encouraged the continued  
22 efforts to raise money without telling DenSco’s investors.

23 **97.** During the process of negotiating the Forbearance Agreement in the first  
24 quarter of 2014, Chittick believed that he could “raise money according to Dave  
25 [Beauchamp]” and that, after discussing disclosure with Beauchamp, “we are going to  
26 put that off as long as possible so that we can improve the situation as much as  
27 possible.” Receiver Punitive Damages SOF Ex. 136 (2/21/2014 Corporate Journal  
28 entry).

1           **98.** In a January 12, 2014 email exchange, Chittick tells Beauchamp that he  
2 “spent the day contacting every investor that has told me they want to give me more  
3 money,” and that he will raise millions. Beauchamp responded, among other things,  
4 “You should feel very honored that you could raise that amount of money that quickly.”  
5 Receiver Punitive Damages SOF Ex. 129.

6           **99.** On February 25, in the midst of negotiating the Forbearance Agreement,  
7 Chittick emailed Beauchamp about the different ideas they were negotiating, and he  
8 stated to Beauchamp that he was “really concerned about” “when I tell my investors  
9 the situation, they request their money back. [I] want to be able to say, this was the  
10 problem, we’ve eliminated this much of the problem and this is what is left. [I] want to  
11 be able to say what is left is as small as possible.” Beauchamp responded, “Good ideas  
12 and probably something we need to work on.” Receiver Punitive Damages SOF ¶¶  
13 239-40.

14           **100.** Similarly, while negotiating terms of the Forbearance Agreement,  
15 including how to keep lending to Menaged in ways that obviously violated the POM,  
16 Beauchamp told Chittick that he “completely agree[s] that [the proposed lending plan]  
17 makes a lot of sense, but I am concerned about disclosure to your investors.” Receiver  
18 Punitive Damages SOF ¶ 256.

19           **101.** These are just some of the examples of Beauchamp advising DenSco to  
20 keep on with its recklessly destructive lending practices and ongoing securities  
21 violations without disclosure to investors.

22           **102.** Beauchamp admits that, at the latest, by late April or early May 2014, he  
23 was aware that DenSco was raising money without making necessary disclosures, and  
24 was after that point committing securities laws violations. **CSOF Ex. 4** (Beauchamp  
25 Dep.) at 161:7-162:9.

26           **103.** Defendants’ expert on standard of care, Scott Rhodes, testified that, at  
27 that point (late April, early May 2014), Defendants had a mandatory duty to withdraw.  
28 **CSOF Ex. 5** (Rhodes dep.) at 180:12-187:2.

1           **104.** Beyond mere termination, a reasonable and prudent attorney would have  
2 done a “noisy” withdrawal, which means that the attorney would “give notice of the  
3 fact of withdrawal and to disaffirm any” any document, such as the 2011 POM. **CSOF**  
4 **Ex. 2** (Wertlieb report) at 57; **CSOF Ex. 5** (Rhodes dep.) at 96:21-101:18 (agreeing  
5 that Clark Hill could have made a “noisy” withdrawal if DenSco is committing  
6 securities fraud); ER 1.1 Comment 11; ER 1.13(c)(2).

7           **105.** Although Beauchamp claims that he orally terminated the representation  
8 in May 2014, the only evidence is his self-serving testimony. There is not a single  
9 document in Clark Hill’s file about termination, no attorney notes, no recording, no  
10 time entry, nothing. Receiver Punitive Damages SOF ¶¶ 350-361.

11           **106.** Beauchamp’s testimony is that Chittick acknowledged the termination  
12 orally, telling Beauchamp “don’t bother, don’t send me a letter.” Receiver Punitive  
13 Damages SOF Ex. 6 at 197:18-21.

14           **107.** That claim is not supported by any document in Clark Hill’s file.

15           **108.** The claim is at odds with all available documents, including Chittick’s  
16 near-daily Corporate Journal and pre-suicide letters. Receiver Punitive Damages SOF  
17 Ex. 38 (letter stating he “talked my attorney in to (sic) allowing me to continue without  
18 notifying my investors. Shame on him.”; Receiver Punitive Damages SOF Ex. 138  
19 (“David [Beauchamp] blessed this course of action.”).

20           **109.** The fact is, Clark Hill and Beauchamp did not terminate representation  
21 of DenSco by April/May 2014, or at any time before Mr. Chittick’s death (or even  
22 after).

23           **110.** Instead, after the completion of the Forbearance Agreement, Beauchamp  
24 agreed to give Chittick time to try to work things out with Menaged and continue raising  
25 and lending investor funds without disclosure. *See* Receiver Punitive Damages SOF ¶¶  
26 296-304; **CSOF Ex. 3** (Menaged dep.) at 386-389.

27           **111.** In March 2015, Beauchamp reached out to Chittick and asked for a  
28 meeting to check on his progress. Chittick agreed to meet and, ahead of the meeting,

1 wrote that Beauchamp “gave me a year to straighten stuff out we’ll see what pressure  
2 I’m under to report now.” Receiver Punitive Damages SOF ¶¶ 296-301.

3 **112.** At the March 2015 meeting, Beauchamp agreed to give Chittick an  
4 additional 90 days. Chittick wrote in his Corporate Journal that he was “nervous  
5 [Beauchamp] was going to put a lot of pressure on me. However, he was thrilled to  
6 know where we were at . . . He said he would give me 90 days.” Receiver Punitive  
7 Damages SOF ¶¶ 302-304.

8 **113.** Menaged talked to Chittick around the time of the meeting, and his  
9 memory was consistent with Chittick’s journal entries about the meeting, including that  
10 Beauchamp had given Chittick/DenSco a year to try to work things out, and that he had  
11 once again approved of Chittick delaying after the March 2015 meeting. **CSOF Ex. 3**  
12 (Menaged dep.) at 386-89.

13 **114.** Menaged stated that he talked with Chittick after the March 2015 lunch,  
14 and Chittick “said that David was very happy with the progress we made. He was  
15 happy everything was going in the right direction. He was glad that—that they didn’t  
16 have to alarm the investors. [Chittick] was grateful that he left him alone for so long.”  
17 **CSOF Ex. 3** (Menaged dep.) at 386:20-387:8.

18 **115.** When asked whether Chittick ever told him that “Beauchamp had  
19 resigned as DenSco’s security lawyers because Denny wouldn’t follow his advice,”  
20 Menaged answered, “Absolutely not.” **CSOF Ex. 3** (Menaged dep.) at 387:21-388:1.

21  
22  
23 **Assertion that Chittick/DenSco’s post-January 2014 business with Menaged was**  
24 **done “without any consideration for legal advice.”**

25 Defendants contend in their cross-motion (at 9) that Defendants’ allegedly bad  
26 legal advice is unimportant because “DenSco had hitched its wagon to Menaged . . .  
27 without any consideration for legal advice.” Additional facts dispute this contention  
28 (in addition to the paragraphs above).

1           **116.** According to a January 7, 2014 email to Beauchamp, Chittick and  
2 Menaged had discussed the double-lien problem in November 2013 (during which  
3 Menaged told Chittick the false story about his cousin). Receiver Punitive Damages  
4 SOF ¶¶ 182-184.

5           **117.** Chittick went on to describe the “plan” that he and Menaged had been  
6 executing since November to “sell of the properties and pay off both liens with interest  
7 and make everyone whole.” The plan was “a combination of injecting capital and  
8 extending cheaper money.” Receiver Punitive Damages SOF ¶ 185.

9           **118.** Chittick described the basic terms of the plan as requiring DenSco to let  
10 its interest accrue rather than be paid, and DenSco is “extending [Menaged] a million  
11 dollars against a home at 3%.” Receiver Punitive Damages SOF ¶ 186.

12           **119.** Chittick asked Beauchamp for help to negotiate this arrangement so that  
13 it continue moving forward with Menaged. because he needed Beauchamp’s “legal  
14 advice to make sure how we were going to memorialize all that transpired and how to  
15 legally deal with it.” Menaged stated that, in January 2014, “the big question to Dave  
16 Beauchamp was, really . . . is there anything further that he needed to do to make sure  
17 everything was valid and correct?” **CSOF Ex 3** (Menaged dep.) at 306:2-307:3.

18           **120.** Upon learning of the depth of the problems with Menaged in January  
19 2014, Beauchamp should have advised Chittick to stop raising funds immediately,  
20 cease all business with Menaged, and update the POM to disclose the problems with  
21 Menaged immediately, along with other material facts concerning DenSco’s business.  
22 If DenSco would not do those things, Clark Hill and Beauchamp needed to terminate  
23 their representation and make a noisy withdrawal, thereby alerting the investors before  
24 additional substantial losses happened. **CSOF Ex. 2** (Wertlieb report) at 8-17, 53-57.

25           **121.** Instead, Beauchamp helped Chittick work out the Forbearance  
26 Agreement, including details about how DenSco would continue business with  
27 Menaged. Receiver Punitive Damages SOF ¶¶ 308-322.

28

1           **122.** Beauchamp took a major role in crafting and advising DenSco’s next  
2 steps with Menaged in the Forbearance Agreement. During the process of working out  
3 the agreement, material terms changed and the parties also discussed all sorts of  
4 proposals. Receiver Punitive Damages SOF ¶¶ 218-257, 308-322; **CSOF Ex. 3**  
5 (Menaged dep.) at 364:17-22 (“It appears from the file that . . . while these discussions  
6 . . . were going on [in February-March 2014], you and Mr. Chittick were still  
7 exchanging ideas about the workout plan”);

8           **123.** Among other terms, Beauchamp helped negotiate the terms of unsecured  
9 lending being provided to Menaged. **CSOF Ex. 3** (Menaged dep.) at 365:1-371:23  
10 (discussing changed and added terms re loans to Menaged and confidentiality  
11 provisions).

12           **124.** In addition, Beauchamp negotiated a “confidentiality” provision in the  
13 Forbearance Agreement. The purpose of the provision was to limit disclosure and  
14 protect Menaged and Chittick, not DenSco. Receiver Punitive Damages SOF ¶¶ 250-  
15 54; **CSOF Ex. 3** (Menaged dep.) at 372:10-374:23.

16           **125.** While negotiating the confidentiality provision, on March 11, 2014,  
17 Beauchamp discussed it on the phone with Menaged and Chittick. Beauchamp said  
18 that details about the Forbearance Agreement would need to be disclosed, but that  
19 disclosure “could be delayed, and ultimately, if the problem was completely resolved  
20 without disclosing to the investors, well, then, there was no reason to have to disclose  
21 it.” **CSOF Ex. 3** (Menaged dep.) at 373:16-374:23.

22           **126.** Beauchamp’s “failures with respect to the Forbearance Agreement” were  
23 so rife with conflict it suggests that he may have been “motivated by other interests,  
24 such as a conflicted desire to give Mr. Chittick’s plan a chance to work so as to  
25 minimize the problems caused by Mr. Chittick’s negligent delay in providing updated  
26 and corrected disclosures.” **CSOF Ex. 2** (Wertlieb report) at 59.

27           **127.** In addition to the terms of the Forbearance Agreement, Chittick sought  
28 advice from Beauchamp on his lending practices. For example, in January 2014,

1 Chittick asked Beauchamp about how to go about funding loans in a way that ensured  
2 he could show DenSco paid the trustee. Rather than do anything to stop the business  
3 with Menaged, Beauchamp responded, “Let me see what the other lenders got from the  
4 Trustee and we can make a better decision.” Receiver Punitive Damages SOF ¶¶ 314-  
5 316; *see also* **CSOF Ex. 2** (Wertlieb report) at 62-63 (noting that there is nothing in the  
6 record indicating that Beauchamp ever followed up or took action to ensure that  
7 Chittick ceased this lending practice).

8 **128.** Beauchamp later advised Chittick that DenSco could continue wiring  
9 money to Menaged, trusting Menaged to pay the loan proceeds to a trustee, so long as  
10 Menaged provided proof. Receiver Punitive Damages SOF ¶ 318.

11 **129.** Although Clark Hill and Beauchamp claim in litigation that Beauchamp  
12 told Chittick to never give money directly to Menaged, there is not a single document  
13 in Clark Hill’s file reflecting that advice. And of course, as part of the Forbearance  
14 Agreement, Beauchamp had helped draft terms that included direct, unsecured lending  
15 to Menaged—none of which was disclosed to investors.

16 **130.** Chittick told Menaged that Beauchamp advised Chittick to get a copy of  
17 the cashier’s check used to pay a trustee. Menaged agreed that this activity “enable[d]  
18 or allow[ed Menaged] to take the activities that had been described in this case . . . as  
19 the second fraud.” **CSOF Ex. 3** (Menaged Dep.) at 327:24-331:3.

20 **131.** There was an obvious conflict of interest between Chittick and DenSco.  
21 The Forbearance Agreement helped Menaged and Chittick, but was almost wholly  
22 against DenSco’s interests. **CSOF Ex. 2** (Wertlieb report) at 59 (The “Forbearance  
23 Agreement provided little or no benefit to DenSco” and it “essentially conced[ed] that  
24 Mr. Menaged’s other lenders had a superior lien position and allow[ed] them to extract  
25 value out of the mortgaged properties ahead of DenSco.”)

26 **132.** The Receiver’s standard of care expert opines that Beauchamp’s failure  
27 to withdraw while continuing to help protect Chittick with the forbearance agreement  
28

1 was “so reckless and irresponsible that such conduct . . . constituted a gross departure  
2 from the standard of care.” **CSOF Ex. 2** (Wertlieb report) at 63.

3 **133.** There is significant evidence that DenSco would have followed sound  
4 legal advice and worked diligently with Clark Hill had DenSco received that advice. In  
5 addition to all the times Chittick followed the advice about the terms of the Forbearance  
6 Agreement, about the ability to delay disclosure, and how to continue doing business  
7 with Menaged, there are other examples:

8 (a) For example, in June 2013, a partner at Beauchamp’s then-  
9 law firm Bryan Cave noticed a significant problem with DenSco’s  
10 website (something Beauchamp missed). After Beauchamp advised  
11 Chittick about it, Chittick corrected the website immediately. In fact,  
12 Bryan Cave’s files reflect that Chittick was prepared to cause DenSco to  
13 refund all investor loans if that was necessary. Receiver Punitive  
14 Damages SOF ¶¶ 61-78, 154.

15 (b) Clark Hill and Beauchamp admit in their initial disclosure  
16 statement that “[o]ver the years, Mr. Chittick showed himself to be a  
17 trustworthy and savvy businessman, and a good client . . . Despite  
18 complaining about the cost of legal services, Mr. Chittick appeared to  
19 follow Mr. Beauchamp’s advice and provided information when asked  
20 for it.” Receiver Punitive Damages SOF ¶ 154.

21  
22 **134.** Defendants have relied on litigation-era, post-Chittick-suicide testimony  
23 and assertions for many key aspects of their defense.

24 **135.** For example, just after Chittick’s suicide, on July 30, 2016 Beauchamp  
25 emailed Clark Hill’s Darrell Davis (managing partner of Clark Hill’s Scottsdale office)  
26 and Mark Sifferman (Clark Hill’s Assistant General Counsel in the Scottsdale office)  
27 to tell them about the suicide. He told them that “the thought is that his actions were  
28 based on personal issues and not business related.” Mr. Davis responded and asked,

1 “Are there any irregularities with his fund?” Beauchamp responded, “Not that I am  
2 aware of.” CSOF Ex. 1 (CH\_0018101).

3 **136.** In addition to incredibly not remembering irregularities, Beauchamp did  
4 not say (as he and Clark Hill now claim in this lawsuit) that he had previously “fired  
5 DenSco for failing to make the requisite disclosures to its investors.”

6 **137.** After Chittick’s July 2016 death, Clark Hill continued representing  
7 DenSco. At the same time, Defendants represented the Chittick Estate. The conflict of  
8 interest between the parties is obvious: DenSco had claims against the Chittick Estate  
9 and against Clark Hill. Receiver Punitive Damages SOF ¶¶ 330-342.

10 **138.** Defendants used their role to dissuade DenSco investors from supporting  
11 receivership. Receiver Punitive Damages SOF ¶ 349.

12 **139.** Clark Hill and Beauchamp also used their position to prevent the Receiver  
13 from obtaining material information. Receiver Punitive Damages SOF ¶¶ 362-373.

14 **140.** After an investor questioned whether Clark Hill had a conflict,  
15 Beauchamp and Clark Hill arranged to have friendly attorneys represent the Estate,  
16 believing they would protect the Estate from claims by investors and the Receiver.  
17 Clark Hill then worked with those lawyers to protect the Estate and Clark Hill from the  
18 Receiver. Receiver Punitive Damages SOF ¶¶ 362-364.

19 **141.** In one egregious example, Clark Hill’s Assistant General Counsel and  
20 Beauchamp prepared a declaration for the Estate to submit to the receivership court  
21 stating that Clark Hill jointly represented DenSco and Chittick individually.  
22 Beauchamp has since acknowledged that declaration was false. Receiver Punitive  
23 Damages SOF ¶ 366.

24 **142.** The Estate used this false statement to obtain an order from the  
25 receivership court that materially limited the Receiver’s ability to promptly obtain  
26 records related to DenSco from Clark Hill’s files because of bogus attorney-client  
27 privilege issues. Receiver Punitive Damages SOF ¶¶ 367-373.



1 This document was electronically filed  
2 and copy delivered\*/e-served via the  
3 AZTurboCourt eFiling system  
4 this 18th day of October, 2019, on:

4 Honorable Daniel Martin\*  
5 Maricopa County Superior Court  
6 101 West Jefferson, ECB-412  
7 Phoenix, Arizona 85003

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16 8259361

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28

# CSOF Ex. 1

Message

---

**From:** Beauchamp, David G. [DBeauchamp@ClarkHill.com]  
**Sent:** 7/30/2016 3:10:03 PM  
**To:** Davis, Darrell E. [ddavis@clarkhill.com]  
**CC:** Sifferman, Mark S. [msifferman@clarkhill.com]  
**Subject:** Re: Very bad personal News

Not that I am aware of.

Sent from my iPhone. Please excuse any typos.

> On Jul 30, 2016, at 3:08 PM, Davis, Darrell E. <DDavis@ClarkHill.com> wrote:

>  
> I'm so sorry to hear that David. Truly tragic. Are there any irregularities with his fund?

>  
>  
>  
>  
> On Jul 30, 2016, at 3:03 PM, Beauchamp, David G. <DBeauchamp@ClarkHill.com> wrote:

>>  
>> Darrell and Mark:

>>  
>> Sorry to bother both of you on the weekend.

>>  
>> I just got a call that the sole owner of a client (DenSCO Investment Corporation), good friend and sole Manager of a real estate investment fund (\$25 million +) committed suicide on Thursday night. I am one of two people named to clean up and shut down the fund.

>>  
>> I do not know what to think and I do not understand why or what brought him to that. As of now, I am to wait for a package with instructions that Denny sent to me just before he committed suicide. Initially the thought is that his actions were based on personal issues and not business related.

>>  
>> However, I just thought his investors (very high profile and possibly some of Darrell's clients) will need to know and they are likely to start calling when the word gets out.

>>  
>> Is there something I should do to set up internal procedures at the firm?

>>  
>> Thanks, David

>>  
>> Sent from my iPhone. Please excuse any typos.

# CSOF Ex. 2

**EXPERT REPORT OF NEIL J WERTLIEB**

**In the matter of**

*Peter S. Davis, as Receiver of DenSco Investment Corporation*

**v.**

*Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp*

**Submitted on March 26, 2019**

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## EXPERT REPORT OF NEIL J WERTLIEB

In the matter of

*Peter S. Davis, as Receiver of DenSco Investment Corporation*

v.

*Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp*

Submitted on March 26, 2019

### I. INTRODUCTION

By letters dated June 15, 2017 and October 3, 2017, the law firm of Osborn Maledon, P.A. (“Osborn Maledon”) retained me (through Wertlieb Law Corp, where I am principal) to serve as an expert witness in the matter of *Peter S. Davis, as Receiver of DenSco Investment Corporation v. Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp* (this “Case”).<sup>1</sup>

This Expert Report of Neil J Wertlieb (this “Report”) contains my opinions, together with the facts and analysis upon which my opinions are based and the reasons for my conclusions.

#### A. My Background and Qualifications

I am the principal of Wertlieb Law Corp, where (among other things) I have served as an expert witness in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics. I also serve as a Special Deputy Trial Counsel on behalf of the State Bar of the State of California, in which capacity I investigate and, when appropriate, prosecute attorney misconduct in certain matters where the State Bar’s Office of Chief Trial Counsel has determined that it may have a conflict of interest.

Prior to founding Wertlieb Law Corp in 2017, I was a partner at the law firm of Milbank, Tweed, Hadley & McCloy LLP (“Milbank”), where for over two decades my practice focused on corporate transactions, primarily securities offerings, acquisitions and restructurings. I have represented clients in a wide variety of business matters, including formation and early round financings, mergers and acquisitions, private placements and public offerings, international securities offerings and other international transactions, fund formations, joint ventures, real estate and hospitality matters, partnerships and limited liability companies, reorganizations and restructurings, independent investigations, and general corporate and contractual matters.

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<sup>1</sup> See Plaintiff’s Disclosure of Areas of Expert Testimony dated September 7, 2018 (“the [Receiver] discloses the following areas of expert testimony he anticipates offering at trial: ... The applicable standard of care, Defendants’ departure from the standard of care and how that departure caused injury to DenSco. Departure from the standard of care will encompass all allegations in the Complaint, both legal malpractice and breaches of fiduciary duty, and will be premised on all actions described in Plaintiff’s Rule 26.1 statement of facts. Expert testimony may also address whether the departures from the standard of care are gross departures from the standard of care.”).

I would estimate that in the course of my 34 years of practicing law, I have worked on securities offerings that raised over \$20 billion in proceeds. Such offerings have included: initial public offerings and other securities offerings registered with the Securities and Exchange Commission (the "SEC"); international and intrastate securities offerings which have been outside of the jurisdictional scope of federal securities regulation; and venture capital and early stage financings, fund financings, real estate related financings, and private placements and other offerings which have been exempt from SEC registration. My responsibilities in such offerings included the following tasks: evaluating compliance with federal, state and foreign securities regulations; preparing, reviewing and advising with respect to disclosures and SEC filings; preparing, reviewing and advising with respect to other documentation, including subscription agreements and investor suitability questionnaires; rendering legal opinions and conducting due diligence; assessing the risks associated with non-compliance, conducting internal compliance investigations, and advising with respect to rescission offers and other remedies; and other tasks associated with the offer and sale of securities. I have also advised securities issuers and other entities, as well as their directors, officers and managers, with respect to their fiduciary duty obligations.

Prior to joining Milbank in 1995, I was the general counsel for a public telecommunications and broadcast company. I also served as the General Counsel and a member of the Board of Directors of the Los Angeles Kings Hockey Team. And before that, I worked for eight years at the law firm of O'Melveny & Myers LLP, as a transactional associate in the firm's Corporate Department.

I am also an Adjunct Professor of Law at the UCLA School of Law where (since 2002) I teach a transaction skills course, entitled "Life Cycle of a Business," which focuses on business transactions, negotiation, contract drafting and attorney ethics. The course subjects include fiduciary duties, securities offerings, disclosure documents and materiality.

I have been engaged by Harvard Law School Executive Education as Senior Advisor, Milbank@Harvard. This professional development program provides Milbank associates with immersive week-long programs to build leadership and business skills each year for four years, as they progress from mid-level associates to senior associates. Led by Harvard Law and Business School faculty, the program covers topics such as business, finance, accounting, marketing, law, management skills, client relations and personal and professional development. As Senior Advisor, I provide input, guidance and assistance in formulating the program and connecting it to the practice of law.

I am a former Chairman of each of the following committees of the California State Bar: the Executive Committee of the Business Law Section; the Corporations Committee; and the Committee on Professional Responsibility and Conduct. I am currently the Chairman of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association. I also served as a Judicial Extern for Justice Stanley Mosk on the California Supreme Court.

I am the general editor of the legal treatise *Ballantine & Sterling: California Corporation Laws*. I have been recognized in *The Legal 500* for my mergers and acquisitions work and was

recognized as one of the top 100 most influential lawyers in California (*California Law Business*, October 30, 2000).

I received my law degree in 1984 from the UC Berkeley School of Law, and my undergraduate degree in Management Science from the School of Business Administration also at the University of California at Berkeley. I am admitted to practice law in California, New York and Washington, D.C.

My qualifications are described in more detail in my curriculum vitae, a current copy of which is attached as Exhibit A to this Report. A list of all cases in which I have testified as an expert at a deposition, hearing or trial during the past four years is attached as Exhibit B to this Report.

### **B. Description of this Case**

This Case was initiated by the filing of a Complaint on October 16, 2017, by Peter S. Davis, as the court-appointed receiver (the "Receiver") of DenSco Investment Corporation, an Arizona corporation ("DenSco"), following the death of Denny Chittick, DenSco's sole owner, shareholder and operator. In the Complaint, the Receiver states two claims for relief against the law firm of Clark Hill PLC ("Clark Hill") and David G. Beauchamp (collectively, the "Defendants")<sup>2</sup>: (1) legal malpractice; and (2) aiding and abetting breach of fiduciary duties. The claims arise from the legal representation of DenSco by the Defendants.

### **C. Scope of Engagement**

In the course of this engagement, I have reviewed certain documents provided or made available to me by, and have been in communication with, Osborn Maledon, the law firm representing Peter S. Davis, as Receiver of DenSco in this Case. The documents which have been provided or made available to me are listed on Exhibit C attached to this Report. In the event new information becomes available to me, I reserve the right to modify my opinions and conclusions accordingly.

At times during the course of this engagement, I have utilized the services of Christa Chan-Pak, who has acted an associate attorney at Wertlieb Law Corp during the preparation of this Report.

For purposes of this engagement, Wertlieb Law Corp charges Osborn Maledon an hourly rate of \$1,000 for my time. The compensation Wertlieb Law Corp receives for the services provided in formulating the opinions stated herein is not in any way contingent upon the conclusions I have reached in, or on the final outcome of, this Case.

### **D. Summary of Opinion**

It is my opinion, as detailed below and based on the record that I have reviewed, that the Defendants violated the applicable standard of care in their representation of DenSco.

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<sup>2</sup> Mr. Beauchamp's wife, identified as Jane Doe Beauchamp, is also named as a defendant in the Complaint.

## II. SUMMARY OF FACTS

### A. The Defendants and DenSco

Mr. Beauchamp started his legal career in 1981 and has practiced at no less than seven different law firms, starting as an associate at Fennemore Craig.<sup>3</sup> Following Fennemore Craig, he moved to Storey & Ross, then to Moya Bailer Bowers & Jones, then to Quarles & Brady, then to Gammage & Burnham, then to Bryan Cave.<sup>4</sup> In September 2013, Mr. Beauchamp joined Clark Hill,<sup>5</sup> where he is currently a Member.<sup>6</sup> His primary practice areas are corporate law, securities, venture capital and private equity transactions.<sup>7</sup>

Defendant Clark Hill is an international law firm. According to its website, it is “one of the largest firms in the United States - with more than 650 attorneys and professionals in 25 offices, spanning the United States as well as Dublin and Mexico City.”<sup>8</sup>

Denny Chittick formed DenSco in April 2001.<sup>9</sup> Prior to forming DenSco, Mr. Chittick worked at Insight Enterprises, Inc. (“Insight”), a publicly traded company, for approximately 10 years. When he left Insight, he began investing his own money, and subsequently established DenSco where he invested his own money and solicited money from other investors.<sup>10</sup>

DenSco made “high-interest loans with defined loan-to-value ratios to residential property remodelers ... who purchase[d] houses through ... foreclosure sales all of which [were] secured by real estate deeds of trust (‘Trust Deeds’) recorded against Arizona residential properties.”<sup>11</sup> “From April, 2001, through June, 2011 [DenSco] engaged in 2622 loan transactions.”<sup>12</sup> Mr. Chittick was the sole shareholder, director, officer and employee of DenSco.<sup>13</sup> Mr. Chittick raised money from investors by issuing general obligation notes (the “Notes”) at variable interest rates. The Notes were “secured by a general pledge of all assets owned by or later acquired by”

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<sup>3</sup> See page 33, line 21, Deposition of David G. Beauchamp on July 19 and 20, 2018 (“Deposition of Mr. Beauchamp”).

<sup>4</sup> See page 33, lines 9-17, Deposition of Mr. Beauchamp.

<sup>5</sup> See page 33, lines 17-18, Deposition of Mr. Beauchamp.

<sup>6</sup> See Clark Hill website, <https://www.clarkhill.com/people/david-g-beauchamp> (retrieved March 2, 2019).

<sup>7</sup> See Clark Hill website, <https://www.clarkhill.com/people/david-g-beauchamp> (retrieved March 2, 2019).

<sup>8</sup> Clark Hill website, <https://www.clarkhill.com/pages/about> (retrieved March 2, 2019).

<sup>9</sup> See page 1, *Arizona Corporation Commission v. DenSco Investment Corporation* (Case No. CV 2016-014142), Preliminary Report of Peter S. Davis, as Receiver of DenSco Investment Corporation, dated September 19, 2016.

<sup>10</sup> See page 40, DenSco’s Confidential Private Offering Memorandum dated July 1, 2011 (the “2011 POM”); printout of the “Company Management” page from the DenSco website dated June 17, 2013.

<sup>11</sup> Page 1, 2011 POM.

<sup>12</sup> Page 1, 2011 POM.

<sup>13</sup> Pages 40-41, 2011 POM.

DenSco.<sup>14</sup> DenSco's largest assets were the Trust Deeds,<sup>15</sup> which were intended to be secured through first position trust deeds.<sup>16</sup>

Mr. Beauchamp began providing securities advice to DenSco in the early 2000s.<sup>17</sup> As DenSco's securities lawyer, Mr. Beauchamp, among other things, drafted DenSco's Private Offering Memoranda ("POMs")<sup>18</sup> and related investor documents.<sup>19</sup> The POMs offered Notes according to the terms set forth therein. In addition, Mr. Beauchamp advised DenSco on federal and state securities laws, mortgage broker regulations and rules and regulations promulgated by state and financial lending authorities.<sup>20</sup>

Mr. Beauchamp "advised DenSco regarding its Private Offering Memoranda, which DenSco generally updated every two years. He helped draft the 2003, 2005, 2007, 2009 and 2011 POMs."<sup>21</sup>

## **B. Events from Mid-2013 to Mid-2014**

### **1. DenSco's 2011 POM Expired**

The 2011 POM provided for a two-year offering period.<sup>22</sup> Thus, by its own terms, the 2011 POM expired on July 1, 2013. However, the Defendants never finalized and provided DenSco with an update to the 2011 POM or a replacement POM.

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<sup>14</sup> Page (i), 2011 POM.

<sup>15</sup> Page (i), 2011 POM.

<sup>16</sup> Page 37, 2011 POM.

<sup>17</sup> Page 3, lines 2-3, Defendants' Sixth Supplemental Rule 26.1 Disclosure Statement dated March 12, 2019 ("Defendants' DS").

<sup>18</sup> As discussed below, a private offering memorandum is a disclosure document used to solicit investment in private securities transactions. A POM is provided to prospective investors to provide such investors with information regarding the issuer and the securities it intends to issue. Generally, a POM describes the business, the investment opportunity, the associated risks, the management team, historical performance and expected performance of the business. Disclosures made in a POM are regulated under the federal securities laws by, among other laws and rules, Rule 10b-5 promulgated under the Securities Exchange Act of 1934.

<sup>19</sup> See pages 3-4, lines 25-1, Defendants' DS.

<sup>20</sup> Page 4, lines 2-4, Defendants' DS.

<sup>21</sup> Page 5, lines 7-8, Defendants' DS; see, also, pages 256-257, lines 22-3, Deposition of Mr. Beauchamp (Mr. Beauchamp testified that it was his practice to revise the POM every two years based on a suggestion "made by a former SEC official, that given the nature of this industry, two years would be an appropriate time. However, if something material happened before then, you need to tell your client this has to be disclosed.").

<sup>22</sup> See page (i), 2011 POM ("The Company intends to offer the Notes on a continuous basis until the earlier of (a) the sale of the maximum offering, or (b) two years from the date of this memorandum.").

In early May 2013, Mr. Chittick prompted Mr. Beauchamp (who was then at Bryan Cave) to begin work on an updated POM.<sup>23</sup> On May 9, 2013, Mr. Beauchamp met with Mr. Chittick. However, when Mr. Beauchamp learned that DenSco was close to issuing \$50 million of Notes,<sup>24</sup> he ceased working on an updated POM.<sup>25</sup> Because of his concern that DenSco was approaching the maximum offering size, he began reaching out to his colleagues at Bryan Cave for advice on federal and state laws.<sup>26</sup> It appears that Mr. Beauchamp's concerns were misplaced, as no such legal issues existed.<sup>27</sup>

Ultimately, the Defendants *never* completed the updated disclosure.<sup>28</sup>

## 2. The Freo Lawsuit (the First of Four “Red Flag” Warnings)

On June 14, 2013, Mr. Chittick emailed Mr. Beauchamp to alert him that a lawsuit had been filed against DenSco (the “Freo Lawsuit”), and included the first four pages of the complaint.<sup>29</sup> Mr. Chittick stated that DenSco was being sued along with one of its borrowers – a borrower that DenSco “had done a ton of business with, millions in loans and hundreds of loans for several years.”<sup>30</sup> The borrower was Scott “Yomtov” Menaged, together with the businesses he operated through two Arizona limited liability companies, Easy Investments, LLC and Arizona Home Foreclosures, LLC.

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<sup>23</sup> See email dated May 1, 2013 from Mr. Chittick to Mr. Beauchamp (“it’s the year when we have to do the update on the memorandum, when do you want to start?”).

<sup>24</sup> See DIC0003345, Mr. Beauchamp’s handwritten notes, dated May 9, 2013, that state “\$50MM (what is this a threshold for).”

<sup>25</sup> See email dated June 25, 2013 from Mr. Beauchamp to Elizabeth Kearny Sipes, his then colleague at Bryan Cave (“*We stopped updating [the POM] when we were told that the investments from the investors had jumped to approximately \$47.5 million. Given that significant increase I have been asking for help to determine what other federal or state laws might be applicable. Bob Pederson out of NY has said that the Trust Indenture Act will not be applicable so long as the client is under the Regulation D, Rule 506 exemption. The other big issues have waited for your help to discern if we need to comply with the Investment Advisors Act of 1940 and the Registered Investment Advisors requirements.*” [italics added]).

<sup>26</sup> Ibid.

<sup>27</sup> See email dated July 1, 2013 from Ms. Sipes to Mr. Beauchamp (“I don’t believe DenSco would ... need to register as an investment adviser.... It is also not necessary to count accredited investors at this time. DenSco is offering the notes under [SEC Rule] 506 which permits an unlimited number of accredited investors.”).

<sup>28</sup> See page 53, lines 11-13, Deposition of Mr. Beauchamp (“We never ... issued a private offering memorandum at Clark Hill for DenSco”); see, also, pages 178-179, lines 22-3 (“Q: So you made a decision with Mr. Chittick that you would not disclose anything until we had a private offering memorandum, irregardless of fiduciary duties? ... A. I did not have that agreement with Mr. Chittick. Over time, that’s what evolved.”).

<sup>29</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged (“David: I have a borrower, to which I’ve done a ton of business with, million in loans and hundreds of loans for several years, he’s getting sued along with me.”).

<sup>30</sup> Ibid.

The complaint in the Freo Lawsuit alleged that Mr. Menaged had secured two mortgages on one property: “Easy [Investments] attempted to encumber the property with deeds of trust to Active [Funding Group, LLC, an Arizona limited company, the other lender] and DenSco.”<sup>31</sup> Mr. Beauchamp recognized that the Freo Lawsuit was material to DenSco’s investors, and immediately told Mr. Chittick, “we will need to disclose this in POM.”<sup>32</sup> Mr. Chittick readily agreed.<sup>33</sup> The Freo Lawsuit put Mr. Beauchamp on notice that DenSco’s 2011 POM may be materially misleading because, if the allegations in the complaint were correct, DenSco was not following the methodology and procedures stated in the 2011 POM for funding its loans.<sup>34</sup> Based on the record I have reviewed in this Case, it appears that such disclosure was never made to DenSco’s investors nor included in any draft updates to the 2011 POM prepared by the Defendants.

Mr. Chittick also informed Mr. Beauchamp that Mr. Menaged’s attorney was working on the defense of the Freo Lawsuit, and that Mr. Chittick intended to “piggy back” on his borrower’s defense.<sup>35</sup> Despite this clear conflict of interest, and Mr. Chittick’s instruction that he speak with Mr. Menaged’s attorney<sup>36</sup> – and Mr. Menaged’s offer to pay for his time<sup>37</sup> – Mr. Beauchamp apparently took no action with respect to the Freo Lawsuit.<sup>38</sup>

The Freo Lawsuit was the first of what I consider to be four “red flag” warnings, as discussed below.

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<sup>31</sup> See paragraph 20, Complaint dated May 24, 2013, *Freo Arizona, LLC v. Easy Investments, LLC, Active Funding Group, LLC, DenSco Investment Corporation, et al.*, brought in The Superior Court for the State of Arizona in and for the County of Maricopa.

<sup>32</sup> Email dated June 14, 2013 from Mr. Beauchamp to Mr. Chittick.

<sup>33</sup> Email response dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp (“ok 1 sentence should suffice!”).

<sup>34</sup> See page 6, Defendants’ DS (“DenSco and Mr. Chittick were both advised, and understood, ... that DenSco was representing to its investors that DenSco’s loans would be in first position, and ... that it was of fundamental importance that DenSco safeguard the use of its investors’ funds in conjunction with properly recording liens, in order to ensure that DenSco’s loans were in first position.”). See also paragraph 121 of Plaintiff’s Fifth Disclosure Statement dated November 14, 2018 (“Plaintiff’s DS”) (“It was apparent from the Freo complaint that Chittick had not conducted any due diligence before loaning money to Easy Investments to acquire this particular home, since the property had been sold, according to public records, five days before a trustee’s sale.”).

<sup>35</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged (“Easy Investments, has his attorney working on it, I’m ok to piggy back with his attorney to fight it.”).

<sup>36</sup> See *Ibid* (“Easy Investments [sic] willing to pay the legal fees to fight it. I just wanted you to be aware of it, and talk to his attorney. Contact info is below.”).

<sup>37</sup> Reply email dated June 14, 2013 from Mr. Menaged (“David Please bill me for your services and utilize my attorney for anything you may need.”).

<sup>38</sup> Mr. Beauchamp testified that he did not speak to the borrower’s attorney, Mr. Goulder, at this time. See page 240, lines 9-19, Deposition of Mr. Beauchamp.

### 3. Mr. Chittick's Instruction (the Second of Four "Red Flag" Warnings)

Although Mr. Beauchamp did some work on an updated POM in July and August of 2013 (after the 2011 POM had expired),<sup>39</sup> he was also preoccupied with changing law firms.<sup>40</sup> In late August 2013, he informed Mr. Chittick that he was leaving Bryan Cave for Clark Hill.<sup>41</sup>

In his deposition, Mr. Beauchamp asserted that the delay in updating the POM was caused by Mr. Chittick, and that Mr. Chittick instructed Mr. Beauchamp to stop working on the POM in August 2013 ("Mr. Chittick's Instruction").<sup>42</sup> Based on the record I have reviewed, it appears there is no evidence confirming Mr. Beauchamp's assertion.<sup>43</sup> While I do not find Mr. Beauchamp's assertion credible under the circumstances, for the reasons discussed below, any such instruction from Mr. Chittick would not relieve Mr. Beauchamp of his obligation to take some form of corrective action.

In September 2013, Mr. Beauchamp left Bryan Cave and moved to Clark Hill. An engagement letter dated September 12, 2013 was signed by Mr. Beauchamp on behalf of Clark Hill, and by Mr. Chittick on behalf of DenSco as a new client at Clark Hill. Mr. Beauchamp requested that Mr. Chittick have certain DenSco files transferred from Bryan Cave to Clark Hill, including

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<sup>39</sup> See Bryan Cave invoice dated August 14, 2013 to DenSco for legal services rendered through July 31, 2013 (Mr. Beauchamp billed 9.7 hours for work on the DenSco POM in July); Bryan Cave invoice dated September 14, 2013 to DenSco for legal services rendered through August 31, 2013 (0.4 hours regarding subscription documents and procedures in August).

<sup>40</sup> See pages 46-47, lines 22-1, Deposition of Mr. Beauchamp ("I don't remember when I first talked to Clark Hill ... but you are talking I believe the end of June – to mid-August [2013] was the time period where I explored different options and tried to deal with it.").

<sup>41</sup> See Mr. Beauchamp's handwritten notes dated August 26, 2013 ("TCW Denny Chittick (8/26/13) – left message – need to work on the latest version of POM that Denny has w/ the prior experience charts – need to discuss timing + update. TCW Denny Chittick (8/26/13) – explained delay w POM – need to get copy of Denny's latest POM make changes to it – BC will be sending a letter to Denny + letting Denny decide if he wants files kept at BC or move to CH").

<sup>42</sup> Page 289, lines 15-25, Deposition of Mr. Beauchamp ("Q. And you write, in your handwriting: Explained delay with POM. Did you write that? A. Yes, I did. ... I believe it was a reference, again, to his decision to put it on hold for the time being, because he wasn't able to focus on it and get us the information. Q. You weren't explaining your delay on the POM, Mr. Beauchamp? A. No."); page 290, lines 11-14 ("Q. But unequivocally, it's your testimony under oath that by August 26, 2013, he told you to stop working on the POM? A. That is correct."). But see Deposition of Mr. Hood, page 101, lines 17-22 ("Q. So would you agree with me that in September 2013, *while he is working at Clark Hill*, Mr. Beauchamp is ordered by Mr. Chittick to stop working on the POM? A. Well, that's what appears to have been the case, according to Mr. Beauchamp's interrogatory answers, yes." [italics added]).

<sup>43</sup> See page 288, lines 5-7, Deposition of Mr. Beauchamp ("Q. And again, this wasn't by letter or email. You think this was a telephone conversation? A. That's how Denny preferred it.").

“2011 and 2013 Private Offering.”<sup>44</sup> Although he asserts that Mr. Chittick directed him to stop all work on the POM just two weeks earlier,<sup>45</sup> Mr. Beauchamp also completed a “New Client/Matter Form” at Clark Hill to “Finish Private Offering Memorandum.”<sup>46</sup>

Despite taking on DenSco as a client in September 2013, the Defendants appear to have done no work in updating the expired 2011 POM, nor made any effort to provide DenSco with a replacement POM, for over three months. By mid-December 2013, Mr. Chittick apparently had to prompt Mr. Beauchamp to resume work on an updated POM.<sup>47</sup>

Mr. Chittick’s Instruction was the second of four “red flag” warnings, as discussed below.

#### **4. The December 2013 Phone Call (the Third of Four “Red Flag” Warnings)**

In December 2013, Mr. Chittick informed Mr. Beauchamp that certain properties DenSco had lent against had other liens competing for priority (the “December 2013 Phone Call”): “In December 2013, Mr. Chittick ... told Mr. Beauchamp over the phone that he had run into an issue with some of his loans to Menaged, and specifically, that properties securing a few DenSco loans were each subject to a second deed of trust competing for priority with DenSco’s deed of trust.”<sup>48</sup> When Mr. Beauchamp found out about the double lien issue, he advised Mr. Chittick to document a “plan” with Mr. Menaged to resolve the double lien issue.<sup>49</sup> Based on the record I have reviewed, and despite this potentially material problem with a borrower that Mr. Beauchamp knew to be very important to DenSco’s business (and the very same borrower that

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<sup>44</sup> See email dated September 12, 2013 from Mr. Beauchamp to Mr. Chittick (“Denny: There should not be a cost associated with transferring your files. However, to be safe, we should just do the following: AZ Practice Review (contains previous research); Blue Sky Issues; Garnishments; General Corporate; 2011 and 2013 Private Offering.”).

<sup>45</sup> Page 289, lines 15-25, and page 290, lines 11-14, Deposition of Mr. Beauchamp.

<sup>46</sup> See DIC0008653, Clark Hill New Client/Matter Form signed by Mr. Beauchamp on September 13, 2013.

<sup>47</sup> See email dated December 18, 2013 from Mr. Chittick to Mr. Beauchamp (“Since you moved, we’ve never finished the update on the memorandum.”). The Defendants attempt to contradict the clear implication of this email by asserting that it was Mr. Beauchamp who reminded Mr. Chittick. See Defendants’ DS, page 8 (“Mr. Beauchamp reminded Mr. Chittick that he still needed to update DenSco’s private offering memorandum.”). While I do not find Defendants’ assertion credible under the circumstances, for the reasons discussed below, the Defendants were still obligated to take some form of corrective action.

<sup>48</sup> Defendants’ DS, page 8.

<sup>49</sup> Defendants’ DS, page 8 (“After briefly discussing the allegedly limited double lien issue, Mr. Chittick emphasized to Mr. Beauchamp that Mr. Chittick wanted to avoid litigation with other lenders. Mr. Chittick, however, did not request any advice or help. Rather, Mr. Chittick indicated that he wanted to continue working on a plan with Menaged to resolve the double-lien issue. Accordingly, Mr. Beauchamp suggested that Mr. Chittick and Menaged document their plan.”)

was the apparent cause of the Freo Lawsuit),<sup>50</sup> there was no discussion or effort to update the POM to disclose this fact, nor does it appear that the Defendants did any investigation into the matter.

The December 2013 Phone Call was the third of four “red flag” warnings, as discussed below.

#### **5. The Bryan Cave Demand Letter (the Fourth of Four “Red Flag” Warnings)**

On January 6, 2014, Mr. Beauchamp received a copy of a demand letter sent by Bryan Cave to DenSco (the “Bryan Cave Demand Letter”).<sup>51</sup> The letter stated that Bryan Cave represented certain lenders and lienholders that had loaned money to Easy Investments, LLC and/or Arizona Home Foreclosures, LLC (both entities owned and controlled by Mr. Menaged), to enable such borrowers to purchase various properties. The letter asserted that DenSco engaged in a practice of recording a mortgage on those same properties on or around the same time that the Bryan Cave lenders were recording their deeds of trust. The Bryan Cave Demand Letter demanded that DenSco agree to sign subordination agreements in favor of such lenders and lienholders with respect to the properties.

It is clear that, despite this very serious and material problem with a borrower that Mr. Beauchamp knew to be very important to DenSco’s business (and the very same borrower that was the apparent cause of both the Freo Lawsuit and the December 2013 Phone Call),<sup>52</sup> there was no effort made to update the POM to disclose this fact, nor does it appear that the Defendants did any investigation into the matter. In fact, as discussed below, once the Bryan Cave Demand Letter came to his attention, Mr. Beauchamp’s priority became drafting and negotiating the Forbearance Agreement (as defined below),<sup>53</sup> not updating the 2011 POM.

The Bryan Cave Demand Letter was the fourth of four “red flag” warnings, as discussed below.

#### **6. The Defendants’ Efforts to Paper Over the Menaged Problem**

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<sup>50</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged (“I’ve done a ton of business with [Mr. Menaged], million in loans and hundreds of loans for several years”).

<sup>51</sup> Email dated January 6, 2014 from Mr. Chittick to Mr. Beauchamp, attaching letter dated January 6, 2014 from Bryan Cave to DenSco, re: “Mortgage Recordation; Demand for Subordination.”

<sup>52</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged (“I’ve done a ton of business with [Mr. Menaged], million in loans and hundreds of loans for several years”).

<sup>53</sup> See page 59, lines 19-24, Deposition of Mr. Beauchamp (“I was giving him clear advice as far as what to do, he would not let me independently confirm that he was giving that advice, which I – he said I’ve never lied to you, and on that basis, that was true, so we proceeded *the priority was the Forbearance Agreement at that time.*” [italics added])

**a. Mr. Beauchamp Learned of the Menaged Fraud and DenSco's Improper and Risky Lending Practices**

The day after receiving the Bryan Cave Demand Letter, Mr. Beauchamp was told that Mr. Chittick had not been following proper funding procedures to ensure DenSco's first lien position, and instead "would wire the money to [Mr. Menaged's] account and [Mr. Menaged, not DenSco] would pay the trustee."<sup>54</sup> Mr. Chittick explained his funding procedure, and also admitted that he did the same thing with several other borrowers and with respect to every auction property.<sup>55</sup> By funding directly to a borrower, rather than to a trustee or escrow company or in some other manner so as to ensure that DenSco had a perfected first lien priority position on the property securing its loan, DenSco was taking significant and unnecessary risk that it might not be in a first lien position with respect to such loans.<sup>56</sup> In fact, because DenSco was funding directly to borrowers *in anticipation* of a property acquisition, there was no way for DenSco to even ensure that the loan proceeds were actually used for such purpose. Mr. Beauchamp was well aware of the risks associated with this funding procedure as he had "provided advice to DenSco regarding proper loan documentation procedures since at least 2007."<sup>57</sup>

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<sup>54</sup> Email dated January 7, 2014 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("I've been lending to Scott Menaged through a few different LLC's and his name since 2007. I've lent him 50 million dollars and I have never had a problem with payment or issue that hasn't been resolved. ... Because of our long term relationship, when Scott needed money, I would wire the money to his account and he would pay the trustee.").

<sup>55</sup> Ibid ("I do this same thing with several borrowers and bidding co's. As an example, he would buy a property at auction for 100k it's worth 145k, he would ask me for 80k. I would wire it to him, he would pay the trustee with my 80k and his 20k and he would sign the RM, which I've attached (all docs you have reviewed and have been reviewed [sic] by a guy at your last law firm, maybe two firms ago in 2007). I've attached them. I would record the RM the day he paid for the property. Then once the trustee's deed was recorded, which during the last few years has been at times 6 weeks from the auction date to the recorded date, I then would record my DOT. This is a practice that I have done for 14 years. It's recognized by all the escrow co's. Some title agents won't see anything before the trustee's deed recording as a valid lien, some look at the whole chain. For me to be covered, I would record the RM to muddy up title then record the DOT after the trustee's deed to ensure my first position lien. ... Again, *this is what I do on every single auction property no matter who is the borrower.*" [italics added]). See, also, Plaintiff's DS ¶ 211.

<sup>56</sup> Mr. Menaged testified in his Rule 2004 Examination conducted on behalf of the Receiver on October 20, 2016 that: DenSco's lending practices were not as uniform or *careful* as other lenders (page 27); DenSco *never* declined a loan amount proposed by Mr. Menaged (page 38); "There was never anything not approved" (page 53); DenSco would wire the funds directly to Mr. Menaged (pages 43-44); DenSco would wire funds before receiving signed documents (page 54); DenSco did not require proof of insurance (page 56); "The only way that DenSco ended up in this position is because he wired the money to the borrower, me, and did not pay the trustee directly" (page 74); and "I guess in general terms, *it was just a very lax hard money lending practice, very, very, lax*" (page 39 [italics added]).

<sup>57</sup> See page 6, Defendants' DS ("Mr. Beauchamp ... provided advice to DenSco regarding proper loan documentation procedures since at least 2007. DenSco and Mr. Chittick were both advised,

These improper and risky funding procedures were not disclosed in the 2011 POM. In fact, the 2011 POM incorrectly stated that DenSco's loans were funded so as to ensure first lien positions on such properties.<sup>58</sup>

Mr. Menaged fabricated a story to explain the double lien issue – a story which we now know to be false. As told by Mr. Menaged, because he was distracted with his wife's illness, he turned over certain business operations to his "cousin." The cousin would obtain a loan from DenSco, which DenSco wired directly, and the cousin would also obtain a loan from another lender, which lender would wire funds directly to the trustee. The cousin would file deeds of trust on behalf of both lenders, and then ultimately absconded with DenSco's funds.<sup>59</sup>

In fact, there was no such cousin. A simple search of records available on the County of Maricopa website showed that it was Mr. Menaged who executed those deeds of trust in the presence of a notary, and not any "cousin."<sup>60</sup>

**b. Mr. Chittick and Mr. Menaged Create the "Plan"**

Mr. Chittick shared with Mr. Beauchamp that he thought his options were limited. Mr. Chittick claimed that DenSco could not sign the subordination agreements demanded by the Bryan Cave

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and understood, (a) that DenSco should fund loans through a trustee, title company or other fiduciary, (b) that DenSco was representing to its investors that DenSco's loans would be in first position, and (c) that it was of fundamental importance that DenSco safeguard the use of its investors' funds in conjunction with properly recording liens, in order to ensure that DenSco's loans were in first position.").

<sup>58</sup> See, e.g., page 37, 2011 POM ("All real estate loans funded by the Company have been and are intended to be secured through first position trust deeds.").

<sup>59</sup> See email dated January 7, 2014 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("Sometime last year, [Mr. Menaged's] wife became ill with cancer. His cousin was working with him and took on a stronger day to day role as scott [sic] was distracted with his wife. Scott always was the one that determined what properties to buy, how much etc. his cousin doing paperwork, checks and management of the day to day. At some point his cousin decided to take advantage of our relationship and started to steal money. Scott would request a loan from me, his cousin would request a loan from another borrower (I would say there are as many as ½ dozen different lenders in total.) ... What his cousin was doing was receiving the funds from me, then requesting them from the other lenders. These other lenders would cut a cashiers [sic] check for the agreed upon loan amount and then take it to the trustee and receive the receipt. ... The cousin absconded with the funds."). See, also, Plaintiff's DS ¶ 215.

<sup>60</sup> See, e.g., Exhibit 103 (Deed of Trust and Security Agreement with Assignment of Rents, recorded in the Official Records of Maricopa County Recorder March 25, 2013, for property located at "7089 W Andrew Lane Peoria, AZ 85383." The Trustor is Easy Investments, LLC. The Beneficiary is Active Funding Group, LLC.); see, also, Exhibit 104 (Deed of Trust and Assignment of Rents, recorded in the Official Records of Maricopa County Recorder April 2, 2013, for property located at "7089 W Andrew Lane Peoria, AZ 85383." The Trustor is Easy Investments, LLC. The Beneficiary is DenSco.).

Demand Letter, because doing so would be contrary to the disclosures made by Mr. Chittick to DenSco's investors.<sup>61</sup> Further, Mr. Chittick claimed that DenSco could not litigate with the other lenders over the priority issue because doing so would somehow limit its ability to collect high interest on its loans.<sup>62</sup>

Mr. Chittick also shared with Mr. Beauchamp that he did not want to disclose the problem to DenSco's investors until the problem had been addressed and DenSco's exposure had been minimized.<sup>63</sup> Otherwise, DenSco would start to "unravel."<sup>64</sup> Mr. Chittick was concerned that when investors learned of the situation, there would be a "run on the bank."<sup>65</sup> Presumably, any such disclosure would also be viewed as an acknowledgment that Mr. Chittick failed in his responsibilities to properly manage DenSco's mortgage loans and investor funds, and thus he fell prey to Mr. Menaged's fraud.

Instead, Mr. Chittick shared with Mr. Beauchamp that he and Mr. Menaged had come up with a plan (the "Plan") to get the other lenders paid off, which would keep them satisfied,<sup>66</sup> avoid

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<sup>61</sup> Email dated January 7, 2014 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("I know that I can't sign the subordination because that goes against everything that I tell my investors.").

<sup>62</sup> See pages 169-170, lines 25-9, Deposition of Mr. Beauchamp ("He had expressed that if we ended up in litigation, that he would have limitations on his ability to collect the high interest on his loans to his borrowers, so he would not be able to make the payments to his investors, which would in fact cause it to unravel. He had a very specific thought that he was concerned with, and that is why he wanted to be able to show: We have a plan to work this out. We have thought it through. And that was his whole focus, get the forbearance done first.").

<sup>63</sup> See Exhibit 360, email dated February 25, 2014 from Mr. Chittick to Mr. Beauchamp ("what both of us [Mr. Menaged and Mr. Chittick] are really concerned about is that when I tell my investors the situation, they request their money back. I want to be able to say, this was a problem, we've eliminated this much of the problem and this is what it left. I want to be able to say what is left is as small as possible."). See, also, pages 169-170, lines 25-9, Deposition of Mr. Beauchamp.

<sup>64</sup> See pages 169-170, lines 25-9, Deposition of Mr. Beauchamp.

<sup>65</sup> See excerpt from DIC0009464, Chittick Investor Letter dated July 28, 2016 ("Why I didn't let all of you know what was going on at any point? It was pure fear ... I have 100 investors, I had no idea what everyone would do or want to do ... I also feared that there would be a classic run on the bank.").

<sup>66</sup> See, e.g., email dated January 12, 2014 from Mr. Chittick to Mr. Menaged, copying Mr. Beauchamp ("Greg [Reichman, Principal of Active Funding Group, LLC, an Arizona corporation, the other lender with a deed of trust on the property that was the subject of the Freo lawsuit] has confirmed with Scott and has told me, as long as he gets his interest and payoffs come, he's happy.").

litigation,<sup>67</sup> and give Mr. Chittick time to minimize the damage caused by Mr. Menaged's fraud.<sup>68</sup>

Mr. Chittick's Plan was to be memorialized in a forbearance agreement, which Mr. Beauchamp spent over three months negotiating until it was finalized and executed on April 16, 2014 (the "Forbearance Agreement").<sup>69</sup>

Despite learning of the very serious issues raised by the Bryan Cave Demand Letter (which were consistent with the problems Mr. Beauchamp learned about earlier in the Freo Lawsuit and the December 2013 Phone Call), the material deficiencies in DenSco's funding procedures, the significant deficiencies in DenSco's first lien positions, and the fraud perpetrated on DenSco, the Defendants appear to have done no work in updating the 2011 POM, nor made any effort to provide DenSco with a replacement POM, for the entire period of time that Mr. Beauchamp was working on the Forbearance Agreement.

### **c. The Forbearance Agreement**

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<sup>67</sup> See, e.g., email dated January 7, 2014 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("What we need is an agreement that as long as the other lenders are being paid their interest and payoffs continue to come (we have 12 more houses in escrow currently, all planned to close in the next 30 days), that no one initiates foreclosure for obvious reasons, which will give us time to execute our plan").

<sup>68</sup> Ibid ("The Plan: 1. All lenders will be paid their interest, except me, I'm allowing interest to accrue. 2. I'm extending him a million dollars against a home at 3%. 3. He is bringing in 4-5 million dollars over the next 120 days from liquidating some assets as well as getting some money back that the cousin stole, and other sources. 4. He's got a majority of these houses rented, this brings in a lot of money every month. 5. The houses that he's buying now and will be flipping will bring in money every week starting next week or two. 6. As the houses become vacant either because of ending the lease or the tenant leaves, scott [sic] will fix up the house and sell it retail. This will drive the order in which the houses will be sold. 7. He owns dozens of houses that only have one lien on them and have substantial equity in them, and he'll be selling these as the tenants vacate.").

<sup>69</sup> Forbearance Agreement dated April 16, 2014 by and among Arizona Home Foreclosures, LLC, Easy Investments, LLC (collectively defined therein as the "Borrower"), Mr. Menaged and DenSco (as "Lender").

The magnitude of the problems with Mr. Menaged are readily apparent from the Forbearance Agreement, which recited that as of April 16, 2014, “the total principal sum now due and payable under the [scheduled] Loans, in aggregate, is \$35,639,880.71.”<sup>70</sup>

Although the Forbearance Agreement required Mr. Menaged to “acknowledge and agree that the Loans are in Default,”<sup>71</sup> the principal economic commitment made by Mr. Menaged was for the Borrower to “use its *good faith efforts*” to pay off the other lenders, with “*any balance* to be paid to [DenSco] to reduce the amount of [DenSco’s] Additional Loan ... to Borrower as provided herein.”<sup>72</sup> As Mr. Menaged testified, he was unwilling to make an unconditional commitment to do so.<sup>73</sup>

On the other hand, the Forbearance Agreement imposed material obligations and economic burdens on *DenSco*, including:

- DenSco agreed to forbear from collecting on the loans to Mr. Menaged and his affiliated entities (the “Menaged Loans”), or otherwise exercising any of its rights or remedies under the Loan Documents and applicable law, for so long as Mr. Menaged and the Borrower were in compliance with the Forbearance Agreement.<sup>74</sup>
- DenSco agreed to extend the maturity date on all of the Menaged Loans to February 1, 2015 and reserved the right to further extend the maturity date for another year.<sup>75</sup>

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<sup>70</sup> Section 1, Forbearance Agreement. See also pages 9-10, lines 25-2, Defendants’ DS (“by the end of 2013, more than half of [DenSco’s] loan portfolio was tied up with Menaged--well in excess of the promised loan concentrations DenSco had set forth in its disclosures to investors”).

<sup>71</sup> Section 2, Forbearance Agreement.

<sup>72</sup> Sections 6(A) and 6(H), Forbearance Agreement [italics added]. The Forbearance Agreement did provide DenSco with a separate corporate guaranty from Furniture King, LLC (see Section 6(D)); however, Mr. Beauchamp failed to cause a UCC-1 to be filed against the new guarantor, and such entity ended up having no value. See email dated August 5, 2016 from Mr. Beauchamp to DenSco’s Noteholders.

<sup>73</sup> See pages 117-119, lines 23-9, Mr. Menaged’s Rule 2004 Examination conducted on behalf of the Receiver on October 20, 2016 (“Q. And did -- so at the time, when you signed [the Forbearance Agreement], did you believe that this was never going to happen? A. I said that I would make my best effort to do so, and in front of Beauchamp and DenSco I did explain to him -- what they both told me, both of them told me was, ‘Hey, this is all really best efforts. You do your best, but we’re going into this forbearance agreement. It’s protecting everyone. End of story.’ That’s all I really know about this forbearance agreement. Q. Okay. But these funds were not delivered on these dates and times, right? A. Correct. Q. And the reason for that was why? A. Like I said, it was best effort. My best effort couldn’t deliver those funds.”).

<sup>74</sup> Section 4, Forbearance Agreement.

<sup>75</sup> Section 5, Forbearance Agreement.

- DenSco committed to fund not less than an additional \$6 million to the Borrower, most of which would be used to pay off the other lenders.<sup>76</sup>
- DenSco agreed to defer the collection of interest on all Menaged Loans,<sup>77</sup> and to waive its right to charge default interest on all defaulted loans.<sup>78</sup>
- Contrary to the disclosures made in the 2011 POM, DenSco agreed to increase its loan-to-value ratio to up to 120% for loans on the double lien properties (meaning that the debt on such properties was materially in excess of the realizable value of such properties).<sup>79</sup>
- DenSco committed, for the benefit of Mr. Menaged, to limit the information that DenSco could disclose to its investors (including omitting the names of Mr. Menaged and his entities), and granted Mr. Menaged the right to review and comment on any disclosure prior to it being released.<sup>80</sup>

As a result, the benefit of the Forbearance Agreement to DenSco (as opposed to Mr. Menaged and perhaps Mr. Chittick individually) is unclear.<sup>81</sup> In substance, because it had the effect of subordinating DenSco's recovery to the recovery of the other lenders (by conceding the priority of the other lenders' liens), the Forbearance Agreement was essentially the same as the subordination agreements that Mr. Chittick rejected as being inconsistent with assurances made to DenSco's investors. By allowing the other lenders to be paid off before DenSco, Mr. Chittick's Plan, as effectuated by the Forbearance Agreement, had the effect of worsening DenSco's financial position by increasing the leverage on the double lien properties such that there was insufficient residual equity value to repay DenSco's loans in full.

It does not appear to be the case that execution of the Forbearance Agreement itself (as opposed to the speculative benefits DenSco might possibly receive going forward, when and if so received) would provide Mr. Chittick with the positive message he wanted to share with investors that DenSco's exposure had been minimized (especially since DenSco committed to extend at least another \$6 million to Mr. Menaged). In other words, because Mr. Chittick had

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<sup>76</sup> Sections 7(B) and 7(D), Forbearance Agreement.

<sup>77</sup> Section 7(C), Forbearance Agreement.

<sup>78</sup> Section 7(E), Forbearance Agreement.

<sup>79</sup> Section 7(A), Forbearance Agreement.

<sup>80</sup> Section 18, Forbearance Agreement ("With respect to the limitation on Lender's disclosure to its investors ... Lender agrees ... to limit such disclosure as much as legally possible").

<sup>81</sup> See page 92 of Mr. Menaged's Rule 2004 Examination conducted on behalf of the Receiver on October 20, 2016, in which his testimony suggests that Mr. Chittick proposed the Forbearance Agreement in order to protect Mr. Chittick ("Q. ... Was it -- you know, when you learn or when you tell him that he's in second position, how does this forbearance agreement come to light? How does this get negotiated and drafted and prepared? A. He said to me that he was going to contact his attorney and *have an agreement drawn up to protect him*. That's how it came to light." [italics added]). See, also, page 98 ("He needed, the attorney, he needed to draft the agreement in a way that will *protect Denny* from any kind of liability with the investors." [italics added]).

explained to Mr. Beauchamp that he did not want to make disclosures until much of the double lien problem had been resolved,<sup>82</sup> Mr. Beauchamp could not have reasonably believed that the completion of the Forbearance Agreement itself would prompt Mr. Chittick to make appropriate disclosures. In fact, the Defendants pursuit of the Forbearance Agreement had the effect of further delaying and limiting required disclosures to DenSco's investors.

**7. Defendants Allege They Withdrew from Representing DenSco in May 2014**

Mr. Beauchamp claimed he was not aware that DenSco had been continuing to offer Notes until after completion of the Forbearance Agreement, at the end of April or May 2014. Mr. Beauchamp further claimed that the Defendants withdrew from the attorney-client relationship with DenSco in May 2014 when Mr. Chittick refused to send updated disclosures to investors.<sup>83</sup>

However, based on the record I have reviewed, and for the following reasons, it is clear that Mr. Beauchamp was aware that DenSco was continuing to offer Notes without updated disclosures, after the expiration of the 2011 POM, and despite his knowledge of the problems revealed in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter.

First, despite his initial delay in updating the 2011 POM due to unfounded legal concerns about the size of the offering, there is no evidence that Mr. Beauchamp communicated to Mr. Chittick to cease offering Notes until an updated POM could be provided to investors.<sup>84</sup>

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<sup>82</sup> See email dated February 25, 2014 from Mr. Chittick to Mr. Beauchamp ("I want to be able to say, this was a problem, we've eliminated this much of the problem and this is what it left. I want to be able to say what is left is as small as possible." [italics added]). See, also, Mr. Chittick's entry in his DenSco Journal on February 21, 2014 ("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.").

<sup>83</sup> See page 81, lines 1-8, Deposition of Mr. Beauchamp ("I was not aware that he was taking any new money from new investors or rollovers ... until the end of April or May [2014] which forced us to give him the disclosure ... for the Forbearance Agreement and say ... we have to finish this thing ... we need to send this to everybody before you proceed. ... And he did not do it so we quit."); Defendants' DS, page 23 ("In May 2014, ... Mr. Beauchamp informed Mr. Chittick that Beauchamp and Clark Hill could not and would not represent DenSco any longer.").

<sup>84</sup> I note, however, that Mr. Beauchamp asserted in his deposition testimony that he told Mr. Chittick that "he could not take any money from any new client [and]; he could not take any rollover money from an existing client, without giving them full disclosure." See page 78, lines 16-19, Deposition of Mr. Beauchamp. For the reasons stated herein, I do not find this assertion credible. However, even if true, such statement appears to simply be paying lip service to proper advice. See also Deposition of Mr. Hood, pages 83-84, lines 24-10 ("Q. Mr. Beauchamp never gave that advice prior to January 9th, 2014.... Clark Hill verified he gave the advice starting on January 9, 2014, and thereafter. True? ... THE WITNESS: ... I think that was right at the time that this issue was presented to Mr. Beauchamp."), pages 85-86, lines 21-5 ("Q. All right. In December 2013, Mr. Beauchamp did not tell Mr. Chittick he had to stop lending money. True? ... THE WITNESS: I - - I don't believe that he told Mr. Chittick that, no. Q. And in December

Second, Mr. Beauchamp knew that between June and December 2013, DenSco had 60 Notes that were scheduled to mature and that, consistent with Mr. Chittick's practice, a significant portion of those outstanding Notes would be rolled over into the issuance of new Notes.<sup>85</sup>

Third, several days *after* receipt of the Bryan Cave Demand Letter and Mr. Chittick's explanation of his funding procedures, the Menaged fraud, and his Plan to address the problem, Mr. Chittick specifically informed Mr. Beauchamp that he was soliciting new investors. On January 12, 2014, Mr. Chittick emailed Mr. Beauchamp, stating that he had "spent the day contacting every investor that [had] told [him] they want[ed] to give [him] more money," and that he expected to raise between \$5 million and \$6 million from the sale of Notes.<sup>86</sup> Mr. Chittick further inquired whether such actions were acceptable to Mr. Beauchamp: "that's my plan, shoot holes in it."<sup>87</sup> Mr. Beauchamp responded that same day, and not only did he fail to "shoot holes in it" (e.g., by instructing Mr. Chittick to not sell Notes without updated and corrected disclosures), he congratulated Mr. Chittick for his ability to "raise that amount of money that quickly."<sup>88</sup>

Fourth, shortly after receipt of the Bryan Cave Demand Letter, Mr. Chittick made a statement to such effect in the corporate journal that he maintained (the "DenSco Journal"). On January 10, 2014, he wrote in the DenSco Journal: "I can raise money according to Dave."<sup>89</sup>

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2013, he didn't tell Mr. Chittick that he couldn't take any rollover monies. True? ... THE WITNESS: I - - I don't believe so.").

<sup>85</sup> See email dated June 20, 2013 from Mr. Beauchamp to several colleagues at Bryan Cave ("According to his note schedule, Denny has approximately 60 investor notes that are scheduled to expire in the next 6 months (and to probably be rolled over into new notes)"). See also Plaintiff's DS ¶ 18 ("Beauchamp knew that the vast majority of DenSco's investors purchased two-year promissory notes. For example, Beauchamp's notes reflect that Chittick told him during a May 3, 2007 meeting that 90% of the promissory notes DenSco had issued to investors were two-year notes."); Plaintiff's DS ¶ 19 ("Beauchamp also knew that the vast majority of DenSco's investors did not redeem their promissory notes when those notes matured, and instead 'rolled over' their investments by executing a subscription agreement and buying a new promissory note when a previous promissory note matured. As Beauchamp wrote in a June 15, 2007 e-mail to Richard Carney, who was then doing 'Blue Sky' work for DenSco, 'DenSco has regular sales of roll-over investments' and an 'ongoing roll-over of the existing investors every 6 months or so.'").

<sup>86</sup> Email dated January 12, 2014 from Mr. Chittick to Mr. Beauchamp ("*I've spent the day contacting every investor that has told me they want to give me more money... I feel like if all goes well, I'll have my money in total of ... 5-6 million in this time frame. ... that's my plan, shoot holes in it.*" [italics added]).

<sup>87</sup> Ibid.

<sup>88</sup> Email response dated January 12, 2014 from Mr. Beauchamp to Mr. Chittick ("You should feel very honored that you could raise that amount of money that quickly.").

<sup>89</sup> See, also, Mr. Chittick's entry in the DenSco Journal on February 21, 2014 ("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.").

Fifth, although Mr. Beauchamp claimed that he believed Mr. Chittick provided full disclosure to every investor about the fraud,<sup>90</sup> that is implausible based on the record I have reviewed. Mr. Beauchamp knew that Mr. Chittick did not want to make *any* disclosures until the Plan had been implemented and the damage contained. Further, although the Defendants assert to the contrary,<sup>91</sup> Mr. Beauchamp knew that there was no proper disclosure mechanism other than pursuant to a new or supplemental POM, and Mr. Beauchamp had neither provided nor reviewed any such documentation – oral disclosures by Mr. Chittick would have been insufficient (as Mr. Beauchamp acknowledged in his deposition).<sup>92</sup> Mr. Beauchamp’s claim that Mr. Chittick had provided full disclosure about the fraud is also inconsistent with the purported rationale for withdrawing from the representation of DenSco. In other words, had Mr. Chittick on his own in fact prepared and actually made such disclosures (as Mr. Beauchamp asserted he believed at the time, according to his deposition testimony), then presumably Mr. Beauchamp would have no reason for withdrawing based on Mr. Chittick’s supposed failure to have done so.

Sixth, it does not appear that the Defendants in fact provided DenSco with the necessary disclosures that they claim Mr. Chittick refused to send to investors. Although the Defendants prepared a draft markup of the 2011 POM (the “Draft 2014 POM”),<sup>93</sup> that draft – which failed to even mention the Menaged fraud – did not contain adequate disclosure of the problems that DenSco had suffered, nor of its failures to comply with the commitments made in the 2011 POM, nor of the magnitude of DenSco’s potential losses.<sup>94</sup> Further, it is not clear from the

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<sup>90</sup> See pages 343-344, lines 12-2, Deposition of Mr. Beauchamp (“Q. Mr. Beauchamp, are you telling me under oath that you thought from ... the end of January that he ... talked [to] every investor who had money in DenSco and told them about the fraud? ... A. Yes, I did believe he had.”); see, also, page 79, lines 3-6 (“he had assured me he wasn’t taking any new money or any rollover money, which was deemed new under the circumstances, from any investor without telling them exactly what was going on.”).

<sup>91</sup> See page 15, lines 1-2, Defendants’ DS (“There was no reason for Mr. Beauchamp to question whether Mr. Chittick was in fact providing disclosures to limited investors.”).

<sup>92</sup> See page v, 2011 POM (“No person has been authorized to give any information or to make any representations concerning the Company other than as contained in this Confidential Private Offering memorandum, and if given or made, such other information or representations must not be relied upon.” [quoted text was upper case bold in original]). See, also, page 161, lines 7-24, Deposition of Mr. Beauchamp (“His representations that he had advised everybody and told them to the contrary, we needed something much more formal than that.”).

<sup>93</sup> See Exhibit 11, Clark Hill invoice dated June 19, 2014 for services rendered through May 31, 2014 (“5/14/14 [Daniel A. Schenck]... Additional revisions to Private Offering Memorandum; finish first draft.”); pages 92-95, lines 7-8, Deposition of Daniel Schenck on June 19, 2018 (“Q. So it looks like you finished the first draft on May 14th, 2014, right? A. Yes.”). See, also, Exhibit 407 to the Deposition of Mr. Beauchamp, draft Confidential Offering Memorandum dated May 2014.

<sup>94</sup> While the Draft 2014 POM added a detailed (although incomplete) summary of the terms of the Forbearance Agreement, in my opinion such disclosure was inadequate for the following reasons. First, the added disclosure was buried on pages 39 and 40 of the 63-page Draft 2014 POM. Second, in neither the added disclosure nor anywhere else in the Draft 2014 POM did the

record I have reviewed that the Draft 2014 POM prepared by the Defendants was ever shared with Mr. Chittick.<sup>95</sup>

Seventh, in a letter Mr. Chittick sent to his sister, Shawna Heuer (also known as “Iggy”; the “Iggy Letter”),<sup>96</sup> Mr. Chittick repeatedly stated that Mr. Beauchamp never made him tell investors about the Menaged fraud.<sup>97</sup> The letter also stated, “Shame on him. He shouldn’t have allowed me. He even told me once I was doing the right thing.”<sup>98</sup>

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Defendants include any mention of either of the following material facts: (a) DenSco’s improper and risky funding procedures (i.e., wiring funds directly to the borrower instead of a trustee or escrow agent) led to the Menaged fraud; and (b) DenSco had been named as a defendant in the Freo Lawsuit. Third, although the added disclosure may have suggested otherwise, the remainder of the Draft 2014 POM remained unchanged from the 2011 POM with respect to the following material and prominent disclosures: (i) “[t]he proceeds of the offering will be used as working capital primarily for lending secured by, and the purchase of, Trust Deeds” (see page 2, Draft 2014 POM), even though the additional loans to Mr. Menaged and his affiliated entities under the Plan were being used to pay off the other lenders; (ii) “[t]he Company does not intend to exceed a maximum loan size of \$1,000,000.00” (see page 1, Draft 2014 POM), even though DenSco agreed in the Forbearance Agreement to loan Mr. Menaged and his affiliated entities up to \$6 million; (iii) “[t]he Company intends to maintain a loan-to-value ratio below 70% in the aggregate for all loans in the portfolio” (see page 1, Draft 2014 POM), even though presumably most if not all of the properties subject to the Forbearance Agreement had a loan-to-value ratio well in excess of 100% (see pages 39-40, Draft 2014 POM: “many of the Forbearance Properties having an aggregate loan-to-value ratio in excess of 100%”); and (iv) “one borrower [would] not comprise more than 10 to 15 percent of the total portfolio” (see page 37, Draft 2014 POM), even though it was apparent that Mr. Menaged and his affiliated entities materially exceeded that cap. And, fourth, the “Risk Factors” section of the Draft 2014 POM (beginning on page 12) was not updated to address any of the foregoing risks nor to add any disclosure of the risks associated with the prior sale of Notes pursuant to materially inaccurate and outdated disclosures, including potential exposure to claims for rescission and securities fraud.

<sup>95</sup> See Plaintiff’s DS ¶ 326 (“Neither the Clark Hill file nor Clark Hill’s billing statement reflect that Beauchamp ever sent the draft POM to Chittick or discussed it with him.”).

<sup>96</sup> DIC0009476, the Iggy Letter dated July 28, 2016, the date Mr. Chittick committed suicide. On that date, Mr. Chittick also prepared, but did not send out, a letter to investors. Instead, he sent the investor letter to Mr. Beauchamp and Ms. Heuer, instructing Ms. Heuer to let Mr. Beauchamp “handle it.” See Iggy Letter dated July 28, 2016 (“I decided not to send the investor letter out, but I sent it to my attorney and you ... Don’t share it with anyone. Let Dave Beauchamp – 480-684-1100, handle it (keep his name and number you may need it later. [sic] The legal consequences are going to be huge.”).

<sup>97</sup> Ibid (“Dave did a work out agreement with Scott ... yet Dave never made me tell the investors”; “I talked Dave my attorney in to allowing me to continue without notifying my investors.”; “Dave my attorney ... let me get the workout signed not tell the investors and try to fix the problem. That was a huge mistake.”).

<sup>98</sup> Ibid. See, also, excerpt from DenSco Journal dated July 31, 2014, maintained by Mr. Chittick (“It’s all going in the right direction, just not sure if it’s going fast enough. *As long as David doesn’t bug me, I feel like we are doing the right thing.*” [italics added]).

Eighth, because Mr. Chittick would have been required to disclose, among other things, DenSco's failures with respect to its first lien positions, loan-to-value ratios, and diversity of its borrowers, and the cause of such failures (including Mr. Chittick's negligence), as well as its exposure to civil and criminal consequences for securities fraud (including the possible right of all Noteholders to demand rescission), Mr. Beauchamp could not have reasonably believed that the sophisticated accredited investors targeted by DenSco would have been inclined to invest in Notes.

As to Mr. Beauchamp's claim that the Defendants withdrew in May 2014 when Mr. Chittick refused to send updated disclosures to investors, the record I have reviewed does not contain any written communication or other documentation to corroborate such claim.<sup>99</sup> In my experience, 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 as well (i.e., to close the file).<sup>100</sup> In addition, although they were no longer working toward updating the POM,<sup>101</sup> the Defendants continued to provide, and bill for, legal services to DenSco through mid-July 2014,<sup>102</sup> and solicited additional legal work from DenSco as late as August 20, 2014<sup>103</sup> – which further suggests that they did not withdraw at the time they assert they did.

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<sup>99</sup> See Arizona Rules of Professional Conduct, Rule 1.3, Comment [4] (“If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, *preferably in writing*, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.” [italics added]).

<sup>100</sup> Not only did the Defendants not close their files, but Mr. Beauchamp continued to bill his time in 2016 to the “General” and “Business Matters” file matters that Clark Hill established in January 2014. See Plaintiff's DS ¶¶ 393(c) & 393(d).

<sup>101</sup> See pages 218-219, lines 24-1, Deposition of Mr. Beauchamp (“Q. Were you bugging [Mr. Chittick] to do a private offering memorandum in July 2014? A. No.”).

<sup>102</sup> See Exhibit 12, Clark Hill invoice dated July 19, 2014 for services rendered through June 31, 2014 (e.g., “06/11/14 DGB [David G. Beauchamp] Review and respond to multiple emails; transmit information to D. Chittick”; and “06/13/14 DAS [Daniel A. Schenck] Revise Authorization form and prepare new slip sheets for updated figures; attorney conference regarding Authorization form; prepare instruction letter to client”); Exhibit 13, Clark Hill invoice dated August 19, 2014, for services rendered through July 31, 2014 (e.g., “07/15/14 DGB Review, work on and respond to several emails; review documents, spread sheets and outline issues and additional schedule needed”; and “07/15/14 DAS Multiple correspondence regarding loan balance spreadsheets.”).

<sup>103</sup> See letters dated May 23, June 25, July 16 and August 20, 2014, from Mr. Beauchamp to Mr. Chittick, transmitting invoices for legal services (“Thank you again for allowing Clark Hill and me to provide legal services to DenSco Investment Corporation. If you have any question or *if we can assist you with any other matter(s), please let me know.*” [italics added]).

Although it is not at all clear from the record that the Defendants in fact withdrew, it is apparent that Mr. Chittick and Mr. Beauchamp had limited or no contact between July 2014 and March 2015. On March 13, 2015, Mr. Beauchamp emailed Mr. Chittick, expressing a desire to meet with Mr. Chittick, to discuss “how things have progressed for [Mr. Chittick] since [the prior] year.”<sup>104</sup> Mr. Beauchamp informed Mr. Chittick that he had been reflecting on the events surrounding the Menaged fraud, that he had second guessed himself about many things in the process, and that he wanted to protect Mr. Chittick as much as he could during the forbearance settlement process.<sup>105</sup> Mr. Beauchamp’s email suggests that the Defendants did not in fact withdraw, but rather Mr. Beauchamp just stopped calling Mr. Chittick so as to avoid any concerns Mr. Chittick might have had that he “was just trying to add more attorneys fees.”<sup>106</sup>

Mr. Chittick’s entries in the DenSco Journal regarding Mr. Beauchamp’s invitation to meet and their subsequent lunch meeting suggest that the Defendants did not in fact withdraw from representing DenSco, but rather were simply giving him time to implement his Plan. Mr. Chittick wrote in his DenSco Journal on March 13, 2015, “At 11pm 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.*”<sup>107</sup> In a further entry dated March 24, 2015 (the date of their lunch meeting), Mr. Chittick wrote, “I had lunch with David 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 15<sup>th</sup>, we’ll be down to 16 properties with seconds on them ... *He said he would give me 90 days ... I’m going to slow down the whole memorandum process too.*”<sup>108</sup>

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<sup>104</sup> Email dated March 13, 2015 from Mr. Beauchamp to Mr. Chittick (“Denny: I would like to meet for coffee or lunch ... 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 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 you were justifiably frustrated and upset with the expense and 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.”).

<sup>105</sup> Ibid. Notably, Mr. Beauchamp did not state that he wanted to protect DenSco.

<sup>106</sup> Ibid (“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.”). Had the Defendants in fact withdrawn, there would have been no basis for Clark Hill to charge DenSco for any such calls.

<sup>107</sup> Excerpt from DenSco Journal dated March 13, 2015 [italics added].

<sup>108</sup> Excerpt from DenSco journal dated March 24, 2015 [italics added].

Mr. Chittick and Mr. Beauchamp resumed actively working together again in 2016, when Mr. Beauchamp began helping Mr. Chittick with an issue involving an audit by the Arizona Department of Financial Institutions.<sup>109</sup> Mr. Beauchamp testified that, at that time, Mr. Chittick confirmed he had made full disclosure to DenSco's investors.<sup>110</sup> However, it does not appear that Mr. Beauchamp asked any questions or took any action to verify Mr. Chittick's alleged statement, and I have seen no evidence that such alleged statement was in fact true.

### C. Events Following Mr. Chittick's Suicide

In the months following Mr. Chittick's suicide on July 28, 2016, the Defendants continued representing DenSco.<sup>111</sup> Based on Clark Hill's invoices, it appears that beginning on July 30, 2016, and continuing at least through September 23, 2016, Mr. Beauchamp billed DenSco for matters relating to the wind down or transition of DenSco's business.<sup>112</sup> In August 2016, Mr. Beauchamp completed a New Business Intake Form to open a new matter for DenSco, entitled "Business Wind Down."<sup>113</sup> In completing the Form, Mr. Beauchamp affirmed that "a check [had] been run for any client, issue or business conflict," and checked the box indicating "no" in response to the inquiry "Is there any potential for a client, issue or business conflict?"

During this same time period, the Defendants began representing the Estate of Denny J. Chittick (the "Chittick Estate").<sup>114</sup> Also in August 2016, Mr. Beauchamp completed a New Business

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<sup>109</sup> See page 23, Defendants' DS ("Clark Hill stopped working with DenSco and Mr. Chittick in any capacity until 2016, when Mr. Chittick requested that Mr. Beauchamp assist with a very limited issue involving an audit by the Arizona Department of Financial Institutions.").

<sup>110</sup> See page 230, lines 4-8, Deposition of Mr. Beauchamp ("Q. Before you took him on as a client and billed him, did you ask him if he had ever complied with your advice and issued a new private offering memorandum? A. I had asked him if he had done full disclosure to his investors and he said yes.").

<sup>111</sup> See, e.g., Exhibit 425, Affidavit of Ryan Lorenz dated June 21, 2017 (in which Mr. Lorenz, a "member in the firm of Clark Hill," confirmed that after Mr. Chittick's death, "the Firm transitioned the subject matter of its work to advice and guidance to DenSco to assist it in winding down its business.").

<sup>112</sup> See Clark Hill invoices dated August 10, 2016 (e.g., time entry on July 30, 2106 referencing "Telephone call ... regarding transition after death of D. Chittick"), September 12, 2016 ("RE: Business Wind Down") and October 18, 2016 ("RE: Business Wind Down"). Such invoices reflect that Mr. Beauchamp recorded 164.8 hours of services from July 30, 2016 through September 23, 2016.

<sup>113</sup> Clark Hill New Business Intake Form, Exhibit 708 to Deposition of Edward Joseph Hood, the Co-General Counsel of Clark Hill, on February 8, 2019. Although the Form appears to have been approved by Mr. Beauchamp on August 23, 2016, as indicated in the Clark Hill invoices Mr. Beauchamp began billing his time to this new matter on August 1, 2016.

<sup>114</sup> See Exhibit 213 to Deposition of Mr. Beauchamp, email dated August 3, 2016 from Mr. Beauchamp to DenSco investors ("As part of the plan moving forward, we have filed the Will of Denny J. Chittick ('Denny's Will') and the necessary filings with the Probate Court to have Shawna designated as the Personal Representative of Denny's Estate, which is what Denny's Will provides.").

Intake Form for the Chittick Estate as a new client.<sup>115</sup> In completing this Form, Mr. Beauchamp also affirmed that “a check [had] been run for any client, issue or business conflict,” and checked the box indicating “no” in response to the inquiry “Is there any potential for a client, issue or business conflict?”. Clark Hill entered into an engagement letter with Mr. Chittick’s sister, Shawna Heuer, dated August 2, 2016, with respect to the Chittick Estate.<sup>116</sup>

Despite the fact that Mr. Beauchamp indicated on both New Business Intake Forms that there was no potential for a conflict of interest, Mr. Beauchamp testified that he had “extensive” discussions with Ms. Heuer regarding the attorney-client relationship, including potential conflicts that he and Clark Hill had with respect to representing DenSco, and that Clark Hill was concerned about potential claims that could be made against it regarding Mr. Beauchamp’s representation of DenSco.<sup>117</sup> In addition, Edward Joseph Hood, the Co-General Counsel of Clark Hill, testified that, as of early August 2016, “it was a possibility” that Clark Hill could reasonably anticipate that a receiver for DenSco might sue the firm for damages.<sup>118</sup> I have seen no evidence in the record I have reviewed of any conflict waivers provided by or on behalf of either DenSco or the Chittick Estate.

With the assistance of Clark Hill as counsel to the Chittick Estate, Ms. Heuer was appointed the personal representative of the Chittick Estate on August 4, 2016.<sup>119</sup> Mr. Beauchamp testified that the Defendants resigned from representing the Chittick Estate immediately after the probate proceeding,<sup>120</sup> although the record I have reviewed does not contain any paperwork terminating

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<sup>115</sup> Exhibit 707 to Deposition of Mr. Hood, Clark Hill New Business Intake Form. This Form appears to have been approved by Mr. Beauchamp on August 3, 2016.

<sup>116</sup> Exhibit 707, Deposition of Mr. Hood.

<sup>117</sup> See pages 447-448, lines 19-15, Deposition of Mr. Beauchamp (“Q. Did you have a discussion with Shawna about what the attorney/client relationship was with her, with respect to your representation of DenSco? A. Yes, extensive. Q. Did you discuss with her potential conflicts of interest that you and Clark Hill would have with respect to representing DenSco? A. Yes. ... Q. Did you disclose to her that Clark Hill was concerned about potential claims that could be made against Clark Hill regarding your representation of DenSco? A. Yes.”).

<sup>118</sup> See page 140, lines 10-20, Deposition of Mr. Hood (“Q. All right. On August 2nd, August 3rd, 2016, with all of the information that Clark Hill [sic] knew, could Clark Hill reasonably anticipate that a receiver might sue Clark Hill for damages? ... THE WITNESS: ... I suppose it was a possibility”). See also page 145, Deposition of Mr. Beauchamp (referring to a letter dated August 9, 2016 from Kevin Merritt of Gammage & Burnham to Mr. Beauchamp: “Since you are meeting with Wendy, for the moment it seems that you are still representing DenSco in some capacity. *While you have conflict issues, do you expect Clark Hill to have to resign from all representations or do you think Clark Hill can continue to represent the estate since your firm filed the probate, or is it still being sorted through?*” [italics added]).

<sup>119</sup> See Exhibit 216, Deposition of Mr. Beauchamp, Letters of Appointment of Personal Representative and Acceptance of Appointment as Personal Representative, submitted by Clark Hill, signed by Clerk of the Superior Court on August 4, 2016.

<sup>120</sup> See page 476, lines 5-20, Deposition of Mr. Beauchamp (“Let’s turn to Exhibit 216. And just to get it in our timeframe, this is the probate petition ... for the appointment of a personal representative for Mr. Chittick’s estate. A. Correct. Q. So it’s filed on August 4th, and Clark Hill is representing the petitioner, right? A. And we resigned immediately after this. Q. Right. And

the attorney-client relationship with the Chittick Estate. However, on August 15, 2016, Mr. Beauchamp, in responding to an email inquiry from a title insurance company, stated that the Defendants were no longer counsel to the Chittick Estate, and that they had resigned “[d]ue to potential conflicts of interest.”<sup>121</sup> Mr. Beauchamp’s former firm, Gammage & Burnham, became legal counsel for the Chittick Estate.

Despite concerns with respect to such conflicts of interest, on August 3, 2016, Mr. Beauchamp began corresponding directly with DenSco’s investors stating his intent “to determine the best procedure to close down DenSco’s business and return the capital contributed by DenSco’s investors.”<sup>122</sup>

In his email to investors on August 3, 2016, Mr. Beauchamp suggested that it was not in the financial interests of the investors to have a receiver or trustee appointed to conduct the wind down of DenSco (nor in the financial interests of any investor to have a supervisory role by being appointed to DenSco’s board of directors):

“If whoever is in charge of DenSco does not work with the Investors, then DenSco will either be put into bankruptcy or have a Receiver appointed, which will incur costs on behalf of the Investors and DenSco that will *significantly reduce what will be available to return to the Investors*. For example, one of the recent reports concerning liquidation of companies owing money to investors indicated that *the costs associated with a bankruptcy or a Receiver can reduce the amount to be paid to investors by almost half or even a much more significant reduction....* In order to maximize the available return to all of the Investors ... we would like to keep DenSco out of a protracted bankruptcy or a contentious Receivership proceeding... As indicated above, various studies have shown that the third party costs and legal and other professional fees and costs and the inherent delays in bankruptcy and / or Receivership proceedings can consume more than 35% of the available money that should or would otherwise be available to be returned to Investors.... If we are going to proceed informally to keep costs down, ... we would like to create an ‘Advisory Board’ of 5 Investors to meet with and to advise DenSco with respect to the information obtained and how that information can be used to cost-effectively help DenSco recover funds that are owed to DenSco. *We intend to structure*

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this was the issue you said you had a discussion with her about the conflict of interest and she waived it. True? ... A. I had the discussion, Michelle Tran had the discussion, and, yeah, that was one of the several conversations.”).

<sup>121</sup> Exhibit 288A to Deposition of Mr. Beauchamp, email dated August 15, 2016 from Mr. Beauchamp to Chris Hyman, Executive Vice President, American Title Service Agency (“Given the need to move quickly on certain items, we only represented the Estate so that a Personal Representative would be appointed for The Estate right away. Due to potential conflicts of interest, we have resigned as counsel to the Estate and new counsel has been appointed or is being appointed for the Estate. ... Gammage & Burnham will be representing the Estate going forward.”).

<sup>122</sup> Exhibit 213 to Deposition of Mr. Beauchamp, email dated August 3, 2016 from Mr. Beauchamp to DenSco investors (in which Mr. Beauchamp also indicates that part of the DenSco wind down includes the “need to better understand ... claims that DenSco has against either Auction.com or Scott Menaged (*or some other parties*)” [italics added]).

*this as an Advisory Board to protect the members of this Advisory Board from any potential liability based upon their role with DenSco. Specifically, the Advisory Board would only have an advisory position with DenSco as opposed to a full authority position, which is to distinguish this situation from having these Investors appointed to the Board of Directors.*"<sup>123</sup>

Similarly, in his email correspondence with investors on August 8 and 9, 2016, Mr. Beauchamp suggested that it was not in the financial interests of the investors to have the Securities Division of the Arizona Corporation Commission take an active role either:

"We need to be willing but not overly anxious to turn it over to the Securities Division. Several people in government made names and careers with the Mortgages Ltd. matter and we do not want this to turn into anything like that."<sup>124</sup>

"With respect to your question concerning the Wednesday meeting, the Director of Enforcement had someone from her office relay a message to me that they do not want any Investors (or attorneys for Investors) at the Wednesday meeting."<sup>125</sup>

In contrast, at the court hearing to appoint a receiver little more than one week later, both new counsel for Chittick's Estate's, Mr. Polese of Gammage & Burnham, and Wendy Coy, Director of Enforcement, Securities Division, Arizona Corporation Commission, testified that it was urgent that a receiver be appointed.<sup>126</sup>

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<sup>123</sup> See Exhibit 213, email dated August 3, 2016 (11:35 pm) from Mr. Beauchamp to DenSco investors [italics added]. Curiously, it appears that earlier in the day, Mr. Beauchamp was instructed by the Director of Enforcement, Securities Division, Arizona Corporation Commission, that a receiver in fact may need to be appointed. See Exhibit 217 to Deposition of Mr. Beauchamp, letter dated August 4, 2016 from Wendy Coy, Director of Enforcement, Securities Division, Arizona Corporation Commission, to Mr. Beauchamp ("Thank you for contacting the Securities Division yesterday. I appreciate your willingness to speak with us and to take control of a very sad and problematic situation. We look forward to working with you to resolve any issues that may arise.... In addition, we discussed that *no assets should be dissipated until a receiver and/or a forensic accountant has reviewed the books and records of DenSco Investments Corporation and a plan is in place regarding the business.*" [italics added]).

<sup>124</sup> Exhibit 256, Deposition of Mr. Beauchamp, email dated August 9, 2016 from Mr. Beauchamp to investor Craig Hood, copying other investors.

<sup>125</sup> Exhibit 256, Deposition of Mr. Beauchamp, email dated August 8, 2016 from Mr. Beauchamp to investor Craig Hood, copying other investors.

<sup>126</sup> See Reporter's Transcript of Digital Recording (pages 5-6, Mr. Polese: "In fact, we think the receiver needs to be appointed as soon as possible.... Everybody knows that we need to get somebody in place to protect the good notes that are out there that -- that are going to be collected"; page 6, Ms. Coy: "We, too, agree and believe that a receiver needs to be immediately appointed.").

Mr. Beauchamp continued communicating directly with investors.<sup>127</sup> In addition, it appears that Mr. Beauchamp took it upon himself to act as a quasi-receiver or liquidator with respect to the wind down of DenSco. The time entries in the Clark Hill invoices for August and September 2016 (especially prior to the appointment of the Receiver) suggest that Mr. Beauchamp was much more involved in the wind down aspects of DenSco's business than, in my opinion, attorneys normally would be, and doing so with limited supervision or oversight by, or instruction from, an authorized and competent representative of his client DenSco.<sup>128</sup> Further, in the absence of a receiver or trustee, Mr. Beauchamp should have reasonably expected that he would bear considerable responsibility for the multitude of non-legal tasks required to liquidate DenSco's assets and wind down its business – e.g., collecting, properly handling, and accounting for funds received from borrowers; negotiating with borrowers and/or pursuing foreclosure proceedings; monitoring, analyzing and monetizing all other loans; completing projects and selling properties where appropriate; valuations; allocating and distributing funds to investors; and maintaining books and records, preparing financial statements, filing tax returns and paying taxes, reporting interest income of investors, and numerous other tasks.<sup>129</sup>

On August 17, 2016, the Arizona Corporation Commission filed legal action alleging that DenSco violated various Arizona securities laws.<sup>130</sup> The Arizona Corporation Commission requested that the court appoint a receiver to preserve DenSco's assets for the benefit of its

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<sup>127</sup> See, e.g., email dated August 20, 2016 from an investor, Robert Brinkman (“Mr. Beauchamp ... Can you please let me know if there was a POM for 2013 and 2015 or if 2011 was the last POM?”), to which Mr. Beauchamp responds one day later (“My law firm started preparing the 2013 POM, but we were put on hold. After the Forbearance agreement [sic] was signed by Scott Menaged, we started to amend the 2013 draft POM, but we stopped and withdrew as securities Counsel [sic] for DenSco. Denny was supposed to get other counsel and finish the POM in 2014, but I do not know if that happened. After that issue, I only was asked to help DenSco with the audit by the AZ Department of Financial Institutions.”). See also Exhibit 709, Deposition of Mr. Hood, letter dated August 9, 2016 from Scott A. Swinson (attorney for Mr. Brinkman) to Michelle Tran at Clark Hill (“I represent Rob Brinkman, as an investor/creditor of DenSco Investment Corporation. He has forwarded to me the various e-mails regarding DenSco [sic] generated by Mr. Beauchamp. From some of the statements Mr. Beauchamp has made in his e-mails, it sounds as though your firm represented either Mr. Chittick and/or DenSco prior to Mr. Chittick's death. If this is in fact the case, *I would appreciate a confirmation from your firm that you have considered the potential of a conflict of interest in your representation of the Chittick estate and you [sic] determination that no conflict exists.*” [italics added]).

<sup>128</sup> See, e.g., Clark Hill invoice time entries for 8/17/16 (“several telephone calls ... regarding loan payoffs, issues and procedure”); 8/19/16 and 8/23/16 (“several telephone calls with escrow agents, borrowers and real estate agents concerning loan payoffs, issues and procedure”). See also page 27, lines 2-3, Defendants' DS (“Ms. Heuer had no knowledge of DenSco's business, records, or hard money lending in general.”).

<sup>129</sup> See section entitled “DenSco was a ‘One-Man Shop’” below.

<sup>130</sup> Verified Complaint dated August 17, 2016 *Arizona Corporation Commission, Plaintiff v. DenSco, Defendant*.

investors.<sup>131</sup> On August 18, 2016, the court held a receivership hearing and appointed Peter Davis as the Receiver for the assets of DenSco.<sup>132</sup>

Although he made a contrary statement only one week prior,<sup>133</sup> at the receivership hearing Mr. Beauchamp testified that “he concurrently represented both DenSco and Denny Chittick personally.”<sup>134</sup> That assertion created certain joint attorney-client privilege issues that complicated and delayed the Receiver’s ability to obtain and utilize DenSco’s files from Clark Hill.<sup>135</sup> Accordingly, to obtain and utilize certain DenSco files in this Case, the Receiver needed to obtain a waiver of privilege from the Chittick Estate, which delayed the Receiver’s receipt of DenSco’s files and its ability to bring claims against the Defendants.

On December 9, 2016, the Receiver filed a Notice of Claim against the Chittick Estate based on the frauds perpetrated by Mr. Menaged and asserted, among other things, claims that Mr. Chittick breached his fiduciary duties owed to DenSco.<sup>136</sup>

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<sup>131</sup> See paragraph 23, Verified Complaint dated August 17, 2016 *Arizona Corporation Commission, Plaintiff v. DenSco, Defendant* (“The ACC requests this Court appoint a Receiver on an interim basis to take control of the assets of DenSco and to marshal and preserve its assets for the benefit of the defrauded investors.”).

<sup>132</sup> See page 1, Preliminary Report of Peter S. Davis, as Receiver of DenSco dated September 19, 2016 (“On August 18, 2016, Peter Davis (‘Receiver’) was appointed the Receiver for the assets of DenSco by the Honorable Lori Horn Bustamante of the Maricopa County Superior Court.”).

<sup>133</sup> See Mr. Beauchamp’s letter dated August 10, 2016 to Ms. Coy, in which he claimed “I have not previously represented Denny Chittick.” But see pages 118-119, lines 23-9, Deposition of Mr. Beauchamp (Mr. Beauchamp asserted that he took action to correct the statement made to Ms. Coy).

<sup>134</sup> See Exhibit 317, email dated August 30, 2016 from Kevin Merritt (attorney for the Chittick Estate, and also Mr. Beauchamp’s former colleague at Gammage & Burnham) to Mr. Beauchamp and Ryan Anderson (an attorney representing the Receiver), copying the Receiver, Mr. Polese (attorney for the Chittick Estate), among others (“I would like to remind everyone that David testified at the receivership hearing that he concurrently represented both DenSco and Denny Chittick, personally.”); see also email dated August 15, 2016 from Mr. Polese to Ms. Coy, copying Mr. Beauchamp, among others (“It is my view and that of Dave Beauchamp, Denny viewed David as both his company attorney and personal attorney.”). See pages 133-134, lines 7-11, Deposition of Mr. Beauchamp (“Based on the information that I have now ... I would say it’s not true [that “Mr. Chittick considered that I was his counsel as well as counsel for DenSco”]. ... At the time I did this declaration [draft received August 17, 2016], I had a different understanding of what counsel was, ... I have since understood that, no, I’m representing the company”).

<sup>135</sup> See, e.g., Order Appointing Receiver dated August 18, 2016 (“It is further ordered the Receiver may not waive the attorney-client privilege as to Chittick’s communications with Beauchamp without the Estate’s consent. The Receiver must obtain court approval before waiving the privilege as to DenSco if the Estate does not consent to the waiver.”).

<sup>136</sup> See Notice of Claim Against Estate of Denny J. Chittick filed December 9, 2016 (“the Receiver has the following claims against Chittick: Conversion, common law fraud, breach of fiduciary duty as director and officer of DenSco, fraudulent transfer (both actual and

On September 14, 2017, the Receiver filed a petition seeking to initiate this Case. That petition was granted on October 10, 2017, and the Complaint in this Case was filed on October 16, 2017.<sup>137</sup>

### III. APPLICABLE STANDARD OF CARE

The standard of care generally applicable to the Defendants required the exercise of that degree of skill, care and knowledge commonly exercised by a member of the legal profession in similar circumstances.

#### A. General Application

Both the Model Rules of Professional Conduct adopted by the American Bar Association and the Restatement of the Law (Third), The Law Governing Lawyer's Civil Liability, adopted by the American Law Institutes, provide guidance in this regard:

- § 50 Duty of Care to a Client, Restatement of the Law (Third): "For purposes of liability ..., a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation."
- § 52 The Standard of Care, Restatement of the Law (Third): "a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances."
- § 16A Lawyer's Duties to a Client – In General, Restatement of the Law (Third): "To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation: (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; (2) act with reasonable competence and diligence; [and] (4) fulfill valid contractual obligations to the client."
- Rule 1.1 (Competence) of the Model Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>138</sup>

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constructive) pursuant to A.R.S §§ 44-1004 et seq., unjust enrichment, or, alternatively, gross negligence or negligence as an officer or director of DenSco."). See also Plaintiff's DS ¶ 408.

<sup>137</sup> See Plaintiff's DS ¶¶ 413 & 415.

<sup>138</sup> See, also, Model Rules of Professional Conduct, Rule 1.1, Comment [1] ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter. ... Expertise in a particular field of law may be required in some circumstances."); and Comment [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and

- Rule 1.3 (Diligence) of the Model Rules of Professional Conduct: “A lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>139</sup>
- Preamble (A Lawyer’s Responsibilities) [20] to the Model Rules of Professional Conduct: “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”

Further, lawyers may not assist a client in conduct the lawyer knows is fraudulent. This prohibition is contained in paragraph (d) of Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), and illuminated in certain of the Comments to the Rule:

- “Comment [10]: When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).  
...
- Comment [11]: Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.”

Lawyers take on enhanced responsibilities when the client is an organization, because an organization can only act through its individual representatives, who are not the client. See, for example, Rule 1.13 (Organization as Client) of the Model Rules of Professional Conduct:

- “(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.”).

<sup>139</sup> See, also, Model Rules of Professional Conduct, Rule 1.3, Comment [3] (“A client’s interests often can be adversely affected by the passage of time ....”); and Comment [4] (“Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. ... If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, *preferably in writing*, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.” [italics added]).

- (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 matter 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, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.”<sup>140</sup>

Lawyers must also be sensitive to conflicts of interest, both among clients and between clients and themselves. See, for example, Rule 1.7 (Conflict of Interest: Current Clients) of the Model Rules of Professional Conduct:

- “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”<sup>141</sup>

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<sup>140</sup> See, also, Model Rules of Professional Conduct, Rule 1.13, paragraph (c) (“[...] if (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”); and Comment [3] (“Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, *the lawyer must proceed as is reasonably necessary in the best interest of the organization*. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and *a lawyer cannot ignore the obvious*.” [italics added]).

<sup>141</sup> See, also, Model Rules of Professional Conduct, Rule 1.7, Comment [1] (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client ... or from the lawyer’s own interests.”); Comment [2] (“Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.”); Comment [3] (“A conflict of interest may exist before representation is undertaken, in which event *the representation must be declined*, unless the lawyer obtains the informed consent of each client ....”); Comment [6] (“... absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, *even when the matters are wholly unrelated*.” [italics added]); Comment [8] (“Even where there is no direct adverseness, *a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited*”).

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: ... (4) each affected client gives informed consent, confirmed in writing.”

Under certain circumstances, a lawyer must withdraw from an attorney-client representation. See, for example, Rule 1.16 (Declining or Terminating Representation) of the Model Rules of Professional Conduct:

- “(a) ... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; ....”<sup>142</sup>

The Rules of Professional Conduct in Arizona (where DenSco was based and Mr. Beauchamp was admitted to practice) are consistent with such Model Rules of Professional Conduct adopted by the American Bar Association.<sup>143</sup>

In the course of working on a matter, lawyers sometimes make mistakes. However, not every mistake made by a lawyer is considered a violation of the standard of care. Instead, a violation of the standard of care happens when a lawyer handles a matter inappropriately due to a failure to exercise the ordinary care of a reasonably competent lawyer in the same or similar circumstances. The mistake must be viewed within the context of the facts and circumstances of the particular engagement, specifically considering whether the mistake made under such circumstances rises to the level of violating the standard of care. A lawyer may be liable only if the mistake rises to the level of violating the standard of care.

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*as a result of the lawyer’s other responsibilities or interests. ... The conflict in effect forecloses alternatives that would otherwise be available to the client. ... The critical questions [include] whether [the difference in interests] will ... foreclose courses of action that reasonably should be pursued on behalf of the client.” [italics added]; and Comment [10] (“The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”).*

<sup>142</sup> See, also, Model Rules of Professional Conduct, Rule 1.16, Comment [2] (“A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.”). See also Model Rules of Professional Conduct, Rule 1.2, Comment [10] (“In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.”).

<sup>143</sup> See Arizona Rules of Professional Conduct, <https://www.azbar.org/ethics/rulesofprofessionalconduct/>. One difference between the Model Rules of Professional Conduct and the Arizona Rules of Professional Conduct is worth noting here: Comment [11] of Rule 1.2 of the Arizona Rules of Professional Conduct makes clear that “a lawyer may be required to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.”

It is important to evaluate compliance with the standard of care in each instance where relevant. The facts and circumstances of each engagement, and with respect to each task within each engagement, are different and often unique, and compliance must be measured by taking into account the particular facts and circumstances of each such engagement and task. And because the proper exercise of the standard of care is dependent on the knowledge of the lawyer, the particular facts and circumstances should take into account the information that the lawyer knew or should have known at all relevant times.

Further, in evaluating compliance with the standard of care, it is important to note the distinction between standard of care and best practices. While standard of care refers to the exercise of that degree of skill, care and knowledge commonly exercised by a member of the legal profession in similar circumstances, best practices is a much higher standard, one to which lawyers should aspire. Lawyers may be liable for failing to meet the standard of care, but not for failing to engage in best practices.

In my experience, when a lawyer or law firm takes on a new client engagement, there is an allocation of tasks and other responsibilities as between the lawyers, on the one hand, and the client or the client's other advisors, agents and representatives, on the other hand. Sometimes such allocations are expressly addressed in an engagement letter or some other documentation, but quite frequently such allocations are casually discussed, or even implicitly understood, between lawyers and their clients based on prior history, course of conduct and/or reasonable expectations. And when the client is an entity with limited personnel, and no in-house legal team, the lawyer should reasonably expect that he or she may need to play a more active role in the course of the attorney-client relationship, than under other circumstances.

Regardless of the allocation of responsibilities between the client and the lawyer, an experienced lawyer engaged on a legal matter is expected to have greater experience and expertise in that particular area of the law, especially where the lawyer has worked on similar matters in the specific area of the law many times, such as in securities offerings. The applicable standard of care may require that the lawyer take the time to ensure that the client understands its responsibilities and that it is capable of performing such responsibilities, and that the lawyer properly coordinates the client's responsibilities with the lawyer's responsibilities. For example, the applicable standard of care may require that the lawyer pay special attention to the adequacy of disclosures made in a securities offering, particularly when the offering is done on a continuous basis.

In addition, a law firm is generally subject to civil liability for the acts or omissions of any principal of the firm who was acting in the ordinary course of the firm's business.<sup>144</sup> "When a client retains a lawyer with [an affiliation with a law firm], the lawyer's firm assumes the

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<sup>144</sup> Restatement (Third) of the Law Governing Lawyers § 58 (2000) ("A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.").

authority and responsibility of representing that client, unless the circumstances indicate otherwise ... and the firm is liable to the client for the lawyer's negligence."<sup>145</sup>

## B. Securities Laws

From the early 2000s to at least mid-2014,<sup>146</sup> Mr. Beauchamp provided securities advice to DenSco in connection with its offer and sale of Notes.<sup>147</sup> He "advised DenSco regarding its Private Offering Memoranda, which DenSco generally updated every two years. He helped draft the 2003, 2005, 2007, 2009 and 2011 POMs."<sup>148</sup> Because of his role as securities counsel for DenSco, the standard of care applicable to Mr. Beauchamp required a basic understanding of securities law applicable to DenSco's offering of Notes, including the following.

The issuance of securities is regulated by federal and state law. Under both the federal Securities Act of 1933 and the Arizona Securities Act, the offer and sale of securities must be registered with the appropriate regulatory agency (i.e., the SEC or the Arizona Corporation Commission, respectively), or be subject to an exemption from such registration. Issuers must strictly adhere to the requirements of an exemption, as the failure to do so results in an unlawful offering, with the accompanying penalties and liabilities, including potential criminal liability. DenSco's offerings were intended to fall within the "private placement" exemption from registration pursuant to Regulation D promulgated under the Securities Act of 1933.<sup>149</sup>

Although Regulation D itself does not mandate that any specific disclosures be provided to investors that are "accredited investors,"<sup>150</sup> other provisions of the securities laws regulate disclosures provided to investors, including pursuant to a private placement. For example, SEC

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<sup>145</sup> *Staron v. Weinstein*, 701 A.2d 1325 (N.J. Super. Ct. App. Div. 1997) at 1328 (citing Restatement (Third) of the Law Governing Lawyers § 79 (Tentative Draft No. 8, 1997) [ellipses in original]).

<sup>146</sup> See pages 3-4, Defendants' DS.

<sup>147</sup> See pages 2-3, Defendants' DS.

<sup>148</sup> Page 5, lines 7-8, Defendants' DS; see, also, pages 256-257, lines 22-3, Deposition of Mr. Beauchamp (Mr. Beauchamp testified that it was his practice to revise the POM every two years based on a suggestion "made by a former SEC official, that given the nature of this industry, two years would be an appropriate time. However, if something material happened before then, you need to tell your client this has to be disclosed.").

<sup>149</sup> See page ii, 2011 POM ("The Notes are offered pursuant to exemptions provided by Section 4(2) of the [Securities Act of 1933], Regulation D thereunder, certain state securities laws and certain rules and regulations promulgated pursuant thereto." [quoted text was upper case bold in original]).

<sup>150</sup> Defined in Rule 501(a) of Regulation D to include high net worth individuals and certain other persons or entities. Rule 502(b) of Regulation D specifies the type of information that must be furnished "a reasonable time prior to sale" to any purchaser that is not an accredited investor. It is good practice to provide such information to accredited investors in addition to non-accredited investors.

Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934,<sup>151</sup> provides that it is unlawful, in connection with the sale of securities, “to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.”<sup>152</sup>

Disclosures that are provided to investors in a private placement offering are typically contained in a written document, often called a private offering memorandum. Such a POM is a disclosure document used to solicit investment in private securities transactions. A POM is provided to prospective investors to provide such investors with information regarding the issuer and the securities it intends to issue. Generally, a POM describes the business, the investment opportunity, the associated risks, the management team, historical performance and expected performance of the business. Disclosures made in a POM are regulated under the federal securities laws by, among other laws and rules, Rule 10b-5. DenSco’s POMs offered Notes according to the terms set forth therein.

An important concept to bear in mind in private placement offerings is called “integration.” Essentially, Regulation D provides that all sales that are part of the same private placement offering are integrated, such that each and every sale of a security must meet all of the requirements for offerings pursuant to Regulation D.<sup>153</sup> In other words, unless the offerings of Notes by DenSco pursuant to its various sequential POMs were not of the “same or a similar class” as the Notes offered pursuant to the immediately prior POM, or such offerings were separated by at least six months, then under Regulation D *all* sales of Notes by DenSco would be integrated and treated as a single continuous offering (notwithstanding language to the contrary in the POMs).<sup>154</sup> As a result, if the sale of even a single Note was not made in compliance with the requirements of Regulation D, then by virtue of integration, the private placement exemption

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<sup>151</sup> The 2011 POM prepared by Mr. Beauchamp incorrectly refers to this provision of federal securities laws as “Section 10b-5.” See page 24.

<sup>152</sup> 17 CFR 240.10b-5 [Employment of manipulative and deceptive devices]; see also Arizona Revised Statutes Section 44-1991 [Fraud in purchase or sale of securities] (“It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, ... directly or indirectly to do any of the following: ... 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”).

<sup>153</sup> Rule 502(a) of Regulation D (“All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the [Securities Act of 1933].”).

<sup>154</sup> See page (i), 2011 POM (“The Company intends to offer the Notes on a continuous basis until the earlier of (a) the sale of the maximum offering, or (b) two years from the date of this memorandum.”).

may have been rendered unavailable – resulting in an unlawful offering with respect to the sale of all Notes.

Continuous offerings, such as those conducted by DenSco, are especially challenging due to the continuous and uninterrupted obligation to be compliant with the exemption and other legal requirements. For example, under both federal and Arizona law, there is a risk that issuers may be committing securities fraud if they fail to provide current and accurate disclosures to investors in connection with the sale of securities. As a result, because of the continuous nature of its securities offerings, DenSco needed to be able to timely update the disclosures provided to investors so as to correct any material misstatement or omission before such investors purchased (or committed to purchase) DenSco securities.<sup>155</sup> This would require both the constant monitoring of the accuracy of the content of the POMs and the ability to promptly correct and distribute updated disclosures.

In my opinion, the applicable standard of care would require that Mr. Beauchamp be aware of at least the following requirements under the federal securities laws and advise his client DenSco accordingly:

- The offer and sale of all Notes was subject to compliance by DenSco with Regulation D and Rule 10b-5.
- If at any point in time, the applicable POM was no longer in compliance with Rule 10b-5, DenSco must immediately cease offering and selling Notes (whether to new or existing investors, and whether for new monetary consideration or in consideration of the rollover of Notes).
- In the event that the applicable POM was no longer in compliance with Rule 10b-5, DenSco must not resume offering or selling Notes unless and until updated and compliant disclosures are provided to investors.
- Because of the continuous nature of the offerings, both pursuant to each individual POM and presumably across all POMs, the apparently arbitrary two-year time period limitation imposed by Mr. Beauchamp and as set forth in the POMs would have had no impact on integration or compliance under Regulation D and Rule 10b-5.

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<sup>155</sup> See page 24, 2011 POM (“In order to continue offering the Notes during this [two year] period, the Company will need to update this Memorandum from time to time. Keeping the information in the Memorandum current will cause the Company to incur additional costs. *A failure to update this Memorandum as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing manipulative or deceptive device in the sale of securities, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors.*” [italics added]). See, also, pages 92-95, lines 7-8, Deposition of Daniel Schenck on June 19, 2018 (“My understanding would be that [the POM] needs to be amended, you know, when there is new information or a change in circumstances from what’s described in there. That was my understanding”).

- DenSco's failure to comply at all times with Regulation D and Rule 10b-5 could result in material penalties and liabilities, including potential criminal liability.

#### IV. ANALYSIS AND OPINIONS

##### A. DenSco was a "High-Risk" Client

Prior to engaging with a new client and forming an attorney-client relationship with that new client, an attorney should evaluate the goals and requirements of the client and the ability of the attorney to reasonably address those requirements. This is implicit in the duties owed by attorneys to their clients once the attorney-client relationship is formed, including the obligation to "provide competent representation to a client"<sup>156</sup> and "act with reasonable diligence and promptness in representing a client."<sup>157</sup> In making such evaluation, it is important for the attorney to do an "analysis of the factual and legal elements"<sup>158</sup> and consider "the relative complexity and specialized nature of the matter."<sup>159</sup> Consistent with such obligations, in my opinion attorneys should, and in accordance with custom in practice do, evaluate and assess whether, and to what extent, the client is able to understand and comply with its legal obligations and the advice of the attorney in the particular matter.

In my experience, certain clients may require extraordinary monitoring and counseling due to the nature of their business operations, the regulatory environment in which they operate, a lack of critical resources (including manpower) or internal controls, an inability (or unwillingness) to comply with legal obligations and attorney advice, and other factors. Such a client poses a material risk to both itself and to its attorneys in the event of failure, crises or other material adverse events. Such risks to the client may include civil or criminal liability, financial losses or other damages to the client and its various constituencies (including investors), and an inability to achieve the goals of the subject of the representation. Attorneys should be aware that such a client also creates an enhanced risk of malpractice and related claims against the attorney, brought by or on behalf of the client. As a result, for purposes of this Report, I refer to such clients as "high-risk" clients.

In accepting DenSco as a client, and continuing to represent DenSco thereafter, the Defendants should have recognized that DenSco was a high-risk client. The factors that indicate DenSco was a high-risk client include the following:

##### 1. DenSco was Engaged in a Highly Regulated Business

A core element of DenSco's business was raising money from investors, which in turn would be used to make mortgage loans. As noted above, the issuance of securities is regulated by federal

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<sup>156</sup> Rule 1.1 of the Arizona Rules of Professional Conduct. See also ABA Model Rule 1.1.

<sup>157</sup> Rule 1.3 of the Arizona Rules of Professional Conduct. See also ABA Model Rule 1.3.

<sup>158</sup> Comment [5] to Rule 1.1 of the Arizona Rules of Professional Conduct. See also Comment [5] to ABA Model Rule 1.1.

<sup>159</sup> Comment [1] to Rule 1.1 of the Arizona Rules of Professional Conduct. See also Comment [1] to ABA Model Rule 1.1.

and state law. Under both the federal Securities Act of 1933 and the Arizona Securities Act, the offer and sale of securities must be registered with the appropriate regulatory agency (i.e., the SEC or the Arizona Corporation Commission, respectively), or be subject to an exemption from such registration. Issuers must strictly adhere to the requirements of an exemption, as the failure to do so results in an unlawful offering, with the accompanying penalties and liabilities, including potential criminal liability. DenSco's offerings were intended to fall within an exemption from registration.<sup>160</sup>

Further, under Rule 10b-5, because of the continuous nature of its securities offerings, DenSco needed to be able to timely update the disclosures provided to investors so as to correct any material misstatement or omission before such investors purchased (or committed to purchase) DenSco securities.<sup>161</sup> This would require both the constant monitoring of the accuracy of the content of the POMs and the ability to promptly correct and distribute updated disclosures.

Activities related to DenSco's mortgage lending business were also subject to regulation and licensing.<sup>162</sup> DenSco potentially may have been subject to regulation and licensing under the Investment Advisers Act of 1940,<sup>163</sup> the Investment Company Act of 1939,<sup>164</sup> the Truth in Lending Act, the Homeownership and Equity Protection Act of 1994, the Equal Credit

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<sup>160</sup> See page ii, 2011 POM ("The Notes are offered pursuant to exemptions provided by Section 4(2) of the [Securities Act of 1933], Regulation D thereunder, certain state securities laws and certain rules and regulations promulgated pursuant thereto." [quoted text was upper case bold in original]).

<sup>161</sup> See page 24, 2011 POM ("In order to continue offering the Notes during this [two year] period, the Company will need to update this Memorandum from time to time. Keeping the information in the Memorandum current will cause the Company to incur additional costs. A failure to update this Memorandum as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing manipulative or deceptive device in the sale of securities, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors."). See, also, pages 92-95, lines 7-8, Deposition of Daniel Schenck on June 19, 2018 ("My understanding would be that [the POM] needs to be amended, you know, when there is new information or a change in circumstances from what's described in there. That was my understanding").

<sup>162</sup> See page 8, 2011 POM ("The financing of construction loans and other types of real estate transactions are regulated by various federal and state government agencies, including the Arizona Department of Financial Institutions."). See, also, Arizona Revised Statutes, Chapter 9 [Mortgage Brokers, Mortgage Bankers and Loan Originators].

<sup>163</sup> See page 9, 2011 POM (The Company's management believes that it is not required to register or be licensed as an investment adviser with the State of Arizona or with the U.S. Securities Exchange Commission ('SEC') pursuant to the Investment Advisers Act of 1940"); page 23, 2011 POM ("The Company intends to take all reasonable steps to avoid such classification.").

<sup>164</sup> See page 22, 2011 POM ("If the Company was subject to the Investment Company Act of 1940, the Company would be required to comply with significant ongoing regulation which would have an adverse impact on its operations. ... The Company intends to take all reasonable steps to avoid such classification.").

Opportunity Act, the Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, and the Home Mortgage Disclosure Act,<sup>165</sup> and similar state laws and regulations. To the extent applicable, such activities would require monitoring, periodic reporting and other documentation, and compliance generally.<sup>166</sup>

## 2. DenSco was Handling High Volumes of Investor Money

At its core, DenSco was soliciting money from investors, which would be transferred to borrowers as mortgage loans. Such borrowers would pay interest and principal back to DenSco, which in turn would then use such funds to pay interest and principal back to its investors (with DenSco profiting from the arbitrage due to the difference in such interest rates). Rather than providing goods or services, DenSco was in the business of handling large sums of money. As of the date of the 2011 POM, DenSco had funded *over \$300 million* in loans.<sup>167</sup> As a result, DenSco was acting in a fiduciary capacity with its investors, and would have required prudent internal controls, careful accounting and secure money management.

## 3. DenSco was a “One-Man Shop”

Based on the record I have reviewed, it is clear that DenSco had only a single shareholder, director, officer and employee: namely, Denny Chittick.<sup>168</sup> The regulatory environment in which DenSco operated, as well as the volume of its business, would have necessitated active involvement by the management team at DenSco. Having only one member in its management team (its sole employee), would suggest that DenSco’s ability to manage its business operations and compliance obligations was severely constrained.

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<sup>165</sup> See page 19, 2011 POM.

<sup>166</sup> Although DenSco may have concluded that it was not subject to such regulation and licensing, it was still required to take action to *avoid* the application of such regulation and licensing to its lending activities. See page 8, 2011 POM (“The Company’s management believes that it is not required to be licensed by the Arizona Department of Financial Institutions as a mortgage broker or mortgage banker nor under certain federal laws, such as Truth-In-Lending Act or the Real Estate Settlement Procedures Act. The Company intends to take the necessary steps to ensure that the borrowers it lends to and the projects covered by such loans will not fall within the requirements imposed by the foregoing agency and acts.”); page 19, 2011 POM (“If it is determined that the Company has not structured its operations so that it is exempt from regulation, *the Company could become subject to extensive regulation*” [italics added]).

<sup>167</sup> Page 39, 2011 POM (“Since inception through June 30, 2011, the Company has participated in 2622 loans, with an average loan amount of \$116,000, with the highest single loan being \$800,000 and the lowest being \$12,000. *The aggregate amount of loans funded is \$306,786,893 with property values totaling \$470,411,170.*” [italics added]).

<sup>168</sup> Page 40, 2011 POM (“The Director and Executive Officer of the Company are [sic]: Denny J. Chittick, 4\_, President, Vice President, Treasurer, and Secretary. ... With the assistance of outside consultants on an as-needed basis, *Mr. Chittick intends to operate the Company as its primary employee, analyzing, negotiating, originating, purchasing and servicing Trust Deeds by himself.*” [italics added]).

On the mortgage lending side of its business, DenSco made on average one loan every single weekday since its formation in 2001.<sup>169</sup> The level of its lending activity increased over the years, such that during the six months leading up to the 2011 POM, DenSco was making on average nearly three loans every single weekday,<sup>170</sup> and was seeking to further increase the volume of its lending business.<sup>171</sup> These statistics are particularly significant in light of the required tasks to support that volume of business (as described below), which suggests an inordinate burden on Mr. Chittick in managing just the mortgage lending side of DenSco's business.

As described in the 2011 POM, before purchasing a trust deed or funding a loan, DenSco would "conduct a due diligence review by interviewing its owner, verifying the documentation and performing limited credit investigations ... and visiting the subject property in a timely manner."<sup>172</sup>

The 2011 POM also describes certain standards for each loan to be made by DenSco.<sup>173</sup> Because of its stated goal of having each loan be secured by a first lien deed of trust,<sup>174</sup> DenSco would need to ensure that the loan documentation for each of its loans was properly prepared and timely recorded. Because of its stated goal of maintaining a loan-to-value ratio of between 50% and 65% across its portfolio of loans,<sup>175</sup> DenSco would need to conduct adequate and reliable property appraisals prior to consummating each loan, update such property appraisals periodically, and calculate the portfolio's loan-to-value ratio on a continuous basis. Because of its stated goal of maintaining diversity among its borrowers and the properties under

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<sup>169</sup> See page 37, 2011 POM (2622 loans funded from April 2001 through June 2011).

<sup>170</sup> See page 37, 2011 POM (378 loans funded in 2011 through June 30, 2011).

<sup>171</sup> See page 15, 2011 POM ("Success of the Company depends to a large extent on its ability to achieve growth in the number of applications and closings, the due diligence and servicing of these loans and the ability to manage growth effectively.").

<sup>172</sup> Page 6, 2011 POM. Although DenSco disclosed that such work could be done on its behalf by "an authorized representative," Mr. Chittick himself would still need to spend the time to select and engage with the representative, direct the work of the representative, and review and evaluate the reports, conclusions and recommendations of the representative.

<sup>173</sup> Although DenSco reserved the right "to amend or revise [certain] policies, or approve transactions that deviate from these policies, from time to time without a vote of the Noteholders" (see page 25, 2011 POM), such reservation of rights and lack of Noteholder control had little relevance to a change in circumstances that may have occurred *prior* to the time an investor committed to become a Noteholder, thus potentially rendering the disclosures made in the POM materially misleading.

<sup>174</sup> See page 37, 2011 POM ("All real estate loans funded by the Company have been and are intended to be secured through first position trust deeds.").

<sup>175</sup> See page 37, 2011 POM ("The loan to value ratio of the Company's overall portfolio has averaged less than 70% and the Company intends to maintain a loan to value ratio of 50% to 65%."); page 10, 2011 POM ("the Company intends to maintain general loan-to-value guidelines that currently range from 50 percent to 65 percent (but it is intended not to exceed 70%), to help protect the Company's portfolio of loans.").

mortgage,<sup>176</sup> DenSco would need to monitor and track the identity of its borrowers (and their affiliates), and the location and type of properties in which it was taking an interest. And because of its goal of avoiding certain licensing requirements, DenSco would need “to take the necessary steps to ensure that the borrowers it lends to and the projects covered by such loans will not fall within [such licensing] requirements.”<sup>177</sup>

In addition to the work involved with the initiation of each mortgage loan, DenSco’s mortgage lending business also required the servicing and monitoring of all loans.<sup>178</sup> As described in the 2011 POM, if a borrower were to become delinquent in making a payment, DenSco would contact the borrower within three to five days, and closely monitor the account until payment was made.<sup>179</sup> If a payment was late by more than five days, the company could impose a late charge, and if a payment was more than 30 days delinquent, the company could impose a default rate of interest and begin foreclosure proceedings.<sup>180</sup> Alternatively, DenSco could request the borrower execute a deed in lieu of foreclosure. Whether by virtue of a foreclosure sale or a deed in lieu of foreclosure, once DenSco gained control of the property, it would either “market the subject property at retail, which may require additional monies to improve the property to retail ready condition, or to wholesale the subject property ‘as is.’ The Company may also decide to rent the subject property as an investment property.”<sup>181</sup> In addition, the repossessing of a property may require that DenSco “complete a project so repossessed by it, ... [and] inject additional capital.”<sup>182</sup>

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<sup>176</sup> See pages 36-37, 2011 POM (“The Company has endeavored to maintain a large and diverse base of borrowers as well as a diverse selection of properties as collateral for its loans to the borrowers.... The Company continues to strive to achieve a diverse borrower base by attempting to ensure that *one borrower will not comprise more than 10 to 15 percent of the total portfolio.*” [italics added]). See, also, page 10, 2011 POM (“The Company will attempt to maintain a diverse portfolio of Trust Deeds and loans by seeking a large borrowing base .... Currently, the Company’s base of borrowers exceed [sic] 150 approved and qualified borrowers. It is the Company’s plan that the base of borrowers eventually will exceed 250 qualified contractors and foreclosure specialists.”).

<sup>177</sup> See page 8, 2011 POM (“The Company’s management believes that it is not required to be licensed by the Arizona Department of Financial Institutions as a mortgage broker or mortgage banker nor under certain federal laws, such as Truth-In-Lending Act or the Real Estate Settlement Procedures Act. The Company intends to take the necessary steps to ensure that the borrowers it lends to and the projects covered by such loans will not fall within the requirements imposed by the foregoing agency and acts.”).

<sup>178</sup> See page 7, 2011 POM (“The Company services the contracts it purchases and originates.”); page 13, 2011 POM (“The Company’s ability to generate cash in amounts sufficient to pay interest on the Notes and to repay or otherwise refinance the Notes as they mature depends upon the Company’s receipt of payments due under the loans that are in the Company’s portfolio.”).

<sup>179</sup> Ibid.

<sup>180</sup> Ibid. See, also, page 13, 2011 POM (“The Company is responsible for collecting payments from loan obligors and for foreclosing under an applicable Trust Deed in the event of default by an obligor.”).

<sup>181</sup> See page 7, 2011 POM.

<sup>182</sup> See page 18, 2011 POM.

On the fund-raising side of its business, DenSco was conducting continuous offerings. Mr. Chittick himself was “making the private placement of the Notes on behalf of the Company.”<sup>183</sup> In my experience, such work would entail, at a minimum: (a) identifying, meeting with, and soliciting existing and new investors, and responding to their inquiries;<sup>184</sup> (b) preparing, distributing, collecting and reviewing all the necessary paperwork to accept new investors;<sup>185</sup> and (c) consummating each investor’s investment by the acceptance of payment and the issuance of a Note.

In order for DenSco’s offerings to fall within the private placement exemption from registration, the 2011 POM stated that Notes were “offered only to persons who are: (1) ‘Accredited Investors’ within the meaning of Rule 501(a) of Regulation D promulgated under the [Securities Act of 1933] and applicable state securities law; (2) able to bear the economic risk of an investment in the Notes, including a loss of the entire investment; and (3) sufficiently knowledgeable and experienced in financial and business matters to be able to evaluate the merits and risks of an investment in the Notes . . .”<sup>186</sup> It was Mr. Chittick’s responsibility to devote the time, energy and resources to ensure that each investor in DenSco satisfied each of these requirements.<sup>187</sup>

The 2011 POM also references a number of additional tasks to be completed by DenSco in connection with the issuance of each Note to investors. Because each POM offering was limited in size,<sup>188</sup> Mr. Chittick would need to monitor the aggregate proceeds received under each offering. Because each Note may have different terms, including principal amount, maturity

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<sup>183</sup> Page iii, 2011 POM.

<sup>184</sup> See page 49, 2011 POM (“The offer to sell Notes must be directly communicated to the investor by [Mr. Chittick]”); page vi, 2011 POM (“Prior to the sale of any Notes offered hereby, the Company will make available to each investor the opportunity to ask questions of and receive answers from Mr. Chittick”) [quoted text was upper case bold in original]; page 50, 2011 POM (“The Company must have furnished and made available for inspection all documents and information that the investor has reasonably requested relating to an investment in the Company, including its Articles of Incorporation, stock records and financial account records.”); page 11, 2011 POM.

<sup>185</sup> Such paperwork would include a subscription agreement and suitability questionnaire for each investor. See pages vi and 55-57, 2011 POM.

<sup>186</sup> Page iv, 2011 POM [quoted text was upper case bold in original].

<sup>187</sup> See page iv, 2011 POM (“The Notes are not offered and will not be sold to any prospective investor unless such investor has established, *to the satisfaction of Denny J. Chittick*, that the investor meets all of the foregoing criteria.” [italics added; quoted text was upper case bold in original]).

<sup>188</sup> See cover page of 2011 POM (“The Company intends to offer the Notes on a continuous basis until the earlier of (a) the sale of the maximum offering [\$50 million in the case of the 2011 POM], or (b) two years from the date of this memorandum”).

date, interest rate, and timing and method of interest payments,<sup>189</sup> such terms would need to be carefully documented and monitored to ensure DenSco's compliance with all payment terms.

Because DenSco's offerings of Notes were continuous offerings, the applicable POMs would need to be updated from time to time. As acknowledged in the 2011 POM, "*failure to update this Memorandum as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing manipulative or deceptive device in the sale of securities*, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors."<sup>190</sup> As a result, Mr. Chittick would need to constantly monitor the activities of DenSco, and the environment in which it operated, to ensure that the POM was up to date and accurate.

Even once Notes were issued, DenSco (and therefore Mr. Chittick) had continuing responsibilities with respect to investors who became Noteholders. For example, in addition to timely and appropriately making interest and principal payments to Noteholders (as discussed

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<sup>189</sup> See page 2, 2011 POM ("The interest rates of the Notes will vary and will depend on the denomination of the Note and the term selected by the investor. The Notes are offered in denominations ranging from \$50,000 to \$1,000,000.00 ... Investors may elect to have interest paid monthly, quarterly or at maturity."); page 17, 2011 POM ("Notes ... may be issued at higher or lower interest rates and shorter or longer maturities, depending upon market conditions and other factors."); pages 45-46, 2011 POM ("Interest is payable on the last day of each period to the investors of the Notes at the principal office of the Company in Chandler, Arizona. At the option of the Company, interest payments may be paid by check mailed to the address of the investor entitled thereto as it appears on the Subscription Agreement for the Notes. An investor may request in writing to the Company that a deposit be made to a designated bank or investment account.").

<sup>190</sup> Page 24, 2011 POM ("Until the maximum offering proceeds are attained or the Company terminates this Offering, *the Company expects to offer the Notes for placement on a continuing basis* for two years from the date of this Memorandum unless the Company changes its operations or method of offering in any material respect prior to the expiration of the two year offering period. ... *In order to continue offering the Notes during this period, the Company will need to update this Memorandum from time to time. Keeping the information in the Memorandum current will cause the Company to incur additional costs. A failure to update this Memorandum as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing manipulative or deceptive device in the sale of securities*, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors. In addition, an investor might seek to have the sale of the Notes hereunder rescinded which would have a serious adverse effect on the Company's operations." [italics added]). See, also, page 45, 2011 POM ("If the Company changes its operations ... in any material respect, *the Company will update the Memorandum as necessary to provide correct information to investors.*" [italics added]).

above), Noteholders were entitled to request from DenSco certain information and certifications,<sup>191</sup> permission to transfer their Notes,<sup>192</sup> and early redemption of their Notes.<sup>193</sup>

In addition to the specific responsibilities associated with mortgage lending and fund-raising, DenSco would have had the same general responsibilities of any business, such as maintaining books and records, preparing financial statements, filing tax returns and paying taxes, reporting interest income of its Noteholders, and other tasks.

In my experience, the volume of business being conducted by DenSco, and the responsibilities of a single individual to adequately manage that business, are quite striking. There was no deep bench or internal team to support Mr. Chittick's enormous responsibilities, no one to cover in the event Mr. Chittick were to become ill or otherwise become unavailable, and no meaningful succession plans to replace Mr. Chittick.<sup>194</sup>

#### **4. Significant Risk of Confusion as to the Identity of the Defendants' Client**

Although the engagement letter between Clark Hill and DenSco only identified DenSco as the client,<sup>195</sup> the nature of the attorney-client relationship with such a "one-man shop" was subject to an enhanced risk of confusion and conflict.

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<sup>191</sup> See page 46, 2011 POM ("On an annual basis and upon written request from an investor, the Company will certify to the requesting investor(s) that the aggregate outstanding principal amount of all cash accounts, other property and Trust Deeds is at least equal to the principal amount of outstanding Notes as of the date of the request.").

<sup>192</sup> See page 46, 2011 POM ("The Notes are not transferable without the prior written consent of the Company").

<sup>193</sup> See page 47, 2011 POM ("the Company intends to use its good faith efforts to accommodate written requests from an investor to prepay any Note prior to maturity").

<sup>194</sup> Although the 2011 POM (under the heading "Contingency Plan in the Event of Death or Disability of Mr. Chittick") references a "written agreement with Robert Koehler ... to provide or arrange for any necessary services for the Company" should Mr. Chittick become "unable to perform his duties to continue the operation of the Company in any capacity," such agreement does not constitute a succession plan. In fact, the only action expected of Mr. Koehler pursuant to such agreement was "to close down the Company's business by collecting all of the monies due on the Trust Deeds and ... return all of the principal and interest owed to the investors pursuant to the Notes." Page 41, 2011 POM. It is unclear whether such agreement was enforceable (e.g., due to a lack of consideration), but it is apparent that Mr. Koehler in fact did not perform as described. See page 68, lines 18-23, Deposition of Shawna Chittick Heuer (Mr. Chittick's sister) on August 22, 2018 ("I remember ... Robert saying ... I don't want to be a part of this. I don't feel comfortable. ... I have my own business. This is too much for me to take on, is what I believe I remember him telling me.").

<sup>195</sup> Engagement Letter dated September 12, 2013, executed by Mr. Beauchamp on behalf of Clark Hill, and Mr. Chittick on behalf of DenSco ("This letter serves to record the terms of our engagement to represent DenSco Investment Corporation (the 'Client'), with regard to the legal matters transferred to Clark Hill PLC from Bryan Cave, LLP."). Such Engagement Letter was

As the only shareholder, director, officer and employee of DenSco, Mr. Chittick was the only point of contact for the Defendants in interacting with their client, DenSco. Based on the record I have reviewed, it does not appear that Mr. Chittick had separate legal counsel to represent him and his interests in his capacity as shareholder, director, officer or employee of DenSco. This situation could easily lead Mr. Chittick to reasonably believe that the Defendants were not only DenSco's attorneys, but his own as well.

Mr. Beauchamp himself appears to have been confused as to the identity of his client, as reflected in the 2011 POM which he prepared: "Legal counsel to the Company will represent the interests solely of the Company *and its President.*"<sup>196</sup> Further, at the hearing to determine the appointment of the Receiver, Mr. Beauchamp testified that "he concurrently represented both DenSco and Denny Chittick personally."<sup>197</sup> In addition, as he testified in his deposition, Mr. Beauchamp apparently understood that Mr. Chittick was also his client, at least in some capacity, and that Mr. Chittick considered he was his attorney.<sup>198</sup>

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expressly "supplemented by our Standard Terms of Engagement for Legal Services, attached, which are incorporated in this letter and apply to this matter and the other matter(s) for which you engage us." The attached Standard Terms of Engagement for Legal Services, under the caption "Whom We Represent," provided: "The person or entity whom we represent is the person or entity identified in our engagement letter and *does not include any affiliates or related parties of such person or entity such as ... employees, officers, directors, shareholders of corporation, ... and/or other constituents of named client unless our engagement letter expressly provides otherwise*" [italics added].

<sup>196</sup> See page 30, 2011 POM [italics added].

<sup>197</sup> See Exhibit 317, email dated August 30, 2016 from Kevin Merritt (attorney for the Chittick Estate) to Mr. Beauchamp and Ryan Anderson (an attorney representing the Receiver), copying the Receiver, Mr. Polese (attorney for the Chittick Estate), et al. ("I would like to remind everyone that David testified at the receivership hearing that he concurrently represented both DenSco and Denny Chittick, personally."); see, also, email dated August 15, 2016 from Mr. Polese to Ms. Coy, copying Mr. Beauchamp, et al. ("It is my view and that of Dave Beauchamp, Denny viewed David as both his company attorney and personal attorney."). Although Mr. Beauchamp claimed that he corrected the statement made to Ms. Coy (see pages 118-119, lines 23-9, Deposition of Mr. Beauchamp), there appears to be no evidence of such action, and it appears to be contrary to his other testimony. See pages 133-134, lines 7-11, Deposition of Mr. Beauchamp ("Based on the information that I have now ... I would say it's not true [that "Mr. Chittick considered that I was his counsel as well as counsel for DenSco"]. ... At the time I did this declaration [draft received August 17, 2016], I had a different understanding of what counsel was, ... I have since understood that, no, I'm representing the company").

<sup>198</sup> See page 3, Defendants' DS ("Mr. Beauchamp averred in an August 17, 2016 declaration under oath that he represented DenSco and 'Mr. Chittick as the President of DenSco.' Mr. Beauchamp did not represent Mr. Chittick outside of his role as a corporate officer at DenSco."). See, also, pages 133-134, lines 7-11, Deposition of Mr. Beauchamp (counsel quotes from Exhibit 435 (paragraph 5, draft Declaration of David Beauchamp, dated August 27, 2016): "Q. ... 'During my involvement with Mr. Chittick and DenSco, I understood that Mr. Chittick considered that I was his counsel as well as counsel for DenSco.' That is not true, correct? A.

It is important to note that the interests of an entity client are not always aligned with, and are often in conflict with, the interests of the client's shareholders, directors, officers and employees, even when only one individual occupies all of those roles. As noted above, the Rules of Professional Conduct make clear that, when representing an entity as client, the attorney *must* recognize that it is the entity whose interests are to be protected, and *not* the interests of the individual or individuals through whom the entity acts.<sup>199</sup> As a result, it is important for the attorney to properly identify his or her client, and to ensure that when the client is an entity, such individual(s) understand who is and who is not the client of the attorney.<sup>200</sup>

This situation creates a material risk that each of the entity client, such individual(s) and perhaps even the attorney – in this Case, DenSco, Mr. Chittick and the Defendants, respectively – may be confused or conflicted with respect to the attorney-client relationship.

## 5. Implications

For the above reasons, in my opinion the applicable standard of care dictates that the Defendants should have recognized that DenSco was a high-risk client. To be clear, I am not suggesting that it was a violation of the standard of care for an attorney to engage with a high-risk client. However, in accepting and continuing to represent DenSco as a client, the Defendants should have recognized the enhanced risks associated with such representation, including the substantial risk (if not likelihood) that: (1) DenSco may be unable to comply with applicable law and the other requirements and guidelines as set forth in the 2011 POM; (2) investors may bring claims for securities fraud and/or breach of fiduciary duties; (3) disabling conflicts of interest may arise between DenSco and Mr. Chittick, thereby jeopardizing the role of the Defendants; and (4) malpractice and related claims may be brought against the Defendants by or on behalf of DenSco.

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Based on the information that I have now ... I would say it's not true. Q. Did you ever think it was true? A. At the time I did this declaration, I had a different understanding of what counsel was, *and it was if you are providing advice to somebody as an officer or director of a company, then you represent them too.* And – Q. Individually? A. – *and that they would have the right to rely upon it and object.* ... Q. Okay but during the time you were representing DenSco at the material events in this case, you thought Mr. Chittick was your individual client? A. Not as an individual client. ... as an officer or director of DenSco ... And my analysis was based upon the right to rely upon the information provided, which I understand is not the appropriate standard now, determining who is your individual client." [italics added].

<sup>199</sup> See Arizona Rules of Professional Conduct, Rule 1.13 [Organization as Client] ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); see also ABA Model Rule 1.13.

<sup>200</sup> See Deposition of Mr. Hood, page 110, lines 8-19 ("Q.... To your knowledge, from what you have reviewed, did Mr. Beauchamp ever clarify with Mr. Chittick that he was representing only DenSco? A. I don't know. Q. Okay. He should have, if there was any confusion. Don't you agree? ... THE WITNESS: If there was confusion, then I agree that the Rule 1.13 would require that David have a discussion with Mr. Chittick.").

As a result, the applicable standard of care dictates that the Defendants should have: (a) engaged in extraordinary monitoring and counseling with respect to DenSco; (b) maintained clear documentation of advice provided and actions taken; and, most importantly, (c) been prepared to recognize, and quickly act in response to, “red flag” warnings or indications of any problems (such as those described below). In my opinion, failure to do so would constitute a violation of the Defendants’ duties under the Rules of Professional Conduct, including but not limited to Rules 1.1 (Competence), 1.3 (Diligence) and 1.13 (Organization as Client) of the Arizona Rules of Professional Conduct and the ABA Model Rules.

**B. The Four Red Flag Warnings that DenSco Needed Immediate and Focused Attention and Protection**

**1. The Freo Lawsuit**

The Freo Lawsuit put Mr. Beauchamp on notice of allegations that one of DenSco’s major borrowers, Mr. Menaged and his affiliated entities, was taking money from DenSco and another third-party lender to purchase the same property and provide both lenders with a deed of trust on that same property – thereby potentially having the effect of subordinating DenSco’s interest in the property to that of the other lender (and diminishing the value of DenSco’s interest).

Mr. Beauchamp knew, or should have known, that DenSco’s interests (as lender) and Mr. Menaged’s interests (as borrower) were not aligned in the Freo Lawsuit and that, as a result, DenSco needed to have independent legal counsel, and not simply “piggy back” on Mr. Menaged’s defense.<sup>201</sup> Despite this clear conflict of interest, and Mr. Chittick’s instruction that he speak with Mr. Menaged’s attorney,<sup>202</sup> Mr. Beauchamp took no action with respect to the Freo Lawsuit.<sup>203</sup>

Had Mr. Beauchamp investigated the allegations in the complaint in the Freo Lawsuit, “he would have found within minutes, by reviewing records available through the Maricopa County Recorder’s website relating to the property described in the Freo lawsuit: (i) a Deed of Trust and Security Agreement With Assignment of Rents given by Easy Investments in favor of Active Funding Group, that Menaged had signed on March 25, 2013; and (ii) a Deed of Trust and Assignment of Rents given by Easy Investments in favor of DenSco, that Menaged had signed on April 2, 2013. Both signatures were witnessed by the same notary public.”<sup>204</sup>

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<sup>201</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged (“Easy Investments, has his attorney working on it, I’m ok to piggy back with his attorney to fight it.”).

<sup>202</sup> See *Ibid* (“Easy Investments [sic] willing to pay the legal fees to fight it. I just wanted you to be aware of it, and talk to his attorney. Contact info is below.”).

<sup>203</sup> Mr. Beauchamp testified that he did not speak to the borrower’s attorney, Mr. Goulder, at that time. See page 240, lines 9-19, Deposition of Mr. Beauchamp.

<sup>204</sup> Plaintiff’s DS ¶ 129.

Upon becoming aware of the Freo Lawsuit, Mr. Beauchamp should have advised Mr. Chittick of the following action items, and should have assisted him in the completion of these action items:

- investigate the policies and procedures, and the trustworthiness, of Mr. Menaged and his affiliated entities;
- investigate where the excess funds from two different mortgage loans went;
- suspend making any further loans to Mr. Menaged and all entities managed by Menaged;
- review all other outstanding loans to Mr. Menaged and his affiliated entities to confirm that DenSco was the only lender on the property with a first lien deed of trust;
- review and reevaluate DenSco's internal procedures to ensure that it was not vulnerable to the type of double lien issue alleged in the Freo Lawsuit;
- contact the other lender to investigate the allegations; and
- evaluate the accuracy of the disclosures made in the 2011 POM, and update and correct them as may be necessary.

Based on the record I have reviewed, Mr. Beauchamp provided no such advice or assistance following the Freo Lawsuit. In fact, from mid-June 2013 when Mr. Beauchamp first learned of the significant allegations in the Freo Lawsuit,<sup>205</sup> until at least January of the following year, Mr. Beauchamp took no such action to protect his client, DenSco.<sup>206</sup>

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<sup>205</sup> See email dated June 14, 2013 from Mr. Beauchamp to Mr. Chittick ("we will need to disclose this in POM").

<sup>206</sup> If, instead, the Defendants had investigated and done proper due diligence with respect to the red flag warning raised by the Freo Lawsuit at or around the time that Mr. Beauchamp transitioned from Bryan Cave to Clark Hill, they would have discovered the magnitude of the damage caused by the Menaged fraud and Mr. Chittick's failure to follow proper funding procedures. Because of the materially inaccurate and incomplete disclosures made in the expired 2011 POM, upon such discovery the Defendants should have then instructed DenSco to immediately cease the offer and sale of all Notes. Any Rule 10b-5 compliant disclosures at that time would be required to disclose, among other things, DenSco's failures with respect to its first lien positions, loan-to-value ratios, and diversity of its borrowers, and the cause of such failures (including Mr. Chittick's negligence), as well as its exposure to civil and criminal consequences for securities fraud (including the possible right of all Noteholders to demand rescission). Because such disclosures would by necessity be so negative (especially in comparison to the disclosures contained in the 2011 POM), it appears to me unlikely that the sophisticated accredited investors targeted by DenSco would have been inclined to continue to invest in Notes. Further, because DenSco's business model was based on soliciting and investing money provided by Noteholders, and because many of the double lien properties were overleveraged, in my opinion the proper advice to be given to DenSco at that time would have been to conduct an

## **2. Mr. Chittick's Instruction**

At the time of Mr. Chittick's Instruction to stop working on updating the POM, the 2011 POM was already out of date, had expired by its own terms, and contained no information regarding the Freo Lawsuit. As discussed above, because I have seen no evidence that Mr. Beauchamp communicated to Mr. Chittick to cease offering Notes until an updated POM could be provided to investors, he should have expected that Mr. Chittick would continue to solicit new investors. Further, Mr. Beauchamp knew that DenSco had dozens of Notes that were scheduled to mature, and that a significant portion of those Notes would be rolled over into new Notes.<sup>207</sup>

However, rather than take corrective action (such as insisting that Mr. Chittick cooperate in updating the POM or cease offering new Notes and/or terminating the attorney-client relationship), the Defendants instead accepted DenSco as a new client at Clark Hill, and continued to do no work in updating the expired 2011 POM for over three months.

In my opinion, Mr. Chittick's Instruction is an inflection point, in that it evidenced both (a) an inability or unwillingness on the part of Mr. Chittick to work with the Defendants in complying with applicable securities laws, and (b) a willingness on the part of the Defendants to knowingly accept and tolerate as a new client one that was failing to comply with applicable securities laws.

## **3. The December 2013 Phone Call**

The December 2013 Phone Call once again put Mr. Beauchamp on notice that there were serious lien priority problems in connection with DenSco's dealings with Mr. Menaged and his affiliated entities.

Once again, following the December 2013 Phone Call, Mr. Beauchamp should have advised and assisted Mr. Chittick with respect to the above action items – this time with more urgency given the prior Freo Lawsuit and Mr. Chittick's Instruction. Instead, Mr. Beauchamp simply advised Mr. Chittick to document a "plan" to resolve the double lien issue.<sup>208</sup>

## **4. The Bryan Cave Demand Letter**

The cumulative effect of the Freo Lawsuit, Mr. Chittick's Instruction, the December 2013 Phone Call and the Bryan Cave Demand Letter put the Defendants on notice that there were very serious problems at DenSco, especially with respect to Mr. Menaged and his affiliated entities (borrowers that the Defendants knew were material to DenSco's business). Further, it should

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orderly liquidation (presumably in a Chapter 7 bankruptcy proceeding) for the benefit of its Noteholders.

<sup>207</sup> See email dated June 20, 2013 from Mr. Beauchamp to several colleagues at Bryan Cave ("According to his note schedule, Denny has approximately 60 investor notes that are scheduled to expire in the next 6 months (and to probably be rolled over into new notes)").

<sup>208</sup> Defendants' DS, page 8 ("Mr. Beauchamp suggested that Mr. Chittick and Menaged document their plan ... to resolve the double-lien issue.")

have become clear to Mr. Beauchamp that Mr. Chittick's strategy to "piggy back" on Mr. Menaged's defense in the Freo Lawsuit,<sup>209</sup> and Mr. Chittick's Plan to resolve the double lien issue raised in the December 2013 Phone Call, had not only failed to address those problems, but were inappropriate actions to take on behalf of DenSco.

## **5. Call to Action**

In my opinion, under such circumstances a reasonably prudent attorney would have immediately taken the following measures to protect DenSco and its Noteholders – none of which were taken by the Defendants:

### **a. Conduct Due Diligence**

As discussed above, Arizona's Rules of Professional Conduct, Rule 1.3 (Diligence) would obligate such an attorney to "act with reasonable diligence and promptness in representing a client."<sup>210</sup>

The Defendants themselves should have investigated the claims involving Mr. Menaged and his affiliated entities, which were raised in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter, including Mr. Menaged's fabricated story involving his "cousin." As part of such investigation, the Defendants should have looked into where the proceeds from DenSco's loans went. The Defendants should have also reviewed all other outstanding loans to Mr. Menaged and his affiliated entities – and all other borrowers – so as to determine whether the problem was limited to the properties identified in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter.

The Defendants themselves should have reviewed and reevaluated DenSco's internal procedures to ensure that it was not vulnerable to the type of double lien issue raised in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter. As part of such review, the Defendants should have investigated the funding procedure used by DenSco to ensure that it was in fact obtaining first lien deeds of trust in properties owned by its borrowers (as it disclosed in the 2011 POM).

### **b. Terminate All Dealings with Mr. Menaged**

The Defendants should have urged DenSco to sever its relationship with Mr. Menaged and his affiliated entities, and to immediately stop providing any additional funds to Mr. Menaged and his affiliated entities.

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<sup>209</sup> Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("Easy Investments, has his attorney working on it, I'm ok to piggy back with his attorney to fight it.").

<sup>210</sup> See, also, Comment [1] to Arizona Rule 1.3 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client.").

The Defendants should have also researched, and advised DenSco with respect to, its rights and remedies with respect to Mr. Menaged and his affiliated entities and with respect to the double lien properties and the other lenders, and should have urged DenSco to take appropriate action against Mr. Menaged and his affiliated entities for fraud.

**c. Update the 2011 POM Immediately and Cease All Solicitations**

By the time of the Bryan Cave Demand Letter, the 2011 POM had already expired by its own terms over a half year earlier. In addition, it did not include any information about the Menaged fraud or DenSco's exposure in the Freo Lawsuit or pursuant to the Bryan Cave Demand Letter, nor did it describe Mr. Chittick's Plan. And, based on the information contained in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter, the Defendants knew that the disclosures made in the 2011 POM were materially inaccurate,<sup>211</sup> especially with respect to DenSco's first lien position,<sup>212</sup> its loan-to-value ratio,<sup>213</sup> and the diversity of its borrowers.<sup>214</sup>

The Defendants knew that the "failure to update [the 2011 POM] as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing *manipulative or deceptive device in the sale of securities*, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors."<sup>215</sup> Further, as Mr. Beauchamp acknowledged in February 2014, he was concerned that Mr. Chittick had committed securities fraud because the loan documents he had Mr. Menaged sign did not comply with DenSco's representations in the 2011 POM.<sup>216</sup> In addition, as Mr. Beauchamp testified, by "the end of April, beginning of May of 2014 ... *I believed he had committed a securities violation, and it was paramount that we get the disclosure statement out in writing to all of the investors as quickly as possible.*"<sup>217</sup>

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<sup>211</sup> See Mr. Beauchamp's handwritten notes of a telephone call with Mr. Chittick on February 11, 2104 ("Material Disclosure – exceeds 10% of the overall portfolio").

<sup>212</sup> See page 37, 2011 POM.

<sup>213</sup> See pages 10 & 37, 2011 POM.

<sup>214</sup> See pages 10 & 36-37, 2011 POM. See also pages 9-10, lines 25-2, Defendants' DS ("by the end of 2013, more than half of [DenSco's] loan portfolio was tied up with Menaged--well in excess of the promised loan concentrations DenSco had set forth in its disclosures to investors").

<sup>215</sup> Page 24, 2011 POM.

<sup>216</sup> Exhibit 70, email dated February 7, 2014 from Mr. Beauchamp to Mr. Goulder (Mr. Menaged's attorney), copying Mr. Chittick ("Based on your previous changes, the Forbearance Agreement would be prima facie evidence that Denny Chittick had committed securities fraud because the loan documents he had Scott sign did not comply with DenSco's representations to DenSco's investors in its securities offering documents.").

<sup>217</sup> See, also, page 161, lines 7-24, Deposition of Mr. Beauchamp ("Q. Was there any point in time, sir, where you learned that Mr. Chittick was continuing to raise money? A. ... the *end of April, beginning of May of 2014*. ... Q. And once you learned that, you knew he was committing a securities violation? ... A. I – *at that point in time, I believed he had committed a securities violation, and it was paramount that we get the disclosure statement out in writing to all of the*

For the reasons stated above,<sup>218</sup> it is clear that Mr. Beauchamp was aware that DenSco was continuing to offer Notes without updated disclosures, after the expiration of the 2011 POM, and despite his knowledge of the problems revealed in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter.

Under these circumstances, and notwithstanding Mr. Chittick's Instruction, the Defendants should have insisted that DenSco immediately cease all solicitations of investors (including new investors and rollover investors) unless and until an updated and corrected POM, in compliance with Rule 10b-5, was prepared and provided to all such investors.

**d. Advise Mr. Chittick of His Fiduciary Duties to DenSco and its Investors**

As a result of the problems revealed in the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter, the Defendants should have advised Mr. Chittick of his fiduciary duties both to DenSco and to its Noteholders. For example, the duty of loyalty mandated that Mr. Chittick, as director,<sup>219</sup> officer<sup>220</sup> and sole shareholder<sup>221</sup> of DenSco, act in the best interests of DenSco. Among other things, the Defendants should not have merely accepted and followed Mr. Chittick's Instruction, but rather urged Mr. Chittick of his obligations to update the POM.

And, to the extent that such problems may have rendered DenSco insolvent, Mr. Chittick would owe fiduciary duties to its creditors, and would be obligated to treat all assets of DenSco as "existing for the benefit" of the Noteholders and other creditors.<sup>222</sup> As a result, the Defendants should have assessed whether DenSco was insolvent or in the "zone of insolvency."

Because of such duties, the Defendants also should have urged Mr. Chittick, on behalf of their client DenSco, to protect and preserve the corporation's assets, and to not pursue a Plan that

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*investors as quickly as possible.* His representations that he had advised everybody and told them to the contrary, we needed something much more formal than that." [italics added]).

<sup>218</sup> See the section entitled "Defendants Allege They Withdrew from Representing DenSco in May 2014" above in this Report.

<sup>219</sup> See Arizona Revised Statutes, Section 10-842 ("an officer's duties shall be discharged ... [i]n a manner the officer reasonably believes to be in the best interests of the corporation.").

<sup>220</sup> See Arizona Revised Statutes, Section 10-830 ("a director's duties ... shall be discharged ... [i]n a manner the director reasonably believes to be in the best interests of the corporation.").

<sup>221</sup> See *Sports Imaging of Arizona, L.L.C. v. 1993 CKC Trust*, No. 1 CA-CV 05-0205, 2008 WL 4448063, \*12 (unpublished opinion, Ariz. Ct. App. 2008) ("shareholders that have the ability to control a corporation owe a fiduciary duty to the corporation").

<sup>222</sup> See *A.R. Teeters & Assocs. v. Eastman Kodak Co.*, 172 Ariz. 324, 836 P.2d 1034 (Ariz. Ct. App. 1992) ("all of the assets of a corporation, immediately on its becoming insolvent, exist for the benefit of all of its creditors" [internal citation omitted]). See, also, *Dooley v. O'Brien*, 226 Ariz. 149, 244 P.3d 586 (Ariz. Ct. App. 2010); *Dawson v. Withycombe*, 216 Ariz. 84, 163 P.3d 1034 (Ariz. Ct. App. 2007).

would benefit Mr. Chittick individually (such as to preserve his reputation and/or equity stake in DenSco) at the risk of DenSco or the Noteholders.

Further, as legal counsel to DenSco, the Defendants should have advised Mr. Chittick as to how to best protect and preserve the corporation's assets, especially with respect to those outstanding loans that were not adequately protected by first lien mortgages. In order to render such advice, the Defendants would have needed to conduct due diligence and research in order to properly consider available alternatives.

**e. Protect DenSco from the Negligent, Reckless and Disloyal Actions of Mr. Chittick**

Because DenSco, and not Mr. Chittick, was the client, the Defendants owed duties to DenSco exclusively.<sup>223</sup> Because the Defendants knew, or should have known, that Mr. Chittick was acting in a manner that violated his legal obligations to DenSco (e.g., breach of fiduciary duties), and that constituted a violation of the law that would be imputed to DenSco (e.g., securities fraud), in both instances that was likely to result in substantial injury to DenSco, the Defendants were obligated to "proceed as is reasonably necessary in the best interest of the organization."<sup>224</sup> In accordance with Arizona's Rules of Professional Conduct, Rule 1.13 (Organization as Client), paragraph (c), such obligation may have included reporting Mr. Chittick to the proper authorities and/or the Noteholders in order protect DenSco against Mr. Chittick.<sup>225</sup>

Here, again, is an issue that arises because DenSco is a high-risk client with only one person making all decisions. The Defendants did not have an opportunity to report to anyone else at DenSco that Mr. Chittick was causing harm to DenSco. Although Rule 1.13(c) itself does not mandate "reporting out," Rule 1.2 makes clear that, under the right set of circumstances, "a lawyer may be required to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud."<sup>226</sup> Because the Defendants were obligated to protect their client against Mr. Chittick, in my opinion the standard of care applicable to them would have obligated them to report Mr. Chittick's inappropriate actions to either the proper authorities or the Noteholders or both.

**f. Withdraw from the Representation of DenSco**

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<sup>223</sup> See Arizona's Rules of Professional Conduct, Rule 1.13 (Organization as Client).

<sup>224</sup> Arizona's Rules of Professional Conduct, Rule 1.13(b).

<sup>225</sup> Arizona's Rules of Professional Conduct, Rule 1.13(c) ("if (1) despite the lawyer's efforts in accordance with ER 1.13(b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then *the lawyer may reveal information relating to the representation ... only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.*" [italics added]).

<sup>226</sup> Comment [11] of Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer) of the Arizona Rules of Professional Conduct.

Once it becomes clear that disclosures being provided to investors in DenSco fail to comply with Rule 10b-5, a reasonably prudent attorney would have three options: (1) cause DenSco to immediately update and correct the disclosures made available to all investors; (2) cause DenSco to immediately cease soliciting investors (including rollover investors); or (3) withdraw from the representation of DenSco. (In my experience, the threat to withdraw often induces an otherwise reluctant client to abide by one of the other options.)

Under the circumstances, because the Defendants failed to cause DenSco to update and correct the 2011 POM or cease soliciting investors, the Defendants had no option but to immediately withdraw from the representation of DenSco. Arizona's Rules of Professional Conduct, Rule 1.16 (Mandatory Withdrawal from the Representation), mandates that a lawyer "*shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law.*"<sup>227</sup> Further, because the Defendants were aware that DenSco was committing securities fraud by continuing to solicit investors without adequate disclosures, in my opinion such withdraw should have been made clear by written notice to Mr. Chittick on behalf of DenSco, together with a statement disaffirming the 2011 POM.<sup>228</sup>

### **C. The Defendants' Conduct Fell Below the Standard of Care**

In my opinion, the Defendants' conduct fell below the applicable standard of care in each of the following respects:

- 1. The Defendants' Failures with Respect to the Menaged Fraud**
  - a. The Defendants Failed to Recognize that DenSco was a High-Risk Client**

For all the reasons stated above under "DenSco was a 'High-Risk' Client," the Defendants should have recognized that DenSco was a high-risk client, and apparently failed to do so. Had they recognized that DenSco was a high-risk client, the applicable standard of care dictates that they would have (a) engaged in extraordinary monitoring and counseling with respect to DenSco, (b) maintained clear documentation of advice provided and actions taken, and (c) been prepared to recognize, and quickly act in response to, red flag warnings or indications of any problems.

- b. The Defendants Failed to Conduct any Due Diligence on Mr. Menaged or on DenSco's Funding Procedure**

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<sup>227</sup> Italics added.

<sup>228</sup> Comment [11] to Rule 1.2 of Arizona's Rules of Professional Conduct ("In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."). See also Model Rules of Professional Conduct, Comment [10] to Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

The Defendants were put on notice of the Menaged fraud by each of the four red flag warnings: the Freo Lawsuit, Mr. Chittick's Instruction, the December 2013 Phone Call, and the Bryan Cave Demand Letter. However, based on the record I have reviewed, at no point in time did the Defendants conduct any due diligence or investigation into the claims involving Mr. Menaged and his affiliated entities. A simple search of records available on the County of Maricopa website would have called into question the veracity of Mr. Menaged's fabricated story about his "cousin."<sup>229</sup>

Even if Mr. Menaged's story were credible, the fraud supposedly committed by his "cousin" still reflected gravely on Mr. Menaged's reliability, management and supervision – all issues that should have been investigated by the Defendants. Further, there appeared to be no inquiry into where the proceeds from DenSco's loans disappeared to.

The Defendants should have reviewed and reevaluated DenSco's internal procedures to ensure that it was not vulnerable to the type of double lien issue raised first in the Freo Lawsuit, then in the December 2013 Phone Call, and again in the Bryan Cave Demand Letter. As part of such review, the Defendants should have investigated the funding procedure used by DenSco to ensure that it was obtaining first lien deeds of trust in properties owned by its borrowers (as it disclosed in the 2011 POM).

Further, the Defendants apparently took no effort to investigate the magnitude of the double lien issue, relying instead only on those issues and properties specifically identified in the Freo Lawsuit, the December 2013 Phone Call, and the Bryan Cave Demand Letter.

In my opinion, these failures violated Rule 1.3 (Diligence) of the Arizona Rules of Professional Conduct and violated the standard of care applicable to the Defendants.

**c. The Defendants Failed to Protect DenSco from Mr. Menaged**

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<sup>229</sup> See, e.g., Exhibit 103 (Deed of Trust and Security Agreement with Assignment of Rents, recorded in the Official Records of Maricopa County Recorder March 25, 2013, for property located at "7089 W Andrew Lane Peoria, AZ 85383." The Trustor is Easy Investments, LLC. The Beneficiary is Active Funding Group, LLC.); see, also, Exhibit 104 (Deed of Trust and Assignment of Rents, recorded in the Official Records of Maricopa County Recorder April 2, 2013, for property located at "7089 W Andrew Lane Peoria, AZ 85383." The Trustor is Easy Investments, LLC. The Beneficiary is DenSco.). See also Plaintiff's DS ¶ 228 ("Beauchamp also knew from his January 6 review of the demand letter and the hours he had devoted on January 7 and 8 to analyzing Chittick's email and other information he had received from Chittick, that Menaged's 'cousin' story was implausible and that by accepting the story without investigation and planning to continue DenSco's lending relationship with Menaged, Chittick was breaching his fiduciary duties to DenSco."). See also Plaintiff's DS ¶¶ 207(b) & 207(c) ("In January 2014, the Maricopa County Recorder's Office had a free "Recorded Document Search" function. The same tool is available today. If Beauchamp had used that tool, two brief searches would have shown that ... Menaged, not 'a guy in his office,' had secured both loans.").

The Defendants failed to advise DenSco to sever its relationship with, and immediately stop providing additional funds to, Mr. Menaged and his affiliated entities. The Defendants also failed to advise DenSco of its rights and remedies with respect to either Mr. Menaged or the other lenders. Instead of urging DenSco to take appropriate action against Mr. Menaged and his affiliated entities for fraud, the Defendants did just the opposite – by encouraging and facilitating Mr. Chittick’s Plan.

The Defendants failed to recognize that the Forbearance Agreement provided little or no benefit to DenSco. In my experience, a forbearance agreement is utilized to provide short-term relief to a borrower that is experiencing a temporary hardship (such as a cash flow issue). As the name of the agreement suggests, a lender sometimes agrees to *forbear* from exercising its remedies, and delay exercising its right to institute foreclosure proceedings, for a limited period of time in order to provide the borrower with an opportunity to recover.<sup>230</sup> However, the Forbearance Agreement here further acerbated DenSco’s risk and exposure by essentially conceding that Mr. Menaged’s other lenders had a superior lien position and allowing them to extract value out of the mortgaged properties ahead of DenSco.

Mr. Beauchamp’s failures with respect to the Forbearance Agreement raise a troubling question as to whether he simply fell below the applicable standard of care by failing to appreciate the potential damage to DenSco caused by pursuing the agreement, or whether he was in fact motivated by other interests, such as a conflicted desire to give Mr. Chittick’s Plan a chance to work so as to minimize the problems caused by Mr. Beauchamp’s negligent delay in providing updated and corrected disclosures.<sup>231</sup> To the extent Mr. Beauchamp’s pursuit of the Forbearance Agreement was motivated by such a personal conflict of interest, such conduct was so reckless and irresponsible that, in my opinion, it constituted a gross departure from the applicable standard of care.

## **2. The Defendants’ Failures with Respect to Disclosures**

### **a. The Defendants Failed to Timely Update the 2011 POM**

Because the 2011 POM provided for a two-year offering period,<sup>232</sup> by its own terms it expired on July 1, 2013. However, based on the record I have reviewed, it appears that the Defendants

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<sup>230</sup> It appears that the Defendants believed that it was in DenSco’s interest to forbear from exercising its remedies. See page 12, lines 21-26, Defendants’ DS (“As Mr. Beauchamp explained in a February 10, 2014 email to his colleagues, “we advised our client that *he needs to have a Forbearance Agreement in place to evidence the forbearance and the additional protections he needs.*” [italics added]).

<sup>231</sup> See Plaintiff’s DS ¶ 249.

<sup>232</sup> See page (i), 2011 POM (“The Company intends to offer the Notes on a continuous basis until the earlier of (a) the sale of the maximum offering, or (b) two years from the date of this memorandum.”).

never finalized and provided DenSco with an update to the 2011 POM nor a replacement POM.<sup>233</sup>

The July 1, 2013 deadline for updating the 2011 POM was known to Mr. Beauchamp, as he was the one who prepared the 2011 POM and advised DenSco with respect to such matters. The applicable standard of care obligated Mr. Beauchamp to be diligent in preparing an updated POM prior to July 2013 in order that DenSco could timely distribute the updated POM to investors. Mr. Beauchamp's apparent concern about DenSco being close to issuing \$50 million of Notes was misplaced,<sup>234</sup> and in no event excused him from updating the 2011 POM as DenSco remained obligated to provide required disclosures to its investors.

Further, with each red flag warning, the Defendants were increasingly aware of the significance of the Menaged fraud and DenSco's inadequate funding procedures, and yet never provided DenSco with any Rule 10b-5 compliant disclosure document that described the facts and circumstances – and material consequences – of the Freo Lawsuit, the December 2013 Phone Call and the Bryan Cave Demand Letter. Even with the first red flag warning, Mr. Beauchamp recognized that the Freo Lawsuit needed to be disclosed to investors, and Mr. Chittick was cooperative,<sup>235</sup> but no such disclosure was ever prepared by Mr. Beauchamp nor provided to Mr. Chittick.

Mr. Beauchamp appears to assert in the alternative that the Defendants were not obligated to update or correct the 2011 POM because either (1) Mr. Chittick on his own was providing the required disclosures to investors or (2) Mr. Beauchamp had advised Mr. Chittick to discontinue offering Notes to investors. In my opinion, under the circumstances described above, neither assertion is plausible nor in compliance with the standard of care applicable to the Defendants. Further, the Defendants' conduct in this regard was so reckless and irresponsible that such conduct, in my opinion, constituted a gross departure from the applicable standard of care.

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<sup>233</sup> Further, it does not appear that Mr. Beauchamp *ever* prepared, or advised DenSco to prepare, any update to any of DenSco's POMs during the two-period when such POMs were in effect. See Plaintiff's DS ¶¶ 28 & 29 ("DenSco's records do not reflect that DenSco ever took steps to '[k]eep[] the information in the [POMs DenSco issued in 2007, 2009 and 2011] current' by issuing updates to those POMs during the two-year period each of those POMs was in effect. The files that Beauchamp maintained, and the billing statements issued to DenSco by his respective law firms, do not reflect that Beauchamp ever advised DenSco to '[k]eep[] the information in the [POMs DenSco issued in 2007, 2009 and 2011] current' by issuing updates to those POMs during the two-year period each of those POMs was in effect."). Also see Plaintiff's DS ¶¶ 161 & 162 ("Clark Hill's records show that neither Beauchamp nor any other Clark Hill attorney performed any work on a new POM during September, October, or November 2013. The records also show that neither Beauchamp nor any other Clark Hill attorney even attempted to contact Chittick about the new POM.").

<sup>234</sup> See DIC0003345, Mr. Beauchamp's handwritten notes dated May 9, 2013; email dated June 25, 2013 from Mr. Beauchamp to Ms. Sipes; email dated July 1, 2013 from Ms. Sipes to Mr. Beauchamp.

<sup>235</sup> See email exchange dated June 14, 2013 between Mr. Beauchamp and Mr. Chittick.

**b. The Defendants Failed to Conform DenSco Policies and Procedures to Those Disclosed in the POM – and Vice Versa**

With each red flag warning, the Defendants became increasingly aware that material statements contained in the 2011 POM were no longer in compliance with Rule 10b-5, especially with respect to DenSco's first lien position,<sup>236</sup> its loan-to-value ratio,<sup>237</sup> and the diversity of its borrowers.<sup>238</sup> In addition, the 2011 POM touted DenSco's historical success rate, including that "no Noteholder has sustained any diminished return or loss on their investment."<sup>239</sup>

In my opinion, the Defendants should have recognized that each of these statements was materially inaccurate in light of the Menaged fraud and DenSco's improper and risky funding procedure, and yet the Defendants failed to make any effort to update or correct these statements until after the Forbearance Agreement was completed in mid-April 2014. And even in the Draft 2014 POM which the Defendants prepared after the Forbearance Agreement was executed, the Defendants failed to modify or correct such statements.

**3. The Defendants' Failures with Respect to Mr. Chittick**

**a. The Defendants Failed to Recognize that DenSco, and not Mr. Chittick, was the Client**

The record is replete with evidence that the Defendants considered Mr. Chittick to be their client and/or that it was their responsibility to protect him. For example, in February 2014, Mr. Beauchamp communicated to Mr. Goulder (Mr. Menaged's attorney) that the Forbearance Agreement "needs to comply with *Denny's* fiduciary obligation to his investors as well as not become evidence to be used against *Denny* for securities fraud."<sup>240</sup> Shortly thereafter, Mr. Beauchamp communicated to Mr. Chittick that the Forbearance Agreement "has to have the necessary and essential terms to protect *you* from potential litigation from investors and third parties."<sup>241</sup>

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<sup>236</sup> See page 37, 2011 POM.

<sup>237</sup> See pages 10 & 37, 2011 POM.

<sup>238</sup> See pages 10 & 36-37, 2011 POM. See also pages 9-10, lines 25-2, Defendants' DS ("by the end of 2013, more than half of [DenSco's] loan portfolio was tied up with Menaged--well in excess of the promised loan concentrations DenSco had set forth in its disclosures to investors").

<sup>239</sup> See page 39, 2011 POM ("Since inception through June 30, 2011, ... [e]ach and every Noteholder has been paid the interest and principle due to that Noteholder in accordance with the respective terms of the Noteholders Notes. Despite any losses incurred by the Company from its borrowers, no Noteholder has sustained any diminished return or loss on their investment in a Note from the Company.").

<sup>240</sup> Email dated February 7, 2014 from Mr. Beauchamp to Mr. Goulder (Mr. Menaged's attorney), copying Mr. Chittick [*italics added*].

<sup>241</sup> Email dated February 9, 2014 from Mr. Beauchamp to Mr. Chittick [*italics added*]. See, also, email dated March 13, 2015 from Mr. Beauchamp to Mr. Chittick ("I wanted to protect *you* as much as I could." [*italics added*]); Mr. Beauchamp's handwritten notes of his telephone call with

Mr. Beauchamp failed to understand or recognize that it was DenSco, and not Mr. Chittick, that was his client and that of Clark Hill, even though the Clark Hill Engagement Letter that he signed made expressly clear that Mr. Chittick was *not* the client.<sup>242</sup> In my opinion, such failure was in violation of Rule 1.13 of the Arizona Rules of Professional Conduct and in violation of the applicable standard of care.

**b. The Defendants Failed to Properly Advise Mr. Chittick as an Officer and Director of DenSco**

The Defendants failed to properly advise Mr. Chittick that he was causing DenSco to engage in securities fraud by continuing to sell Notes based on disclosures in the outdated, incorrect and expired 2011 POM.

For the reasons stated above,<sup>243</sup> the Defendants' conduct fell below the standard of care to the extent that they were relying on any purported claim by Mr. Chittick that he was making proper disclosures to investors without an updated and corrected POM.

The Defendants failed to properly advise Mr. Chittick that the Defendants would be required to withdraw from the attorney-client relationship unless he caused DenSco to either cease soliciting investors or provide investors with Rule 10b-5 compliant disclosures.

The Defendants failed to properly advise Mr. Chittick of his fiduciary duties to DenSco. The Defendants further failed to assess whether DenSco was insolvent (or in the zone of insolvency) as a result of the Menaged fraud, in which case Mr. Chittick should also have been advised of his fiduciary duties to the Noteholders.

The Defendants failed to properly advise Mr. Chittick that it was his obligation to protect and preserve DenSco's assets, and to not pursue a Plan that would benefit Mr. Chittick individually (such as to preserve his reputation and/or equity stake in DenSco) at the risk of DenSco or the Noteholders. The Defendants failed to promptly and definitively instruct Mr. Chittick to not fund loan proceeds to borrowers. When Mr. Chittick informed Mr. Beauchamp by email that he provides funds directly to Mr. Menaged and most other borrowers to acquire properties at auctions,<sup>244</sup> rather than reaffirm the "fundamental importance" of adhering to the advice that he

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Mr. Chittick on February 27, 2014 ("will need Forbearance Agmt to ... protect *Denny*" [italics added]).

<sup>242</sup> Engagement Letter dated September 12, 2013 (referenced above).

<sup>243</sup> See "Defendants Allege They Withdrew from Representing DenSco in May 2014" above.

<sup>244</sup> Email dated January 9, 2014 from Mr. Chittick to Mr. Beauchamp ("If i cut cashiers check and take it to the trustee myself, i dont' get receipt that DenSco Paid for it. i get a receipt saying that property was paid for, for X \$'s vested in borrower's name. my name doesn't appear on it. other than having a cashiers check receipt saying that i made a check out for it, there isn't anything from the trustee saying that it was my check. i could wire Scott the money, he could produce cashiers check that says remitter is DenSco and it would have the exact same affect as if

had been giving since 2007,<sup>245</sup> Mr. Beauchamp simply replied “Let me see what the other lenders got from the Trustee and we can make a better decision.”<sup>246</sup> There is nothing in the record that I have reviewed that indicates Mr. Beauchamp followed up with Mr. Chittick on this exchange or took appropriate action to ensure that Mr. Chittick ceased this improper and risky funding procedure.

And the Defendants failed to advise Mr. Chittick as to how to best protect and preserve the corporation’s assets, especially with respect to those outstanding loans that were not adequately protected by first lien mortgages. Nor did they conduct the requisite due diligence and research in order to properly consider available alternatives.

The Defendants conduct fell below the applicable standard of care by, in effect, aiding and abetting Mr. Chittick’s wrongful conduct by focusing their attention on the Forbearance Agreement rather than on DenSco’s rights and remedies in connection with the Menaged fraud and on updating and correcting the 2011 POM. In other words, by failing to terminate the attorney-client relationship, the Defendants provided substantial assistance in Mr. Chittick’s wrongful conduct. The Defendants’ conduct in this regard was so reckless and irresponsible that such conduct, in my opinion, constituted a gross departure from the applicable standard of care.

#### **4. The Defendants Failed to Protect DenSco from Mr. Chittick**

The Defendants’ conduct fell below the applicable standard of care by failing to realize, and act on the fact, that Mr. Chittick’s interests conflicted with those of DenSco’s. As the director, officer and sole shareholder of DenSco, Mr. Chittick had a fiduciary duty to act in the best interest of DenSco, and not in his own self-interest.

The Defendants failed to recognize that, while Mr. Chittick’s Plan and the Forbearance Agreement benefited Mr. Menaged and perhaps Mr. Chittick, the speculative benefit to DenSco (if any) was greatly outweighed by the burdens to DenSco. As discussed above, the Forbearance Agreement imposed material obligations and economic burdens on DenSco, including the obligation (in accordance with Mr. Chittick’s Plan) to misuse DenSco’s funds by throwing good

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i got cashiers check that said I’m the remitter. i don’t just do this with scott, i do this with 90% of the guys that i fund at the auctions.” [SIC]),

<sup>245</sup> See page 6, Defendants’ DS (“Mr. Beauchamp ... provided advice to DenSco regarding proper loan documentation procedures since at least 2007. DenSco and Mr. Chittick were both advised, and understood, (a) that DenSco should fund loans through a trustee, title company or other fiduciary, (b) that DenSco was representing to its investors that DenSco’s loans would be in first position, and (c) that it was of fundamental importance that DenSco safeguard the use of its investors’ funds in conjunction with properly recording liens, in order to ensure that DenSco’s loans were in first position.”).

<sup>246</sup> Email dated January 9, 2014 from Mr. Beauchamp to Mr. Chittick. See, also, Plaintiff’s DS ¶ 213(a) (“Chittick had been grossly negligent in managing DenSco’s loan portfolio, by not complying with the terms of the Mortgage, which called for DenSco to issue a check payable to the Trustee, and instead wiring money to Menaged, trusting Menaged to actually use those funds to pay a Trustee.”).

money after bad in a manner that was inconsistent with the disclosures made to investors in the 2011 POM.

The Defendants fell below the applicable standard of care by allowing and assisting Mr. Chittick in protecting his own self-interest, by among other things: (1) continuing to provide additional funds to Mr. Menaged; (2) delaying disclosure to investors; (3) implementing Mr. Chittick's Plan before making appropriate disclosures to investors; and (4) negotiating and entering into the Forbearance Agreement to the detriment of DenSco and its Noteholders.

Under the circumstances, in accordance with Rules 1.13(b) and 1.2 of the Arizona Rules of Professional Conduct, the Defendants could have – and in my opinion should have – reported Mr. Chittick's breaches to the proper authorities and/or the Noteholders in order protect DenSco against Mr. Chittick.

## **5. The Defendants' Conflicts of Interest**

The Defendants fell below the standard of care, and violated the applicable Rules of Professional Conduct, by failing to recognize and properly address two conflicts of interest: first, the conflict of interest created by concurrently representing both DenSco and the Chittick Estate, when DenSco had potential claims against the Estate for malfeasance by Mr. Chittick; and second, the conflict of interest in representing DenSco in wind down matters when DenSco had potential claims against the Defendants for malfeasance.

### **a. The Defendants Failed to Recognize the Concurrent Conflict of Interest Between DenSco and the Chittick Estate**

For the reasons stated above, the Defendants knew that Mr. Chittick had violated his fiduciary duties to DenSco, and that as a result DenSco had potential claims against Mr. Chittick and, following his death, against the Chittick Estate.<sup>247</sup> However, rather than consider and pursue such claims against the Chittick Estate, the Defendants concurrently took on the representation of the Chittick Estate. Such representation was in violation of Rule 1.7 of the Arizona Rules of Professional Conduct: “a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client.” It would have been contrary to the interests of the Chittick Estate for DenSco to consider or pursue claims against the Chittick Estate for Mr. Chittick's malfeasance, and yet, as wind down counsel to DenSco, it was the obligation of the Defendants to consider and pursue such claims (as independent legal counsel to DenSco would have done, and as the Receiver in fact has done).<sup>248</sup>

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<sup>247</sup> See, e.g., Exhibit 288A to Deposition of Mr. Beauchamp, email dated August 15, 2016 from Mr. Beauchamp to Mr. Hyman (“Due to potential conflicts of interest, we have resigned as counsel to the Estate and new counsel has been appointed or is being appointed for the Estate.”).

<sup>248</sup> See Arizona Rules of Professional Conduct, Rule 1.7, Comment [3] (“A conflict of interest may exist before representation is undertaken, in which event the representation must be declined”); Comment [4] (“If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation”); Comment [6] (“Loyalty to a current client prohibits undertaking representation directly adverse to that client .... a lawyer may not act

The Defendants failed to secure informed consent, confirmed in writing, to such conflict, as required by Rule 1.7. In fact, it's not clear that anyone could have provided such consent on behalf of the Chittick Estate prior to the appointment of Ms. Heuer as the personal representative of the Chittick Estate (which appointment was done during the course of the Defendants' representation of the Chittick Estate), and even after Ms. Heuer was appointed, it does not appear that the Defendants sought or received the required consent from her.

**b. The Defendants Failed to Recognize the Conflict of Interest Between Wind Down Work for DenSco and the Defendants' Interests**

For all the reasons stated above, the Defendants' conduct fell below the standard of care, resulting in potential claims that DenSco may bring against the Defendants for malfeasance. The Defendants were well aware of such risk and the resulting conflict of interest.<sup>249</sup> Despite such conflict of interest, the Defendants actively stepped into the role as legal counsel to DenSco in connection with wind down and transition matters, and Mr. Beauchamp took it upon himself to act as a quasi-receiver or liquidator with respect to the wind down of DenSco.

Such representation was in violation of Rule 1.7 of the Arizona Rules of Professional Conduct: "a lawyer shall not represent a client if ... there is a significant risk that the representation ... will be materially limited ... by a personal interest of the lawyer." It would have been contrary to the personal interests of the Defendants for DenSco to consider or pursue claims against the Defendants for their malfeasance, and yet, as wind down counsel to DenSco, it was the

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as an advocate in one matter against a person the lawyer represents in some other matter"); Comment [8] ("a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's responsibilities .... The conflict in effect forecloses alternatives that would otherwise be available to the client. ... The critical questions [include] whether [the difference in interests] will ... foreclose courses of action that reasonably should be pursued on behalf of the client.").

<sup>249</sup> See, e.g., DIC0009476, the Iggy Letter dated July 28, 2016 ("Dave never made me tell the investors"; "I talked Dave my attorney in to allowing me to continue without notifying my investors."; "Dave my attorney ... let me get the workout signed not tell the investors and try to fix the problem. That was a huge mistake."); email dated March 13, 2015 from Mr. Beauchamp to Mr. Chittick ("I have second guessed myself concerning several steps in the overall process, but I wanted to protect you as much as I could."); pages 447-448, lines 19-15, Deposition of Mr. Beauchamp ("Q. Did you discuss with [Ms. Heuer] potential conflicts of interest that you and Clark Hill would have with respect to representing DenSco? A. Yes. ... Q. Did you disclose to her that Clark Hill was concerned about potential claims that could be made against Clark Hill regarding your representation of DenSco? A. Yes."); page 140, lines 10-20, Deposition of Mr. Hood ("Q. ... On August 2nd, August 3rd, 2016, with all of the information that Clark hill [sic] knew, could Clark Hill reasonably anticipate that a receiver might sue Clark Hill for damages? ... THE WITNESS: ... I suppose it was a possibility").

obligation of the Defendants to consider and pursue such claims (as independent legal counsel to DenSco would have done, and as the Receiver in fact has done).<sup>250</sup>

The Defendants failed to secure informed consent, confirmed in writing, to such conflict, as required by Rule 1.7. In fact, it's not clear that anyone could have provided such consent on behalf of DenSco following the death of Mr. Chittick, and even after Ms. Heuer was appointed as the personal representative of the Chittick Estate (not that such appointment would have necessarily given her the authority to consent to the conflict of interest on behalf of DenSco), it does not appear that the Defendants sought or received the required consent from her.

Following Mr. Chittick's death, rather than consider and pursue claims that DenSco might have against the Defendants, it appears that Mr. Beauchamp actively tried to protect himself and Clark Hill. As discussed above, it appears that Mr. Beauchamp took it upon himself to act as a quasi-receiver or liquidator with respect to the wind down of DenSco, despite not necessarily having the requisite skills to do so nor having an authorized and competent client representative from whom to take instruction, receive approvals or seek guidance. Further, Mr. Beauchamp advocated against each of the following: (1) having a receiver or trustee appointed to conduct the wind down of DenSco;<sup>251</sup> (2) having any investor become an authorized representative of DenSco;<sup>252</sup> and (3) having the state regulator take any active role.<sup>253</sup>

In my opinion, these actions violated the standard of care applicable to Mr. Beauchamp, and suggest that Mr. Beauchamp was attempting to persuade the investors to support him as the

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<sup>250</sup> See Arizona Rules of Professional Conduct, Rule 1.7, Comment [8] (“a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s ... interests. ... The conflict in effect forecloses alternatives that would otherwise be available to the client. ... The critical questions [include] whether [the difference in interests] will ... foreclose courses of action that reasonably should be pursued on behalf of the client.”); Comment [10] (“The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”).

<sup>251</sup> See, e.g., Exhibit 213, email dated August 3, 2016 from Mr. Beauchamp to DenSco investors (“the costs associated with a bankruptcy or a Receiver can reduce the amount to be paid to investors by almost half or even a much more significant reduction”).

<sup>252</sup> See, e.g., Exhibit 213, email dated August 3, 2016 from Mr. Beauchamp to DenSco investors (“We intend to structure this as an Advisory Board to protect the members of this Advisory Board from any potential liability based upon their role with DenSco. Specifically, the Advisory Board would only have an advisory position with DenSco as opposed to a full authority position, which is to distinguish this situation from having these Investors appointed to the Board of Directors”).

<sup>253</sup> See, e.g., Exhibit 256, Deposition of Mr. Beauchamp, email dated August 9, 2016 from Mr. Beauchamp to investor Craig Hood, copying other investors (“We need to be willing but not overly anxious to turn it over to the Securities Division. Several people in government made names and careers with the Mortgages Ltd. matter and we do not want this to turn into anything like that.”).

appropriate person to wind down the business, thereby avoiding or delaying the pursuit of claims that DenSco might have against the Defendants. One could reasonably infer that Mr. Beauchamp wanted to control the wind down so as to protect himself because if a receiver were to be appointed, he or she would file a claim against the Defendants on behalf of DenSco – which is exactly what happened in this Case.

In addition, Mr. Beauchamp's testimony at the receiver appointment hearing that he represented both DenSco and Mr. Chittick, together with his former law firm's assertion of a joint attorney-client privilege premised on that testimony, further complicated and delayed the Receiver's ability to obtain and utilize DenSco's files from Clark Hill. One could also reasonably infer that Mr. Beauchamp intended such result so as to protect himself, especially with respect to preventing disclosure of the Iggy Letter, the Chittick Investor Letter dated July 28, 2016, and the DenSco Journal, all of which implicate the Defendants.

Under the circumstances, the Defendants' conduct in this regard was so reckless and irresponsible that such conduct, in my opinion, constituted a gross departure from the applicable standard of care.

#### **6. The Defendants Failed to Withdraw from Representing DenSco**

Finally, in my opinion, the Defendants failed to properly withdraw from the representation of DenSco on a timely basis, as required by Rules 1.16 and 1.2 of the Arizona Rules of Professional Conduct.

#### **V. CONCLUSION**

It is my opinion, as detailed above and based on the record I have reviewed, that the Defendants violated the applicable standard of care in their representation of DenSco.

\* \* \*

I reserve the right to supplement, update or amend my opinions as new information becomes available or is brought to my attention.

  
Neil J Wertlieb

March 26, 2019

**Exhibit A**

**Curriculum Vitae of Neil J Wertlieb**

**NEIL J WERTLIEB**  
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Pacific Palisades, CA 90272  
(424) 265-9659  
Neil@WertliebLaw.com



## CURRENT PROFESSIONAL ACTIVITIES



**Wertlieb Law Corp**  
*Principal*

2017 – Present

- Wertlieb Law Corp provides expert witness and expert consulting services to attorneys in their litigation and arbitration matters
  - Our engagements have been focused primarily in two areas:
    - Disputes involving business transactions, corporate governance and fiduciary duties
    - Cases involving attorney ethics and attorney malpractice
  - I have served as an expert in dozens of such disputes and cases
  - I have testified numerous times, in court (both bench and jury trials), in arbitration and in depositions
- Other services provided by Wertlieb Law Corp include:
  - Mediation services for business disputes
  - Board of director appointments
  - Ethics consulting
  - MCLE presentations
  - Legal services
- For more detailed information, see [www.WertliebLaw.com](http://www.WertliebLaw.com)



**UCLA School of Law**  
*Adjunct Professor / Lecturer in Law*

2002 – Present

- I teach a transaction skills course entitled “Life Cycle of a Business,” a course of my own design focusing on deals, negotiation, contract drafting and ethics
- 3-unit course satisfies one of the requirements for students seeking a Business Law and Policy Specialization



**Ballantine & Sterling: California Corporation Laws**  
*General Editor*

2012 – Present

- 7-volume treatise on the laws governing businesses in the State of California
- In-depth practical guidance concerning the formation, operation and dissolution of corporations, partnerships, limited liability companies and other business entities
- Cited as authority in over 500 federal and state court opinions, 25 SEC No-Action Letters and other administrative reference materials, and 50 law review articles



**Milbank@Harvard**  
**Senior Advisor**

2018 – Present

- Engaged by Harvard Law School Executive Education
- This professional development program provides attorneys at Milbank, Tweed, Hadley & McCloy LLP with immersive week-long programs to build leadership and business skills each year for four years, as they progress from mid-level associates to senior associates
- Led by Harvard Law School and Harvard Business School faculty, the program covers topics such as business, finance, accounting, marketing, law, management skills, client relations and personal and professional development
- As Senior Advisor, I attend program sessions at Harvard and provide input, guidance and assistance in formulating the program and connecting it to work at Milbank



**State Bar of California, Office of Chief Trial Counsel**  
**Special Deputy Trial Counsel**

2017 – Present

- The State Bar Office of Chief Trial Counsel must recuse itself when it receives a disciplinary complaint against an attorney who has a close professional, personal, family or financial connection with the State Bar of California
- To avoid an appearance of impropriety under such circumstances, an independent Special Deputy Trial Counsel is appointed, with all the powers and duties of the Chief Trial Counsel, to investigate and, if warranted, prosecute alleged misconduct by such an attorney
- Since my appointment as a Special Deputy Trial Counsel, I have worked on several such matters

**EMPLOYMENT HISTORY**



**Milbank, Tweed, Hadley & McCloy LLP, Los Angeles**  
**Partner**

1995 – 2016

- General Practice Areas: Business transactions, primarily acquisitions, finance, securities offerings and restructurings
- Representative transactions:
  - Represented an NYSE-listed company as regular outside corporate counsel in numerous transactions, including IPO, acquisitions, financings and a change-in-control transaction
  - Represented underwriters in the initial public offering of a California-based home builder, considered by *The Daily Journal* to be one of the Top 10 IPOs of 2013
  - Led the restructuring of a social network company for which Milbank received an "M&A Advisor" Award for Deal of the Year (2014) from *The M&A Advisor*
  - Represented the finance subsidiary of one of the world's largest automotive companies in numerous debt financings totaling almost \$20 billion

- Represented the venture capital investing subsidiaries of three major public companies – a multinational conglomerate, a leading telecom company and a large U.S. bank – in over 50 different investments in early stage companies
- Represented two different alternative energy companies in sale transactions for which Milbank received the “Top Legal Advisor Award for M&A” from *Bloomberg New Energy Finance*
- Represented family owners in disposition transactions for a fashion optical company, a broadcast company and a hair care company
- Represented unsecured lenders in the restructuring of a print media company with over \$10 billion in debt
- Administrative Responsibilities:
  - Chair of Ethics Group for California Practices
  - Corporate Governance Group
  - Professional Development Committee
  - Milbank@Harvard (training program for associates)
  - Hiring Partner for Los Angeles Office



**IDB Communications Group, Inc., Culver City, CA**  
*Vice President, General Counsel & Secretary*

1992 – 1995

- IDB was the fourth-largest U.S.-based provider of international telephone service when it was acquired by WorldCom, Inc. in December 1994
- As General Counsel, responsible generally for all legal matters, including acquisitions, financings and loan transactions, securities law compliance, litigation and crisis management, employment disputes, real estate transactions, board of director meetings, corporate records and customer contracts
- Responsibilities included what was then the second largest equity offering by a NASDAQ-listed company
- Named Executive Officer & Member of Executive Committee
- Established and supervised legal department of nine attorneys and five legal assistants



**Los Angeles Kings Hockey Team, Culver City, CA**  
*General Counsel (part-time) & Director*

1994 – 1995

- Responsible for the acquisition transaction in which the Chairman of IDB Communications Group, Inc. acquired a controlling interest in the Kings
- General ongoing responsibilities included management, player and broadcast contracts and interaction with the National Hockey League and lenders
- Member of Board of Directors



**O'Melveny & Myers, Los Angeles, CA**  
*Associate*

1984 – 1992

- Practice Areas: Transactional work focused on public and private securities financings (including initial public offerings), mergers and acquisitions, joint ventures and general corporate and contractual matters

- Administrative Responsibilities: Monitoring of legislative developments in California, training seminars, summer committee, executive compensation group, and “blue sky overseer”



**California Supreme Court, San Francisco, CA**  
*Judicial Extern for Associate Justice Stanley Mosk*

1983

- Responsible for reviewing and evaluating Petitions for Hearing and drafting judicial opinions for the longest-serving justice on the California Supreme Court

## **EDUCATION**

**UC Berkeley School of Law, Berkeley, CA** 1982 – 1984  
*Juris Doctor Degree*

- Juris Doctor awarded 1984
- Associate Editor, *International Tax & Business Lawyer*

**UC Hastings College of the Law, San Francisco, CA** 1981 – 1982

- Top 1% (ranked number 5 in first-year class of 503 students)
- Transferred to UC Berkeley School of Law after first year
- Law Review (awarded based on both grades and writing competition)

**UC Berkeley School of Business Administration, Berkeley, CA** 1976 – 1980  
*Bachelor of Science Degree*

- Bachelor of Science awarded 1980 in Management Science
- Honor Students Society
- Alumni Scholarship Award
- Dormitory Government Chairman

## **LEADERSHIP POSITIONS**

### **STATE BAR OF CALIFORNIA & CALIFORNIA LAWYERS ASSOCIATION**

- **Committee on Professional Responsibility and Conduct** 2008 – 2014  
*Chairman*
  - COPRAC is a standing committee of the Board of Trustees of the State Bar of California, whose primary charge is the development and issuance of advisory ethics opinions to assist attorneys in understanding their professional responsibilities under the California Rules of Professional Conduct
  - Chair during 2012-2013, Vice Chair during 2011-2012, Advisor during 2013-2014
  - Organized, moderated and participated on numerous panel presentations on various ethical issues, including at the Annual Meeting of the State Bar and at the Annual Ethics Symposium

- Authored several ethics opinions and, as Chair of COPRAC's Rules Revision Commission Subcommittee, led COPRAC's efforts in reviewing and commenting on proposed new rules of professional conduct
  
- **Business Law Section** 2003 – 2008  
*Chairman*
  - The Business Law Section serves as a forum to educate attorneys on recent developments and current issues in all fields of business law
  - Chair during 2006-2007, Vice Chair for Legislation during 2005-2006, and Member of the Executive Committee the remaining duration of my 5-year term
  
- **Corporations Committee** 1999 – 2003  
*Chairman*
  - The Corporations Committee is a standing committee of the Business Law Section, focused on the laws relating to corporations and business transactions
  - Co-Chair during 2001-2002, Vice Chair for Legislation during 2000-2001
  - As Vice Chair for Legislation, responsible for the Section's efforts to prepare and advocate for legislative proposals to amend the California Corporations Code
  
- **Business Litigation Committee** 2016 – Present  
*Vice Chair*
  - The Business Litigation Committee is a standing committee of the Business Law Section, focused on the laws relating to business disputes in California
  - Co-Vice Chair during 2018-2019
  
- **Business Law News** 2008 – Present  
*Editorial Advisor*
  - The *Business Law News* is the official publication of the Business Law Section of the California Lawyers Association (formerly the California State Bar)
  - Providing advice and guidance to the Editorial Board of the *Business Law News*

#### **LOS ANGELES COUNTY BAR ASSOCIATION**

- **Professional Responsibility and Ethics Committee** 2013 – Present  
*Chairman*
  - PREC is a standing committee of the Board of Trustees of the Los Angeles County Bar Association, whose primary mission is to prepare written opinions and responses to questions concerning the ethical duties and responsibilities of lawyers
  - Chair during 2018-2019, Vice Chair during 2017-2018, Secretary during 2016-2017
  - As Chair of PREC's Rules Revision Commission Subcommittee, led PREC's efforts in reviewing and commenting on proposed new rules of professional conduct

#### **BOARD APPOINTMENTS**

- **Windward School** 2013 – Present  
*Chair & Member, Board of Trustees*
  - Windward School is an independent middle and high school in Los Angeles

- Also served on Executive Committee and as Co-Chair of Committee on Trustees and Chair of Strategic Planning Committee
  
- **Los Angeles Arts Association** 2010 – 2018  
*Member, Board of Directors*
  - As a 501(c)(3) nonprofit organization, LAAA's mission since 1925 is to provide opportunities, resources, services and exhibition venues for Los Angeles artists, with an emphasis on emerging talent
  
- **Village School** 2008 – 2014  
*Member, Board of Trustees & Executive Committee*
  - Village School is a TK through Sixth Grade independent school in Los Angeles
  - Also served on the Finance Committee and as Chair of the Legal Committee
  
- **Los Angeles Kings Hockey Team** 1994 – 1995  
*Member, Board of Directors*
  - Also served as General Counsel of this National Hockey League team
  
- **821 Bay Street Homeowners Association, Inc.** Early 1990s  
*President & Member, Board of Directors*
  - Homeowners association for 15-unit condominium complex in Santa Monica
  
- **Co-Opportunity Consumers Cooperative, Inc.** Late 1980s  
*Member, Board of Directors*
  - The “co-op” is a community owned and operated market based in Santa Monica

## **RECOGNITIONS, SPEAKING ENGAGEMENTS & PUBLICATIONS**

### **Recognitions & Honors**

- “AV Preeminent” peer review rated (5.0 out of 5.0) on Martindale-Hubbell (Present)
- Profiled in *The Lexis Practice Advisor Journal*: “An Overview of Corporate Transactional Practice & Expert Witnessing: Q&A with Neil J Wertlieb” (Spring 2016)
- Led transactions for which Milbank received an “M&A Advisor” Award for Deal of the Year and an “M&A Advisor Turnaround” Award from *The M&A Advisor* (2014)
- Advised underwriters on an initial public offering selected by *The Daily Journal* as one of the Top 10 IPOs (2013)
- Recognized in *The Legal 500* for M&A work (2012)
- Led two transactions for which Milbank received the “Top Legal Advisor” Award for M&A from *Bloomberg New Energy Finance* (2009)
- Recognized by *Super Lawyers* as a Top Rated Mergers & Acquisitions Attorney and for his Corporate Finance work (2004)
- Profiled in *California Law Business*: “The 100 Most Influential Lawyers in California” (October 30, 2000)
- Profiled in *Los Angeles Business Journal*: “Who’s Who Banking & Finance: Roadkill Warriors” (October 16, 2000)

- Profiled in *California Law Business*: “Dealmaker of the Week” (October 9, 2000)
- Profiled in *Los Angeles Business Journal*: “Wall Street West: Cyber Lawyer” (September 20-26, 1999)

**Speaking Engagements (since 2000)**

- Presenter, “California’s New Rules of Professional Conduct,” presentations to various law firms and other organizations in Southern California (2018 – Present)
- Moderator, “Ethical Issues for In-House Counsel,” Lowell Milken Institute for Business Law and Policy at UCLA School of Law, Palo Alto, CA (January 30, 2019)
- Presenter, “The New Rules of Professional Conduct,” California Lawyers Association, Webinar (January 29, 2019)
- Presenter, “The New Rules of Professional Conduct,” J. Reuben Clark Law Society, Irvine, CA (January 17, 2019)
- Presenter, “The New Rules of Professional Conduct (for Transactional Lawyers),” Los Angeles County Bar Association’s Business and Corporations Law Section, Webinar (January 15, 2019)
- Panelist, “Ethics – All You Need to Know: Conflicts, Conflicts, Conflicts – What the New Rules and the *Sheppard Mullin v. J-M* Case have To Say,” Los Angeles County Bar Association’s Annual Program on Ethics, Los Angeles, CA (January 13, 2019)
- Moderator, “How to Keep Your Expert In and Their Expert Out,” California Lawyers Association’s Business Law Section, Webinar (November 6, 2018)
- Presenter, “A New Chapter in Professional Responsibility,” Lowell Milken Institute for Business Law and Policy at UCLA School of Law, Los Angeles, CA (October 30, 2018)
- Presenter, “Trials and Tribulations – Tactics, Strategies and Updates for the Business Litigator: The Ethical Use of Expert Witnesses,” California Lawyers Association’s Solo and Small Firm Section, Los Angeles, CA (October 18, 2018)
- Panelist, “Conflict Waivers, Mediation Waivers, New Rules - Oh My! Avoiding Ethical Traps Triggered by Recent Developments Under California Law,” Beverly Hills Bar Association, Los Angeles, CA (October 11, 2018)
- Presenter, “New Rules of Professional Conduct go into Effect on November 1, 2018 – Are You Ready?,” California Lawyers Association Annual Meeting, San Diego, CA (September 14, 2018)
- Panelist, “New Rules of Professional Conduct go into Effect Later this Year – *ARE YOU READY?*,” Los Angeles County Bar Association, Los Angeles, CA (August 21, 2018)
- Panelist, “Brave New World: What Business Lawyers Need to Know About the Sea Change to New Rules Of Professional Conduct,” Beverly Hills Bar Association, Beverly Hills, CA (July 12, 2018)
- Presenter, “Contracts 101: The Contract of the Year – *But is it Enforceable?*” presentations to various law firms and other organizations in Southern California (2018)
- Presenter, “Teach the Basics of Contract Drafting, Corporate Governance & Transactional Law . . . *in One Single Sentence!*” Emory Law’s 6<sup>th</sup> Biennial Conference on Teaching Transactional Law and Skills, Atlanta, GA (June 1, 2018)

- Panelist, “Advising Clients on the Formation of Legal Entities in California – Ethical Issues,” California Lawyers Association’s Business Law Section, Los Angeles, CA (March 30, 2018)
- Presenter, “The Proposed Rules of Professional Conduct – What Every Litigator Should Know,” California Lawyers Association’s Litigation Section, Webinar (March 1, 2018)
- Presenter, “Proposed Changes to California Professional Conduct Rules for Transactional Attorneys,” Los Angeles County Bar Association’s Business and Corporations Law Section, Webinar (January 29, 2018)
- Presenter, “The Proposed Rules of Professional Conduct,” presentations to various law firms in Southern California (2017 – 2018)
- Moderator, “Conflicts of Interest: Guidelines for Every Lawyer’s Success,” American Bar Association’s Center for Professional Development, Webinar (July 20, 2017)
- Panelist, “Ethics Issues Relating to the Use of Expert Witnesses,” American Bar Association’s National Conference on Professional Responsibility, St. Louis, MO (June 2, 2017)
- Panelist, “Ethics in, and Negotiating and Preserving Privilege in, M&A Transactions,” American Bar Association’s Business Law Section Spring Meeting, New Orleans, LA (April 6, 2017)
- Moderator, “Venture Capital Panel,” Law and Entrepreneurship Association of UCLA School of Law, Los Angeles, CA (April 4, 2017)
- Panelist, “Ethics – All You Need to Know: The Ethical Use of Expert Witnesses,” Los Angeles County Bar Association’s Annual Program on Ethics, Los Angeles, CA (January 14, 2017)
- Presenter, “The Ethical Use of Expert Witnesses,” presentations to various litigation groups in Southern California (2016 – Present)
- Panelist, “The Effective and Ethical Use of Expert Witnesses,” Annual Meeting of the California State Bar, San Diego, CA (September 30, 2016)
- Presenter, “Key Ethical Issues When Ending the Attorney-Client Relationship,” Bloomberg BNA Ethics, Webinar (April 12, 2016)
- Panelist, “Phantom Clients and How to Exorcise Them,” LMRM Conference, Chicago, IL (March 3, 2016)
- Presenter, “How to Be, and How to Use, an Expert Witness,” California State Bar, Webinar (November 4, 2015)
- Presenter, “Ethics for the In-House Attorney,” presentations to 15 legal departments in California and New York, approximately 1,000 in-house attorneys (2011 – 2014)
- Panelist, “Ethics Update 2014: Significant Developments in the Law of Lawyering,” Annual Meeting of the California State Bar, San Diego, CA (September 12, 2014)
- Panelist, “Ethics Update 2013: Significant Developments in the Law of Lawyering,” Annual Meeting of the California State Bar, San Jose, CA (October 11, 2013)
- Moderator, “Doing Good Made Easy (or at Least Easier): Ethical Issues Arising in *Pro Bono* Representations,” Annual Ethics Symposium of the California State Bar, Los Angeles, CA (April 20, 2013)
- Panelist, “Ethics Update 2012: Significant Developments in the Law of Lawyering,” Annual Meeting of the California State Bar, Monterey, CA (October 12, 2012)
- Moderator, “The No Contact Rule: Up Close and Personal,” Annual Ethics Symposium of the California State Bar, San Francisco, CA (May 19, 2012)

- Co-Teacher, “Negotiations: Creating and Claiming Value,” Harvard University, Cambridge, MA (February 16, 2012 & November 17, 2011)
- Co-Teacher, “Negotiations: Strategies of Influence,” Harvard University, Cambridge, MA (November 15, 2011)
- Moderator & Panelist, “Dealing with Difficult Clients While Maintaining Your Professional Responsibility,” Annual Meeting of the California State Bar, Long Beach, CA (September 17, 2011)
- Moderator, “Ethics on the Inside (Ethical Issues Faced by In-House Attorneys),” Annual Ethics Symposium of the California State Bar, Irvine, CA (April 9, 2011)
- Moderator & Panelist, “Conflicts for Lawyers: How to Get Yourself Disqualified, Sued and Disciplined,” Annual Meeting of the California State Bar, Monterey, CA & San Diego, CA (September 24, 2010 & September 11, 2009)
- Panelist, “When Private Equity Comes Calling: The Role of Corporate Counsel in Takeover Transactions,” 2007 Institute for Corporate Counsel, Los Angeles, CA (December 6, 2007)
- Presenter, “Basics of Mergers & Acquisitions,” Southern California Chapter of ACCA, Los Angeles & Orange Counties, CA (November 8, 2006)
- Panelist, “Developments in Corporate Governance: Revisiting Director Voting and other Hot Potatoes,” ABA Business Bar Leaders Conference, Chicago, IL (May 10, 2006)
- Panelist, “Legislation: Turning Ideas into Law: Effective Legislative Strategies for Business Law Organizations,” ABA Business Bar Leaders Conference, Chicago, IL (May 10, 2006)
- Panelist, “Mergers & Acquisitions: Growth, Access to Capital and Liquidity through Mergers, Acquisitions and Strategic Alliances,” The Investment Capital Conference 2004, Los Angeles, CA (April 27, 2004)
- Guest Lecturer, “Corporate Governance,” USC Business School, Course on Advanced Finance, Los Angeles, CA (July 26, 2004)
- Moderator & Panelist, “Doing Business Online: Financing Online Operations,” Law Seminars International, Los Angeles, CA (August 25, 2000)

**Publications (since 2004)**

- *Ballantine & Sterling: California Corporation Laws*, General Editor (2012 – Present)
- *Life Cycle of a Business: Transaction Skills*, UCLA Law Course Reader, Editor (2002 – Present)
- *Lexis Practice Advisor: Ethics For In-House Counsel*, Contributing Author (2015 – Present)
- “Teach the Basics of Contract Drafting, Corporate Governance & Transactional Law in One Sentence,” *20 Tennessee Journal of Business Law* 387 (2019)
- “An Update: Rules of Professional Conduct,” *The Practitioner* (Summer 2018)
- “New Rules of Professional Conduct,” *Business Law News* (2018)
- “New Rules: The Entirely New Rules,” *The Daily Journal* (Part 3 of 3-part series) (June 1, 2018)
- “New Rules of Conduct: The Uncontroversial, But Important,” *The Daily Journal* (Part 2 of 3-part series) (May 25, 2018)

- “New Rules of Conduct: The Disruptive and Controversial,” *The Daily Journal* (Part 1 of 3-part series) (May 18, 2018)
- “Proposed New Ethics Rules, and Their Impact on Solo Practitioners,” *The Practitioner* (Spring 2018)
- “The Proposed Rules of Professional Conduct,” *Business Law News* (2018)
- “Proposed New Ethics Rules: What You Need to Know,” *Family Law News* (2018)
- “Best Behavior: Proposed Conduct Rules,” *Los Angeles Lawyer* (November 2017)
- “Ethics Issues in the Use of Expert Witnesses,” *The Professional Lawyer* (2017)
- “Special Coverage – Proposed Rules of Professional Conduct: Lawyer as Third-Party Neutral (Rule 2.4),” *The Daily Journal* (September 11, 2017)
- “Special Coverage – Proposed Rules of Professional Conduct: Organization as Client (Rule 1.13),” *The Daily Journal* (April 24, 2017)
- “What Transactional Lawyers Should Know About Conflicts of Interest,” *Business Law News* (with Nancy T. Avedissian) (2016)
- “The No Contact Rule Actually DOES Apply to Transactional Lawyers,” *Business Law News* (with Nancy T. Avedissian) (2015)
- “The Rules of Professional Conduct DO Apply to In-House Lawyers,” *Business Law News* (with Adam S. Bloom) (2015)
- “Ethical Issues for the In-House Transactional Lawyer,” *Business Law News* (with Adam S. Bloom) (2010)
- “Ex Parte Communications in a Transactional Practice,” *Business Law News* (with Nancy T. Avedissian) (2009)
- “Addressing Conflicts of Interest in a Transactional Practice,” *Business Law News* (with Nancy T. Avedissian) (2008)
- “Hostage Situation: Holders of Preferred Stock Can Become the Victims of Legal Blackmail by Common Stockholders When an Early-Stage Firm Fails – Unless They Take a Simple Step Up Front,” *The Deal* (October 25, 2004)

**Quoted as Authority** (since 2017)

- “Rules of Professional Conduct Approved by the Supreme Court,” *Ethics News*, State Bar of California website (2018 – Present)
- “Avenatti Saga Spotlights Attorney Ethics, When to Draw Lines,” *Bloomberg Law* (March 26, 2019)
- “Women on board: California law requiring female corporate directors could be unconstitutional,” *CBC News* (March 8, 2019)
- “Michael Avenatti’s Ex Mareli Miniutti Got Money Allegedly Hidden From Bankruptcy Court,” *The Daily Beast* (February 18, 2019)
- “Former Client Accuses Michael Avenatti of Operating Law Firm Like a ‘Ponzi Scheme,’” *The Daily Beast* (January 22, 2019)
- “Michael Avenatti Preps for Two Weeks of Hell: Child Support, Debts, and Abuse Allegations,” *The Daily Beast* (December 3, 2018)
- “Raging Wildfires Bring Concerns of Legal Fraud in California,” *Bloomberg Law* (November 16, 2018)
- “California Rules of Professional Conduct Update,” *Legal Talk Network* (October 16, 2018)

- “Media Companies Could Run Afoul of California Law Banning All-Male Boardrooms,” *The Hollywood Reporter* (October 4, 2018)
- “California is One of Few States Implementing New Anti-Harassment Rule,” *The Daily Journal* (September 27, 2018)
- “Judge Puts Brief Pause on CBS-Shari Redstone Legal Battle,” *Variety* (May 16, 2018)
- “Trump Boasts NDAs a Common Practice for ‘Celebrities and People of Wealth,’” *NBC News* (May 3, 2018)
- “Hidden Expert-Pay Ruling Won’t Improve J&J Odds at Retrial,” *Law360* (April 30, 2018)
- “Federal Judge Rejects Stormy Daniels’ Request for Expedited Trial,” *ABC News* (March 29, 2018)
- “Porn Star Raising Funds for Legal Expenses in Trump Disclosure Fight,” *ABC News* (March 14, 2018)
- “Corporations Must Embrace Diversity to Prevent Misconduct and Liability Costs from Sexual Harassment,” *Variety* (December 13, 2017)
- “Weinstein Scandal Triggers Questions of Corporate Liability and Even Complicity,” *Variety* (October 25, 2017)
- “California Cases To Watch In 2017,” *Law360* (January 2, 2017)

## **MISCELLANEOUS**

### **Bar Admissions & Memberships**

- Admitted to practice in California, New York & District of Columbia
- Member:
  - American Bar Association
  - Association of Professional Responsibility Lawyers
  - California Lawyers Association
  - Los Angeles County Bar Association

### **Personal**

- Married; father to 3 teenage boys
- Marathon runner: New York, Los Angeles, Ventura, Long Beach . . . and still going!



## Exhibit B

### List of Cases in Which I Have Testified as an Expert During the Past Four Years

*Robert Hayman v. Michael Treiman*

- Arbitration, Los Angeles County; Arbitrator Barbara A. Reeves (JAMS Case No. 1210035620)

*Feldman v. GearShift Inc., T. Blinn, N. Safyurtlu, E. Cwiertny & N. Tribe*

- Superior Court of the State of California for the County of Orange, Civil Complex Center; Judge Ronald L. Bauer (Case No. 30-2017-00951741)

*Kenneth D. Rickel v. Martin W. Enright, Littman Krooks, LLP, et al.*

- Superior Court of the State of California for the County of Los Angeles, Central District; Honorable Frederick C. Shaller (Case No. BC595770)

*Jeffrey I. Golden, Trustee of Aletheia Research and Management, Inc., v. O'Melveny & Myers LLP, Steven J. Olson and J. Jorge deNeve*

- Arbitration, Orange County; Arbitrator Honorable Gary A. Feess (Phillips ADR)

*Adam Levin v. Weingarten Brown LLP et al.*

- Arbitration, Los Angeles County; Arbitrator Edward J. Wallin (JAMS Ref. No. 1200051061)

*William Atkins, Gregory Smith, and John Waite v. Allen Z. Sussman*

- Arbitration, Los Angeles County; Arbitrator Irma E. Gonzalez (JAMS Ref. No. 1240054486)

*Sork v. Slaughter*

- Superior Court of the State of California for the County of San Diego, North County District; Honorable Timothy M. Casserly (Case No. 30-2015-00783369-CU-MC-CJC)

*Marino, et al. v. Greenberg Traurig, P.A.*

- Florida Circuit Court, Palm Beach County (Case No. 50-2016-CA-007297)

*EQT Production Company v. Vorys, Sater, Seymour and Pease LLP and John Keller*

- United States District Court, Eastern District of Kentucky, Southern Division (Case No. 6:15-CV-00146-DLB)

*Brezoczky v. Domtar Corporation and Polsinelli PC*

- United States District Court, Northern District of California (Case No. 5:16-CV-04995-EJD)

*Drake Kennedy v. Regency Outdoor Advertising, Inc. et al.*

- Superior Court of the State of California, Los Angeles County (Case No. BC522560)

*Association for Los Angeles Deputy Sheriffs v. Armando Macias, Bruce Nance, et al.*

- Superior Court of the State of California, Los Angeles County (Case No. BC540789)

*Thomas A. Vogele, Gimino Vogele Associates, LLP v. Richard D. Williams, Susan D. Lintz, Kelly Lytton & Williams, LLP*

- Superior Court of the State of California, Orange County; Honorable Michael Brenner, Judge Presiding (Case No. 30-2012-00558522-CU-NP-CJC)

*Wood River Capital Resources, LLC, et al. v. CapitalSource, Inc., et al. (Asset Real Estate & Investment Company Consolidated Cases)*

- Superior Court of the State of California, Los Angeles County; Honorable Elihu M. Berle (Case No. JCCP-4730)

*Dyadic International, Inc. v. Ernst & Young, LLP, et al.*

- Florida Circuit Court, Palm Beach County; Circuit Judge Richard Oftedal (Case No. 50 2009 CA 010680 XXXXMBAA)

*maxIT Healthcare Holdings, Inc. v. Acumen Technology Solutions for Healthcare, LLC*

- Arbitration, Orange County; Honorable Gary L. Taylor (JAMS Ref. No. 1200046297)

## Exhibit C

### Documents Provided or Made Available

1. Verified complaint of Arizona Corporation Commission (“ACC”) against DenSco Investment Corporation (8/17/16)
2. ACC’s Memorandum of Points and Authorities in Support of Application for Preliminary Injunction and Appointment of Receiver (8/17/16)
3. Receiver’s Preliminary Report (9/19/16)
4. Receiver’s Status Report (12/23/16)
5. Declaration of David Beauchamp (8/17/16)
6. Letter from D. Beauchamp to D. Chittick (5/7/07)
7. DenSco Confidential Private Offering Memorandum (6/1/07)
8. Letter from D. Beauchamp to D. Chittick (3/18/08)
9. E-mail exchanges between D. Beauchamp and D. Chittick and e-mail exchange between D. Beauchamp and M. McCoy (4/1/09)
10. D. Beauchamp handwritten notes (4/9/09)
11. E-mail exchanges between D. Beauchamp and R. Burgan (4/22/09)
12. E-mail exchanges between D. Beauchamp, D. Chittick and R. Burgan (4/23/09)
13. E-mail exchanges between D. Beauchamp and D. Chittick (5/15/09)
14. D. Beauchamp handwritten notes (6/30/09)
15. DenSco Confidential Private Offering Memorandum (7/1/09) w/ handwritten notes from 2011
16. E-mail exchanges between D. Beauchamp and D. Chittick (4/6/11)
17. D. Beauchamp handwritten notes (4/13/11)
18. E-mail exchanges between D. Beauchamp, D. Chittick and G. Schneider (5/3/11)
19. E-mail exchanges between D. Beauchamp, D. Chittick and G. Schneider (5/25/11)
20. E-mail exchanges between D. Beauchamp, D. Chittick and G. Schneider (6/10/11)
21. E-mail exchanges between D. Beauchamp, D. Chittick and G. Schneider (6/14/11)
22. E-mail exchanges between D. Beauchamp, D. Chittick and G. Schneider (6/20/11)
23. E-mail exchanges between D. Beauchamp and D. Chittick (7/11/11)
24. DenSco Confidential Private Offering Memorandum (7/1/11)
25. E-mail from D. Chittick to D. Beauchamp, DenSco investors (7/19/11)
26. Letter from Arizona Department of Financial Institutions (“ADFI”) to DenSco (8/11/11)
27. Letter from D. Beauchamp to ADFI (8/22/11)
28. E-mail exchanges between D. Beauchamp and D. Chittick (5/1/13)
29. D. Beauchamp handwritten notes re mtg. w/ D. Chittick (5/9/13)
30. Excerpt from DenSco corporate journal maintained by D. Chittick (5/9/13)
31. Draft DenSco Confidential Private Offering Memorandum (5/XX/13)
32. E-mail from D. Beauchamp to R. Pederson (6/10/13)
33. E-mail exchange between D. Beauchamp and M. Weakley (6/10/13)
34. E-mail exchanges between D. Beauchamp and D. Chittick (6/11/13)
35. E-mail from D. Chittick to D. Beauchamp (6/14/13)
36. E-mail from S. Menaged to D. Beauchamp, D. Chittick (6/14/13)
37. E-mail exchanges between D. Beauchamp and D. Chittick (6/14/13)
38. E-mail exchanges between D. Beauchamp and R. Wang (6/17/13)

39. Excerpt from DenSco website (6/17/13)
40. D. Beauchamp handwritten notes re call w/ D. Chittick (6/17/13)
41. E-mail from D. Beauchamp to R. Wang (6/17/13)
42. D. Beauchamp handwritten notes re call w/ R. Wang (6/17/13)
43. E-mail from D. Beauchamp to M. Weakley (6/17/13)
44. Excerpt from DenSco corporate journal maintained by D. Chittick (6/17/13)
45. D. Beauchamp handwritten notes re call w/ R. Wang (6/18/13)
46. D. Beauchamp handwritten notes re call w/ M. Weakley (6/18/13)
47. E-mail exchanges between D. Beauchamp, R. Wang, K. Henderson, R. Endicott, G. Jensen (6/20-21/13)
48. E-mail from D. Beauchamp to E. Sipes (6/25/13)
49. D. Beauchamp handwritten notes re E. Sipes (6/25/13)
50. D. Beauchamp handwritten notes re call w/ E. Sipes (6/27/13)
51. D. Beauchamp handwritten notes re call w/ D. Chittick (6/27/13)
52. E-mails from D. Chittick to D. Beauchamp (6/27/13)
53. E-mail exchange between E. Sipes and D. Beauchamp (7/1/13)
54. E-mail exchanges between D. Beauchamp and D. Chittick (7/10/13)
55. E-mail exchanges between D. Beauchamp and D. Chittick (7/11/13)
56. Draft DenSco Confidential Private Offering Memorandum (7/XX/13)
57. E-mail exchanges between D. Beauchamp and G. Jensen (8/6/13)
58. D. Beauchamp handwritten notes re calls w/ D. Chittick (8/26/13)
59. Letter from D. Beauchamp and J. Zweig to D. Chittick (8/30/13)
60. E-mail exchanges between D. Beauchamp and D. Chittick (9/12/13)
61. Letter from D. Beauchamp to D. Chittick (9/12/13)
62. E-mail exchanges between D. Beauchamp and D. Chittick (9/12/13)
63. Clark Hill New Client/New Matter form (9/13/13)
64. E-mail from S. Brewer to L. Stringer (9/17/13)
65. E-mail from D. Chittick to D. Beauchamp re "few things" (12/18/13)
66. E-mail from D. Chittick to D. Beauchamp re "2011 memorandum" (12/18/13)
67. E-mail from D. Beauchamp to D. Chittick re "2011 memorandum" (12/18/13)
68. E-mail exchange between D. Chittick and D. Beauchamp (1/5/14)
69. E-mail from D. Chittick to D. Beauchamp (1/6/14)
70. E-mail from D. Chittick to D. Beauchamp (1/7/14)
71. D. Beauchamp handwritten notes from meeting with D. Chittick and S. Menaged (1/9/14)
72. E-mail exchange between D. Chittick and D. Beauchamp (1/9/14)
73. Clark Hill New Client/Matter form (1/10/14)
74. D. Beauchamp handwritten notes from telephone call with D. Chittick (1/10/14)
75. Excerpt from DenSco corporate journal (1/10/14)
76. E-mail exchange between D. Chittick and D. Beauchamp (1/12/14)
77. E-mail from D. Beauchamp to D. Chittick (1/15/14)
78. E-mail from S. Menaged to D. Beauchamp and D. Chittick (1/16/14)
79. E-mail exchange between D. Chittick and D. Beauchamp (1/16/14)
80. E-mail exchange between D. Chittick, D. Beauchamp, S. Menaged, J. Goulder (1/17/14)
81. Executed Term Sheet (1/17/14)
82. E-mail exchange between D. Chittick and D. Beauchamp (1/21/14)
83. E-mail exchange between D. Chittick and D. Beauchamp (1/21/14)

84. E-mail exchange between D. Chittick and D. Beauchamp (1/21/14)
85. Excerpt from DenSco corporate journal (1/10/14)
86. E-mail exchange between D. Chittick and D. Beauchamp (1/23/14)
87. E-mail exchange between D. Chittick and D. Beauchamp (1/31/14)
88. E-mail from D. Beauchamp to D. Chittick (2/4/14)
89. E-mail from D. Beauchamp to D. Chittick (2/4/14)
90. D. Beauchamp handwritten notes from call with D. Chittick (2/6/14)
91. E-mail exchange between D. Beauchamp and D. Chittick (2/7/14)
92. E-mail exchange between D. Beauchamp and D. Chittick (2/7/14)
93. D. Beauchamp handwritten notes from call with D. Chittick and S. Menaged (2/7/14)
94. D. Beauchamp handwritten notes from calls with D. Chittick (2/7/14)
95. Excerpt from DenSco journal (2/7/14)
96. E-mail exchange between D. Beauchamp and D. Chittick (2/9/14)
97. E-mail exchange between D. Beauchamp and D. Chittick (2/10/14)
98. D. Beauchamp handwritten notes from calls with D. Chittick (2/11/14)
99. E-mail exchange between D. Beauchamp and D. Chittick (2/14/14)
100. E-mail exchange between D. Beauchamp and D. Chittick (2/15/14)
101. E-mail exchange between D. Beauchamp and D. Chittick (2/20/14)
102. E-mail exchange between D. Beauchamp and D. Chittick (2/20/14)
103. D. Beauchamp handwritten notes from meeting with D. Chittick, S. Menaged, J. Goulder (2/20/14)
104. Excerpt from DenSco journal (2/20/14)
105. D. Beauchamp handwritten notes from call with D. Chittick (2/21/14)
106. Excerpt from DenSco journal (2/21/14)
107. D. Beauchamp handwritten notes from call with D. Chittick (2/24/14)
108. Excerpt from DenSco journal (2/24/14)
109. E-mail exchange between D. Beauchamp and D. Chittick (2/25/14)
110. Excerpt from DenSco journal (2/25/14)
111. E-mail exchange between D. Beauchamp and D. Chittick (2/26/14)
112. E-mail exchange between D. Beauchamp and D. Chittick (2/26/14)
113. E-mail exchange between D. Beauchamp and B. Price (2/26/14)
114. Excerpt from DenSco journal (2/26/14)
115. D. Beauchamp handwritten notes from call with D. Chittick (2/27/14)
116. E-mail exchange between D. Beauchamp and B. Price (2/27/14)
117. Excerpt from DenSco journal (2/26/14)
118. D. Beauchamp handwritten notes from call with D. Chittick (3/3/14)
119. Excerpt from DenSco journal (3/3/14)
120. E-mail exchange between D. Beauchamp and D. Chittick (3/4/14)
121. D. Beauchamp handwritten notes from call with D. Chittick (3/7/14)
122. Excerpt from DenSco journal (3/7/14)
123. E-mail exchange between D. Beauchamp and D. Chittick (3/10/14)
124. D. Beauchamp handwritten notes from calls with D. Chittick (3/11/14)
125. Excerpt from DenSco journal (3/11/14)
126. D. Beauchamp handwritten notes from calls with D. Chittick (3/12/14)
127. D. Beauchamp handwritten notes from calls with D. Chittick and S. Menaged (3/12/14)
128. E-mail exchange between D. Beauchamp and D. Chittick (3/12/14)

129. E-mail exchange between D. Beauchamp and D. Chittick (3/12/14)
130. E-mail exchange between D. Beauchamp and D. Chittick (3/13/14)
131. E-mail exchange between D. Beauchamp and D. Chittick (3/13/14)
132. E-mail exchange between D. Beauchamp and D. Chittick (3/13/14)
133. E-mail exchange between D. Beauchamp and D. Chittick (3/14/14)
134. Excerpt from DenSco journal (3/17/14)
135. E-mail exchange between D. Beauchamp and D. Chittick (3/17/14)
136. E-mail exchange between D. Beauchamp and D. Chittick (3/18/14)
137. E-mail exchange between D. Beauchamp and D. Chittick (3/19/14)
138. Excerpt from DenSco journal (3/20/14)
139. Forbearance Agreement (4/16/14)
140. Excerpt from DenSco journal (4/16/14)
141. E-mail exchange between D. Beauchamp and D. Chittick (4/18/14)
142. D. Beauchamp handwritten notes from call with D. Chittick (4/24/14)
143. E-mail from D. Chittick to D. Beauchamp (4/24/14)
144. Copy of DenSco Confidential Private Offering Memorandum dated July 2011 with handwritten notes (4/24/14)
145. E-mail exchange between D. Beauchamp and D. Chittick (4/25/14)
146. E-mail exchange between D. Beauchamp and D. Chittick (4/28/14)
147. E-mail exchange between D. Beauchamp and D. Chittick (4/28/14)
148. E-mail exchange between D. Beauchamp and D. Chittick (4/28/14)
149. D. Beauchamp handwritten notes from calls with D. Chittick (4/29/14)
150. D. Beauchamp handwritten notes re private offering memorandum (4/29/14)
151. Excerpt from DenSco journal (4/29/14)
152. D. Beauchamp handwritten notes re private offering memorandum (5/13/14)
153. E-mail from D. Schenck to D. Beauchamp (5/14/14)
154. Draft of DenSco Confidential Private Offering Memorandum (5/14/14)
155. Draft of DenSco Confidential Private Offering Memorandum (5/14/14)
156. E-mail exchanges between D. Beauchamp and D. Chittick (6/12/14)
157. E-mail exchange between D. Beauchamp and D. Schenck (6/13/14)
158. Authorization to Update Forbearance Documents (6/18/14)
159. Excerpt from DenSco journal (7/2/14)
160. Excerpt from DenSco journal (7/25/14)
161. Excerpt from DenSco journal (7/31/14)
162. E-mail exchange between D. Beauchamp and D. Chittick (3/13/15)
163. E-mail exchange between D. Chittick and S. Menaged (3/13/15)
164. Excerpt from DenSco journal (3/13/15)
165. Excerpt from DenSco journal (3/24/15)
166. Excerpt from DenSco journal (6/18/15)
167. Letter to Investors (7/28/16)
168. Iggy List (7/28/16)
169. E-mail from D. Beauchamp to DenSco investors (8/3/16)
170. E-mail from D. Beauchamp to DenSco investors (8/5/16)
171. E-mail exchange between D. Beauchamp and K. Johnson (8/8/16)
172. E-mail exchange between D. Beauchamp and R. Brinkman (8/21/16)
173. E-mail exchange between D. Beauchamp and R. Brinkman (8/21/16)

174. Letter from D. Beauchamp to D. Chittick with enclosed invoices (2/20/14)
175. Letter from D. Beauchamp to D. Chittick with enclosed invoices (3/14/14)
176. Letter from D. Beauchamp to D. Chittick with enclosed invoices (4/24/14)
177. Letter from D. Beauchamp to D. Chittick with enclosed invoices (5/23/14)
178. Letter from D. Beauchamp to D. Chittick with enclosed invoices (6/25/14)
179. Letter from D. Beauchamp to D. Chittick with enclosed invoice (7/16/14)
180. Letter from D. Beauchamp to D. Chittick with enclosed invoice (8/20/14)
181. Plaintiff's Initial Disclosure Statement w/ Appendices (3/9/18)
182. Defendant's Initial Disclosure Statement (3/9/18)
183. Notice of Service of Preliminary Expert Opinion Declaration – M.Hiraide (3/9/18)
184. Plaintiff's Second Disclosure Statement documents (3/27/18), [RECEIVER\_000001-1497]
185. Plaintiff's Third Disclosure Statement documents (5/15/18), [RECEIVER\_000001-1497]
186. Defendant's Third Supplemental Disclosure Statement documents (6/13/18), [AF000001-002448, AZBEN000001-005248, CH\_0013387-0013616, GE000001-000257, SELL000001-000766]
187. Beauchamp's Responses to Plaintiff's First Set of Non-Uniform Interrogatories No.1 thru 14; including breakdown of each NUI with the referenced documents (6/21/18)
188. Plaintiff's Fourth Disclosure Statement documents (7/11/18), [RECEIVER\_001498-001548]
189. Daniel Schenck Deposition Transcript, Exhibits, Errata sheet (6/19/18)
190. Robert Anderson Deposition Transcript and Exhibits (6/21/18)
191. David Beauchamp Deposition Transcript, Exhibits, Errata sheet and video deposition (7/19-20/18)
192. Shawna Heuer Deposition Transcript (8/22/18)
193. Mark Sifferman Deposition Transcript (8/31/18)
194. Scott Menaged 2004 Exam Transcript
195. Edward Hood Deposition Transcript and Exhibits (2/8/19)
196. Letter from R. Miller to D. Chittick w/ attachment re Mortgage Recordation; Demand for Subordination (1/6/14), [CH\_0000828-0000848]
197. Notice of Claim Against Estate of Denny J. Chittick (12/9/16)
198. Exhibits A thru H re Motion to Modify Receivership Order re Alleged Joint Privilege (12/7/17)
199. Receiver's Petition No. 48 for Reconsideration of the Order Appointing Receiver with Respect to Alleged Joint Attorney Client Privilege (12/11/17)
200. Chittick Estate's Response to Receiver's Petition No. 48 re Attorney-Client Relationship (1/3/18)
201. Chittick Estate's Sur-Response to Receiver's Petition No. 48 re Attorney-Client Relationship (1/9/18)
202. Receiver's Reply in Support of Petition No. 48 for Reconsideration of the Order Appointing Receiver with Respect to Alleged Joint Attorney Client Privilege (1/12/18)
203. Plaintiff's Third Set of Requests for Production of Documents to Defendant Clark Hill (8/1/18)
204. Defendants' Sixth Supplemental Disclosure Statement (3/13/19)
205. Blackline Fifth Supplemental Disclosure Statement to Sixth Supplemental Disclosure Statement (3/13/19)

206. Signed Verification to Defendants' Sixth Supplemental Disclosure Statement (3/12/19)

## CSOF Ex. 3

Mr. Menaged requested that his deposition transcript be marked as confidential. The Receiver does not agree with that designation. Rather than seek to file this exhibit under seal, Receiver will first seek to obtain agreement that this exhibit may be placed on the record without being under seal. The Receiver will file this exhibit as a supplement promptly.

# CSOF Ex. 4

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. )

NO. CV2017-013832

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

Defendants. )

-----)

VIDEOTAPED DEPOSITION OF DAVID GEORGE BEAUCHAMP

VOLUME I  
(Pages 1 through 233)

Phoenix, Arizona  
July 19, 2018  
9:03 a.m.

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

PREPARED FOR:

1 Q. You understand he continued to raise new money  
2 and took rollover money from your meeting on  
3 January 9th until he died.

4 MR. DeWULF: Object to form.

5 Q. (BY MR. CAMPBELL) True?

6 A. I don't remember the specific time period.

7 Q. Was there any point in time, sir, where you  
8 learned that Mr. Chittick was continuing to raise money?

9 A. As I indicated earlier, the end of April,  
10 beginning of May of 2014, he acknowledged he was doing it  
11 beyond his line of credit and beyond his personal loans  
12 that he had.

13 Q. So you learned at the end of April or early May?

14 A. Correct.

15 Q. All right. And once you learned that, you knew  
16 he was committing a securities violation?

17 MR. DeWULF: Object to form.

18 THE WITNESS: I -- at that point in time, I  
19 believed he had committed a securities violation, and it  
20 was paramount that we get the disclosure statement out in  
21 writing to all of the investors as quickly as possible.  
22 His representations that he had advised everybody and told  
23 them to the contrary, we needed something much more formal  
24 than that.

25 Q. (BY MR. CAMPBELL) This is late April, early

1 May, you learn he is committing securities violations, and  
2 you also realize these are breaches of fiduciary duty that  
3 DenSco owes its investors. True?

4 MR. DeWULF: Object to form.

5 THE WITNESS: I clear -- I would acknowledge  
6 it's a securities violation. In terms of fiduciary duty,  
7 that would require a separate analysis that has to go  
8 through a number of different steps that I didn't have all  
9 the information to deal with.

10 Q. (BY MR. CAMPBELL) Mr. Beauchamp, you understand  
11 what a fiduciary duty is?

12 A. You are responsible to protect the -- if you are  
13 in a fiduciary position, guiding and directing assets or  
14 investments of a third party, you are responsible to use  
15 your best -- well, reasonable business efforts to protect  
16 and preserve those.

17 Q. You understand that DenSco owed a duty of  
18 loyalty to its investors. That's part of a fiduciary  
19 duty, correct?

20 A. Correct.

21 Q. They had a duty of full disclosure to its  
22 investors. That's part of a fiduciary duty, correct?

23 A. I don't recall -- based on the information that  
24 had been provided for fiduciary duty before, I don't -- I  
25 don't recall all the individual steps.

DAVID GEORGE BEAUCHAMP, VOLUME I, 7/19/2018

1 I would hope to God he would be completely honest, like he  
2 had been in other instances previously.

3 Q. (BY MR. CAMPBELL) Did you ever stop to think  
4 that the work you were doing would prevent an audit of his  
5 books?

6 MR. DeWULF: Object to form.

7 THE WITNESS: In my past experience with the  
8 Arizona Department of Financial Institutions, they audit  
9 the loans closed, not the company.

10 MR. CAMPBELL: Why don't we break for the day  
11 and we will start tomorrow at 9:00.

12 MR. DeWULF: Okay.

13 VIDEOGRAPHER: The time is 4:32 p.m. We are  
14 ending for the day with media seven.

15 (Deposition Exhibit Nos. 103 through 432 were  
16 marked for identification.)

17 (4:32 p.m.)

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*David G. Beauchamp*  
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DAVID GEORGE BEAUCHAMP

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# CSOF Ex. 5



SCOTT RHODES, 5/15/2019

1 rule, right --

2 A. That's correct.

3 Q. -- on what they have to do?

4 A. Yes.

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

6 A. That's correct.

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

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

21 Q. All right. So you go to Exhibit No. 60 or 62,  
22 then, or page 62, and you talk about an "up the ladder"  
23 approach. Why don't you just describe for me what the ER  
24 1.3 "up the ladder" approach is.

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

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

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

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

25 If that person refuses, then you see if there is

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

4 Q. And then turn to page 65.

5 A. Yes.

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

7 A. Right.

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

9 A. You do, to subsection (c).

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

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

23 Q. All right.

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

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

6 Q. Let me give you a hypothetical.

7 A. Sure.

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

12 Are you with me so far?

13 A. I am, yeah.

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

19 Authorized by the rule?

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

22 (The requested portion of the record was read.)

23 MR. DeWULF: Object to form.

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

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

4 Q. You have understood my question correctly.

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

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

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

25 A. Actually, I think there is a big difference

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

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

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

18 A. More than a noisy withdrawal.

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

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

23 what are you referring to here?

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

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1 THE WITNESS: I think all I'm qualified to say  
2 in that regard is that in May of 2014, he knew that  
3 Mr. Chittick, as the principal, the constituent for his  
4 client, DenSco, was -- was intending to act or was acting  
5 in a manner that was contrary to the law.

6 Q. All right.

7 A. And I'm using the terminology, as I'm sure you  
8 recognize, that pertains to ER 1.13.

9 Q. Turn to page 161 of Mr. Beauchamp's deposition?

10 MR. DeWULF: 160 what?

11 MR. CAMPBELL: 161.

12 Q. Line 7, Question: Was there a point in time,  
13 sir, where you learned that Mr. Chittick was continuing to  
14 raise money?

15 Answer: As I indicated earlier, the end of  
16 April, beginning of May of 2014, he acknowledged he was  
17 doing it beyond his line of credit and beyond his personal  
18 loans that he had.

19 A. Correct.

20 Q. Question: So you learned at the end of April or  
21 early May?

22 Answer: Correct.

23 Question: All right. And once you learned  
24 that, you knew he was committing a securities violation?

25 The witness: I -- at that point, I believed he

SCOTT RHODES, 5/15/2019

1 had committed a securities violation, and it was paramount  
2 that we get the disclosure statement out in writing to all  
3 of the investors as quickly as possible. His  
4 representations that he had advised everybody and told  
5 them to the contrary, we needed something more formal than  
6 that.

7 A. Correct.

8 Q. You agree with Mr. Beauchamp that at that point  
9 in time, Mr. Beauchamp believed there was a securities  
10 violation?

11 A. Well, certainly that's what he said, and there  
12 is no reason to question his professional judgment about  
13 that call.

14 Q. Right.

15 A. Up until that time before, I -- there was a  
16 question as to whether the written POM and then of course  
17 there might have been oral disclosures made, but it  
18 appears at this point in April, early May, Mr. Beauchamp  
19 is concluding that there had been either no oral  
20 disclosures or inadequate oral disclosures.

21 Q. And in the situation or circumstance when your  
22 client is committing an ongoing fraud, securities fraud,  
23 or a crime, there is a mandatory duty to withdraw. True?

24 A. Yes, I think that at this point the withdrawal  
25 was mandatory.

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1 Q. So earlier today I think I asked you about this  
2 and you seemed to suggest, I thought, that it wasn't  
3 mandatory.

4 A. When? I don't think --

5 Q. This morning.

6 A. -- we were talking about May 2014 earlier.

7 Q. Okay. If Mr. Beauchamp had knowledge, and I  
8 realize -- let's assume actual knowledge is a question of  
9 fact.

10 A. Okay.

11 Q. If he had actual knowledge of a securities  
12 violation prior to May of 2014, he would have been  
13 required to mandatorily withdraw at that time?

14 A. It depends on whether under the securities law  
15 it would have been possible to remedy the improper conduct  
16 through disclosures.

17 Q. Let me rephrase it.

18 A. Sure.

19 Q. If he had actual knowledge at any time prior to  
20 May of 2014 that there was an ongoing securities fraud or  
21 ongoing crime and his client refused to follow his advice,  
22 he had a duty to mandatorily withdraw, right?

23 A. You rephrased it, but my answer is the same.

24 First of all, DenSco is the client. Not  
25 Chittick. If he was aware of an ongoing fraud earlier,

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1 the obligation would have been first, as we have  
2 discussed, to inform Chittick, "I'm not your lawyer. I'm  
3 DenSco's lawyer."

4 Then the next question is, can I, remaining as  
5 DenSco's lawyer, assure that such actions are taken to  
6 protect DenSco's interests, notwithstanding Chittick's  
7 fraud. And if so, can I continue as counsel for DenSco in  
8 order to protect the interests of DenSco by whatever would  
9 be necessary under the securities laws, making proper  
10 disclosures or whatever else needs to be done.

11 Q. Let me rephrase it. We are making this more  
12 complicated than it has to be.

13 If prior to May 2014 -- well, strike that.

14 You understand that DenSco only has one  
15 employee, one president, one shareholder --

16 A. Sure.

17 Q. -- right?

18 A. I understand.

19 Q. Prior to May 2014, if Mr. Beauchamp has actual  
20 knowledge that DenSco is selling securities in violation  
21 of the federal and state securities laws by not making  
22 full disclosure of material matters, and Mr. Chittick  
23 won't change that, he would have a mandatory duty to  
24 withdraw. True?

25 A. I think that the first step would have been to

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1 advise Chittick I'm not your lawyer, have Chittick get  
2 separate counsel, and to -- you have to do something. So  
3 I'm not -- I'm not indicating that there is not a  
4 mandatory withdrawal that might come into play, and it  
5 might happen very quickly, but before, there is going to  
6 be a discussion with Chittick: I'm not your lawyer. You  
7 have committed securities fraud. Your -- your duties run  
8 to DenSco. My duty runs to try to -- to DenSco as well.  
9 I'm going to try to save the company.

10 But obviously he can't do anything on his own.  
11 If DenSco won't -- if Chittick won't step down, then  
12 probably he is going to be left with no option than to  
13 withdraw.

14 Q. well --

15 A. And the reason I am -- I am quibbling with you a  
16 little bit here is that I understand what you are saying  
17 is that DenSco has committed securities fraud, because --  
18 I assume it's because Chittick's actions are imputed to  
19 DenSco.

20 On the other hand, Chittick made his own  
21 decisions and they -- under your hypothetical, and they  
22 would have been imputed. They would have been his own  
23 actions.

24 And so there is a little window of time, even in  
25 a slow -- in a closely held corporation where perhaps

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1 there can be a separation between that one individual, and  
2 someone else can step in and take over the company.

3 And so that's -- I don't want to foreclose that  
4 as being a possibility. And unless Beauchamp had had the  
5 knowledge necessary, under your hypothetical, if he had  
6 then had that discussion with Chittick, there is some  
7 possibility, maybe a slim one, but some possibility  
8 Chittick would have resigned, someone else would have  
9 stepped in to take control of the company, and then  
10 perhaps Clark Hill could have stayed on as company  
11 counsel.

12 Q. Let's go back to May of 2014.

13 A. Okay.

14 Q. Okay?

15 You agree he had a mandatory duty to withdraw in  
16 May of 2014?

17 A. Because at that time --

18 MR. DeWULF: Object to form.

19 THE WITNESS: I do, and that's because at that  
20 point Chittick had been advised. Mr. Beauchamp had done  
21 everything he was supposed to do. He had counseled him,  
22 he had stayed with him, he had worked with us, and then it  
23 gets to the point where it is now time to disclose. And  
24 it's at that point that he learns that Chittick has lied  
25 to him, that there were other loans, that there were --

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1 there was a failure to disclose after he had been told you  
2 should not be raising new money, that Beauchamp had not  
3 been aware of those facts, and that Chittick is saying,  
4 "No, I'm not going to disclose any of these facts."

5 well, at that point there is no -- there are no  
6 options. You have to -- you have to withdraw.

7 Q. Let me give you a hypothetical.

8 First of all, you understand there is an issue  
9 of fact between plaintiffs and Clark Hill about whether  
10 they terminated or not?

11 A. I have understood that, yes.

12 Q. Assume hypothetically that Mr. Beauchamp did not  
13 terminate the representation; that he put his pencil down  
14 and said I'll give you a year to fix this problem.

15 would that meet the standard of care?

16 MR. DeWULF: Object to form.

17 THE WITNESS: You are asking me then in very  
18 simple terms, so I'm going to answer it in simple terms.  
19 In other words, I'm assuming there are no other facts,  
20 that there was not a discussion between Beauchamp and  
21 Chittick. So, in other words, you are asking me to assume  
22 things that are inconsistent with what I have seen, but I  
23 will answer it as such.

24 Under these facts with what he knew in May of  
25 2014, as I have testified, I think he had a duty to

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1 withdraw. So if he did not withdraw, then, no, he didn't  
2 meet -- he did not meet his duties.

3 Q. When you terminate your representation because  
4 your client is committing an ongoing crime or fraud, is it  
5 your opinion you can -- that Mr. Beauchamp could continue  
6 to work on the Forbearance Agreement that was going to be  
7 disclosed in the Private Offering Memorandum?

8 A. Well, first of all, you started that as sort of  
9 a general question, if you, and then you went specifically  
10 into him.

11 So generally speaking, when a lawyer withdraws,  
12 whether it's mandatory or not, a lawyer needs to, has to  
13 do what's necessary to avoid prejudice. That's called  
14 just cleanup work basically. So, yes, it's not unusual  
15 for an attorney-client relationship to end, but with some  
16 work to be done after the -- after that.

17 Q. Okay. So your opinion is that Mr. Beauchamp,  
18 under the standard of care for securities lawyers, could  
19 continue working on the Forbearance Agreement after he  
20 terminated the representation for fraud?

21 A. Now --

22 MR. DeWULF: Object to form.

23 THE WITNESS: -- again, my standard of care is  
24 with respect to lawyers in general under the ethical and  
25 professional obligations. I'm not a securities expert.

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1 Q. -- by asserting a privilege?

2 A. Well, first of all, I understand it was  
3 Gammage & Burnham that did that on behalf of the estate.

4 Q. Mr. Beauchamp filed an affidavit, did he not?

5 A. True, but he was not counsel for DenSco at the  
6 time, was he?

7 Q. Why do you say that?

8 A. I don't know. I don't remember. It's a  
9 question.

10 Q. He was.

11 A. I don't know if it was or -- it was in DenSco's  
12 best interests or not. It was just a question for  
13 litigation.

14 MR. CAMPBELL: All right. Read and sign?

15 MR. DeWULF: Yes.

16 VIDEOGRAPHER: This concludes the videotaped  
17 deposition of J. Scott Rhodes, consisting of one media  
18 unit. We are going off the record at 3:01 p.m.

19 (3:01 p.m.)

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SCOTT RHODES

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