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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation, Plaintiff, v. Clark Hill PLC, a Michigan limited liability company; David G. Beauchamp and Jane Doe Beauchamp, husband and wife, Defendants.	No. CV2017-013832 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE AIDING AND ABETTING** (Oral Argument requested) (Assigned to the Honorable Daniel Martin)

Pursuant to Rule 56(a) of the Arizona Rules of Civil Procedure, Defendants Clark Hill PLC and David Beauchamp (collectively, "Clark Hill") respectfully request that this Court grant summary judgment in Clark Hill's favor on Count 2 of Plaintiff's Complaint, that Clark Hill aided and abetted Denny Chittick in breaching fiduciary duties owed to DenSco Investment Corporation ("DenSco"). Contrary to Plaintiff's allegations, which seek to impose knowledge and intent on Clark Hill based on what the parties know about *now*, rather than what Clark Hill knew at the time, the facts establish that Clark Hill did not have actual knowledge that Chittick was breaching any fiduciary duties, nor did it's legal advice substantially assist Chittick in any such breach. Summary judgment is appropriate.

I. INTRODUCTION

By all outward appearances, Denny Chittick, former CIO at Insight Enterprises, was an upstanding individual, who ran DenSco profitably and professionally prior to his death in July 2016. DenSco never missed an interest payment to its investors, most of whom were family, friends, and business acquaintances, not even during the Great Recession.

Yet starting in late 2012, Chittick secretly used risky lending protocols to funnel more than half of DenSco's money directly into the accounts of a single borrower – Yomtov "Scott" Menaged. Menaged took advantage. In early 2014, Chittick informed DenSco's attorney, David Beauchamp, that Menaged had double liened more than a hundred properties with loans from DenSco and other hard money lenders. Chittick also told Beauchamp that DenSco had devised and implemented a plan with Menaged to resolve the issue, and that it would soon be cleared up. Over a four month period, Beauchamp worked to memorialize his client's business plan in a Forbearance Agreement that offered some protections, before firing his client when Chittick refused to make the necessary disclosures to DenSco's investors.

Plaintiff now alleges that Clark Hill should have divined that Chittick was breaching his fiduciary duties to DenSco in no less than 11 different ways and that Clark Hill substantially assisted in those alleged breaches, by, among other things, failing to intervene in DenSco's

business decisions. The facts, however, demonstrate that Clark Hill had no *actual* knowledge of many of the alleged breaches of fiduciary duty (to the extent they constitute breaches at all), and did not "substantially assist" in that conduct beyond fulfilling its duties as counsel to the company, deferring to its client's business judgment where appropriate, and otherwise acting to protect DenSco's interests. While Plaintiff's arguments as to what Clark Hill should have known or should have done may be enough to create a triable question regarding Clark Hill's alleged negligence, it is not enough to establish the intentional tort of aiding and abetting.

I. BRIEF SUMMARY OF RELEVANT FACTS

A. DenSco raises money to lend to borrowers; Clark Hill acts as securities counsel.

DenSco was a "One-Man Shop," with Denny Chittick being DenSco's "single shareholder, director, officer and employee." [DSOF ¶ 1] DenSco borrowed funds from about 100 investors, mostly friends and family, which it then lent out to borrowers, typically used to purchase properties at trustee's sales. [DSOF ¶¶ 2, 6] One of DenSco's largest borrowers was Menaged, through his entities. [DSOF ¶ 10]

Beauchamp did securities work for DenSco beginning in the early 2000s. This largely involved updating DenSco's Private Offering Memorandum ("POM") every two years. [DSOF ¶ 9] DenSco represented to its investors in its POMs, among other things, that its loans would be secured in first position and that it would maintain a diverse borrower base, with no borrower holding more than 15% of DenSco's portfolio. [DSOF ¶ 2]. Beauchamp occasionally did other legal work for DenSco when asked. [DSOF ¶ 8] Beauchamp, however, was not DenSco's general counsel or business consultant, and never had access to DenSco's financial records until August 2016, after Chittick's death.

B. Chittick funnels DenSco funds directly to Menaged, bypassing fiduciary safeguards.

For unknown reasons, Chittick chose not to fund DenSco loans to a trustee. Instead, he delivered the funds directly to his borrowers, including Menaged, and trusted them to make proper

use of DenSco's money. [DSOF ¶ 5]. That approach contradicted DenSco's loan documents, industry practice, and common sense. [DSOF ¶¶ 3,4].

In September 2012, another hard money lender, Active Funding Group, told Chittick that Menaged had double liened at least 10 properties using DenSco and AFG loans, thereby jeopardizing DenSco's (and AFG's) lien priority and raising questions about Menaged's use of his lenders' money. [DSOF ¶ 11][1] Chittick never told Clark Hill about this issue. Nor did Chittick change his lending protocols. Instead, Chittick increased DenSco's exposure to Menaged six-fold, with DenSco's outstanding loans to Menaged's entities growing from $4.65 million at the end of 2012 *to more than $28 million at the end of 2013*, which was more than 50% of DenSco's portfolio. [DSOF ¶ 12] Chittick hid this fact from Clark Hill as well.

The 2011 POM was intended to be updated in 2013. In June 2013, just prior to the 2011 POM expiring, Chittick informed Beauchamp that DenSco had been sued by FREO Arizona, LLC ("Freo") over a property purchased by Easy Investments with DenSco funds. [DSOF ¶ 16] Chittick wrote to Beauchamp that Easy Investments had purchased a property at a trustee's sale using a DenSco loan, but that the property had potentially been purchased by Freo prior to the trustee's sale, raising questions as to which entity owned the property. [*Id.*] [2] Chittick sent Beauchamp the first four pages of the complaint in the lawsuit and told Beauchamp he only wanted him "to be aware" of it. [*Id.*][3] As a result, Beauchamp did nothing further in relation to the Freo lawsuit. He did note that the fact of the lawsuit would be disclosed in an updated POM. [DSOF

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[1] In other words, Menaged had obtained two loans, from two lenders, to buy the same property, allowing each lender to believe it was in first position.

[2] Plaintiff asserts that the FREO lawsuit is of monumental importance, because the complaint, which named every entity that might have an interest in the property, included separate allegations that AFG and DenSco each had a lien on the property. According to Plaintiff, this loan allegation should have alerted Beauchamp to systemic issues with DenSco's lending procedures. [DSOF ¶ 16]. The lawsuit, however, *which dealt with a single property*, did not in any way concern lien priority. [DSOF ¶ 15]

[3] As Chittick told Menaged later that day, he would "keep [Beauchamp] from running up any unessary [sic] bills" and that Menaged should "just talk to your guy and hadn [sic] it off ot [sic] him." [DSOF ¶ 17]

¶ 18] Chittick responded that "1 sentence should suffice!" [*Id.*] A cursory reference to the lawsuit in the anticipated POM was appropriate given that the Court granted summary judgment in favor of Easy Investments and dismissed DenSco. [DSOF ¶ 20]

Chittick, however, never provided Clark Hill the financial information necessary to update the POM. [DSOF ¶ 21] Although Beauchamp started the process, he stopped working on the update in September 2013 at DenSco's request.[4] [*Id.*] We now know that at the time, Chittick was in the process of handing most of DenSco's money to Menaged. [DSOF ¶ 12]

C. The double-liening problem explodes.

Unbeknownst to Beauchamp (and perhaps Chittick), Menaged had been double liening properties with loans from both DenSco and other hard money lenders since at least 2012 and throughout 2013, jeopardizing DenSco's first lien position on all of those properties. [DSOF ¶ 11] Chittick does not appear to have learned about the widespread double lien issue, however, until November 2013. [DSOF ¶ 22] Menaged's excuse was that his cousin was responsible for the fraud and had fled the country with the money. [*Id.*][5] Plaintiff refers to this double liening, and Menaged's fictitious explanation, as the "First Fraud." [*Id.*]

Chittick did not approach Clark Hill for help in resolving the First Fraud at any point in 2013. Instead, Chittick and Menaged devised a plan to resolve the First Fraud and began implementing that plan in mid-November 2013, which included DenSco making additional loans to Menaged. [DSOF ¶ 24][6]

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[4] Plaintiff has asserted that it does not believe Chittick ever gave Beauchamp such an instruction (without any support), but nevertheless identifies Chittick's instruction to Beauchamp to stop working on the 2013 POM as a "red flag" warning that should have put Beauchamp on notice that there were major issues with DenSco's lending practices. [DSOF ¶ 16]

[5] AFG, one of the competing lenders subject to the double-liening (perhaps knowingly), testified that Menaged likewise blamed the double lien issue on a rogue employee, and that AFG had no reason to doubt the veracity of that story. [DSOF ¶ 23]

[6] On December 18, 2013, Chittick first mentioned the issue with Menaged's double liened properties to Beauchamp in a phone call to discuss updating the 2011 POM. [DSOF ¶ 25] Chittick explained in that phone call that DenSco had run into an issue with some of the loans made to Menaged's entities and that it appeared as if a few properties purchased with DenSco loans were subject to a competing deed of trust

On January 7, 2014, Chittick forwarded a letter sent by other lenders subject to competing double-liens with DenSco. They demanded that DenSco subordinate what they referred to as fraudulent deeds of trust – fraudulent because, unlike their loans, DenSco's loans had not been provided to the trustee and used to purchase the property. [DSOF ¶¶ 26, 27] By separate email to Beauchamp, Chittick explained the "cousin" story, and told Chittick that Menaged was a borrower whom DenSco had lent $50 million to since 2007 and that DenSco had "never had a problem with payment or issue that hasn't been resolved." [DSOF ¶ 29] That was a lie. Menaged had double liened properties with DenSco loans as far back as 2012. [DSOF ¶ 11][7] Yet Chittick did not share that information with Beauchamp, who had no reason to disbelieve his successful client's assessment of Menaged or their business relationship.

The email also reiterated that Menaged and Chittick had developed and implemented a business plan to resolve the First Fraud:

> I've been over this plan 100 times and the numbers and I truly believe this is the right avenue to fix the problem. We have been proceeding with this plan since November and we've already cleared up about 10% of the total $'s in question.

[DSOF ¶ 29] As the Receiver acknowledges, DenSco had already started lending Menaged additional funds to clear up the double-liens pursuant to his plan with Menaged [DSOF ¶ 34]

Clark Hill advised that the plan be written up quickly to provide some protection to DenSco. [DSOF ¶ 36] It also advised Chittick that he could not raise or roll over investor funds without full disclosure to those investors. [DSOF ¶ 37] Though Clark Hill anticipated that the Forbearance Agreement would be finalized soon, it took several months to negotiate with Menaged and his lawyer, in large part because Chittick repeatedly tried to acquiesce to their demands. [DSOF ¶ 44] This forced Clark Hill to repeatedly admonish Chittick regarding DenSco's best interests and its fiduciary duties to its investors. [*Id.*] As negotiations wound

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from other hard money lenders. [*Id.*] Chittick further explained that he was already resolving the issue and did not need advice. [*Id.*] He provided no further details until January 7, 2014.

[7] Menaged was also in default on numerous loans. [DSOF ¶ 14]

down, Clark Hill immediately began to update the 2011 POM to provide formal disclosure to all DenSco investors. [DSOF ¶ 55]

The initial draft POM included a description of the double lien issue and Forbearance Agreement, and included various blanks and comments that required Chittick's cooperation to provide DenSco information uniquely in his possession. [*Id.*] Clark Hill shared a copy of the initial draft POM with Chittick in mid-May 2014, but Chittick refused to authorize the POM's issuance to DenSco's shareholders in any form. [DSOF ¶ 56] Clark Hill immediately informed Chittick that it was withdrawing as DenSco's securities counsel. [*Id.*][8]

Plaintiff has continually asserted that Clark Hill's failure to send Chittick a termination letter or close its files is definitive proof that Clark Hill never actually terminated the relationship and remained DenSco's securities counsel, allegedly in a bid to provide DenSco cover for its ongoing securities violations. The reality is that other Clark Hill attorneys testified they understood the relationship had been terminated, there are no legal invoices from Clark Hill to DenSco after May 2014 (aside from bills to clean up the Forbearance Agreement exhibits Clark Hill had already drafted), and there are no communications between Clark Hill and DenSco regarding securities advice after May 2014. [*Id.*]

II. PLAINTIFF'S ALLEGATIONS

Plaintiff asserts that Clark Hill aided and abetted the following breaches of fiduciary duty by Chittick: (i) using "grossly negligent" lending practices, (ii) failing to question Menaged's "cousin" excuse for the First Fraud and failing to question where the stolen money had gone, (iii) failing to hire enough employees to manage DenSco's loan volume; (iv) selling promissory notes between September 2013 and December 2013 without an updated POM; (v) pursuing a workout

[8] Clark Hill performed limited work after it terminated DenSco as a client related to cleaning up exhibits to the Forbearance Agreement. The work was necessary because the prior exhibits Chittick had provided setting forth the outstanding Menaged loans and loan balances were inaccurate. [DSOF ¶ 57] This work was complete in June 2014. [DSOF ¶ 58]

plan with Menaged as embodied in the Forbearance Agreement; and (vi) selling promissory notes after January 2014 without an updated POM.

III. ARGUMENT

A. Legal Standard.

Arizona recognizes aiding and abetting as embodied in Restatement (Second) of Torts § 876(b), which provides that "a person who aids and abets a tortfeasor is himself liable for the resulting harm to a third person." *Wells Fargo Bank v. Az. Laborers, Teamsters and Cement Masons Local No. 395 Pension*, 201 Ariz. 474, 485, ¶ 31 (Ariz. 2002). Aiding and abetting requires proof of three elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty ("knowledge element"); and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach ("substantial assistance element"). Restatement (Second) of Torts § 876(b). This Motion focuses on the second and third elements.[9]

1. The knowledge element

"[A]iding and abetting liability is based on proof of a scienter . . . the defendants must know that the conduct they are aiding and abetting is a tort." *Id.* at ¶ 33 (citations and quotations omitted). Specifically, "[b]ecause aiding and abetting is a theory of secondary liability, the party charged with the tort must have knowledge of the primary violation," which may be inferred from the circumstances. *Id.* at ¶ 36. Knowledge of "suspicious activity" is not enough to satisfy the scienter requirement. *See Stern v. Charles Schwab & Co., Inc.*, 2009 WL 3352408, at *7 (citing *Wells Fargo* and *Dawson v. Withycombe,* 216 Ariz. 84 (App. 2007)). Evidence about what

[9] Case law has since added a fourth element: a causal relationship must exist between the assistance or encouragement and the primary tortfeasor's breach ("causation element"). *Wells Fargo*, 201 Ariz. at 485, ¶ 34. Although this element is not separately addressed the Motion, there can, of course, be no causation without knowledge and substantial assistance.

defendants "should have known" is similarly insufficient to prove scienter. *Dawson*, 216 Ariz. at 102, ¶ 49.

Dawson v. Withycombe is illustrative. The plaintiff in *Dawson* asserted that various officers of a company had aided and abetted a third party's fraudulent scheme. The third party had procured a loan from the plaintiff on behalf of the officers' company. 216 Ariz. at 94, ¶ 14. In doing so, the third party made various misrepresentations to plaintiff to induce the loan. *Id.* at ¶¶ 12-13. When the loan was not repaid and the company declared bankruptcy, the plaintiff sued the defendants for aiding and abetting the third party's fraud. The court, however, found that the defendants had no knowledge of the fraudulent scheme. *Id.* at 103, ¶ 52. The only facts defendants were aware of was that the third party "was dishonest," "that [the company] was in poor financial condition," and that "[the defendants] nonetheless sent [the third party] out to procure a loan." *Id.* Thus, while the defendants' conduct indicated "poor judgment and risky business practices," their knowledge of the relevant facts "[did] not . . . rise to the level of scienter required for aiding and abetting, specifically that they were *aware* that [the third party] *did or would in fact* use fraudulent statements as a mean of procuring the loan." *Id.* Consequently, Plaintiff can only create a triable question regarding Clark Hill's scienter if evidence shows that Clark Hill actually knew that Chittick was breaching fiduciary duties owed to DenSco.

2. Substantial assistance element

A party "substantially assists" another when it provides "more than a little aid" such that the "assistance was a substantial factor in causing the plaintiff's harm." *Wells Fargo*, 201 Ariz. at 488, ¶ 46 and *Mann v. GTCR Golder Rauner, L.L.C.,* 351 B.R. 685, 699 (D. Ariz. 2006). In determining whether substantial assistance has occurred, the Court considers "the nature of the act encouraged, [Defendant's] presence or absence at the time of the tort, [Defendant's] relation to [the primary tortfeasor] and [Defendant's] state of mind." *Universal Engraving, Inc. v. Metal Magic, Inc.*, 2010 WL 4922703, at *11 (citations omitted).

Importantly, providing routine legal advice to a client cannot be considered "substantial assistance." For example, in *Art Capital Group, LLC v. Neuhaus*, 70 A.D.3d 605, 606 (N.Y. Sup. Ct. 2010), the court noted that "it is recognized that public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients." *See also Camp v. Dema,* 948 F.2d 455, 464 (8th Cir. 1991) ("[W]e will not easily find actions routinely engaged in by lawyers associated with these types of transactions to constitute substantial assistance without a greater showing of scienter."). Engaging in routine acts like documenting an agreement, transmitting papers, and engaging with other represented parties cannot be considered "substantial assistance without a showing of a *conscious* intent to substantially assist" the primary tort. *Camp*, 948 F.2d at 464. *See also, Schatz v. Rosenberg*, 943 F.2d 485, 497 (4th Cir. 1991) ("a plaintiff must prove that a defendant rendered 'substantial assistance' to the primary securities law violation, not merely to the person committing the violation").

B. Clark Hill neither knew that Chittick was breaching any fiduciary duties owed to DenSco nor "substantially assisted" those breaches.

1. Clark Hill negotiating and documenting the Forbearance Agreement does not constitute aiding and abetting.

Plaintiff alleges that Chittick breached its fiduciary duties to DenSco by "[p]ursuing a work out plan with Menaged that was not in the best interests of DenSco, and its investors and other creditors, instead of pursuing legal remedies against Menaged." [DSOF ¶ 69] Even assuming the truth of the allegation, Plaintiff has offered no evidence that Clark Hill knew the Forbearance Agreement was not in DenSco's best interests (and thus, that Chittick was breaching a fiduciary duty in the first place). To the contrary, Chittick, DenSco's sole owner and employee, averred that it was, stating that he had "been over this plan 100 times and the numbers and I truly believe this is the right avenue to fix the problem." [DSOF ¶ 29] In a subsequent meeting, Chittick represented that progress was being made, with 10% of the properties subject to the double liening having been cleared up "in last 45 days" with another 12 properties were in escrow. [DSOF ¶ 33]

Nor is there evidence that Clark Hill knew that Chittick's representations were incorrect, or that it had any reason to doubt their veracity. Prior to the double lien issues, Clark Hill reasonably believed that Chittick had operated DenSco, whom Clark Hill had represented for more than decade, without any major problems. Given this history, and the reality that Beauchamp did not have or require access to DenSco's financials, Clark Hill had no reason to doubt Chittick's business judgment regarding the efficacy of the workout.

Further, Clark Hill did not "substantially assist" Chittick in purportedly breaching his fiduciary duties to DenSco by negotiating the workout, the main provisions of which were already agreed upon prior to January 7, 2014. [DSOF ¶ 24] Clark Hill simply documented the agreement and negotiated with Menaged, Menaged's attorney, and often Chittick, for additional protections for DenSco. These are precisely the types of routine activities that lawyers engage in every day that courts refuse to classify as "substantial assistance."

For example, in *Schatz v. Rosenberg*, the court found that firm's participation in negotiating, documenting, and closing its client's deal did not provide substantial assistance to its client's securities law violations. There, the plaintiffs were paid $1.5 million in promissory notes for their interests in two companies purchased by a third company. 943 F.2d at 488. The promissory notes were personally guaranteed by the owner of the third company. *Id.* Financial documents supporting the promissory notes contained a number of misrepresentations about the owner's net worth. When the plaintiffs were never paid on their promissory notes, they sued the law firm that drafted the financial documents for aiding and abetting the owner's misrepresentations. *Id.* The Fourth Circuit, however, rejected the contention that the law firm had "substantially assisted" the misrepresentations by "participating in negotiations, drafting documents and conducting the Closing" because the law firm had simply "papered the deal". *Id.* at 497. Absent evidence that the law firm engaged in something more, with the requisite intent, it could not be considered to have "substantially assisted."

Like the law firm in *Schatz*, Clark Hill's primary role with regards to the Forbearance Agreement was putting down on paper what Chittick, in his business judgment, had already agreed to do, while participating in negotiations regarding some customary protections for DenSco. A Term Sheet outlining the main aspects of the oral plan was executed on January 17, 2014 – 10 days after Chittick told Clark Hill about the First Fraud – and the final Forbearance Agreement largely mirrored that initial Term Sheet. [DSOF ¶ 40] Further, to the extent that Clark Hill negotiated any of the particular provisions of the Forbearance Agreement, the evidence demonstrates that Clark Hill repeatedly sought to ensure that the agreement complied with DenSco's fiduciary duties to its investors, and implored Chittick to look out for DenSco's best interests. [DSOF ¶ 44][10] In short, documenting a workout plan that a client, in his business judgment, has already agreed to and implemented, does not constitute aiding and abetting. While Plaintiff may argue that Clark Hill should have advised as to alternative arrangements or counseled DenSco not to do business with Menaged, that 20/20 hindsight perspective does not amount to actual knowledge of a breach, nor substantial assistance.

2. Clark Hill did not aid and abet Chittick's reckless lending practices.

Plaintiff asserts that Clark Hill aided and abetted Chittick's reckless practice of sending DenSco funds directly into his borrowers' coffers, allowing both the First and Second Fraud to take place. [DSOF ¶ 70] There is simply no evidence of that. For one, funding loans to a trustee is recognized as the standard good business practice in the hard money lending industry. [DSOF ¶ 4] That Chittick had abandoned this guideline came to light only because of the First Fraud. There is no evidence, however, that Clark Hill knew Chittick was systematically violating basic lending protocols prior to January 2014. To the contrary, Chittick spelled out to Clark Hill his

[10] These efforts, documented in this Motion's accompanying Statement of Facts, included: (1) refusing to make edits to the Forbearance Agreement that Menaged and his attorney demanded that would have violated DenSco's fiduciary duties, (2) reminding Chittick of his own fiduciary duties, and (3) negotiating a carve out in the confidentiality clause of the Forbearance Agreement for disclosure to DenSco investors. [DSOF ¶ 44]

inexplicable lending protocols for the first time in his January 7, 2014 email. [DSOF ¶ 30] There is no conceivable reason for Chittick to include that detail but to educate Clark Hill on this previously secret practice. While Plaintiff will argue that Clark Hill *would have* been alerted to the issue if it had investigated the allegations in the FREO lawsuit, allegations about what Clark Hill should have done (a) support only a negligence claim and (b) admit that Beauchamp did not actually know DenSco was violating basic lending protocols until January 2014.[11]

There is similarly no evidence either that Clark Hill knew Chittick was continuing to provide loans directly to Menaged rather than a trustee after the First Fraud came to light, or that Clark Hill approved, and thereby assisted, that procedure. Although Chittick sent various emails to Beauchamp that explained his process of funding loans directly to borrowers, Beauchamp told Menaged that funding loans to a borrower was a process "that did not work." [DSOF ¶ 31][12] Beauchamp also testified that he repeatedly told Chittick that DenSco had to fund loans to a trustee rather than a borrower. [DSOF ¶ 32] There is not a single piece of written evidence wherein Clark Hill even suggests that DenSco continue lending directly to Menaged.[13] As Clark Hill attorney Daniel Schenk testified, "[Clark Hill] did not know what Denny was going to . . . still go[] forward with his practices." [DSOF ¶ 39] Without evidence of knowledge or substantial assistance, the claim that Clark Hill aided and abetted DenSco's grossly negligent lending procedures fails.

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[11] In any event, the Freo lawsuit did not give cause to investigate DenSco's lending procedures.

[12] This should have been obvious to Chittick. His January 7, 2014 email to Beauchamp was a tacit admission that his lending practices had caused the First Fraud. [DSOF ¶ 30]

[13] The one exception is Chittick's suicide note to his investors, wherein he attempts to blame Beauchamp for the Second Fraud, stating that "I talked to Dave about this in January and he was in agreement with it as long as I received copies of checks and receipts showing that I was the one paying the trustee." Of course, in that same letter, Chittick also tried to blame his investors by asserting that they knew, and approved of, his decision to fund loans directly to his borrowers and his decision to concentrate DenSco's lending with Menaged in 2013. That is a blatant fabrication, as testified to by numerous investors. Chittick also attempts to save face by asserting that he devoted all his financial resources to saving DenSco. That is also a blatant fabrication. Chittick actually looted his company for millions of dollars. His suicide letters are untrustworthy attempts at exonerating himself, and should not be considered evidence. *See* Clark Hill's May 15, 2019 Motion in Limine To Preclude Use of Documents Identified In Plaitniff's Rule of Evidence 807(b) Notices.

3. Clark Hill did not aid and abet DenSco's failure to hire more employees.

Plaintiff asserts that Clark Hill is liable because it failed to advise DenSco that it needed to hire more employees. [DSOF ¶ 70]. That assertion only serves to highlight Plaintiff's propensity to view all of Clark Hill's actions with the benefit of hindsight. There is, in fact, no evidence that Clark Hill was aware that DenSco did not have the "manpower and resources necessary to effectively manage DenSco's ever-increasing loan volume," as Plaintiff alleges. [*Id.*] Plaintiff's expert himself acknowledges that at the time the 2011 POM was issued, DenSco had funded over $300 million in loans without any significant issues – despite being a "One-Man Shop." [DSOF ¶ 2] More critically, there is no evidence that DenSco's lax lending practices or issues with Menaged arose due to a lack of manpower. Chittick had used these same lending practices years before any alleged insufficiencies in manpower before 2014. [DSOF ¶ 30] [14]

There is similarly no evidence to suggest that Clark Hill, after the First Fraud was revealed, should have concluded that Chittick had become incapable of running his business. Nor is there evidence that Clark Hill had access to DenSco's financial records or loan portfolio to evaluate whether Chittick could manage DenSco's operations, even if Clark Hill (a) had determined that such an assessment was necessary and (b) could have rendered such an assessment in the first place. Clark Hill after all, was only DenSco's securities lawyer. The claim fails.

4. Clark Hill did not aid and abet Chittick by not forcing him to investigate Menaged's "cousin" story or where the funds taken by the "cousin" had gone.

Plaintiff alleges that Chittick breached his fiduciary duties by "failing to question, much less investigate, the veracity of Menaged's claim that his 'cousin' had caused" the losses associated with the First Fraud and "failing to investigate where the funds supposedly taken by Menaged's 'cousin' had gone." [DSOF ¶ 70] Yet again, Plaintiff has not come forward with any evidence that Clark Hill knew that the "cousin" story floated by Menaged was dubious. Chittick

[14] The Wertlieb Report itself does not conclude that it was impossible for Chittick to manage DenSco's operations. It only explains that "the volume of business being conducted by DenSco, and the responsibilities of a single individual to adequately manage that business, are quite striking." [DSOF ¶]

himself appears to have believed the "cousin" story up until his death, as did Greg Reichmann, another hard money lender whose properties were tied up in the First Fraud. [DSOF ¶ 23]

In any event, contemporaneous notes from the initial meeting between Beauchamp, Chittick, and Menaged evidence that the three men discussed where the money had gone, and that Menaged would pursue his cousin once he determined where the money was. [DSOF ¶ 33] As David Beauchamp testified, he asked Chittick if had looked into Menaged and his explanation. Chittick told him he had. [DSOF ¶ 35][15] There is no evidence that Chittick asked Clark Hill to perform any investigation of where the money had gone, or that Chittick had any reservations about the "cousin" story. While Plaintiff has claimed that Clark Hill should have either conducted its own investigation at the client's expense or terminated the relationship, that does not suffice to establish the requisite scienter. Because Clark Hill did not know that the "cousin" story was false, it could not have "substantially assisted" Chittick nor caused the breach.

5. Clark Hill did not aid and abet DenSco's sale of securities to investors after January 2014 without full disclosure.

Plaintiff argues that "Clark Hill aided and abetting Chittick's sale of promissory notes after January 2014 without first issuing a new POM." [DSOF ¶ 70] Plaintiff's assertions fail to state a claim for aiding and abetting.

First, there is no evidence that Clark Hill had any knowledge whether DenSco issued an updated POM and/or continued to solicit investments in the company after May 2014, or substantially assisted either action. Beauchamp testified that when he terminated his representation of DenSco in May 2014, Chittick averred that he would obtain new counsel to advise DenSco. [DSOF ¶ 56] While Plaintiff asserts that Clark Hill did not terminate the representation in May 2014, there is no dispute that Clark Hill did no further work for DenSco

[15] Chittick lied to Beauchamp about his relationship with Menaged. Although he told Beauchamp about the double liening issue Menaged revealed in November 2013, he failed to mention that *the same thing had happened more than year earlier*, in September 2012, when AFG alerted Chittick to at least ten double liened properties. That would have been crucial information for Beauchamp to know in evaluating the veracity of Menaged's story.

(other than minor work to clean up the Forbearance Agreement through June 2014) and otherwise never learned that DenSco had not issued an updated POM prior to Chittick's death. In fact, when Clark Hill did some limited work on behalf of DenSco again in 2016, Chittick lied and told Beauchamp that DenSco had issued a new POM. [DSOF ¶ 59]

Second, while Clark Hill was aware that DenSco had not issued an updated POM between January and May 2014, there is no evidence that Clark Hill knew that Chittick was selling promissory notes to investors during that time without providing the disclosures required under Regulation D of the Securities Act of 1933 or substantially assisted that action.[16] Beauchamp testified repeatedly that he instructed Chittick to provide necessary verbal disclosures to any and all investors that were either investing new money in DenSco or rolling over prior investments. [DSOF ¶ 37] Contemporaneous emails from Chittick to Beauchamp corroborate that Chittick understood this obligation. [DSOF ¶ 38] While Plaintiff asserts that Clark Hill should have known that Chittick's representations were inaccurate, as noted several times in this Motion, what Clark Hill "should have known" is irrelevant for establishing scienter for aiding and abetting. *See Dawson*, 216 Ariz. at 102, ¶ 49.

6. Clark Hill did not aid and abet Chittick's breaches by allowing him not to update the 2011 POM.

Plaintiff's asserts that Clark Hill aided and abetted Chittick by allowing him not to update his 2011 POM while continuing to sell securities from September 2013 through December 2013. This likewise misses the mark.[17]

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[16] The failure to update the POM does not alone constitute a breach of fiduciary duty (discussed in more detail below). Instead, the critical inquiry is whether investors were provided with proper and accurate disclosures, either in writing or orally, prior to investing money with DenSco. There is no dispute that under the law, Chittick could make oral disclosures to DenSco investors in lieu of a written document. [DSOF ¶ 37]

[17] Specifically, Plaintiff asserts Chittick breached his fiduciary duties to DenSco by "instructing Clark Hill not to do any work on a new POM while causing DenSco to continue selling promissory notes between September and December 2013" and further "instructing Clark Hill to not do more work on a new POM other than the limited work that Clark Hill performed in May 2014 to prepare a new POM."

First, there is no evidence that Clark Hill knew that DenSco was breaching its fiduciary duties by not updating the 2011 POM. The failure to update the POM alone did not constitute a breach of fiduciary duty. As Plaintiff acknowledges, failure to update the POM would constitute a breach of fiduciary duty only if DenSco was not providing the necessary oral disclosures [DSOF ¶ 37] Plaintiff has not identified any evidence that Clark Hill knew that Chittick was not providing those oral disclosures to investors prior to January 7, 2014.

Plaintiff hangs his hat on Beauchamp's assertion that the Freo lawsuit would need to be included in a POM update. [DSOF ¶ 18] That update, however, would merely have noted that DenSco was involved in litigation regarding a single loan, just as DenSco provided updates on the status of all its loans that were either foreclosed on or not collected. [DSOF ¶¶ 16, 19] Plaintiff imagines that this disclosure would have included a larger revelation about DenSco's lending procedures, but as set forth above, the Freo lawsuit did not concern lien priority issues and would not have put anyone on notice of systemic lending problems.

Even assuming that this information was material, there is no evidence that Clark Hill knew that DenSco was failing to provide this uncontroversial information regarding the Freo lawsuit to investors. The evidence establishes that Chittick understood DenSco's disclosure obligations, and Clark Hill believed that DenSco would provide sufficient verbal disclosures regarding this uncontroversial suit relating to a single DenSco loan. Chittick's business decision to wait to update the 2011 POM is insufficient for inferring that Clark Hill knew that the 2011 POM contained material misrepresentations or that DenSco was breaching its fiduciary duties by failing to provide full disclosures. *See Stern,* 2009 WL 3352408, at *7.

Second, Clark Hill did not "substantially assist" Chittick in delaying the issuance of the POM once it "expired" in the summer of 2013. To the contrary, Clark Hill began to update the POM in May 2013 and continued to make revisions to it through June and July 2013. [DSOF ¶ 21] Chittick then instructed Beauchamp to stop updating the POM in August 2013, despite Clark Hill's advice to the contrary, and refused to provide the information necessary to update the POM.

[*Id.*] Clark Hill could not force DenSco to provide Clark Hill with the information necessary to update the POM. While Plaintiff takes the position that Clark Hill should have threatened to quit as counsel instead of continuing to counsel the client regarding its fiduciary duties, that argument will be dealt with factually and legally within a negligence framework considering Beauchamp's lack of knowledge regarding any breach of fiduciary duty. Clark Hill did not knowingly aid and abet Chittick's breach of fiduciary duty by allowing DenSco to not update the 2011 POM.

III. CONCLUSION

For the foregoing reasons, Defendants Clark Hill and David Beauchamp respectfully request that this Court dismiss Plaintiff's claims that either defendant aided and abetted Denny Chittick's breach of fiduciary duties to DenSco.

DATED this 15th day of November, 2019.

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