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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 RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON JOINT & SEVERAL LIABILITY** (Assigned to the Honorable Daniel Martin) (Oral Argument Requested)

There is ample evidence that Defendants Clark Hill and David Beauchamp "consciously agreed" with Denny Chittick and Scott Menaged to breach fiduciary duties to DenSco and investors, and thus acted "in concert" with them for purposes of A.R.S. § 12-2506(D)(1). For example: In January 2014, Beauchamp agreed with Chittick and Menaged to hide a multi-million-dollar fraud from DenSco's investors, even though he knew the investors were continuing to invest based on a long-outdated disclosure. And in the following months, Beauchamp worked tirelessly with Chittick and Menaged to develop a "work-out plan" which he knew ran contrary to DenSco's interests and instead served Chittick's and his own personal interests.[1]

Defendants tell a different story. They try to portray Beauchamp as a lawyer who intended to protect DenSco and did not know what Chittick and Menaged were doing. But the jury can reject this portrayal and conclude, instead, that Beauchamp acted "in concert" with Chittick and Menaged to breach fiduciary duties.

I. DEFENDANTS IGNORE GENUINE ISSUES OF MATERIAL FACT.

Summary judgment must be denied because this case is filled with genuine disputes of material fact. *See* Ariz. R. Civ. P. 56(a). Defendants ignore key evidence and draw inferences favoring themselves even though a jury could reasonably conclude otherwise. The Receiver explains these disputes more fully in the Controverting Statement of Facts accompanying this brief ("CSOF") and in the concurrently filed Response to Defendants' Motion for Summary Judgment re Aiding & Abetting ("Response re Aiding & Abetting"). Below are some highlights.

A. The jury can conclude that Clark Hill and Beauchamp consciously agreed with Chittick not to update the expired written disclosure to DenSco investors, even though they knew that investors were continuing to invest.

Before 2013, DenSco issued written disclosures called Private Offering Memoranda ("POMs") to its investors every two years, based on Beauchamp's advice.

[1] These are just examples. As explained below, Clark Hill and Beauchamp also entered into other conscious agreements, some of which were with Chittick only.

(CSOF ¶¶ 82-84.) Beauchamp knew that the vast majority of DenSco's investors purchased two-year promissory notes and "rolled over" their investments by purchasing a new two-year note when their existing note matured. (*Id.* ¶¶ 89-90.)

Beauchamp prepared DenSco's POMs in 2003, 2005, 2007, 2009, and 2011. (CSOF ¶¶ 83, 85.) Each POM assured investors that the POM would be updated every two years. (*Id.* ¶¶ 95, 99.) Each POM also warned investors that the only disclosures they could rely on were written updates to the POM itself. (*Id.* ¶ 100.)

The 2011 POM expired on July 1, 2013. But Beauchamp never prepared an updated POM. (CSOF ¶¶ 97-98, 107.) Beauchamp claims that this was because Chittick asked him to stop working on the POM, during an August 2013 phone call. (DSOF ¶ 21.) That claim is contradicted by the record. (*See* Response re Aiding & Abetting at 2.)

But even if the jury believes that Chittick asked Beauchamp to stop working on the POM, the jury can conclude that Beauchamp consciously agreed to do so even though he knew that DenSco's investors were continuing to invest. Clark Hill and Beauchamp knew that, in the six months after the 2011 POM expired in July 2013, many DenSco investors would purchase new promissory notes. (CSOF ¶¶ 143, 148, 188-190, 230-232; *see* Response re Aiding & Abetting at 2-3.) Clark Hill and Beauchamp also knew that Chittick's fiduciary duties required updating the POM every two years *before* selling new promissory notes. (*Id.* ¶¶ 82-84, 89-90, 95-100, 109, 140, 143, 199-200, 224-29.)

Thus, the jury can conclude that Beauchamp consciously agreed with Chittick to stop working on the POM, in breach of Chittick's fiduciary duties.

B. The jury can conclude that Clark Hill and Beauchamp, upon learning of the First Fraud, consciously agreed with Chittick and Menaged to hide the fraud from DenSco's investors, even though they knew that investors were continuing to invest.

Beauchamp admits that he learned of the massive "First Fraud" against DenSco by January 7, 2014. (DSOF ¶ 29.)[2] Beauchamp met with Chittick and Menaged two

[2] The parties disagree on when exactly Beauchamp learned of the First Fraud. (*See* Response re Aiding & Abetting at 3 n.2.)

days later, on January 9, 2014. (DSOF ¶ 33.) The jury can conclude that, at that meeting, Beauchamp consciously agreed with Chittick and Menaged to hide the fraud from DenSco's investors. Evidence shows that the following things happened at that meeting:

1. Beauchamp learned that Chittick was *not* planning to disclose the fraud to investors. Here is how Menaged recalls that discussion:

> Q. Did Mr. Beauchamp say anything when you were in the room about Denny's obligation to disclose that this problem had occurred in his lending practices?
>
> A. He did. ***He said to him, "We need to draft a letter to the investors to advise them of the situation."***
>
> ***And Denny said, "That's not happening."***
>
> And he said, "Why is that?"
>
> And he said, "Because there will be a run on the bank and then at that point I can't pay off all these loans, and so I'm going to take care of the problem myself." . . .
>
> ***And then at that point Beauchamp said, "Well, okay, if that's what we're going to do, then we definitely need to work very closely on this forbearance agreement to protect you from fraud***, protect you from the Arizona Corporate Commission, protect you from the AG's office."

(CSOF ¶ 347(a) (emphasis added).)

2. Beauchamp agreed that *he* would not disclose the fraud to investors, even though he had a separate obligation to do so. Here is how Menaged recalls that discussion:

> Q. Did Mr. Beauchamp ever say to Denny, while you were in the room or present, that he, Mr. Beauchamp, had an obligation to alert Denny's investors of what happened?
>
> A. . . . Yes. ***He said, "You do understand that you're putting me in a very awkward and bad position, because I do have an obligation to advise the investors."***
>
> ***And Denny said, "I didn't under -- I didn't know that, but I would appreciate it if you did not advise anybody and just prepare this agreement so we can move on from this."***

> ***And at that point I knew that he was not advising the investors, because Beauchamp said, "Okay, Denny, I will do what you want."***

(CSOF ¶ 347(b) (emphasis added).)

REDACTED

In addition, evidence from after the January 9, 2014 meeting confirms that Beauchamp consciously agreed with Chittick and Menaged to hide the fraud from DenSco's investors, even though he knew investors were continuing to invest. For example:

1. On January 10, 2014, Beauchamp spoke with Chittick on the phone, and Beauchamp's notes state: "***Denny does not want to talk to his investors until he is ready*** – will not take long." (CSOF ¶ 349 (emphasis added).)
2. That day, Chittick wrote in his corporate journal: "***I can raise money according to Dave***." (CSOF ¶ 350 (emphasis added).)
3. On January 12, 2014, Chittick told Beauchamp in an email that he had "spent the day contacting every investor that has told me they want to give me more money" and expected to raise ***between $5 and $6 million*** in the next ten days. Beauchamp responded: "***You should feel very honored that you could raise that amount of money that quickly***." (CSOF ¶¶ 351-52 (emphasis added).)
4. On February 21, 2014, Beauchamp spoke with Chittick, and his notes state:

"***cannot be ready to tell everything***." (CSOF ¶ 357 (emphasis added).)

5. That day, Chittick wrote in the journal: "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." (CSOF ¶ 312 (emphasis added).)

6. On February 25, 2014, Chittick told Beauchamp in an email: "what both of us are really concerned about is that ***when [I] tell my investors the situation, they request their money back***." (CSOF ¶ 314 (emphasis added).)

REDACTED

8. On March 13, 2015, Chittick wrote in the journal: "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.***" (CSOF ¶ 381 (emphasis added).)

9. On March 24, 2015, after meeting with Beauchamp, Chittick wrote in the journal: "I had lunch with Dave Beauchamp. . . . ***He said he would give me 90 days.*** . . . ***I'm going to slow down the whole memorandum process too. Give us as much time as possible to get things in better order.***" (CSOF ¶ 383 (emphasis added).)

10. In a suicide note to his sister, Chittick explained: "***I talked Dave my attorney into allowing me to continue without notifying my investors.*** Shame on him. He shouldn't have allowed me. ***He even told me once I was doing the right thing***." (CSOF ¶ 410 (emphasis added).)

REDACTED

Unfortunately, the agreement to hide the fraud from DenSco's investors fulfilled its purpose. Investors did not learn of the fraud until years later, after Chittick committed suicide and the Receiver was appointed. (CSOF ¶ 407.) The investors have testified that, had they known the truth, they would not have continued investing. (*Id.*)[3]

From this and other evidence, the jury can conclude that Clark Hill and Beauchamp consciously agreed with Chittick and Menaged to hide the fraud from DenSco's investors, despite knowing that investors were continuing to invest.

[3] Clark Hill and Beauchamp have elsewhere claimed that they thought Chittick was giving "verbal disclosures" to investors about the fraud. That claim is contradicted by the above evidence and other evidence. (*See* Response re Aiding & Abetting at 7.)

C. The jury can conclude that Clark Hill and Beauchamp, upon learning of the First Fraud, consciously agreed with Chittick and Menaged to develop a work-out plan which they knew ran contrary to DenSco's interests.

Clark Hill and Beauchamp also agreed with Chittick and Menaged to develop a "work-out plan" which they knew was contrary to DenSco's interests. Clark Hill and Beauchamp try to minimize their role in this process with two claims. First, they claim that the plan was formed before they got involved, so all they did was "document" it. (Mot. at 5-6, 11.) Second, they claim that they were trying to "protect" DenSco. (*Id.* at 6, 12-13.) But the jury can reject these claims, because evidence contradicts them.

1. The jury can conclude that Clark Hill and Beauchamp actively developed, and substantially modified, a work-out plan with Chittick and Menaged.

On January 7, 2014, Chittick told Beauchamp that he and Menaged had made a "plan" to work out of the double-lien problem caused by the First Fraud. (CSOF ¶¶ 248, 257-63.) At that time, the plan was simple: Menaged would sell each double-liened property to pay off both lenders—DenSco and the other lender with a lien—but the other lender would be paid first, with interest, while DenSco would let its interest accrue. (*Id.* ¶¶ 257-58.) Menaged would contribute $4 to $5 million of his own money to the endeavor, and DenSco would loan Menaged another $1 million and increase its loan-to-value ratios up to 95% of property values. (*Id.* ¶¶ 257-58, 285.)

On January 9, 2014, Beauchamp met with Chittick and Menaged to flesh out the plan. According to Menaged, it was *Beauchamp* who proposed a formal agreement:

> So he [Beauchamp] then left the room. I remember he said he needed to -- or I remember he said he needed to go downstairs and get fresh air and clean up, and which he did, because he was a mess. His shirt was all wet, and it really was disgusting.
>
> And then he came back up, came back upstairs. ***He said, "Okay, I have had some time to relax and think about the situation," he said, "and here's what we're going to do: We are going to draw up an agreement to protect you and Denny from the situation."***

(CSOF ¶ 347(d) (emphasis added).) REDACTED

After the January 9, 2014 meeting, Beauchamp spent *three months* developing what eventually became a 24-page "Forbearance Agreement," which Chittick and Menaged signed on April 16, 2014. (CSOF ¶¶ 286-337.) Beauchamp spent 274.8 hours on this project during that time. (*See* Response re Aiding & Abetting at 9 & n.3.) Beauchamp did much more than "document" a pre-existing agreement. He continually advised Chittick and negotiated with Menaged (and sometimes Menaged's lawyer) about the *content* of the agreement. (*See, e.g.*, CSOF ¶¶ 292, 295-332, 408, 411.)

Moreover, Beauchamp's work led to dramatic changes to the initial "plan" that Chittick had described. REDACTED These changes were so frequent that Menaged told Chittick, in an April 2014 email, that signing the agreement would help "***not to have Dave change it again and again with every move we make***." (*Id.* (emphasis added).) For example, here are three ways in which the initial "plan" changed:

1. The initial "plan" was for Menaged to pay off the other lenders and contribute $4 to $5 million of his own money. But the final Forbearance Agreement merely required Menaged to use "good faith efforts" to do so. (*See* Response re Aiding & Abetting at 10.)
2. The initial "plan" was for DenSco to loan Menaged another $1 million and increase its loan-to-value ratios up to 95% of property values. But the final Forbearance Agreement required DenSco to loan Menaged another $6 million and increase its loan-to-value ratios up to 120% of property values. (*See id.* at 10.)
3. The initial "plan" was silent on what DenSco should tell investors. But the final Forbearance Agreement included a confidentiality provision requiring DenSco to

use "good faith efforts to ***limit such disclosure as much as legally possible*** pursuant to the applicable SEC Regulation D disclosure rules." (*See id.* at 10-11.) With these and other changes, Beauchamp approved the final Forbearance Agreement. As Chittick later wrote to his sister: "Dave, my lawyer, negotiated the work out agreement and endorsed the plan." (CSOF ¶ 411.)

Based on this and other evidence, the jury can conclude that Clark Hill and Beauchamp actively developed, and substantially modified, the work-out plan with Chittick and Menaged. They did not just "document" it. REDACTED

2. The jury can conclude that Clark Hill and Beauchamp knew that the work-out plan with Chittick and Menaged ran contrary to DenSco's interests.

Clark Hill and Beauchamp's client was DenSco, not Chittick. Their engagement letter specified that they were representing DenSco only, not Chittick in any capacity. (CSOF ¶¶ 194-95.) Yet the work-out plan that Clark Hill and Beauchamp developed was not intended to benefit DenSco. Instead it was intended to benefit Chittick and Beauchamp, in breach of Chittick's duties to DenSco and investors.

Key to the work-out plan was that no one would disclose the First Fraud or the work-out plan itself to DenSco's investors, at least not for a while. As explained above, Beauchamp agreed to this part of the plan during the January 9, 2014 meeting, and acted accordingly. (*See* Part I.B above.) Plainly, non-disclosure was contrary to DenSco's interests. Chittick had a fiduciary duty to disclose material information to DenSco's investors, as was done in 2003, 2005, 2007, 2009, and 2011, so that investors could make informed decisions. Clark Hill and Beauchamp knew this. (*See* Part I.A above.)

Instead, non-disclosure was intended to serve Chittick's and Beauchamp's own interests. Chittick had an interest in preventing investors from learning that his lending practices had led to the First Fraud. And Beauchamp had an interest in preventing investors from learning that he had failed to update the 2011 POM before it expired on

July 1, 2013, which he knew had been causing investors to invest based on increasingly outdated and false information. (*See* Parts I.A and I.B above.)

Other parts of the work-out plan ran contrary to DenSco's interests too, and Clark Hill and Beauchamp knew this.[4] For example:

1. Having Menaged pay off other lenders before DenSco would, in effect, subordinate DenSco's liens, which would violate DenSco's promise that its loans were in first position. (*See* Response re Aiding & Abetting at 12.)
2. Having Menaged merely use "good faith efforts" to contribute his own money and pay off the other lenders would, in effect, enable him to avoid paying off the other lenders. (*See id.*)
3. Requiring DenSco to loan Menaged another $6 million and increase its loan-to-value ratios up to 120% of property values would violate DenSco's promises to investors regarding the diversity and security of its loan portfolio. (*See id.*)

Moreover, Beauchamp's claim that he thought the work-out plan was in DenSco's interests contradicts what *he said* at the time. (*See, e.g.*, CSOF ¶¶ 299-320.) For example, he told Menaged that the agreement was "***to protect you and Denny from the situation.***" (CSOF ¶ 347(d) (emphasis added).) And he told Chittick in a February 9, 2014 email that the agreement "has to have the necessary and essential terms ***to protect you from potential litigation from investors and third parties.***" (CSOF ¶ 304 (emphasis added).)

Based on this and other evidence, the jury can conclude that Clark Hill and Beauchamp knew that the work-out plan they developed would not benefit DenSco but would instead serve Chittick's and Beauchamp's own interests in covering up their misdeeds, in breach of Chittick's fiduciary duties to DenSco and its investors.

D. The jury can conclude that Clark Hill and Beauchamp, after learning of the First Fraud, consciously agreed with Chittick and Menaged that Chittick could continue giving DenSco's loan money directly to Menaged rather than a trustee.

[4] Expert Neil Wertlieb observes that it is "unclear" how the Forbearance Agreement was supposed to benefit DenSco at all. (CSOF ¶ 339.)

By January 2014, Clark Hill and Beauchamp knew that one cause of the First Fraud was that Chittick had given loan money directly to Menaged instead of a trustee, in violation of DenSco's promises to investors. (DSOF ¶¶ 3-4, 30.) But the "work-out plan" required DenSco to continue loaning to Menaged. (*See* Part I.C above.) Thus, Clark Hill and Beauchamp agreed with Chittick and Menaged that Chittick could continue giving DenSco's loan money directly to Menaged, as long as Menaged provided written confirmation that the money was then given to a trustee. For example:

1. In a recorded conversation, Chittick told Menaged that Beauchamp "***agreed that it was okay that I wired it to you, as long as you provided copies of the check.***" (CSOF ¶ 400(a) (emphasis added).)
2. Menaged testified: "***Beauchamp told [Chittick] that if you were going to continue to wire the borrower, to get a copy of the check***, or something like that." (CSOF ¶ 400(b) (emphasis added).)
3. In a suicide note to DenSco's investors, Chittick wrote: "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***." (CSOF ¶ 399(a) (emphasis added).)
4. In a suicide note to his sister, Chittick wrote: "We went to Dave, and ***he gave some constraints on how we were to operate.*** I have all the documentation. ***I received copies of checks made out to trustees, receipts from the trustees***." (CSOF ¶ 399(b) (emphasis added).)

Thus, the jury can conclude that Clark Hill and Beauchamp consciously agreed with Chittick and Menaged as to the lending practice that led to the Second Fraud.[5]

[5] The jury can also conclude that Clark Hill and Beauchamp continued representing DenSco for years after the First Fraud, and they attempted to cover up their misdeeds after Chittick's suicide. (*See* Response re Aiding & Abetting at 14-15 & n.5.)

II. THE JURY SHOULD DECIDE WHETHER DEFENDANTS "ACTED IN CONCERT" WITH CHITTICK AND MENAGED.

The fact disputes in this case raise a triable question as to whether Clark Hill and Beauchamp "acted in concert" with Chittick and Menaged under A.R.S. § 12-2506(D)(1).

A. The jury can conclude that Clark Hill and Beauchamp "consciously agreed" with Chittick and Menaged (and, at times, with Chittick only) to breach Chittick's fiduciary duties to DenSco and its investors.

"Acting in concert" requires "entering into a conscious agreement to pursue a common plan or design to commit an intentional tort." A.R.S. § 12-2506(F)(1). As Defendants point out, a "conscious agreement" is similar to a civil conspiracy, in which two or more persons "agree to accomplish an unlawful purpose or to accomplish a lawful objective by unlawful means, causing damages." (Mot. at 9-10 (quoting *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 489 (2002))). A conspiracy "may be inferred from the nature of the acts, the relationship of the parties, the interests of the conspirators, or other circumstances." *Mohave Elec. Co-op., Inc. v. Byers*, 189 Ariz. 292, 306 (App. 1997) (citation omitted).

As explained above, the jury can conclude that:

1. In 2013, Clark Hill and Beauchamp "consciously agreed" with Chittick not to update the expired written disclosure to DenSco investors, even though they knew that investors were continuing to invest. (Part I.A above.)
2. Starting on January 9, 2014, Clark Hill and Beauchamp "consciously agreed" with Chittick and Menaged to hide the First Fraud from DenSco's investors, even though they knew that investors were continuing to invest. (Part I.B above.)
3. Starting on January 9, 2014, Clark Hill and Beauchamp "consciously agreed" with Chittick and Menaged to develop a "work-out plan" which they knew ran contrary to DenSco's interests. (Part I.C above.)
4. After January 9, 2014, Clark Hill and Beauchamp "consciously agreed" with Chittick and Menaged that Chittick could continue giving DenSco's loan money

directly to Menaged, in violation of DenSco's loan documents. (Part I.D above.) Each of these was a conscious agreement to breach Chittick's fiduciary duties to DenSco and its investors, including duties of loyalty, care, and disclosure.[6]

Defendants' arguments are mostly limited to the third agreement listed above, and mostly based on disputed factual claims. (Mot. at 8-13.) First, Defendants claim that all they did was "memorialize" a work-out plan that Chittick and Menaged had "already substantially agreed upon and partially performed," while "attempting to provide additional protection for DenSco." (Mot. at 11-12.) But the jury can reject those claims and can conclude, instead, that Clark Hill and Beauchamp played an active role in developing and modifying the work-out plan, and that Clark Hill and Beauchamp intended to protect Chittick and Beauchamp, not DenSco. (*See* Part I.C above.)[7]

Second, Defendants claim that they negotiated the work-out plan "against Menaged who was represented by counsel for the majority of the negotiation." (Mot. at 12-13.) But the jury can conclude otherwise. Although Beauchamp was against *some* of Menaged's proposals in the negotiation, Beauchamp agreed to *many others*, including (1) having Menaged pay off other lenders before DenSco, (2) having Menaged merely use "good faith efforts" to contribute money and pay off other lenders, (3) increasing DenSco's loans to Menaged, (4) increasing the loan-to-value ratios of DenSco's loans to Menaged, and (5) adding a confidentiality provision limiting DenSco's disclosure to investors. (*See* Part I.C above.) Similarly, although Menaged was represented by counsel for *some* of the negotiations, he was *not* represented during crucial times, including the January 9, 2014 meeting and after February 25, 2014. (CSOF ¶¶ 280-85, 313, 322.)

Third, Defendants claim that they tried to protect DenSco by advising Chittick to

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[6] The Receiver explained these duties in the Prima Facie Case Motion (at 7-8).

[7] Moreover, it does not matter whether Chittick and Menaged entered into an agreement before Clark Hill and Beauchamp did. *See* 15A C.J.S. *Conspiracy* § 23 (Dec. 2019) ("To render a person civilly liable for injuries resulting from a conspiracy of which he or she is a member, it is not necessary that the person join the conspiracy at the time of its inception . . . .").

"make disclosures" to investors. (Mot. at 13.) But the jury can reject that claim and conclude, instead, that Clark Hill and Beauchamp advised Chittick that he could *delay* disclosing to investors even though he was raising money. (*See* Part I.B above.)

Defendants' legal authorities are inapposite. They rely on an unpublished Ninth Circuit case in which construction workers claimed that the government "acted in concert" with a subcontractor to harm them. *Denson v. U.S.*, 104 F.3d 365 (9th Cir. 1996). But in that case, there was no evidence of any agreement to commit an intentional tort; rather, the government merely agreed "to provide a safe work site." *Id.* Here, in contrast, the jury can conclude that Clark Hill and Beauchamp entered into a conscious agreement with Chittick and Menaged to breach Chittick's fiduciary duties.[8]

B. The jury can conclude that Clark Hill and Beauchamp were "substantially certain" that their actions would cause DenSco's investors to invest based on materially inaccurate information and would otherwise harm DenSco.

"Acting in concert" applies to only intentional torts. A.R.S. § 12-2506(F)(1). Thus, an agreement to do something negligent or reckless is not enough. To act in concert, persons must be "substantially certain" that their actions will have a harmful consequence. *Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 100 ¶ 17 (App. 2008).

Here, the jury can conclude that:

1. Clark Hill and Beauchamp were "substantially certain" that DenSco's investors would not know about the First Fraud or other material facts even though they were continuing to invest. (Parts I.A and I.B above.)
2. Clark Hill and Beauchamp were "substantially certain" that, if DenSco's investors had known about the First Fraud or other material facts, they would not have continued investing. As Chittick told Beauchamp: if investors find out, "there

[8] Defendants also cite *Richards v. Badger Mut. Ins. Co.*, 297 Wis. 2d 699 (App. 2006), which is inapposite. There, a 31-year-old bought alcohol for a 19-year-old, who then drove while drunk and killed someone. *Id.* at 704. Again, there was no evidence that the 31-year-old "agreed" with the 19-year-old to drive while drunk. *Id.* at 719.

will be a run on the bank." (Part I.B above.)

3. Clark Hill and Beauchamp were "substantially certain" that the work-out plan they developed would be contrary to DenSco's interests. (Part I.C above.)

4. Clark Hill and Beauchamp were "substantially certain" that Chittick would continue giving DenSco's loan money directly to Menaged, in violation of DenSco's promises to investors. (Part I.D above.)

Each of these is a harmful consequence that Clark Hill and Beauchamp were substantially certain of and therefore intended.

Defendants' counter-arguments are either irrelevant or based on fact disputes. First, Defendants argue that they did not know about the First Fraud until after it occurred and did not know about the Second Fraud until after Chittick's suicide. (Mot. at 14.) That argument misconstrues the Receiver's claims. The Receiver is not claiming that Clark Hill and Beauchamp consciously agreed to commit the First Fraud or the Second Fraud. Rather, the Receiver is claiming that Clark Hill and Beauchamp consciously agreed to breach Chittick's fiduciary duties to DenSco and its investors.

Second, Defendants claim that they did not know their actions would "result in the financial losses that DenSco experienced." (Mot. at 15-16.) But that claim is based on fact disputes, such as the following:

- Defendants claim that they did not know Menaged would "fail to perform" under the Forbearance Agreement. (Mot. at 15.) But the jury can conclude that, by merely requiring Menaged to use "good faith efforts," they intentionally enabled him not to perform. (*See* Part I.C above.) Besides, DenSco's own obligations under the Forbearance Agreement violated its promises to investors. (*See id.*)
- Defendants claim that they did not know Chittick would "continu[e] to wire the funds directly to Menaged." (Mot. at 15.) But the jury can conclude otherwise, based on evidence that Defendants agreed to this method. (*See* Part I.D above.)
- Defendants claim that the work-out plan was "meant to remedy the damages associated with the First Fraud." (Mot. at 16.) But the jury can conclude

otherwise, based on evidence that Defendants intended to protect Chittick and Beauchamp, not DenSco. (*See* Part I.C above.)

Moreover, apart from fact disputes, Defendants' claim is irrelevant because "acting in concert" does not require that they knew, in advance, the "financial losses" DenSco would incur. Rather, "acting in concert" requires only that they agreed to an intentional tort and thus were substantially certain of a harmful consequence. *Mein*, 219 Ariz. at 101 ¶ 17; *see also, e.g., Granewich v. Harding*, 329 Or. 47, 59 (1999) (allegations that lawyers entered into agreement with corporation's directors to breach fiduciary duties sufficed to state claim for "joint liability on the part of defendant lawyers as persons acting in concert"); Restatement (Third) of Torts: Liab. for Econ. Harm § 27 TD, cmt. c (2018) ("The defendant held liable as part of the conspiracy must have intended to bring about *the tortious wrong* that was the subject of the agreement." (emphasis added)).[9]

Here, the jury can conclude that Defendants were substantially certain that their actions would cause DenSco's investors to invest based on expired and materially inaccurate disclosures and otherwise harm DenSco, as explained above. Defendants' actions were thus "intentional" under A.R.S. § 12-2506(F)(1).[10]

C. The jury can conclude that Clark Hill and Beauchamp "actively took part" in Chittick's breaches of fiduciary duty.

"Acting in concert" also requires "actively taking part" in the agreed-upon intentional tort. A.R.S. § 12-2506(F)(1). The jury can conclude that Clark Hill and Beauchamp "actively took part" in Chittick's breaches of fiduciary duty because:

1. Clark Hill and Beauchamp intentionally did not update the POM that expired in

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[9] For example, in *Mein*, two drivers agreed to race while intoxicated, and one of them lost control and injured someone. 219 Ariz. at 97-98 ¶¶ 3-4. The other driver was not "acting in concert" because, though he agreed to do something reckless, he did not agree to any intentional tort. *Id.* at 98-103 ¶¶ 9-35. Here, in contrast, the jury can conclude that Clark Hill and Beauchamp agreed to an intentional tort.

[10] Of course, *damages* cannot be calculated until financial losses are known. But intentional torts do not require advance knowledge of damages. That is the point of the eggshell skull rule, for example. Restatement (Second) of Torts § 461, cmt. b (1965).

2013, even though they had prepared the previous POMs and knew that DenSco's investors relied on the POMs and were continuing to invest. (Part I.A above.)

2. Clark Hill and Beauchamp agreed to hide the First Fraud from DenSco's investors and advised Chittick that he could delay disclosure of the First Fraud while continuing to raise money. (Part I.B above.)

3. Clark Hill and Beauchamp actively developed a "work-out plan" which they knew ran contrary to DenSco's interests. (Part I.C above.)

4. Clark Hill and Beauchamp advised Chittick that he could continue giving DenSco's loan money directly to Menaged, in violation of DenSco's loan documents. (Part I.D above.)

Each of these acts is evidence that Clark Hill and Beauchamp played an active role.

Defendants argue that the evidence shows only that they "aided and abetted" Chittick's breaches of fiduciary duty, which is not enough for "acting in concert." (Mot. at 16-17.) That argument is both factually disputed and legally unsound. Factually, the jury can conclude that Clark Hill and Beauchamp not only "substantially assisted" Chittick's breaches of fiduciary duty (for aiding and abetting), but also "actively took part" in them (for acting in concert). (*See* Parts I.A, I.B, I.C, I.D above.) And legally, evidence of "aiding and abetting" often *also* happens to be evidence of "acting in concert," even though the elements of each are different. *See, e.g.*, *Dube v. Likins*, 216 Ariz. 406, 413 ¶ 15 (App. 2007) (describing aiding and abetting as "[s]imilar[]" to civil conspiracy); Restatement (Third) of Torts: Liab. for Econ. Harm § 27 TD, cmt. a (2018) ("Many claims of conspiracy can also be viewed as cases of aiding and abetting.").[11]

IV. CONCLUSION.

The Court should deny Defendants' motion for summary judgment.

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[11] Defendants also assert that the "only intentional tort" alleged is aiding and abetting. (Mot. at 16-17.) But breach of fiduciary duty is an intentional tort too. *See, e.g.*, *Zastrow v. Journal Commc'ns, Inc.*, 291 Wis. 2d. 426, 448-50 (2006) ("[I]f a trustee does not make a full disclosure of material facts to a beneficiary, that conduct is a breach of the trustee's duty of loyalty. The law concludes this breach is intentional.").

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

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