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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 **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSE OF *IN PARI DELICTO*** **AND** **RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Daniel Martin) (Oral Argument Requested)

The Receiver's motion presents a pure question of law: Can *in pari delicto* bar the Receiver from presenting his damages claims to a jury? The answer is no, for four independent legal reasons: **(1)** The Arizona constitution guarantees that a party's conduct—even wrongful, criminal conduct—shall not bar the party from presenting its damages claims to a jury. **(2)** The legislature has replaced common-law loss-shifting rules such as *in pari delicto* with comparative fault. **(3)** The doctrine would not bar a receiver's claims. **(4)** The doctrine would not bar the Receiver's claims based on breach of fiduciary duty.

Defendants' responses are unpersuasive. Defendants concede that Arizona law applies, but barely mention it. Instead they rely on non-Arizona cases applying different laws and lacking Arizona's constitutional protections. The Court should find that, as a matter of Arizona law, *in pari delicto* cannot bar the claims.

While the Receiver's motion raises a pure issue of law, Defendants' cross-motion does not. Even where *in pari delicto* applies broadly, it applies on a fact-intensive, case-by-case basis, and requires a careful comparison of the parties' conduct. The Cross-Motion is full of disputed contentions about the conduct of the parties and hardly mentions Defendants' own very blameworthy conduct. So regardless of how the Court decides the Receiver's motion, the Court should deny Defendants' cross-motion.

I. Receiver's Motion: *In Pari Delicto* Does Not Bar the Receiver from Presenting His Claims to the Jury.

A. Arizona's constitution guarantees that an injured party's conduct shall not bar the party from presenting damages claims to a jury.

Article 18, § 5 of the Arizona Constitution guarantees that "[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." The constitutional provision means that a claim may not be barred from the jury based on the "conduct of a particular category of persons who otherwise could proceed with an action for damages . . . even if the rule or statute directing otherwise attaches some other name to the defenses."

Sonoran Desert Investigations, Inc., 213 Ariz. 274, 281 ¶ 26 (App. 2006) (quoting *City of Tucson v. Fahringer*, 164 Ariz. at 603 (1990)).

Sonoran Desert—a case Defendants ignore—is decisive. At issue was a statute that barred recovery by "a plaintiff who is injured while involved in a criminal act." *Id.* at 755–56 ¶ 1. The court held the statute unconstitutional under Article 18, § 5 because the statute barred a plaintiff from presenting his case to the jury because of his "conduct":

> If [the statute] is applied here, [the plaintiff's] antecedent criminal conduct, and nothing else, triggers a statutory defense of nonliability. The statute, therefore, bars recovery based on 'the conduct of a particular category of persons injured.' This result violates article XVIII, § 5 . . . .

Id. at 759 ¶ 13 (quoting *Schwab v. Matley*, 164 Ariz. 421, 423 (1990)).

Defendants' *in pari delicto* defense suffers the same constitutional flaw. They urge (at 1) the Court to "determine that a plaintiff's right to present its case to the fact finder is barred by the plaintiff's own wrongful or illegal conduct." In other words, exactly what Article 18, § 5 prohibits: making "the conduct of a particular category of persons injured by the negligence of another . . . a bar to recovery" rather than a "question of fact for the jury." *Schwab*, 164 Ariz. at 423.

Defendants' response (at 15) ignores the long line of cases applying Article 18, § 5. Instead, they argue that the "plain language, which expressly governs only 'contributory negligence' and 'assumption of risk', does not apply to *in pari delicto*" because *in pari delicto* is different. This argument fails for several reasons.

First, Defendants' conception of *in pari delicto* plainly fits within Article 18, § 5's term "contributory negligence." Compare the two:

Art. 18, § 5's Contributory negligence	**Defendants' *in pari delicto***
"Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered . . ." *Schwab*, 164 Ariz. at 424.	The defense of *in pari delicto* applies when the plaintiff's "wrongful conduct is the primary cause of their own injuries." (Defs' Resp. at 13.)

As the Supreme Court said in *Schwab*, "[i]f there is a difference between this and contributory negligence, we are unable to perceive it." 164 Ariz. at 424.

Defendants point to some other jurisdictions that distinguish between contributory negligence and *in pari delicto*. (*See* Defs.' Resp. at 12–15.) But these jurisdictions "do not have constitutional provisions similar to our Article 18, Section 5, and therefore are not helpful." *Estate of Reinen v. N. Arizona Orthopedics, Ltd.*, 198 Ariz. 283, 288 (2000). Defendants cannot "cite any Arizona authority barring, as a matter of law, recovery by a tort plaintiff who was engaged in criminal conduct at the time of the injury." *Sonoran*, 213 Ariz. at 281 ¶ 24. Arizona law governs this case and Arizona law is clear: a defense based on the conduct of the plaintiff is "a question of fact" that is "left to the jury" "in all cases whatsoever," including this one. Ariz. Const. art. 18, § 5.

Second, Defendants ignore that Arizona's courts have made clear that the protections of Article 18, § 5 cannot be evaded simply by avoiding the use of the label "contributory negligence" or "assumption of risk." Instead, the constitution "in all cases" leaves defenses based on the injured party's "conduct" to the jury. *Sonoran*, 213 Ariz. at 277–78 ¶ 9 (quoting *Fahringer*, 164 Ariz. at 601–02). That is precisely what Defendants' *in pari delicto* affirmative defense seeks to do: bar an injured party's claims based on the injured party's conduct. The fact that Defendants have labeled their defense "*in pari delicto*" rather than "contributory negligence" does not give them a pass.

Courts have repeatedly rejected Defendants' cramped view of Article 18, § 5. *See Fahringer*, 164 Ariz. at 602 (holding that statute falls under § 5 because it concerned "conduct" "contributing as a legal cause to the harm he has suffered"); *see also Schwab*, 164 Ariz. at 424-25 (rejecting argument that statute should be conceived as merely eliminating a duty); *Sonoran*, 213 Ariz. at 759 ¶ 17 (rejecting argument that Art. 18, § 5 does not apply to "criminal conduct" because it "interprets the defenses of contributory negligence and assumption of risk too narrowly"). Article 18, § 5 applies to defenses based on the "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered." *Sonoran*, 213 Ariz. at 758 ¶ 11 (quoting *Schwab*, 164 Ariz. at 424–25).

That is what Defendants' *in pari delicto* is, regardless of whether they "characterize[]" the defense "as contributory negligence or assumption of risk." *Id.* at 761 ¶ 26.

B. Arizona does not recognize Defendants' version of *in pari delicto*.

It is no wonder that Article 18, § 5 doesn't call out "*in pari delicto*" by name: Defendants' conception of *in pari delicto* does not exist in Arizona. Defendants say (at 1) that Arizona case law on the issue is "sparse." That is an understatement. Defendants cite no Arizona case using *in pari delicto* to bar a damages claim from the jury.

The only Arizona case Defendants cite using the term *in pari delicto* does not support their position. (Defs.' Resp. at 8 (citing *Brand v. Elledge*, 89 Ariz. 200 (1961)).) *Brand* involved a claim for equitable contract enforcement, not damages, and the trial court dismissed after plaintiff put her case on at trial, concluding that the contract was illegal and "one party may not enforce an illegal contract against the other where the parties are *in pari delicto*." 89 Ariz. at 201-02, 204.

Defendants also cite a federal district court opinion using the term *in pari delicto*. (Defs.' Resp. at 8 (citing *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d 927, 934 (D. Ariz. 2017)).) But that court did not consider Article 18, § 5; it does not speak for Arizona law; and it relied largely on a different district court opinion that applied Colorado law, not Arizona law. *See Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P.*, 175 F. Supp. 2d 1180, 1198 (D. Ariz. 2001) (applying "Colorado substantive law"). Moreover, the district court denied the motion for summary judgment and left consideration of *in pari delicto* for the jury. *In re Bill Johnson's*, 255 F. Supp. 3d at 934.

C. Arizona's legislature has replaced common-law loss-shifting rules with a system in which the jury determines fault all at once.

Regardless of whether Defendants' version of *in pari delicto* ever existed in Arizona, it could not survive the legislature's enactment of comparative fault in the 1980s. Defendants admit that A.R.S. § 12-2506 applies to this case. That statute requires the jury to determine the "fault" of all parties and nonparties "as a whole at one time."

Id. § 12-2506(C). The statutory definition of fault is "extremely broad" and includes "intentional conduct." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 54 ¶ 17, 55 ¶ 20 (1998), *abrogated on other grounds by State v. Fischer*, 242 Ariz. 44 (2017). The Receiver's motion explained (at 4-6) that this statutory scheme replaced common-law rules that would otherwise control, and that *in pari delicto* is precisely the sort of common-law rule that has been replaced.

Defendants' efforts to evade the statute fail. They say the Court must narrowly construe statutes that purport to "abrogate common law." (Defs.' Resp. at 12.) That is not true. The case Defendants cite instructs courts to narrowly construe statutes that purport to "*abrogate* common-law *damage actions*." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994) (emphasis added). Here, the Receiver is not seeking to abrogate a damage action. If anything, Defendants are.

Defendants also cite opinions from other jurisdictions that have entertained an *in pari delicto* defense despite comparative fault schemes. (Defs.' Resp. at 13–14.) But those opinions are unpersuasive because they involve different statutes. *See Hutcherson*, 192 Ariz. at 55 (finding non-Arizona case "unpersuasive because [other] state's statute does not parallel our own"); *see also State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 228 (2007) (finding non-Arizona cases "inapposite" because they "do not address Arizona's statutory scheme").

At the same time, Defendants do not discuss analogous cases, such as *Dugger v. Arredondo*, 408 S.W.3d 825, 829, 831-32 (Tex. 2013) (holding that common-law "unlawful acts" doctrine, which "originated with the principle of *in pari delicto*," was "no longer a viable defense" after enactment of "proportionate responsibility" statute). *Id.* at 829, 831. Like Arizona's, the Texas statute requires the jury to determine the "responsibility" of all parties and nonparties that "caus[ed] or contribut[ed] to cause . . .

the harm." *Id.* at 831 (citation omitted).[1] To whatever extent *in pari delicto* previously existed in Arizona, it has been replaced by Arizona's comparative fault statute.

D. In any event, *in pari delicto* does not bar a receiver from bringing claims for the benefit of innocent creditors.

Setting aside the constitutional and statutory problems with Defendants' position, Defendants also cannot invoke *in pari delicto* because the Receiver is not the supposed bad actor to which the doctrine—where it exists—is designed to apply. As discussed in the Motion (at 8-9), barring a receiver's claims "would . . . frustrate[]" the legislative purpose of receivership, which is "to protect the interests of third parties," not the person who did the alleged "misdeeds." *FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) (holding it would be inequitable to bar receiver's claims).

The view set forth in *O'Melveny & Myers* is persuasive here. The Receiver was appointed at the request of the Arizona Corporation Commission for the purpose of "protect[ing] the rights of persons having a direct interest in the properties and affairs of" DenSco. A.R.S. § 44-2015(C). This legislative purpose would be frustrated if *in pari delicto* bars the Receiver's claims. Barring the Receiver's claims would gift Defendants a "windfall" by giving them a pass on the Receiver's claims of serious misconduct. *O'Melveny & Myers*, 61 F.3d at 19. Finally, Arizona courts often look to the Ninth Circuit for guidance. *See, e.g., Skydive Arizona, Inc. v. Hague*, 238 Ariz. 357, 365 (App. 2015) (Ninth Circuit decisions are "persuasive"). This Court should follow *O'Melveny & Myers* and the other jurisdictions that find *in pari delicto* inapplicable against receivers.

Defendants response (at 10-12) is that, although the "case law on this issue is admittedly not settled" and there is "no law binding on Arizona courts," the "policy

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[1] Other jurisdictions have reached similar conclusions. *See, e.g., Chelsea Hous. Auth. v. McLaughlin*, 125 N.E.3d 711, 714 (Mass. 2019) (holding statute "preempted . . . in pari delicto as it applies to the negligent conduct of accountants and auditors in failing to detect fraud"); *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cty.*, 773 S.E.2d 627, 630, 635 (W. Va. 2015) (rejecting *in pari delicto* because "our system of comparative negligence offers the most legally sound and well-reasoned approach to dealing with a plaintiff who has engaged in immoral or illegal conduct").

considerations" weigh in favor of totally barring the Receiver's claims. The arguments Defendants advance, however, are unconvincing for several reasons.

First, although Defendants cite a handful of opinions from other jurisdictions that Defendants say favor their position (at 11-12), Defendants fail to explain why Arizona would follow these cases, which are in the minority. "The better and more prevalent view is that a receiver appointed . . . is not a representative of the corporation, but instead is a representative of its innocent investors and creditors. Therefore, . . . the receiver's claim is not subject to the *in pari delicto* defense." Brian A. Blum, *Equity's Leaded Feet in a Contest of Scoundrels: The Assertion of the In Pari Delicto Defense Against a Lawbreaking Plaintiff and Innocent Successors*, 44 Hofstra L. Rev. 781, 830 (2016) (citations omitted).

Many other courts are in line with the Ninth Circuit. *See, e.g.*, *Nicholson v. Shapiro & Assocs., LLC*, 82 N.E.3d 529, 532–33 (Ill. App. 2017) ("the receiver is not the wrongdoer but is an administrative officer of the state . . . who is seeking damages on behalf of . . . creditors and defrauded clients"); *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 965–67 (5th Cir. 2012) (*in pari delicto* "would undermine one of the primary purposes of the receivership"); *Grant Thorton, LLP v. FDIC*, 435 F. App'x 188, 200–01 (4th Cir. 2011) (receiver served to "vindicat[e] the rights of the public"); *Wooley v. Lucksinger*, 61 So. 3d 507, 606 (La. 2011) ("[T]he receiver is acting to protect the interests of innocent policyholders and creditors").[2]

Second, Defendants' assertion that a receiver "stands in the shoes of the entity it represents" does not answer whether this equitable defense should apply. (Defs.' Resp. at 11 (quoting *Gravel Resources of Arizona v. Hills*, 217 Ariz. 33, 38 ¶ 16 (App. 2007)).)

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[2] Courts have deemed *in pari delicto* inapplicable against receivers asserting precisely the type of claims asserted here. *See, e.g.*, *Bell v. Kaplan*, No. 3:14CV352, 2016 WL 815303, at *4 (W.D.N.C. Feb. 29, 2016) (receiver's claims for legal malpractice and aiding and abetting breach of fiduciary duty); *Hays v. Paul, Hastings, Ianofsky & Walker LLP*, No. CIV.A 106CV754-CAP, 2006 WL 4448809, at *10 (N.D. Ga. Sept. 14, 2006) (receiver's claims against law firm for professional negligence and breach of fiduciary duty).

As the Ninth Circuit explained in *O'Melveny & Myers*, that general proposition does not settle the *in pari delicto* question because a receiver "does not voluntarily step into the shoes" of the entity but is instead "thrust into those shoes" and was not "a party to the original inequitable conduct." 61 F.3d at 19 (citation omitted).

Third, Defendants say (at 11-12) that DenSco's creditors are free to "bring their own tort claims" against Defendants. But one of the purposes of a receivership is to streamline claims through a court-monitored process. That is why the Receiver has been authorized to "negotiate with any creditors of [DenSco], for the purpose of compromising or settling any claim." 8/18/2016 Order Appointing Receiver, at ¶ 10. Forcing creditors to bring their own claims against Defendants would be highly impractical, to say the least. *See Scholes*, 56 F.3d at 755 (rejecting this alternative because it "would multiply litigation"). The more efficient—and equitable—option is for the Receiver to bring claims for the benefit of creditors, as the legislature intended.

E. And besides, *in pari delicto* does not bar claims based on breach of fiduciary duty.

The Receiver's Motion (at 10) also explained that, even in jurisdictions that apply *in pari delicto* against receivers in general, the doctrine does not apply to claims against the corporation's fiduciaries. *See Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 304 (Del. Ch.), *aff'd*, 126 A.3d 1115 (Del. 2015) (applying "fiduciary duty exception," whereby "the doctrine has no force in a suit by a corporation against its own fiduciaries"). The exception covers not just direct claims against a corporation's fiduciaries, but also claims against third parties for "aiding and abetting breaches of fiduciary duty." *Id.* at 319. Thus, regardless of the applicability of *in pari delicto* generally, the Receiver's claims against DenSco's fiduciaries are not barred. Otherwise, Defendants could "immunize themselves through their own wrongful, disloyal acts, a transparently silly result." *Id.* (citations and internal quotation marks omitted).

Defendants have no persuasive response. First, they note (at 16) that the fiduciary duty exception "has not been adopted in Arizona." Of course not; *in pari delicto* itself

has never applied in Arizona in a case remotely like this one. The Court need only consider the fiduciary duty exception if it concludes, contrary to § I.A-D above, that an expansive form of *in pari delicto* such as Delaware's applies here. If the Court so concludes, then the Court should apply the corresponding fiduciary duty exception.

Defendants also cite an Ohio federal district court opinion that declined to recognize the fiduciary duty exception when there were no "innocent" shareholders or board members. (Defs.' Resp. at 16 (citing *In re Nat'l Century Fin. Enters., Inc.*, 783 F. Supp. 2d 1003, 1024–25 (S.D. Ohio 2011)).)[3] But that opinion misses the point of the exception. Regardless of whether corporate management is "innocent," a corporation's fiduciaries owe solemn duties that, when breached, cannot be escaped by pointing at other wrongdoers and saying they did it too.

II. Response to Defendants' Cross-Motion: Genuine Disputes of Fact Preclude Summary Judgment.

The Receiver's Motion raises an issue of law that the Court may decide now. Defendants' motion depends on the Court accepting a one-sided, premature (discovery continues), and disputed view of the facts. *See* Controverting Statement of Facts and Separate Statement of Facts ("CSOF ¶ __"). In addition, Defendants' analysis fails to consider their own egregious conduct, or the equities of applying this equitable defense. That analysis is required. Thus, even if Defendants could clear the **four** independent legal hurdles to their defense, the Court should deny Defendants' cross-motion. No matter what legal regime applies, Defendants cannot escape the judgment of the jury.

A. The cross-motion should be denied because *in pari delicto* requires a fact-intensive weighing of the facts and equities of *both* parties' conduct.

The court should deny the cross-motion because it fails to even attempt to present facts which would prove that the defense should apply. By solely focusing on DenSco's alleged conduct, Defendants leave out much of what they would need to prove for their affirmative defense.

[3] Defendants' "see also" cases (at 17) do not directly address the exception.

When courts apply *in pari delicto*, they do not simply ask whether a claimant engaged in wrongful conduct and, if so, bar the claim automatically. The Court must compare the conduct of the parties. "[W]here the parties are not equal in guilt . . . but where one of them, although participating in the wrong, is less guilty than the other, the party more at fault cannot employ the doctrine of pari delicto to shield his deliberate invasion of the rights of the former." *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d at 934 (quoting *Brand*, 89 Ariz. at 204).

In addition to the underlying conduct, courts consider and weigh the equities of applying the defense. "*In pari delicto* is not an absolute standard to be applied across the board regardless of the circumstance. It is an equitable defense." *In re Fuzion Techs. Grp., Inc.*, 332 B.R. 225, 233 (Bankr. S.D. Fla. 2005). *See Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 138 (D. Mass. 2008) (surveying federal and state cases and concluding that, even where the defense sometimes applies to a receiver, the "weight of authority" holds that the defense would not apply "if the equities so required"). Thus, to make out the defense, in addition to proving that Receiver/DenSco bears "at least substantially equal responsibility for the wrong as compared to the defendant," Defendants must prove its application would be equitable. *See Fine*, 634 F. Supp. 2d at 138, 143 (denying summary judgment because defense could be inequitable).

Courts examining whether to apply the defense to a receiver have considered multiple equitable factors, including: (1) "whether the wrongdoer would benefit from the receipt of the funds sought by the receiver;" (2) "whether the defendant . . . gained some illegitimate benefit from the wrongdoer's act;" and (3) "whether applying" *in pari delicto* "would frustrate the purposes of the law the receiver seeks to invoke." *Id.* at 143 (summarizing relevant factors "gleaned from the federal appellate cases").

Not surprisingly, courts routinely deny summary judgment on this defense because of the highly fact-intensive analysis required. *See, e.g., NCP Litig. Trust v. KPMG LLP*, 901 A.2d 871, 878-89 (N.J. 2006) ("[M]any courts have held that the applicability of the imputation defense"—i.e., whether the claimant should have the bad

actor's conduct imputed to them—"to a particular case cannot be determined on a motion to dismiss or on a motion for summary judgment."); *In re TOCFHBI, Inc.*, 413 B.R. 523, 537 (Bankr. N. D. Tex. 2009) (denying summary judgment "because such defense is intensely factual" and requires a careful consideration of "facts and equities"). Indeed, in the District of Arizona case Defendants rely on, the district court denied summary judgment because of the thorny factual issues involved in determining the fault of the parties. *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d at 934.

Defendants do not present facts or argument to prove their affirmative defense. Defendants state (at 8) that the validity of the Receiver's claims against Defendants "is not at issue here." But it is. The cross-motion does not prove a prima facie case for the affirmative defense, much less summary judgment, and it should be denied.

B. The cross-motion should be denied because of Defendants' own blameworthy conduct.

The Court could not possibly grant summary judgment without assessing Defendants' conduct and resolving many disputes about Defendants' conduct. Any comparison must take account of the fact that Clark Hill and Beauchamp owed fiduciary duties to their client. *See Coleman v. Coleman*, 48 Ariz. 337, 342 (1936) (party with "fiduciary relation" significantly more at fault); *Peterson v. Winston & Strawn LLP*, 729 F.3d 750, 751-52 (7th Cir. 2013) (reasoning that lawyer should not avoid liability for bad advice simply because lawyer and client corporation had same knowledge of underlying wrongdoing).

Defendants' conduct is extraordinarily blameworthy; not only should these claims go forward, Defendants should be assessed punitive damages. Currently pending is the Receiver's motion for a determination that Plaintiff has made a prima facie case for punitive damages. That motion, separate statement of facts (incorporated in the Receiver's CSOF here), and reply lay out a damning case of aiding and abetting conduct that shows Defendants "consciously disregard[ed] the unjustifiable substantial risk of significant harm" to DenSco. *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn,*

184 Ariz. 120, 132 (App. 1995). Indeed, expert witness Neil Wertlieb opines that in many respects, Defendants' conduct was "reckless and irresponsible" and was "a gross departure from the applicable standard of care." (CSOF ¶ 132.)

Defendants substantially aided and abetted Chittick in multiple ways:

First, the evidence shows that Beauchamp knew that Chittick was causing DenSco to sell securities to investors without full disclosure, and that Beauchamp worked to protect Chittick (an officer breaching fiduciary duties) rather than DenSco (Beauchamp's actual client). (CSOF ¶¶ 90-102, 120-132.) Indeed, in a January 12, 2014 email exchange, Chittick tells Beauchamp he "spent the day contacting every investor that has told me they want to give me more money," and that he will raise millions. Beauchamp's response? "You should feel very honored that you could raise that amount of money that quickly." (CSOF ¶ 98.)

And the evidence shows that Beauchamp's approval was important: Chittick worried about when Beauchamp would advise him he needed to make new disclosures. (CSOF ¶¶ 92, 97, 108-12.) Chittick believed that he "can raise money according to [Beauchamp]" and that, after discussing disclosure with Beauchamp, "we are going to put that off as long as possible so that we can improve the situation as much as possible." (CSOF ¶ 97.)

Second, Beauchamp and Clark Hill did not terminate representation of DenSco even when Defendants' own expert admits they had a mandatory duty to terminate, and their continued representation after that point was aiding and abetting the client committing securities fraud. Beyond termination, Clark Hill should have done a "noisy" withdrawal, disclosing that Clark Hill no longer represents DenSco and disaffirming the expired 2011 POM. Defendants did none of this. (CSOF ¶¶ 102-104.)

Although Beauchamp now claims that he orally terminated the representation in May 2014, the only evidence to prove it is his self-serving testimony. There is not a single document about termination, and all the evidence goes the other way. (CSOF ¶¶ 105-08.) Instead of confirming a 2014 withdrawal, the evidence shows that Beauchamp

gave Chittick time to work things out without a new POM or other disclosures to investors. (CSOF ¶¶ 110-15.) When Beauchamp reached out to meet with Chittick in March 2015 to check on his progress, Chittick wrote that Beauchamp "gave me a year to straighten stuff out we'll see what pressure I'm under to report now." (CSOF ¶ 111.) After their March 2015 meeting, Chittick wrote that, though he "was nervous [Beauchamp] was going to put a lot of pressure on me . . . he said he would give me 90 days." (CSOF ¶ 112.) Menaged testified that Chittick told him the same thing. (CSOF ¶¶ 113-14.) This is not passive negligence; this conduct is affirmatively aiding and abetting breaches of fiduciary duty.

The failure to withdraw is especially wrongful because of the obvious conflict of interest between Chittick and DenSco. The failure to withdraw while continuing to help protect Chittick with the forbearance agreement was "so reckless and irresponsible that such conduct . . . constituted a gross departure from the standard of care." (CSOF ¶ 132.) At that point, Beauchamp left his duties to DenSco behind and committed to protecting Chittick's and his own interests, hoping against all reason that Chittick could dig DenSco out of its hole while disregarding securities laws and lax lending practices.

Third, Defendants' version of facts on these issues are based on after-the-fact untruths invented after Mr. Chittick's suicide**,** when they knew liability claims may be coming, all part of a pattern of concealment of their disregard of DenSco's rights. (CSOF ¶¶ 134-143.) Remarkably, just after Chittick's death, Beauchamp told management at Clark Hill about the suicide and was asked, "are there any irregularities with his fund?" Beauchamp responded, "Not that I am aware of." (CSOF Ex. 1.)

Clark Hill then continued representing DenSco ***and*** the Chittick Estate, despite the obvious conflict of interest: DenSco had claims against the Chittick Estate and Defendants. (CSOF ¶ 137.) Defendants used their dual role to dissuade investors from supporting receivership. (CSOF ¶ 138.) Beauchamp also told the Receivership Court that he represented DenSco and Chittick personally, apparently to create privilege issues to frustrate and delay the Receiver's work. (CSOF ¶¶ 139-142.)

No doubt Defendants will dispute these facts; the jury will have to sort them out. But a reasonable factfinder could conclude that Defendants' conduct makes them at much greater fault than DenSco and thus Defendants "cannot employ the doctrine of pari delicto" to avoid liability. *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d at 934.

C. The Cross-Motion should be denied because it relies on disputed fact.

Setting aside these facial deficiencies of the cross-motion, genuine disputes of material fact abound. Defendants spend nearly six pages (at 2-7) on a "brief summary" of their version of the facts. Defendants' argument, however, as to why they think DenSco's conduct is "wrongful" is laid out at pages 8-10. Defendants make three main assertions that they contend are "undisputed" and show "wrongful and illegal conduct." Each of them is disputed; they read as if part of Defendants' closing statement at trial, not summary judgment papers.

First, Defendants argue (at 8-9) that "it cannot be reasonably disputed that DenSco understood its disclosure obligations." Defendants point to various evidence, including that DenSco had "made disclosures" in POMs for several years, and that Chittick made statements to Menaged indicating he understood the need for disclosures.

Defendants' problem is that they ignore Beauchamp's role in all of this and the evidence showing that Chittick looked to Beauchamp for advice on when and what he must disclose. Beauchamp was DenSco's lawyer throughout this entire period. DenSco was a high-risk client—a one-man band operating in a highly regulated industry. (CSOF ¶ 60.) In that circumstance, Defendants' fiduciary obligations to DenSco required them to do more than passively assume that Chittick was operating DenSco properly. DenSco badly needed securities counsel and relied on Defendants for it. Chittick asked Beauchamp for help with Menaged because he wanted to work the problem out legally. (CSOF ¶ 119.) Rather than provide that counsel—even if it meant advising DenSco to stop raising funds immediately and disclose the known problems to investors—Beauchamp instead helped Chittick to DenSco's detriment. Beauchamp helped Chittick work out the forbearance agreement, helped arrange how

he would continue working with Menaged, and authorized delay after delay in making disclosures all while he knew DenSco continued raising money. (CSOF ¶¶ 91-101, 110-113, 120-32.)

Second, Defendants assert (at 9) it is undisputed that DenSco violated its promises to investors by continuing to lend to Menaged, and had put in place a "joint venture" with Menaged before Defendants had knowledge of the problem and "without any consideration for legal advice." The jury is unlikely to believe this spin.

The fact is, Beauchamp had a main-player's role in crafting and advising DenSco's next steps with Menaged. While working out the forbearance agreement, material terms changed, including the amount and interest rate of additional loans that DenSco would provide to Menaged, and the development of a "confidentiality" provision intended to discourage disclosure to investors. (CSOF ¶¶ 122-25.) These changes—all done under Beauchamp's guidance—benefitted Menaged and Chittick to DenSco's detriment. The Receiver's expert opines that Beauchamp's involvement in the forbearance agreement was so rife with conflict it suggests that he may have been "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." (CSOF ¶ 126.)

The parties dispute whether Chittick would have had DenSco follow appropriate legal advice. There is substantial evidence that he would have followed sound advice, had Beauchamp bothered to provide it. (CSOF ¶ 133.) Among other things, Defendants needed to tell DenSco to terminate dealings with Menaged, cease raising funds and update the POM, or failing that, terminate their representation and make a noisy withdrawal, thereby alerting the investors before substantial losses happened. (CSOF ¶ 120.) Instead, Beauchamp helped Chittick delay disclosure and figure out how to continue business with Menaged. (CSOF ¶¶ 121-32.)

Moreover, the claim that Beauchamp was unaware of the problems with DenSco before January 2014 is wrong. He knew that the latest 2011 POM had expired on July

1, 2013. Although he had been engaged to work on an updated POM, Beauchamp not provide DenSco with an updated POM in 2013. (CSOF ¶ 66, 80). Worse, by mid-2013, Beauchamp knew that the 2011 POM was inaccurate (expired or not). In June 2013, Beauchamp learned of a lawsuit against DenSco and Menaged, alleging that Menaged double-liened a property. Beauchamp knew this was material to DenSco's investors; he told Chittick "we will need to disclose this in POM." (CSOF ¶¶ 70-75.)

Furthermore, in December 2013, Chittick told Beauchamp that some Menaged properties had competing liens. Despite this being the same borrower, Beauchamp did not update the POM or investigate further for DenSco's benefit. (CSOF ¶ 81-84.)

Third, Defendants assert (at 10) that "it cannot reasonably be questioned that DenSco understood the proper way to lend money, and secure a first position lien" regardless of the adequacy of Defendants' advice. Though that may be Defendants' position, a reasonable jury could conclude otherwise.

Chittick sought advice from Beauchamp on his lending practices and dealings with Menaged. (CSOF ¶ 127-30.) For example, in January 2014, Chittick asked Beauchamp about how to go about funding loans in a way that ensured he could show DenSco paid the trustee. (CSOF ¶ 127.) Chittick told Menaged that Beauchamp advised Chittick to get a copy of the cashier's check used to pay a trustee (rather than DenSco pay directly). (CSOF ¶ 130.) A jury could reasonably believe that Chittick believed this course of action was permissible. *See Timmerman v. Eich*, 809 F. Supp. 2d 932, 952-53 (N.D. Iowa 2011) (denying summary judgment and holding that factfinder could agree that supposed wrongdoers had been "misled" by lawyer "into believing" that they made proper disclosures).

D. The Cross-Motion should be denied because Defendants cannot show that it would be equitable to apply the defense in this case.

The Court should also deny the Cross-Motion because Defendants have not (and could not have) shown that a balance of the equities favors barring the Receiver's claims.

First, the alleged "wrongdoer" would not "benefit from the receipt of the funds sought by the receiver." *Fine*, 634 F. Supp. 2d at 143. Mr. Chittick committed suicide, and the Receiver is recovering losses for the benefit of legitimate creditors and investors, consistent with the statutory purpose of the Receiver's appointment under A.R.S. § 44-2015(C).

Second, although Defendants contend (at 11) that they "did not benefit from DenSco's" actions, that is not true. DenSco paid Defendants more than $125,0000 in legal fees for Beauchamp's work on the forbearance agreement and for the POM update that Defendants never produced. (CSOF ¶ 144.) And by aiding Chittick to work out the forbearance agreement with Menaged—even while Beauchamp knew that DenSco was raising money without making disclosures—Defendants got to keep the legal fees coming in rather than withdrawing as even Defendants admit they were required to do. *See Fine*, 634 F. Supp. 2d at 144 (denying summary judgment on *in pari delicto* because receiver could show that bank earned fees related to fraud that it may have known about or been willfully blind to).

Third, applying *in pari delicto* would plainly "frustrate the purposes of the law the receiver seeks to invoke." *Fine*, 634 F. Supp. 2d at 143. The claims against Defendants are not merely for passive negligence. The claims include that Defendants actively aided and abetted in DenSco's breach of fiduciary duties. Such claims are necessary to deter securities attorneys helping companies breach their fiduciary duties to make adequate disclosures to investors. *See id*. at 145 (denying summary judgment on defense because there would be a "compelling public policy reason" to impose liability if "receiver is able to prove [defendant bank] aided and abetted" in raiding the wrongdoer company's accounts).

III. Conclusion.

The Court should grant the Receiver's motion for partial summary judgment; the Court should deny Defendants' cross-motion for summary judgment regardless of how the Court decides the Receiver's motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 18th day of October, 2019.

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