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Attorneys for Estate of Denny J. Chittick, Deceased

**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

ARIZONA CORPORATION
COMMISSION,

Plaintiff,

vs.

DENSCO INVESTMENT
CORPORATION, an Arizona
corporation,

Defendant.

No. CV2016-014142

**OPPOSITION TO RECEIVER’S
PETITION NO. 13 FOR EMPLOYMENT
OF ERISA LITIGATION COUNSEL;**

**REQUEST FOR CONSOLIDATION OF
PETITIONS NO. 11 AND NO. 13; AND**

**REQUEST FOR CONSOLIDATED
HEARING ON PETITIONS 11 AND 13**

(Assigned to the Honorable
Lori Bustamante)

(Peter S. Davis – Appointed Receiver)

1 **I. Background Facts.**

2 After several months of extensive discussions with the Receiver which led to no
3 agreement, on or about December 20, 2016, the Estate of Denny J. Chittick (the “Estate”)
4 filed its Petition No. 11.¹ Petition No. 11 (the “Petition”) seeks, *inter alia*, a
5 determination that the assets of the DenSco Investment Corporation Defined Benefit
6 Pension Plan (the “DB Plan”) are not and cannot be reasonably viewed as assets of the
7 Receivership Estate. Further, the Petition seeks to have Shawna Heuer, the personal
8 representative of the Estate, named as the Plan Administrator and Trustee of the Plan.
9 The Petition also makes clear that it would be impossible, both under Arizona and federal
10 law, for the Receiver to claim control over the DB Plan or its assets in light of the
11 Receiver’s recent admission that it fully intends to attack the DB Plan and seize its assets
12 for the benefit of investors.

13 The Receiver’s Petition No. 13 seeks to retain counsel to “evaluate” the Estate’s
14 claims that the DB Plan is not an asset of the Receivership and to “explore” whether the
15 DB Plan assets can be used to pay what are described by the Receiver as the “massive”
16 losses sustained by the investors of DenSco Investment Corporation (“DenSco”).
17 Receiver’s Petition No. 13, ¶¶ 6-7.

18 The Estate would not normally object to the Receiver retaining the services of an
19 ERISA lawyer inasmuch as DenSco was the Plan Sponsor of the DB Plan and prudence
20 dictates that the Receiver know exactly what continuing fiduciary obligations the
21 Receivership Estate or DenSco still has with respect to the DB Plan.

22 However, as the recently filed Receiver’s Status Report makes clear, the Receiver
23

24 ¹ The Receiver complains that the Estate failed to consult with the Receiver before filing its Petition. In
25 fact, counsel for the Estate had offered the Receiver a tolling agreement so that there would be no need to
26 currently address the issue of claims involving the DB Plan, but the Receiver elected not to follow
through on that opportunity. Counsel for the Estate did try to contact the Receiver’s counsel prior to
filing Petition No. 11, but was unable to speak with him. In any event, Petition No. 11 hardly comes as a
surprise to the Receiver.

1 believes that Denny J. Chittick’s 401(k) Plan and DB Plan account balances are valid
2 targets under a “transfer in defraud of creditors” theory because, according to the
3 Receiver (with the benefit of two years of hindsight), the transfers were made at a time
4 when “DenSco was insolvent or *would soon be insolvent or unable to pay its debts as*
5 *they became due.*” Receiver’s Status Report dated December 23, 2016, p. 6, attached to
6 Receiver’s Petition No. 15 (emphasis supplied). Needless to say, the Estate contests the
7 Receiver’s position and will vigorously defend against the claims asserted by the
8 Receiver against the Estate in the Probate Court.²

9 Accordingly, while the Estate would not object to the discrete appointment of an
10 outside pension expert, the scope of whose engagement was strictly limited and the cost
11 of which established at the outset, the Estate does object to the Receiver squandering
12 money on some fanciful hope that it has standing to attack the DB Plan while still
13 contending it has the right to control it.

14 **II. The Issues Raised by the Estate’s Petition No. 11 and the Receiver’s Petition**
15 **No. 13 Substantially Overlap and Should Be Consolidated.**

16 Rule 42(a), Ariz. R. Civ. P. provides:

17 _____
18 ² The Receiver also has pointed to supposed salaries paid by Chittick to his minor children but has
19 provided no specifics as to when and in what amount payments were supposedly made. The Receiver’s
20 Petition No. 13 also refers to \$867,289 as a “type of distribution” taken by Chittick in addition to his
21 salary as further evidence of a fraudulent transfer. The Receiver conveniently fails to advise the Court
22 that, as an S corporation, DenSco paid no income tax on its earnings; rather it passed its taxable income to
23 Chittick, who was obligated to pay the income tax thereon. As the Receiver is no doubt aware, the only
24 way Chittick would have been able to pay the resulting income tax liability would have been with
25 S corporation dividends, which are frequently characterized as “distributions.” For the period 2011-2015,
26 records reflect that Chittick paid an effective federal and state income tax rate of 30% on \$4,763,760 of
DenSco income. The simple fact of the matter is that, unlike a traditional C corporation that pays its own
taxes, S corporations make distributions to their shareholders for the shareholders to pay the resulting
taxes. These distributions are no more fraudulent or sinister than a C corporation making a normal
quarterly tax payment to the relevant taxing authorities. Beyond this, the Receiver has suggested that
Chittick overpaid his federal and state income taxes for several years, and that significant sums are
potentially recoverable from the taxing authorities through the filing of amended returns. As noted in
Petition No. 11, the Estate has asked that the Receiver be compelled to cooperate in the effort to
maximize amounts that may be recovered through tax refunds by the Chittick Estate.

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When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions, or it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

There is no question that the subject matter of the two Petitions involves common questions of law and fact with regard to the DB Plan. Consolidation of consideration of the Petitions would tend to avoid unnecessary costs or delay and prevent possible inconsistent rulings.

III. The Court Should Schedule a Consolidated Hearing on Petitions 11 and 13.

Under the order dealing with administrative matters, where the Receiver files a Petition, a hearing date is to be secured and notice thereof sent. See Paragraphs 3c and 6a, Order Governing Administration of Receivership dated September 23, 2016. As presently advised, no hearing date has been sought on the Receiver’s Petition No. 13. And no hearing date has yet been sought on the Estate’s Petition No. 11.

The issues dealing with qualified plans are admittedly complicated and it would undoubtedly benefit the Court to hear argument on the Estate’s Petition No. 11 as well as the scope of any employment of ERISA counsel by the Receiver as requested by Receiver’s Petition No. 13.³ Accordingly, the Estate requests that the Court set a date and time for oral argument on Petitions No. 11 and No. 13. Accordingly, the Estate requests that the Court set a date and time for oral argument on Petitions No. 11 and No. 13.⁴

³ One of the concerns the Estate has is the Receiver’s apparent reflexive employment of outside experts who will no doubt be expensive when it is not at all clear that the benefits will outweigh the costs. Mr. Swift’s hourly rate is set at \$630, a supposed discount from his normal billing rate.

⁴ The proposed Order lodged herewith suggests a briefing schedule on the Petitions.

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RESPECTFULLY SUBMITTED this 29th of December, 2016.

GAMMAGE & BURNHAM, P.L.C

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