

1 **GUTTILLA MURPHY ANDERSON**

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5 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

6 IN AND FOR THE COUNTY OF MARICOPA

7 ARIZONA CORPORATION
COMMISSION,

8 Plaintiff,

9 v.

10 DENSCO INVESTMENT
CORPORATION, an Arizona
corporation,

11 Defendant.

Cause No. CV2016-014142

RESPONSE TO PETITION NO. 11

(Assigned to Judge Lori Horn Bustamante)

12 Peter S. Davis, as the court appointed Receiver of DenSco Investment Corporation
13 (“Receiver”), hereby responds to Petition No. 11 filed by the Estate of Denny J. Chittick as
14 follows:

15 **I. INTRODUCTION**

16 The Estate of Denny J. Chittick (“Estate of Chittick”) petitions the Court for authority
17 to fill purported corporate “vacancies” of DenSco Investment Corporation (“DenSco”); an
18 order making a determination the DenSco Investment Corporation Defined Benefit Pension
19 Plan (the “Plan”) is not a Receivership Asset; and this Court’s approval to retain an
20 accountant to prepare amended tax returns. For the reasons set forth below, the Receiver
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1 opposes the appointment of corporate officers of DenSco and disputes the contention that the
2 Plan is not an asset of the DenSco Receivership.

3 **II. THE PLAN IS AN ASSET OF THE RECEIVERSHIP ESTATE**

4 The Estate of Chittick contends that the Plan is not an asset of the Receivership Estate.
5 The Estate of Chittick is wrong. Under the Receivership Order, the Receivership Court took
6 exclusive jurisdiction and possession of “. . . the assets, monies, securities, choses in action,
7 and properties, real and personal, tangible and intangible, of whatever kind and description,
8 wherever situated of the Receivership Defendant, (hereinafter, “Receivership Assets”).” *See*
9 *Order Appointing Receiver*, ¶1. The Court then authorized the Receiver “. . . to take and have
10 possession and control of the Receivership Assets.” Additionally, until further order of the
11 Court, the Receiver was provided “. . . complete and exclusive control, possession, and
12 custody of all Receivership Assets.” *See Order Appointing Receiver*, ¶2. In other words, the
13 Receiver has stepped into DenSco’s shoes with respect to any Receivership Assets.

14 DenSco is the employer sponsor of the Plan and purportedly established the Plan for
15 the benefit of eligible participants and their beneficiaries. If the Plan was validly established
16 and maintained, the relationship between DenSco, the Plan participants and their beneficiaries
17 and the Plan fiduciaries is governed and controlled by the terms and conditions set forth in the
18 Plan itself. Under the terms of the Plan, DenSco has complete control and authority with
19 respect to all aspects related to the Plan. DenSco has the authority to amend or terminate the
20 Plan.¹ DenSco has the authority to appoint the Plan Administrator of the Plan, which also is

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¹ *See generally* Plan Sections 8.1 and 9.1.

1 the “Named Fiduciary” under the Plan.² In fact, DenSco appointed itself as the Plan
2 Administrator.³ Under the Plan, the Plan Administrator is given broad authority and
3 responsibility to decide all matters with respect to the Plan,⁴ including the authority to appoint
4 or remove the Trustee of the Plan.⁵ Finally, DenSco has the sole authority under the Plan to
5 appoint a successor Trustee of the Plan if for any reason, the original Trustee is either
6 removed, resigns or is otherwise incapable of performing his, her or its duties under the Plan.⁶
7 There can be no reasonable dispute that DenSco established the Plan, maintained the Plan,
8 and is given all the authority over the Plan’s administration, including the authority to amend
9 or terminate the Plan. In other words, DenSco owns the Plan and, although the Plan’s assets
10 may be held for the benefit of the participant’s beneficiaries (who are not, by the way,
11 represented by the Estate of Chittick), it is DenSco, and not the Estate of Chittick, that is
12 responsible for the Plan.

13 As counsel for the Estate of Chittick points out in its Memorandum in Support of
14 Petition No. 11 (“Memorandum No. 11), a defined benefit plan, such as the Plan, provides a
15 specific benefit to the participants (and beneficiaries) rather than the participant being entitled
16 to whatever amounts are allocated to his account under a plan, such as would be the case in a
17 defined contribution plan (i.e., a profit sharing plan or a 401(k) plan). As such, if a defined
18 benefit plan’s liabilities are greater than its assets at termination, the employer plan sponsor
19 would be liable to make up the shortfall. However, if the defined benefit plan’s liabilities are

20 ² Id at Section 1.4.

³ *Id.*

⁴ *Id* at Section 2.3(a).

⁵ *Id* at Section 2.1.

⁶ *Id* at Section 7.8(c).

1 less than its assets, the employer plan sponsor would be entitled to the excess amounts. Of
2 course we recognize, as does counsel for the Estate of Chittick, that any excess amounts
3 reverting from a defined benefit plan to the employer plan sponsor could be subject to
4 punitive excise taxes.⁷ Nevertheless, the excess amounts that revert to an employer from a
5 defined benefit plan are assets of the employer plan sponsor, and do not belong to the
6 participant or beneficiaries. This is the most basic characteristic of a defined benefit plan: the
7 employer plan sponsor reaps the benefit of an overfunded defined benefit plan, but likewise
8 bears the financial responsibility of an underfunded defined benefit plan.

9 Moreover, when the Receiver took control of DenSCO and its property, this included
10 taking control of both tangible property, such as the Plan’s assets, and intangible property⁸
11 such as the right of DenSCO to act as the Plan’s Administrator, and the right to appoint a new
12 Trustee to the Plan if Mr. Chittick stopped acting as Trustee, along with a comprehensive
13 series of additional rights expressly set forth in the Plan. As intangible property, the rights in
14 the Plan are Receivership Assets that fall under the purview of the Receivership Order. The
15 Estate of Chittick proposes to contravene the Receivership Order and interfere with
16 Receivership Estate property, to elect Denny J. Chittick’s sister, Mrs. Shawna Heuer as a
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18 ⁷ See 26 U.S.C. Section 4980.

19 ⁸ Intangible property rights “. . . . Consist of rights not related to physical things, but that are merely
20 relationships between persons, natural or corporate, which the law recognizes by attaching to them certain
21 sanctions enforceable in the courts.” 63C Am. Jur. 2d *Property* §9 (Nov. 2016). Even a vote of a member of
the Arizona Board of Pardons and Paroles, at a board meeting, is treated as intangible property and something
of value included within the definition of property in A.R.S. 13-1804(A)(8). See *State v. Steigner*, 162 Ariz.
138, 781 P.2d 616 (Ariz. App. 1989). A.R.S. § 13-1804(A)(8) states: A person commits theft by extortion by
knowingly obtaining or seeking to obtain *property* . . . by means of a threat to do in the future any of the
following: cause anyone to part with any *property*.” (Emphasis added.)

1 director of DenSco so that she could self- appoint herself as Administrator and Trustee of the
2 Plan.

3 Therefore, under the terms of the Order Appointing Receiver and the definition of the
4 Receivership Assets which includes all “property” of DenSco, the Plan, is as an asset of the
5 DenSco Receivership Estate.

6 However, a critical distinction does not escape the Receiver. It is possible that the
7 monetary assets within the Plan may be held in trust for third parties. Regardless, there can be
8 no reasonable dispute that the Plan and its related operational obligations are assets of the
9 Receivership and under the control of the Receiver of DenSco. The Estate of Chittick
10 appears to concede this distinction, as it states “ (the) assets of a qualified retirement plan are
11 not the assets of DenSco”, tacitly admitting that it is the assets within the Plan that are in
12 question, not the Plan itself. In conclusion and as set forth above, the Plan is an asset of the
13 Receivership Estate of DenSco.

14 **III. DENSCO DOES NOT REQUIRE THE APPOINTMENT OF ANY OFFICERS OR DIRECTORS**
15 **AS DENSCO IS IN RECEIVERSHIP**

16 The Estate of Chittick requests the Court appoint Mrs. Heuer as the “director” of
17 DenSco. The Estate of Chittick clearly wants to advance one interest, and one interest only,
18 in seeking to have the Personal Representative of the Estate of Chittick appointed as the Plan
19 Administrator and Trustee of the Plan, and that is the interest of the Estate of Chittick,
20 whatever that may be, if anything at all, in the assets held in the Plan as a beneficiary. In
21 contrast, the Receiver’s interest in DenSco and the Plan is based upon the Receiver’s duties as

1 the representative of all the creditors and any shareholders of DenSco (including the Plan's
2 beneficiaries).

3 The Estate of Chittick does not provide any evidence that the Plan has in any way been
4 impaired or mismanaged since the Receiver has taken control of DenSco. The stated
5 incentive for the filing of Petition No. 11 appears to be the Estate of Chittick's alarm that the
6 Receiver filed a Notice of Claim in the Probate Court against the Estate of Chittick claiming a
7 right to the assets of the Plan under a fraudulent transfer theory. The Estate of Chittick
8 describes the Receiver as having "open hostility" to the Plan. There is no evidence that the
9 Receiver is "hostile" to the Plan itself. However, unlike the Estate of Chittick, whose
10 interests do not extend beyond itself, the Receiver represents the interests of the creditors of
11 the DenSco Receivership Estate as well as any shareholders of DenSco. (*See Greenbaum v.*
12 *Lehrenkrauss Corp.*, 9 F.Supp. 425, 426 (E.D. N.Y. 1935). Also, unlike the Estate of
13 Chittick, the Receiver is a neutral party, whose interests are not skewed to any particular
14 shareholder or creditor, with a duty to collect Receivership Estate property even if it is held
15 under the Plan. See *Culhane v. Anderson*, 17 F.2d 559, 561 (8th Cir. 1927) quoting from
16 *Atlantic Trust Co. v. Chapman*, 208 U.S. 360 at page 370, 28 S.Ct. 406, 408 (52 L.Ed. 528,
17 13 Ann.Cas. 1155):

18 Immediately upon such appointment and after the qualification of the receiver,
19 the property passed into the custody of the law, and thenceforward its
20 administration was wholly under the control of the court by its officer or
21 creature, the receiver. In *Booth v. Clark*, 17 How. 322, 331, 15 L.Ed. 164, 167,
it was said: 'A receiver is an indifferent person between parties, appointed by
the court to receive the rents, issues, or profits of land, or other thing in question
in this court, pending the suit, where it does not seem reasonable to the court
that either party should do it. Wyatt, Practical Reg. 355. He is an officer of the

1 court; his appointment is provisional. He is appointed on behalf of all parties,
2 and not of the complainant or of the defendant only. He is appointed for the
3 benefit of all parties who may establish rights in the cause. The money in his
4 hands is in custodia legis for whoever can make out a title to it. *Delany v.*
5 *Mansfield, 1 Hogan (Ir.) 234.*'

6 It is the court itself which has the care of the property in dispute. The receiver is
7 but the creature of the court; he has no powers except such as are conferred
8 upon him by the order of his appointment and the course and practice of the
9 court. *Verplanck v. Mercantile Inc. Co., 2 Paige (N.Y.) 452.*

10 In *Porter v. Sabin*, 149 U.S. 473, 479, 13 S.Ct. 1008, 1010, 37 L.Ed. 815, the
11 court said: 'When a court exercising jurisdiction in equity appoints a receiver of
12 all the property of a corporation, the court assumes the administration of the
13 estate; the possession of the receiver is the possession of the court; and the court
14 itself holds and administers the estate, through the receiver as its officer, for the
15 benefit of those whom the court shall ultimately adjudge to be entitled to it' -
16 citing *Wiswall v. Sampson*, 14 How. 52, 65, 14 L.Ed. 322, 328; *Peale v. Phipps*,
17 14 How. 368, 374, 14 L.Ed. 459, 461; *Booth v. Clark*, 17 How. 322, 331, 15
18 L.Ed. 164, 167; *Union Nat. Bank v. Bank of Kansas City*, 136 U.S. 223, 10
19 S.Ct. 1013, 34 L.Ed. 341; *Thompson v. Phoenix Ins. Co.*, 136 U.S. 287, 297, 10
20 S.Ct. 1019, 34 L.Ed. 408, 413.

21 The DenSco Receiver is an officer of the Receivership Court and is appointed "not for
the benefit any particular party," ". . . but instead as "a representative and protector of the
interests of creditors and shareholders alike," charged with preventing injury to the subject
property and preserving its value. *U.S. Commodity Futures Trading Commission v.*
Yellowstone Partners, Inc., 2014 WL 619478, p.3 (E.D. N.C. 2014).

The Receiver suspects that the Estate of Chittick's unspoken motivation seeking
authority to appoint corporate officers of DenSco and take control of the Plan is to fulfill Mr.
Chittick's final directives to his sister that all available assets be utilized for his children and
family to the detriment of the defrauded investors of DenSco. To that end, the Receiver

1 believes that in seeking authority to appoint a corporate officer of DenSco, Mrs. Heuer
2 intends to undertake actions to revise and potentially rehabilitate the Plan to make it better
3 suited to defend against claims against the Plan.

4 The Receiver’s suspicions are based on his initial investigation which revealed that
5 Mr. Chittick undertook a series of questionable actions to ensure that his minor children and
6 elderly parents had sufficient monetary resources by attempting to divert significant
7 DenSco’s assets for their benefit. Specifically, the Receiver has uncovered a disconcerting
8 and consistent pattern of actions by Mr. Chittick, as detailed in the Receiver’s reports⁹, to
9 transfer DenSco assets to his family and minor children. For example, Mr. Chittick left a
10 cardboard box full of at least \$551,400.00 in his parents’ garage for Mrs. Heuer with detailed
11 written instructions directing Mrs. Heuer how to hide or divert the DenSco funds and how to
12 use them to benefit Mr. Chittick’s family and children¹⁰. While Mrs. Heuer and the Estate of
13 Chittick voluntarily turned over these DenSco funds to the Receiver, it is only one striking
14 example of Mr. Chittick’s intentions to secure as much money for his family as possible, with
15 DenSco’s creditors being left saddled with astronomical financial losses from DenSco.
16 Another example, is found in a different letter to Mrs. Heuer, [a letter that was discovered by
17 the Receiver and not provided to the Receiver by the Estate of Chittick], in which Mr.

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⁹ See Petitions No. 3 and No. 5.

19 ¹⁰ Mr. Chittick left a series of written notes that lead the Chandler Police Department to a clothes dryer in the
20 garage of a condominium owned by Mr. Chittick’s parents. Inside the dryer was a cardboard box with cash
21 totaling at least \$551,400.00 and a letter to “Iggy [the nickname that Mr. Chittick had given Mrs. Heuer] that
in part reads “I am sorry, I know this seems dirty but I had to do something now that I have ruined mom + dad.
Give Mike and Joan their principle back; you can have your (sic) back next to Mo and Sam” (sic). The letter
goes on to give Iggy suggestions on how to launder the DenSco cash to avoid detection, including “Buy gift
cards, get money orders, make small deposits. I don’t know, give to your boss, he can give you a bonus.”

1 Chittick openly details his concerted efforts, in the final weeks of his life, to ensure certain
2 monies are available for Mr. Chittick’s family, again to the detriment of the DenSco
3 investors. In this letter, Mr. Chittick admits material facts showing his involvement in a
4 scheme to defraud his investors; admits that certain portions of his “personal” assets are
5 tainted with the ill-gotten gains of the DenSco scheme; and reflects how his planned suicide
6 is contemplated to make asset recoveries by a Receiver or other fiduciaries impossible.
7 Finally, Mr. Chittick acknowledges, in the letter, that after he was aware of the fraud
8 perpetrated upon DenSco by Mr. Scott Menaged at a time that DenSco was in financial peril,
9 Mr. Chittick divested 100% of the assets in the Plan by selling the DenSco stock held in the
10 Plan to DenSco for a grossly overinflated value, thereby diverting corporate assets for his (or
11 his beneficiaries’) benefit. Accordingly, these unfortunate actions by Mr. Chittick require
12 the Receiver to remain vigilant in evaluating all potential avenues of recovery for the benefit
13 of the creditors of DenSco, which ironically include the parents and other relatives of Mr.
14 Chittick.

15 It is well known that the Receiver is actively engaged in an investigation into the
16 formation of the Plan as well as its subsequent operation. As set forth in more detail below,
17 if the Plan was not tax-qualified as of the date of Mr. Chittick’s death, the Plan’s assets may
18 be subject to the claims of all of DenSco’s creditors (including the beneficiaries under the
19 Plan) and may be Receivership Estate property. Even if the Plan was properly formed, and
20 operated, the transfer, by DenSco of some, or all, of the assets held by the Plan may be
21 subject to fraudulent transfer claims resulting in a transfer of the assets back to the

1 Receivership Estate. Accordingly, if a determination is made by this Court that the assets
2 held under the Plan are Receivership Estate property, then the proposed actions by the Estate
3 of Chittick would also violate the Receivership Order by interfering with the control,
4 possession and custody of this Receivership Estate property.

5 For the foregoing reasons, the Receiver opposes any shareholder action to elect Mrs.
6 Mrs. Heuer, as a “director” of DenSco so that she may then appoint herself as the
7 Administrator and Trustee of the Plan and recommends that the Court permit the Receiver to
8 retain the right to decide who should act as the Administrator of the Plan and the right to
9 appoint a Trustee for the plan, if necessary, subject to Court approval.

10 **IV. THE PLAN AND RELATED RETIREMENT ACCOUNTS MAY BE SUBJECT TO**
11 **CREDITOR CLAIMS**

12 The Estate of Chittick claims that the assets of the Plan are held for the exclusive
13 benefit of the plan participants and are safe from creditor attachment under any
14 circumstances. *See, generally*, Petition No. 11 ¶4 (B). However, this position is legally and
15 factually incorrect. In fact, it is well settled under federal law that a single participant defined
16 benefit plan, like the Plan, is not subject to ERISA’s anti-alienation protections and can be
17 subject to creditor claims under the federal bankruptcy laws. Moreover, there are a litany of
18 cases that have essentially held that while both federal law and Arizona state law provide an
19 exemption for assets held in retirement accounts, these presumed exemptions may be
20 defeated by a showing that either the retirement plan does not satisfy the requirements to be a
21 tax-qualified plan, or that the party in control of the retirement account engaged in self-

1 dealing prohibited transaction and otherwise treated the retirement plan as his or her own
2 private “piggy bank.”

3 The case law in this area demonstrates that courts are empowered to review the tax-
4 qualified status of retirement plans and creditors may reach assets in a retirement plan, which
5 would otherwise be exempt, after a finding that the retirement plan is disqualified. For
6 example, in *In re Willis*, 2009 WL 2424548 (Bankr. S.D. Fl. 2009), a bankruptcy debtor
7 claimed as exempt assets held in three IRAs. A creditor challenged this exemption by
8 asserting that the debtor engaged in prohibited transactions. The Court held that, although
9 section 522(b)(3)(C) of the United States Code creates a rebuttable presumption that assets
10 held in tax-exempt retirement funds are exempt in a bankruptcy proceeding, proof that the
11 IRA owner engaged in prohibited transactions were sufficient to rebut the presumption of
12 exemption. In *Willis*, the Court determined that because the IRA owner engaged in
13 prohibited transactions with respect to the IRA assets, the IRAs lost their tax-exempt status
14 and the assets held in the IRAs could be reached by creditors in bankruptcy.

15 In *In re Bennett*, 2013 WL 4716180 (Bankr. Ore. 2013), a bankruptcy Debtor claimed
16 as exempt assets held in a defined contribution plan. A creditor challenged the exemption by
17 asserting that the debtor had engaged in a pattern of prohibited transactions. The Bankruptcy
18 Court held that neither the federal nor the state exemption applied to assets held in a qualified
19 defined contribution account where the debtor used the plan “like a [personal] savings
20 account.” The Bankruptcy Court disqualified the retirement plan and determined that the
21 retirement plan assets could be reached by the employer plan sponsor’s creditors.

1 In Arizona, courts have followed the principal that they are empowered to review the
2 tax-qualified status of retirement plans and if the court determines that the retirement plan
3 does not satisfy the necessary requirements, courts have determined that the retirement plan
4 assets may be available to the employer plan sponsor's creditors. For example, *see,*
5 *generally*, *In re Richey*, 2011 WL 4485900 (Bankr. 9th Cir. 2011); *In re Moses*, 215 B.R. 27
6 (Bankr. 9th Cir. 1997), *aff'd*, *In re Moses*, 167 F.3d 470 (9th Cir. 1999), and *In re Gilbraith*,
7 523 B.R. 198 (Bankr.D.Ariz. 2014)

8 In this case, the assets of the Plan that are equal to Mr. Chittick's accrued benefit as of
9 the date of his death must be available to pay Mr. Chittick's beneficiaries, absent a showing
10 that the Plan did not satisfy the requirement necessary to be a tax-qualified retirement plan or
11 upon a showing that Mr. Chittick used the Plan as his own personal piggy bank by devising a
12 scheme to defraud the Company's creditors and shareholders. Of course, if this Court
13 determines the Plan is tax-qualified and that Mr. Chittick did not use the Plan to engage in a
14 scheme to defraud the Company's creditors and shareholders, the Receiver will absolutely
15 make distributions to Mr. Chittick's beneficiaries under the terms of the Plan.

16 In the limited time that the Receiver has had to investigate the Plan, it appears that
17 there may be potentially serious and numerous issues surrounding the formation and
18 operation of the Plan and that the Court must make a determination as to whether the Plan in
19 indeed tax-qualified or whether Mr. Chittick engaged in self-dealing transaction that would
20 cause the Court to conclude he used the Plan as a subterfuge to defraud Company creditors
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1 and shareholders. For example, in a relatively short period of time has discovered the
2 following facts:

- 3 1. The Receiver is unaware of the existence of an executed version of the Plan¹¹;
- 4 2. The Receiver believes that several required amendments to the Plan have not
5 been signed.
- 6 3. The Receiver believes that the Plan has never filed any Form 5500s (which is
7 the annual information return required to be filed with respect to the Plan),
8 despite the fact that it appears the Plan's third party administrator prepared the
9 returns and instructed Mr. Chittick of their required filing;
- 10 4. It appears that the Plan is grossly overfunded based upon the unsigned Form
11 5500's prepared for but not filed for the Plan;
- 12 5. The Receiver's investigation has determined that Mr. Chittick caused the Plan
13 to engage in a number of self-dealing prohibited transactions including:
 - 14 a. Investing the Plan's assets in DenSco stock.
 - 15 b. After the Plan's TPA informed Mr. Chittick that the investment in
16 DenSco stock was a prohibited transaction, he caused the Plan to sell the
17 stock to DenSco for a "profit" in excess \$879,000.00, at a time when
18 DenSco was insolvent and when Mr. Chittick was aware of the fraud
19 scheme perpetrated upon DenSco by Mr. Scott Menaged¹². This

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21 ¹¹ The version of the Plan attached to the Estate of Chittick's Petition No. 11 is undated and unsigned.

¹² For a detailed explanation of the purported fraud schemes, see Exhibit A to Receiver's Petition No. 15, Paragraph 3.1.

1 resulting prohibited transaction caused the Company to pay many times
2 more than fair market value for the DenSco stock in an attempt to shield
3 assets from the Company's creditors and shareholders.

4 Therefore, and based upon the foregoing, the Receiver contends that the Estate of
5 Chittick's blanket assertion that the Plan's assets are absolutely and unconditionally protected
6 is just not correct.

7 **V. THE ESTATE OF CHITTICK MAY LACK STANDING TO ELECT ITSELF DIRECTOR OF**
8 **DENSICO**

9 The Estate of Chittick has failed to establish it has standing to assert a right to elect a
10 director of DenSco, as a voting shareholder of DenSco. The Receiver does not dispute that
11 Denny Chittick was the sole shareholder of DenSco prior to his death; however, the Estate of
12 Chittick has failed to provide any authority for the proposition that *all* of Mr. Chittick's
13 shareholder rights passed to his estate upon his death including any voting rights. The Estate
14 of Chittick appears to blithely assume that Mr. Chittick's stock interest was associated with
15 voting rights and that these rights, should they exist, survived the death of Mr. Chittick and
16 automatically passed to his estate. It is the Receiver's contention that the Estate of Chittick
17 has no standing to even pursue certain voting rights as a shareholder until it first establishes
18 that it has any voting rights whatsoever.

19 Assuming arguendo that the Estate of Chittick has legal title to any shares of stock
20 owned by Denny Chittick and assuming further that this includes any voting rights for the
21 appointment of a director of DenSco, and assuming even further that the express terms of the
Plan (stating that DenSco will name the Trustee of the Plan should Mr. Chittick no longer act

1 as Trustee) may be ignored, the Estate of Chittick should not be permitted to vote for the
2 appointment of a director of DenSco, so that the newly appointed director may appoint
3 herself to control the Plan transferring, in effect, control over Receivership property to a
4 singularly self- interested party who shares no concern for the interests of other parties in this
5 matter. In *Clark on Receivers*, (3rd Ed.), vol. 3, §708, it is made clear that shareholders of an
6 entity in receivership are subject to the equitable powers of a Receivership Court: “The court
7 can also take away or restrain action by the corporation's stockholders, if such stockholders
8 should pretend to act as and for the corporation.”

9 VI. THE TAX REFUNDS

10 The Receiver has determined, independent of assistance from the Estate of Chittick
11 that Mr. Chittick caused DenSco to intentionally overstate its taxable income and paid
12 significantly more in federal income tax than it should have. Frustratingly, the Estate of
13 Chittick has apparently known that Mr. Chittick inflated the income of DenSco since the day
14 that Mr. Chittick died, but for apparent strategical reasons failed to ever advise the Receiver
15 of Mr. Chittick’s actions. Once the Receiver discovered the potential tax refunds as an asset
16 that could be recovered through the collective efforts of the Estate of Chittick and the
17 Receiver, communications were initiated by the Receiver with the Estate of Chittick to
18 determine if the Receiver and the Estate of Chittick could work together. The Estate of
19 Chittick would agree to work with the Receiver only if the Receiver agreed to release any and
20 all claims against the Estate of Chittick and the Plan in exchange for \$600,000.00, an amount
21 estimated to be 50% of the potential tax refunds. For obvious reasons, the Receiver could not

1 blindly agree to release claims against the Estate of Chittick or the Plan, even in light of the
2 demands of the Estate of Chittick. During the discussions the Estate of Chittick made it clear
3 that it was not going to go through the trouble of amending the returns in order to generate
4 funds for the Receiver (in the form of shared refunds) only to give the Receiver unbridled
5 right to sue the Estate of Chittick over claims that the Plan is not legitimate or to otherwise
6 seek monetary recovery from the Estate of Chittick.

7 Accordingly, the Estate of Chittick and the Receiver find themselves at a potential
8 crossroads. The Receiver, who is a fiduciary and looking out for the interest of all creditors
9 and shareholders, has proposed that the Estate of Chittick and the Receiver work together
10 cooperatively to amend the respective tax returns and recover the tax refunds. The Receiver
11 has proposed that once the refunds are recovered and attendant expenses paid from the
12 refunds, that the remaining tax refunds be held in an escrow account until the Estate of
13 Chittick and the Receiver can determine how the funds should be allocated.¹³ The Estate of
14 Chittick has refused to accept this proposal. The Receiver, as a truly disinterested fiduciary,
15 believes that it is critical to recover assets for the creditors and shareholders of the
16 Receivership Estate and that the work of asset recovery should not be hampered by one party
17 seeking to protect its own interests.

18 IV. CONCLUSION

19 Based upon the foregoing, the Receiver requests that the Court enter an Order to
20 maintain the status quo, and set forth that the Plan is an asset of the Receivership under the
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¹³ Any resolution of the division of the tax refunds would be subject to the approval of this Court.

1 control of the Receiver. With respect to the tax refunds, the Receiver remains committed to
2 proceed with efforts to recover any tax refunds that may be due to DenSco or the Estate of
3 Chittick and if it is necessary engage services of a CPA to assist in this recovery.

4 Respectfully submitted this 9th day of January, 2017.

5 GUTTILLA MURPHY ANDERSON, P.C.

6
7 /s/ Ryan W. Anderson
8 Ryan W. Anderson
9 Attorneys for the Receiver

10 Original of foregoing e-filed this
11 This 9th day of January, 2017 with:
12 Clerk of the Maricopa County Superior Court
13 201 West Jefferson
14 Phoenix, Arizona 85003
15 Copies of the foregoing mailed and
16 e-mailed to all persons on the attached Master
17 Service List on this 9th day of January, 2017.

18 By: /s/Cynthia Ambrozic

19
20
21
2359-001(272021)

MASTER SERVICE LIST

Arizona Corporation Commission v. DenSco Investment Corporation

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

CV2016-014142

(Revised December 23, 2016)

The Honorable Lori Bustamante
Maricopa County Superior Court
East Court Building
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