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8 Attorneys for the Receiver

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
10 IN AND FOR MARICOPA COUNTY

11 ARIZONA CORPORATION )  
12 COMMISSION, )

13 Plaintiff, )

14 v. )

15 DENSCO INVESTMENT )  
16 CORPORATION, an Arizona )  
17 corporation, )

18 Defendant. )

Cause No. CV2016-014142

PETITION NO. 36

PETITION FOR ORDER TO APPROVE  
THE ENGAGEMENT OF BERGIN,  
FRAKES, SMALLEY &  
OBERHOLTZER, PLLC TO  
REPRESENT THE RECEIVER AS  
SPECIAL COUNSEL

(Assigned to the Honorable Teresa  
Sanders)

19 Peter S. Davis, as the Court appointed Receiver of DenSco Investment Corporation  
20 (“DenSco”), respectfully petitions the Court for an Order approving the engagement of  
21 Bergin, Frakes, Smalley & Oberholtzer, PLLC., as Special Counsel to the Receiver, as  
follows:

1. On August 18, 2016, this Court entered its *Order Appointing Receiver*, which appointed Peter S. Davis as Receiver of DenSco Investment Corporation (“Receivership Order”).

1           2.       The Receivership Order authorizes the Receiver to, among other things,  
2 employ attorneys and other professionals that are necessary and proper for the collection,  
3 preservation and maintenance of the Receivership Assets. [See ¶16 of the Receivership  
4 Order]

5           3.       The Receiver has initially determined that DenSco may hold significant claims  
6 against financial institutions including JP Morgan Chase Bank, N.A and U.S. Bank N.A for  
7 their participation in a scheme to defraud DenSco. The Receiver has determined that certain  
8 financial institutions may have been instrumental in allowing Yomtov Scott Menaged  
9 (“Menaged”) to operative a massive fraudulent loan scheme upon DenSco. The Receiver has  
10 determined that starting in January 2014, as part of the DenSco’s underwriting requirements,  
11 Menaged was required to provide DenSco with a copy of each specific cashier check, issued  
12 by Menaged’s financial institution, to the respective foreclosure trustee for the purchase of a  
13 property by Menaged at a foreclosure trustee’s auction/sale.

14           4.       The Receiver’s investigation has determined that Menaged was able to procure  
15 at least 1,383 legitimate cashier’s checks from financial institutions in a period of two years  
16 for a collective face value of at least \$319,292,828.

17           5.       However, the cashier’s checks were used by Menaged to make it appear that  
18 Menaged was actually using DenSco loan proceeds to purchase property from a foreclosure  
19 trustee, when in fact, Defendant obtained the cashier’s check for the sole purpose of simply  
20 taking a picture of the cashier’s check to send to DenSco to make it appear that the DenSco  
21 funds were being used to purchase real property. Moreover, the Receiver has learned that

1 after Menaged took a picture of the cashier's check to send to DenSco he returned to the  
2 financial institution to cancel the cashier's check, typically only a few hours after the  
3 cashier's check was issued. The sheer volume of issued and then immediately cancelled  
4 cashier's checks by Menaged is staggering.

5         6. The Receiver has determined that he requires the legal services of the law firm  
6 of Bergin, Frakes, Smalley & Oberholtzer, PLLC., to assist the Receiver in his ongoing  
7 investigation of these potential claims and the potential prosecution, trial or settlement of any  
8 claims that the DenSco may have against the financial institutions who allowed Menaged to  
9 issue and cancel the cashier's checks used to defraud DenSco.

10         7. The Receiver has determined that he requires the expertise of Bergin, Frakes,  
11 Smalley & Oberholtzer, PLLC, as these accomplished lawyers have significant experience in  
12 the areas of banking and banking regulation and can not only assist the Receiver in the  
13 investigation of DenSco's potential claims, but also to provide sound advice and counsel to  
14 the Receiver in all aspects of potential legal claims and possible remedies that may arise from  
15 actions or omissions of the financial institutions in question.

16         8. Bergin, Frakes, Smalley & Oberholtzer, PLLC, has agreed to serve as Special  
17 Counsel pursuant to the terms of the Engagement Agreement as set forth in Exhibit 'A'.  
18 Pursuant to the Engagement Agreement, Special Counsel will complete an investigation into  
19 DenSco's potential claims and provide a detailed memorandum of the claims with an  
20 estimation of probable costs of pursuit of the claims within thirty (30) days from the Court's  
21 approval of this Petition.

1           9.       Thereafter, assuming the Receiver determines that DenSco's claims should be  
2 advanced, the Receiver will have the option to elect either an hourly or contingent fee as the  
3 basis for future compensation to Special Counsel. If the Receiver elects to proceed on an  
4 hourly basis, Bergin, Frakes, Smalley & Oberholtzer's professionals will be compensated on  
5 an hourly rate basis pursuant to the professional rate schedule as set forth in Exhibit 'A'. If  
6 the Receiver elects to proceed on a contingency fee basis, Special Counsel has agreed to a  
7 sliding scale for the potential contingency fee as set forth in Exhibit 'A'. Specifically,  
8 Special Counsel would be compensated Thirty-three and one-third percent (33.33%) of any  
9 gross recovery between \$00.00 and \$6,000,000.00; Twenty-Five percent (25%) of any gross  
10 recovery between \$6,000,000.00 and \$12,000,000.00; Fifteen percent (15%) of any gross  
11 recovery between \$12,000,000.00 and \$20,000,000.00; and ten percent (10%) of any gross  
12 recovery above \$20,000,000.00.

13           10.       The Receiver believes that both the hourly rates and sliding scale for the  
14 potential contingency fee are reasonable in light of the substantial experience of the  
15 professionals at Bergin, Frakes, Smalley & Oberholtzer, PLLC and the nature of the DenSco  
16 claims.

17           WHEREFORE, the Receiver respectfully requests that the Court enter an order:

18           1.       Appointing the law firm of Bergin, Frakes, Smalley & Oberholtzer, PLLC, as  
19 special counsel to the Receiver;

20           2.       Approving the engagement agreement with the law firm of Bergin, Frakes,  
21 Smalley & Oberholtzer, PLLC, attached as Exhibit "A" to ; and

1           3.     Directing the Receiver to file a notice with the Court when the Receiver has  
2 made his election to either proceed with compensation of Special Counsel on an hourly basis  
3 or on a contingency basis.

4           Respectfully submitted this 19<sup>th</sup> day of September, 2017.

5   GUTTILLA MURPHY ANDERSON, P.C.

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

9   2359-001(296673)

**FEE AGREEMENT**  
**BERGIN, FRAKES, SMALLEY & OBERHOLTZER, PLLC**

The law firm of BERGIN, FRAKES, SMALLEY & OBERHOLTZER, PLLC ("Attorneys"), agrees to represent Peter S. Davis, as receiver of DenSco Investment Corporation (hereinafter "DenSco"), in receivership in CV 2016-014142 ("Client"), in the investigation, prosecution, trial or settlement of any claims that DenSco may have against JP Morgan Chase Bank, N.A.

1. **Flat Fee, Memorandum of Claim.** Receiver shall seek approval from the Court to retain Attorneys. If approval is given, Attorneys will prepare a memorandum of claim for the Receiver setting out an analysis of claims the Receiver may pursue. In preparing the memorandum, Attorneys shall review relevant documentation, setting out the factual and legal basis of any claims, and possible remedies. The memorandum will set out the probable costs of pursuing the claims. The memorandum will be submitted to the Receiver within thirty days of the approval of this agreement by the Court. Attorneys will prepare the memorandum of claim for a flat fee of \$20,000, with the understanding that the Receiver will seek approval from the Court to pay that fee after receipt of the memorandum.

2. **Election of Hourly or Contingent Fee.** If the Receiver decides to pursue the claims, then the Receiver may choose to proceed with the case either on a standard hourly rate basis or on a contingent fee basis.

3. **Hourly Rate.** If a decision is made to proceed on an hourly rate basis, Attorneys will be paid in accordance with the standard form hourly rate retention agreement that is attached to this Fee Agreement.

4. **Contingent Fee.** If a decision is made to proceed on a contingent fee basis, Client agrees to pay and assign to Attorneys:

- (1) Thirty-three and one third percent (33 1/3%) of any gross recovery between zero and \$6,000,000 obtained by reason of settlement or trial; and, in addition
- (2) Twenty-five percent (25%) of any gross recovery between \$6,000,000 and \$12,000,000 obtained by reason of settlement or trial; and, in addition
- (3) Fifteen percent of any gross recovery between \$12,000,000 and \$20,000,000 obtained by reason of settlement or trial; and, in addition
- (4) Ten percent of any gross recovery above \$20,000,000.

The term "gross recovery" shall mean actual receipt by Client (or its representatives) of the proceeds of a settlement, a court or arbitration award and/or a jury verdict; and the gross recovery is "obtained" either on receipt or on the date on which there is an enforceable settlement agreement with any Defendant or other relevant person or entity.

Any award of attorneys' fees, if allowed and ordered by the Court, will be included in calculating the gross recovery.

Except as provided in Paragraph 8 below, attorneys' fees, expenses and costs will be payable only out of recovery, and if no recovery is obtained, no fees or costs shall be payable to Attorneys except for the flat fee for the memorandum of claim.

Client consents to the payment of any recovery directly to Attorneys. If any recovery is paid by a joint check to Attorneys and Client, Client shall endorse such check over to Attorneys, and Attorneys shall disburse the proceeds in accordance with this Agreement, after deducting unreimbursed costs and its attorneys' fees.

Client agrees that the attorneys' fee calculated shall be a lien on any amount recovered, by settlement or otherwise.

5. **Appeal.** Attorneys shall respond to any appeal or special action filed by an adverse party. Attorneys shall initiate any appeal or special action requested by the Receiver.

6. **Future Payments.** If a settlement is reached or a judgment provided which provides that clients shall receive money and/or other benefits to be paid or conferred over some future period of time, any contingent fee will be based upon the present value of the recovery. In that event, the current value of such money or benefits shall be determined by fair and reasonable means, and that current value shall be the amount recovered. If practicable, Attorneys may take any contingent fee at the time a future payment is made; for example, if there is an annuity, Attorneys may take any contingent fee when an annuity is paid.

7. **Expenses.** Under the ethical rules governing lawyers and lawsuits in Arizona, Attorneys are allowed to, and hereby agree to, advance the expenses of representation. If an hourly rate basis is selected, Client will reimburse Attorneys for all expenses so advanced. If a contingent fee basis is selected, expenses advanced by Attorneys, and not otherwise reimbursed to Attorneys, for example by a recovery of taxable costs, shall be deducted from Client's share of the amount recovered. If nothing is recovered, then Client shall not have to reimburse Attorneys for any expenses advanced.

8. **Expenses includes Taxable Costs.** In the event that the case is litigated to a judgment, Client may, if the Client prevails, recover "taxable costs." Taxable costs include such items as filing fees, and the costs of depositions, subpoenas, etc. Any taxable costs recovered shall be used to reimburse Attorneys for the taxable costs and expenses which they have advanced in the course of the litigation, and will not become part of the gross amount recovered if a contingent fee basis is selected.

9. **Withdrawal.** Attorneys may withdraw as counsel for Client at any time upon giving reasonable notice. This Agreement may also be terminated at any time by Client before settlement or ultimate recovery after reasonable notice to Attorneys.

In the event a contingent fee basis is selected and this Agreement is terminated by Attorneys for no cause before settlement or ultimate recovery, no fees shall be payable to Attorneys. In the event that Attorneys withdraw for good cause, then the Attorneys shall be paid their ordinary hourly rates for work performed up to the time of their withdrawal. If Client and Attorneys cannot agree on the issue of good cause, then that issue shall be determined in a single arbitrator arbitration conducted according to the commercial arbitration rules of the American

Arbitration Association, in confidential proceedings. The result of the Arbitration will be submitted to the Court for approval, and the parties agree that the Court may review the result as to the reasonableness of the hourly fees awarded.

In the event a contingent fee basis is selected and this Agreement is terminated by Client before settlement or ultimate recovery, Client agrees to pay to Attorneys from any recovery ultimately obtained a fee that fairly represents the value of Attorneys services, taking into account all the facts and circumstances, including the fee specified in this agreement, the status of the litigation at the time of the termination, and the pro rata division of time between Attorneys and any subsequent law firm. If disputed, that fee shall be set by the Court.

10. **Settlement.** No settlement shall be binding without the consent of Client, and the approval of the Court.

11. **Requirement of Reasonableness and Court approval.** Pursuant to ER 1.5, Rule 42, Rules of the Arizona Superior Court, Attorneys will review any fees billed if an hourly rate basis is selected to assure that the fees are reasonable in light of the factors set forth in ER 1.5, and will adjust their fees to the extent necessary to assure that they are reasonable and comport with ER 1.5.

Pursuant to the Receivership Order, the Court must approve the reasonableness of all attorneys' fees and costs and expenses. No attorneys' fees, costs or expenses shall be paid until approved by the Receiver and the Court.

12. **Retention of Documents.** In the course of the representation, Attorneys are likely to come into possession of copies or originals of documents or other materials belonging to Client or others. Once the particular matter to which those materials relate has been concluded, Attorneys will have no further responsibility to maintain such materials unless expressly agreed otherwise. If Client has not sought the return of such materials within one year of the closing of the matter to which such materials relate, Attorneys may destroy such materials in accordance with their normal file retention policies.

13. **Client's Duties.** Client agrees to be truthful with Attorneys, to cooperate in the prosecution of the Claim, to keep Attorneys informed of all relevant developments, and to keep Attorneys advised of Client's address, telephone number, and whereabouts.

Dated this 12th day of September, 2017

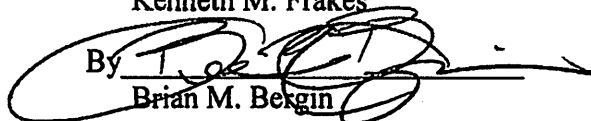


Peter S. Davis, Receiver

BERGIN, FRAKES, SMALLEY &  
OBERHOLTZER PLLC



By  
Kenneth M. Frakes



By  
Brian M. Bergin



**FEE AGREEMENT**  
**BERGIN, FRAKES, SMALLEY & OBERHOLTZER, PLLC**

**Representation.** The law firm of Bergin, Frakes, Smalley & Oberholtzer, PLLC (hereinafter "us" or "we") has agreed to represent Peter S. Davis, as receiver of DenSco Investment Corporation, in receivership in CV 2016-014142 (hereinafter "DenSco" or "you"), in the investigation, prosecution, trial or settlement of any claims that DenSco may have against its former legal advisors, including any claims against JP Morgan Chase Bank, N.A.

**Fees and Costs.** You agree to pay us for legal services at our regular hourly rates which will be billed to you and which are to be paid each month.

Our fee will be determined by multiplying the number of hours worked on your behalf by the standard hourly rate of each attorney, law clerk, paralegal, and other assistant. A rate schedule for the attorneys and others who we expect to work on your case is attached. We adjust our standard billing rates periodically. A rate schedule is available to you at any time on request.

We record and bill for our time in tenths of an hour. Our bills will include the time we spend on researching factual and legal issues, negotiations, conferences, preparation of various documents or pleadings, conducting discovery, court appearances, travel, and telephone calls.

In addition to our fees, you will be responsible for any charges and expenses we incur on your behalf. We normally advance the cost of court fees, deposition expenses, and travel expenses, and charge them to you monthly as bills are received and processed by the firm. We may also submit certain outside charges to you for direct payment, and you have agreed to hire, pay directly, and be solely responsible for the charges of all experts, investigators, and local counsel. We will bill you for photocopies (\$.20/page), data duplication (from \$10 to \$45), computer-assisted research (at average imputed cost), messenger services (from \$7 to \$30 or more, depending on distance), automobile travel (53.5¢/mile), extraordinary staff overtime (at cost), long distance telephone calls (at average imputed cost), and certain specialized technical services, such as computerized litigation support, at \$155 to \$200 per hour.

We prepare statements each month for mailing by the 15<sup>th</sup>. The statements will show the fees and charges incurred during the previous month and any balance of your trust account after payment of the statement. We will address our statements to you at the above address unless directed otherwise.

Payment of each month's statement is due 30 days after the date of the statement. However, if there are funds in the trust account we may immediately pay our statement from those funds. We would encourage you to examine our statements with as much care as you deem appropriate and to contact us immediately if you have any questions or concerns. We may withdraw from the representation, after reasonable notice, if our bills are not paid when due, or if you do not comply with the other terms of this Agreement. We reserve the right, upon ten days advance notice to you, to charge interest on past due amounts at 1.5% per month.

The responsible attorney will review your statements to make any adjustments we believe are appropriate. We would ask you to alert us promptly to any questions you may have about the statement or the work for which you were billed by contacting the attorney with whom you are working or the firm's controller. We are always willing to discuss our fees with you if you have

questions or feel the charges may be inappropriate. It is our desire to provide you with the best representation possible at a price which is fair and reasonable and to build an ongoing relationship of trust, confidence, and fair dealing.

You may terminate our representation at any time. If you do so, you will be responsible for our fees and costs to the date of the termination plus any fees and costs incurred in withdrawing and in assisting new counsel during the termination.


**Retention and Destruction of Documents.** During our representation, we are likely to receive copies or originals of documents or other materials belonging to you or others. Once the matter to which those materials relate has been concluded, we will retain and eventually return these materials to you or destroy them in accordance with our file retention policy, a copy of which is enclosed. Please inform us of any change of address so that we can contact you when it is time to return the file.

**Electronic Communications.** Communication through email, cellular, and wireless devices is cost-efficient and convenient. We take reasonable internal precautions and safety measures to prevent disclosure of client sensitive information when using these forms of communication. But, we have no control regarding Internet providers, the Internet itself, wireless communications, or where and how you store confidential information. You must understand it is possible for such communications to be intercepted, misdirected, viewed, heard, or otherwise accessed by third parties, either accidentally or intentionally. You authorize us to communicate with you and third parties via email, cellular, and wireless methods, and you understand and accept all confidentiality risks associated with such use. It is important for you to let us know if there are email or other electronic addresses to which we should avoid sending confidential information.

**Arbitration of Fee Disputes.** In the event of a dispute involving our fees or costs, you and we agree to submit the matter to the fee arbitration process conducted by the Arizona State Bar. The decision of the arbitrators will be final and non-appealable. You and we waive the right to file suit in court concerning disputed fees or costs.

**Binding Contract.** If you agree to the terms set forth in this Agreement, please execute the enclosed copy and return it to us as soon as possible. When signed by you, this agreement constitutes a binding contract. You are encouraged to seek separate legal counsel if you desire independent legal advice concerning the meaning or effect of this agreement.

Dated this 12th day of September, 2017.

  
\_\_\_\_\_  
Peter S. Davis, Receiver

BERGIN, FRAKES, SMALLEY & OBERHOLTZER, PLLC

By   
\_\_\_\_\_  
Kenneth M. Frakes

By   
\_\_\_\_\_  
Brian M. Bergin

## RATE SCHEDULE

Kenneth M. Frakes	\$325
Brian M. Bergin	\$325
Michael Smalley	\$325
Carolyn K. Oberholtzer	\$405
Kevin M. Kasarjian	\$295
Bradley Scott	\$235
Tyler Brown	\$225
Paralegal	\$125
Planner	\$175
Law Clerk	\$140
Planning Assistant	\$75

# **File Retention Policy**

**Bergin, Frakes, Smalley & Oberholtzer, PLLC**  
**(Effective May 1, 2015)**

The State Bar of Arizona has issued Opinion No. 08-02 (December 2008) furnishing file retention guidelines for Arizona lawyers. Bergin, Frakes, Smalley & Oberholtzer, PLLC (the "Firm") has adopted this File Retention Policy to comply with such guidelines.

1. **Disclosure.** Each client will be notified in writing at the commencement of the representation of the Firm's file retention policy. In most cases, this will be accomplished by enclosing a copy of this policy with the retention letter or agreement. Existing clients shall be furnished a copy of this policy with their next statement.

2. **Retention Period.** Most files ("Short Term Files") will be held by the Firm for a period of five years after the earlier of (a) the closing of the file, or (b) the last recorded activity for the file (normally filing a document or retrieving a document). Other files ("Long Term Files") will be held for an indefinite period. Long Term Files include probate, estate planning, or trust matters, capital cases, homicide cases, life sentence cases, life probation cases, and other cases where the responsible attorney believes that indefinite file storage is appropriate to protect the interests of the client. Long Term Files will be destroyed only when the responsible attorney or the Firm's President has reviewed the file and has determined that there is no reasonable possibility that the file may ever be needed by the client. The Firm may store files in either hard copy or digital format; effective as of May 1, 2015, files and client documents generally will be stored only electronically and will not be retained in paper format.

3. **Disposition Procedure.** After the expiration of the five-year period described above, the file room supervisor will notify the responsible attorney in writing to ask the attorney whether the client should be contacted to determine if the client desires the file to be returned to the client. If the attorney responds in the negative, the file will continue to be held for another year, at which time the attorney will again be queried. If the attorney responds in the affirmative, the supervisor will attempt to contact the client by mail to offer the client the choice of taking possession of the file, or having the file destroyed by the Firm. If the client responds, the supervisor will take the action requested by the client after a review of the file as set forth below. This procedure will be followed for both Short Term Files and Long Term Files as it may not be apparent to the file room supervisor whether a file is Short Term or Long Term—this judgment is to be made by the responsible attorney. In addition, even Long Term Files are appropriate for destruction at some point.

4. **Unresponsive Client.** If no answer is received from the client within a reasonable period of time, the supervisor will make an additional effort to locate the client, and again query the client by mail about the disposition of the file. If no response is received within a reasonable period of time after this second inquiry, the supervisor will ask the attorney in writing if the file may be destroyed. If the attorney responds in the affirmative, the file will be given to the attorney for review as set forth below, and if appropriate the file will be destroyed.

If the attorney responds in the negative, the file will be held an additional year, at which time the attorney will again be queried by the supervisor. The Firm is under no obligation to continue to store Short Term Files for more than five years or Long Term Files which are appropriate for destruction if the client cannot be located or if the client fails to respond. In addition, the Firm is under no obligation to continue to store any file if the client fails, after reasonable notice, to retrieve a file the client has indicated it wants.

5. **Return of File.** When a file is returned to a client, the complete file, including any portion of the file stored electronically, is to be returned, except only internal practice management memoranda. Arrangements for the return of the file are to be made between the filing supervisor and the client. If the client does not wish to pick up the file, it will be delivered or shipped at the client's expense unless it can be mailed for less than \$10.00 in postage, in which case the Firm shall pay the postage. The client is to be notified that the Firm is not keeping a copy of the file, and that the client should safeguard the file if it may be needed for future use or reference. The Firm may retain photocopies of all or any portion of the file at the Firm's expense. The responsible attorney is to review the file prior to its return to remove internal practice memoranda and any information relating to another client that may have been inadvertently placed in the file. The Firm is not responsible for any file lost in transit if the client chooses not to personally retrieve the file at the Firm's offices.

6. **Early Return.** A client's file belongs to the client and may be retrieved by the client at any time, so long as the return of the file does not interfere with the ongoing representation of the client.

7. **Destruction of File.** Destruction of files shall be done in a manner that preserves client confidences and confidentiality. In no event will a file be destroyed until it has been reviewed by the responsible attorney or the Firm's president to insure that no original documents tendered by the client are in the file and that there is no reason to continue to store the file.