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10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF MARICOPA
12

13 Peter S. Davis, as Receiver of DenSco
Investment Corporation, an Arizona
14 corporation,

15 Plaintiff,

16 vs.

17 Clark Hill PLC, a Michigan limited
liability company; David G. Beauchamp
18 and Jane Doe Beauchamp, husband and
19 wife,

20 Defendants.
21

No. CV2017-013832

**PLAINTIFF'S DISCLOSURE OF
REBUTTAL EXPERT WITNESS
REPORT RE DAMAGES**

(Commercial case)

(Assigned to the
Honorable Daniel Martin)

22 Pursuant to the scheduling order entered in this matter, Plaintiff Peter S. Davis, as
23 Receiver of DenSco Investment Corporation, hereby discloses the attached rebuttal
24 report of David Weekly, Felix Financial Forensics, LLC, which addresses the Expert
25 Report of David R. Perry, served by Defendants on April 5, 2019.
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DATED this 7th day of June 2019.

OSBORN MALEDON, P.A.

By Geoffrey M. T. Sturr

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**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.

**In the Superior Court of the State of Arizona
In and For the County of Maricopa**

Case No. CV2017-013832

Rebuttal Expert Report of:

**David B. Weekly
Fenix Financial Forensics LLC**

June 5, 2019

Peter S. Davis, as Receiver of DenSco Investment Corporation
v.
Clark Hill PLC, et al.
(Case No. CV2017-013832)

Rebuttal Expert Report of David B. Weekly
June 5, 2019

Introduction

1. On April 4, 2019, F3 issued the Expert Report of David B. Weekly (“F3 Original Report”) in the above referenced matter. The entire F3 Original Report and this Rebuttal Expert Report should be considered collectively.
2. On April 5, 2019, Sterling Group LLC issued the Expert Report of David R. Perry (“Perry Report”). The Perry Report states Mr. Perry was engaged by counsel for Defendants to “perform financial and economic analyses related to (i) the frauds perpetrated by Mr. Menaged, (ii) DenSco’s financial situation and (iii) the Receiver’s claim for economic damages.”¹

Scope and Opinions

3. This Rebuttal Expert Report summarizes the rebuttal opinions of David B. Weekly, a Senior Managing Director for F3. Exhibit A contains a list of documents considered subsequent to the issuance of the F3 Original Report. All other information and statements included in the F3 Original Report should be considered collectively with this Rebuttal Expert Report unless otherwise stated.
4. The Perry Report was prepared prior to the issuance of the F3 Original Report and does not address the F3 Original Report or its calculation of damages. Mr. Perry provides his observations primarily on areas disclosed in various Receiver Status Reports or Plaintiff Disclosure Statements.
5. The Perry report is organized in five main sections: 1) Background, 2) Summary of Main Opinions, 3) Mr. Menaged’s Frauds, 4) DenSco’s Financial Situation, and 5) Receiver’s Economic Damage Claims. Section 2 of the Perry Report (“Summary of Main Opinions”) contains a number of observations that are grouped into three categories: “Mr. Menaged’s Frauds,” “DenSco’s Financial Condition,” and “Receiver’s Economic Damage Claims.”²
6. Mr. Perry’s observations related to Mr. Menaged’s Frauds and DenSco’s Financial Condition are not relevant to the scope of the F3 Original Report and will not be addressed in this Rebuttal Expert Report. However, if Mr. Perry asserts in any subsequent report or testimony that any of his observations related to Mr. Menaged’s Frauds or DenSco’s Financial Condition are relevant to F3’s opinions or damage calculations, we reserve the right to comment at that time. This Rebuttal Expert Report will address Mr. Perry’s three observations related to “Receiver’s Economic Damages Claims,” which are contained in Section 5 of the Perry Report.

¹ Perry Report, Section 1.2.

² Perry Report, Section 2.

Opinions

- I. The Perry Report incorrectly assumes Plaintiff's disclosure statements contain Plaintiff's claim for economic damages.
- II. The Perry Report's observations of the Receiver's Economic Damages Claims are based on estimates and unsupported assumptions, and Mr. Perry does not provide any definitive alternate calculations.

Detailed Findings in Support of Opinions

7. Section 5 of the Perry Report contains his findings and observations related to the "Receiver's Economic Damage Claims." F3 will address each subsection of Section 5 in this Rebuttal Expert Report.
8. Mr. Perry's initial statement in Section 5 that the disclosure statement identifies the Receiver's economic damage claims is wrong. All of Plaintiff's five disclosure statements contain similar remarks regarding damages: "***The Receiver will rely on expert testimony to testify about damages*** DenSCO suffered as a result of Defendants' conduct. The Receiver has previously disclosed to Defendants' counsel the following ***preliminary information relating to damages*** and prejudgment interest." (emphasis added) The Receiver's disclosure statements do not contain Plaintiff's damage claims. Plaintiff's claim for damages is contained in the F3 Original Report.

Perry Report Section 5.1 – January 2014 Relationship Termination

9. In this subsection, Mr. Perry states "Even if it is assumed that Defendants would have been able to persuade Mr. Chittick to sever DenSCO's relationship with Mr. Menaged in the first week of January 2014, the First Fraud had already been completed and the Second Fraud had already started by this time." He then states that the Receiver's economic damage claim is overstated because it fails to deduct \$17.7 million in losses that Mr. Perry "estimated" DenSCO would have realized if DenSCO terminated its relationship with Mr. Menaged in January 2014.
10. While we agree the assumptions used to determine the period for calculating damages will impact the results, Mr. Perry's observation is incorrect because the Receiver's reported \$43,155,342 of damage components is not the Plaintiff's claim for damages. The F3 Original Report calculates Plaintiff's damages based on net loan losses for Workout Loans originated after September 30, 2013 and Non-Workout Loans beginning January 22, 2014. As a result, the F3 Original Report does not include the actual Workout Loan losses on loans to Menaged that originated prior to October 1, 2013. Therefore, Mr. Perry's conceptual argument for his estimated loan loss of \$17.7 million has already been addressed in F3's damage calculation.
11. In addition, Mr. Perry's \$17.7 million loss "estimate" is incomplete and speculative because: 1) his calculations are based on assumed second lien positions and assumed market values where the sale occurred after January 9, 2014³, 2) he has not demonstrated these values would have been known

³ For these 72 properties, Mr. Perry's assumed market value is based on a date averaging 4.44 months past January 9, 2014.

or knowable as of January 9, 2014, 3) he made no adjustment for loans where DenSco may have been in a first lien position, and 4) he states, “Sterling has insufficient information on the 204 properties underlying DenSco’s loans to Mr. Menaged as of January 9, 2014 to accurately quantify the effect on DenSco’s net worth if DenSco had stopped doing business with Mr. Menaged on January 9, 2014.”⁴

12. Mr. Perry claims that the alleged economic damage claims in the Receiver’s disclosure statement are overstated because the Receiver failed to offset his alleged damage claims for estimated loan losses prior to January 9, 2014. However, he does not offer an alternative calculation of alleged damages. Section 5.1 of the Perry Report implies the adjusted damage claim in the Receiver’s disclosure statement should be \$25,444,340 (i.e. \$43,155,342 less \$17,711,002). While I disagree with Mr. Perry’s methodology and calculations, I note this amount is close to the \$24,713,219 in net loan loss damages calculated in the F3 Original Report.
13. The Perry Report contains no discussion of DenSco’s losses related to Non-Workout Loans. Mr. Perry offers no opinion or calculation of what amount of Non-Workout Loan losses DenSco incurred as a result of Defendants’ alleged actions, should Defendants be found liable. The F3 Original Report quantified this amount as \$24,436,100.⁵

Perry Report Section 5.2 – Net Loss from Frauds

14. Section 5.2 of the Perry Report discusses the settlement the Receiver reached with Menaged resulting in a nondischargeable civil judgment of \$31 million against Menaged. Mr. Perry states, “Based on the above, the Receiver determined in 2017 that DenSco’s net loss from Mr. Menaged’s fraudulent activities was approximately \$31 million. Accordingly, the upper limit of the Receiver’s claims related to actions that allegedly would have prevented DenSco from suffering losses related to Mr. Menaged’s frauds should be \$31 million.” This assertion is wrong.
15. The Receiver initially sought a judicial determination of at least \$47.2 million against Menaged. The Receiver’s analysis to determine the \$31 million was used for the purpose of obtaining a negotiated settlement with Menaged and this amount is not referred to in the Settlement Agreement as DenSco’s damages. The settlement amount was determined by deducting the entire amount of interest Menaged paid to DenSco beginning in 2007 against the Receiver’s calculation of the final outstanding loan balance due from Menaged in 2016.

Perry Report Section 5.3 – Net Loss by Investors

16. Section 5.3 of the Perry Report refers to the Receiver’s discussion of investor losses contained in his December 2016 Status Report and distributions made by the Receiver to DenSco’s investors/creditors as of March 11, 2019. The Perry Report states, “The net investment loss is \$24.9 million based on the distributions so far and will be reduced further by future distributions.”⁶ F3 was not asked to analyze or determine the net investment loss suffered by DenSco’s investors. Mr. Perry fails to provide any definitive calculations related to his observations.

⁴ Perry Report, Section 4.4.4, p. 26.

⁵ F3 Original Report, Table 1. This amount is included in the total net loan losses of \$24,713,219.

⁶ Perry Report, Section 5.3.

Perry Report Section 5.4 – Potential Future Distributions/Recoveries

17. Section 5.4 of the Perry Report refers to potential future recoveries from several individuals and entities including: 1) Mr. Menaged and his bankruptcy estate, 2) Mr. Chittick's estate, 3) Net investment winners from the Ponzi scheme, 4) Banks involved in the cashier's check scheme, 5) Active Funding Group ("AFG"), and 6) One DenSco borrower other than Mr. Menaged.
18. Mr. Perry states that any damage claim should subtract some, if not all, of the expected future distributions and/or recoveries from individuals other than Defendants. However, he makes no attempt to analyze or quantify any of these amounts. F3's damage calculation was reduced by the amount of net Menaged-related recoveries received to date.⁷ Paragraph 47 of the F3 Original Report states that we understand that potential settlements and claims against other parties could impact the damages F3 has computed, and that we would amend the F3 Original Report for any net recoveries or other costs and expenses that may impact our calculations.

Perry Report Section 5.5 – Non-Parties at Fault

19. Section 5.5 of the Perry Report states, "Sterling understands an appropriate damage award against Defendants, if any, should take account of the relative contribution of all individuals and entities."⁸ Mr. Perry also states that the alleged economic damage claims in the Receiver's disclosure statement fails to include an offset for the relative contribution of individuals and entities other than Defendants. Again, the Receiver's disclosure statement information is not the Plaintiff's damages claim, and Mr. Perry provides no definitive or alternate calculation of what amount, if any, he believes should be offset against damages for the relative contributions of other individuals and entities other than the Defendants.

Perry Report Section 5.6 – Workout Loan Balances

20. F3's findings related to Mr. Perry's \$17.7 million estimate are discussed previously in this report. The F3 Original Report calculates DenSco's net loan losses associated with Workout Loans after September 30, 2013 of \$69,123⁹ and properly excludes losses incurred by DenSco which resulted from Workout Loans originated prior to October 1, 2013.

Perry Report Section 5.7 – Prejudgment Interest

21. Mr. Perry claims the economic damages resulting from the Alleged Actions identified in the disclosure statement are not liquidated or a sum certain. Mr. Perry implies that prejudgment interest is not applicable. His observations in this section relate only to his assertion that the Receiver's disclosure statements are the Plaintiff's damage claims. This is an incorrect assertion because F3's Original Report contains the Plaintiff's damage claims.

⁷ F3 Original Report, Table 1.

⁸ Perry Report, Section 5.5.

⁹ F3 Original Report, Table 1.

22. F3 calculated DenSco's actual loan losses related to Workout Loans for transactions where the economic damages occurred after September 30, 2013. Loan loss damages for Workout Loans represent cash paid by DenSco to resolve their Menaged loan shortfalls ("Cash Out") less payments made by Menaged to DenSco on these loans ("Cash In"). Loan losses related to Non-Workout Loans beginning January 22, 2014 were also calculated by determining the total "Cash Out" minus "Cash In". These amounts were determined using Receiver Reports, loan activity schedules prepared by the Receiver's staff, DenSco's QuickBooks file, DenSco's bank account statements, Chittick's corporate journal and relevant communications from emails produced by Chittick and Menaged.
23. Professional guidance published by the American Institute of Certified Public Accountants (AICPA) related to prejudgment interest states, "Claims may be liquidated or unliquidated. A claim is liquidated if its specific dollar amount is known. A claim is unliquidated if the exact amount owed has not been determined."¹⁰ The F3 Original Report identifies the specific amount of DenSco's Menaged-related cash net loan loss and applied all known Menaged-related offsets. The F3 Original Report calculates prejudgment interest on the amount of net loan losses based on time periods and interest rates provided by Counsel.¹¹

Perry Report Section 5.8 – Receiver's Economic Damage Claims Summary

24. F3's findings and opinions related to the statements in this section of the Perry Report have been addressed throughout this Rebuttal Expert Report. The following is a summary of F3's findings.
- ***The economic damage claims in the Receiver's disclosure statement are substantially overstated for several reasons:*** The Receiver's disclosure statements do not contain the Receiver's claim for damages. The Receiver stated on multiple occasions that his damages would be quantified and testified to by an expert. F3 calculated loan loss damages based on actual cash losses that properly excluded Workout Loan losses occurring prior to October 1, 2013 and offset by recoveries to date.
 - ***The economic damages resulting from the Alleged Actions, if any, are not liquidated or a sum certain:*** F3 calculated DenSco's actual "Net Loan Losses" on a "Cash Out/Cash In" basis as described in the F3 Original Report. All known Menaged-related offsets have been applied. These calculated net loan losses represent a liquidated amount.
 - ***Numerous assumptions are needed to estimate how, if at all, the losses suffered by DenSco and/or its investors would have differed from the realized amounts if Defendants had acted differently:*** The F3 Original Report calculates damages based on actual cash losses suffered by DenSco during the stated damage period and does not rely on estimates of loan losses that would have occurred prior to the damage period. In addition, Mr. Perry has not provided any definitive alternate damages calculation that could clarify this observation.

¹⁰ AICPA Forensic & Valuation Services Practice Aid, *Calculating Lost Profits*, paragraph 101.

¹¹ F3 Original Report, Exhibit F.

Other Matters

25. This Rebuttal Expert Report is based on information provided to F3 as of the date of this report. We reserve the right to modify or supplement this report should additional information become available to us or if we are requested to perform additional tasks including, but not limited to updated recoveries reduced by costs and expenses, updated calculations of prejudgment interest, analyses performed as a result of the production of additional documents, or matters related to additional discovery. In addition, F3 may prepare illustrative or demonstrative exhibits for use during testimony from the information contained in this report, the F3 Original Report, any supplemental reports, our work papers, or the documents considered.
26. The report has been prepared only for the purposes stated herein and shall not be used for any other purpose. Neither this report nor any portions thereof shall be disseminated to third parties by any means without the prior written consent and approval of F3.

Respectfully submitted,



David B. Weekly
Senior Managing Director
Fenix Financial Forensics LLC

List of Documents Considered Subsequent to the Issuance of the F3 Original Report

1. Defendants' Disclosure of Expert Witness David Perry including the Expert Report of David R. Perry dated April 5, 2019
2. AICPA Forensic & Valuation Services Practice Aid – Calculating Lost Profits
3. Menaged Interest Income Analysis.xlsx
4. Menaged Loan Bal per Receiver's 12 22 17 Status Report.xlsx
5. Analysis of Menaged Loans as of 01.09.14 - Priority Lien Calcs.xlsx
6. Petition for Order Approving Settlement Agreement with Yomtov Scott Menaged and Francine Menaged