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SUPERIOR COURT OF ARIZONA

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 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON JOINT AND SEVERAL LIABILITY** (Commercial Case) (Assigned to the Honorable Daniel Martin)

Pursuant to Rule 56(a) of the Arizona Rules of Civil Procedure, Defendants Clark Hill PLC and David Beauchamp (collectively, "Clark Hill") respectfully move for summary judgment on Plaintiff's assertion that Clark Hill is jointly and severally liable under A.R.S. § 12-2506(D)(1) with two individuals Clark Hill named as non-parties at fault: (a) felon Yomtov "Scott" Menaged, serving 17 years in prison for defrauding DenSco out of more than $31 million, and (b) DenSco's sole owner and employee, Dennis Chittick, whose reckless business practices Plaintiff admits allowed Menaged to steal from DenSco. Contrary to Plaintiff's vague disclosures to the contrary, Plaintiff cannot saddle Clark Hill with all of the damages suffered by DenSco – damages a jury must severally apportion to those it finds culpable for contributing to the injury– with a Hail Mary assertion that Clark Hill entered into a conscious agreement with Menaged and Chittick to harm DenSco. Plaintiff's attempt to be made whole for damages caused by a convicted con-man and his now deceased victim, from one of the few deep pockets remaining, fails as a matter of law.

I. INTRODUCTION

DenSco, a hard money lender who raised money from his friends, family, and neighbors to lend to borrowers, was defrauded out of more than $31 million between 2012 and 2016, before its sole owner and president, Denny Chittick, took his own life. The cause of those losses is clear.

On October 17, 2017, Menaged pled guilty in Federal Court for the District of Arizona to defrauding DenSco out $34 million. He did so by using "completely fabricated" documents, including cashier's checks and trustee sale receipts, to "embezzl[e] millions of dollars without purchasing properties with the loans obtained from DenSco . . . ." [DSOF ¶ 66] [1] The Receiver has acknowledged in Court filings that DenSco lost no less than $31 million as a result of

[1] Menaged also pled guilty to defrauding Wells Fargo and Synchrony Bank out of $2.1 million, a fraud Menaged perpetrated "largely to obtain cash quickly after" his fraud against DenSco "no longer provided the defendant with a source of cash." [DSOF ¶ 66]

"Menaged's fraudulent activities." [DSOF ¶ 67] Menaged is now serving 17 years in prison. While he has agreed to pay restitution, Menaged has no means of repaying his debt to DenSco.

Chittick, at times unwittingly, played a significant role in allowing Menaged to defraud DenSco as a result of reckless lending practices, including: concentrating more than half of DenSco's loan portfolio in loans to Menaged; lending DenSco's funds directly to Menaged, rather than a fiduciary; and allowing DenSco's loans to be secured in second, rather than first, position, all in violation of DenSco's promises to its investors. [DSOF ¶¶ 3, 5, 11, 12] The Receiver has repeatedly acknowledged this wrongdoing, including in the claim he filed against the Chittick estate, wherein he asserted that *Chittick caused more than $45 million of damage to DenSco* by "aiding and abetting [Menaged] in his torts against DenSco," defrauding DenSco and its investors, and committing "gross negligence" through his reckless lending practices. [DSOF ¶ 64][2] The Chittick estate did not have the assets, many of which were exempt, to pay $45 million in alleged damages. The Receiver ultimately settled with the estate for between $1.8 and $3 million. [DSOF ¶ 65]

On October 16, 2017, Plaintiff filed suit against Clark Hill, which had provided securities advice to DenSco, using 20/20 hindsight to claim that different legal advice to DenSco would have prevented Menaged's fraud, and alleging that Clark Hill's advice aided and abetted Chittick's breach of fiduciary duty to his own company. [DSOF ¶ 68] Plaintiff is seeking more than $24 million in damages from Clark Hill—the same damages Plaintiff acknowledges were caused by Menaged and Chittick. On June 7, 2018, Clark Hill timely identified Chittick and Menaged as non-parties at fault pursuant to A.R.S. § 12-2506.

Not until May 13, 2019, in an over-the-top demand letter Plaintiff's counsel sent directly to Defendants' insurance carrier, did Plaintiff for the first time advance the theory that no fault could be apportioned to the convicted felon or his enabling victim, because David Beauchamp

[2] The Receiver also acknowledged that Chittick had looted millions from DenSco starting in 2014, once he ascertained the losses Menaged had caused the company.

purportedly conspired with them to harm DenSco. As Plaintiff argued in both his demand letter and subsequent disclosure statement, Clark Hill aided and abetted Chittick's breach of fiduciary duty by allegedly (a) advising that DenSco did not need to disclose material facts to investors while a forbearance agreement between DenSco and Menaged was drawn up, (b) negotiating a forbearance agreement that "itself was a breach of fiduciary duty to DenSco's investors," and (c) advising Chittick he could refrain from disclosure while DenSco and Menaged performed on the forbearance agreement. [DSOF ¶ 69] As a result of such aiding and abetting, Plaintiff summarily concluded that "Clark Hill is jointly and severally liable with both Chittick and Menaged for damages" because Clark Hill, Menaged, and Chittick "acted in concert to create [the forbearance agreement]…" [*Id.*]

Joint and several liability, however, requires more than the assistance necessary to support an aiding and abetting claim. The statute demands a *conscious agreement* to commit a tort, akin to a conspiracy, that the defendant is *substantially certain* will result in the harm complained of. Absent from Plaintiff's attempt to lump Clark Hill in with Menaged's criminal conduct, however, is a description of the required conscious agreement between David Beauchamp, Menaged, and Chittick to harm DenSco. For good reason. There was no such agreement and there is no evidence of such an agreement. Plaintiff's attempt to avoid reality – that bad actors, including one who will spend nearly two decades in jail for the precise harm attributed to Clark Hill, will bear the lion's share of any fault—fails. Summary judgment is appropriate.

II. BRIEF SUMMARY OF RELEVANT FACTS

A. DenSco makes various promises to investors.

Chittick founded DenSco in 2001, and solely owned and managed it until his death in late July 2016. [DSOF ¶ 1] The company focused on "hard money lending," meaning it would raise money from investors to make high interest short-term loans to borrowers, who used DenSco's funds to buy residential properties, often out of trustee's sales. [DSOF ¶ 2] DenSco

represented to its investors in its various Private Offering Memoranda ("POM") that it would minimize risk by (a) securing all its loans with first position deeds of trust and (b) maintaining a diverse borrower base with no borrower holding more than 10-15% of DenSco's portfolio. [*Id.*] DenSco's loan documents, prepared by Beauchamp or his prior law firms, stated that the loans would be secured with first position deeds, with loan funds delivered directly to a trustee. [DSOF ¶ 3]

B. DenSco repeatedly violates promises to its investors with reckless lending practices.

DenSco flagrantly, and without disclosure to its investors or its counsel, violated those promises for years. [DSOF ¶ 5] Rather than fund DenSco's money to a trustee, as common sense and its loan documents dictated, DenSco sent its loans *directly to borrowers*, trusting them to use the funds as intended and to properly secure the loan. [*Id.*] Menaged, a long-time DenSco borrower, took full advantage.

In November 2013, Menaged told Chittick that DenSco's lien priority on more than a hundred properties was jeopardized through what the Receiver has termed the First Fraud. [DSOF ¶ 22] Here, Menaged would obtain two loans to purchase one property, with both lenders believing their loan was secured in first position. [*Id.*] Because DenSco sent its money directly to Menaged, rather than the trustee, its funds were not actually used to purchase the property, and its lien was usually not recorded in first position. [*Id.*] Menaged's excuse was that an employed cousin had concocted this scheme behind Menaged's back while Menaged took time away to care for terminally ill wife, and had fled the country with DenSco's funds. [*Id.*] This was all a lie, of course. Chittick, however, believed Menaged's explanation, as did other lenders who had lent Menaged money. [DSOF ¶ 23]. Further, Chittick understood that his practice of funding loans into his borrowers' hands was directly to blame for permitting the theft of DenSco's money. [DSOF ¶ 5] Chittick, however, did not immediately seek counsel to deal with this revelation. Instead, Chittick and Menaged created and implemented their own

plan for dealing with the lien priority issues. [DSOF ¶ 24]

Chittick, moreover, had long had *actual knowledge of* Menaged's misuse of DenSco funds. More than a year earlier, in September 2012, a competing hard money lender, Active Funding Group ("AFG"), informed Chittick that Menaged had double liened at least ten properties with deeds of trust in favor of both DenSco and AFG, jeopardizing DenSco's lien priority. [DSOF ¶ 11] Chittick did not consult his lawyer. Chittick did not impose stricter lending protocols. Instead, he further abandoned DenSco's promises to investors to embark on an inexplicable lending binge to Menaged, from $4.65 million in loans outstanding at the end of 2012 *to more than $28 million outstanding at the end of 2013*. [DSOF ¶ 12] By that point, Menaged held more than 50% of DenSco's loans. [*Id.*] At no point during 2013 did Chittick inform Clark Hill that he had stopped performing in accordance with DenSco's POM.

C. DenSco approaches Clark Hill for help in resolving the First Fraud after DenSco is threatened with a lawsuit.

On January 6, 2014, various hard money lenders whose properties had been double liened sent a demand letter to DenSco asserting that DenSco's deeds of trust were fraudulent because DenSco's funds were not actually used to purchase the subject properties (which was true). [DSOF ¶¶ 26, 27] They also demanded that DenSco subordinate its interests in the double liened properties to the other lenders. *Id.* Only when threatened with a lawsuit, did Chittick finally involve Clark Hill. He forwarded the demand letter to Beauchamp with a cover email that detailed (for the first time) his penchant for providing loan funds directly to his borrowers, and deceptively described Menaged to Beauchamp as someone he'd "never had a problem with payment or issue that hasn't been resolved." [DSOF ¶¶ 13, 29] Notably absent was any mention of the serious double lien issue that arose in 2012, or any mention that Menaged was in default on many of DenSco's loans. [DSOF ¶ 29].

Chittick also told Beauchamp that he and Menaged had devised and implemented a plan to resolve the double liens. [*Id.*] Chittick defended the plan, writing to Beauchamp, "i've [sic]

been over this plan 100 times and the numbers and i [sic] truly believe this is the right avenue to fix the problem. we [sic] have been proceeding with this plan since November and we've already cleared up about 10% of the total $'s in question." [*Id.*]

Because the plan was already in motion, Beauchamp advised DenSco that the plan, and the parties' respective obligations and admissions, should at least be documented in writing – and quickly. [DSOF ¶ 36] A Term Sheet that outlined the plan's broad elements was drawn up by January 17th and Beauchamp reasonably anticipated that a more formal Forbearance Agreement would be executed in a few weeks. [DSOF ¶ 42] Menaged retained Jeff Goulder at Stinson Morrison to negotiate the Forbearance Agreement on his behalf. [DSOF ¶ 43]

Negotiating the specific language of the Forbearance Agreement, however, proved to be much more difficult than Clark Hill anticipated, as Chittick repeatedly acquiesced to demands made by Menaged and his attorney. [DSOF ¶ 44] As a result, Beauchamp was often at odds with Chittick on how to adequately protect DenSco. For example, throughout the negotiations, Beauchamp admonished Chittick that DenSco had fiduciary duties to its investors, and could not simply agree to Menaged's self-serving proposals:

- Beauchamp wrote Chittick on February 4, 2014: "**AT YOUR REQUEST, I DID NOT INCLUDE ANY HARSH OR SIGNIFICANTLY PRO-LENDER PROVISIONS. . . .** You can help and have helped Scott, but you cannot OBLIGATE DenSco to further help Scott, because that would breach your fiduciary duty to your investors." [DSOF ¶ 44.a.]
- A few days later, Beauchamp again warned Chittick, "you are limited in what risk or liability you can assume. Your fiduciary duty to your investors makes this a difficult balancing act." [DSOF ¶ 44.c.]
- Beauchamp advised Chittick again a few weeks later, "[Menaged's attorney] clearly thinks he can force you to…give up substantial rights…. Unfortunately, it is not your money. It is your investor's money. So you have a fiduciary duty." [DSOF ¶ 44.d.]

Beauchamp also sought counsel from other Clark Hill lawyers regarding Menaged's demands for protections in the event of a bankruptcy filing. [DSOF ¶ 45] Yet Beauchamp's admonitions

often fell on deaf ears. Chittick contemptuously referred to Beauchamp's edits as "spelling fixes" and the agreement generally as a "language arts assignment," while repeatedly sharing privileged communications with Menaged. [DSOF ¶¶ 47-49]

Chittick and Menaged never intended to follow the Forbearance Agreement in any event. After finally signing the document in April 2014, Menaged told Chittick he had signed it "even though it is not anymore a true understanding of what we are doing. . . . So lots of this is no longer valid or True [sic], but I signed it so at least you have it for *and not to have [Clark Hill] Change [sic] it again and again with every move we make*." [DSOF ¶ 51 (emphasis added)] And while the Forbearance Agreement capped DenSco's additional lending to Menaged at $6 million, DenSco lent Menaged more $14 million as part of the workout. [DSOF ¶ 53] Clark Hill did not know Chittick and Menaged lacked any intention of complying with the Forbearance Agreement. He also had no knowledge of their business relationship after it was signed. There is no evidence to the contrary.

D. Menaged begins a Second Fraud with the help of US Bank and Chase Bank.

Unbeknownst to Clark Hill or DenSco, Menaged began perpetrating a new fraud on DenSco in January 2014 while the Forbearance Agreement was being negotiated. The Receivers refers to this as the "Second Fraud." [DSOF ¶ 60] Despite DenSco's significant losses caused by DenSco's lending procedures, Chittick continued to wire DenSco funds to Menaged's bank account, rather than a trustee. In the Second Fraud, however, Menaged never purchased any properties at all. Instead he utilized his banks to obtain cashiers' checks made out to various trustees, took pictures of the checks to prove to Chittick that they had been issued, immediately redeposited the funds back into his accounts, then falsified trustee sales receipts to make it look like Menaged had bought the property. [DSOF ¶ 61] Menaged procured more than 1,300 checks for $319 million dollars through this fraud. As acknowledged by Plaintiff, but for "[Menaged's banks'] substantial assistance, Menaged could not have

scammed DenSco out of tens-of-millions of dollars." [*Id.*][3]

DenSco never recovered; it merely dug itself a deeper financial hole. DenSco continued to raise money and continued to send it to Menaged. Chittick committed suicide in July 2016, unable to bear the burden of DenSco's losses any longer. [DSOF ¶ 63] On October 16, 2017, Plaintiff sued Clark Hill and is seeking more than $24 million in damages, including all of the damages suffered as a result of the Second Fraud. [DSOF ¶ 68] Almost two years later, Plaintiff asserted for the first time that none of those damages may be apportioned to Menaged or Chittick because Clark Hill is joint and severally liable with them.

III. ARGUMENT

Arizona nearly abolished joint and several liability when it adopted A.R.S. § 12-2506. The statute requires that juries apportion damages amongst those responsible based on degrees of fault, and preserves joint and several liability only in "very limited and carefully designed circumstances." *State Farm Ins. Cos. V. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 225, ¶ 12 (2007). Plaintiff alleges that Clark Hill is jointly and severally liable with Menaged and Chittick pursuant to one of those statutory exceptions - A.R.S. § 12-2506(D)(1). That subsection imposes joint and several liability on a party with another only when "[b]oth the party and the other person were acting in concert." A.R.S. § 12-2506(D)(1). The statute defines "acting in concert" to mean

> *entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort.* Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. *A person's conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.*

A.R.S. § 12-2506(F)(1) (emphasis added). Plaintiff must prove three elements to impose joint and several liability: (1) the parties must have "knowingly agreed" to commit an intentional

[3] The specifics of how the Second Fraud was committed is set out in detail in Plaintiff's complaint against banks pending with this Court at CV2019-011499. [DSOF ¶ 61]

tort; (2) the parties must have been "certain" or "substantially certain" that their actions would result "in the consequences complained of"; and (3) the parties must have actively participated in the commission of an intentional tort. *Chappell v. Wenholz*, 226 Ariz. 309, 311 (App. 2011).

The case law clarifies that aiding and abetting, without more, in insufficient to impose joint and several liability under the "acting in concert" exception of A.R.S. § 12-2506(D)(1). Under Arizona law, "acting in concert requires a *greater showing* that the parties entered into a *conscious agreement*, whereas aiding and abetting *is a much lesser showing* that a party rendered assistance by acts or words of encouragement or support." *FireClean LLC v. Tuohy,* No. CV-16-00604-TUC-JAS, 2018 WL 1811712 (D. Ariz. Apr. 17, 2018) (citations and quotations omitted) (emphasis added). The less burdensome elements required to prove aiding and abetting underscore that distinction.[4] But aiding and abetting – and nothing more – is precisely what Plaintiff alleges makes Clark Hill jointly and severally liable with Chittick and Menaged. [DSOF ¶ 69] Nowhere does Plaintiff proffer any evidence that speaks to any of the heightened elements required to establish "acting in concert," and Plaintiff cannot meet his burden to create a triable question

A. Clark Hill did not enter into a "conscious agreement" with either Chittick or Menaged to commit any intentional tort.

A "conscious agreement" under A.R.S. § 12-2506(F)(1) is only established when the parties consciously enter into an agreement commit an intentional tort. This "knowing agreement" requirement is analogous to a conspiracy, which requires clear and convincing evidence demonstrating that "two or more people . . . agree[d] to accomplish an unlawful

[4] The elements of aiding and abetting are: (a) the primary tortfeasor committed a tort that causes injury to the plaintiff, (b) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty, and (c) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach. *See. Sec. Title Agency, Inc. v. Pope,* 219 Ariz. 480, 497 (App. 2008) (noting that aiding and abetting is a legal claim, which is different than determining the allocation of responsibility for damages).

purpose or to accomplish a lawful objective by unlawful means, causing damages." *Wells Fargo Bank v. AZ. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund,* 201 Ariz. 474, 489 (2002) (citations omitted); *see also Dow Chem. Co. v. Mahlum,* 114 Nev. 1468, 1488 (Nev. 1998) ("Concert of action resembles the tort of civil conspiracy."); *Cresser v. Am. Tobacco Co.,* 662 N.Y.S. 2d 374, 378-79 (N.Y. Sup. Ct. 1997) ("An unlawful agreement is the gravamen of both concerted action and conspiracy . . . ."). *Denson v. U.S.* illustrates the concept embodied in subsection (F)(1). 104 F.3d 365 (9th Cir. 1996) (unpublished). In *Denson*, seven construction employees working on a Bureau of Reclamation ("BOR") project sued the BOR and their employer, a subcontractor of the BOR, when they were injured on the job. 104 F.3d 365, at *1. The employees alleged that the BOR was jointly and severally liable with the employer under A.R.S. § 12-2506(D)(1). *Id.* The District Court of Arizona disagreed, finding that the employer was principally responsible for job site safety and that the main causes of the accident were because of "affirmative actions" taken by the employer. *Id.* "In contrast . . . BOR's fault stemmed only from its passive reaction to [the employer's] negligent actions." *Id.*

The Ninth Circuit affirmed that analysis, rejecting the employees' assertion that "acting in concert" requires "only that the parties participate in a common plan which results in a tortious act." *Id.* at *2. It observed that the BOR's agreement with the employer to provide a safe work site did not amount to "pursuing a common plan or design to commit a tortious act." *Id.* The agreement between the parties was instead "simply" an agreement to achieve a "salutary objective," which "d[id] not support the imposition of acting in concert liability." *Id.* at *3. The "knowing agreements" that impose joint and several liability, the court observed, are those that "typically involve an agreement to *participate* in wrongful behavior of some kind that *directly and foreseeably* produces an injury." *Id.* (emphasis added); *see also Richards v. Badger Mut. Ins. Co.,* 297 Wis.2d 699 (Wis. 2006) ("even if an agreement exists, if that agreement does not relate to the tortious conduct that caused the injury, the agreement is

insufficient to satisfy the agreement required for concerted action"). [5]

Here, there is no evidence that Clark Hill entered into a "knowing" or "conscious agreement" with Chittick or Menaged to engage in the only intentional tort alleged in this case, aiding and abetting Chittick's breach of fiduciary duties to DenSco.

First, Plaintiff asserts only that Clark Hill "acted in concert" with Menaged and Chittick to create a Forbearance Agreement "that on its face and in practice subordinated DenSco's notes into junior positions." [DSOF ¶ 69] But neither the Forbearance Agreement itself nor Clark Hill's participation in drafting it is enough to establish a "knowing agreement" to aid and abet Chittick's breach of fiduciary duties. The mere fact that an attorney drafted a document signed by others does not constitute a "conscious agreement" between the signatories *and the lawyer* to do anything. To the contrary, a "knowing agreement" is proven only when there is evidence that an agreement was made *for the purpose* of committing a tortious act. It is not enough to constitute a "knowing agreement" for a party to agree to participate in a common plan that simply results in a tortious act, nor is it enough for the person to provide substantial assistance to that plan. *See* A.R.S. § 12-2506(F)(1) ("A person's conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.").

Here, the evidence is that Clark Hill simply memorialized a plan already substantially

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[5] In *Richards*, two underage men asked an of-age co-worker to purchase alcohol on their behalf. *Id.,* 297 at 703-04. The co-worker agreed and provided the alcohol to the men, who were subsequently involved in a collision that killed another driver. *Id.* The widow of the deceased driver sued and alleged that the of-age co-worker was jointly and severally liable with the underage drivers because all three "acted in concert" when they all decided to procure alcohol. *Id.* at 708. The Wisconsin Supreme Court held that the agreement at issue was only "an agreement to purchase alcohol," which had nothing to do with the conduct that caused the injury (drunk driving), and thus the of-age co-worker could not have engaged in a "common scheme or plan" required for joint and several liability. *Id.*

agreed upon and partially performed by Chittick and Menaged, while attempting to provide additional protection for DenSco.[6] As explained in a January 15, 2014 email, Clark Hill advised DenSco: "We still need to get Scott to sign the Term Sheet and then the Forbearance Agreement to protect DenSco as we proceed." [DSOF ¶ 36]. To that end, the Forbearance Agreement itself does not constitute an agreement, conscious or otherwise, for Clark Hill to do anything. While Plaintiff will argue that Clark Hill's alleged failure to advise against a Forbearance Agreement either fell below the standard of care or substantially assisted Chittick in breaching his duties to DenSco, there is no evidence that Clark Hill consciously conspired with Menaged and Chittick to aid in such purported breaches.

Second, Clark Hill negotiated the Forbearance Agreement on behalf of DenSco *against Menaged who was represented by counsel for the majority of the negotiation*. It is implausible for Plaintiff to suggest that Clark Hill was actively negotiating against opposing counsel and his client, while concurrently entering into a conscious agreement with them regarding the subject of those negotiations. And to the extent Plaintiff is claiming that Clark Hill was negotiating a conscious agreement with Menaged and his counsel, that assertion is not supported by the record. Instead, the evidence is that Clark Hill routinely attempted to shield DenSco *from* Menaged and Goulder's efforts to water down any protections for DenSco:

- January 16, 2014: Email to Chittick advising him not to accept the terms recommended by Menaged because it was "not in your legal best interest"; [DSOF ¶ 41]
- February 4, 2014: Email to Chittick warning him that he could not obligate DenSco to help Menaged because of his fiduciary duty to his investors; [DSOF ¶ 44.a.]
- February 7, 2014: Email to Goulder explaining that his edits were unacceptable in part because "the agreement needs to comply with Chittick's fiduciary duties to his investors"; [DSOF ¶ 44.b.]
- February 9, 2014: Email to Chittick reminding Chittick that he cannot accept the ongoing edits proposed by Menaged because it would violate Chittick's fiduciary duties to DenSco investors; [DSOF ¶ 44.c.]

[6] Plaintiff's own financial analysis confirms that the plan was already in effect. [DSOF ¶ 34]

- February 14, 2014: Email to Chittick warning him against accepting a "watered down" Forbearance Agreement because DenSco's money "is not your money. It is your investors' money. So you have a fiduciary duty." That same email further admonished Chittick that "[y]our job is to protect the money that your investors have loaned to DenSco." [DSOF ¶ 44.d.]

- February 25, 2014: Email to Chittick informing him that Menaged's "demands and changes have pretty much killed your ability to sign the Forbearance Agreement." [DSOF ¶ 44.e.]

- March 13, 2014: Email to Chittick telling him that DenSco is "**very late** in providing information to your investors about this problem and the resulting material changes from your business plan. *We cannot give Scott and his attorney any time to cause further delay in getting this Forbearance Agreement finished and the necessary disclosure prepared and circulated*." [DSOF ¶ 44.f.][7]

Thus, at best, Plaintiff is left with the rank speculation that the Forbearance Agreement "was a fig leaf to fool investors." Such speculation, however, does not constitute evidence that Clark Hill entered into a knowing agreement with Menaged to deceive DenSco or its investors.

Third, as set forth above, Clark Hill was equally insistent with Chittick himself that DenSco's rights be protected in the Forbearance Agreement. [DSOF ¶ 44] Not only did Clark Hill remind Chittick that the Forbearance Agreement had to comply with his fiduciary duties to investors as evidenced above, but it advised Chittick to make disclosures that complied with Reg D to all DenSco investors either rolling over money or investing new money while the Forbearance Agreement was being negotiated. [DSOF ¶ 37] Chittick understood this obligation. He joked with Menaged on February 11, 2014 that DenSco had not "taken any new investors, so if I do, i [sic] have to disclose a loto [sic] to them, which is all about you!" [DSOF ¶ 38]

In short, Plaintiff has not set forth a consistent theory, let alone evidence to support such a theory, that Clark Hill had a conscious agreement with Menaged and Chittick to aid and abet Chittick in breaching his fiduciary duties to DenSco. Consequently, Plaintiff cannot avail

[7] Menaged himself acknowledged that his interests were adverse to DenSco's interests. [DSOF ¶ 43] (writing to Beauchamp on January 13, 2014 "I just know you can't advise me legally so I asked to meet with my attorney")].

himself of joint and several liability.

B. Clark Hill was not "certain" or "substantially certain" that its alleged aiding and abetting would result in the consequences complained of in this lawsuit.

There is similarly no evidence that Clark Hill was "certain" or "substantially certain" that its alleged aiding and abetting of Chittick's breach of fiduciary duties would result in the consequences complained of by Plaintiff. "Certain" means "known for sure; established beyond doubt." *Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 102 (App. 2008). "Substantially certain" means "nearly certain" and requires more "than mere likelihood or probability…[and] even more than a 'substantial probability' of significant harm." *Id.* Further, "substantial certainty" means something more than "consciously disregarding a substantial risk that something will happen." *Id.* Here, *there is no evidence* that Clark Hill was certain or substantially certain that the Forbearance Agreement, or any other alleged advice, would result in the consequences Plaintiff complained of, i.e., DenSco's alleged losses suffered as a result of Menaged's independent frauds. Clark Hill did not know about the Second Fraud until after Chittick's death, and knew nothing about the First Fraud until *after* it was complete. And as the case law makes clear, the mere risk that Clark Hill's advice could lead to damages is insufficient to impose joint and several liability on the grounds that parties acted in concert to cause a particular harm. *See id.*

Plaintiff asserts that Clark Hill aided and abetted Chittick's breach of fiduciary duties by: (1) "initially advis[ing] DenSco that it did not need to disclose material facts to investors while a forbearance agreement was drawn up," (2) "negotiat[ing] and recommend[ing] a forbearance agreement between DenSco and Menaged that itself was a breach of fiduciary duty to DenSco's investors," and (3) "[sitting] quietly by and allow[ing] DenSco over a year to work itself out of the Menaged fraud problem – telling Chittick that DenSco could do so without disclosing a thing to investors." [DSOF ¶ 69] Plaintiff then divides the damages he seeks as a result of these alleged misdeeds into two compartments: (i) losses from the so called Workout

loans, i.e., those loans made by DenSco pursuant to the Forbearance Agreement to "work out" the double lien issue that arose before Clark Hill was even involved and (ii) losses from the so called Non-Workout loans, i.e., those Second Fraud loans DenSco made of its own accord. Yet even assuming the underlying allegations to be true, none of those acts were "certain" or "substantially certain" to result in the financial losses that DenSco experienced.[8]

For example, there is no evidence that Clark Hill knew of or anticipated that (i) Chittick would lend Menaged more than double the amount in "workout loans" contemplated in the Forbearance Agreement, (ii) Menaged would entirely fail to perform his monetary obligations under the Forbearance Agreement, (iii) Chittick would make these excess loans to Menaged despite Menaged's failure to contribute anything to the workout, or (iv) Chittick would lend Menaged more than $300 million more dollars by continuing to wire the funds directly to Menaged, thereby exacerbating the company's losses. Plaintiff may argue that the workout loan losses were foreseeable. That's not good enough. They had to be substantially certain, because Clark Hill, Menaged and Chittick are required to have acted in concert for the purpose of causing them. There is no evidence that Beauchamp decided to toss aside a sterling 30 year track record as securities counsel at some this region's most prominent firms to conspire to harm his own client.

Similarly, there is no evidence that Clark Hill knew about the Second Fraud, let alone that Clark Hill knew the Second Fraud, which relied on (a) Chittick's continued poor lending protocols and (b) the assistance of Menaged's banks, was substantially certain. More generally, while Plaintiff asserts that Clark Hill "initially advised DenSco that it did not need to disclose material facts to investors" and that it then "sat quietly by and allowed DenSco over a year to work itself out of" the First Fraud, those allegations likewise do not compel the conclusion that Clark Hill "knew for sure" that DenSco would experience financial losses as a

[8] These alleged acts of aiding and abetting also fail to establish a "knowing agreement" between Clark Hill, Menaged and Chittick to aid and abet Chittick's breach of fiduciary duties.

result.[9] At most, Clark Hill would have known only that DenSco investors were making investments with DenSco without proper disclosures. This does not "establish beyond a doubt" that financial losses to DenSco would arise. To satisfy the "certainty" or "substantial certainty" requirement, Clark Hill would have had to have some additional knowledge or awareness of an ongoing fraud, and acted in concert with Menaged and Chittick to bring about the resulting damages. Plaintiff has not alleged such knowledge.

Clark Hill similarly could not have "known for sure" (and did not know at all) that its "negotiat[ion] and recommend[iation]" of "a forbearance agreement between DenSco and Menaged that itself was a breach of fiduciary duty to DenSco's investors," would lead to additional financial losses. [DSOF ¶ 69] The agreement was meant to remedy the damages associated with the First Fraud, in any event, contemporaneous communications between Menaged and Chittick (hidden from Clark Hill) illustrate that the two men had no intention of ever following the terms documented therein anyway, and in fact, did not do so. [DSOF ¶ 51]

Because there is no evidence that Clark Hill consciously agreed with Menaged and Chittick to commit a tort, and no certainty that acting in concert would cause the resulting damages complained of, the jury must be allowed to apportion any potential damages to Menaged and Chittick, whom the Receiver has already admitted are culpable for the harm.

C. Clark Hill did not actively participate in any intentional tort other than aiding and abetting.

Plaintiff's theory that Clark Hill is jointly and severally liable with Clark Hill under A.R.S. § 12-2506(D)(1) fails for the additional simple reason that it has not proffered any evidence that Clark Hill actively participated in an intentional tort beyond aiding and abetting a breach of fiduciary duties. As noted above, Plaintiff has not argued that Clark Hill participated in the First or Second Fraud. Plaintiff alleges only that by aiding and abetting, Clark Hill is jointly and severally liable with Menaged and Chittick for financial losses

[9] To be clear, Clark Hill denies those allegations, and its experts agree that Beauchamp met the standard of care.

resulting from the two frauds. But not a single case was found in Arizona in which a court imposed joint and several liability for "acting in concert" when the only intentional tort alleged was aiding and abetting. This is because evidence that Clark Hill may have aided and abetted is not in itself sufficient for creating a triable question that Clark Hill "acted in concert" with Menaged and/or Chittick. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 497, ¶ 77 (rejecting contention that A.R.S. § 12-2506(D) and common law aiding-and-abetting liability address the same principle). Conduct beyond aiding and abetting must be shown to burden a party with joint and several liability. That something more cannot be found in this case.

IV. CONCLUSION

The law does not allow Plaintiff to make the leap that Clark Hill "acted in concert" with Menaged and Chittick simply because a claim for aiding and abetting a breach of fiduciary duties has been asserted. Plaintiff must offer evidence that speaks to the three elements required to establish "acting in concert" joint and several liability under A.R.S. § 12-2506(D)(1). Plaintiff has not identified any such evidence and it will not be able to because Clark Hill did not consciously agree with Menaged and Chittick to harm DenSco. Clark Hill therefore respectfully requests that this Court find that as a matter of law, Clark Hill is not jointly and severally liable with either Menaged or Chittick for any damages alleged in this case, and require that a jury apportion any potential damages to those acknowledged wrongdoers.

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