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9 **SUPERIOR COURT OF ARIZONA**
10 **COUNTY OF MARICOPA**

11 Peter S. Davis, as Receiver of DenSco
Investment Corporation, an Arizona
12 corporation,

13 Plaintiff,

14 v.

15 Clark Hill PLC, a Michigan limited liability
company; David G. Beauchamp and Jane
16 Doe Beauchamp, husband and wife,

17 Defendants.

No. CV2017-013832

**DEFENDANTS' MOTION FOR
LEAVE TO FILE REPLY IN
SUPPORT OF MOTION IN LIMINE
TO PRECLUDE USE OF
DOCUMENTS IDENTIFIED IN
PLAINTIFF'S RULE OF EVIDENCE
807(b) NOTICES**

(Assigned to the Honorable Daniel Martin)

19 Pursuant to Arizona Civil Procedure Rules 7.1(a) and 7.2(c), Defendants hereby request
20 leave to file a Reply in Support of Defendants' Motion in Limine to Preclude Use of
21 Documents Identified in Plaintiff's Rule of Evidence 807(b) Notices. Defendants respectfully
22 submit that in light of (i) the number of statements identified by Plaintiff in his Supplemental
23 Rule 807(b) Notices, many of which Plaintiff relies on to support pending substantive motions,
24 (ii) the volume of unreliable documents from which Plaintiff selected those statements and
25 which Plaintiff seeks to offer as evidence, (iii) the complexity of the legal and factual issues at
26

1 hand, as evidenced by the full briefs submitted by the parties, (iv) the new and alternative
2 arguments for admissibility Plaintiff raised in his Response to the Motion, and (iv) the
3 extremely prejudicial nature of Plaintiff’s use of ambiguous and incomplete statements made
4 by a deceased individual with motivation to bend the truth (if not outright lie), that the Court
5 could benefit from a Reply addressing the critical issues raised in Plaintiff’s Response.

6 **A. BRIEF PROCEDURAL AND FACTUAL HISTORY**

7 1. Plaintiff filed his Complaint against Defendants on October 16, 2017.

8 2. On January 29, 2018, less than a month after Defendants filed their Answer,
9 Plaintiff filed a Notice under Arizona Rule of Evidence 807(b) regarding his intent to “offer as
10 evidence” (a) the personal and purported “business” journals (collectively the “Journals”)
11 maintained by DenSco’s sole owner, Denny Chittick, as well as (b) the suicide letters
12 (collectively the “Letters”) written by Mr. Chittick in the days leading up to his unfortunate
13 death.

14 3. The Journals and the Letters total more than 400 pages of hearsay statements.
15 *See Exhs. A-J attached to the Motion.*

16 4. On July 13, 2018 and May 8, 2019, Plaintiff filed his First and Second
17 Supplemental Notices under Arizona Rule of Evidence 807(b), identifying, in total, 76 separate
18 “statements” or sentences from the Journals and Letters as allegedly subject to the Rule 807(b)
19 hearsay exception.

20 5. In addition to identifying various “particular statements” as evidence, Plaintiff
21 stated that he intended to “offer the...absence of statements” from the Journals and Letters as
22 evidence. *See First and Second Supplemental Notices at 1.*

23 6. On April 12, 2019, Plaintiff filed a Motion for Determination that Plaintiff Has
24 Made a Prima Facie Case for Punitive Damages for Aiding and Abetting Breach of Fiduciary
25 Duty (the “Punitive Damages Motion”). The Punitive Damages Motion relies on statements
26 and absence of statements in the hearsay Journals and Letters. *See e.g., Punitive Damages*

1 Motion at 10, 13, 15-16; Plaintiff’s SOF in Support of Punitive Damages Motion at ¶¶ 277,
2 281, 283, 295, 303-304, 318, 325-329. Plaintiff’s Punitive Damages Motion is also supported
3 by his expert’s report, which is likewise premised in part on the Journals and Letters. *See e.g.*
4 Exh. A to Punitive Damages Motion at footnotes 65, 82, 87, 96-98, 107, 108, 249.

5 7. On May 5, 2019, Defendants filed a 17-page Motion in Limine to preclude the
6 use of the Journals and Letters included in the Notices, on the grounds that neither those
7 documents, nor the hearsay statements therein, met the exceptional guarantees of
8 trustworthiness necessary for admission under Rule of Evidence 807(b). The Motion included
9 a request for leave to “file a Reply in support of this Motion…” Motion at 17.

10 8. After two extensions, Plaintiff filed a 16-page Response to the Motion in Limine
11 on June 27, 2019, asserting, among other things, that the Motion in Limine was premature, and
12 that certain statements in the documents are allegedly corroborated by other evidence. Plaintiff
13 also asserted for the first time that the documents are purportedly admissible under a number
14 of other hearsay exceptions or evidentiary rules. The Response also attached excerpts of expert
15 reports and deposition testimony. Plaintiff did not object in his Response to Defendants’
16 request for leave to file a Reply.

17 **B. ARGUMENT**

18 Defendants understand that replies in support of motions in limine are generally
19 precluded under ARCP 7.2(c). This, however, is not your typical motion in limine, filed on
20 the eve of trial with respect to a limited document or item of testimony. The issues presented
21 in the briefing are critical, far reaching, and ripe for the Court’s review.

22 For one, while Plaintiff dismisses the Motion as “premature,” Plaintiff raised the issue
23 regarding the admissibility of the voluminous Journals and Letters within *weeks* of Defendants’
24 Answer, and has since relied on those Journals and Letters to support his expert reports and his
25 Punitive Damages Motion (in addition to frequent references in Plaintiff’s Disclosure
26 Statements). The admissibility of these documents under Rule 807 is not an issue that can or

1 should be put off for the weeks leading up to trial, or, as Plaintiff suggests in his Response,
2 *during trial itself*, where the Court would be forced to parse through various documents,
3 deposition testimony, and countless other exhibits to determine, sentence by sentence, which
4 statements that Plaintiff culled from 400 pages of hearsay are sufficiently trustworthy to be
5 deemed admissible under Rule 807. *See e.g.* Comment to ARCP 7.2 (“parties are encouraged”
6 to file motions in limine in advance of the deadline “particularly if an early ruling on
7 admissibility would advance settlement”). That said, Defendants respectfully submit a fuller
8 record and explanation would allow the Court to better determine whether some of these issues
9 cannot be decided at this time. For example, the Court could rule that the Journals and Letters
10 do not have exceptional guarantees of trustworthiness necessary for admission under Rule of
11 Evidence 807(b), as Defendants argue in the Motion, while leaving for a later time whether
12 statements in those documents could be admissible under another evidentiary rule for some
13 limited purpose, as Plaintiff suggests.

14 However, many of these alternative bases for admissions that Plaintiff raised in his
15 Response are ripe for the Court’s consideration. For example, contrary to Plaintiff’s
16 arguments, the Journals are not “business records” as contemplated by Evidentiary Rule
17 803(6), nor are statements in Mr. Chittick’s suicide letters “statements against interest” as set
18 forth in Evidentiary Rule 804(b)(3). A reply brief may aid the Court in assessing Plaintiff’s
19 alternative theories of admissibility, and Defendants should be allowed to address these
20 additional arguments raised in the Response prior to oral argument on the Motion in Limine.¹

21 Finally, Plaintiff argues that affirmative statements in the Journals and Letters are
22 purportedly evidence as to “what Clark Hill did and did not do in this case.” Plaintiff also
23 argues that the lack of certain statements in the Journals and Letters is proof that the
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25 _____
26 ¹ No hearing has been set on the Motion in Limine, though one has been requested. Plaintiff
thus will not be prejudiced by the filing of a Reply.

1 unmentioned action never occurred.² A fuller record regarding the context for the Journals and
2 Letters, as well as the statements on which Plaintiff relies to justify his Punitive Damages
3 Motion, can aid the Court in determining whether corroborative evidence exists to support
4 those statements in the Journals and Letters.³

5 In short, a Reply brief will help narrow the critical issues the Court can decide at this
6 time. The Court has inherent authority and discretion to grant Defendants leave to file a Reply,
7 given its wide latitude regarding evidentiary matters. *See e.g.* Ariz. R. Civ. P. 1 (procedural
8 rules “should be construed, administered, and employed by the court...to secure the just,
9 speedy, and inexpensive determination of every action and proceeding”); Ariz. R. Evid. 611(a)
10 (“The court should exercise reasonable control over the mode and order of . . . presenting
11 evidence so as to: (1) make those procedures effective for determining the
12 truth...”). Defendants respectfully request that the Court exercise that authority and grant
13 Defendants leave to file a Reply.

14 RESPECTFULLY SUBMITTED this 18th day of July, 2019.

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16 **COPPERSMITH BROCKELMAN PLC**

17 By: /s/ Marvin C. Ruth

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23 ² Assessing the trustworthiness of Mr. Chittick’s omission of certain alleged conduct in his
24 Journals and Letters necessarily requires that the Court consider the entire document.

25 ³ Plaintiff’s Response asserts that many of his identified hearsay statements are “corroborated,”
26 but offers little more than Plaintiff’s own theory of the case in support of that corroboration.
Meanwhile, Plaintiff ignores that those same documents include various other statements that
are demonstrably false, thereby rendering the entire document, and its contents, untrustworthy.

1 **ORIGINAL E-Filed** via AZTurboCourt,
2 mailed and emailed this 18th day of July, 2019 to:

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9 /s/ Verna Colwell