

GUTTILLA MURPHY ANDERSON

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Attorneys for the Receiver

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

ARIZONA CORPORATION
COMMISSION,

Plaintiff,

v.

DENSCO INVESTMENT
CORPORATION, an Arizona
corporation,

Defendant.

Cause No. CV2016-014142

PETITION NO. 94

PETITION FOR ORDER APPROVING
PAYMENT TO SPECIAL COUNSEL
OSBORN MALEDON, P.A.

(Assigned to the Honorable
Teresa Sanders)

Peter S. Davis, as the court appointed Receiver, respectfully petitions the Court 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”).

2. On March 13, 2017, the Receiver filed Petition No. 22 – Petition for Order to Approve the Engagement of Osborn Maledon, P.A. to Represent the Receiver as Special Counsel seeking approval of the law firm of Osborn Maledon, P.A. (“Osborn Maledon”) to serve as Special Counsel to the Receiver to investigate DenSco’s potential claims against its

1 former legal advisors including the law firm of Clark Hill, PLC. Exhibit "A" to Petition
2 No. 22 is a copy of the engagement agreement between the Receiver and Osborn Maledon.

3 3. On April 27, 2017, the Court entered its Order Re: Petition No. 22 which
4 appointed the law firm of Osborn Maledon as Special Counsel to the Receiver, approved the
5 engagement agreement with the law firm of Osborn Maledon and directed the Receiver to
6 file a notice with this Court as to whether the Receiver elected to proceed with
7 compensation of Special Counsel on an hourly basis or on a contingency basis after Osborn
8 Maledon completed its initial investigation.

9 4. On July 21, 2017, the Receiver filed his Notice of Election to Proceed with
10 Contingency Fee Agreement Re: Order Re: Petition No. 22. In this notice, the Receiver
11 specified that he intended to proceed with the engagement of Osborn Maledon under the
12 terms of the contingency fee agreement set forth in the engagement agreement between the
13 Receiver and Osborn Maledon.

14 5. On August 3, 2017, the Receiver filed Petition No. 31 seeking a one-time flat
15 fee payment of \$20,000 pursuant to the engagement agreement between the Receiver and
16 Osborn Maledon, P.A. and upon completion of Osborn Maledon, P.A.'s initial investigation
17 into DenSco's potential claims against its former legal advisors. The Court entered its
18 *Order Re: Petition No. 31* on September 8, 2017 approving the Petition No. 31.

19 6. On October 10, 2017, the Court entered its Order Re: Petition No. 35 which
20 authorized the Receiver to file a complaint and prosecute civil litigation against Clark Hill
21 PLC and David Beauchamp.

1 7. On October 16, 2017, Osborn Maledon as Special Counsel to the Receiver,
2 filed a Complaint in Maricopa County Superior Court, Cause No. CV2017-013832 against
3 defendants Clark Hill PLC and David Beauchamp on behalf of plaintiff Peter S. Davis as
4 Receiver of DenSco Investment Corporation (“Davis v. Clark Hill PLC et al”).

5 8. Davis v. Clark Hill PLC et al was a complex professional liability case. The
6 case was complex because, in an attorney malpractice case, a plaintiff must prove not only
7 malpractice, but also that the alleged malpractice made a difference (the case within the
8 case). Two cases, malpractice and causation, are always in play in a legal malpractice case.
9 Additionally, Davis v. Clark Hill PLC et al involved review and organization of voluminous
10 documents created over more than ten years.

11 9. After Davis v. Clark Hill PLC et al was filed, Osborn Maledon devoted
12 substantial time and efforts to obtaining relevant documents through discovery, and then
13 reviewing, cataloging, and managing a large document file for litigation. Aside from
14 document management, a large number of depositions took place of Clark Hill attorneys,
15 multiple DenSco investor victims, and third-party witnesses. Moreover, successfully
16 litigating Davis v. Clark Hill PLC required expert witnesses, both as to liability and as to
17 damages.

18 10. Davis v. Clark Hill PLC et al was vigorously defended on both liability,
19 damages and multiple alleged third parties at fault. Competent and able defense counsel
20 represented Clark Hill PLC. Among the defenses asserted was that the Receiver’s claims
21 were completely barred by the *in pari delicto* doctrine, and that his entitlement to damages

1 was limited by the actions of a large number of persons and entities whom the defense
2 identified as non-parties at fault. Clark Hill PLC vigorously argued that the Receiver's
3 recovery should be limited by the fault of DenSco's president, Denny Chittick, and Scott
4 Menaged [who defrauded DenSco and others and who is currently serving a 17-year
5 sentence in a federal prison]. Mr. Menaged was among the many witnesses who were
6 deposed in the case; his deposition took place over two days in a federal prison in Texas.

7 11. The case did not settle until late February 2020, on the eve of the final joint
8 pretrial conference. By that date, the case had proceeded through multiple Rule 26.1
9 statements, depositions, motions for summary judgment, motions to compel, motions in
10 limine and motions on sanctions, and the drafting of the final joint pretrial statement.

11 12. On March 20, 2020, the Receiver caused his Petition No. 91, Petition for
12 Order Approving Settlement Agreement between Receiver, Clark Hill PLC and David
13 Beauchamp to be filed with the Court. On May 28, 2020, this Court entered its order
14 approving the Settlement Agreement.

15 13. Attached as Exhibit "A" is the Declaration of Colin F. Campbell and Geoffrey
16 M.T. Sturr in Support of the Receiver's Petition for Order Approving Payment to Special
17 Counsel Osborn Maledon, P.A.¹. This Declaration provides additional information regarding
18 the litigation of Davis v. Clark Hill PLC, the professionals engaged by the Receiver as
19 Special Counsel and supports the Receiver's request to approve payment to Osborn
20 Maledon.

21 ¹ Exhibit "A" does not contain any information which would violate the confidentiality provisions of the Settlement between the Receiver and Clark Hill PLC.

1 14. Attached as Exhibit “B” to this Petition [Filed under seal] is an invoice from
2 Osborn Maledon seeking total payment of attorneys’ fees \$3,995,000 for and Costs of
3 \$948,000². As set forth in Exhibit “B”, Osborn Maledon has agreed to write off over
4 \$60,000 in costs. Based on the terms of the engagement agreement between Osborn
5 Maledon and the Receiver, the exemplary work performed by Osborn Maledon and the
6 successful resolution of the Receiver’s claims, the Receiver recommends that the Court
7 approve payment of \$4,943,000 to Osborn Maledon.

8 15. The Receiver’s recommendation approve payment of \$4,943,000 to Osborn
9 Maledon is based upon the fee agreement negotiated between the parties, the work and the
10 result in Davis v. Clark Hill PLC, the risks undertaken by Osborn Maledon, the declaration
11 of Colin Campbell and Geoff Sturr, the principal lawyers in the case, and the declaration of
12 Ron Kilgard, which is filed under seal as Exhibit “C”³.

13 16. The Receiver notes the following comments by Ron Kilgard, who is an expert
14 on issues regarding the reasonableness of fee requests, and who opined on the
15 reasonableness of the attorney fees to Osborn Maledon. Although the mathematical

16
17 ² Exhibit “B” has been filed under seal because the settlement agreement between Clark Hill
18 and the Receiver requires the Receiver to maintain in the strictest confidence regarding the
19 consideration paid in the resolution of Davis v. Clark Hill PLC. Because the Receiver and
20 Osborn Maledon agreed to a contingency fee that had reduced percentages given the size of
21 the recovery, Exhibit “B” has to reflect the total settlement amount.

³ Exhibit “C” has been filed under seal because the settlement agreement between Clark Hill
and the Receiver requires the Receiver to maintain in the strictest confidence the
consideration paid in the resolution of Davis v. Clark Hill PLC and the Declaration by Ron
Kilgard contains detailed information including the total consideration paid in resolution of
Davis v. Clark Hill PLC with supporting information regarding the appropriateness of the
fees sought by Osborn Maledon.

1 proportionality and lode star cross-check analysis of Mr. Kilgard is detailed in Exhibit “C”,
2 it made cannot be made public under the confidentiality agreement, some of his concluding
3 comments can be made public:

4 The fees requested here are eminently reasonable, and for four reasons: the
5 process by which the fee agreement was reached; the fee agreement itself; the
6 raw data on the recovery, the fees, and the lodestar; and finally, the quality of
7 the work. I take them in turn.

8 First, unlike the class cases discussed above, the fee percentages in this
9 engagement were set at the outset by negotiation between the lawyers and Mr.
10 Davis, a knowledgeable receiver, himself represented by counsel. One of the
11 concerns in contingent fee litigation is that the client, especially an individual
12 personal injury client, is an unsophisticated consumer of legal services. There is
13 thus a danger that the lawyer may overreach. In such a situation, a party
14 reviewing the fee agreement, whether a court or an arbitrator, will be attentive
15 to whether the fee is reasonable under E.R. 1.5 regardless of what the fee
16 agreement provides. Here there is no such danger. Osborn Maledon reviewed
17 the pros and cons of litigation on a fixed fee basis and reported its findings to
18 Mr. Davis. The firm then offered to handle the engagement either on a
19 contingency or as an ordinary hourly rate engagement. Mr. Davis was a well-
20 informed, sophisticated decision maker on the contingency fee. Nothing about
21 the process of arriving at the contingency fee agreement raises any concerns
that the fee to which the parties themselves agreed might be unreasonable⁴.

Second, quite aside from the process by which it was reached, the fee
agreement itself is reasonable. I have negotiated fee agreements structured like
this, for both individual and class clients, many times. Most recently I have
done so for the firm’s Arizona governmental clients (mostly counties) in the
opioid litigation. The fact that the agreement uses not a single fixed percentage
of the recovery, but a declining percentage as the recovery increases, indicates
to me that this is a reasonable, carefully thought-out fee agreement. The bulk of
the work in a major commercial case like this is dedicated to basic briefing,
discovery, retention of experts, etc., work that will be required however large or
small the recovery ends up being. Reducing the percentage for larger recoveries
fairly recognizes this reality. The percentages themselves are well within the

⁴ It must also be noted that the engagement agreement between the Receiver and Osborn Maledon was publically filed with and approved by this Court. [See Receiver’s Petition No. 22]

1 range I would expect to see in an engagement of this sort. Indeed, given what
2 was sure to be a bitterly fought legal malpractice case, I think higher
percentages would also have been reasonable.

3 Third, the raw data of the result obtained, the percentage recovery, and the
4 lodestar, all indicate that the fee is a reasonable one, indeed a very reasonable
one.

5 [Mr. Kilgard's mathematical comments on the proportionality of the fee with
6 other cases he has handled and the reasonableness of the fee on the lodestar
cross-check is not included as it discloses the settlement amount which is
7 confidential]

8 The lodestar cross-check confirms my view that this fee is reasonable. The
9 lodestar in the case, based on Osborn Maledon's standard hourly rates – the very
10 rates at which if offered to handle this case on an hourly basis – is
11 approximately \$1.5 million. (Had the case continued through trial and appeal the
amount would likely have reached, or exceeded, \$2.25 million.) This is a
12 staggering amount of time for a medium-sized firm to invest in a contingent
case. And this speaks only to the time invested. The firm also invested nearly
13 one million dollars in out of pocket expenses, an amount the firm would not
14 have recovered *at all* if there had been a defense verdict.

15 Based on the time invested in the case, the lodestar multiplier is approximately
16 [redacted]. This is well within the range courts routinely permit to compensate
17 the lawyers for the risk in taking the case contingently. In my own practice we
18 have recovered fees in which the lodestar multiplier was well in excess of this
19 amount – and we have recovered fees in which the multiplier was far less.

20 Fourth and finally, turning to more subjective criteria, the work on this case was
21 excellent. This is hardly surprising given the reputation of the firm, but I do not
base this opinion simply on that reputation or the resumes of the lawyers who
worked on this case. I have reviewed the pleadings, the enormous disclosure
statements, and the motion papers on various issues (punitive damages, in pari
delicto, Daubert, and various discovery disputes). The work is not only of high
quality in the sense of legal craftsmanship – it was effective. Particularly
compelling to me is that Osborn Maledon was able to win a motion that it could
present the issue of punitive damages to the jury. I know from experience that
this is not easy to do. To achieve it here reflected first-class lawyering, and first-
class lawyering that was effective. I cannot but believe that prevailing on that
motion alone significantly increased the settlement value of the case.

1 In sum, this was a risky, hard-fought case. The process by which the fee
2 agreement was agreed upon was well-informed, the fee agreement itself is
3 facially reasonable, and under the law and practice of awards in major class
4 litigation, the fee is eminently reasonable. Equally important, however, is that
when one “looks under the hood,” as I have done, this is an excellent piece of
legal work. Osborn Maledon’s client was well-served here, and Mr. Davis is
correct that the requested fee is reasonable.

5 Finally, the requested expenses, of nearly one million dollars are reasonable.
6 The itemized expenses are exactly what I would expect, both in type and in
7 amount, in a case of this nature. As is typical in cases like this, the lion’s share
of the expenses is for experts. Since Osborn Maledon did not know that would
prevail in this litigation, it had absolutely no incentive to “pad” its expenses, and
I see no evidence that it did so. The expenses are reasonable.

8
9 WHEREFORE, the Receiver respectfully requests that the Court enter an order
10 authorizing the Receiver to pay from Receivership Assets the amount of \$4,943,000 to
11 Osborn Maledon, P.A. for its professional services to the Receiver.

12 Respectfully submitted this 8th day of June 2020.

13 GUTTILLA MURPHY ANDERSON, P.C.

14 /s/ Ryan W. Anderson

15 Ryan W. Anderson
16 Attorneys for the Receiver

17 2359-001(393412)
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21

EXHIBIT A

Colin F. Campbell, 004955
Geoffrey M.T. Sturr, 014063
Joseph N. Roth, 025725
Joshua M. Whitaker, 032724
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Attorneys for Receiver

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

Arizona Corporation Commission,

Plaintiff,

v.

Densco Investment Corporation, an
Arizona Corporation,

Defendants.

No. CV2016-014142

**DECLARATION OF COLIN F.
CAMPBELL AND
GEOFFREY M. T. STURR IN
SUPPORT OF PETITION FOR
ORDER APPROVING
PAYMENTS TO SPECIAL
COUNSEL OSBORN MALEDON,
P.A.**

We, Colin F. Campbell and Geoffrey M. T. Sturr, state as follows:

1. Colin Campbell is of counsel to the firm of Osborn Maledon, P.A. ("Osborn Maledon") and Geoffrey Sturr is a member of the firm. We are the lawyers at the firm most familiar with Osborn Maledon's work on the DenSco case against Clark Hill. We are familiar with the firm's contingent fee agreement, and we are the lawyers responsible for assessing the reasonableness of the fees and costs.

2. This declaration is made in support of the Receiver's Application for Approval of Payment of the Attorneys' Fees and Costs for Osborn Maledon. Osborn Maledon's fees and costs are set forth on a separate invoice to the Receiver's counsel.

1 3. At the outset of this case, Osborn Maledon offered to work on either an
2 hourly rate agreement, or a contingent fee agreement where Osborn Maledon would
3 receive a percentage of recovery and costs only from a settlement or judgment against
4 Clark Hill. The Receiver chose a contingent fee agreement. The contingent fee
5 agreement shielded DenSco from the risk of loss; that is, the risk of losing the case.
6 Osborn Maledon bore the risk of loss. The contingent fee was a waterfall; that is, the
7 contingent fee was reduced dependent upon the level of recovery. The waterfall is set
8 out in the agreement and invoice.

9 4. The contingent fee agreement was approved by the Court in April 2017,
10 and Osborn Maledon began working on the case in earnest from that date forward.

11 5. The contingent fee agreement and ER 1.5 of the Arizona Rules of
12 Professional Conduct require Osborn Maledon to assess at the end of the case the
13 reasonableness of the contingent fee. The firm has reviewed the outcome of the
14 contingent fee agreement, and concluded the fees and costs are reasonable.

15 6. In assessing the reasonableness of the fees and costs, Osborn Maledon
16 considered several factors under ER 1.5(a).

17 7. This was a complex professional liability case involving voluminous
18 documents created over more than ten years. Large amounts of time were spent,
19 obtaining and analyzing voluminous documents before the complaint was filed. After
20 suit was filed, the firm devoted substantial time and effort to obtaining relevant
21 documents through discovery, and then reviewing, cataloging, and managing a large
22 document file for litigation. The amount of time spent in document review, analysis,
23 and management is reflected in the attorney work sheets. Aside from document
24 management, a large number of depositions took place as to Clark Hill attorneys,
25 multiple investors, and third-party witnesses. The case was also complex because, in an
26 attorney malpractice case, a plaintiff must prove not only malpractice, but also that the
27 malpractice made a difference (the case within the case). Two cases, malpractice and
28

1 causation, are always in play in a malpractice case. The case required expert witnesses,
2 both as to liability and as to damages.

3 8. The case was vigorously defended both on liability and damages and on
4 multiple alleged third parties at fault. Competent and able defense counsel represented
5 the defendants. Among the defenses asserted was that the Receiver's claims were
6 completely barred by the *in pari delicto* doctrine, and that his entitlement to damages
7 was limited by the actions of a large number of persons and entities whom the defense
8 identified as non-parties at fault. The defense vigorously argued that the Receiver's
9 recovery should be limited by the fault of DenSco's president, Denny Chittick, and
10 Scott Menaged, who defrauded him and others and who is currently serving a 17-year
11 sentence in a federal prison. Mr. Menaged was among the many witnesses who were
12 deposed in the case; his deposition took place over two days. The case did not settle
13 until late February 2020, on the eve of the final joint pretrial conference. By that date,
14 the case had proceeded through multiple Rule 26.1 statements, depositions, motions for
15 summary judgment, motions to compel, motions in limine and motions on sanctions,
16 and the drafting of the final joint pretrial statement.

17 9. Clark Hill had a "burning" insurance policy; that is, defense costs were
18 paid from the policy decreasing the available coverage. Based on the limits the
19 Receiver was told remained at mediation, Defendants vigorously defended the case, and
20 spent more in defending the case than we incurred in prosecuting the case for the
21 Receiver.

22 10. Osborn Maledon does commercial contingency work. We have done
23 commercial cases where a set flat fee is paid up to a cap and there may or may not be
24 cost sharing. If there is a recovery, Osborn Maledon is brought up to its full hourly
25 rates and, in addition, takes a negotiated percentage of the recovery. The negotiated
26 contingent waterfall fee in this case is proportional in terms of fees to what Osborn
27 Maledon has negotiated and received in commercial cases and reflects the high risk of
28 commercial cases that are comparable in complexity to this professional liability case.

1 11. On hourly rate cases, Osborn Maledon generally bills its clients monthly
2 for services rendered and expenses incurred in the previous month. Although this case
3 was a contingent fee case, for internal business purposes, Osborn Maledon tracked its
4 legal services on an hourly billing basis. This is done for firm budgeting and yearly
5 compensation purposes.

6 12. Osborn Maledon uses a software program to record the time each
7 attorney, paralegal, or paralegal assistant spends working on particular matters. Each
8 timekeeper is expected to record his or her time every day, and to ensure that time
9 records are uploaded on the Tuesday and Friday of each week. The program produces a
10 record that lists the client, matter, date, task performed, and the time (in tenths of an
11 hour) taken to perform the task.

12 13. The time that is entered by individual timekeepers is maintained as part of
13 an integrated accounting system by the firm's accounting department.

14 14. From this information, the accounting department can periodically prepare
15 a "pro forma statement" for each matter the firm handles for that client. The pro forma
16 statement lists all the attorney and paralegal services performed during the relevant
17 period (usually the previous month), the date on which each service was performed, the
18 attorney or paralegal performing the service, the time required to perform the service (in
19 tenths of an hour), and other information.

20 15. As this was a contingent fee case, the firm did not prepare monthly
21 pro formas, but it is able to generate a raw billing statement that has not been edited
22 each month and reviewed. Nonetheless, it is a record of the time and costs the firm put
23 into the case. We have reviewed that summary, redacted certain work product entries
24 and, in one instance, removed a mistaken entry for another client.

25 16. We can provide this billing summary to the Court. It reflects that Osborn
26 Maledon put over 4,400 hours of time in this case.

1 17. As noted above, the principal lead attorneys on the case were Colin
2 Campbell and Geoffrey Sturr. Other junior partners, associates, and paralegals also
3 worked on the case from 2017 to the present.

4 18. Colin Campbell has practiced law in Arizona since 1977. He was a Judge
5 of the Superior Court of Arizona, Maricopa County, from 1990 to 2007, and Presiding
6 Judge from 2000 to 2005. He received his undergraduate degree from Northwestern
7 University and received his law degree, *summa cum laude*, from the University of
8 Arizona Law School. He has concentrated his private practice on complex commercial
9 litigation, tort litigation, and some white collar criminal defense work.

10 19. Geoffrey Sturr is a member of the firm. He received a B.A. from
11 Haverford College in 1982 and graduated from the University of California, Los
12 Angeles, in 1990, where he was Editor-in-Chief of the UCLA Law Review. Before
13 joining Osborn Maledon’s predecessor firm in 1991, he clerked for Judge Cynthia
14 Holcomb Hall of the U.S. Court of Appeals for the Ninth Circuit. He is an Adjunct
15 Professor of Law at Arizona State University at the Sandra Day O’Connor School of
16 Law, teaching a course in professional responsibility. His practice focuses on
17 professional liability, professional responsibility, and civil litigation.

18 20. Joseph Roth is a member of the firm. He received a B.A. from the
19 University of Arizona in 2003 and graduated from Columbia Law School in 2007. He
20 clerked for Chief Justice Scott Bales (ret.). Mr. Roth is a member of the firm’s
21 litigation group. His practice focuses on governmental investigations and litigation,
22 complex commercial litigation, and appeals. Mr. Roth is listed by Chambers USA as
23 “up and coming,” is recognized on the Benchmark Litigation 40 & Under Hot List for
24 2018-2019, and has been selected by *Southwest Super Lawyers* as a “Rising Star” for
25 2012-2019.

26 21. Josh Whitaker is an associate of the firm. He received a B.A. from
27 Arizona State University and graduated from Harvard Law School in 2015. Before
28 joining the firm, Mr. Whitaker clerked for two federal judges—Judge Andrew Hurwitz

1 of the Ninth Circuit Court of Appeals and Judge Neil Wake of the District Court of
2 Arizona. Mr. Whitaker focuses on complex civil litigation and appeals. He has
3 represented clients in private arbitration, federal district court, state superior court, the
4 Arizona Court of Appeals, and the Arizona Supreme Court (petition for review).

5 22. Other attorneys did limited work on the case. Corporate attorneys, with
6 experience in securities law, were consulted during the drafting of the Complaint and the
7 legal theories developed to pursue the Receiver's claims. Other associates provided
8 research from time to time.

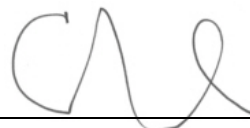
9 23. Extensive work was required of paralegals in document management and
10 in preparing the final trial exhibit lists and deposition designations. Michelle Burns is a
11 paralegal of the firm, and Rob Franks is an assistant paralegal at the firm.

12 24. For purposes of assessing the risk the firm undertook, Osborn Maledon
13 incurred in addition to its time, \$1,000,000 in costs, more or less, in the case. Those
14 costs are summarized in the separate invoice provided to the Receiver's counsel.

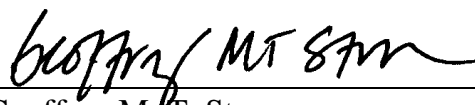
15 25. If the case had proceeded to trial and appeal, Osborn Maledon had
16 estimated an additional \$500,000 for trial, and \$250,000 for appeal.

17 26. Based on all these facts, Osborn Maledon believes the attorneys' fees it
18 has earned under the contingent fee agreement and the costs it incurred in prosecuting
19 the Receiver's claims are reasonable under ER 1.5.

20 Dated this 10th day of April 2020.

21 
22

23 Colin F. Campbell

24 
25

26 Geoffrey M. T. Sturr

27 8480776
28

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

FILED UNDER SEAL