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SUPERIOR COURT OF ARIZONA

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COUNTY OF MARICOPA

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

No. CV2017-013832

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Plaintiff,

**RESPONSE TO MOTION FOR
DETERMINATION THAT
PLAINTIFF HAS MADE A PRIMA
FACIE CASE FOR PUNITIVE
DAMAGES FOR AIDING AND
ABETTING BREACH OF FIDUCIARY
DUTY**

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v.

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

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Defendants.

(Assigned to the Honorable Daniel Martin)

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1 Plaintiff asks this Court to find that there is clear and convincing evidence that Mr.
2 Beauchamp acted with an evil mind when he “aided and abetted DenSco in continuing its
3 business, and continuing to raise monies, without full disclosure of the first Menaged fraud to
4 investors.” [Motion, 5.] But Plaintiff’s Motion fails to establish prima facie evidence that Mr.
5 Beauchamp aided and abetted DenSco’s breach of fiduciary duty or that the alleged aiding and
6 abetting was aggravated and outrageous conduct undertaken with an evil mind.

7 On the aiding and abetting claim, Plaintiff does not establish that Mr. Beauchamp (1)
8 knew that DenSco was accepting investor money without disclosing the double-lien issue and
9 thereby breaching its fiduciary duty, or (2) substantially assisted DenSco’s breach. Without
10 knowing that Yomtov “Scott” Menaged, a DenSco borrower and smalltime reality TV star,
11 was defrauding DenSco, Mr. Beauchamp worked to address the risks DenSco faced, follow his
12 client’s directions, and advise DenSco on its disclosure obligations. After learning that DenSco
13 was not disclosing the double-lien issue to investors providing funds and would not provide an
14 updated Private Offering Memorandum (“POM”) to all investors, Mr. Beauchamp repeated
15 that DenSco could not accept funds without disclosure and terminated the representation.

16 Additionally, Plaintiff presents no evidence that Mr. Beauchamp’s alleged aiding and
17 abetting of DenSco’s breach was done with an evil mind. Plaintiff’s allegations of Mr.
18 Beauchamp’s evil mind rely on his actions after Mr. Chittick killed himself, “when the dam of
19 hidden information broke, [and] Clark Hill str[ove] to conceal its misconduct.” [*Id.*] But as
20 Defendants’ expert states, Mr. Beauchamp’s limited efforts to help DenSco after Mr. Chittick’s
21 death were justified and appropriate because no one else with knowledge of DenSco was
22 willing to help. Regardless, this alleged evidence cannot establish a prima facie case of Mr.
23 Beauchamp’s evil mind in aiding and abetting DenSco’s breach of fiduciary duty because it
24 occurred after the alleged aiding and abetting. Mr. Chittick was dead and DenSco was no
25 longer breaching any fiduciary duty. There is no causal link between these allegations and
26 Plaintiff’s damages, as required by Arizona law.

1 **I. Factual Background**

2 On July 30, 2016, Mr. Beauchamp received a call from Mr. Chittick’s sister, Shawna
3 Heuer, while he was driving on Route 51. [DSOF at ¶ 110] Ms. Heuer stated that Mr. Chittick,
4 a friend who Mr. Beauchamp had known and worked with since the early 2000s, had killed
5 himself. [Id.] The news was so shocking, that Mr. Beauchamp pulled over to the side of the
6 freeway to collect himself. At Ms. Heuer’s request, Mr. Beauchamp began helping her address
7 the issues presented by Mr. Chittick’s death. [Id. at ¶¶ 110 and 113] Mr. Chittick was the sole
8 owner, manager, director, and officer of DenSco. [Id. at ¶ 114] He had appointed Robert
9 Koehler, an experienced hard money lender, to help wind down DenSco in the event of his
10 death. [Id. at ¶ 115] But Mr. Koehler backed out. [Id.] With no one left to step in, Mr.
11 Beauchamp agreed to help.

12 In a limited representation that lasted about a week, Mr. Beauchamp helped Ms. Heuer
13 quickly open an estate for Mr. Chittick and arranged for her appointment as the personal
14 representative of the Chittick Estate. [Id. at ¶¶ 115-117] On August 4, the court appointed
15 Ms. Heuer as personal representative of the Chittick Estate. [Id. at ¶ 119] On August 10,
16 Gammage & Burnham took over the Estate’s representation. [Id. at ¶ 121]

17 At Ms. Heuer’s request, Mr. Beauchamp also helped maintain DenSco’s status quo and
18 provide documents and information to DenSco investors and the ACC, until the court
19 appointed the Receiver on August 18. Those updates included (1) an August 3 email notifying
20 DenSco investors of Mr. Chittick’s suicide and information on DenSco’s finances collected by
21 Ms. Heuer and Mr. Koehler, (2) an August 5 email summarizing the status of DenSco’s loans,
22 and (3) an August 12 email explaining his work on behalf of DenSco, which included
23 responding to the ACC’s subpoena, obtaining and reviewing DenSco’s records, and preserving
24 DenSco’s rights with respect to Mr. Menaged’s bankruptcy. [Id. at ¶ 117, 121, 131]

25 Through discovery, the parties have learned that Mr. Menaged had been defrauding
26 DenSco since 2012. In 2012, Mr. Menaged began borrowing loans from multiple hard money

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2 lenders purchase the same piece of real estate. [*Id.* at ¶ 19] Mr. Menaged paid for the properties
3 with some of the loan funds and pocketed the overage. [*Id.*] The lenders recorded competing
4 deeds of trust against the properties, and the total liens exceeded the properties' values. [*Id.*]
5 The parties also learned that Mr. Reichman, owner of hard money lender Active Funding
6 Group ("AFG"), discovered this double-lien issue in September 2012 and raised it with Mr.
7 Menaged and Mr. Chittick. [*Id.* at ¶ 20] But Mr. Chittick did not tell Mr. Beauchamp about
8 the double-lien issue. [*Id.* at ¶ 22]

9 In May 2017, the Department of Justice arrested Mr. Menaged for defrauding various
10 banks. [*Id.* at ¶ 134] He was also charged with embezzling millions from DenSco. [*Id.* at
11 ¶ 137] In his plea agreement, Mr. Menaged admitted that he was responsible for the double-
12 lien issue. [*Id.*] He also admitted that beginning in January 2014, he had accepted DenSco
13 loans to buy properties to be secured with first position liens, but did not actually purchase any
14 properties. [*Id.*] Mr. Menaged confirmed that he fabricated all documents establishing that he
15 had purchased the properties, including "an image of a bank cashier's check and a copy of a
16 Trustee Certificate of Sale Receipt." [*Id.*] While the cashier's checks recording the property
17 allegedly purchased were real, Mr. Menaged immediately redeposited the cashier's checks into
18 his bank account, and did not purchase any properties that would have secured the loans. [*Id.*]

19 Mr. Beauchamp did not know that Mr. Menaged had been defrauding DenSco until after
20 Mr. Chittick's death. [*Id.* at ¶ 138] In December 2013, Mr. Chittick raised the double-lien
21 issue with Mr. Beauchamp for the first time.¹ [*Id.* at ¶ 49] Based on Mr. Chittick's
22 representations, Mr. Beauchamp understood that it was a limited issue that Mr. Chittick first
23 learned about in late 2013. [*Id.* at ¶ 50] In January 2014, only after competing lenders
24 threatened to file suit, did Mr. Chittick first explain the extent of the double liening issue to
25 Mr. Beauchamp. He also explained that: Mr. Menaged's cousin (who was running Mr.
26 Menaged's businesses while his wife was critically ill) was responsible for the double-lien

¹ Mr. Beauchamp also generally knew of the unrelated FREO lawsuit.

1 issue and had absconded with the funds; Mr. Menaged had addressed the issue by firing his
2 cousin; and DenSco and Mr. Menaged had agreed to and begun implementing a workout plan
3 that would pay off the double-liened loans. [*Id.* at ¶¶ 40, 56] Mr. Beauchamp advised Mr.
4 Chittick to document the agreement and incorporate that documentation into DenSco’s updated
5 POM. [*Id.* at ¶ 50] Mr. Beauchamp also advised DenSco to disclose the double-lien issue to
6 investors providing funds to DenSco. [*Id.* at ¶ 61]

7 Mr. Beauchamp helped DenSco document its agreement in a Term Sheet. [*Id.* at ¶ 63]
8 Mr. Menaged agreed in writing to (1) pay off any shortfall on the double-lien loans by
9 borrowing \$1 million and liquidating assets worth \$4-5 million, and (2) obtain a \$10 million
10 life insurance policy with DenSco as the beneficiary. [*Id.* at ¶ 64] DenSco agreed to loan up
11 to \$1 million to Mr. Menaged for the purpose of “wholesaling” properties, with all profits used
12 to pay off the double-lien loans. [*Id.*] Against Mr. Beauchamp’s advice, DenSco did not
13 require Mr. Menaged to admit that the deeds of trust securing DenSco loans should have been
14 in first position. [*Id.* at ¶ 65]

15 The parties then turned to drafting and negotiating a formal Forbearance Agreement,
16 which they thought could be accomplished in a few weeks, during which time DenSco was to
17 cease raising funds from investors absent full disclosure. [*Id.* at ¶ 66] Negotiations were
18 difficult and took longer than expected. Mr. Beauchamp repeatedly pushed back against
19 changes made by Mr. Menaged’s attorney and reminded Mr. Chittick of DenSco’s fiduciary
20 duties and disclosure obligations to investors. [*Id.* at ¶ 68] Mr. Chittick understood DenSco’s
21 disclosure obligations, stating to Mr. Menaged on February 11, “I’ve not taken any new
22 investors, so if I do, I have to disclose a lot to them, which is all about you.” [*Id.* at ¶ 76] On
23 March 13, Mr. Beauchamp advised Mr. Chittick that “we cannot give Scott and his attorney
24 any time to cause further delay in getting this Forbearance Agreement finished and the
25 necessary disclosure prepared and circulated.” [*Id.* at ¶ 85]

26 Under the Forbearance Agreement, Mr. Menaged (1) identified the facts regarding, and

1 scope of, the double lien issue, (2) acknowledged his obligation to discharge the competing
2 liens, (3) agreed to pay off the double-encumbered loans, and (4) agreed to provide additional
3 security and guarantees, including a \$10 million life insurance policy naming DenSco as
4 beneficiary. [*Id.* at ¶ 67] DenSco agreed to extend additional financing to Mr. Menaged (and
5 defer the collection of interest on defaulted loans) for purposes of purchasing additional
6 properties, with all profits used to pay off the loans at issue. [*Id.*]

7 Mr. Beauchamp then returned to updating DenSco’s POM now that the terms of the
8 Forbearance Agreement and the scope of the double-lien issue were clear. [*Id.* at ¶ 96] In May
9 2014, Mr. Beauchamp delivered a draft updated POM to Mr. Chittick. [*Id.* at ¶¶ 97, 98] Mr.
10 Chittick refused to complete the POM and disclose the double-lien issue. [*Id.* at ¶ 99] In
11 response, Mr. Beauchamp terminated its securities work for DenSco. [*Id.* at ¶¶ 100-102]

12 **II. Legal Argument**

13 **A. There is Insufficient Evidence that Mr. Beauchamp Aided and Abetted** 14 **DenSco’s Breach of Fiduciary Duty.**

15 Plaintiff’s punitive damages claim relies on the allegation that Mr. Beauchamp “aided
16 and abetted DenSco’s breaches of fiduciary duty when he caused DenSco to borrow investor
17 monies without disclosing material facts to its investors” [Motion, 2.] But Plaintiff does
18 not address the elements required to establish aiding and abetting, or establish that Mr.
19 Beauchamp’s performance of his duties met those requirements. Under Arizona law, claims
20 of aiding and abetting require proof of three elements:

- 21 (1) the primary tortfeasor committed a tort that caused injury to the plaintiff;
- 22 (2) the defendant must know that the primary tortfeasor’s conduct constitutes a
breach of duty; and
- 23 (3) the defendant must substantially assist or encourage the primary tortfeasor in
the achievement of the breach.

24 *Stern v. Charles Schwab & Co.*, 2009 WL 3352408, at *7 (D. Ariz. Oct. 16, 2009). Plaintiff
25 fails to provide any clear and convincing evidence on the second or third element.

26 **1. Plaintiff Fails to Establish Knowledge of Breach of Fiduciary Duty.**

Plaintiff does not cite to any clear and convincing evidence establishing that Mr.

1 Beauchamp knew that DenSco was breaching its fiduciary duty by accepting investor funds
2 without disclosing the double lien issue between January 2014 and late April or early May
3 2014. As of January 2014, Mr. Beauchamp knew of only:

- 4 • An isolated lawsuit (the “FREO” lawsuit) that Mr. Chittick had brought to his
5 attention in June 2013, asserting a competing ownership claim against (1) a
6 DenSco borrower, (2) DenSco, and (3) an unrelated loan servicer based on the
7 alleged failure by the loan servicer to cancel a trustee’s sale, which resulted in
8 the DenSco borrower purchasing a property that the plaintiff had already
9 purchased, and
- 10 • A double-lien issue with Mr. Menaged, whom Mr. Chittick portrayed
11 (misleadingly as it turns out) as one of DenSco’s most trusted and long-
12 performing borrowers, who had run into issues when his wife became critically
13 ill and his cousin took over his business operations, which DenSco was in the
14 process of resolving through a workout plan it had already agreed to and begun
15 implementing.

16 While Plaintiff questions whether this story is believable, the evidence establishes that both
17 Mr. Chittick and another hard money lender, AFG’s Mr. Reichman, believed and continued to
18 trust Mr. Menaged. [DSOF ¶¶ 23, 24] As expert Scott Rhodes explains, “Beauchamp could
19 rely on Chittick’s representations to him about facts relevant to the ‘double lien’ issue and also
20 could rely on Chittick’s business plan for resolution of that issue.” [S. Rhodes Report, 6.]

21 With this limited backdrop, Mr. Beauchamp advised DenSco to document the workout
22 plan, disclose the workout plan, but that in the interim, DenSco could not raise funds without
23 providing full disclosure. [Id. at ¶¶ 50, 75, 81; PSOF Ex. 6, 78:12-24.] As expert Kevin
24 Olson explains,

25 Given Mr. Beauchamp’s history with Mr. Chittick, his communications with Mr.
26 Chittick, and Mr. Chittick’s knowledge and understanding of DenSco’s
disclosure obligations (including the need to periodically disclose material
information), this oral conversation [regarding the need to disclose before
accepting investor funds] was a reasonable way to communicate what needed to
be done.

[K. Olson Report, 24-25.] Mr. Chittick understood that advice. [DSOF Ex. 22 (“I’ve not taken
any new investors, so if I do, I have to disclose a lot to them, which is all about you.”).]

1 Mr. Beauchamp also advised DenSco that it must finalize the Forbearance Agreement,
2 update its POM, and provide this written disclosure to all existing investors. [Plaintiff SOF
3 Ex. 6, 78:12-24; PSOF Ex. 120 (“[W]e cannot give Scott and his attorney any time to cause
4 further delay in getting this Forbearance Agreement finished and the necessary disclosure
5 prepared and circulated.”).] As expert Kevin Olson states,

6 DenSco could comply with its Regulation D obligations by disclosing
7 information orally. . . . So long as the disclosures were being made [to investors
8 providing new or rollover funds], the update to the POM was not urgent and it
9 was reasonable to wait to update the POM until the Forbearance Agreement was
10 complete.

11 [K. Olson Report, 9, 25.]

12 When Mr. Beauchamp began having concerns that DenSco was accepting investor
13 funds without this disclosure in late April or early May 2014, he again stressed DenSco’s
14 obligation to disclose the double-lien issue before accepting funds. [DSOF at ¶ 70] Mr.
15 Beauchamp also immediately updated DenSco’s POM with information regarding the double-
16 lien issue and the recently-executed Forbearance Agreement. [*Id.* at ¶ 98] Mr. Beauchamp
17 gave the draft updated POM to Mr. Chittick and asked Mr. Chittick to approve the language
18 on the Forbearance Agreement and provide the remaining information to complete the POM.
19 Mr. Chittick refused, and Mr. Beauchamp terminated the representation. [*Id.* at ¶ 100-102]

20 Plaintiff asserts that the documentary evidence establishes that Mr. Beauchamp did not
21 give this advice regarding DenSco’s disclosure obligations. First, Plaintiff relies on a January
22 12, 2014 email from Mr. Beauchamp to Mr. Chittick stating, “You should feel very honored
23 that you could raise that amount of money that quickly.” [PSOF Ex. 129.] But this email is
24 consistent with Mr. Beauchamp’s advice that DenSco could raise investor funds as long as it
25 disclosed the double-lien issue to those investors. Second, Plaintiff relies on a couple entries
26 in Mr. Chittick’s incomplete and misleading “business” journal, which are inadmissible
hearsay as explained in Defendants’ forthcoming Motion in Limine. In addition, these vague
entries appear to address disclosures to existing investors who provided funds based on

1 information DenSco believed to be accurate at the time. [PSOF Ex. 82.] The documentary
2 evidence is consistent with Mr. Beauchamp’s advice regarding the distinct disclosure
3 obligations to investors providing new or rollover funds and to existing investors.

4 Next, Plaintiff asserts that the lack of an email, letter, or note documenting Mr.
5 Beauchamp’s advice that DenSco could not accept new investor funds without disclosing the
6 double-lien issue is clear and convincing evidence that Mr. Beauchamp failed to provide it.
7 But the lack of written advice is not clear and convincing evidence of the failure to provide
8 that advice when there is a history of giving such advice, and there is no obligation to advise
9 the client in writing. Again, Kevin Olson observes that Mr. Beauchamp’s “oral conversation
10 was a reasonable way to communicate what needed to be done.” [K. Olson Report, 25.]

11 Additionally, the red flags that Plaintiffs allege Mr. Beauchamp should have been aware
12 of and investigated cannot establish Mr. Beauchamp’s knowledge of DenSco’s breach of
13 fiduciary duty. [N. Wertlieb Report, 9-13, 50-56 (outlining the “red flags” that Mr.
14 Beauchamp should have identified and addressed); PSOF ¶¶ 32-33, 173-75, 197-200 (same).]
15 Under Arizona law, red flags do not establish a party’s knowledge of the underlying tort.
16 *Hashimoto v. Clark*, 264 B.R. 585, 599 (D. Ariz. 2001) (dismissing aiding and abetting claim
17 when there were “red flags as to [the debtor’s] trading practices” because red flags are “not
18 conclusive as to the degree of knowledge that [the bank] enjoyed at the time [the debtor] bought
19 the loans [and] imposing a legal duty on the facts in this record would . . . turn every creditor
20 into an investigatory agency); *Stern*, 2009 WL 3352408, at *7 (“[M]ere knowledge of
21 suspicious activity is not enough.”).

22 Finally, Plaintiff cannot avoid Mr. Beauchamp’s lack of knowledge by asserting that
23 “[c]lear and convincing prima facie evidence demonstrates that Clark Hill did not terminate its
24 representation.” [Motion, 12.] This argument cannot save Plaintiff’s aiding and abetting claim
25 because Plaintiff acknowledges that Mr. Beauchamp “did nothing from May 2014 until July
26 2016 [when Mr. Chittick killed himself].” [Motion, 5.] In addition, Plaintiff’s “clear and

1 convincing evidence” that there was no termination is, again, the mere assertion that Mr.
2 Beauchamp did not document the termination. [Motion, 12-13.] But again, the lack of
3 evidence cannot establish clear and convincing evidence here because “[t]he standard of care
4 . . . did not require [Mr. Beauchamp] to terminate the relationship in writing, nor to state his
5 reasons for doing so.” [S. Rhodes Report, 10.] In addition, Mr. Beauchamp and Clark Hill
6 associate, Daniel Schenck, testified that Clark Hill terminated its representation of DenSco
7 with regard to securities work in May 2014. [DSOF Ex. 18] Without any cause, Plaintiff
8 consistently casts Mr. Beauchamp as a liar and completely ignores (1) Mr. Schenck’s
9 confirming testimony that Mr. Beauchamp terminated the representation as securities counsel,
10 and (2) the confirming shift in Clark Hill’s work for DenSco after May 2014, which is
11 documented by limited invoices through July 2014, and the lack of any invoices thereafter.

12 The only evidence Plaintiff cites to contradict two attorneys’ sworn testimony regarding
13 the termination of the representation is (1) limited corrections made by Clark Hill to the
14 Forbearance Agreement in June and July 2014; (2) discrete work on an unrelated ADFI
15 regulatory issue in 2016; and (3) a March 2015 email from Mr. Beauchamp to Mr. Chittick
16 stating that he “would like to meet for coffee or lunch (at no charge to you) so we can sit down
17 and talk about how things have progressed for you since last year.” [Motion, 13.] But Plaintiff
18 admits that the work correcting minor errors to the Forbearance Agreement and providing
19 advice on an unrelated and discrete ADFI issue was limited. [Motion, 5 (acknowledging that
20 Mr. Beauchamp “did nothing from May 2014 until July 2016.”).] This discrete work was not
21 inconsistent with the termination of the representation of DenSco on securities matters. [K.
22 Olson Report, 27-28 (“[T]hat clean-up work was appropriate notwithstanding the termination
23 of the relationship given the duplication of effort and extra expense that would have been
24 required to turn over these relatively small tasks to another lawyer.”).]

25 The March 2015 email checking in with Mr. Chittick, whom Mr. Beauchamp had
26 worked with for 10 years, is also not clear and convincing evidence that Mr. Beauchamp did

1 not terminate the relationship in May 2014, nor does it warrant the conclusion that multiple
2 attorneys are lying under oath. Mr. Beauchamp understandably did not raise the awkward
3 termination of the representation by email. And his willingness to potentially “move beyond
4 everything that happened and still work [together],” if the issues requiring termination have
5 been addressed, does not contradict two witnesses’ testimony regarding the termination.
6 [PSOF Ex. 135.] Plaintiff fails to identify any clear and convincing evidence that Mr.
7 Beauchamp knew that DenSco breached its fiduciary duties by accepting investor funds
8 without disclosing the double-lien issue before the representation termination in May 2014.

9 **2. Plaintiff Fails to Establish Substantial Assistance.**

10 Plaintiff also fails to allege or establish that Mr. Beauchamp’s alleged acts substantially
11 assisted DenSco in raising investor funds without disclosing the double-lien issue.
12 “Substantial assistance” means more than “a little aid,” and “requires a showing that the
13 defendant's assistance was a substantial factor in causing the plaintiff's harm.” *Mann v. GTCR*
14 *Golder Rauner, L.L.C.*, 351 B.R. 685, 699 (D. Ariz. 2006).

15 Plaintiff asserts that Mr. Beauchamp “[h]elp[ed]” DenSco “raise new investor monies
16 and roll over monies without full disclosure of material facts.” [Motion, 8.] In identifying
17 how Mr. Beauchamp helped DenSco, Plaintiff offers a few different theories, including Mr.
18 Beauchamp’s alleged advice that DenSco “could pursue” the workout plan it had already
19 agreed to and implemented with Mr. Menaged, and Mr. Beauchamp’s drafting and negotiation
20 of the Forbearance Agreement. [Motion, 5, 14.] But none of these alleged acts establish that
21 Mr. Beauchamp substantially assisted DenSco’s acceptance of investor funds without
22 disclosing the double-lien issue.

23 First, the workout agreement and the Forbearance Agreement have no direct
24 relationship to DenSco’s acceptance of investor funds without disclosure. Plaintiff tries to
25 connect the two by asserting that Mr. Beauchamp assured DenSco that it “could continue to
26 sell promissory notes and take rollover money without issuing a new POM while the

1 Forbearance Agreement was negotiated.” [Motion, 10.] But none of the evidence establishes
2 that Mr. Beauchamp provided this advice, as described above. Again, Mr. Beauchamp advised
3 DenSco that it must disclose the double-lien issue to investors providing funds, and Mr.
4 Chittick understood this advice. [DSOF at ¶ 76; DSOF Ex. 21 (“I’ve not taken any new
5 investors, so if I do, I have to disclose a lot to them, which is all about you.”).] Without any
6 evidence that Mr. Beauchamp advised DenSco that it could wait to disclose the double-lien
7 issue, Mr. Beauchamp’s negotiation and drafting of the Forbearance Agreement (which
8 DenSco did not provide to its investors) cannot be a substantial factor in causing DenSco to
9 accept investor funds without disclosure. As expert Kevin Olson explains,

10 [T]he use of the Forbearance Agreement was proper [and provided] a legally
11 enforceable agreement so that [DenSco] could plan its own business efforts . . . ,
12 demonstrate to others, including its investors, that it had acted properly and
13 prudently to resolve the Menaged issues; [and] memorialize the workout plan,
14 set forth relevant facts, obtain admissions and warranties, set forth each party’s
15 obligations and establish consequences if the borrower failed to perform.

16 [K. Olson Report, 21.]

17 Plaintiff’s real complaint is with Mr. Beauchamp’s failure to stop DenSco from
18 accepting investor funds without disclosing the double-lien issue. [Motion, 10 (asserting that
19 Mr. Beauchamp “allowed” DenSco to accept investor funds without disclosing the double-lien
20 issue); PSOF ¶¶ 155-56, 201-206; Wertlieb Report, 63 (asserting that Mr. Beauchamp “failed
21 to protect DenSco from Mr. Menaged” and “failed to timely update the 2011 POM”)] But the
22 failure to act cannot satisfy the substantial assistance requirement of an aiding and abetting
23 claim when, as here, the defendant had no knowledge his client was raising money without
24 disclosure, and no duty to act to protect the injured third party of whom he was unaware. *Stern*,
25 2009 WL 3352408, at *9 (finding that inaction failed to satisfy substantial assistance
26 requirement). Mr. Beauchamp was not DenSco’s general counsel and was not in a position to
“allow” DenSco to do anything. [DSOF at ¶ 12] As expert Scott Rhodes states, “Lawyers for
a business are advisors, not regulators.” [S. Rhodes Report, 7.]

1 **B. Plaintiff Fails to Establish Clear and Convincing Evidence of Mr.**
2 **Beauchamp’s Evil Mind.**

3 A triable issue on liability for punitive damages requires the plaintiff to establish “upon
4 clear and convincing evidence that the ‘defendant's evil hand was guided by an evil mind.’”
5 *Allen v. Am. Capital Ltd.*, 287 F. Supp. 3d 763, 811 (D. Ariz. 2017) (requiring conduct invoking
6 “similar outrage to that usually found in response to a crime”). Specifically,

7 It is only when the wrongdoer should be consciously aware of the evil of his
8 actions, of the spitefulness of his motives or that his conduct is so outrageous,
9 oppressive or intolerable in that it creates a substantial risk of tremendous harm
10 to others that the evil mind required . . . may be found.

11 *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330 (1986) (“denying all claims upon any
12 possible supportable basis” to increase insurer’s profits did not support punitive damages);
13 *Gurule v. Ill, Mut. Life & Cas. Co.*, 152 Ariz. 600, 607 (1987) (finding insurer acted in bad faith
14 by failing to reasonably investigate benefits claims, but not with an evil mind, when there was
15 no clear evidence that insurer consciously disregarded plaintiff’s rights).

16 The parties agree that Plaintiff can only prove that Mr. Beauchamp acted with an evil
17 mind if it establishes clear and convincing evidence that Mr. Beauchamp acted to serve his own
18 interests, having reason to know and consciously disregarding a substantial risk of significant
19 harm to DenSco investors. *Linthicum*, 150 Ariz. at 330; *Gurule*, 152 Ariz. at 607 (“Self interest
20 [alone] is not, however, evidence of an evil mind.”) [Motion, 1.] Plaintiff asserts that the
21 following clear and convincing evidence establishes Mr. Beauchamp’s self-interested acts,
22 concealment of his alleged misconduct, and his knowing and conscious disregard of the
23 substantial risk that his alleged aiding and abetting of DenSco’s breach of fiduciary duty would
24 significantly injure DenSco investors:

- 25 • Mr. Beauchamp intentionally delayed the updating of DenSco’s POM to conceal
26 his allegedly improper advice; and
- After Mr. Chittick’s death, Mr. Beauchamp “tried to protect himself and Clark Hill” when he represented the Chittick Estate for less than a week and represented DenSco for less than a month. [Motion, 11, 16.]

1 **1. Lack of Evil Mind in Helping DenSco After Mr. Chittick's Death.**

2 First, Plaintiff's cynical argument regarding Mr. Beauchamp's conduct after Mr.
3 Chittick's death cannot support an award of punitive damages because it does not have any
4 relationship to Plaintiff's alleged aiding and abetting claim or Plaintiff's alleged damages.
5 Arizona law requires Plaintiff to establish a causal link between the clear and convincing
6 evidence of an evil mind and Plaintiff's alleged damages. *Saucedo v. Salvation Army*, 200 Ariz.
7 179, 182 (App. 2001) (leaving scene of hit and run after killing pedestrian could not establish
8 evil mind when the pedestrian died on impact and leaving scene did not cause the alleged harm);
9 *Forquer v. Pinal Cty.*, 22 Ariz. App. 266, 270 (1974) (finding defendant's misstatements to
10 investigating officer after deadly crash, which allegedly concealed facts regarding the crash,
11 inadmissible on punitive damages issue when statements did not cause injuries at issue).

12 Here, Plaintiff's alleged damages arise out of the loans DenSco made to Mr. Menaged
13 before Mr. Chittick killed himself. DenSco did not enter into additional loans with Mr.
14 Menaged after Mr. Chittick's death, and there is no causal link between Mr. Beauchamp's
15 representation of the Chittick Estate or DenSco in August 2016 and Plaintiff's alleged damages.
16 Plaintiff's evidence regarding Mr. Beauchamp's alleged evil mind after Mr. Chittick killed
17 himself cannot establish a prima facie case for punitive damages.

18 Second, even if Plaintiff could establish the required causal link, there is no clear and
19 convincing evidence that Mr. Beauchamp represented the Chittick Estate or DenSco to conceal
20 his alleged malpractice, knowingly and consciously disregarding a substantial risk that this
21 representation would significantly injure DenSco investors. In alleging that Mr. Beauchamp
22 represented the Estate and Densco after Mr. Chittick's death with an evil mind, Plaintiff asserts:

- 23 • Mr. Beauchamp had a conflict of interest in representing DenSco and the Estate
24 of Mr. Chittick. [Motion, 16.]
- 25 • Clark Hill wrote a few emails to DenSco investors that provided accurate
26 information, but did not describe Mr. Menaged's first fraud, Mr. Chittick's
mismanagement of DenSco, or Clark Hill's involvement in drafting the
Forbearance Agreement. [Motion, 16 (citing SOF Ex 31, 93-98).]

- 1 • Mr. Beauchamp stated, “In order to maximize the available return to all of the
2 Investors . . . we would like to keep DenSco out of a protracted bankruptcy or
3 a contentious Receivership proceeding” [PSOF Ex. 213.]
- 4 • Mr. Beauchamp stated, “We need to be willing but not overly anxious to turn it
5 over to the Securities Division. Several people in government made names and
6 careers with the Mortgages Ltd. Matter and we do not want this to turn into
7 anything like that.” [PSOF Ex. 256.]
- 8 • Mr. Beauchamp supported a privilege claim asserted by counsel for the Estate
9 of Denny Chittick to “delay his receipt of that information.” [*Id.* at 17.]

10 These points do not establish Mr. Beauchamp consciously disregarding a substantial risk of
11 significant harm to further his own interests.

12 Regarding the Estate, Mr. Beauchamp filed paperwork to open an estate for Mr.
13 Chittick, arranged for the appointment of Ms. Heuer as the personal representative of the
14 Estate, and transferred the representation to Ms. Heuer’s attorneys. [DSOF at ¶¶ 112, 119,
15 121] Plaintiff has not identified any damage arising from either action or any unjustifiable
16 significant risk of substantial harm posed by this limited representation.

17 Regarding DenSco, Mr. Beauchamp helped DenSco gather and provide documents and
18 information, while maintaining the status quo. [*Id.* at ¶ 113] By this time, the second fraud
19 had already occurred and Mr. Chittick’s sister was overseeing DenSco. Within less than a
20 week of Mr. Chittick’s death, the ACC began providing oversight. [*Id.* at ¶ 116] Within less
21 than a month, the court appointed the Receiver. [*Id.* at ¶ 133] Any potential risk of minor
22 harm was justifiable because no one else with knowledge of DenSco was willing to help. As
23 expert Scott Rhodes explains,

24 Beauchamp and Clark Hill’s short-lived legal work to help start the
25 administration of his estate and communication with investors and the [ACC]
26 were discrete tasks that, because of Beauchamp’s history with the company, it
was logical for his firm to perform. In essence, like Emergency Room doctors,
Beauchamp and the firm stabilized the situation and then passed it on to other
lawyers. Lawyers are permitted to give legal assistance in an emergency if the
assistance is “limited to that reasonably necessary under the circumstances.”

[S. Rhodes Report, 10.]

1 In addition, there is no evidence that Mr. Beauchamp knew that there was a conflict of
2 interest between Mr. Chittick and DenSco. As expert Scott Rhodes states,

3 [B]ecause of his knowledge of Chittick’s history of substantial compliance with
4 his legal advice, as well as his knowledge of Chittick’s successful management
5 of DenSco for a period of years, Beauchamp could . . . assume, within the
standard of care . . . that Chittick’s interest were aligned with the interest of
Beauchamp’s client, DenSco”

6 [*Id.* at 6.]

7 There is also no evidence that Mr. Beauchamp consciously misled DenSco investors, the
8 ACC, or the Receiver. When Mr. Beauchamp emailed DenSco investors in August 2013, he
9 did not know of Mr. Menaged’s true role in the first fraud, he did not know whether Mr. Chittick
10 had mismanaged DenSco from May 2014 to July 2016 (during which time Mr. Beauchamp
11 only performed two discrete tasks for DenSco), and he did not know how or whether Mr.
12 Chittick had moved forward with the Forbearance Agreement. There is nothing outrageous
13 about leaving unconfirmed information out of status updates.

14 Regarding the appointment of a receiver, Mr. Beauchamp stated, “if we determine that
15 DenSco’s recoverable proceed are likely to be . . . insufficient to return investors’ capital to the
16 investors, then . . . we will work with the various state authorities to have a Receiver named for
17 DenSco.” [PSOF Ex. 151.] He also stated that there would be costs associated with a
18 “contentious Receivership proceeding.” [PSOF Ex. 213.] Other DenSco investors and Ms.
19 Heuer had similar concerns regarding these costs, without evil minds. [DSOF at ¶ 124.]

20 Similarly, mentioning that DenSco investors would want to avoid a Mortgages
21 Unlimited situation was not outrageous. In Mortgages Unlimited, “the lender’s nearly \$1
22 billion collapse and its CEO Scott Coles’ suicide in 2008 led to huge investor losses, too many
23 foreclosures, a slew of lawsuits and fraud charges by regulators.” According to news articles,
24 “So many legal battles ensued from the lender’s collapse, lawyers are the only ones who really
25 made any money.” [Catherine Reagor, *Frightful Look Back*, The Republic, available at
26 <https://www.azcentral.com/story/money/real-estate/catherine-reagor/2016/11/06/frightful->

1 look-back-crash-arizona-commercial-lender-mortgages-ltd/93173858/ (Nov. 6, 2016).] There
2 is nothing outrageous about wanting to avoid this result.

3 Finally, Mr. Beauchamp’s support of a privilege claim asserted by counsel for the Estate
4 of Denny Chittick does not establish Mr. Beauchamp’s evil mind. [Motion, 17.] The Chittick
5 Estate’s attorneys asserted the privilege, not Mr. Beauchamp. Mr. Beauchamp provided
6 information he believed to be accurate at the time in a declaration drafted by the Chittick
7 Estate’s attorneys. While the declaration could have been clearer, it stated that certain
8 documents “were personal to Mr. Chittick as the President of DenSco.” [PSOF Ex. 165
9 (emphasis added).] Mr. Beauchamp later clarified that he did not represent Mr. Chittick
10 “outside of his role as a corporate officer at DenSco.” [SOF Ex. 1 (142:22-143:6).]

11 **2. Lack of Evil Mind in Helping DenSco Before Mr. Chittick’s Death.**

12 To establish Mr. Beauchamp’s evil mind, Plaintiff is left only with the argument that
13 Mr. Beauchamp intentionally delayed the updating of DenSco’s POM to conceal his alleged
14 improper advice regarding DenSco’s loan procedures and Forbearance Agreement, and his
15 conflict of interest in representing Mr. Chittick and DenSco. But there is no clear and
16 convincing evidence that Mr. Beauchamp (1) knew that he had provided improper advice
17 regarding DenSco’s loan procedures or Forbearance Agreement, or (2) intended to cover it up
18 by intentionally delaying the Forbearance Agreement and/or the updated DenSco POM.

19 Regarding DenSco’s loan procedures, the evidence establishes that Mr. Chittick knew
20 how to properly fund loans through a trustee; Mr. Beauchamp worked with DenSco on loan
21 documents and POMs that properly lay out this procedure. [DSOF at ¶ 10] Plaintiff relies on
22 a January 9, 2014 email to assert that Mr. Beauchamp later agreed that DenSco could wire loan
23 funds to a borrower. [PSOF Ex. 39.] But Mr. Beauchamp states only, “Let me see what the
24 other lenders got from the Trustee and we can make a better decision. There is either another
25 way to do it or someone described a procedure that does not work.” [*Id.*] This email does not
26 establish Mr. Beauchamp’s agreement, improper advice, or knowledge that his advice was

1 improper.

2 Regarding the Forbearance Agreement, even Plaintiff’s expert acknowledges that Mr.
3 Beauchamp’s alleged failures regarding the Forbearance Agreement do not provide clear and
4 convincing evidence of an evil mind. He states,

5 Mr. Beauchamp’s failures with respect to the Forbearance Agreement raise a
6 troubling question as to whether he simply fell below the applicable standard of
care by failing to appreciate the potential damage to DenSco caused by pursuing
the agreement, or whether he was in fact motivated by other interests

7 [Wertlieb Report, 59 (emphasis added).] *See also Allen*, 287 F. Supp. 3d at 811 (finding that
8 plaintiffs implicitly conceded that defendant could not have consciously disregarded substantial
9 risk of injury to others when they asserted that defendant did not understand the risks involved).

10 Finally, there is no clear and convincing evidence that Mr. Beauchamp intentionally
11 delayed finalizing the Forbearance Agreement and/or updating DenSco’s POM to cover up his
12 alleged malpractice. At worst, and as Plaintiff alleges, the delay was the result of “a distracted
13 Beauchamp,” which cannot establish an evil mind. [PSOF ¶ 100 (alleging that a “distracted
14 Beauchamp took minimal steps in July and August 2013 to prepare a new POM”), PSOF pg.
15 100 (alleging that “[a] distracted Beauchamp . . . did not advise DenSco to stop selling
16 promissory notes until a new POM was issued”); Wertlieb Report, 59 (characterizing Mr.
17 Beauchamp’s alleged “delay in providing updated and corrected disclosures” as “negligent,”
18 not intentional).] Under Arizona law, “A failure to follow through ‘would merely show
19 negligence rather than a conscious disregard of a substantial risk of injury to others, and thus
20 would not support the award of punitive damages.’” *Allen*, 287 F. Supp. 3d at 813.

21 **III. Conclusion**

22 Plaintiff fails to establish a prima facie case of clear and convincing evidence that (1)
23 Mr. Beauchamp aided and abetted DenSco’s breach of fiduciary duty, and (2) he did so with
24 an evil mind.
25
26

1 DATED this 13th day of May, 2019.

2 **COPPERSMITH BROCKELMAN PLC**

3
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