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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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|---|---|
| Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation,<br><br>Plaintiff,<br><br>vs.<br><br>Clark Hill PLC, a Michigan limited liability company; David G. Beauchamp and Jane Doe Beauchamp, husband and wife,<br><br>Defendants. | No. CV2017-013832<br><br>**PLAINTIFF'S DISCLOSURE OF REBUTTAL EXPERT WITNESS REPORT RE STANDARD OF CARE**<br><br>(Commercial case)<br><br>(Assigned to the Honorable Daniel Martin) |

Pursuant to the scheduling order entered in this matter, Plaintiff Peter S. Davis, as Receiver of DenSco Investment Corporation, hereby discloses the attached rebuttal report of Neil J. Wertlieb, which addresses the Preliminary Expert Report of J. Scott Rhodes and the Expert Report of Kevin Olson, served by Defendants on April 5, 2019.

DATED this 7th day of June 2019.

OSBORN MALEDON, P.A.

By _____

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WERTLIEB LAW

# REBUTTAL REPORT OF NEIL J WERTLIEB

# TO DEFENDANTS' EXPERT REPORTS

**In the matter of**

***Peter S. Davis, as Receiver of DenSco Investment Corporation***

***v.***

***Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp***

**Submitted on June 4, 2019**

**REBUTTAL REPORT OF NEIL J WERTLIEB**

**TO DEFENDANTS' EXPERT REPORTS**

**In the matter of**

***Peter S. Davis, as Receiver of DenSco Investment Corporation***
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**Submitted on June 4, 2019**

## I. INTRODUCTION

By letters dated June 15, 2017 and October 3, 2017, the law firm of Osborn Maledon, P.A. ("Osborn Maledon") retained me (through Wertlieb Law Corp, where I am principal) to serve as an expert witness in the matter of *Peter S. Davis, as Receiver of DenSco Investment Corporation v. Clark Hill PLC, David G. Beauchamp and Jane Doe Beauchamp* (this "Case").

This Case was initiated by the filing of a Complaint on October 16, 2017, by Peter S. Davis, as the court-appointed receiver (the "Receiver") of DenSco Investment Corporation, an Arizona corporation ("DenSco"), following the death of Denny Chittick, DenSco's sole owner, shareholder and operator. In the Complaint, the Receiver states two claims for relief against the law firm of Clark Hill PLC ("Clark Hill") and David G. Beauchamp (collectively, the "Defendants"): (1) legal malpractice; and (2) aiding and abetting breach of fiduciary duties. The claims arise from the legal representation of DenSco by the Defendants.

I submitted an Expert Report in this Case on March 26, 2019 ("my Expert Report").[1] On April 5, 2019, the Defendants filed the Preliminary Expert Declaration of J. Scott Rhodes (the "Rhodes Declaration") and the Expert Report of Kevin Olson (the "Olson Report"). Mr. Rhodes' deposition (the "Rhodes Deposition") was taken on May 15, 2019, and Mr. Olson's deposition (the "Olson Deposition," and together with the Rhodes Deposition, the "Defendants' Experts' Depositions") was taken on May 17, 2019. This Rebuttal Report contains my observations with respect to the Rhodes Declaration and the Olson Report and the Defendants' Experts' Depositions.

## II. THE RHODES DECLARATION AND DEPOSITION

With respect to the Rhodes Declaration and the Rhodes Deposition:

- First, I note that Mr. Rhodes expressly qualified his Declaration by stating that he is not opining with respect to "the standard of care specific to lawyers practicing in the area of

[1] Terms used in my Expert Report which are referenced in this Rebuttal Report without definition are intended to have the same meaning as used in my Expert Report.

securities law."[2] Further, Mr. Rhodes acknowledged in his deposition that he has not practiced in the area of securities law,[3] nor was he asked to form any opinions regarding the standard of care of securities lawyers with respect to securities laws in the state of Arizona.[4] Consequently, in my opinion, Mr. Rhodes is not qualified to opine on what Mr. Beauchamp would have or should have known in his capacity as the securities lawyer for DenSco, nor is he qualified to opine on Mr. Beauchamp's responsibilities and obligations in light of the risks of securities fraud and related aiding and abetting (as discussed in my Expert Report).

- Mr. Rhodes informs his opinions on Mr. Beauchamp's conduct based on "Chittick's history of substantially following Mr. Beauchamp's advice over the years."[5] However, Mr. Chittick in fact was not following Mr. Beauchamp's advice, at least with respect to his advice as to how to fund DenSco's loans so to ensure that such loans were in a first lien position (as disclosed in the 2011 POM).[6] As described in my Expert Report, Mr. Beauchamp had a series of "red flag" warnings that Mr. Chittick was not following such advice, beginning with the Freo Lawsuit in June 2013, through the December 2013 Phone Call, and culminating with the Bryan Cave Demand Letter in early January 2014. Certainly by January 7, 2014, when Mr. Chittick expressly acknowledged that he was not following Mr. Beauchamp's advice, if not earlier, it was undeniable that Mr. Beauchamp knew Mr. Chittick was not following his advice on this matter of fundamental importance (as characterized by Mr. Beauchamp). Because of the materially inaccurate statements and material omissions made in the 2011 POM, which Mr. Chittick was continuing to use to solicit investors, Mr. Beauchamp knew that his client was committing securities fraud. As a result, any reliance that Mr. Beauchamp may have placed on his incorrect belief as to Mr. Chittick's history of following legal advice was misplaced and should be irrelevant in evaluating the Defendants' conduct following the red flag warnings.

- The Rhodes Declaration asserts that, "In late 2013 and early 2014, Mr. Beauchamp had no reason to suspect, much less to 'know' that Chittick himself was engaging [...] in any illegal conduct."[7] The Rhodes Declaration further asserts that "Beauchamp was ethically

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[2] Rhodes Declaration, paragraph D, Qualifications.

[3] Rhodes Deposition, page 23, lines 5-7. Mr. Rhodes also acknowledged in his deposition that he does not practice in the area of drafting private offering memorandums (page 23), hard-money lending (page 23), fiduciary duties owed by a hard-money lender to its investors (page 23), forbearance agreements (page 30), and when a corporation owes fiduciary duties to its stockholders or its investors (page 79).

[4] Rhodes Deposition, page 28, lines 20-24.

[5] Rhodes Declaration, paragraph 25; see also paragraph 31.

[6] See page 6, Defendants' DS ("DenSco and Mr. Chittick were both advised [...] that it was of *fundamental importance* that DenSco safeguard the use of its investors' funds in conjunction with properly recording liens, in order to ensure that DenSco's loans were in first position." [italics added]).

[7] Rhodes Declaration, paragraph 26. Note that "a violation of law" is only one of two categories of misconduct that trigger an attorney's obligations under Rule 1.13. The other category is "violation of a legal obligation to the organization" (such as a breach of fiduciary duty).

prohibited in late 2013 and early 2014 from taking any action [pursuant to] ER 1.13's requirement to take action contrary to Chittick's business decisions."[8] However, beginning in June 2013, Mr. Beauchamp had a series of red flag warnings that, as DenSco's securities lawyer, should have at least given him reason to suspect illegal conduct on the part of Mr. Chittick. Further, Mr. Beauchamp knew that, beginning in July 2013, Mr. Chittick was causing DenSco to improperly issue securities based on the expired and out-of-date 2011 POM. Regardless, by January 7, 2014, Mr. Beauchamp knew Mr. Chittick was not following his advice, which was causing his client DenSco to commit securities fraud. The Rhodes Declaration does not dispute this fact. As described in my Expert Report, this knowledge imposed an obligation on the part of the Defendants to immediately withdraw from the representation of DenSco. However, the Rhodes Declaration acknowledges that this did not happen.[9]

- The Rhodes Declaration asserts that "Mr. Beauchamp acted within the standard of care [...] by promptly communicating [...] about the legal ramifications to DenSco of the 'double lien' issue."[10] However, in my opinion (as described in my Expert Report), merely paying lip service to the client's disclosure obligations does not satisfy the standard of care applicable to a securities lawyer when that lawyer knows that his client was committing securities fraud, and is continuing to commit securities fraud following such communication. The Rhodes Declaration also asserts that "Chittick never indicated he would not disclose; the only issue appeared to be about when he would disclose."[11] However, this assertion ignores the fact that it was the timing of such updated and corrected disclosure that was critically important, due to the fact that Mr. Chittick was causing DenSco to commit securities fraud in the interim.

- The Rhodes Declaration asserts that Mr. Beauchamp was acting within the standard of care by deferring to Mr. Chittick's "plan to resolve the 'double lien' issue so as to include the plan with the disclosure of the issue to investors."[12] This assertion, however, ignores the fact that the Chittick Plan included preparation of a Forbearance Agreement, an unnecessary document that delayed disclosure by three months, while Mr. Beauchamp's client continued to offer and sell securities in violation of the disclosure requirements under applicable securities laws. The Rhodes Declaration further asserts that Mr. Beauchamp was not obligated "to seize control of the DenSco decision-making process from Chittick."[13] This assertion, however, ignores the fact that Mr. Beauchamp was not simply passive with respect to the Chittick Plan, but rather he encouraged Mr. Chittick to

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[8] Rhodes Declaration, paragraph 30.
[9] Rhodes Declaration, paragraph 42; page 12, lines 21-26, Defendants' DS ("As Mr. Beauchamp explained in a February 10, 2014 email to his colleagues, 'we advised our client that he needs to have a Forbearance Agreement in place to evidence the forbearance and the additional protections he needs.'").
[10] Rhodes Declaration, paragraph 28.
[11] Rhodes Declaration, paragraph 35.
[12] Rhodes Declaration, paragraph 33.
[13] Rhodes Declaration, paragraph 33.

document the Plan and Mr. Beauchamp himself took the lead in documenting and in advocating for the Forbearance Agreement.[14]

- The Rhodes Declaration asserts that Mr. Beauchamp was not obligated "to perform an independent investigation into Menaged," and that "to have done so [...] would have violated his ethical duties" – "[u]nless Chittick had asked him to investigate Menaged."[15] The Rhodes Declaration, however, ignores the fact that Mr. Chittick specifically asked Mr. Beauchamp to do exactly that, at the time of the Freo Lawsuit.[16]

- The Rhodes Declaration includes the following statement: "Beauchamp reasonably could consider that [...] DenSco and Chittick were one client."[17] This strikes me as an incorrect and fundamentally flawed statement of the law. While DenSco was wholly-owned by Mr. Chittick, they are not the same person nor the same client, nor should they have been treated as such by the Defendants. It was DenSco, and not Mr. Chittick, that was issuing Notes to investors, and it was DenSco, and not Mr. Chittick, that was using the proceeds from those sales to fund mortgage loans. The problems with Mr. Rhodes' statement become obvious when viewed in the context of the events that occurred in this Case. Following the death of Mr. Chittick, Mr. Beauchamp acknowledged that it was a conflict of interest for the Defendants to represent both DenSco and its owner, the Chittick Estate.[18] Further, as described in my Expert Report, the fiduciary duties owed individually by Mr. Chittick as director, officer and sole shareholder shifted to DenSco's creditors once DenSco became insolvent (or entered the zone of insolvency), such that Mr. Chittick was obligated to treat all assets of DenSco as "existing for the benefit" of the Noteholders and other creditors.

- The Rhodes Declaration asserts as a factual matter that Mr. Beauchamp "terminated the attorney-client relationship in May 2014."[19] However, the Rhodes Declaration fails to cite to any evidence in support of this factual assertion, and Mr. Rhodes in his deposition acknowledged that he had "seen no writing indicating one way or another whether Mr. Chittick believed that Clark Hill had withdrawn."[20] Mr. Rhodes conceded during his deposition that, if in fact Mr. Beauchamp did not withdraw in May 2014, "he did not

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[14] Defendants' DS, page 8 ("Mr. Beauchamp suggested that Mr. Chittick and Menaged document their plan.");
[15] Rhodes Declaration, paragraph 34.
[16] Email dated June 14, 2013 from Mr. Chittick to Mr. Beauchamp, copying Mr. Menaged ("Easy Investments [sic] willing to pay the legal fees to fight it. I just wanted you to be aware of it, and talk to [Menaged's] attorney. Contact info is below.").
[17] Rhodes Declaration, paragraph 27.
[18] Exhibit 288A to Deposition of Mr. Beauchamp, email dated August 15, 2016 from Mr. Beauchamp to Chris Hyman, Executive Vice President, American Title Service Agency ("Due to potential conflicts of interest, we have resigned as counsel to the Estate").
[19] Rhodes Declaration, paragraph 42.
[20] Rhodes Deposition, pages 49-50, lines 19-2.

meet his duties."[21] As discussed in my Expert Report, there is substantial evidence that the Defendants did not in fact terminate its relationship with DenSco in May 2014.

- The Rhodes Declaration suggests that it was appropriate for the Defendants to represent both DenSco and the Chittick Estate following the death of Mr. Chittick because "Lawyers are permitted to give legal assistance in an emergency if the assistance is 'limited to that reasonably necessary under the circumstances,'" citing to Rule 1.1, Comment [3], of the Arizona's Rules of Professional Conduct.[22] What the Rhodes Declaration ignores, however, is that Rule 1.1 is the rule relating to competence. As such, Rule 1.1, as extended by Comment [3] with respect to emergency situations, only pertains to competence (e.g., the quality of the work performed in an emergency) and not as to whether the attorney is otherwise permitted to engage with a particular client. As discussed in my Expert Report, the Defendants failed to recognize and properly address the conflicts of interest they had (a) in representing DenSco in wind down efforts due to their own interests, and (b) in representing DenSco and the Chittick Estate due to the potential claims that DenSco had against the Chittick Estate. While the sudden and unexpected death of Mr. Chittick may have created an emergency of the type contemplated by Rule 1.1, such emergency does not excuse the Defendants' violation of Rule 1.7 pertaining to conflicts of interest – whether in taking on a new matter for an existing or former client (in the case of DenSco) or taking on an entirely new client (in the case of the Chittick Estate). In other words, contrary to what is suggested in the Rhodes Declaration, there is no emergency exemption to Rule 1.7, and therefore no excuse for the Defendants' improper representation of DenSco or the Chittick Estate following the death of Mr. Chittick.

- Finally, at his deposition, Mr. Rhodes offered an additional opinion on the above topic: that there was no conflict of interest for the Defendants in opening a file after Mr. Chittick's death to represent DenSco in wind down efforts.[23] Mr. Rhodes appeared to be of the opinion that no conflict of interest could exist until someone asserted a claim against Clark Hill.[24] He further testified that eventually "Clark Hill informed individuals that they were going to be withdrawing because they anticipated that there was a conflict, and that's because they had received some indications of questions being posed about their conduct."[25] But Mr. Rhodes was unable to identify when the obligation to withdraw arose, because he was "not sure when the first communication came to Clark Hill that [...] gave them the first indication of an actual review of their conduct."[26] Mr. Beauchamp approved the opening of the file for wind down efforts on August 23, 2016, five days after the Receiver was appointed. The Defendants represented DenSco in wind down efforts for at least eight weeks following Mr. Chittick's suicide (beginning on July

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[21] Rhodes Deposition, pages 186-187, lines 24-2.
[22] Rhodes Declaration, paragraph 42.
[23] Rhodes Deposition, page 194, lines 15-17, and page 196, line 4. Mr. Rhodes offered no such opinion with respect the Defendants' representation of the Chittick Estate.
[24] Rhodes Deposition, page 196, lines 17-24.
[25] Rhodes Deposition, page 198, lines 18-22.
[26] Rhodes Deposition, page 200, lines 10-15.

30, 2016, and continuing at least through September 23, 2016). Even absent the assertion of a claim against Clark Hill, the Defendants were well aware of the risk that claims for malfeasance could be brought against them on behalf of DenSco, as evidenced, inter alia, in the Iggy Letter and by Mr. Beauchamp's "extensive" discussions with Ms. Heuer regarding potential conflicts he had in representing DenSco.[27] Contrary to Mr. Rhodes apparent opinion, Arizona Rule 1.7 (Conflict of Interest: Current Clients) does not require that a claim be asserted on behalf of a client in order for a conflict to exist: "A [...] conflict of interest exists if [...] there is a significant risk that the representation [...] will be materially limited [...] by a personal interest of the lawyer." As stated in Comment [10] to the Rule: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." In my opinion, that is exactly what occurred here. As stated in my Expert Report, independent legal counsel to DenSco would have considered and pursued claims against the Defendants for their malfeasance; instead, it appears that Mr. Beauchamp actively tried to protect himself and Clark Hill against such claims.

## III. THE OLSON REPORT AND DEPOSITION

With respect to the Olson Report and the Olson Deposition:

- Consistent with my Expert Report, the Olson Report acknowledges that "DenSco did not have any directors, officers, or employees other than Mr. Chittick," who "was responsible for managing DenSco's business, with only occasional assistance from experts, consultants and contractors."[28] The Olson Report appears to dismiss this serious problem by explaining that Mr. Chittick "sought to operated DenSco with very low overhead."[29] While perhaps a desirable goal on the part of Mr. Chittick, the Olson Report fails to recognize that DenSco's ability to manage its business operations and compliance obligations was severely constrained – a serious problem that should have been obvious to Mr. Beauchamp, as described in my Expert Report.

- Like Mr. Rhodes, Mr. Olson informs his opinions on Mr. Beauchamp's conduct based on Mr. Chittick appearing to be "trustworthy [...] and a good client," who "appeared to follow Mr. Beauchamp's advice."[30] Under a section entitled "Reasonableness of Mr. Beauchamp's reliance on Mr. Chittick," the Olson Report states that Mr. Chittick "appeared to have followed appropriate procedures," which "properly informed Mr. Beauchamp's perception of, and advice to, Mr. Chittick."[31] However, Mr. Chittick in fact was not following Mr. Beauchamp's advice, at least with respect to his advice as to

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[27] See pages 447-448, lines 19-15, Deposition of Mr. Beauchamp.
[28] Olson Report, page 2.
[29] Olson Report, page 2.
[30] Olson Report, page 4.
[31] Olson Report, page 14.

how to fund DenSco's loans so to ensure that such loans were in a first lien position (as disclosed in the 2011 POM).[32] As described in my Expert Report, Mr. Beauchamp had a series of "red flag" warnings that Mr. Chittick was not following such advice, beginning with the Freo Lawsuit in June 2013, through the December 2013 Phone Call, and culminating with the Bryan Cave Demand Letter in early January 2014. Certainly by January 7, 2014, when Mr. Chittick expressly acknowledged that he was not following Mr. Beauchamp's advice, if not earlier, it was undeniable that Mr. Beauchamp knew Mr. Chittick was not following his advice on this matter of fundamental importance (as characterized by Mr. Beauchamp). Because of the materially inaccurate statements and material omissions made in the 2011 POM, which Mr. Chittick was continuing to use to solicit investors, Mr. Beauchamp knew that his client was committing securities fraud. As a result, any reliance that Mr. Beauchamp may have placed on his incorrect belief as to Mr. Chittick's history of following legal advice was misplaced and should be irrelevant in evaluating the Defendants' conduct following the red flag warnings.

- I generally agree in concept with the summary description of "Securities Regulations and Context" contained on pages 4 through 8 of the Olson Report.[33] However, this description (and other portions of the Olson Report, as described below) fails to recognize that, while the issuer of securities in a Rule 506 offering to accredited investors "is not required to provide substantive information in *any particular format*,"[34] because the disclosure of such information is subject to Rule 10b-5 (among other applicable securities laws and rules), the issuer's own statements regarding such format are highly relevant. As noted in my Expert Report, the 2011 POM contained the following statements:

    - The Company intends to offer the Notes on a continuous basis until the earlier of (a) the sale of the maximum offering, or (b) two years from the date of this memorandum.[35]

    - In order to continue offering the Notes during this [two year] period, the Company will need to update this Memorandum from time to time. [...] A failure to update this Memorandum as required could result in the Company being subject to a claim under Section 10b-5 [sic] of the Securities Act for employing manipulative or deceptive device in the sale of securities, subjecting the Company, and possibly the management of the Company, to claims from regulators and investors.[36]

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[32] See page 6, Defendants' DS ("DenSco and Mr. Chittick were both advised [...] that it was of *fundamental importance* that DenSco safeguard the use of its investors' funds in conjunction with properly recording liens, in order to ensure that DenSco's loans were in first position." [italics added]).

[33] Although it appears that the last sentence of Section 4.5 of the Olson Report is misstated.

[34] Olson Report, page 7 [italics added].

[35] 2011 POM, page (i).

[36] 2011 POM, page 24.

- No person has been authorized to give any information or to make any representations concerning the Company other than as contained in this Confidential Private Offering memorandum, and if given or made, such other information or representations must not be relied upon.[37]

These statements, taken together, convey to investors that Notes were being offered exclusively pursuant to written POMs, that such POMs will be updated or replaced as required, and that any information provided outside of a POM should be disregarded. As a result, because of the language contained in the 2011 POM prepared by Mr. Beauchamp, DenSco was not permitted to offer Notes by providing substantive information in "any particular format" nor was it permitted to provide such information verbally.

- At his deposition, Mr. Olson was questioned about the form of Subscription Agreement utilized by DenSco with its investors in April 2013 and thereafter, which form was prepared by Mr. Beauchamp. The Subscription Agreement contained the following representations and warranties to be made by investors:

  - Section 2(a): "The undersigned has carefully reviewed the POM [incorrectly defined as the 2009 POM]. The undersigned has relied solely on the information contained therein, and information otherwise provided to me *in writing* by the Company."[38]

  - Section 2(b): "No representations have been made or information furnished to me or my advisor(s) relating to the Company or the Note which were *in any way inconsistent with the POM.*"[39]

  Contrary to the language of such representations, Mr. Olson suggested that it was reasonable and acceptable for Mr. Beauchamp to rely on Mr. Chittick's alleged assurances in January 2014 that he was making disclosures to investors, orally and not in writing, that were inconsistent with the applicable POM.[40] In my experience, POMs are often used in private placement offerings to accredited investors, even though not required under the securities laws.[41] One of the principal reasons for doing so is to create a paper trail such that, if there is a subsequent dispute with an investor as to the adequacy of disclosures made, the issuer can introduce the POM as clear evidence of what was disclosed. Relying solely on oral disclosures to update and correct material misstatements and omissions in a POM creates unnecessary exposure to the issuer. Further, the language of the Subscription Agreement indicates to investors that they must not even take into account any disclosures made orally nor any disclosures (whether orally or in writing) that were inconsistent with the POM. For these reasons, I disagree

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[37] 2011 POM, page (v).
[38] Italics added.
[39] Italics added.
[40] See, e.g., Olson Deposition, page 68, lines 10-14; pages 71-72, lines 13-4.
[41] Mr. Olson is in accord. See Olson Deposition, pages 74-75, lines 16-1.

with Mr. Olson. In my opinion, it would have been neither reasonable nor acceptable for Mr. Beauchamp to rely on any such assurances by Mr. Chittick.

- The Olson Report appears to suggest that, "[f]rom the start of its capital raising efforts, DenSco's offerings [...] were intended to qualify under Regulation D, Rule 506(c) and appear to have so qualified."[42] However, Rule 506(c) did not go into effect until September 23, 2013, months after the 2011 POM expired.

- The Olson Report asserts that "DenSco could comply with its Regulation D obligations by disclosing information orally," that "DenSco could stop using the expired POM entirely, but make other disclosures (both orally and in writing) to replace those in the expired POM," and that "DenSco could continue to use the POM [...] and use it's [sic] supplemental oral and written disclosures to bring the information provided to investors up to date."[43] As explained above, however, because of the statements made in the 2011 POM, DenSco could do no such thing. As described in my Expert Report, the failure to provide updated and corrected information, in the manner required by the 2011 POM, resulted in a violation of Rule 10b-5 and constituted securities fraud. Further, as described in my Expert Report, Mr. Beauchamp knew or should have known that Mr. Chittick was not providing the disclosures (whether orally or in writing) that would have been required in order to update and correct the information contained in the 2011 POM.

- The Olson Report suggests that, *because* Notes were only being offered in a manner that did not mandate "specific written information that the SEC requires in [...] non-accredited investor offerings," the Defendants did "not have to [...] confirm the information."[44] This suggestion, however, is incorrect. Regardless of whether they were required by the specific disclosure requirements of Regulation D, POMs were in fact utilized, and as DenSco's securities lawyer, Mr. Beauchamp bears certain responsibility for ensuring their accuracy – especially when he knew that the disclosures contained therein were materially inaccurate or incomplete.

- The Olson Report attempts to deflect what he characterizes as the Receiver's position that "Mr. Chittick [had] taken on too much responsibility," by observing that "[t]he amount of money being lent and raised was consistent with a 'hot' market as the real estate market finally recovered from the 2007 to 2010 collapse."[45] However, although such observation may explain *why* Mr. Chittick had taken on too much responsibility, it in no way explains *how* he could possibly manage such responsibility. As detailed in my Expert Report, DenSco was operating a high-volume business in a regulated environment that would have necessitated active involvement by Mr. Chittick. Because DenSco was a "one-man shop," its ability to manage its business operations and compliance obligations was severely constrained – a fact that should have been readily apparent to Mr. Beauchamp.

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[42] Olson Report, page 8.
[43] Olson Report, page 9.
[44] Olson Report, page 10.
[45] Olson Report, page 12.

- The Olson Report asserts as a factual matter that it was Mr. Chittick, and not Mr. Beauchamp, that caused delay in timely preparing the 2013 POM: "Mr. Chittick [...] did not provide all the updated detail, including financial detail, that was needed for the 2013 POM. Mr. Beauchamp also understood that Mr. Chittick preferred to wait to issue an updated POM until after he scaled down the amount outstanding to investors. Mr. Beauchamp advised against waiting."[46] However, the Olson Report fails to cite to any evidence in support of this factual assertion. As discussed in my Expert Report, it was Mr. Chittick who prompted Mr. Beauchamp to begin work on the 2013 POM in early May 2013, but shortly thereafter it was Mr. Beauchamp who stopped working on the POM when he identified what he thought was an issue with respect to the amount outstanding. After consulting with his colleagues, Mr. Beauchamp learned that the amount outstanding was a non-issue, but by then the 2013 POM had already expired – and the Defendants never completed the updated disclosure.

- Even though it acknowledges that Mr. Chittick specifically asked Mr. Beauchamp to speak with Mr. Menaged's attorney, the Olson Report asserts that "Mr. Chittick did not ask Mr. Beauchamp to [...] investigate the factual allegations in the [Freo Lawsuit] Complaint."[47] The Olson Report further asserts that "neither the information in the FREO lawsuit, nor the information Mr. Chittick shared with Beauchamp about the FREO lawsuit, would have or should have prompted Mr. Beauchamp to raise additional concerns about DenSco's business practices."[48] Despite this, the Olson Report acknowledges that Mr. Beauchamp explained to Mr. Chittick that the Freo Lawsuit would need to be disclosed to investors.[49] However, Mr. Beauchamp failed to follow through with Mr. Menaged's attorney as instructed by Mr. Chittick,[50] and failed to prepare any disclosures with respect to the Freo Lawsuit or ensure that such disclosures were provided to investors. As described in my Expert Report, the Freo Lawsuit was the first in a series of red flag warnings that alerted Mr. Beauchamp to the fact that his client was committing securities fraud.

- The Olson Report asserts that, aside from correspondence transitioning a portion of DenSco's files from Bryan Cave to Clark Hill, there was no communication between Mr. Chittick and Mr. Beauchamp from August 2013 to December 2013.[51] This appears to be contrary to the Defendants' position that Mr. Chittick instructed Mr. Beauchamp to stop working on the POM in either August or September 2013, as referenced in footnote 42 in my Expert Report. Further, because Mr. Beauchamp knew that DenSco was continuing to sell Notes to investors, and that the 2011 POM contained outdated and inaccurate information – in addition to failing to disclose the Freo Lawsuit, which Mr. Beauchamp

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[46] Olson Report, page 14.
[47] Olson Report, page 15.
[48] Olson Report, page 15.
[49] Olson Report, page 15.
[50] Mr. Beauchamp testified that he did not speak to the borrower's attorney, Mr. Goulder, at this time. See page 240, lines 9-19, Deposition of Mr. Beauchamp.
[51] Olson Report, page 16.

knew needed to be disclosed to investors – Mr. Beauchamp knew or should have known that his client was committing securities fraud during this time period.

- The Olson Report asserts that "Mr. Beauchamp's advice regarding, and documentation of, a Forbearance Agreement, was an appropriate approach to provide a framework to resolve the problems with Menaged's loans."[52] The Olson Report further asserts that "it was appropriate for Mr. Beauchamp to try and ascertain the facts and determine a course of action before a wholesale and meaningful disclosure to the investors could be made."[53] However, as detailed in my Expert Report, the Forbearance Agreement imposed material obligations and economic burdens on DenSco, including subordinating DenSco's recovery to the recovery of the other lenders, and had the effect of further delaying and limiting required disclosures to DenSco's investors. The Forbearance Agreement was entered into as of mid-April 2014, nearly a year after the 2011 POM expired and three months after the Defendants' undeniably knew that the disclosures contained in the 2011 POM were outdated and contained materially incorrect information and that the 2011 POM omitted material information required to be contained therein. And Mr. Beauchamp knew that his client had committed and was continuing to commit securities fraud during this entire time period.

- The Olson Report asserts that "[i]t was reasonable for Mr. Beauchamp to rely on Mr. Chittick's description of the timing and extent of the double liening and other issues with Menaged," based on (among other factors) Mr. Chittick being "a seemingly competent and reasonable client."[54] However, as described above, Mr. Chittick in fact was not following Mr. Beauchamp's advice, at least with respect to his advice as to how to fund DenSco's loans so to ensure that such loans were in a first lien position (as disclosed in the 2011 POM). Certainly by January 7, 2014, when Mr. Chittick expressly acknowledged that he was not following Mr. Beauchamp's advice, if not earlier, it was undeniable that Mr. Beauchamp knew Mr. Chittick was not following his advice on this matter of fundamental importance (as characterized by Mr. Beauchamp). This knowledge, as well as the series of red flag warnings, should have informed the Defendants' actions thereafter.

- The Olson Report asserts that "Mr. Beauchamp informed Mr. Chittick [in early January 2014] that Mr. Chittick could not accept new money, or roll over existing investments, unless he informed the investors involved about the Menaged issues," and that "Mr. Chittick had represented that he was following Mr. Beauchamp's advice."[55] The Olson Report further asserts that "[s]o long as the disclosures were being made, the update to the POM was not urgent and it was reasonable to wait to update the POM until the Forbearance Agreement was complete."[56] However, as described in detail (with eight

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[52] Olson Report, page 20.
[53] Olson Report, pages 21-22.
[54] Olson Report, page 22.
[55] Olson Report, page 24.
[56] Olson Report, page 25.

distinct supporting points) in my Expert Report, it is clear that Mr. Beauchamp was aware that DenSco was continuing to offer Notes without updated disclosures.

- The Olson Report appears to attach some significance to the fact that Mr. Chittick may have informed an "advisory council" consisting of "a select group of investors [presumably existing investors] to whom he turned for advice and approval" regarding "the double line issue and proposed workout."[57] I fail to see any significance to this, even if true. As Mr. Beauchamp knew, Rule 10b-5 and the other disclosure requirements under applicable securities laws relate to the adequacy of the disclosures made to each investor as of the time that such investor makes a commitment to invest. Disclosures made to an advisory council of Noteholders, and any advice or approvals received from such council, are simply not relevant to the issue of whether Mr. Beauchamp's client was committing securities fraud with respect to any other investors.

- The Olson Report asserts as a factual matter that Mr. Beauchamp informed Mr. Chittick in May 2014 that the Defendants would no longer represent DenSco on securities matters.[58] However, the Olson Report fails to cite to any evidence in support of this factual assertion. As discussed in my Expert Report, there is substantial evidence that the Defendants did not in fact terminate its representation in May 2014.

- The Olson Report asserts that "Mr. Beauchamp's conduct after Mr. Chittick's suicide, including helping Mr. Chittick's sister Shawna to get appointed P.R. of Chittick's Estate, communicating with investors and coordinating with the Arizona Corporation Commission was a *reasonable* effort to help resolve the problems Mr. Chittick had created."[59] The Olson Report, however, fails to recognize that the Defendants were prohibited by the applicable Rules of Professional Conduct from undertaking the representation of either DenSco or the Chittick Estate at that time. As discussed in my Expert Report, the Defendants failed to recognize and properly address the conflicts of interest they had (a) in representing DenSco in wind down efforts due to their own interests, and (b) in representing DenSco and the Chittick Estate due to the potential claims that DenSco had against the Chittick Estate. In his deposition, Mr. Olson acknowledged that he was expressing no opinion as to whether there was a conflict of interest, and that he was deferring to Mr. Rhodes as to such issues.[60] As a result, it is unclear what was intended by Mr. Olson's use of the term "reasonable" in this context, as he expresses no opinion with respect to the Mr. Beauchamp's compliance with the standard of care after Mr. Chittick's suicide.

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[57] Olson Report, page 26.
[58] Olson Report, page 27.
[59] Olson Report, page 29 [italics added].
[60] Olson Deposition, page 100, lines 15-22.

## IV. CONCLUSION

There is nothing in the Rhodes Declaration or the Olson Report, nor in the Defendants' Experts' Depositions, that has caused me to alter any of my opinions in my Expert Report.

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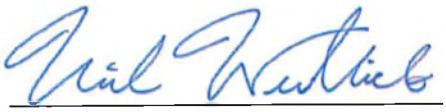
I reserve the right to supplement, update or amend my opinions as new information becomes available or is brought to my attention.



Neil J Wertlieb

June 4, 2019