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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation, Plaintiff, v. Clark Hill PLC, a Michigan limited liability company; David G. Beauchamp and Jane Doe Beauchamp, husband and wife, Defendants.	No. CV2017-013832 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE AIDING & ABETTING** (Assigned to the Honorable Daniel Martin) (Oral Argument Requested)

There is ample evidence that Defendants Clark Hill and David Beauchamp aided and abetted Denny Chittick in breaching fiduciary duties owed to DenSco and its investors. The Receiver explained much of this evidence already, in a motion for determination of a prima facie case for punitive damages for aiding and abetting breaches of fiduciary duty, which the Court granted. The Court need not revisit the issue.

Nevertheless, the Receiver takes this opportunity to highlight evidence that (1) Clark Hill and Beauchamp knew Chittick was breaching fiduciary duties to DenSco and its investors, and (2) Clark Hill and Beauchamp substantially assisted these breaches.

I. THE COURT ALREADY DECIDED THIS ISSUE.

Months ago, the Receiver moved for a determination that he has presented a prima facie case for punitive damages for aiding and abetting breaches of fiduciary duty. ("Prima Facie Case Motion," filed 4/12/2019.) Defendants opposed the motion, arguing that there was no evidence that they "aided and abetted" Chittick's breaches of fiduciary duty to DenSco and its investors. (Resp. filed 5/13/2019, at 5-11.) Specifically, Defendants argued that they did not "know" Chittick was breaching his duties, nor did they "substantially assist" him. (*Id.*) But the Court granted the Prima Facie Case Motion, finding that the Receiver "has presented a *prima facie* case that Defendants aided and abetted Mr. Chittick's breaches of fiduciary duty." (Order dated 11/18/2019.)

That finding forecloses Defendants' present motion. Defendants are arguing, again, that they did not "know" Chittick was breaching his fiduciary duties, nor did they "substantially assist" him. (Mot. at 7-17.) Because the Receiver has presented a prima facie case of aiding and abetting, Defendants cannot obtain summary judgment on this claim. *See Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283 (App. 1992) (explaining that "a defendant can obtain summary judgment when the plaintiff is unprepared to establish a prima facie case"). The Court need not revisit this issue.[1]

[1] Indeed, under the law of the case doctrine, the Court ***should not*** revisit the issue. *See Dancing Sunshines Lounge v. Indus. Comm'n of Arizona*, 149 Ariz. 480, 482 (1986) (court's decision is "law of the case" in subsequent proceedings when issues and evidence are substantially the same).

II. DEFENDANTS IGNORE GENUINE DISPUTES OF MATERIAL FACT.

In any event, summary judgment must be denied because this case is full of genuine disputes of material fact. *See* Ariz. R. Civ. P. 56(a). Defendants ignore key evidence and draw inferences favoring themselves even though a jury could reasonably conclude otherwise. The Receiver explains these disputes more fully in the Controverting Statement of Facts accompanying this brief ("CSOF"). Below are some highlights.

A. The jury can conclude that Clark Hill and Beauchamp aided and abetted Chittick's breaches of fiduciary duty by intentionally not updating the expired written disclosure to DenSco investors.

Before 2013, DenSco issued written disclosures called Private Offering Memoranda ("POMs") to its investors every two years, based on Beauchamp's advice. (CSOF ¶¶ 82-84.) Beauchamp knew that the vast majority of DenSco's investors purchased two-year promissory notes and "rolled over" their investments by purchasing a new two-year note when their existing note matured. (*Id.* ¶¶ 89-90.)

Beauchamp prepared DenSco's POMs in 2003, 2005, 2007, 2009, and 2011. (CSOF ¶¶ 83, 85.) Each POM assured investors that the POM would be updated every two years. (*Id.* ¶¶ 95, 99.) Each POM also warned investors that the only disclosures they could rely on were written updates to the POM itself. (*Id.* ¶ 100.)

The 2011 POM expired on July 1, 2013. Beauchamp never prepared an updated POM. (CSOF ¶¶ 97-98, 107.) Beauchamp claims that this was because Chittick asked him to stop working on the POM, during an August 2013 phone call. (DSOF ¶ 21.) But Beauchamp's account is contradicted by several documents, such as a December 2013 email in which Chittick *scolded* Beauchamp for not having updated the POM yet. (CSOF ¶¶ 122, 177-78, 179-82, 197, 202, 221-24.) The jury can therefore reject Beauchamp's account and can conclude, instead, that Beauchamp was responsible for failing to update the 2011 POM.

But suppose the jury believes Beauchamp. Even then, the jury can conclude that Defendants' aiding and abetting began in 2013. Clark Hill and Beauchamp knew that, in

the six months after the 2011 POM expired in July 2013, many DenSco investors were going to purchase new promissory notes. (CSOF ¶¶ 143, 148, 188-190, 230-232.) Indeed, as Beauchamp wrote in a June 20, 2013 email, DenSco "***has approximately 60 investor notes that are scheduled to expire in the next 6 months (and to probably be rolled over into new notes)***." (*Id.* ¶ 143 (emphasis added).) Clark Hill and Beauchamp also knew that Chittick's fiduciary duties required updating the POM every two years *before* selling new promissory notes. (*Id.* ¶¶ 82-84, 89-90, 95-100, 109, 140, 143, 199-200, 224-29.)

Thus, even if the jury believes Beauchamp's claim that Chittick asked him to stop working on the POM**,** the jury can still conclude that Beauchamp's agreement to do so was a knowing and substantial assistance of Chittick's breaches of fiduciary duty.

B. The jury can conclude that Clark Hill and Beauchamp, upon learning of the First Fraud, advised Chittick that he could delay disclosing the fraud to investors while continuing to raise money, and knew that he was doing so.

Beauchamp admits that he learned of the multi-million-dollar double-lien "First Fraud" against DenSco by January 7, 2014. (DSOF ¶ 29.)[2] Beauchamp claims that, upon learning of the fraud, he told Chittick not to raise or roll over investor funds without "full disclosure" of the fraud to investors. (*Id.*) Relatedly, Beauchamp claims that he thought Chittick was making "verbal disclosures" of the fraud to investors. (*Id.*) But both of these claims rely, again, on Beauchamp's account of what happened. (DSOF ¶ 37.) The jury can reject Beauchamp's account, because the evidence contradicts it. For example:

1. The advice Beauchamp claims to have given—that Chittick needed to disclose the fraud before raising money—is not documented anywhere. (CSOF ¶¶ 340-43.)

[2] The jury can conclude that Beauchamp was on notice of the problem as early as June 2013, when Chittick emailed him a complaint filed by Freo Arizona LLC alleging that Menaged's entities had attempted to secure two mortgages with a single property. (CSOF ¶¶ 149-61.) Upon receiving that complaint, Beauchamp emailed Chittick: "We will need to disclose this in POM." (*Id.* ¶ 155.) But Beauchamp never investigated the allegations or disclosed them in any updated POM. (*Id.* ¶¶ 114-15, 166-70.)

2. Many documents show that Chittick was *not* disclosing the fraud while continuing to raise money, and that Clark Hill and Beauchamp knew this. For example:

a. On January 10, 2014, Beauchamp spoke with Chittick on the phone, and Beauchamp's notes state: "***Denny does not want to talk to his investors until he is ready*** – will not take long." (CSOF ¶ 349 (emphasis added).)

b. That same day, Chittick wrote in his corporate journal: "***I can raise money according to Dave***." (CSOF ¶ 350 (emphasis added).)

c. On January 12, 2014, Chittick told Beauchamp in an email that he had "spent the day contacting every investor that has told me they want to give me more money" and expected to raise ***between $5 and $6 million*** in the next ten days. Beauchamp responded: "***You should feel very honored that you could raise that amount of money that quickly***." (CSOF ¶¶ 351-52 (emphasis added).)

d. On February 21, 2014, Beauchamp spoke with Chittick, and his notes state: "***cannot be ready to tell everything***." (CSOF ¶ 357 (emphasis added).)

e. That same day, Chittick wrote in his corporate journal: "I talked to Dave . . . . ***We talked about telling my investors; we are going to put that off as long as possible*** so that we can improve the situation as much as possible." (CSOF ¶ 312 (emphasis added).)

f. On February 25, 2014, Chittick told Beauchamp in an email: "what both of us are really concerned about is that ***when [I] tell my investors the situation, they request their money back***." (CSOF ¶ 314 (emphasis added).)

g. On March 13, 2015, Chittick wrote in his corporate journal: "I got an email from Dave my attorney wanting to meet. ***He gave me a year to straighten stuff out. We'll see what pressure I'm under to report now.***" (CSOF ¶ 381 (emphasis added).)

h. On March 24, 2015, after meeting with Beauchamp, Chittick wrote in his corporate journal: "I had lunch with Dave Beauchamp. . . . ***He said he would give me 90 days. . . . I'm going to slow down the whole memorandum process***

too. Give us as much time as possible to get things in better order." (CSOF ¶ 383 (emphasis added).)

i. In a suicide note to his sister, Chittick explained: "***I talked Dave my attorney into allowing me to continue without notifying my investors.*** Shame on him. He shouldn't have allowed me. ***He even told me once I was doing the right thing***." (CSOF ¶ 410 (emphasis added).)

3. Menaged testified that, during a January 9, 2014 meeting, Beauchamp learned that Chittick was *not* going to disclose the fraud to investors:

> Q. Did Mr. Beauchamp say anything when you were in the room about Denny's obligation to disclose that this problem had occurred in his lending practices?
>
> A. He did. ***He said to him, "We need to draft a letter to the investors to advise them of the situation."***
>
> ***And Denny said, "That's not happening."***
>
> And he said, "Why is that?"
>
> And he said, "Because there will be a run on the bank and then at that point I can't pay off all these loans, and so I'm going to take care of the problem myself." . . .
>
> ***And then at that point Beauchamp said, "Well, okay, if that's what we're going to do, then we definitely need to work very closely on this forbearance agreement to protect you from fraud***, protect you from the Arizona Corporate Commission, protect you from the AG's office."

(CSOF ¶ 347(a) (emphasis added).)

4. Menaged testified that, during the January 9, 2014 meeting, Beauchamp agreed that *he* would not disclose the fraud to investors, despite his obligation to do so:

> Q. Did Mr. Beauchamp ever say to Denny, while you were in the room or present, that he, Mr. Beauchamp, had an obligation to alert Denny's investors of what happened?
>
> A. . . . Yes. ***He said, "You do understand that you're putting me in a very awkward and bad position, because I do have an obligation to advise the investors."***

And Denny said, "I didn't under -- I didn't know that, but I would appreciate it if you did not advise anybody and just prepare this agreement so we can move on from this."

And at that point I knew that he was not advising the investors, because Beauchamp said, "Okay, Denny, I will do what you want."

(CSOF ¶ 347(b) (emphasis added).)

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8. Additional evidence contradicts Beauchamp's assertion that he thought Chittick was giving "verbal disclosures" to investors about the fraud. For example:

a. DenSco's longstanding practice was to give ***written*** disclosures to investors in the form of POMs, not verbal disclosures. (CSOF ¶¶ 82-84, 385(a).)

b. DenSco's POMs, which Beauchamp prepared, warned investors that the ***only*** disclosures they could rely on were written updates, not verbal disclosures. (CSOF ¶¶ 100, 385(b).)

c. Beauchamp himself admitted that if Chittick had been raising money from investors, "***something much more formal***" than verbal disclosures would have been necessary. (CSOF ¶ 385(c) (emphasis added).)

d. The jury can use common sense: If Chittick had been disclosing the fraud to the investors, they would not have continued investing. (CSOF ¶ 385(d).) Indeed, the investors have so testified. (CSOF ¶¶ 385(e), 407.)

Unfortunately, Chittick followed Beauchamp's advice and did not disclose the fraud to

DenSco's investors while continuing to raise money. The investors did not learn of the fraud until years later, after Chittick committed suicide. (CSOF ¶ 407.)

Based on this and other evidence, the jury can conclude that Clark Hill and Beauchamp advised Chittick that he could delay disclosing the fraud (and otherwise delay updating the expired POM) while continuing to raise money, and knew he was doing so.

C. The jury can conclude that Clark Hill and Beauchamp, upon learning of the First Fraud, actively developed a work-out plan with Chittick and Menaged, which they knew ran contrary to DenSco's interests.

Clark Hill and Beauchamp not only advised Chittick that he could delay disclosing the fraud, but actively developed a work-out plan with Chittick and Menaged which they knew ran contrary to DenSco's interests. Clark Hill and Beauchamp try to minimize their role in that process by making two claims. First, they claim that the plan was already formed by the time they got involved and all they did was "document" it. (Mot. at 9-11.) Second, they claim that they thought the plan was "in DenSco's best interests." (*Id.*) But again, the jury can reject these claims, because evidence contradicts them.

1. The jury can conclude that Clark Hill and Beauchamp actively developed, and substantially modified, the work-out plan with Chittick and Menaged.

On January 7, 2014, Chittick told Beauchamp that he and Menaged had made a "plan" to work out of the double-lien problem caused by the First Fraud. (CSOF ¶¶ 248, 257-63.) At that time, the plan was simple: Menaged would sell each double-liened property to pay off both lenders—DenSco and the other lender with a lien—but the other lender would be paid first, with interest, while DenSco would let its interest accrue. (*Id.* ¶¶ 257-58.) Menaged would contribute $4 to $5 million of his own money to the endeavor, and DenSco would loan Menaged another $1 million and increase its loan-to-value ratios up to 95% of property values. (*Id.* ¶¶ 257-58, 285.)

On January 9, 2014, Beauchamp met with Chittick and Menaged. According to Menaged, it was ***Beauchamp*** who proposed a formal agreement:

> So he [Beauchamp] then left the room. I remember he said he needed to -- or I remember he said he needed to go downstairs and get fresh air and clean up, and which he did, because he was a mess. His shirt was all wet, and it really was disgusting.
>
> And then he came back up, came back upstairs. ***He said, "Okay, I have had some time to relax and think about the situation," he said, "and here's what we're going to do: We are going to draw up an agreement to protect you and Denny from the situation."***

(CSOF ¶ 347(d) (emphasis added).) REDACTED

After the January 9, 2014 meeting, Beauchamp spent *three months* developing what eventually became a 24-page "Forbearance Agreement," which Chittick and Menaged signed on April 16, 2014. (CSOF ¶¶ 286-337.) To track his work, Beauchamp opened a new matter in Clark Hill's accounting system called "work out of lien issue." (*Id.* ¶ 291.) Beauchamp spent 274.8 billable hours on this matter from January 2014 through April 2014. (*Id.* ¶ 293.)[3] During those 274.8 hours, Beauchamp did much more than "document" a pre-existing agreement. He continually advised Chittick and negotiated with Menaged (and sometimes Menaged's lawyer) about the *content* of the agreement. (*See, e.g.*, *id.* ¶¶ 292, 295-332, 408, 411.)

As a result, the initial "plan" that Chittick had described to Beauchamp changed dramatically. REDACTED These changes were so frequent that Menaged told Chittick, in an April 2014 email, that signing the agreement would help "***not to have Dave change it again and again with every move we make***." (*Id.* (emphasis added).)

[3] At Beauchamp's direction, other Clark Hill attorneys also worked on this matter during that time, adding 54.9 hours. In total, Clark Hill billed DenSco $136,190.00 for 329.7 hours of work on this matter from January 2014 through April 2014 alone. (*Id.*)

For example, here are three ways in which the initial "plan" changed:

1. The initial "plan" was for Menaged to pay off the other lenders and contribute $4 to $5 million of his own money. But the final Forbearance Agreement merely required Menaged to use "good faith efforts" to do so. (CSOF ¶ 338(a).) That change was made because Beauchamp and Chittick told Menaged that he only needed to use "best efforts." As Menaged recalled:

> I said that I would make my best effort to do so, and in front of Beauchamp and DenSco I did explain to him -- ***what they both told me, both of them told me was, "Hey, this is all really best efforts. You do your best, but we're going into this forbearance agreement. It's protecting everyone. End of story."***

(*Id.* (emphasis added).)

2. The initial "plan" was for DenSco to loan Menaged another $1 million and increase its loan-to-value ratios up to 95% of property values. But the final Forbearance Agreement required DenSco to loan Menaged another $6 million and increase its loan-to-value ratios up to 120% of property values. (CSOF ¶ 338(b).) Beauchamp discussed this change with Chittick by email in March 2014, and he approved the change even though he knew Chittick had not told investors about it. He told Chittick: "***I completely agree that it makes a lot of sense, but I am concerned about the disclosure to your investors.***" (*Id.* (emphasis added).)

3. The initial "plan" was silent on what DenSco should tell investors. But the final Forbearance Agreement included a confidentiality provision requiring DenSco to use "good faith efforts to ***limit such disclosure as much as legally possible*** pursuant to the applicable SEC Regulation D disclosure rules." (CSOF ¶ 338(c) (emphasis added).) Beauchamp discussed this change with Chittick via email in March 2014, and he approved the change even though he knew Chittick had not told investors about it. He told Chittick: "I have done a complete re-write of the Confidentiality section . . . . ***With respect to timing, we are already very late in providing information to investors about this problem and the resulting material***

changes from your business plan." (*Id.* (emphasis added).)

With these and other changes, Beauchamp approved the final Forbearance Agreement. As Chittick later wrote to his sister: "Dave, my lawyer, negotiated the work out agreement and endorsed the plan." (CSOF ¶ 411.)

Based on this and other evidence, the jury can conclude that Clark Hill and Beauchamp actively developed, and substantially modified, the work-out plan with Chittick and Menaged. They did not just "document" it REDACTED

2. The jury can conclude that Clark Hill and Beauchamp knew that the work-out plan with Chittick and Menaged ran contrary to DenSco's interests.

Clark Hill and Beauchamp's client was DenSco, not Chittick. Their engagement letter specified that they were representing DenSco only, not Chittick in any capacity. (CSOF ¶¶ 194-95.) Yet the work-out plan that Clark Hill and Beauchamp developed was not intended to benefit DenSco. Instead it was intended to benefit Chittick and Beauchamp, in breach of Chittick's duties to DenSco and investors.

Key to the work-out plan was that no one would disclose the First Fraud or the work-out plan itself to DenSco's investors, at least not for a while. As explained above, Beauchamp agreed to this part of the plan during the January 9, 2014 meeting, and acted accordingly. (*See* Part II.B above.) Plainly, non-disclosure was contrary to DenSco's interests. Chittick had a fiduciary duty to disclose material information to DenSco's investors, as was done in 2003, 2005, 2007, 2009, and 2011, so that investors could make informed decisions. Clark Hill and Beauchamp knew this. (*See* Part II.A above.)

Instead, non-disclosure was intended to serve Chittick's and Beauchamp's own interests. Chittick had an interest in preventing investors from learning that his lending practices had led to the First Fraud. And Beauchamp had an interest in preventing investors from learning that he had failed to update the 2011 POM before it expired on July 1, 2013, which he knew had been causing investors to invest based on increasingly

outdated and false information. (*See* Parts II.A and II.B above.)

Other parts of the work-out plan ran contrary to DenSco's interests too, and Clark Hill and Beauchamp knew this.[4] For example:

1. Having Menaged pay off the other lenders before DenSco would, in effect, subordinate DenSco's liens to those of the other lenders. (CSOF ¶ 339(a).) That would violate DenSco's promise to investors that its loans were in "first position," as stated in the 2011 POM which Beauchamp drafted. (*Id.*)
2. Having Menaged merely use "good faith efforts" to contribute his own money and pay off the other lenders would, in effect, enable him to avoid paying off the other lenders. Indeed, that was Menaged's explanation for why he did not follow through: "Like I said, it was best effort. My best effort couldn't deliver those funds." (CSOF ¶ 339(b).)
3. Requiring DenSco to loan Menaged another $6 million and increase its loan-to-value ratios up to 120% of property values would violate DenSco's promises to investors that (a) DenSco would attempt to "ensure that one borrower will not comprise more than 10 to 15 percent of the total portfolio," and (b) DenSco's loan-to-value guidelines were "not intended to exceed 70%." These promises were stated in the 2011 POM which Beauchamp drafted. (CSOF ¶ 339(c).)

Moreover, Beauchamp's claim that he thought the work-out plan was in DenSco's interests contradicts what ***he said*** at the time. (***See, e.g.***, CSOF ¶¶ 299-320.) For example, he told Menaged at the January 9, 2014 meeting that the agreement was "***to protect you and Denny from the situation.***" (CSOF ¶ 347(d) (emphasis added).) And he told Chittick in a February 9, 2014 email that the agreement "has to have the necessary and essential terms ***to protect you from potential litigation from investors and third parties.***" (CSOF ¶ 304 (emphasis added).)

Based on this and other evidence, the jury can conclude that Clark Hill and

[4] Expert Neil Wertlieb observes that it is "unclear" how the Forbearance Agreement was supposed to benefit DenSco at all. (CSOF ¶ 339.)

Beauchamp knew that the work-out plan they developed would not benefit DenSco but would instead serve Chittick's and Beauchamp's own interests in covering up their misdeeds, in breach of Chittick's fiduciary duties to DenSco and its investors.

D. The jury can conclude that Clark Hill and Beauchamp, upon learning of the First Fraud, advised Chittick that he could continue giving loan money directly to Menaged rather than to a trustee, which led to the Second Fraud.

Defendants admit that Chittick's method of giving DenSco's loan money directly to Menaged rather than to a trustee contradicted DenSco's loan documents and led to the First Fraud and Second Fraud. (Mot. at 2-3, 11-12.) But Defendants claim there is "no evidence" that they knew Chittick continued to use this method after the First Fraud came to light, or that they approved it. (*Id.* at 12.)

Yes, there is. Evidence shows that Clark Hill and Beauchamp advised Chittick that he could continue giving loan money directly to Menaged, as long as Menaged provided written confirmation that the funds were then given to a trustee. For example:

1. In a recorded conversation, Chittick told Menaged that Beauchamp "***agreed that it was okay that I wired it to you, as long as you provided copies of the check.***" (CSOF ¶ 400(a) (emphasis added).)
2. Menaged testified: "***Beauchamp told [Chittick] that if you were going to continue to wire the borrower, to get a copy of the check***, or something like that." (CSOF ¶ 400(b) (emphasis added).)
3. In a suicide note to DenSco's investors, Chittick wrote: "I talked to Dave about this in January and ***he was in agreement with it as long as I received copies of checks and receipts showing that I was the one paying the trustee***." (CSOF ¶ 399(a) (emphasis added).)
4. In a suicide note to his sister, Chittick wrote: "We went to Dave, and ***he gave some constraints on how we were to operate.*** I have all the documentation. ***I received copies of checks made out to trustees, receipts from the trustees***."

(CSOF ¶ 399(b) (emphasis added).)

Thus, the jury can conclude that Clark Hill and Beauchamp expressly approved the lending practice that led to the Second Fraud.

E. The jury can conclude that Clark Hill and Beauchamp did not terminate their representation of DenSco in May 2014.

Defendants claim that they terminated representation of DenSco in May 2014. (Mot. at 6.) That claim is essential to their defense. Even their own expert admits that they had a "mandatory duty to withdraw" in May 2014. (CSOF ¶ 442.)

But the jury can reject Defendants' claim. Evidence shows that Clark Hill and Beauchamp did *not* terminate representation in May 2014, but instead just stopped their work and gave Chittick time to deal with the mess. The Receiver described much of this evidence in the Prima Facie Case Motion (at 12-15), as explained in the Controverting Statement of Facts. (*See* CSOF ¶¶ 433-45.) After the Prima Facie Case Motion was filed, *more* evidence came to light contradicting the May 2014 termination claim:

1. On June 26, 2014, Beauchamp's secretary emailed a list of his "Active Matters" while he was out of the office. This list included the "***work out of lien issue***" matter and the "***POM***" matter for DenSco, which Beauchamp delegated to another Clark Hill attorney to handle in his absence. (CSOF ¶ 446(a) (emphasis added).)
2. On July 30, 2016, Beauchamp emailed the managing partner and resident assistant general counsel of his office, informing them that the sole owner of DenSco, "a client," had committed suicide. The managing partner asked: "***Are there any irregularities with his fund?***" Instead of advising his managing partner that DenSco was a former client terminated over two years ago, Beauchamp replied, incredulously: "***Not that I am aware of.***" (CSOF ¶ 446(b) (emphasis added).)

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Based on this and other evidence, the jury can conclude that Clark Hill and Beauchamp continued representing DenSco (and thus continued aiding and abetting Chittick's breaches of fiduciary duty) well after May 2014.[5]

III. DEFENDANTS' LEGAL AUTHORITIES ARE INAPPOSITE.

Defendants not only ignore genuine disputes of material fact, but also ignore relevant principles of Arizona law and rely on inapposite cases.

A. The seminal Arizona case on aiding and abetting is *Wells Fargo Bank*, which Defendants largely ignore.

The seminal Arizona case on aiding and abetting is *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension*, 201 Ariz. 474 (2002). Although Defendants cite this case, they ignore several of its principles.

First, to evaluate an aiding-and-abetting claim, the facts must be viewed holistically. This is because facts may be "unremarkable taken in isolation," but when "taken together," present "a jury issue on the question of aiding-and-abetting liability." *Wells Fargo Bank*, 210 Ariz. at 488 ¶ 47 (quoting *Metge v. Baehler*, 762 F.2d 621, 630 (8th Cir. 1985)). Thus, the analytical approach in Defendants' motion is misguided. Defendants take a divide-and-conquer approach, separately analyzing specific acts and

[5] After Chittick's suicide, Clark Hill and Beauchamp attempted to cover up their misdeeds by, among other things, (1) representing DenSco and Chittick's Estate despite clear conflicts of interest, (2) emailing DenSco's investors without disclosing the fraud or the work-out plan, (3) urging DenSco's investors not to seek the appointment of a receiver, and (4) falsely telling the Receivership Court that Beauchamp represented Chittick personally. (*See* CSOF ¶¶ 413-58.) The jury can view these coverup attempts as additional evidence that Clark Hill and Beauchamp "knew" Chittick was breaching fiduciary duties, and that they "substantially assisted" these breaches.

concluding that none was aiding and abetting. (Mot. at 9-17.) But the jury will be asked, instead, whether Defendants' acts, "taken together," were aiding and abetting.

Second, the "knowledge" and "substantial assistance" elements of aiding and abetting are not strict. Knowledge "may be inferred from the circumstances," and "[a] showing of actual and complete knowledge of the tort is not uniformly necessary." *Wells Fargo Bank*, 210 Ariz. at 485 ¶ 36, 488 ¶ 45. Similarly, "substantial assistance" is assistance that "makes it 'easier' for the violation to occur." *Id.* at 489 ¶ 54 (quoting *Aetna Cas. & Sur. Co. v. Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000)).

Third, a jury is often needed to resolve fact issues in this context. In *Wells Fargo Bank*, there was evidence that a bank knew its client had made false representations to a third party, and that the bank adopted a strategy to avoid having the third party learn what it knew about its client. 210 Ariz. at 488 ¶ 45. The Arizona Supreme Court reversed the trial court's summary judgment, holding that the "facts raise inferences sufficient to take the issue to the jury." *Id.* at 490 ¶ 58. So too here.

B. It does not matter when Chittick began breaching his fiduciary duties.

Defendants suggest that Chittick began breaching fiduciary duties before Clark Hill and Beauchamp got involved. (Mot. at 4-5.) That claim is not only disputed, but irrelevant. Aiding and abetting a breach of fiduciary duty can occur "after a breach has begun." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 407 ¶ 101 (App. 2012).

C. *Dawson* is inapposite.

For the "knowledge" element of aiding and abetting, Defendants rely on *Dawson v. Withycombe*, 216 Ariz. 84 (App. 2007). But that case is inapposite. **First**, that case went to trial. The dispute on appeal was whether the trial court acted correctly *after* the evidence was presented to the jury. *Id.* at 94 ¶¶ 16-18, 102 ¶ 49. Here, Defendants are trying to keep the jury from hearing the evidence at all.

Second, *Dawson* involved a claim of aiding and abetting fraud, and the plaintiff presented no evidence that the defendants were "even aware" of the fraudulent scheme. *Id.* at 102-03 ¶¶ 49-52. Here, there is ample evidence that Defendants were aware that

Chittick was breaching fiduciary duties to DenSco and its investors, as explained above.

D. *Schatz* is inapposite.

For the "substantial assistance" element, Defendants rely on *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991). That case is inapposite. **First**, that case involved claims under federal securities law and Maryland law, not Arizona law. *Id.* at 489. In Arizona, generally "lawyers have no special privilege against civil suit," so "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances." *Chalpin v. Snyder*, 220 Ariz. 413, 424 ¶¶ 44-45 (App. 2008) (citations omitted).

Second, *Schatz* involved an allegation that a law firm aided and abetted its client in defrauding a third party. 943 F.2d at 489-98. As a result:

- The law firm owed no special duties to the victim (a third party).
- The law firm did owe special duties to the person it aided (its client).

These facts were critical to the court's decision. *Id.* at 489-98. Here, in contrast, Clark Hill aided and abetted someone who was not its client (Chittick) in breaching fiduciary duties toward its client (DenSco). As a result:

- Clark Hill owed special duties to the victim (DenSco and its investors).
- Clark Hill did not owe special duties to the person whom it aided (Chittick).

Whereas the law firm in *Schatz* was like a shepherd who helps his sheep evade a wolf, Clark Hill was like a shepherd who helps a wolf steal his sheep!

Third, the law firm in *Schatz* merely "papered the deal" between its client and a third party, playing the role of "scrivener." 943 F.3d at 496-97. Here, Clark Hill, among other things, advised Chittick that he could delay disclosure to investors while continuing to raise money, and actively developed a work-out plan with Chittick and Menaged that it knew ran contrary to DenSco's interests. Clark Hill was far more than a "scrivener."

IV. CONCLUSION.

The Court should deny Defendants' motion for summary judgment.

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

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This document was electronically filed
and copy delivered*/e-served via the
AZTurboCourt eFiling system
this 10th day of January, 2020, on:

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