

**UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF PENNSYLVANIA**

DILWORTH PAXSON, LLP.,	:	
	:	
v.	:	CIVIL ACTION
	:	
	:	
MANUEL P. ASENSIO,	:	
ASENSIO & COMPANY, INC.,	:	NO. 02-8986
ASENSIO.COM, INC.	:	

**RESPONDENTS-DEFENDANTS, MANUEL P. ASENSIO, ASENSIO &
COMPANY, INC., AND ASENSIO.COM, INC.’S AMENDED REPLY TO THE
PETITION TO COMPEL ARBITRATION AND APPOINT A NEUTRAL
ARBITRATOR PURSUANT TO 42 Pa.C.S.A. 7304, TOGETHER WITH
AFFIRMATIVE DEFENSES AND COUNTERCLAIMS.**

Respondents-Defendants, Manuel P. Asensio, Asensio & Company, Inc., and Asensio.com, Inc., (herein after “Asensio Defendants”) by and through their Counsel, Goldfein & Hosmer, hereby object to Plaintiff’s (herein after “Dilworth”) Petition to Compel Arbitration and Appoint a Neutral Arbitrator and in opposition to said Petition aver as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Denied as stated. The Action was transferred to the Court of Common Pleas of Philadelphia County (July Term, 2000, No. 003970) pursuant to 42 Pa. C.S.A. §5103.
5. Admitted.
6. Denied as stated. It is admitted only that after discussion Dilworth was

again retained to represent the Asensio Defendants in the underlying matter.

7. Denied. Mr. Asensio signed the fee agreement under duress.

8. Denied as stated. It is admitted only that Thomas Biemer, of Dilworth Paxson, represented the Respondent, Asensio & Company, and Asensio.com, Inc. while Fredric Goldfein of Goldfein & Hosmer represented Respondent Manuel P. Asensio in a three week jury trial, presided over by the Honorable Judge Sheppard, and that the jury rendered a verdict in favor of the Asensio Defendants.

9. Denied. It is denied that the Asensio Defendants owe any fees to Dilworth for legal services. To the contrary, Dilworth owes the Asensio Defendants \$350,000.00 for improper bills submitted by and paid to Dilworth.

10. Denied. The Asensio Defendants dismissed Dilworth as counsel in February 2002.

11. Denied as stated. It is admitted that a dispute exists between Dilworth and the Asensio Defendants. It is denied that the Asensio Defendants owe Dilworth any fees.

12 - 13. Admitted only that Dilworth set forth its position in the letter of October 25, 2002. It is denied that Dilworth's position is legally correct.

14. Admitted.

15. Admitted.

16. Denied. The Asensio Defendants' counsel reiterated the necessity of Dilworth filing a Complaint.

17. Denied. It is specifically denied that there is or was any valid fee agreement.

WHEREFORE, the Asensio Defendants respectfully request that this Honorable

Court deny Dilworth's Petition to Compel Arbitration.

FIRST AFFIRMATIVE DEFENSE

18. The Asensio Defendants never agreed to submit this controversy to arbitration.

SECOND AFFIRMATIVE DEFENSE

19. There is no valid fee agreement.

THIRD AFFIRMATIVE DEFENSE

20. Dilworth forced the Asensio Defendants to sign the alleged "fee agreement" at issue before resuming the defense of the Asensio Defendants in the Action referenced in the Petition, when in fact Dilworth knew it would be impossible for the Asensio Defendants to obtain other counsel in light of the complexity of the matter and the volume of materials involved.

FOURTH AFFIRMATIVE DEFENSE

21. The purported agreement is invalid because it was procured under duress.

COUNTERCLAIMS

The Asensio Defendants allege the following in support of these Counterclaims set forth below against Dilworth:

JURISDICTION AND VENUE

22. This Court's jurisdiction is invoked pursuant to 28 USC § 1332 (a)(1) through diversity of citizenship as Dilworth is a resident of the Commonwealth of Pennsylvania and the Asensio Defendants are citizens and/or residents of the State of New York and Delaware and the amount in controversy exceeds \$100,000.00. Pursuant

to Federal Rules of Civil Procedure 13(a), Asensio Defendants file these counterclaims in the Eastern District of Pennsylvania together with their reply to Dilworth's Petition to Compel Arbitration.

23. Venue in the Eastern District of Pennsylvania is proper under 28 USC § 1391 because a substantial part of the events or omissions giving rise to this action occurred within the Eastern District of Pennsylvania.

FACTUAL BACKGROUND

24. The allegations of paragraph 1 through 23, inclusive, are incorporated by reference as though set forth herein at length.

25. At the time the Asensio Defendants retained Dilworth to represent them in the underlying case, Hemispherx Biopharma v. Asensio et al., Dilworth informed the Asensio Defendants that Mr. McMichael and Mr. Biemer were experienced trial counsel that could handle a case of such magnitude.

26. Mr. McMichael and Mr. Biemer, attorneys employed by Dilworth, were not experienced trial counsel.

27. On March 31, 2000, Dilworth filed a motion to dismiss the underlying action against the Asensio Defendants for lack of subject matter jurisdiction pursuant to Fed. R.Civ.P. 12(b)(1).

28. On June 17, 2000, the District Court granted the Asensio Defendants' motion to dismiss.

29. Plaintiff in the underlying action, Hemispherx Biopharma, then transferred the underlying action to the Philadelphia Court of Common Pleas pursuant to 42 Pa.C.S.A. §5103.

30. On September 1, 2000, Dilworth filed Preliminary Objections on behalf of the Asensio Defendants in the underlying matter asserting *inter alia* lack of personal jurisdiction over the Asensio Defendants.

31. By Order dated February 14, 2001 with supporting opinion, the Court of Common Pleas of Philadelphia County found that the Asensio Defendants had waived the objection to personal jurisdiction in the District Court.

32. During the course of Dilworth's representation of the Asensio Defendants, Dilworth overcharged Asensio Defendants for its services.

COUNT I – NEGLIGENCE - PROFESSIONAL MALPRACTICE

33. The allegations of paragraph 1 through 32, inclusive, are incorporated by reference as though set forth herein at length

34. The negligence and carelessness of Dilworth Paxson, LLP consisted of Dilworth's failure to raise an objection to personal jurisdiction in the Federal Court in the underlying case in which Dilworth represented Asensio Defendants.¹

35. Dilworth owed a fiduciary duty and professional duty to Asensio Defendants in providing them adequate legal services.

36. As a direct and proximate result of the negligence of the Dilworth, the Asensio Defendants incurred additional costs of defense, from the time when Dilworth should have first raised the issue of lack of personal jurisdiction.

WHEREFORE, the Asensio Defendants demand judgment for the costs of the

¹ Asensio Defendants have appealed various of the rulings of the Court of Common Pleas including the February 14, 2001 Order holding that they waived the issue of personal jurisdiction. Should the Pennsylvania appellate courts find that the February 14, 2001 Order was issued in error and Asensio Defendants did not waive personal jurisdiction, such a ruling will limit but not eliminate Counts I and IV of the Counterclaims against Dilworth.

defense from the time when Dilworth should have first raised the issue of lack of personal jurisdiction together with costs of suit, interest and attorney's fees.

COUNT II – FRAUD & MISREPRESENTATION

37. The allegations of paragraph 1 through 36, inclusive, are incorporated by reference as though set forth herein at length.

38. Dilworth represented to the Asensio Defendants that it would provide the Asensio Defendants with experienced trial attorneys to represent the Asensio Defendants in the underlying action.

39. Dilworth's ability to provide experienced trial attorneys to represent Asensio Defendants was a material fact considered in retaining Dilworth to represent the Asensio Defendants in the underlying action.

40. Dilworth knew that the lawyers from its firm that would represent the Asensio Defendants were not experienced trial attorneys and Dilworth knew it made a false representation to the Asensio Defendants.

41. Dilworth intended the Asensio Defendants to retain Dilworth's legal services based on its representation that the attorneys representing the Asensio Defendants were experienced trial counsel who could handle the magnitude of the underlying action.

42. Based on Dilworth's representation that its attorneys were experienced trial counsel, the Asensio Defendants hired Dilworth to represent them in the underlying matter.

43. Counsel from Dilworth who represented the Asensio Defendants did not have sufficient trial experience to handle the underlying case.

44. Due to Dilworth's lack of trial experience, the Asensio Defendants were forced to hire extra counsel immediately before trial and incurred costs for the additional counsel to review the massive volume of records in order to be able to properly defend at trial.

45. As a direct and proximate result of Dilworth's fraudulent misrepresentation the Asensio Defendants incurred the costs of hiring additional attorneys with the appropriate trial experience to review and learn the voluminous case file to be able to properly defend the Action.

WHEREFORE, Asensio Defendants demand judgment for the costs of the Asensio Defendants incurred to hire extra counsel immediately before trial and incurred cost for the additional counsel to review the massive volumes of records in order to be able to properly defend at trial together with costs of suit, interest and attorney's fees.

**COUNT III – BREACH OF CONTRACT – FAILURE TO PROVIDE
CONSIDERATION**

46. The allegations of paragraph 1 through 45, inclusive, are incorporated by reference as though set forth herein at length.

47. The Asensio Defendants and Dilworth entered into an agreement pursuant to which Dilworth was to provide the Asensio Defendants with experienced trial counsel to defend Asensio Defendants in the underlying action. Dilworth charged inappropriate hourly rates for the services provided which the Asensio Defendants were forced to pay.

48. Dilworth failed to provide the quality of legal services for which the Asensio Defendants contracted.

49. The Asensio Defendants compensated Dilworth for the legal services provided at an excessive rate for said services based on Dilworth's attorneys' lack of

adequate experience.

50. Dilworth overcharged the Asensio Defendants for the legal services it provided. Dilworth charged excessive attorney fees for the qualifications of the attorneys that provided representation to the Asensio Defendants.

51. As a direct and proximate result of Dilworth's breach of contract, the Asensio Defendant overpaid the Dilworth \$350, 000.00 in improper billings.

WHEREFORE, the Asensio Defendants demand judgment for the amount of \$350,000.00 in which the Asensio Defendants were overcharged for services rendered by Dilworth together with costs of suit, interest and attorney's fees.

COUNT IV – BREACH OF CONTRACT (MALPRACTICE)

52. The allegations of paragraph 1 through 51, inclusive, are incorporated by reference as though set forth herein at length.

53. The Asensio Defendants and Dilworth entered into an agreement pursuant to which Dilworth was to provide the Asensio Defendants with experienced trial counsel and the Asensio Defendants were to monetarily compensate Dilworth for the services provided.

54. Dilworth breached the agreement between Dilworth and the Asensio Defendants by failing to render competent legal services to the Asensio Defendants.

55. Dilworth's handling of the underlying action resulted in the Court of Common Pleas holding that the Asensio Defendants waived their objections to personal jurisdiction in the underlying action when Dilworth failed to raise the issue promptly, continued to litigate and ultimately failed to raise the issue when Dilworth filed a motion to dismiss for lack of subject matter jurisdiction on behalf of the Asensio Defendants.

56. As a direct and proximate result of Dilworth's breach of contract, the Asensio Defendants incurred costs of a defense from the time when Dilworth should have first raised the issue of lack of personal jurisdiction.

WHEREFORE, Asensio Defendants demand judgment in their favor for the expenses they incurred to defend the action from the time when Dilworth should have first raised the issue of lack of personal jurisdiction together with costs of suit, interest and attorney's fees.

Respectfully submitted,

GOLDFEIN & HOSMER

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Rosann Lynn Brenner
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Asensio.Com, Inc.

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ASENSIO & COMPANY, INC.,	:	NO. 02-8986
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CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of January 2003, served a true and correct copy of the within Respondent's Amended Reply to the Petition to Compel Arbitration Together with Affirmative Defenses and Counterclaims upon the following counsel of record:

Mark Gottlieb, Esquire
2200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103

Date: January 16, 2003

Samantha L. Conway
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Asensio & Company, Inc., and
Asensio.Com, Inc.

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