UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF PENNSYVANIA

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

DEFENDANTS, MANUEL P. ASENSIO, ASENSIO & COMPANY, INC. AND ASENSIO.COM, INC.'S BRIEF IN OPPOSITION TO PLAINTIFF PETITION TO COMPEL ARBITRATION

Defendants, Manuel P. Asensio, Asensio & Company, Inc. and Asensio.com, Inc. ("Asensio Defendants"), respectfully submit the following Brief in Opposition to Plaintiff Dilworth Paxson, LLP's ("Dilworth") Petition to Compel Arbitration.

I. INTRODUCTION

The instant matter is an attempt to enforce an agreement obtained through duress and misrepresentations. Today Dilworth requests this Court to compel the Asensio Defendants to submit disputes regarding Dilworth fees, as well as, numerous other actions which resulted in harm to the Asensio Defendants to a neutral arbitrator for resolution. The basis of this petition is a letter dated March 16, 2000, which on its face appears to contain a fee agreement and arbitration clause. However, this matter is not that simple and straightforward. Asensio executed the March 16, 2000 "agreement" and arbitration clause under duress and as a direct result of material misrepresentations by Dilworth. As such, the "agreement" and arbitration clause are invalid and most certainly unenforceable. Dilworth perpetuated the relationship with the Asensio Defendants through additional material misrepresentations, and improperly retaining

possession of Asensio Defendants' files and documents in the underlying action, Hemispherx Biopharma, Inc. vs. Asensio, et al, at a time when Dilworth was not legal counsel for Asensio, and the Asensio Defendants were under court imposed time constraints. Dilworth used the urgency of Asensio Defendants' situation to solicit and obtain Asensio's signature on the March 16, 2000 letter.

In addition to the dispute regarding the validity of the March 16, 2000 "agreement" and arbitration clause, Asensio Defendants have asserted numerous counterclaims against Dilworth arising directly out of Dilworth's legal representation of these parties in Hemispherx Biopharma, Inc., v. Asensio, et al. (the "action"). The counterclaims include allegations of legal malpractice, fraud and misrepresentation by Dilworth, all of which adversely affected the Asensio Defendants in the Action. Dilworth throughout the course of its representation of the Asensio Defendants made fraudulent misrepresentation with the intent that the Asensio Defendants would rely on same and continue to retain Dilworth's services.

This petition to compel arbitration is based upon an "agreement" obtained by Dilworth's fraudulent misrepresentations to Asensio Defendants, and the Asensio Defendants' reliance on those representations all at a time when Asensio Defendants were under duress. As such, the dispute regarding the "agreement" of March 16, 2000 and the arbitration clause contained therein must be resolved in this forum by this Honorable Court. The counterclaims asserted by the Asensio defendants must also be heard by this Court. As several of the counterclaims are contingent on the state appellate court's decision in the Action, this entire case should be stayed pending the conclusion of the appellate process in the Action.

II. FACTUAL BACKGOUND

The Asensio Defendants are located in New York, New York. On September 30, 1998 Hemispherx Biopharma, Inc. filed a complaint against the Asensio Defendants in the United States District Court for the Eastern District of Pennsylvania ("district court"). On October 16, 1998, after discussions regarding the complex nature of the Action and Dilworth's assurances that it would provide experienced trial counsel, the Asensio Defendants retained Dilworth to represent them in the Action. Larry McMichael, Esquire ("McMichael"), a partner at Dilworth took over the Asensio Defendants' defense in the Action. The Action alleged that the Asensio Defendants published false and/or misleading information about Hemispherx's lead product and its management in an effort to manipulate the price of the publicly traded shares of Hemispherx. The Action was dismissed in Federal Court and subsequently reinstated in the Court of Common Pleas of Philadelphia County on July 31, 2000.

On November 29, 1999, Dilworth withdrew its appearance for the Asensio Defendants in the action after Asensio fired the attorneys for what Asensio felt to be over billing and "creating problems" in the litigation. At that time, Ira Silverstein, Esquire entered his appearance on behalf of the Asensio Defendants. However, Mr. Silverstein was limited in his ability to properly defend the Asensio Defendants because he did not have full access to all the files and documents that were still in Dilworth's possession. After approximately a month, on January 3, 2000, Mr. Silverstein withdrew his appearance on behalf of the Asensio Defendants. Asensio petitioned to appear individually in the action. On March 6, 2000, the Honorable John R. Padova denied Asensio's petition and ordered the Asensio Defendants to obtain substitute counsel within 72 hours with sanction in the amount of $1000 for each day thereafter that new counsel had not been retained.

On March 13, 2000, the District Court entered an order allowing Dilworth to represent the Asensio Defendants during an interim period. Simultaneously, the District Court ordered the Asensio Defendants to identify trial counsel by Monday, March 20, 2000. McMichael sent Asensio a supplemental fee agreement contained in a letter on Thursday, March 16, 2000 and discussed the agreement with Asensio on that same day knowing the exact predicament that Asensio was in and the fact that Asensio did not have the "mind of a person of ordinary firmness". As a direct result of the grave urgency to retain local counsel, the severity of the pending action, McMichael's representation to Asensio that the letter and in particular the arbitration clause was unenforceable, and the fact that Dilworth had retained possession of the files in the action, Asensio, under duress, signed the March 16, 2000 letter. (See Asensio Affidavit attached hereto as Exhibit "A" at paragraphs 2, 4 and 5). In his weakened state of mind, Asensio relied on McMichael's representations that not only was the arbitration clause unenforceable but also that the Asensio Defendants could not waive future claims. (See paragraph 2 of Exhibit "A"). Asensio believed that McMichael was giving him correct information and honest legal advice. In short, Asensio had no choice but to sign the March 16, 2000 letter. (See paragraph 9 of Exhibit "A")

Dilworth filed a 12(b)(1) motion in the district court on March 31, 2000 for lack of subject matter jurisdiction. However, Dilworth failed to object to the court's personal jurisdiction over the Asensio Defendants despite the fact that the Asensio Defendants could not be served in Pennsylvania. Further, Dilworth waited a year and a half into the litigation before filing the 12(b)(1) motion. The court granted the 12(b)(1) motion based on subject matter jurisdiction and dismissed the action in the district court. Hemispherx subsequently reinstituted the action in the Philadelphia Court of Common Pleas of Philadelphia County. Dilworth

proceeded to file Preliminary Objections in the Action contesting personal jurisdiction. However, the Honorable Albert W. Sheppard, Jr. denied the Preliminary Objections on the grounds that the issue of personal jurisdiction had been waived. Asensio Defendants have appealed Judge Sheppard's order denying the preliminary objection to personal jurisdiction. Accordingly, several aspects of Asensio Defendants' counterclaims against Dilworth are contingent on the appellate courts' rulings on the issues appealed.

Approximately one and a half to two months prior to trial, the Asensio Defendants were forced to obtain **additional** counsel to assist in the trial, as it was only at this juncture that the Asensio Defendants became aware that the Dilworth attorneys lacked the jury trial experience necessary to try a case of the magnitude of the action. Due to the complex legal issues involved and the volume of the file, the Asensio Defendants **could not replace** Dilworth, and instead had to retain experienced counsel to assist in the trial of the action. The Asensio Defendants originally and continuously retained Dilworth based on Dilworth's misrepresentations that they were qualified to handle the case. Ironically, Dilworth's brief in this matter completely neglects to address the point that additional counsel was retained to represent Asensio in the Action, that Asensio advised Dilworth that the additional counsel would lead the defense and that the additional counsel presented the defense at trial. On or about March 8, 2002, Dilworth withdrew as counsel for the Asensio Defendants.

On November 20, 2002, Dilworth filed a Petition to Compel Arbitration and Appoint a Neutral Arbitrator in the Court of Common Pleas of Philadelphia County. The Asensio Defendants removed the action to the District Court on December 10, 2002. On January 16, 2003, the Asensio Defendants filed a Reply to Plaintiff's Petition to Compel Arbitration together with Counterclaims. The Asensio Defendants filed their counterclaims pursuant to Federal Rule

of Civil Procedure 13(a) which states that "[a] pleading **shall** state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." F.R.C.P 13(a) (emphasis added). The Counterclaims asserted by the Asensio Defendants are not only appropriate but, at this juncture mandatory per the Federal Rules of Civil Procedure. Dilworth's assertions to the contrary are without merit.

III. ARGUMENT

A. The Arbitration Clause Of The March 16, 2000 Letter Is Invalid And Unenforceable

For the following reasons this Court should deny Dilworth's Petition to Arbitrate and place this matter in civil suspense pending resolution of the issues currently before the appellate court in the underlying action.

1. The Arbitration Clause In The March 16, 2000 Letter Is Invalid And Unenforceable Because Asensio Signed The Letter Under Duress And In Reliance On Misrepresentations Made By Dilworth

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. AT&T Technologies, Inc. v. Communications Workers of America et al. 475 U.S. 643, 648 (1986)(quoting Steelworkers v. Warrior & Gulf & Navigation Co., 363 U.S. 564 at 570-571 (Brennan, J., concurring)(1960)). The arbitrator's authority to resolve the disputes is derived from the parties' agreement to submit their grievances to arbitration. Id at 649. The question of arbitrability is undeniably an issue for judicial determination. Id. The question of whether the parties have agreed to arbitrate is to be decided by the court, not the arbitrator. Id.; see also Howsam v.Dean Witter Reynolds, Inc., 123 S.Ct. 588 (2002).

The general principles governing common law arbitration in Pennsylvania are well settled. When a party seeks to compel arbitration and the opposing party denies the existence of an agreement to arbitrate the court will proceed to determine the issue. Borgia v. Prudential Insurance Com., 750 A.2d 843, 846 (Pa. 2000); see also, 42 Pa.C.S.§7304(a); 42 Pa.C.S.§7342(a). Further, the United States Supreme Court has held that the under the Federal Arbitration Act, an arbitration agreement that is revocable on contractual grounds may not be enforcement. Southland Corp. v. Keating, 465 U.S. 1 (1984). Pennsylvania's policy toward arbitration is consistent with the United States Supreme Court's holding in Southland Corp. v. Keating. See Lytle v. Citifinancial Services, Inc., 810 A.2d 643, 654 (2002).

It is clear that Asensio did not agree to the arbitration clause of his own volition but rather signed the letter under duress. There was no meeting of the minds between Asensio and Dilworth.

Asensio was under that degree of restraint, both actually inflicted and impending (by Dilworth and by third parties of which Dilworth had knowledge), which was sufficient in severity and apprehension to overcome the mind of a person of ordinary firmness. See Carrier v. William Penn Broadcasting Com., 426 Pa. 427, 431, 233 A.2d 519 (1967); Smith v. Lechner, 204 Pa Super. 500, 504, 205 A.2d 626 (1964).

Further, Dilworth and Asensio were not dealing at arms length or on equal terms. Id. Dilworth had purposefully retained the Asensio Defendants' file and documents.[1] Dilworth had repeatedly showed no willingness to cooperate with any potential incoming new counsel, failing

[1] Dilworth alleges that they held the files and documents due to a fee dispute between them and the Asensio Defendants: however, the litigation was ongoing and it was adverse to the Asensio Defendants' interest to hold the files. That fee dispute could have and should have been handled through the courts not by holding the files and documents. Further, it should be noted that the letter dated March 16, 2000 in which Dilworth bases this entire petition to compel arbitration states that Asensio Defendants were current on fees.

to protect the Asensio Defendants' interest in the underlying action. See Pa. R. Prof. C. 1.16(d). The arbitration clause is not enforceable for it was not agreed to by both parties. The petition to arbitrate must be denied and this court must hear the issues set forth in Dilworth's petition and the Asensio Defendants counterclaims.[2]

2. Asensio Signed the Fee Agreement Including the Arbitration Clause Under Duress

Duress is defined as "that degree of restraint or danger, either actually inflicted or impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness." Carrier v. William Penn Broadcasting Com., 426 Pa. 427, 431, 233 A.2d 519 (1967); Smith v. Lechner, 204 Pa Super. 500, 504, 205 A.2d 626 (1964). Asensio Defendants and Dilworth were not dealing at arm's length and on equal terms when Asensio signed the March 16, 2000 letter. Id. It is assumed that every person is competent to contract, unless it appears he is weak for sufficient cause. Id. Further, there is no duress where the contracting party is free to consult with counsel. Id. On March 16, 2000, Asensio was presented with a supplemental fee agreement that contained an arbitration clause. Dilworth used its superior legal skills to leave Asensio with no choice but to sign the supplemental fee agreement and allegedly agree to an arbitration clause, while at the same time attempting to protect itself from this valid duress defense.

Dilworth egregiously retained the Asensio Defendants files and documents as litigation proceeded in the underlying Action. After the Asensio Defendants fired Dilworth the first time

[2] Dilworth alleges that Asensio Defendants ratified the arbitration agreement by "their decision to continue accepting the benefits". It cannot be expressed how strongly Asensio Defendants contest such a statement. First, Asensio Defendants did not benefit from Dilworth's representation. To the contrary, Dilworth's representation caused Asensio Defendants more harm than good. Further, Dilworth fraudulently misrepresented to Asensio that the arbitration clause was not enforceable and after the March 16, 2000 letter was signed, it was never again mentioned by anyone at Dilworth. Throughout Dilworth's representation, Asensio Defendants believed that the arbitration clause was unenforceable. Furthermore, all the reasons that Asensio was under duress when he signed the letter did not disappear after he signed the letter. In essence Dilworth had Asensio hostage.

for over-billing and creating problems in the litigation, the Asensio Defendants retained Ira Silverstein, Esquire to represent them. However, Mr. Silverstein was unable to represent the Asensio Defendants with limited access to the files and documents, together with Dilworth's unwillingness to work with him and therefore withdrew as counsel. At that time, the District Court ordered the Asensio Defendants to retain substitute counsel within 72 hours. In essence, Dilworth was holding the Asensio Defendants' documents for ransom leaving Asensio with no other option but to sign the supplemental fee agreement which contains the arbitration clause presently in dispute.

Through previous dealings with Asensio, Dilworth and, in particularly McMichael, was aware that Asensio would rely on McMichael's representations and knew that Asensio did not consult with outside counsel after receiving the legal advice from McMichael regarding Dilworth's representation in the action. Dilworth was aware of the magnitude of the claims against Asensio in the underlying action. It used its knowledge of the Asensio Defendants, through its previous dealing with Asensio, its control over the Asensio Defendants' files and documents, the urgency imposed by court order on the Asensio Defendants to retain counsel, along with its personal knowledge of the high stakes for the Asensio Defendants in defending the underlying action, to leave Asensio with no option but to sign the March 16, 2000 letter, which included an arbitration clause.

Asensio clearly signed the March 16, 2000 letter under duress. Furthermore, Asensio did not have the opportunity to have outside counsel review the March 16, 2000 letter. Dilworth, drafted the March 16, 2000 letter, which included Paragraph 7 which states that Asensio consulted outside counsel to protect themselves, and then proceeded to give Asensio improper

legal advice that the arbitration clause was not enforceable. Asensio relied on Dilworth's legal advice as it purported to be his counsel at the time the letter was signed.

The circumstances surrounding the signing of the March 16, 2000 letter are both sad and disturbing. Dilworth not only used duress but also made fraudulent misrepresentations to induce Asensio to sign the fee agreement.

3. Dilworth Procured The Agreement To Arbitrate Through The Use Of Fraudulent Misrepresentations

Above and beyond the fact that Asensio signed the March 16, 2000 letter containing the arbitration clause which was issued under duress, Dilworth also made fraudulent misrepresentations specifically regarding the enforceability of the arbitration clause. The Asensio Defendants are claiming that there was fraud in the inducement of the arbitration clause itself together with fraudulent misrepresentations regarding the fee agreement itself, and as such, this issue must be adjudicated by this Honorable Court and not an arbitrator. See Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 663, 331 A.2d 184, 186 (1975). When Asensio was presented with the March 16, 2000 letter that contained the arbitration clause, as stated in his sworn affidavit, he was specifically and deliberately informed by McMichael that he would not be relinquishing any right to sue for some future event, and that although the letter contained the arbitration clause, the arbitration clause was not legally enforceable. This legal advice was given to Asensio by McMichael, an individual that purported to be his legal counsel.

The elements of fraudulent misrepresentation are well settled. A contract or an arbitration provision may be void due to fraudulent misrepresentation when a party alleging fraud proves with clear and convincing evidence that there was 1) a representation, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another to rely on the

representation, 5) justifiable reliance on the misrepresentation; and 6) resulting in injury. Porreco v. Porreco, 811 A.2d 566, 2002 Pa. LEXIS 2468, *11 (Pa. 2002). All these elements are present in this case. See id. at *11

Over the course of Dilworth's dealings with the Asensio Defendants, Dilworth made numerous fraudulent misrepresentations to the Asensio Defendants. However, only one of those misrepresentations is relevant to Asensio Defendants opposition to Dilworth's petition to compel arbitration. McMichael specifically and deliberately informed Asensio that the arbitration clause was not legally enforceable. (See exhibit "A" at paragraph 4). McMichael is an attorney. He knew that the information he was giving Asensio was false and if he did not know the statements made were false, then they were made recklessly. Asensio was asking him direct questions about the arbitration clause and the effectiveness of such a clause. McMichael clearly was attempting to mislead Asensio regarding the enforceability of the arbitration clause to induce Asensio to sign the letter. McMichael was the Asensio Defendants' attorney at the time the misrepresentations were made and McMichael was aware that Asensio was relying on his representation that the arbitration agreement was unenforceable. Further, the fact that McMichael knowingly gave Asensio false legal advice regarding the arbitration agreement is further evidence that he knew that Asensio was not obtaining advice from outside counsel with respect to the fee agreement and the arbitration clause. Asensio justifiably relied on McMichael's misrepresentations. McMichael was Asensio's lawyer at the time the letter was signed and he was giving Asensio what appeared to be proper legal advice. As such, Asensio signed the letter which included the arbitration clause. Now McMichael and Dilworth are attempting to enforce the arbitration clause, a clause Asensio was fraudulently induced to sign when he clearly had no intention of agreeing to submit any claims to arbitration.

4. The Arbitration Clause Contained In The Supplemental Fee Agreement Is Limited To Fee Disputes

The Asensio Defendants asserted counterclaims against Dilworth because Dilworth committed legal malpractice and perpetuated a fraud against the Asensio Defendants, not as attempt to avoid arbitration. The arbitration clause was signed under duress and based on misrepresentations that the arbitration clause was not enforceable and Asensio Defendants would not be waiving their right to sue for future wrongful actions of Dilworth. Notwithstanding the duress and fraud perpetuated by Dilworth, the arbitration clause in the March 16, 2000 fee agreement is limited to fee disputes.[3]

Arbitration is a matter of contract and a party cannot be required to submit to arbitration those disputes which he has not agreed to submit to arbitration. Howsam, 123 S.Ct. at 591. The March 16, 2000 letter is a supplemental fee agreement. As set forth above, Dilworth had originally represented the Asensio Defendants in the underlying action and in or around November, 1999 the Asensio Defendants fired Dilworth for over billing. Dilworth states in its brief that the representation was terminated based on a fee dispute. See Dilworth Brief p. 2. The March 16, 2000 letter specifically addresses the fact that the Asensio Defendants paid the "agreed upon fees" for Dilworth's prior services. See March 16, 2000 Letter p. 2. Further, the letter states that it is modifying the previous **fee** agreements of October 16, 1998 and June 21, 1999. See March 16, 2000 Letter p. 2. And again in the last paragraph of the letter, Dilworth makes note of the prior disagreements over the fees. See March 16, 2000 Letter p. 3. Given the circumstances surrounding the fee agreement, and the prior history between Dilworth and the

[3] Not to steal Dilworth's own words but it appears that it is talking out of both sides of its mouth. On the one hand, Dilworth claims all the issues should be sent to arbitration. See Dilworth Brief. At the same time, Dilworth is asking this court to "stay or dismiss the pending action, including the Asensio Defendants' purported counterclaims, pending the completion of the required arbitration". See Dilworth Brief p. 14.

Asensio Defendants it is clear that arbitration clause contained in the March 16, 2000 letter is limited to any future fee disputes.

The case law cited by Dilworth is unpersuasive. Waddell v. Shriber, involves individual parties that were allied members of the NYSE. 357 A.2d 571, 572 (1976). As a prerequisite to becoming an allied member, each individual signed an application which provided that he/she pledged to abide by the Constitution and the rules of the Board of Governors of the New York Stock Exchange. Id. Further, the Constitution states that "any controversy between parties . . **arising out of the business** of such member . . . shall . . . be submitted for arbitration. Id at 573. The case cited by Dilworth is not applicable here. First, the parties to the action were all members of NYSE. See id. Second, the dispute arose out of a partnership agreement. See id. Third, it states "out of the business of such members". See id. In the present case, the arbitration clause is contained in a fee agreement; there is prior history of fee disputes between Dilworth and Asensio Defendant; the letter itself makes reference to the fee disputes in two different locations; and finally there is no language in the clause that would put the Asensio Defendants on notice that the arbitration clause went to matters outside of fee disputes. The court cannot force the Asensio Defendants to arbitrate issues that it never agreed to arbitrate.

5. For Judicial Efficiency This Matter Should Be Stayed Until The State Appellate Courts Rules On The Appeals Arising Out Of The Underlying Action

The Asensio Defendants asserted counterclaims against Dilworth pursuant to F.R.C.P 13.[4] The Asensio Defendants in an effort to preserve all claims against Dilworth asserted same counterclaims. Unfortunately, various aspects of their counterclaims are contingent on the State Appellate Courts' decision on issues currently on appeal in the underlying action. Since all the

[4] F.R.C.P 13(a) Compulsory Counter Claims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the

issue in this matter must be decided by or before this Honorable Court, for purposes of judicial efficiency, this matter should be stayed until the State Appellate Courts have issued their decisions in the underlying matter.

IV. CONCLUSION

For all the foregoing reasons, this Honorable Court should deny Dilworth's Petition to Compel Arbitration and stay this matter until the underlying issues have been resolved by the State Appellate Court.

RESPECTFULLY SUBMITTED:

_____

Fredric L. Goldfein
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transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

EXHIBIT "A"

UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF PENNSYVANIA

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

AFFIDAVIT OF MANUEL P. ASENSIO

I, Manuel P. Asensio, a named Defendant in the above-captioned action, submit this Affidavit, and being duly sworn according to law, states that:

1. On March 16, 2000 after I received the supplemental fee agreement I had a discussion with Larry McMichael, Esquire of Dilworth Paxson, and questioned him at length regarding the arbitration clause and various other clauses contained in the letter.

2. I was specifically and deliberately informed by Mr. McMichael, at the time he asked me to sign the letter which included the arbitration clause, that I would not be relinquishing any right to sue for some future event.

3. Mr. McMichael advised me that he was making me sign the March 16, 2000 letter only for the purpose of allowing him to fulfill the executive committee's request to obtain some sort of document as a condition of taking the Asensio Defendants, Asensio & Company, Inc., Asensio.com, Inc. and me, Manuel P. Asensio, on as clients again.

4. Mr. McMichael informed me that even though the letter included a arbitration clause that the arbitration clause was not legally enforceable.

5. I did not consult with another attorney after Mr. Michael assured me that the clause was not enforceable. In fact, I received several assurances from Mr. Michael that the letter was not enforceable including the specific statement that he could not legally be relieved from my right to sue him for future acts.

6. I signed the letter after receiving and relying upon Mr. Michael's representation.

7. At the time I signed the letter there was a grave and immediate urgency that I have representation in Philadelphia.

8. On March 6, 2000 and March 8, 2000, the Federal Judge presiding over Hemispherx Biopharma, Inc. vs. Asensio et al, the Honorable John R. Padova, ordered that I obtain legal counsel immediately. Sanctions in the amount of $1000 per day were to be imposed if I did not retain counsel within 72 hours. See attached Court Dockets for Hemispherx Biopharma, Inc. vs. Asensio et al.Civil Action No. 98-CV-5204.

9. Dilworth Paxson had shown no willingness to cooperate with any incoming new counsel, I had no alternative but to sign the supplemental fee agreement which included an arbitration clause.

10. Dilworth Paxson was holding the files and **refusing** to release them forcing me to sign the letter containing the arbitration clause so that I could have access to my files.

11. While Dilworth Paxson was holding the files in Hemispherx Biopharma, Inc. vs. Asensio et al the case was going forward and orders were issued against the Asensio Defendants in the Federal Court and the Judge ordered me to get local counsel.

12. Initially, I decided to retain Dilworth Paxson based on their representation that I would be represented by experienced trial attorneys, however, I was forced to retain additional trial counsel before trial to assist in my representation because Dilworth Paxson did not provide me with experienced trial counsel qualified to try a jury trial of the magnitude of Hemispherx Biopharma, Inc. vs. Asensio et al. The additional counsel had no papers to work from in forming a defense.

13. During Dilworth's initial representation, motion after motion was filed against the Asensio Defendants and Dilworth was losing the majority of the motions.

14. The litigation began to move forward at a frenzied pace when we had no legal representation and Hemispherx took full advantage of our situation by filing numerous motions against us. Dilworth was aware of this fact and yet they continued to retained possession of our files. As the litigation progressed, I came under extreme pressure and duress due to the situation created by Dilworth. I was left with no option but to re-retain Dilworth three and a half months after I had originally fired them.

15. After witnessing Mr. Michael's inept and embarrassing performance during the jury selection and in the first day of trial, I decided to make additional counsel the lead counsel at trial.

16. I could not totally replace Dilworth Paxson because they had the files and the case involved complex issues and a multitude of records.

17. My decision to sign the letter that included the arbitration clause was based on Mr. McMichael's representation that the clause was not enforceable and the

grave urgency to have Philadelphia Counsel who would have access to the file in the case.

18. I state that the facts set forth in this Affidavit are true and correct to the best of my knowledge, information, and belief.

____/s/_____
Manuel P. Asensio

Sworn to before me this
_____ day of _____, 2003

Notary Public

UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF PENNSYVANIA

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

CERTIFICATE OF SERVICE

I, SAMANTHA L. CONWAY, ESQUIRE, hereby certify that I have this 10th day of March 2003, served a true and correct copy of the within Defendants' Brief in Opposition to Plaintiff's Petition to Compel Arbitration and Appoint a Neutral Arbitrator upon the following counsel of record:

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

Date: _____

_____/s/_____
Samantha L. Conway
Attorneys for Manuel P. Asensio,
Asensio & Company, Inc., and
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