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Hodgeson and Hawkins, LLC

53 Severance Ridge Road

Columbia City, Columbia

MEMORANDUM

To: Sarah Hodgeson

From: Applicant

Date: February 23, 2021

Re: Matter of I.B.I.

I. The relationship between an I.B.I. mentor and mentee will likely give rise to fiduciary obligations owed by the mentor to the mentee

a. Fiduciary obligations may arise where a confidential relationship exists

A fiduciary duty can arise out of a relationship like agent and principal. *Togs for Tots, Inc. v. CCM*. A fiduciary duty may also arise out of a "confidential relationship." *Id.* The key factors in a confidential relationship are reliance and dominance. *Id.*

A confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship. *Id.*

b. The contract agreement between I.B.I. requires confidentiality between the Mentor and the Mentee

c. The Mentee relies upon the Mentor for their superior training and knowledge and assumes a position of dominance in the relationship

Our client can be distinguished from the facts in *Shaw v. Benedetti*. In *Shaw*, the plaintiff and defendant were business partners in a children's clothing manufacturing company. They were paid equally and worked together to advance the business. The Court held that there did not exist a fiduciary duty because neither the plaintiff nor defendant had substantially greater knowledge, expertise, or financial resources than the other.

However, the same would not be true for a Mentor and Mentee. A Mentor is specifically chosen as a result of their greater knowledge and expertise in the Mentee's field. Our client began the mentoring service because there were areas in which I.B.I. lacked expertise, so he recruited mentors that represented different business types.

II. The draft contract between I.B.I. and a Mentor will likely create contractual rights that an I.B.I. Mentee can assert against the Mentor because the Mentee is an intended beneficiary of the contract.

a. The Mentee is an intended beneficiary of the contract because the intent of the parties is to confer a benefit on the Mentee

A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. *Norton*; See Restatement (Second) of Contracts § 302(1)(b). The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication.

I.B.I. Mentees will likely be able to show that it was the intent of the parties to the contract, I.B.I. and the Mentor, to confer a benefit on the mentee. I.B.I. and the Mentor are entering into a contract whereby the Mentor will provide a service to the Mentee. Under the Supreme Court's decision in *Norton*, the Mentee will have the right to enforce the terms of the contract against the Mentor.

The contract between I.B.I. and the Mentor can be likened to the contract between the defendant in *Norton* and the non-profit corporation. In *Norton*, the defendant entered into a contractual relationship that induced him to remain physically present at the non-profit's facility. The third party beneficiaries were twenty resident members of the non-profit who alleged that they were attracted to the facility because of the defendant's presence. The defendant had attained a cult-

like status that influenced the residents to be in his presence. The residents successfully argued that the defendant contracted with the non-profit to provide services to the residents, and as such they were able to bring an action for breach of contract as third-party beneficiaries.

The contract between I.B.I. and the Mentor likewise shows intent to confer a benefit on the Mentee. The contract lists such benefits as not charging a fee or accepting a gift from the Mentee, not servicing competing Mentees at the same time without notice, and keeping Mentee information confidential. Almost all of the provisions to which the Mentor is agreeing directly mention the Mentee and are benefitting the Mentee, as well as I.B.I.

III. Changes to the draft contract

Firstly, our client could include a provision in the draft contract that explicitly states that the contract is for the benefit of I.B.I. and the Mentor, and any benefit to any third party is incidental. This would protect our client and the Mentors from third party contractual liability.

Secondly, our firm could create an amendment to the draft contract for our client that requires the Mentee's signature and requires that the Mentee will not enter into business with the Mentor without 1) first timely notifying I.B.I. and 2) seeking independent business and/or legal counsel.

This way, our client will still be achieving his goal of protecting his Mentees, while limiting liability as well. Furthermore, a prudent Mentor would likely agree that a Mentee should seek independent counsel when making such a decision, and in good faith would likely approve of such a provision.

Question #1 Final Word Count = 870

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