

CAUSE NO. \_\_\_\_\_

DIAMOND McCARTHY LLP,

Plaintiff,

v.

SHEILA M. GOWAN,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

\_\_\_\_<sup>TH</sup> JUDICIAL DISTRICT

**ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW DIAMOND McCARTHY LLP (“Diamond McCarthy” or “the Firm”) and would respectfully show the Court as follows:

**I. DISCOVERY CONTROL PLAN AND JURY DEMAND**

1. Plaintiff intends to conduct discovery under Level 2. Plaintiff demands a jury trial and has tendered the required fee to the Clerk of Court.

**II. PARTIES**

2. Plaintiff Diamond McCarthy is a Texas limited liability partnership with its principal place of business in Houston, Texas. Diamond McCarthy is a litigation and bankruptcy boutique practicing in complex business and bankruptcy cases. It has three Texas-based offices in Houston, Dallas, and Austin and four out-of-state offices in New York City, Denver, San Francisco, and Los Angeles.

3. Defendant Sheila M. Gowan was a Non-Equity Partner at Diamond McCarthy from April 2008 to February 2013 and during part of that time served as the Dreier Trustee. At all relevant times, Gowan was a resident of New York. Although Gowan worked out of Diamond McCarthy’s New York office, she worked primarily with, and therefore directed and

reached out to, Diamond McCarthy's Texas offices and Texas-based personnel. The actions complained of in this suit were purposefully directed into Texas. Gowan may be served with service of process at her home address: 96 President Street, Brooklyn, New York 11231.

## **II. JURISDICTION AND VENUE**

4. This Court has jurisdiction to hear this matter under § 37.004 of the Texas Civil Practices and Remedies Code ("CPRC"), Texas's long-arm statute, and Texas's common law. As further described below, Gowan had continuous and systematic contacts with the state of Texas by virtue of her activities with Diamond McCarthy, a Texas limited liability partnership, and repeatedly reached out to Texas in connection with the instant dispute, directing her activities toward this forum in the form of purposeful contacts with Texas and thereby establishing specific personal jurisdiction. A summary of Gowan's contacts with Texas is set forth in Part III below. The amount in controversy exceeds the minimum requirements of this Court.

5. Venue is proper in Harris County, Texas pursuant to § 15.002(a) of the CPRC. The parties conducted business in Harris County, Texas, and the acts upon which this suit is based occurred in part in Houston, Texas, and caused damage in Houston, Texas.

## **III. FACTUAL ALLEGATIONS**

6. This is a dispute about a bankruptcy trustee fee of over \$1.4 million that Gowan owes to Diamond McCarthy, but which Gowan has stated that she intends to take for her sole personal benefit.

7. In December 2008, through her employment with Diamond McCarthy and upon the recommendation and personal efforts of other Diamond McCarthy partners, Gowan obtained the position of, and was appointed as, chapter 11 trustee of the Dreier LLP bankruptcy estate (the

“Dreier Trustee”). Under the contractual terms of her employment with the Firm, all fees that Gowan would earn from her engagement as the Dreier Trustee while employed by the Firm would be the property of, and owed to, Diamond McCarthy (the “Dreier Trustee Fee”).

8. As an employee of the Firm, Gowan worked on her engagement as the Dreier Trustee almost exclusively between December 2008 and February 2013. Diamond McCarthy provided substantial support for those efforts, paying Gowan’s bi-weekly “partner draws” as well as health, dental, and life insurance benefits; procuring and paying for premiums on a special professional liability policy covering Gowan as the Dreier Trustee; providing tax preparation and other administrative support; and financing partner, associate, paralegal, and secretarial assistance. Diamond McCarthy made this substantial outlay of resources in reliance on its contract with Gowan that it would be entitled to the Dreier Trustee Fee when it became payable.

9. Gowan’s work as the Dreier Trustee is now complete and the bankruptcy court has entered an order authorizing the Dreier estate to pay a Dreier Trustee Fee in the amount of \$1,451,067.50. Gowan resigned from the Firm and has taken the position that Diamond McCarthy is not entitled to any portion of the fee. Diamond McCarthy files the instant petition against its former non-equity partner with considerable regret and only after potential avenues of compromise reached an impasse.

**A. Gowan Joins Diamond McCarthy and Agrees to the Firm’s Partnership Agreement**

10. Diamond McCarthy hired Gowan as a Non-Equity Partner in February 2008. Previously, Gowan had worked in the Civil Division of the U.S. Attorney’s office, focusing her practice on health care, qui tam, and other civil fraud cases. As part of Gowan seeking a job with Diamond McCarthy, and in order to obtain her position at the Firm, Gowan traveled to Texas for three days of interviews with Firm attorneys (including, without limitation, each of the Firm’s

Equity Partners as well as multiple Non-Equity Partners and associates) in the Firm's Houston and Dallas offices. During this trip, Gowan was soliciting a partnership position from Diamond McCarthy. After her trip to Texas, the Firm's Texas-based Managing Partner offered Gowan a Non-Equity Partner position at Diamond McCarthy.

11. The details of Gowan's employment were confirmed in a February 26, 2008 letter (the "Partnership Letter"), attached hereto as Exhibit A. The Partnership Letter provided that Gowan would receive annual "partnership draws" of \$275,000 and would be eligible for major medical, dental, vacation, and life insurance benefits.

12. The Partnership Letter also enclosed and incorporated by reference a copy of Diamond McCarthy's Partnership Agreement ("Partnership Agreement"), and it asked Gowan to bind herself to the Partnership Agreement by signing the Partnership Letter:

***A copy of the firm's Partnership Agreement, which more fully and definitively describes the responsibilities and obligations of a non-equity partner, is enclosed for your review. Should you have any questions concerning any part of the agreement, please ask. Otherwise, acknowledge your understanding and acceptance of the terms of the agreement by signing the signature page and returning to [the Executive Director of Administration].***

*Id.* (emphasis added). Gowan acknowledged her assent to the terms of the Partnership Agreement—and the rights and obligations created thereunder—by signing and executing the signature page of the Partnership Letter, which she sent to Texas in order to obtain her position as a Non-Equity Partner at the Firm.

13. The Partnership Agreement binds each and every partner of Diamond McCarthy and provides that all of the fees that Diamond McCarthy's partners generate while employed by the Firm—including for work as a bankruptcy trustee—are owed to the Firm. Specifically, § 2.03 of the Partnership Agreement states:

Section 2.03 *Disposition of Partners' Earned Income*. Each Partner shall pay into the Firm all income received for legal work, court appointments, lecturing or teaching, law-related writing or editing, all commissions received as executor, administrator, trustee or guardian, all directors' fees for directorships . . . and all income received for holding public office unless determined otherwise by the Partners when disclosed and submitted for approval as outlined under Section 2.02 herein.

Partnership Agreement § 2.03.

14. Gowan began working as a Non-Equity Partner at Diamond McCarthy in April 2008. At all relevant times between April 2008 and her withdrawal from Diamond McCarthy in February 2013, Gowan consistently held herself out as a partner of the Texas-based Firm in, *inter alia*, court filings, the Firm's website, letterhead, business cards, and numerous speaking engagements. Specifically, and without limitation, Gowan personally edited her own biography on the Firm's website to reflect that she was "a partner in the Firm's New York City office," advertised herself on the professional networking service LinkedIn as a "partner at Diamond McCarthy LLP," prepared a CV which was attached to an application for an errors and omissions policy purchased for her role as Dreier Trustee and identified her as a "Partner," advertised herself in connection with a nationally-marketed continuing legal education program as having "joined Diamond McCarthy as a partner in the New York Office in April 2008," and published at least one article where she described herself "as a partner at Diamond McCarthy."

15. After joining Diamond McCarthy, Gowan participated in the governance of the Texas partnership through physical and telephonic attendance in at least ten partnership meetings conducted in Texas. During these meetings, in her capacity as a Non-Equity Partner, Gowan spoke at length (among other issues) regarding the Firm's review of its major litigation and bankruptcy matters; reviewed Firm attorneys; and voted on compensation paid to the Firm's junior attorneys, admission of new attorneys to the partnership, and major partnership decisions

such as the opening of offices. In addition to Firm partnership meetings, one of which she physically attended in Austin, Texas, Gowan traveled to at least one other Firm event in Texas, including a holiday party in Houston. She also knowingly directed thousands of telephone calls, faxes, and emails into Texas relating to the partnership and her work as the Dreier Trustee. These are all examples of activity systematically and purposefully directed to Texas by a non-equity partner in a Texas-based law firm. Gowan knew and understood when she joined Diamond McCarthy and throughout her tenure at the Firm that she was part of and participating in the workings and representations of a Texas limited liability partnership.

**B. Gowan Serves, with the Firm's Support, as the Dreier Trustee**

16. In December 2008, Diamond McCarthy was approached about the possibility of one of its attorneys serving as the trustee for the estate of Dreier LLP, which filed for bankruptcy after its principal was indicted for committing investment fraud using a Ponzi scheme.

17. A Diamond McCarthy bankruptcy partner recommended Gowan for the Dreier Trustee position based on the strength of her background in prosecuting civil fraud cases for the United States government. Gowan was appointed the chapter 11 Dreier Trustee on December 30, 2008, and she continued in that role through the May 13, 2014 effective date of the Dreier LLP chapter 11 liquidation plan (the "Effective Date"). Shortly after her appointment as Dreier Trustee, Gowan retained Diamond McCarthy as the Dreier Trustee's counsel, and the Firm continued in that role through the Effective Date.

18. Gowan was based in the Firm's New York office while working as the Dreier Trustee. At that time, however, the Firm's New York office did not have enough litigators—particularly younger partners and associates—to adequately staff the case exclusively from New York, which Gowan knew and understood at the time she accepted the trusteeship. Accordingly,

Gowan repeatedly directed requests to the Firm's Texas-based Managing Partner for a team of Texas-based litigators to assist in managing the case.

19. At Gowan's specific request and continual direction, she was represented and supported in the Dreier LLP matter in large part by lawyers—including multiple partners and associates—in the Firm's Texas offices. Diamond McCarthy's Texas attorneys were responsible for nearly all of the litigation work on the Dreier LLP matter as well as much of the bankruptcy work. A partner in the Houston office acted as the senior bankruptcy litigator on the case. A partner in the Dallas office was primarily responsible for prosecuting large claims on behalf of the estate against major hedge funds. Multiple partners and associates from the Houston and Dallas offices were assigned, from time to time, to support the bankruptcy and litigation efforts. At various times, as many as six or seven attorneys worked on the case, the vast majority of whom were based in Diamond McCarthy's Texas offices. All of these assignments and undertakings were done at Gowan's direction and instruction into Texas.

20. For example, Gowan instructed these Texas-based attorneys to file and handle all aspects of twenty-two separate lawsuits or adversary proceedings in the Dreier LLP matter, in which twenty-seven depositions were taken. Similarly, at Gowan's instruction and request, Diamond McCarthy's Texas attorneys handled dozens of substantive hearings in the Dreier LLP matter. Gowan controlled the details of all of this work, including determining which Texas attorneys would be responsible for handling any particular issue, choosing which Texas attorneys would travel to New York to attend meetings and handle court hearings, and reviewing and approving every single document and pleading prepared by Texas attorneys before filing them with the court. Almost all such communications by Gowan were directed into Texas.

21. Gowan traveled to Houston on at least two occasions to speak at length at partnership meetings about the status and substantive merits of the Dreier LLP matter. Gowan also initiated thousands of emails and hundreds of telephone calls with Texas attorneys in order to discuss the case, plan its strategies, develop action plans, and make assignments.

22. Gowan also requested and received administrative support for the Dreier LLP matter from the Firm's Texas offices and staff. Specifically, and without limitation, all billing, including preparation of pre-bills, editing, and final invoicing related to the Dreier matter were handled out of Houston; all legal documents were placed on a server in Houston; the database of case documents was hosted on a server in Dallas; and administrative overhead (including for photocopies, messengers, postage, and Westlaw) was paid from Texas.

23. In summary, Gowan knowingly directed hundreds and hundreds of communications, requests, and instructions to Diamond McCarthy's Texas-based attorneys and staff in connection with her work as a Diamond McCarthy non-equity partner and the Dreier Trustee. The fee to be earned based upon that work is at the core of this lawsuit.

24. In addition to providing the above support, Texas-based Diamond McCarthy compensated Gowan during her tenure at the Firm in at least the following financial respects: paying her "draws" of \$275,000 per annum, totaling \$1,297,964 during her time at the Firm; paying her annual bonuses, totaling \$75,000; providing major medical, dental, life, accidental death and dismemberment, and long-term disability insurance benefits; administering and paying employer contributions toward Gowan's account in the Firm's 401(k) Plan; procuring and paying for a separate professional liability policy covering Gowan as Dreier Trustee over a period of years, all of which was done at Gowan's request and at the sole expense of the Firm; reimbursing Gowan's bar dues and professional memberships; arranging and paying costs related to speaking

engagements for Gowan on panels regarding the intersection of criminal forfeiture and bankruptcy; posting the required Trustee bond premiums in the Dreier LLP matter from 2009-2011; reimbursing thousands of dollars of Gowan's business-related travel expenses; and supplying a number of administrative benefits, such as transportation credits, car service, and federal tax preparation assistance. All of these expenses were paid from Texas bank accounts. All services were provided by Texas-based administrators. Gowan knew and understood this. She was a partner in a Texas-based-and-run law firm, and she herself directed all relevant payment requests to Texas.

25. During her employment with the Firm, Gowan devoted approximately 90% of her time to the Dreier Trustee matter—hours for which Diamond McCarthy was not compensated by the Dreier bankruptcy estate. As a result, continuing to employ Gowan as a partner imposed a significant financial burden on Diamond McCarthy and was a commitment for which the Firm was reasonably expecting to be reimbursed through the Dreier Trustee Fee.

### **C. Gowan Resigns from Diamond McCarthy**

26. In January 2013, Gowan informed Diamond McCarthy's management in Texas, among others in the Firm, that she believed she was entitled to keep the entire potential Dreier Trustee Fee. Gowan contended that she was not bound by the Partnership Agreement because she had not manually signed that Agreement. Various Diamond McCarthy partners, on behalf of the Firm, told Gowan that they (and the Firm) disagreed with her position and expected the Dreier Trustee Fee to be paid to the Firm when it became payable. Shortly thereafter, Gowan gave notice to the Firm and resigned from Diamond McCarthy.

27. The bankruptcy court confirmed the joint plan of liquidation for the Dreier Estate on April 29, 2014. The bankruptcy court entered an order permitting the Dreier estate to pay the

Dreier Trustee Fee in the amount of \$1,451,067.50 on June 23, 2014, and Diamond McCarthy expects that Gowan will direct that the Dreier Trustee Fee be paid into her personal bank account in the next several days. Therefore, Diamond McCarthy commenced this lawsuit to protect the Firm's claims to the Fee, but only after making substantial unsuccessful efforts to resolve these claims outside of court.

#### **IV. CONDITIONS PRECEDENT**

28. All conditions precedent to the filing of this lawsuit have been satisfied, waived, or otherwise performed.

#### **V. SUIT FOR DECLARATORY RELIEF**

29. Plaintiff incorporates all of the allegations in paragraphs 1-28 as though set forth herein fully.

30. Under § 37.004 of the CPRC, "[a] person interested under a . . . written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there is a breach."

31. Gowan contends that she is not bound by the Partnership Agreement because she did not sign the agreement itself. But Gowan clearly bound herself to the Partnership Agreement by signing the Partnership Letter, which attached the Partnership Agreement, incorporated it by reference, and plainly stated that by signing the Partnership Letter's signature page, Gowan was acknowledging her consent to be bound by the Partnership Agreement.

32. Under § 2.03 of the Partnership Agreement, to which Gowan is bound, all trustee fees earned by Diamond McCarthy partners while employed by the Firm are owed to the Firm.

Accordingly, Gowan owes to the Firm the portion of the Dreier Trustee Fee that she earned while employed at Diamond McCarthy.

33. This is a live controversy because the determination of this issue directly affects the dispute between Diamond McCarthy and Gowan regarding her refusal to have the now-approved Dreier Trustee Fee paid to the Firm.

34. Plaintiff, through this action, seeks to have the Court interpret Gowan's signature to the Partnership Letter as binding her to the Partnership Agreement, and the Partnership Agreement as compelling Gowan to pay to the Firm that portion of the Dreier Trustee Fee earned while she was employed by Diamond McCarthy.

## **VI. CAUSES OF ACTION**

### **Count 1: Breach of Partnership Agreement**

35. Plaintiff incorporates all of the allegations in paragraphs 1-34 as though set forth herein fully.

36. By signing the Partnership Letter's signature page, Gowan consented to be bound by the Partnership Agreement. That agreement is therefore valid and enforceable against her. Section 2.03 of the Partnership Agreement clearly requires that all fees earned by partners of Diamond McCarthy while working at the Firm, including trustee fees like the Dreier Trustee Fee at issue, are payable to the Firm.

37. Diamond McCarthy performed all of its contractual obligations under the Partnership Letter and Partnership Agreement by supporting Gowan in her Dreier Trustee efforts and paying her the salary and benefits promised under those contracts. Gowan has repudiated and breached her obligations under the Partnership Agreement to tender to the Firm the portion

of the Dreier Trustee Fee that she earned while employed by Diamond McCarthy. All conditions precedent to these obligations have been met.

38. Diamond McCarthy will sustain substantial damages, likely in excess of \$1 million, as a result of this breach.

**Count 2: Breach of Fiduciary Duty**

39. Plaintiff incorporates all of the allegations in paragraphs 1-38 as though set forth herein fully.

40. As a Non-Equity Partner of Diamond McCarthy, Gowan owed the Firm fiduciary duties not to use the Firm's funds or employees for personal gain and not to usurp opportunities for her own benefit. By using the Firm to obtain her position as the Dreier Trustee, drawing heavily upon (at her direction and instruction) the Firm's resources to support her efforts as the Dreier Trustee, and then ultimately refusing to pay the Dreier Trustee Fee to the Firm, Gowan breached her fiduciary duties to the Firm. Gowan has enjoyed significant gains, and Diamond McCarthy has sustained substantial damages, as a result of this breach.

**Count 3: Quantum Meruit**

41. Plaintiff incorporates all of the allegations in paragraphs 1-40 as though set forth herein fully.

42. Diamond McCarthy rendered valuable services to Gowan by securing her a position as the Dreier Trustee and then committing substantial resources to support her efforts as a partner of the Firm, including her efforts as the Dreier Trustee. Gowan accepted these services under such circumstances as would reasonably notify her that Diamond McCarthy expected to be repaid. The value of these resources provided by Diamond McCarthy is well in excess of \$1,000,000.

#### **Count 4: Unjust Enrichment**

43. Plaintiff incorporates all of the allegations in paragraphs 1-42 as though set forth herein fully.

44. Gowan obtained substantial benefits from Diamond McCarthy in connection with her position as a non-equity partner of Diamond McCarthy. She obtained the position as Dreier Trustee as a result of her association with Diamond McCarthy, and the Firm devoted substantial resources to supporting her in her Dreier Trustee efforts. Gowan obtained these substantial benefits through fraud or undue advantage, accepting them with no intention that Diamond McCarthy would ever be repaid.

#### **Count 5: Money Had and Received**

45. Plaintiff incorporates all of the allegations in paragraphs 1-44 as though set forth herein fully.

46. If successful in her efforts, Gowan would obtain and keep the entire Dreier Trustee Fee. In equity and good conscience, Diamond McCarthy is entitled to that portion of the Dreier Trustee Fee that Gowan earned while employed by the Firm, as Diamond McCarthy devoted substantial resources to supporting her in her Trustee efforts during that time.

#### **VII. REQUEST FOR ATTORNEY'S FEES**

47. Pursuant to CPRC § 37.009 (governing actions for declaratory judgment) and § 38.001 (governing actions for breach of contract), Plaintiff requests costs and all reasonable and necessary attorneys' fees incurred by Plaintiff herein, including all fees necessary in the event of an appeal of this cause to the Court of Appeals or Texas Supreme Court, as the Court deems equitable and just.

**IX. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff Diamond McCarthy prays for a final judgment against the Defendant that includes:

1. A declaratory judgment that Defendant is bound by the Partnership Agreement and that under the Agreement that portion of the Dreier Trustee Fee that she earned while a Non-Equity Partner of the Firm is owed to Diamond McCarthy;
2. Compensatory, actual, and consequential damages;
3. Prejudgment interest;
4. Post-judgment interest;
5. Reasonable and necessary attorneys' fees;
6. Punitive and exemplary damages; and
7. Any and all other relief to which Plaintiff may show itself entitled.

Respectfully submitted,

**GIBBS & BRUNS, L.L.P.**

By: /s/ Kathy D. Patrick  
Kathy D. Patrick  
TBA No. 15581400  
Jeff C. Kubin  
TBA No. 24002431  
Brice A. Wilkinson  
TBA No. 24075281  
1100 Louisiana, Suite 5300  
Houston, TX 77002  
Telephone: 713/650-8805  
Telecopier: 713/750-0903

**ATTORNEYS FOR PLAINTIFF  
DIAMOND MCCARTHY LLP**