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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.

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This memo will address the two issues arising out of the draft contract between I.B.I. and its mentors:

- 1, Whether the relationship between and I.B.I. mentor and mentee gives rise to fiduciary obligations owned by the mentor to the mentee; and
2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that an I.B.I. mentee can assert against the mentor.

As discussed below, the answer to both questions is "yes," and changes to the contract language will be recommended.

As to the fiduciary obligations owed by I.B.I. mentors to their mentees, this is discussed in the Columbia Supreme Court case *Togs for Tots, Inc. v. CCM* (2011). The court found that outside of the well-recognized relationships such as agent and principal, trustee and beneficiary, or guardian and ward, a fiduciary relationship arises out of a "confidential relationship." "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." Trust, older age and superior training and knowledge are all present in the I.B.I. mentor / mentee relationship. The court continued, "Reliance and dominance are the key

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factors in such a relationship. In the relationship between a business advisor and client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. The resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms." The court compared *Shaw v. Benedetti Enterprises* (2007) where the state Supreme Court found equal bargaining power and did not find a fiduciary relationship. Similarly, the court did not find a fiduciary relationship in the Togs for Tots case, as it found that the parties (the owners of each business) had equal bargaining power: ". . . the pleadings do not indicate that either Painter or Denito had substantially greater knowledge, expertise, or financial resources than the other." This is not our situation--here, the mentors have substantially greater knowledge, expertise, and financial resources than the mentees and will likely be found to be in a fiduciary relationship with the mentees.

You also asked whether the draft contract between I.B.I. and a mentor creates contractual rights that an I.B.I. mentee can assert against the mentor. As the contract is presently drafted, a mentee would be able to assert rights as a third party beneficiary to the contract. In *Norton v. Kramer* ((2007) Columbia Sup. Ct.), the court discussed the difference between an intended beneficiary and an incidental beneficiary: "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. See Restatement (Second) of Contracts [sec.] 302(1)(b)." The court further went on to state that the intent to confer a benefit on the third party "must appear from the contract itself or be shown by necessary implication." "Only intended beneficiaries, not incidental beneficiaries can enforce a contract." (*Id.*) Although the court found that the third parties were not intended beneficiaries, it is clear from the draft I.B.I. contract that mentees are intended beneficiaries of the contract.

In your interview with Frank Duquesne, he stated that he believes that in most circumstances, both the mentor and mentee will act in good faith, and that the mentees will seek independent advice before transacting with a mentor. We should probably add both clauses to the contract. Because the agreements are between I.B.I. and the mentors, we could also change the language in the two clauses following "accomplish the following goals," and have them address only the interests and relationships between I.B.I. and the mentors, without mentioning the mentees. This might not entirely eliminate the mentee's rights as third party beneficiaries, but it could reduce the likelihood of their being found to be intended beneficiaries of the contract.

It will be more difficult to revise the contract to avoid the fiduciary relationship between mentor and mentee. A possible solution might be a separate contract between I.B.I. and the mentees holding I.B.I. harmless from any damage to the mentee from the mentor-mentee relationship. There could also be separate contracts between the mentors and mentees, which could distance I.B.I. from any claims by either. But this solution seems to be more intrusive than our

client desires.

Another possible solution, briefly discussed in the Incubator Newsletter (although in another context) would be to add a clause providing that each party has had an opportunity to review the contract with independent counsel. Once again, this appears to be more formal than our client desires.

Question #1 Final Word Count = 843

**END OF EXAM**