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8	Thorneys for Defendants					
9	SUPERIOR COUR	RT OF ARIZONA				
10	COUNTY OF	MARICOPA				
11 12	Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation,	No. CV2017-013832				
13 14	Plaintiff, v.	DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL CHASE BANK TO COMPLY WITH SUBPOENA DUCES TECUM				
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16	Clark Hill PLC, a Michigan limited liability company; David G. Beauchamp and Jane Doe Beauchamp, husband and wife,	Oral Argument Requested (Assigned to the Hon. Daniel Martin)				
17	Defendants.					
18	Defendants Clark Hill and David Beauch	namp (together, "Clark Hill") have named				
19	Chase Bank and three of its former employees a	as non-parties at fault for aiding and abetting				
20	the fraudulent conduct of a felon, Yomtov Men	aged, who caused millions of dollars of				
21	damage to DenSco Investment Corporation—th	e same damages the Receiver for DenSco				
22	now seeks to recover from Clark Hill.					
23	Chase asserts that Clark Hill's subpoena	amounts to an improper fishing expedition				
24	foisted upon a non-party whereby Defendants "seek to point the finger at Chaseasserting					
25	that Chase should somehow be held responsible	for a portion of DenSco's alleged losses"				
26	Mot. at 1. To be clear, however, the Receiver for	or DenSco (the Plaintiff in this case) has				
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himself pointed the finger at Chase, and concluded that Chase "may have been instrumental in allowing [Menaged] to operate a massive fraudulent scheme upon DenSco" when it allowed Menaged to procure, in little more than a year, more than 1,300 cashier's checks, totaling more than \$300,000,000.00--checks Menaged then redeposited into his account the same day he procured them. *See* Mot. at Exh. B.

Those numbers are staggering. And to say that this was unusual activity would be a gross understatement. Yet contrary to Chase's strawman, the question is not whether Chase breached a duty to DenSco or any other third party. The question (and Clark Hill's burden), as expressly stated in the Motion to Compel, is whether Chase and its employees knew about numerous money laundering "red flag" transactions that Menaged engaged in at Chase, whether Chase had internal policies and procedures to identify such transactions, and ultimately, whether Chase (or its employees) knew Menaged was defrauding DenSco and substantially assisted him in doing so. Clark Hill's discovery is tailored to proving those elements of aiding and abetting fraud as part of its comparative fault affirmative defense.

Chase makes two main arguments in support of its refusal to produce documents. First, Chase asserts that because it does not owe a duty to DenSco or other third parties, the

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intended" and redeposited that day. *Id.* at DIC0016693, 96.

The finer details are just as disturbing. To provide the Court with a one week snapshot of Menaged and Chase's activities: On April 10, 2014, Chase provided Menaged with two cashier's checks for \$243,409 and \$174,300, each of which listed DenSco in the Memo line and identified a specific property address to be purchased. Exh. A at DIC0016636-37. Both were redeposited that same day. *Id.* at DIC0016632. On April 11, 2014, Chase provided Menaged with three cashiers for \$176,200, \$143,200, and \$154,900. *Id.* at DIC0016638-39, 48. All were redeposited that same day. *Id.* at DIC0016640, 47. On April 14, 2014, Chase provided Menaged cashier checks for \$368,500 and \$105,800. *Id.* at DIC0016645-46. They were redeposited that same day, stamped "not used for purposes intended." *Id.* at DIC16649. On April 15, 2014, another cashier check, this time for \$279,600 check (*Id.* at DIC0016652), and redeposited that same day. *Id.* at DIC0016660. On April 16, 2014, five more cashier's checks: \$96,900 (*Id.* at DIC0016663), \$175,600 (DIC0016665), \$117,213 (DIC0016666), \$264,310 (DIC0016667), \$153,100 (DIC0016668). All of them are stamped "not used for purposes intended" and redeposited that same day. *Id.* at DIC0016679, 81, 83, 85. On April 17, 2014, three more cashier's checks: \$96,810 (*Id.* at DIC0016689), \$177,200 (DIC0016690), \$174,609 (DIC0016694), all of them are stamped "not used for purposes

discovery sought is irrelevant as a matter of law under Arizona's non-party at fault statute. In doing so, Chase construes that statute far too narrowly and ignores Clark Hill's clarification that its comparative fault claim is largely based on Chase's intentionally tortious conduct. Second, Chase argues that federal regulations prohibit Chase from disclosing any documents related to its investigation of Menaged's fraud, and Chase and its employees' complicity therein. Yet Chase, construes those federal regulations, which govern Chase's required reporting to regulators, far too broadly.

Because the discovery sought is both relevant and discoverable, the Court should compel production of the requested documents under the existent Protective Order.

I. ARGUMENT

A. The Discovery Sought is Relevant - Clark Hill Need Not Show that Chase Owes Any Legal Duty in Order to Pursue Comparative Fault under A.R.S. § 12–2506.

Chase argues that in order to apportion fault under A.R.S. § 12–2506, Clark Hill must prove that Chase was "comparatively negligent" and consequently, prove that Chase breached a duty owed to DenSco. Because banks owe no duties of care to third parties, Chase reasons, Chase cannot be negligent and thus, all of Clark Hill's discovery is irrelevant for comparative fault purposes. *See* Resp. to Mot. at 5-6, 9.² That misreads the law regarding comparative fault in Arizona, which expressly covers intentional torts, such as the aiding and abetting fraud claim spelled out in Clark Hill's Motion.

Arizona's comparative fault statute defines "fault" as:

an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

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² Chase's arguments regarding relevancy are entirely based on this false premise regarding its duties (or lack thereof) to third parties. *See* e.g. Resp. at 9 ("given that (i) Chase owes no duty to a non-customer as a matter of law; and (ii) internal polices and guidelines cannot form the basis of a bank's duty to a customer...there is no basis to find [the requests] relevant to any attempt to assess comparative fault against Chase."

A.R.S. § 12-2506(F). The plain language of the statutory definition of "fault" explicitly includes not just breach of a legal duty, but also any other "act or omission" that causes injury or damages. "Fault" within the meaning of A.R.S. § 12-2506(F) thus includes intentional torts such as fraud or aiding and abetting fraud, not just claims based on alleged breach of duty.

Moreover, Arizona courts that actually have considered this issue have expressly held that A.R.S. § 12–2506 permits the apportionment of fault among defendants and nonparties based on either negligence or intentional conduct.³ The Supreme Court of Arizona, for example, has held that "a jury may apportion fault among defendants and nonparties, without distinguishing between intentional and negligent conduct or requiring that a minimum percentage of responsibility be assigned to the former." Hutcherson v. City of Phoenix, 192 Ariz. 51, 55, 961 P.2d 449, 453 (1998) (emphasis added), abrogated in part on other grounds by State v. Fischer, 242 Ariz. 44, 392 P.3d 488 (2017). The Supreme Court noted that the "statutory definition [of 'fault'] is extremely broad," and commented that "[w]e have no doubt that jurors are capable of evaluating degrees of fault, and the statute reflects our legislature's agreement." Id. at 54-55; 961 P.2d at 452-53. In reaching its conclusion, the Supreme Court considered and rejected the argument that negligent and intentional conduct could not be compared when apportioning fault under A.R.S. § 12-2506. Id.; see also Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 409, 207 P.3d 654, 662 (App. 2008) (trial court erred in denying a request for jury instructions related to the apportionment of

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In support of its argument, Chase cites two cases involving the apportionment of fault among various parties based on negligence, *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, 217 P.3d 1220, 1226 (App. 2009) and *Ocotillo W. Joint Venture v. Superior Court In & For Cty. of Maricopa*, 173 Ariz. 486, 844 P.2d 653 (App. 1992). But neither *A Tumbling-T Ranches* nor *Ocotillo* considered allegations that the alleged non-party at fault committed intentional torts such as fraud or aiding and abetting fraud, as Clark Hill has alleged in this case. Therefore, those cases are factually inapposite and do not address the key issue of whether comparative fault may be apportioned to intentional tortfeasors.

comparative fault among all intentional and negligent tortfeasors); *Thomas v. First Interstate Bank of Arizona, N.A.*, 187 Ariz. 488, 490, 930 P.2d 1002, 1004 (App. 1996) (comparative fault statute extends to intentional criminal conduct, and allows for apportionment of comparative fault between an allegedly negligent defendant and a nonparty accused of intentional criminal conduct) (cited by *Hutcherson* with approval, 192 Ariz. at 54-55; 961 P.2d at 452-53).

In this case, Clark Hill is seeking to have fault apportioned among a defendant accused of professional negligence and non-parties (both the Bank and its employees) who are alleged to have aided and abetted fraud. Both *Thomas* and *Hutcherson* make clear that it is perfectly appropriate to apportion "fault" under A.R.S. § 12-2506 not just to parties alleged to owe a duty to the plaintiff, but also to those at fault based on intentional acts or omissions. Consequently, Chase's argument that a bank owes no legal duty to its customers or others is beside the point. The discovery is relevant to Clark Hill's defense that the Bank and its employees aided and abetted Menaged's fraud. See Motion generally; see also Freedman & Gersten, LLP v. Bank of Am., N.A., CIV.A. 09-5351 SRC, 2010 WL 5139874, at *5 (D.N.J. Dec. 8, 2010) (if the bank "undertook any investigation to reveal [it's empoyee's] potential negligence or fraudulent conduct, documentation evidencing or contradicting same is relevant..." (emphasis added); Nelson v. Union Bank of California, N.A., 290 F.Supp. 2d 1101, 1120 (C.D. Cal. 2003) ("That the Banks utilized atypical banking procedures to service Slatkin's accounts, rais[ed] an inference that they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business."). Chase's policies, investigative materials, and personnel files regarding Menaged's account activity must be produced.4

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⁴ Chase also argues that the Court should assess relevancy based on an unidentified sliding scale that applies to nonparty under Rule 45. Chase, however, is afforded the protections spelled out under Rules 26 and 45, which already protect litigants from harassment, inconvenience, and the disclosure of confidential documents. Those rules do not require litigants to meet a higher burden of proof in order seek discovery from non-parties.

B. Chase's Investigative Documents, Policies and Procedures, and Personnel Files, are not Privileged.

Chase next argues that any document "reflecting or relating to bank investigations of suspicious and/or potentially fraudulent activity" is barred from production as absolutely privileged under 12 C.F.R. § 22.11. Based on that broad reading, Chase argues it must be excused from producing documents related to its investigation of Menaged's fraud, and Chase's potential complicity in that fraud. See Resp. at 7-8. The applicable regulation, however, only protects Suspicious Activity Reports ("SAR") themselves, or information that would reveal the existence of a SAR. As courts around the country have recognized, the regulations do not provide banks with a blanket excuse to avoid producing documents or policies related to the bank's investigation of fraudulent behavior.

It is true, as a general matter and as acknowledged in the Motion, that "no national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR." 12 C.F.R. § 21.11(k)(1). However, that same regulation further states that "the underlying facts, transactions, and documents upon which a SAR is based" are discoverable and are specifically exempted from the confidentiality protections of 12 C.F.R. § 21.11(k)(1). 12 C.F.R. § 21.11(k)(1)(ii)(A)(2).⁵

Thus, as Chase correctly points out and as set forth in the Federal Register's Rules and Regulations, "any document or other information that affirmatively states that a SAR has been filed...must be kept confidential." See Confidentiality of Suspicious Activity Reports, 75 F.R. 75, 576-01. Likewise, "any document stating that a SAR has not been filed" must also be kept confidential. *Id.* Clark Hill is not requesting such documents. However, "documents that may identify suspicious activity, but that do not reveal whether a SAR

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⁵ Chase asserts that the Clark Hill "materially understate[d]" the "scope and applicability" the SAR privilege. Resp. to Mot. at 7. Chase, however, never expressly raised the issue in its Responses and Objections to the Subpoena (See Exh. A to Mot.) leaving Clark Hill to guess as to what Chase intended by its later invocation of the Patriot Act during the meet and confer process.

<u>exists</u>...should be considered as falling within the underlying facts, transactions, and documents upon which a SAR is based, and need not be afforded confidentiality." Id. (emphasis added). Clark Hill is properly requesting those documents.

While Chase asks this Court to shield all of its investigative materials, policies, and procedures as privileged, Chase fails to explain how any of those documents would reveal whether Chase filed a SAR related to Menaged or not. That, however, *is the relevant consideration for the Court in determining whether to preclude the discovery*. As the court in *Freedman & Gersten, LLP v. Bank of America, N.A.* explained, "although [the bank] may have undertaken an internal investigation in anticipation of filing a SAR, it is also a standard business practice for banks to investigate suspicious activity and [the bank] does not cite any binding precedent on this Court which bars the production of this relevant documentation." 2010 WL 5139874 at *3 (D.N.J. Dec. 8, 2010); *First American Title Ins. Co. v. Westbury Bank*, 2014 WL 4267450, at *3 (E.D.Wis. Aug. 29, 2014) ("documents generated as part of standard business practice of investigating potential fraud or other irregularities are discoverable. This remains true even if this fraud investigation parallels the process of preparing a SAR.") Had federal regulators intended on shielding all documents related to internal investigations of suspicious conduct, they would have included such sweeping language in the regulation itself. They did not do so.

Freeman ultimately compelled the production of precisely the same types of documents Clark Hill requested: "memoranda or documents drafted in response to the suspicious activity at issue" as well as "policies and procedures for handling suspicious activity and risk management, except for those policies and procedures specifically designated for SARs." Id. at *4-5. Freeman explained that such information was relevant because, as in this case, it could reveal whether the bank and its employee properly followed internal procedures regarding the legitimacy of certain transactions, whether the bank had

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proper preventative steps in place to investigate the legitimacy of such transactions, and whether the bank or its employee deviated from such procedures. *Id.* at *4.

Likewise, in *In re Whitley*, plaintiffs sought discovery of investigative documents relating to the identification of an individual's bank account as "an account which was experiencing unusual, suspicious and potentially illegal activity." 2011 WL 6202895, at *1-2 (Bankr.M.D.N.C. Dec. 13, 2011). Notwithstanding the bank's invocation of 12 C.F.R. § 21.11, the court compelled the disclosure of any documents or notes obtained by the bank from any source, relating to "any investigation or inquiry by the bank or its agents into any account of" the individual at issue, including where the individual was identified as having "suspicious and/or unusual, irregular or improper account activity." See id. at *4.

At most, the limitations imposed by 12 C.F.R. 22.11 led *Freedman* to order that the production from the bank must exclude "any request for policies and procedures specifically related to filing of SARs and/or the decision to file a SAR" and that "Defendants shall not produce any SARs or previous drafts of SARs, need not indicate if and when a SAR was produced, and shall not state what documents and facts were or were not included in any SARs." *Id.* at * 5. Chase is entitled to similar limited protections based on the plain language of the regulation. It is not, however, entitled to simply withhold all investigative materials it their entirety, as they are relevant to Chase's, and its employees', actual knowledge of, and substantial assistance to, Menaged's fraud. Courts around the country 20 agree.⁶

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of suspicious activity...[the] requirement of confidentiality applies only to the SARs

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⁶ See e.g., In re Mongelluzzi, Case No. 8:11-ap-00653-CED, 2015 WL 4389564, at *1-2 (Bankr. M.D.Fla. July 14, 2015) (bank ordered to produce portions of its standard practice records of investigating suspicious activity, including investigatory reports and documents, computer generated monitoring reports . . . or alerts concerning the customer's banking activity); Wultz v. Bank of China, Ltd., 2013 WL 1788559, at *1-2 (S.D.N.Y. Apr. 17, 2013) (ordering production of the bank's internal investigation files consisting of materials used in the investigation leading up to the report); Wultz v. Bank of China Ltd., 56 F.Supp.3d 598, 602–603 (S.D.N.Y.2014) (rejecting invocation of the SAR prohibition as to investigatory documents); Gregory v. Bank One, Ind., N.A., 200 F.Supp.2d 1000, 1002 (S.D.Ind. 2002) (The rule "requires confidentiality only of SARs and their contents, not of other reports

1	In the absence of evidence that Chase's disclosure of its investigative documents or
2	personnel files would themselves reveal the existence (or absence) of an SAR, the Court
3	should compel production of Chase's investigative documents and all other documents or
4	internal alerts showing when and how (or if) Chase learned of Menaged's scheme to defraud
5	DenSco, and its employees' involvement in that scheme.
6	II. CONCLUSION
7	As set forth above and in the Motion, the Court should compel the production of the
8	requested documents pursuant to the Protective Order already in place, which covers
9	confidential documents produced by non-parties.
10	
11	RESPECTFULLY SUBMITTED this 8 th day of April, 2019.
12	COPPERSMITH BROCKELMAN PLC
13	
14	By:/s/Marvin C. Ruth John E. DeWulf
15	Marvin C. Ruth Vidula U. Patki 2200 North Control Account Societ 1000
16	2800 North Central Avenue, Suite 1900 Phoenix, Arizona 85004 Attorneys for Defendants
17	ORIGINAL filed and a COPY e-mailed /mailed this
18	8 th day of April, 2019 to:
	Nicole M. Goodwin, Esq. Aaron T. Lloyd, Esq.
20	2375 E. Camelback Rd., Suite 700
21	Phoenix, AZ 85016
22	
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25	themselves and the information contained therein, but not to their supporting
26	documentation.").

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1	Colin F. Campbell, Esq.
2	Joshua M. Whitaker, Esq.
3	Colin F. Campbell, Esq. Geoffrey M. T. Sturr, Esq. Joshua M. Whitaker, Esq. OSBORN MALEDON, P.A. 2929 N. Central Ave., Suite 2100 Phoenix, AZ 85012-2793 Attorneys for Plaintiff
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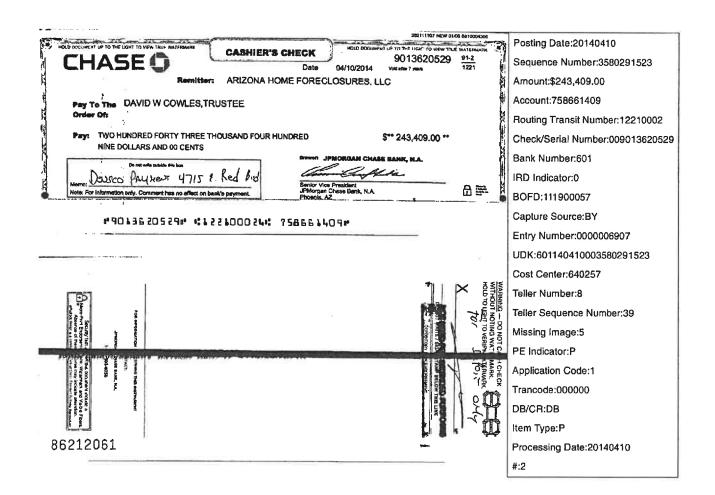
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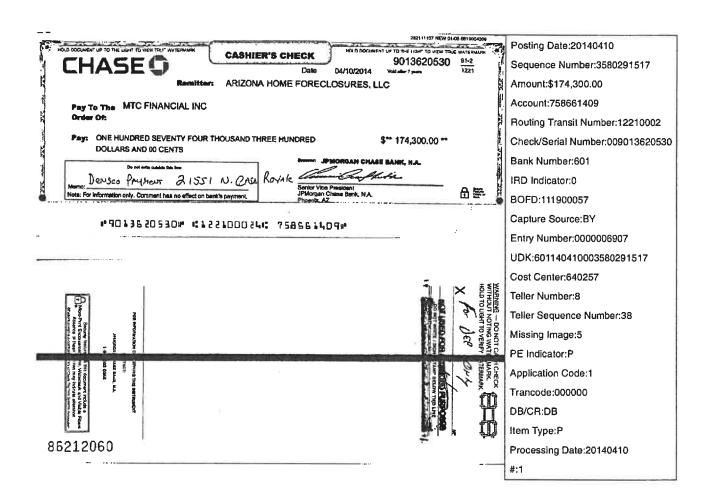
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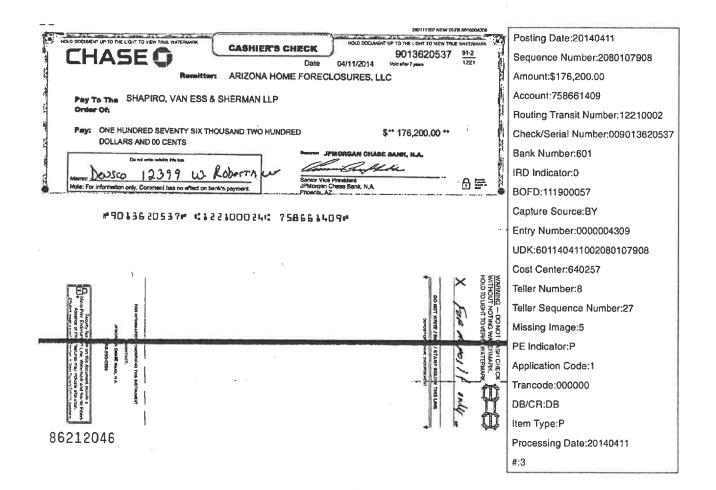
Exhibit A

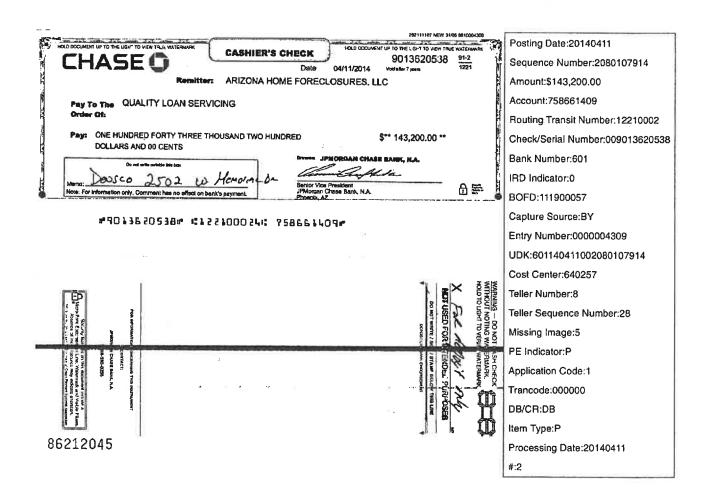
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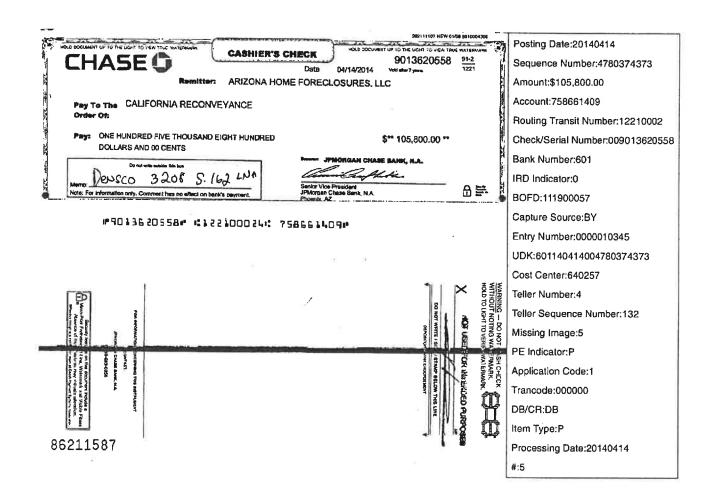


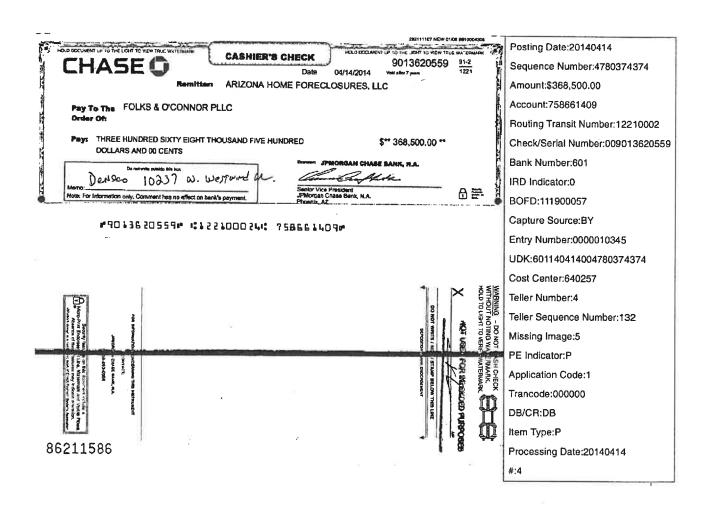




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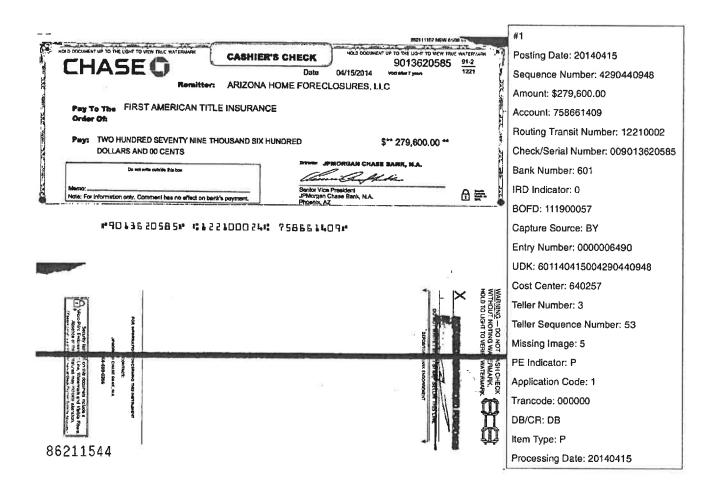
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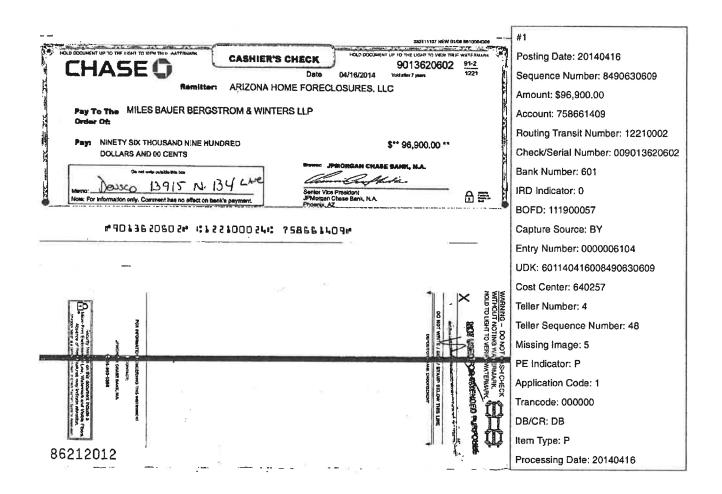


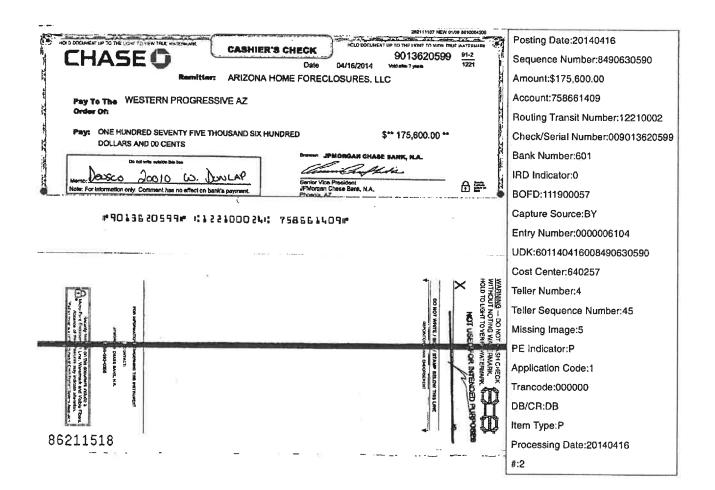
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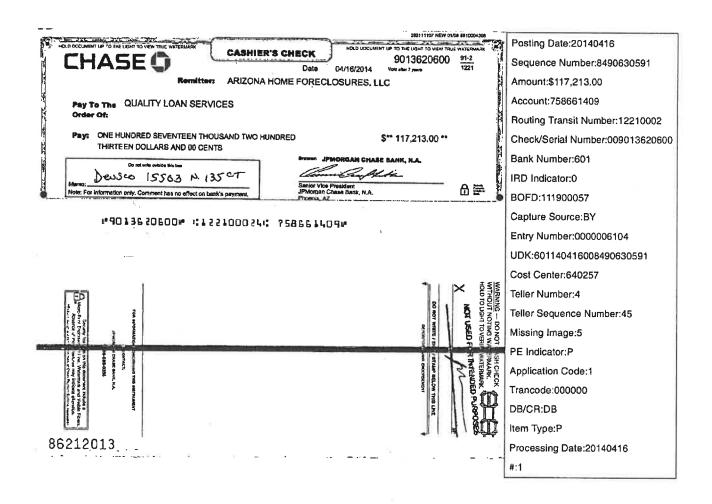
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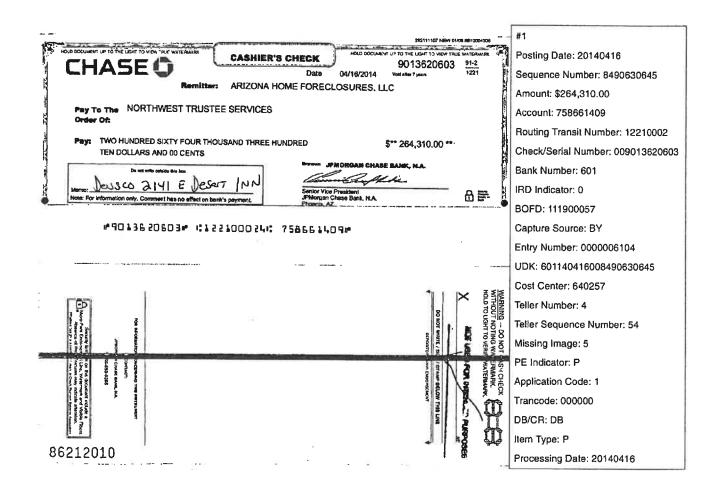
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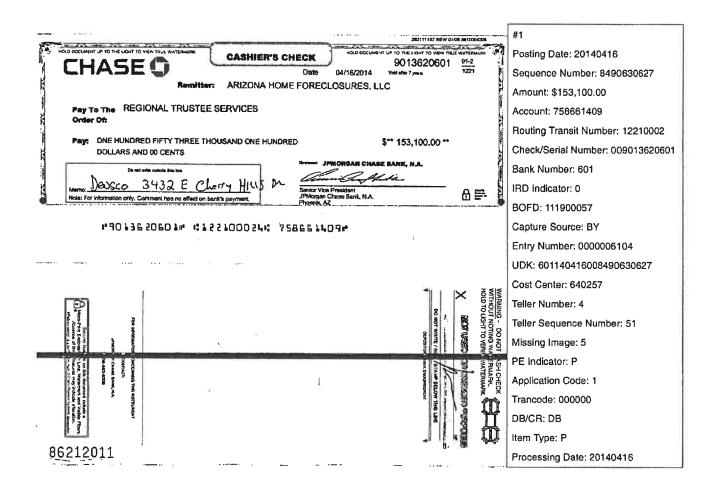
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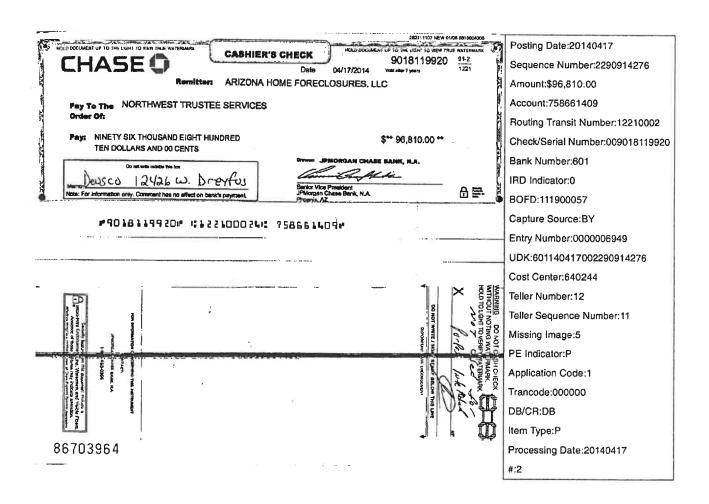
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m	7,5	0-01	CHECK	•	
PO	Sign Here (If cash is received from this deposit)	TOTAL FROM OTHER SIDE	•		
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7	Start your accord	int number here (S115)	- CASH BACK TOTAL	▶ .\$	15310000
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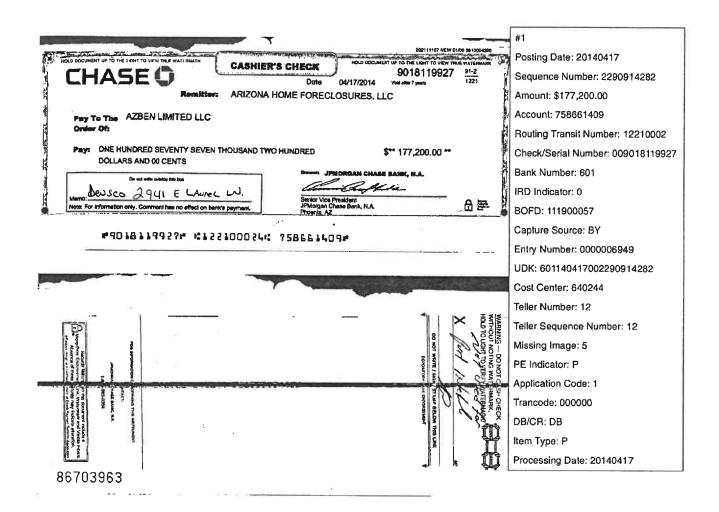
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Sequence number 008490630650 Posting date 16-Apr-14 Amount 264310.00

	CHASE O	DEPOSIT	CHECKING G SAVINGS G CHASE LIQUID G	
	Today's Date, K/((a/))			FVT 500001020
DEPOSIT	Customer Name (Please Print) OM FOV MENUGED Sign Here (H cash is received from this deposit) X N13060-CH (Rev. 07/12) 40082737 C2/14	CASH	•	264310.00
		CHECK	•	•
		TOTAL FROM OTHER SIDE	•	
		SUBTOTAL	•	•
	▼ Start your account number here	CASH BACK	•	•
	54255115	TOTAL	. \$	264310.00

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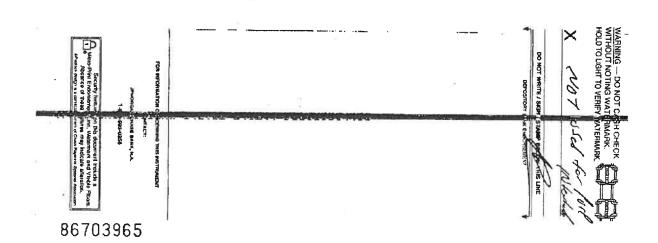
Sequence number 002290914274 Posting date 17-Apr-14 Amount 271419.00

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=		ount number here	E> CASH BACK		27 1419.00
Hª }	1180980664# #5000	Ö 10 501			

Sequence number 002290914275 Posting date 17-Apr-14 Amount 174609.00

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CHASE O	CASHIER'S CHECK	HOLD DOCUMENT UP	TO THE LIGHT TO VIEW THUS 9018119919	
LUADE (1)	Date		dafter7yeen	1221
Remitters	ARIZONA HOME FOREC	LOSURES, LLC		
Pay To The DAVID W. COWLES TO Order Of: Pay: ONE HUNDRED SEVENTY FOUR TO NINE DOLLARS AND 00 CENTS		\$**	174,609.00 **	
Do not write ownside this box		PHORGAN CHARE RA	HK, N.A.	
Memo: Deuts Co. 801 w Sy. Note: For Information only, Comment has no effect on bar		e President Chase Bank, N.A.	- 986	A =.

#4018119919# #122100024# 758661409#



Sequence number 002290914281 Posting date 17-Apr-14 Amount 177200.00

	CHASE O	DEPOSIT	CHECKING P SAVINGS (1) CHASE LIQUID 11
	Todat's Date TITLE Customer Name (Please Print) AZ Howe	Forclosunt CASH >	P/T 500001020
DEPOSI.	Sign Here (If cash is received from this deposit) X N13000-0H (Per. 97/12) 19979660 02/12	TOTAL FROM OTHER SIDE	177200.00
3	▼ Start your account number here 5	CASH BACK TOTAL \$	177 200.00
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