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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PETER S. DAVIS, as Receiver of DENSCO INVESTMENT CORPORATION, an Arizona corporation, Plaintiff, v. U.S. BANK, NA. a national banking organization; HILDA H. CHAVEZ and JOHN DOE CHAVEZ, a married couple; JPMORGAN CHASE BANK, N.A., a national banking organization; SAMANTHA NELSON f/k/a SAMANTHA KUMBALECK and KRISTOFER NELSON, a married couple, and VIKRAM DADLANI and JANE DOE DADLANI, a married couple, Defendants.	NO. CV2019-011499 **DEFENDANTS JPMORGAN CHASE BANK, N.A., SAMANTHA NELSON F/K/A SAMANTHA KUMBALECK, KRISTOFER NELSON, VIKRAM DADLANI AND JANE DOE DADLANI'S APPLICATION FOR ATTORNEYS' FEES AND COSTS** (Assigned to the Hon. Dewain D. Fox)

Pursuant to this Court's Minute Entries dated September 10, 2021 and November 21, 2023, and A.R.S. §§ 12-341 and 13-2314.04(A), Defendants JPMorgan Chase Bank, N.A. ("Chase"), Samantha Nelson f/k/a Samantha Kumbaleck, Kristopher Nelson, Vikram Dadlani, and Jane Doe Dadlani (collectively, the "Chase Defendants"), submit this application to recover $30,731.82 in costs and $1,338,232.19 in reasonable attorneys' fees incurred in defending Plaintiff's (the "Receiver") civil racketeering claim and obtaining an order of dismissal as to Chase and summary judgment as to the other Chase Defendants. Itemized statements of these amounts are attached as **Exhibits A and B** to the declaration of Paul J. Ferak filed in support of this application and attached hereto as **Exhibit 1**. This application is also supported by the declaration of local counsel Nicole M. Goodwin, attached as **Exhibit 2**, and the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. APPLICABLE STANDARDS

A. Awards of Costs

Pursuant to A.R.S. § 12-341, a "successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." Such costs include fees of officers and witnesses and costs of taking depositions, among others. A.R.S. § 12-332(A). An award of costs to the successful party under A.R.S. § 12-341 is mandatory and not subject to the trial court's discretion. *See In re $15,379 in U.S. Currency*, 241 Ariz. 462, 471 ¶ 26, 388 P.3d 856, 865 (App. 2016). Awards of costs to prevailing defendants are also expressly allowed under Arizona's anti-racketeering statute. *See* A.R.S. § 13-2314.04(A).

B. Awards of Attorneys' Fees

"If the person against whom a racketeering claim has been asserted, including a lien, prevails on that claim, the person may be awarded costs and reasonable attorney fees incurred in defense of that claim." A.R.S. § 13-2314.04(A). However, "[n]otwithstanding subsection A . . . a court shall not award costs, including attorney fees, if the award would be unjust because of special circumstances, including the relevant disparate economic

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position of the parties or the disproportionate amount of the costs . . . to the nature of the damage." A.R.S. § 13-2314.04(M). A trial court's decision in this context is reviewed for abuse of discretion. *Hannosh v. Segal*, 235 Ariz. 108, 114, ¶ 22, 328 P.3d 1049, 1056 (App. 2014).

Arizona courts have not outlined factors to guide this Court's determination whether to award attorneys' fees under the racketeering statute, but courts consider the following when exercising discretion to award fees under A.R.S. § 12-341.01:[1] (1) the merits of the unsuccessful party's claims or defenses; (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the results; (3) whether assessing fees against the unsuccessful party would cause an extreme hardship; (4) whether the successful party did not prevail with respect to all of the relief sought; (5) the novelty of the legal question presented; (6) whether such claim or defense had previously been adjudicated in this jurisdiction; and (7) whether the award in any particular case would discourage other parties from litigating legitimate claims or defenses for fear of incurring liability for substantial amounts of attorneys' fees. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

C. Determination of Reasonable Attorneys' Fees

The factors Arizona courts consider when determining a reasonable fee award are provided in *Schwartz v. Schwerin*, 85 Ariz. 242, 245-246, 336 P.2d 144, 146 (1959): (1) the advocates' ability, training, education, experience, professional standing, and skill; (2) the character of the work to be done: including its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed, and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.

[1] A.R.S. § 12-341.01 allows the successful party in an action "arising out of a contract" to recover its reasonable attorneys' fees. Similar to A.R.S. § 13-2314.04(A), decisions whether to award fees and how much to award under A.R.S. § 12-341.01 are matters of judicial discretion.

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How the factors are to be used in calculating a reasonable fee is set forth in *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) ("*China Doll*"). *China Doll* instructs that the beginning point is the determination of the actual billing rate charged by counsel. The Court then looks to the number of hours expended. 138 Ariz. At 187-188, 673 P.2d at 931-932. The prevailing party is "entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit" of the matter. *Id*. (internal quotations omitted). "[N]o one element should predominate or be given undue weight." *Id*. at 187, 673 P.2d at 931.

II. ARGUMENT

A. Chase Defendants should be awarded $30,731.82 in costs

As **Exhibit A** to the Ferak Declaration establishes, Chase Defendants have incurred $30,731.82 in costs since the inception of this action in 2019. Such costs include court filing, deposition, and pro hac vice fees. The Receiver cannot oppose an award of these costs, as their award is mandatory under A.R.S. § 12-341. *In re $15,379 in U.S. Currency*, 241 Ariz. at 471 ¶ 26, 388 P.3d at 865. Chase Defendants prevailed on <u>all</u> claims asserted against them and are undeniably the successful party as opposed to the Receiver. *See Hooper v. Truly Nolen of Am., Inc.*, 171 Ariz. 692, 695, 832 P.2d 709, 712 (App. 1992) (awarding defendants their costs and noting that relief under A.R.S. § 12-341 is "equally available to those who successfully defend an action as to those who successfully seek affirmative relief") (citation omitted).

B. Chase Defendants should be awarded $1,338,232.19 in attorneys' fees

1. <u>An award is warranted under A.R.S. § 13-2314.04(A)</u>

Chase Defendants' seek an award of their reasonable attorneys' fees associated with the defense of the Receiver's "Civil Racketeering" claim (Count Eight of the Receiver's Second and Third Amended Complaints) under A.R.S. § 13-2314.04(A). (*See* 2d Am. Cmpl. ¶ 160 (alleging Chase Defendants' liability for "the conduct of Menaged, Castro and others" under A.R.S. § 13-2314.04(L)); 3d Am. Cmpl. ¶ 163 (same).)

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Count Eight was dismissed against Chase under Rule 12(b)(6) because the Receiver did not – and could not – allege that a director or high managerial agent of the bank was involved in any racketeering acts, which is a prerequisite to Enterprise liability under A.R.S. § 13-2314.04(L). *See* Under Advisement Ruling filed Sept. 13, 2021 at 11. The Receiver also failed to state a valid claim against Chase because it alleged no predicate racketeering offense committed by a Chase agent. *Id*. at 12. Chase, therefore, prevailed on this claim in full.

Summary judgment on Count Eight was granted to Defendants Samantha and Kristofer Nelson, Vikram Dadlani, and Jane Doe Dadlani because (1) the Receiver lacked standing to pursue a civil racketeering claim against them, (2) the claim was barred by the statute of limitations, and (3) "the record here is devoid of evidence demonstrating" these branch employees knew that Menaged was involved in criminal conduct. *See* Under Advisement Ruling on Motions for Summary Judgment filed Nov. 21, 2023 at 20-21, 22-24. The individual Chase Defendants, therefore, prevailed on this claim in full.

2. All *Warner* factors weigh in favor of awarding Chase Defendants their reasonable attorneys' fees

Each of the factors set forth in *Associated Indemnity Corp. v. Warner* weighs in favor of awarding Chase Defendants their reasonable attorneys' fees. First, the dismissal of Count Eight against Chase confirms that the Receiver's racketeering claim lacked any merit as to the bank, and the grant of summary judgment in favor of the other Chase Defendants confirms the Receiver had no standing or evidence to recover from them and was time-barred anyway. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) ("The motions for directed verdict and for summary judgment serve the same purpose of expediting the business of the court by removing meritless claims.").

Second, there is nothing Chase Defendants could have done to avoid being sued by the Receiver. *See Maguire v. Coltrell*, No. CV-14-01255-PHX-DGC, 2015 WL 3999188, at *3 (D. Ariz. July 1, 2015) ("…there is no evidence that [defendant] could have avoided the litigation; Plaintiff chose to sue him.").

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Third, the Receiver will not suffer extreme hardship by paying Chase Defendants' reasonable attorney's fees. The Receiver filed a petition on October 4, 2023 in the DenSco receivership action, Maricopa County Superior Court Case No. CV2016-014142, seeking approval to pay a $699,999 distribution to creditors, which would leave the DenSco estate with approximately $2,000,000 in cash, which is more than Chase Defendants seek. *See* Receiver's Petition to Approve Fifth Interim Distribution to Creditors, copy attached hereto as **Exhibit 3**. DenSco has no ongoing business operations and minimal expenses. While the Receiver's most recent petition to pay distributions refers to a need to compensate the Receiver's Special Counsel for legal fees and expenses in ongoing litigation, Chase Defendants are aware of no other litigation besides the instant case, and the Receiver's counsel accepted the matter on contingency. *See id*. at ¶ 10; Exhibit A (Fee Agreement) to Receiver's Petition for Order to Approve the Engagement of Osborn Maledon, P.A., to Represent the Receiver as Special Counsel, filed October 21, 2020, copy attached as **Exhibit 4** (providing that the Receiver bore no responsibility for attorneys' fees *or* expenses absent a judgment or settlement in its favor).

Fourth, Chase Defendants were entirely successful in their defense of the racketeering claim and the Receiver recovered nothing on it.

Fifth, the legal issues involved, despite the Receiver's attempt to redefine them to save its case, were not novel. There is ample precedent that Arizona's racketeering statute and its federal corollary do not support the Receiver's theory of liability as to any of the Chase Defendants. The standing and statute of limitations issues were not novel either – it is axiomatic that a receiver stands in the shoes of the entity it is appointed to manage and control and the Receiver's own allegations showed that it knew the basis of its (otherwise flawed) claim more than three years before it was filed.

Sixth, while aspects of the racketeering claim and Chase Defendants' defenses have not been adjudicated in this jurisdiction previously, other aspects relied upon well settled law. Chase Defendants' statute of limitation defense was based in longstanding Arizona precedent and the Court referred to Arizona authority in determining that neither Nelson

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nor Dadlani was a "high managerial agent" of Chase as was necessary to state a claim against the bank under A.R.S. § 13-2314.04(L).

Finally, awarding Chase Defendants their reasonable attorneys' fees would not discourage other parties with tenable claims from litigating them for fear of incurring liability for substantial amounts of attorneys' fees. To the contrary, an award of attorneys' fees would deter other parties from litigating spurious claims against innocent parties and wasting valuable judicial resources. *See All-Way Leasing v. Kelly*, 182 Ariz. 213, 218-219, 895 P.2d 125, 130-131 (App. 1994) (holding that one purpose of A.R.S. § 12-341.01(A) is to notify parties with untenable claims that if they pursue those claims, attorneys' fees awards are a risk they must consider before filing). Thus, all *Warner* factors support the award of reasonable attorneys' fees to the Chase Defendants.

3. The attorneys' fees award Chase Defendants seek is reasonable

China Doll instructs that the beginning point in evaluating reasonable attorney's fees in a commercial litigation action like this one is the determination of the actual billing rate charged by counsel. 138 Ariz. at 187, 673 P.2d at 931. "[I]n corporate and commercial litigation between fee-paying clients, there is no need to determine the reasonable hourly rate prevailing in the community for similar work because the rate charged by the lawyer to the client is the best indication of what is reasonable under the circumstances of the particular case." *Id.* at 187-188, 673 P.2d at 931-932. Here, the billing rates charged to Chase Defendants were significantly discounted by Greenberg Traurig in recognition of its relationship with Chase, despite the complexity and high value of the Receiver's claims.

Arizona courts next look to the number of hours expended. *Id.* at 188, 673 P.2d at 932. Attached to this application as **Exhibit 1** is the declaration of Paul J. Ferak, counsel for Chase Defendants. Mr. Ferak's declaration attaches an itemization of legal expenses for which Chase Defendants seek recovery created from contemporaneous time records. The itemization details the tasks performed, the length of time performing tasks in tenths of an hour, the attorney or paralegal who performed the work, the standard billing rate of each attorney and paralegal and their agreed-upon billing rate. The hours expended on Chase

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Defendants' behalf and charged to Chase Defendants were reasonable. *See* Ex. 1 ¶¶ 10-12, Ex. 2 ¶ 3.

Chase Defendants were conservative in their calculation of a reasonable attorney fee for defense of the Receiver's failed racketeering claim. The fees requested are approximately 40% of the total fees incurred by Chase Defendants. *See* Ex. 1 ¶¶ 7-8. The Receiver's other claim, aiding and abetting fraud, overlapped substantially with the racketeering claim in that both sought to hold Chase Defendants responsible for the same acts committed by Scott Menaged. Whether Chase Defendants knew Menaged's conduct constituted a tort and substantially assisted him in carrying it out (necessary elements of the aiding and abetting theory) is inextricably interwoven with the Receiver's claim that Chase Defendants "authorized, requested, commanded, ratified or recklessly tolerated [] unlawful conduct of [Menaged]" (a necessary element of racketeering liability). A.R.S. § 13-2314.04(L). Arizona Courts allow prevailing parties to recover both for contract claims and tort claims when such are closely intertwined, as the Receiver's racketeering and tort claims were here. *See, e.g. Modular Min. Sys. V. Jigsaw Techs.*, 221 Ariz. 515, 522, ¶¶ 23-25, 212 P.3d 853, 860-861 (App. 2009) (awarding fees for breach of contract and trade secrets claims under A.R.S. § 12-341.01 where both were based on the same set of facts with common allegations of wrongdoing, requiring the same factual development, research work, and discovery and disclosure tasks). While the same concept should apply here, Chase Defendants seek half of the value of counsel's work that was equally necessary to defend the racketeering and aiding and abetting fraud claims. *See* Ex. 1 ¶¶ 8(a)-(g).

As to the other factors described in *Schwartz v. Schwerin*, 85 Ariz. at 245-246, 336 P.2d at 146, the Court has had the opportunity to observe and assess the high work quality of Chase Defendants' counsel (factor 1). The racketeering claim includes elements requiring proof of defendants and non-parties' knowledge, motivations, and actions, which prompted extensive deposition and written discovery practice, dozens of Rule 26.1 disclosures, and the collection, review, and production of copious amounts of documents and electronically stored information (factor 2).

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Throughout this case, the Receiver's unreasonable conduct caused Chase Defendants to incur fees (factor 3). Chase Defendants moved to dismiss the racketeering claim on April 7, 2021, which was successful as to Chase and should have prompted the withdrawal of that claim against Nelson and Dadlani. However, despite the Receiver having no evidence that the branch employees knew anything about the wrongdoing Menaged was engaged in, and despite there being dubious prospects to recover any significant amount from Nelson and Dadlani even if discovery might reveal a basis for the claim, the Receiver pressed on for two years. The discovery process was entirely unhelpful to the Receiver. Far from supporting the Receiver's conjecture that Nelson or Dadlani were aware of Menaged's fraud scheme and "authorized," "ratified," or "recklessly tolerated it," discovery confirmed they did not have knowledge that Menaged's conduct was criminal or fraudulent. Discovery also confirmed that Nelson actually made two internal reports regarding Menaged's accounts and informed the Receiver that the bank considered those reports and analyzed Menaged's activity multiple other times without finding sufficient evidence of wrongdoing, such that the Receiver knew Nelson and Dadlani were simply doing their jobs by continuing to service Menaged's account relationship with Chase. Chase Defendants were forced to file a motion for summary judgment to eliminate the racketeering claim against Nelson and Dadlani, by which point it was also apparent that the claim was barred by the statute of limitations and that the Receiver lacked standing to pursue the claim. The Receiver fought to continue the claim nonetheless. There is no just reason to give the Receiver a reprieve from compensating Chase Defendants for the Receiver's expensive litigation strategy.

Finally, Chase Defendants prevailed on all aspects of the racketeering claim and on all other claims asserted against them by the Receiver (factor 4). This was a complete win against the Receiver's baseless claims and Chase Defendants should be reimbursed for all their reasonable attorneys' fees eligible for an award.

1. A.R.S. § 13-2314.04(M) does not prohibit an award

A.R.S. § 13-2314.04(M) prohibits the Court from making an award of attorneys' fees "if the award would be unjust because of special circumstances, including the relevant

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disparate economic position of the parties or the disproportionate amount of the costs, including attorney fees, to the nature of the damage or other relief obtained." This language has not been construed by Arizona's appellate courts. On its face, subsection M only precludes an award the Court determines would be unjust under the unique circumstances of the case.

The award Chase Defendants request is well within the Receiver's ability to pay. And it pales in comparison to the damages the Receiver purported to be seeking, which exceeded $30,000,000. Thus, there are no special circumstances present that would make it unjust to award Chase Defendants $1,338,232.19 in reasonable attorneys' fees associated with the Receiver's failed racketeering claim. The Court should therefore award that amount.

III. CONCLUSION

For the foregoing reasons, the Court should award Chase Defendants $30,731.82 in costs and $1,338,232.19 in reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and 13-2314.04(A).

DATED this 12th day of December 2023.

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ORIGINAL of the foregoing e-filed with the Clerk of Court this 12th day of December, 2023.

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