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Kenneth Frakes, #021776
Kevin Kasarjian, #020523
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Telephone: (602) 888-7855
Facsimile: (602) 888-7856
kfrakes@bfsolaw.com
kkasarjian@bfsolaw.com
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE COUNTY OF MARICOPA

PETER S. DAVIS, as Receiver of DENSCO INVESTMENT CORPORATION, an Arizona corporation, Plaintiff, vs. U.S. BANK, NA, a national banking organization; HILDA H. CHAVEZ and JOHN DOE CHAVEZ, a married couple; JP MORGAN 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.	Case No.: CV 2019-011499 **PLAINTIFF'S RESPONSE TO MOTION TO DISMISS FILED BY THE CHASE DEFENDANTS** (Assigned to the Hon. Daniel Martin) **(Oral Argument Requested)**

Plaintiff, Peter S. Davis, as Receiver of DenSco Investment Corporation ("Receiver"), responds to the Motion to Dismiss filed by JP Morgan Chase Bank, NA, Samantha Nelson, Kristopher Nelson, Vikram Dadlani, and Jane Doe Dadlani (collectively "Chase" or "Chase Defendants"). The Motion should be denied because (1) the Receiver filed his Complaint less than three years after he uncovered both the Second Fraud and the Chase Defendants' involvement in it, (2) it is indisputable that Menaged defrauded DenSco, and (3) the Complaint contains sufficient factual allegations of the Chase Defendant's knowledge of, and substantial assistance to, the Second Fraud.

I. FACTUAL BACKGROUND

Yomtov Scott Menaged ("Menaged") defrauded DenSco in excess of $46 million dollars between 2011 through 2016. *See* First Amended Complaint ("FAC") at ¶ 16. Menaged and his companies, Arizona Home Foreclosures, LLC and Easy Investments, misappropriated these funds by two separate and distinct fraudulent schemes promulgated upon DenSco, the unwitting victim.

Menaged orchestrated the "First Fraud" between 2011 and 2013. (FAC ¶ 24.) Essentially, DenSco's lax lending practices enabled Menaged to obtain two mortgages on real estate that he purchased at foreclosure auctions. (FAC ¶¶ 23-25.) Both lenders believed they were the only lender and the sole creditor in first position. (FAC ¶ 23.)

DenSco discovered the First Fraud in November 2013. (FAC ¶ 26.) Rather than immediately pursuing legal action, DenSco instead elected to enter into a Forbearance Agreement whereby Menaged guaranteed the repayment of $37,420,120.47 to DenSco, agreed to liquidate other assets valued at approximately $4 to $5 million, and use rental income from his properties and other means to repay the amounts owed. (FAC ¶¶ 35-36.)

DenSco continued doing business with Menaged as a means to recover the losses caused by the First Fraud. (FAC ¶¶ 37-42.) DenSco added safeguards for future loans by requiring Menaged to provide copies of the specific cashier's checks issued by Menaged's banks made payable to the respective foreclosure trustee with the property address in the

memo line, as well as a copy of the receipt which Menaged received from the foreclosure trustee for the purchase of a real property at a trustee's sale. (FAC ¶¶ 46-47.)

Unfortunately, Menaged contrived a second fraudulent scheme (the "Second Fraud") designed to circumvent these additional safeguards to obtain over 1,400 new loans from DenSco between January 2014 and June 2016. (FAC ¶¶ 48-53.) Amazingly, Menaged convinced both U.S. Bank and Chase to issue actual cashier's checks, complete with the name of the Trustee who he pretended was conducting a foreclosure sale of a parcel of real estate. (FAC ¶¶ 103-105; 151-153.) Each cashier's check contained the address of the property supposedly being purchased and had DenSco's name in the memo line, further memorializing the purported use of DenSco's funds. *Id*. Tragically, Menaged and the Chase Defendants knew that Menaged never intended to use over 1,400 cashier's checks to purchase any properties. Menaged, with the material assistance of the Chase Defendants, took a picture of each cashier's check to send to DenSco and then immediately re-deposited the check into his bank account and used these funds for his own gain. (FAC ¶¶ 179-180, 183-189, 191) Menaged then falsified a trustee's sales receipt purporting to evidence the purchase of a real property that never happened. (FAC ¶ 168.) These forged sales receipts typically contained information directly from the cashier's check issued and redeposited by Chase, providing further legitimacy to DenSco. (FAC ¶ 169.)

Denny Chittick was the sole owner, shareholder, officer and employee of DenSco. (FAC ¶ 2). Chittick committed suicide on July 28, 2016. (FAC ¶ 68.) He did not know about the Second Fraud before his death. (FAC ¶ 69.) He knew that Menaged filed for Chapter 7 bankruptcy in April 2016, at a time when Menaged and his companies owed DenSco $30 million in loans. (FAC ¶¶ 62-63.) Menaged lied to Chittick and told him that DenSco's money was safe and was being held at Auction.com, an online marketplace for foreclosure buyers. (FAC ¶ 64.) Menaged also lied and told Chittick that he could retrieve the money owed to DenSco from Auction.com as soon as the bankruptcy action was discharged. (FAC ¶ 65.) Menaged told Chittick that the bankruptcy court would seize the money if it discovered

it. (FAC ¶ 66.) He also threatened to testify that Chittick was complicit in the First Fraud if Chittick told anyone about Auction.com. (FAC ¶ 67.) Based on these misrepresentations, Chittick believed that DenSco's money was tied up at Auction.com pursuant to some agreement, the details of which he did not fully understand, and that Menaged was unable to repay DenSco the money owed until after the bankruptcy matter was discharged. (FAC ¶ 70.)

The Receiver was appointed on August 18, 2016. Through diligent efforts and exhaustive investigation, he first discovered the existence and nature of the Second Fraud in approximately December 2016, although the full extent of it would not be known until at least June 2017. (FAC ¶¶ 71-82.) During this investigation, the Receiver came to understand how the defendants aided and abetted Menaged to commit the Second Fraud through the substantial assistance they provided that allowed him to "issue" over 1,400 cashier's checks whose sole purpose was to be photographed so that Menaged could present them as legitimate to DenSco. *Id.* The Receiver subsequently filed his Complaint on August 16, 2019, which is well within three years after discovering the Second Fraud.[1]

II. LEGAL ANALYSIS

A. The Receiver Filed Its Complaint Within Three Years After Discovering the Facts Constituting the Second Fraud.

Chase argues that the Receiver's claims against them are time barred because the Receiver filed the Complaint more than three years after the last transaction with Chase occurred (June 2016), and more than five-and-a-half years after DenSco discovered the First Fraud in November 2013. This argument ignores any analysis of when the Receiver's causes of action actually accrued and the facts that the Receiver alleged. They are premised upon (1) taking the Receiver's allegations *as false*, rather than true; and (2) resolving factual disputes at the pleading stage based on an undeveloped record. This is improper.

[1] Even if the Receiver discovered the fraud on the first day of his appointment, the complaint is still timely.

1. A Statute of Limitations Cannot Run Before the Tort Occurred.

The Chase Defendants argue that the statute of limitations on the Receiver's aiding and abetting claim began to run in November of 2013 when DenSco discovered the First Fraud. Motion, p. 1, ll. 19-23. This is a peculiar argument since Chase did not begin aiding and abetting Menaged in defrauding DenSco until April 2014. (FAC ¶¶ 47, 139, 144.) It is impossible for the statute of limitations of the aiding abetting claims to begin to run *before* Chase actually aided and abetted Menaged.

Courts should not apply the statute of limitations in such a way that (1) either immunizes defendants from torts that have not occurred; or (2) shortens the limitation period such that the statute would not allow the Plaintiff the full period of time to investigate and discover the facts of the claim. Doing so is contrary to the statutory purpose of eliminating stale claims and runs afoul with Arizona's general policy favoring resolution of disputes on the merits. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 590 (1995).

If the statute of limitations began to run in November of 2013, then it began to run before the Chase Defendants ever committed the tort, and would have expired in November 2016, a mere five months after Chase stopped aiding and abetting Menaged's fraud. This would immunize the Chase Defendants for their tortious conduct that had not yet occurred and drastically shorten the length of the statute of limitations by such an extent that DenSco would have had mere months to discover their bad acts and to bring this claim. Such a result is contrary to Arizona Law. *Gust,* 182 Ariz. at 590.

2. The Cause of Action Did Not Accrue Until the Receiver Discovered Chase Aided and Abetted the Second Fraud.

When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury. *Gust,* 182 Ariz. at 591. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id*. at 588. The plaintiff must

"possess a minimum requisite of knowledge sufficient to identify that a wrong has occurred and caused injury." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32 (1998). The plaintiff must also have reason to connect the "what" to a particular "who." *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 22 (2002).

The statute of limitations for aiding and abetting fraud is three years. A.R.S. § 12-543(3). A cause of action for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* Here, any statute of limitations did not accrue until the Receiver discovered, or through the exercise of reasonable diligence might have discovered, that Chase aided and abetted Menaged in furtherance of the Second Fraud. *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 358, 701 P.2d 851, 854 (App. 1985) (holding that the discovery date in A.R.S. § 12-543 begins at the time the defrauded party, by exercise of reasonable diligence, might have discovered the fraud); *see also Merck & Co, Inc. v. Reynolds*, 559 U.S. 633, 651-653 (2010) (statute of limitations begins when plaintiff discovers or a reasonably diligent plaintiff would have discovered the facts constituting the violation; discovery of facts that only put a plaintiff on "inquiry notice" does not automatically begin the running of the limitations period).

Chase argues there is no distinction between the First Fraud and the Second Fraud and that Menaged committed only one continuous fraudulent scheme, which DenSco discovered in November 2013. This argument disregards the facts and is another example of Chase refusing to take the Receiver's allegations as true.

The FAC sets forth in detail the history of both the First Fraud and the Second Fraud, how and when Menaged committed each separate fraud, and how each fraud was discovered. (FAC ¶¶ 16-82.) The Receiver alleged how, after DenSco discovered the First Fraud, it entered into a Forbearance Agreement with Menaged whereby DenSco agreed to forbear its rights against Menaged, provided that Menaged repaid the amounts owed to DenSco. (FAC ¶ 35.) DenSco entered into the Forbearance Agreement believing that this was the best way to recover the funds that it discovered had been misappropriated by the First Fraud. (FAC ¶¶

35-38.)

As part of the Forbearance Agreement, DenSco agreed to lend additional money to Menaged for the purchase of real estate from foreclosure auctions. (FAC ¶ 37.) DenSco agreed to do this to help Menaged repay the substantial amounts that were misappropriated by the First Fraud. (FAC ¶ 38.) Menaged took advantage of this by devising an entirely new scheme to defraud DenSco. (FAC ¶¶ 47-61.) DenSco believed Menaged was using the loan proceeds for their intended purpose of purchasing foreclosed properties. (FAC ¶ 59.) Had DenSco known that Menaged was not using the loan proceeds for their intended purpose, it would have put a stop to it just as it did when it discovered the First Fraud.

The Receiver was appointed on August 18, 2016. (FAC ¶ 3.) A few days later, the Receiver first became vaguely aware of the lending procedures DenSco and Menaged used after the First Fraud. (FAC ¶ 72.) The Receiver immediately began an investigation to track the funds DenSco loaned to Menaged. (FAC ¶ 73.) The Receiver discovered that Menaged did not use the funds obtained from DenSco for the purpose they were intended. (FAC ¶ 74.) The Receiver obtained a forensic image of Menaged's computers and cell phone on or around October 3, 2016, in which it located emails from Menaged to Chase. (FAC ¶¶ 75-76.) The Receiver deposed Menaged on October 20, 2016 and issued subpoenas to U.S. Bank and Chase in November 2016. (FAC ¶¶ 77-78.) The Receiver ultimately performed a complete forensic recreation of Menaged banking activities. (FAC ¶ 80.) It was only when the Receiver completed a draft of that forensic investigation on or around June 13, 2017, that he finally understood the facts and losses involving the Second Fraud. (FAC ¶ 81.)

These and other allegations in the First Amended Complaint, which must be assumed as true, show that Receiver's claims against Chase did not accrue until around June 13, 2017. It was the Receiver's thorough and painstaking investigation that uncovered the Second Fraud. That investigation began after the Receiver was appointed on August 18, 2016. The Receiver filed its Complaint on August 16, 2019, less than three years after his appointment. The statute of limitations does not, therefore, bar the Receiver's claims.

3. Even under a Continuous Fraud Theory, Claims for Menaged's Misconduct after November 2013 Did Not Accrue Until Discovery.

Even assuming for the sake of argument that there was just one continuous fraud, the Court still cannot apply the statute of limitations in the manner that the Chase Defendants urge it to. It is inconsistent with case law recognizing partial survival of claims otherwise time-barred where the underlying acts arise from continuing duties and discrete instances of performance. *See Doe*, 191 Ariz. at 325, ¶ 39 & n.12 (declining to address questions regarding application of statute of limitations on separate or continuous tort theory, but noting a 1906 Arizona case posing hypothetical repeated-trespass scenario and stating that purpose and effect of statute of limitations would not be served were years-later claim barred with respect to recent trespasses "for no other reason than ... tolerat[ion of] [some of] the acts for years beyond the period of statutory limitation" (second alteration in original)).[2]

The allegations in the First Amended Complaint, which must be accepted as true, clearly set forth that while DenSco discovered Menaged's fraudulent conduct *through* November 2013, DenSco did not know that Menaged continued to defraud it *after that date* as Menaged, with Chase's help, went to great lengths to keep DenSco from learning the truth. It was not until after the Receiver was appointed that Menaged's fraudulent conduct after November 2013, as well as the Chase Defendants' tortious conduct, became known.

4. Courts Don't Resolve Fact Disputes on An Undeveloped Record.

Chase argued that several of Chittick's journal entries prove there was only one continuous fraud, and that Chittick was aware of the Second Fraud before his death. These journal entries are not the smoking gun Chase portends them to be. Several of the entries are

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[2] *Anonymous Wife v. Anonymous Husband*, 153 Ariz. 573, 578 (1987) (holding that stepfather's claim for child-support reimbursement from child's biological father was not wholly time-barred because biological father had continuing obligation, meaning that new cause of action for reimbursement accrued each time stepfather expended funds from his share of community estate to support child); *Builders Supply Corp. v. Marshall*, 88 Ariz. 89, 95 (1960) (holding that claim for breach of contract based on underpayments was not wholly time-barred because each successive underpayment constituted separate breach).

taken out of context, and not once does Chittick conclusively state that he was aware that Menaged defrauded DenSco after November 2013. In fact, read as a whole these documents support the Receiver's allegations.

The sentences set for in DIC0009473[3] where Chittick states that in his estimation there was "some kind of fraud" refers to the First Fraud. It is clear, however, that Chittick doesn't believe that Menaged was defrauding DenSco at this time because he believed DenSco proceeds were tied up in Auction.com and it was Menaged's bankruptcy that prevented Menaged from returning the amounts owed to DenSco. DIC0009472-75. Discussing Menaged's bankruptcy, Chittick states "this of course was the stupidest thing for him to do" . . . . "because of the BK they won't return the money to Scott or me that is owed." DIC0009474. We know now this was a lie because Menaged used the DenSco proceeds for his personal gain. This entry supports the Receiver's allegations that Chittick was unaware of the Second Fraud because Menaged misrepresented to him that the DenSco funds were being held in Auction.com (FAC ¶ 64), and his bankruptcy was preventing the return of DenSco's funds (FAC ¶ 66).

At best, the journal entries create a fact dispute about whether, and to what extent, Chittick knew of the Second Fraud.[4] The First Amended Complaint contains several non-conclusory allegations that, if assumed as true, demonstrate that Chittick *did not know* about it. (FAC ¶¶ 62-82.) It is up to the fact finder to determine whether the journal entries contradict these allegations. In ruling on a Rule 12(b)(6) motion to dismiss, "a court does not resolve factual disputes between the parties on an undeveloped record. Instead, the issue is whether the pleading states a sufficient claim to warrant allowing the [plaintiff] to attempt to prove [its] case." *Coleman v. City of Mesa*, 230 Ariz. 352, 363, ¶ 46 (2012).

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[3] These Excerpts are from Exhibit E of Chase's Motion. DIC0009473-75 are attached hereto as **Exhibit A** for the Court's convenience.

[4] Chase attached hundreds of documents, takes a few sentences out of context, and wants this Court to ignore the Receiver's allegations with no opportunity to develop the record.

5. Under the Doctrine of Adverse Domination, the Statute of Limitations Did Not Accrue Before the Receiver's Appointment.

If Chittick was aware of the Second Fraud, the Receiver's claims against the Chase Defendants are tolled by the doctrine of adverse domination. Under this doctrine, the statute of limitations for an entity's claim is tolled when the entity is controlled or dominated by individuals engaged in conduct that is harmful to the entity. *F.D.I.C. v Jackson*, 133 F.3d 694, 698 (9th Cir. 1998); *Warfield v. Carnie*, 2007 WL 1112591, at *15 (N.D. Tx. April 13, 2007). The doctrine applies in cases where the directors' control of a corporation reasonably prevented others from discovering the directors' wrongdoing. *Resolution Trust Corp. v. Blasdell*, 930 F. Supp. 417, 429-430 (D. Ariz. 1994). The doctrine recognizes that an entity is paralyzed to protect itself against officers who have engaged in wrongdoing by ensuring the statute of limitations begins to run only when the wrongdoers lose control of the entity. *Shapo v. O'Shaughnessy*, 246 F. Supp. 2d 935, 953 (N.D. Ill. 2002).

While the adverse domination doctrine typically applies to an entity's claims asserted against its own wrongdoing officers, courts have also applied it to toll an entities' claims against third parties under the theory that the wrongdoing officers and directors would not bring claims against culpable third parties on behalf of the entity out of fear that it would bring their own misconduct to light. *See, e.g., Damian v. A-Mark Precious Metals, Inc*., 2017 WL 6940515, at *4-5 (C.D. Cal. Aug. 28, 2017) (holding the adverse domination doctrine applies to claims against third parties); *In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig*., 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (applying the adverse domination doctrine against a law firm that was alleged to have been part of the wrongdoing); *Admiralty Fund v. Peerless Ins. Co*., 143 Cal.App.3d 379, 390 (Cal. App. 1983) (holding that the adverse domination doctrine could apply in a suit against a third-party insurance company where the plaintiff corporation claimed that it was prevented from discovering its loss until the "wrongdoer employees" were removed).

If Menaged committed one continuous fraud and Chittick continued lending money to

Menaged even though he knew Menaged was misappropriating it, that would be a clear breach of the fiduciary duties he owed to DenSco and the adverse domination would apply to toll the statute of limitations until after the Receiver was appointed. Additionally, the adverse domination doctrine also applies if, as the Receiver has alleged, Chittick was not aware of the mechanics of the Second Fraud or of the substantial assistance Chase provided. There is evidence that Chittick, as the sole director and shareholder of DenSco, breached his fiduciary duties to DenSco by, among other things, engaging in a course of conduct designed to conceal the full nature and extent of the First Fraud from DenSco's investors and creditors. This included, among other things, an effort to conceal the First Fraud from the investors, how his own failures allowed the First Fraud to occur, and how his agreement to a workout plan (the Forbearance Agreement) with Menaged in response to the First Fraud was not in the best interests of DenSco, its investors, and other creditors.[5] (FAC ¶¶ 29-45.)

Because Chittick, who had total control of DenSco, breached his fiduciary duties to DenSco to prevent his own mismanagement from coming to light, the statute of limitations on DenSco's claims against Chase are tolled at least until the date of the Receiver's appointment, which was less than three years before the Receiver filed the Complaint.

B. It Is Indisputable That Menaged Defrauded DenSco.

The Chase Defendants next make a truly incredible argument. They argue the Receiver cannot state a claim against them for aiding and abetting the Second Fraud because Menaged *did not commit actionable fraud* when he (1) misrepresented that he was the winning bidder on properties that were sold at a trustee's sale, (2) misrepresented that he needed financing to purchase these properties, (3) requested that DenSco loan the funds required to complete the purchase of the properties, (4) misrepresented that he would secure the loans with deeds of trusts recorded against the properties, and (5) instead used the loan

[5] These and other issues regarding Chittick's breaches of his fiduciary duties to DenSco have been addressed at length in the Receiver's companion litigation also before this Court, *Davis v Clark Hill*, CV2017-013832. Those pleadings are a matter of public record.

proceeds obtained from DenSco for his own personal benefit. (FAC ¶¶ 49-61.) Chase argues this even though Menaged was indicted and pled guilty to Conspiracy to Commit Bank Fraud, Aggravated Identity Theft, and Money Laundering Conspiracy, and was sentenced to prison for 17 years. (FAC ¶¶ 83, 85-86.) He also entered into a Settlement Agreement with the Receiver consenting to the entry of a nondischargeable civil judgment against him in the amount of $31 million dollars. (FAC ¶ 84.)

Despite all of that, the Chase Defendants argue that DenSco could not prevail on a fraud claim against Menaged because it could not prove that it justifiably relied on Menaged's misrepresentations in committing the Second Fraud due to its knowledge of the First Fraud.

This is nonsense. Menaged committed two separate and distinct fraudulent schemes against DenSco. Menaged orchestrated the First Fraud by obtaining two loans from separate lenders who believed they were the only lender and would be the only secured creditor on properties that were actually purchased. (FAC ¶¶ 23-25.) Menaged orchestrated the Second Fraud by creating falsified checks, deeds, contracts, and receipts for properties that he never actually purchased. (FAC ¶¶ 48-61.)

Moreover, while DenSco knew of the First Fraud, Menaged consistently maintained that it was actually his "cousin" who was responsible for committing the fraudulent scheme while Menaged cared for his sick wife. (FAC ¶ 28.) Menaged then entered into a Forbearance Agreement designed to help him to repay the losses from the First Fraud through the profits he received from future hard money loans for what DenSco believed was the purchase of real estate from foreclosure auctions. (FAC ¶¶ 35-38.) Upon the advice of legal counsel, DenSco enacted new lending procedures before agreeing to lend Menaged additional funds. (FAC ¶¶ 39-43, 47.) Despite new lending procedures that required the acquisition of a purportedly legitimate cashier's check from the Chase Defendants, Menaged deceived DenSco into believing the certified funds were being taken to a foreclosure Trustee to purchase real property, when Menaged and the Chase Defendants knew the cashier's checks were never allowed to leave Chase Bank.

DenSco's knowledge of the First Fraud does not mean, as a matter of law, that DenSco knew or had reason to know the misrepresentations Menaged made in connection with the Second Fraud were false. It certainly does not mean that Menaged did not defraud DenSco.

C. The Receiver Alleged That Chase Knew of Menaged's Scheme.

Chase argues that the Receiver failed to allege that Chase had knowledge of Menaged's fraudulent scheme. This is wrong. The Receiver alleged numerous facts demonstrating that Chase was "generally aware" of Menaged's scheme.

1. General Awareness May Be Inferred from the Circumstances.

Arizona law requires that "defendants must know that the conduct they are aiding and abetting is a tort." *Wells Fargo Bank v. Arizona Laborers,* 201 Ariz. 474, 485, 38 P.3d 12, 23 (2002). This requirement is satisfied by showing "*general awareness*" of the primary tortfeasor's scheme. *Dawson v. Withycombe*, 216 Ariz. 84, 102, 163 P.3d 1034, 1052 (App. 2007) (emphasis added). "A showing of actual and complete knowledge of the tort is not uniformly necessary . . . [and] can be met, even though the bank may not have known of all the details of the primary fraud—the misrepresentations, omissions, and other fraudulent practices." *Wells Fargo Bank*, 201 Ariz. at 488, 38 P.3d at 26. Instead, "such knowledge may *be inferred from the circumstances*." *Id.* at 485, 38 P.3d at 23 (emphasis added).

The *Wells Fargo Bank* Court held that the following evidence is sufficient to raise the inference that the bank knew the perpetrator was engaged in a fraud: (1) the bank knew the perpetrator was making representations to the Plaintiff related to the fraudulent scheme; and (2) the bank knew that these representations were false. *Id.* at 488, 38 P.3d at 26 (bank knew perpetrator made representations related to his financial condition to Plaintiff and bank knew that those representations were false).

In Arizona and other jurisdictions[6], courts have also held that a plaintiff properly

[6] Mass.: *Mansor v. JPMorgan Chase Bank N.A.*, 183 F. Supp. 3d 250, 270-72 (D. Mass. 2016)(knowledge can be inferred when the bank knew investors expected the funds to be used

alleged an aiding and abetting claim against a credit card company when, like a bank, it accepts wire transfers while knowing that the funds were fraudulently obtained and were used for the defrauder's benefit. *Koss Corp. v. American Exp. Co.*, 233 Ariz. 74, 93, ¶ 65, 303 P.3d 898, 917 (App. 2013) (a bank/credit card company may be liable for aiding and abetting the fraud by its customer without owing any duty to the victim).

2. The Receiver's Allegations Regarding Chase's General Awareness.

Here, the Receiver alleged that Chase was aware that (1) Menaged was providing assurances to DenSco that its proceeds were being used to purchase the properties, and (2) Chase knew these assurances were false. (FAC ¶ 179.) The Receiver also alleged that Chase knew that the funds DenSco loaned to Menaged were for purchased properties, but Menaged used those funds for his own personal gain:

- Chase knew that Menaged was in the business of purchasing foreclosed properties because he told Chase, and other Chase Defendants expressed interest in purchasing a foreclosed home. (FAC ¶¶ 173-175).

- Chase knew that DenSco loaned money to Menaged and AZHF for the purchase of foreclosed homes because (1) he told Chase this; and (2) DenSco would wire money to Chase and was listed as the "originator" of that wire transfer. (FAC ¶¶ 147-149, 175-176).

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for the purpose of purchasing CDs, and the bank knew the perpetrators were not using the investment funds for the intended purpose because it could see that no money was being used for investment activity and that the perpetrator was transferring the investment funds to their own personal accounts); Cal.: *Arreola v. Bank of Am. Nat. Ass'n,* 2012 WL 4757904 *3 (C.D. Ca. 2012)(banks can be liable for aiding and abetting when tortfeasor's bank accounts received investor funds, and knew that tortfeasor transferred the funds to his personal accounts); *Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 1526394, (N.D. Cal. 2010)(bank knew that none of the investor funds were being used to purchase any securities, but instead, were being wired to offshore bank accounts or being used to pay for the tortfeasor's personal expenses); Tex: *Rostain v. Trustmark Nat'l Bank*, 2015 WL 1303 4513 10-11 (N.D. Tex. 2015)(plaintiff adequately plead scienter by alleging that the bank knew the tortfeasor's funds in his account were investment proceeds, and knew that the tortfeasor was transferring those funds into his own personal accounts); Minnesota: *Anderson v. U.S. Bank Nat. Ass'n*, 2014 WL 502955, (Minn. App. 2014)(knowledge inferred when there were incongruities between the tortfeasor's claimed business activities and his actual account transactions "inconsistent with any legitimate business activity").

- Chase knew that most of the funds in Menaged's accounts consisted of DenSco proceeds because Chase accepted the wire transfers from DenSco, kept records of transactions, and compiled this in bank statements. (FAC ¶¶ 149).

- Chase knew that the DenSco loan proceeds were intended to be used to purchase foreclosed property because after DenSco wired the funds to Menaged's Chase accounts, Chase would prepare cashier's checks approximately equal to the amount of the wire transfer made payable to a trustee, and the cashier's check memorialized the purpose of the funds was for the purchase of a foreclosed property because it stated "DenSco Payment [property address]" in the memo lines. (FAC ¶¶ 146-159, 175-178).

- Chase knew that DenSco had an expectation that the loan proceeds that were the subject of the cashiers' checks were for the purchase of foreclosed properties because Menaged told Chase that he sent pictures of the cashiers' checks to DenSco to provide assurances to DenSco that the funds were going to be used to purchase the foreclosed properties. (FAC ¶ 179).

- Chase knew that Menaged's assurances to DenSco were false because, after Menaged took the pictures of the cashiers' check, Chase would redeposit the cashiers' check in his account. (FAC ¶¶ 179-180, 182-189).

- Chase knew that these assurances to DenSco were false because it would mark the cashiers' check "Not Used For Intended Purpose" and prepare the deposit slip for Managed in the identical amount. (FAC ¶¶ 183, 189).

- Chase knew that Menaged was not using the DenSco loan proceeds to purchase the foreclosed properties identified, but rather for his own gain, because Chase knew that Menaged was withdrawing the DenSco loan proceeds in the form of cash; Chase was transferring the DenSco Loan Proceed to Menaged's other accounts; and Chase knew that Menaged was using DenSco Loan Proceeds for gambling. (FAC ¶¶ 190-191, 199-209).

These allegations are sufficient to allege that Chase knew that Managed was defrauding DenSco. Chase knew that Menaged did not use the incoming funds for any legitimate banking or other investment activity. *Mansor*, 183 F. Supp. 3d at 270-72; *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003) (Bank utilized atypical banking procedures to service the tortfeasor's accounts, raising an inference that they knew

of the Ponzi scheme and accommodated it by altering their normal ways of doing business).

Chase seems to argue that the Receiver's allegations related to the "general awareness requirement" are really that Chase "should have known" of Menaged's fraudulent scheme because of various "red flags". But that is not the case. Nowhere does the Receiver allege that Chase should have known of Menaged's fraud because of various red flags. Rather, the Receiver is very clear that Chase knew and was generally aware of Menaged's fraud.

D. The Receiver Sufficiently Alleged Chase Substantially Assisted Menaged.

Chase next argues that the Receiver did not allege sufficient facts that Chase substantially assisted Menaged in his fraudulent scheme. Not true.

"[S]ubstantial assistance by an aider and abettor, can take many forms, but means more than a little aid." *Wells Fargo Bank*, 201 Ariz. at 488, 38 P.3d at 26 (2002). "[S]ubstantial assistance does not mean assistance that is necessary to commit the fraud. *The test is whether the assistance makes it easier for the violation to occur, not whether the assistance was necessary.*" *Id*. at 489, 38 P.3d at 27 (emphasis added). For example, "executing transactions, even ordinary course transactions, can constitute substantial assistance under some circumstances, such as where there is an extraordinary economic motivation to aid in the fraud." *Id.* Indeed, "[o]rdinary business transactions a bank performs for a customer can satisfy the substantial assistance element of an aiding and abetting claim … [k]nowledge is the crucial element." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 955 (9th Cir. 2006).

Courts have held that the bank "substantially assisted" the fraudulent scheme simply because the bank continued to maintain the perpetrators' account despite knowledge of the fraudulent scheme. *Rotstain v. Trustmark Nat'l Bank* 2015 WL 13034513, at *11 (N.D. Tex. 2015). The court reasoned, that "[b]y providing even routine banking services for the [fraudulent] scheme, Defendants inherently facilitated the financial transactions and operations that formed the lifeblood of the [fraudulent] scheme." *Id.* Courts have held—like in this case—a bank that repeatedly allowed the tortfeasor to immediately return cashier's checks drawn on the investment account and deposit the proceeds in the tortfeasor's personal

account is an unusual and highly suspicious transaction. *Alesii v. Bank of Am., N.A.*, 2014 WL 7341292 (Ariz. App. 2014).

First, the Receiver has alleged that Chase continued to furnish Menaged routine banking services despite knowing that he was defrauding DenSco. (FAC ¶¶ 192-193, 215). These services included, but are not limited to: accepting wire transfers from DenSco knowing that the DenSco Loan Proceeds were not going to be used for their intended purpose; creating cashier's checks knowing that they were not going to be used for their intended purpose; redepositing the cashier's checks knowing that they consisted of DenSco Loan Proceeds and that Menaged would use them for his own benefit; allowing Menaged to withdraw substantial amounts of DenSco Loan Proceeds in the form of cash; and transferring DenSco Loan Proceeds from Menaged's AZHF Accounts to his other accounts at Chase. (FAC ¶ 193). Menaged could not have done it without Chase's material assistance. (FAC ¶ 216). These facts alone establish that the Chase Defendants substantially assisted Menaged.

Second, Chase assisted Menaged by preparing the bogus cashiers' check for Menaged to provide false assurances (FAC ¶ 179-180). These cashiers' checks were the "lifeblood" of Menaged's fraudulent scheme. *Rostain*, 2015 WL 13034513, at *1. Chase prepared the cashier's checks, marked the back of the checks "Not for Intended Purposes," and then facilitated the re-depositing into Menaged's bank accounts. These are *not* routine banking services; it is not "routine" to issue, photograph, and immediately redeposit several cashier's checks nearly every business day for approximately fifteen months. Menaged and Chase worked together to create, photograph, and then immediately redeposit at least 1,349 cashier's checks, in the total amount of $312,108,679.00, which Menaged used for his personal benefit.

Third, Chase assisted Menaged in defrauding DenSco by actively assisting Menaged using the DenSco loaned funds for his own gain by, among other things:

- transferring DenSco Loan Proceeds from Menaged's AZHF Accounts to his other accounts at Chase (FAC ¶¶ 191-209). *See Benson v. JPMorgan Chase Bank, N.A.*, No. C-09-5272 EMC, 2010 WL 1526394, (N.D. Cal. 2010) (Bank

allowed the tortfeasor to deposit investor money into private accounts);

- instructing Menaged on how to circumvent scrutiny when he engaged in cash transactions that would not cause a suspicious activity report (FAC ¶¶ 194-198);

- while knowing that the funds in Menaged's account were DenSco's Loan Proceeds, making it easier for Menaged to gamble with those funds by increasing the limits on Menaged's debit card so he could gamble at casinos without Chase's fraud prevention department flagging the account or declining his debit card. (FAC ¶¶199-208.)

Fourth, the Chase Defendants argue the Receiver did not allege that Chase had a heightened economic motivation to materially assist Menaged. The Receiver alleges that: "Because Menaged and Chase re-deposited the cashier's check 1,349 times totaling over $312,108,679.00, and Chase knew that Menaged was not using DenSco's loan proceeds for their intended purpose, Chase knew that the cashier's check scheme had no legitimate banking or business purpose, and despite this, continued to provide Menaged banking services because of its own heightened motivation of maintaining accounts worth millions of dollars. " (FAC ¶ 191.) If having this volume of money pass through the Chase does not provide it with an obvious "heightened" economic motivation, or its role in creating thousands of illegitimate cashier's checks for no other purpose than to be photographed is not "extraordinary", then nothing is.

III. CONCLUSION

Based upon the foregoing, Plaintiff urges this Court to deny the Motion to Dismiss filed by the Chase Defendants and allow this case to proceed on the merits.

DATED this 5th day of June, 2020.

Bergin, Frakes, Smalley & Oberholtzer, PLLC

/s/ Ken Frakes
Ken Frakes
Kevin Kasarjian
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Attorneys for Plaintiff

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Greenburg Traurig
c/o Nicole Goodwin
2375 E. Camelback Road #700
Phoenix, Arizona 85016
goodwinn@gtlaw.com
Counsel for JP Morgan Chase Bank, Samantha Nelson, Kristofer Nelson, and Vikram Dadlani

Greenburg Traurig
c/o Jonathan H. Claydon
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
claydonj@gtlaw.com
Counsel for JP Morgan Chase Bank, Samantha Nelson, Kristofer Nelson, and Vikram Dadlani

Greg Marshall
Snell & Wilmer
One Arizona Center
400 East Van Buren Street Suite 1900
Phoenix, Arizona 85004-2202
gmarshall@swlaw.com
Counsel for US Bank, NA, and Hilda Chavez

/s/ *Kristine Berry*

EXHIBIT A

leverage against him saying he had an agreement with them and he had no way of complaining to anyone. His position was, they were putting pressure on him to continue, they both were making money, and I was getting paid down. If I stopped he had no viable way to pay down the debt that had accrued from selling all the double encumbered properties and he would just file BK and I would be back to the same situation was I was before with a huge problem, no way to solve it, poised to go to the investors, the redemptions would come in and down spiral would occur. Now compounded with the knowledge that all along I had been an unwittingly accomplice in some kind of fraud in my estimation. I felt like I was between a rock and hard place, with no out. In December I said no more. We have to stop this. I can put the money back to work with other borrowers, return it to my investors whatever was best. I would run the business profitably for years, making the up the deficit by the profits of the company and eliminate the negative capital position I was in. In January we agreed to a plan through the first quarter and scale down by 2nd quarter by him finding someone to replace Land.auction.com had a guy out of Las Vegas that would do the same Scott was doing. I agreed because he was still paying me the interest and principle, we were selling the homes off we were down to the last 30-40 homes that were double encumbered and now that all the leases, some were two years were now coming to an end, that by June all the 2nd positions loans would be paid off. Typing this and looking back at it, it sounds insane and stupid, I'll admit it. The business was still operating, I was profitable, this huge issue of second positions was almost gone and we had a plan to end this wholesale program and I would be able to do continue running the business profitably and slowly regain a positive capital position. Scott also decided to start a used car lot in 2015 to help make more money and pay down the outstanding debt. He opened it Easter Sunday. It started slow and grew and became profitable and doing really well by the fall. I had no affiliation with this at all. In the summer, he had surgery; he put his wife on his bank accounts allow her to get cashier's checks and other transactions to help operate his many business when he was home recovering. He also owns Furniture King. Scott by this time had a plan and agreement with auction.com to allow this guy from Las Vegas start taking over for him by fall. The balance hadn't gone up and I was looking forward to being done with this. In mid October his wife, whom I learned was bi-polar, decided to divorce Scott. She went to the bank and cleared out all the money out of all his accounts personal and business. This destroyed his used car business because he was unable to operate without the capital and his flooring companies cut off his credit, he had to sell the cars at auction for losses and close the place by the end of the year. With the divorce going through its phases of discovery and motions etc, this put a stop to all the transactions that he could do through his entities and bank accounts. The way we were operating had to stop. He couldn't send me money and I couldn't send him money. His wife was acting irrational and ended up in a mental health hospital at one point. The problem that his caused put a huge strain on auction.com relationship with Scott and the plans to end the relationship and return the money were all put on hold. Now the money going back and forth one daily basis was sometimes over a million to 1.5 a day. The bank didn't like this back in the spring, so instead we would wire the difference to each other and just do the reconciling. If he purchased (at this point they were all offers to purchase) a million worth of properties for 6 different addresses, he would pay me off on 1.05 million. So he would wire me 50k. Some days I would wire him some days he would wire me. In October we had to stop this because of the divorce and instead we would just do reconciliation each day of who owed who

Dec 2014

2015

Summer 2015

Oct 2015

Oct 2015

late 2015

how much. All the second positions houses have been sold by now. I just had a handful of loans with him which was all first position left over from his original group of loans he had me. The real issue was his inability to pay down the debt he owed me for the loss I had taken on the 2nd position houses and this wholesale deal was supposed to come to an end. Here we are at the end of the year and the divorce issues brought it all to a stop. Coming in to 2016, he finally got the divorce canceled and then she filed again. Then several months later is canceled again. His landlord from the car company was suing him. At one point in February under all the stress he decided he would file BK thinking he could get a filing number, which would put him in a barging position with his landlord and fighting the divorce. This of course was the stupidest thing for him to do. He didn't realize the laws and procedures in doing this. I didn't find out about it until May when I was contacted by a trustee asking for a payoff amount for a home. He then explained it to me what his thinking was and why he did it. By now auction.com had enough of this nightmare. By June it all stopped. However because of the BK they won't return the money to Scott or me that is owed. Scott's wife at point had gone in to their office and threatened to bring in her lawyers because she saw all the ins/outs in the bank accounts and wanted to know if he was hiding money from her. Auction.com said they wouldn't return the money to me until she signed an agreement with them and then Scott and I had to sign something between us, I've never seen this agreement. I'm not even sure what they would say or the intent of them would be. I never had contact with auction.com; they wanted to pretend I wasn't even involved. When that's all done they would return the money to him then to me or just to me. The whole BK filing stopped anything from happening. Here I am in July. I've got a small lending base the rest of the money is on the A/R that he owes me and 28.1 million plus interest (500k) sitting at auction.com. Plus 3 million in the reconcillation part that they owed me when they were paying me off on more than they were borrowing each day. There were profits made on these transactions. Scott and auction.com were splitting the profits, not sure how or where the funds came and went to, his portion he used to pay down on the workout agreement. However, none has been paid to me since October. The amount is insignificant in the big picture because I believe they were ill-gotten gains. Plus the 1.7 mil Scott's wife took out of his account. You can see that the 14 million (that's principle and interest from the 2nd's positions workout agreement) owed to DenSco by Scott would be about 9 million. I could make another 2 million this year. The net difference is getting smaller and it would be attainable to make all the investors whole at that point in another couple of years of business. That's why I kept working towards doing what I was doing. Scott is now knee deep into his BK procedure and you can imagine when they are looking at all of this they are having issue with it and my fear and belief is that it's criminal and auction.com has propagated a fraud, Scott was someone knowledgeable or conspiring in it, and because I was the money behind it I'm guilty by association. Now typing this it sounds like some obscene twilight show. It's embarrassing and humiliating reading this thinking how could I have made such wrong decisions got wrapped up in to this. But the only answer I can tell you is, in the beginning I was defrauded by Scott's cousin, I didn't realize what Scott was doing with auction.com. From all aspects it was legit, I get copies of checks, receipts, I would be paid back, etc. and I believed it was the best way to return your money to you. That was always my goal. I know I accepted some funds from some of you over the last three years. I believed that I was going to get this all fixed. I returned many more millions to some of you and turn down even more millions from others. I wasn't trying to

2016

Feb 2016 Scott - BK

July 2016

No pay since Oct 2015

keep myself afloat by taking more money and investors and making things worse. I put all non-retirement personal available funds in to DenSco over the last few years trying to help solve this. I was doing everything I could and believed to fix this issue. No I wasn't forthright to you. I had convinced myself no matter what relationship I had with anyone of you individually, I couldn't go to just one or two of you without telling all of you and at no point throughout this nightmare did I believe that you would be accepting and trusting to allow me to notify you and would still trust me, assist me on how to work through this without starting massive withdrawals and lawsuits. That would be the natural reaction for a few, some or most of you? I didn't know. The loss that would have happened day one when I was first made aware of the fraud, might be smaller than today. However, with all the lawsuits and lawyers involved I know that it would have exasperated the loss. I know I made wrong decisions. I did consult my lawyer for the first year on each step of the way. He's unaware of the situation I'm in today and the information I now know regarding the relationship between auction.com and Scott's arrangement with them. I'm not privy to the details of it. The guilt, embarrassment, and humility any other adjective you can add in there is over whelming. I can't face my parents, which yes, they are going to be severely hurt, more than all of you by this, going through the legal process is unbearably thought. I have no idea where that would lead, jail? Possibly. Years spent in courts and lawyers trying to settle this all out. Mean while having to face all of you. I can't do it. I love my family and my boys as much as any of you do your families. I can't put them through this face to face. I've decided to be my own judge and jury and I decided the death penalty. I am never going to see my amazing boys grow up. My divorce which I spent more effort than anyone would believe to mitigate the negative effect on my boys, is now in vain because my death is going to be overwhelming to them. As I'm sitting her typing this I'm crying because of the thought of the sadness, angry, confusion, I am going to bring to their lives. As bad as it is, I feel it's a better option than me living, having them see what you and courts would do to me, justifiably too. I'm sorry for everything that I've done. I believe that you can recover a substantial amount of your principle. I believe with me dead there is no change in the chance of that happening. I don't know how to end this other than I'm not asking for forgiveness I'm just sorry I wasn't forthcoming in the beginning maybe it would have had a better ending or process than I feared would happen. I know this all sounds nearly incoherent but my mind isn't exactly clear.