

Gregory J. Marshall (#019886)
Amanda Z. Weaver (#034644)
Bradley R. Pollock (#033353)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
gmarshall@swlaw.com
aweaver@swlaw.com
*Attorneys for Defendants U.S. Bank National
Association and Hilda H. Chavez*

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;
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.

No. CV2019-011499

**THE U.S. BANK DEFENDANTS'
RULE 26.1 DISCLOSURE
STATEMENT**

(Assigned to the Hon. Daniel Martin)

Defendants U.S. Bank National Association and Hilda H. Chavez (collectively, the
“U.S. Bank Defendants”) provide their Disclosure Statement in accordance with Ariz. R.
Civ. P. 26.1.

I. FACTUAL BASIS FOR DEFENSES

According to the allegations in the First Amended Complaint, Plaintiff DenSco
Investment Corporation (“DenSco”) was defrauded by Yomtov Scott Menaged between
2011 and 2016 in the amount of \$46 million, and now seeks to hold others liable for its
resulting losses.

1 DenSco was an investment company, who made “short term, ‘hard money loans’ to
2 ‘foreclosure specialists’” purchasing homes in foreclosure. DenSco would charge its
3 borrowers between 15% and 18% interest for these loans, which were to be secured by a
4 deed of trust recorded against the purchased property. Menaged defrauded DenSco by
5 using the loan proceeds from DenSco for his own personal benefit, instead of purchasing
6 properties in foreclosure and giving DenSco a first position secured interest in those
7 properties. According to the allegations, Chittack (DenSco’s only officer, shareholder,
8 and employee) became aware of the fraud in November 2013, when Menaged was already
9 indebted to DenSco in the amount of \$35 million. Instead of disclosing the fraud to
10 investors and reporting the matter to law enforcement, Chittack had DenSco enter into a
11 Forbearance Agreement with Menaged in April 2014, and thereafter continued to have
12 DenSco loan money to Menaged to purchase more foreclosed properties, allowing the
13 fraud to continue and DenSco’s losses to mount.

14 DenSco alleges that the fraud proceeded as follows: Menaged emailed DenSco a
15 list of properties that were in foreclosure, and represented that he was the winning bidder
16 to purchase them. Menaged would request financing from DenSco. DenSco made the
17 requested loans and wired the loan proceeds to Menaged’s Easy Investments account at
18 U.S. Bank. Menaged or his associate, Veronica Castro, would request that U.S. Bank
19 issue cashiers’ checks to pay for the properties he claimed to purchase, and emailed
20 photographs of the cashiers’ checks to DenSco, supposedly as proof that the funds were
21 used to purchase foreclosed properties. Menaged would then redeposit cashiers’ checks
22 into the account from which they were drawn, and thereafter used the funds for his own
23 purposes. Menaged would falsify trustee’s sale receipts purporting to evidence the fake
24 purchases and provide them to DenSco.

25 As the fraud unraveled, DenSco filed for Chapter 7 bankruptcy in April 2016,
26 Chittick committed suicide in July 2016, and the United States indicted Menaged in 2017
27 on a variety of federal charges, including conspiracy, wire fraud, and identity theft. *See*
28 *United States v. Menaged*, CR-17-00680-PHX-GMS(MHB), Doc. No. 3, Indictment.

1 Menaged ultimately pled guilty to several criminal counts and was sentenced to 17 years
2 in federal prison.

3 The Receiver was appointed in August 2016, and thereafter brought a variety of
4 actions related to Menaged's activities, including a malpractice claim against DenSco's
5 attorney, *see Davis v. Clark Hill*, CV2017-013832, as well as this action. *See also Davis*
6 *v. Smith, et al.*, CV2019-057398 (additional action brought by Receiver); *Davis v. Fischer*
7 *Family Holdings, L.L.C.*, CV2018-052830 (same). According to the allegations, Menaged
8 cut a deal with DenSco in which Menaged and his wife agreed to a non-dischargeable
9 civil judgment in favor of DenSco in the amount of \$31 million, but the Menageds are
10 entitled to offset the judgment against them in an amount equal to the gross recovery from
11 third parties that is related to Menaged's cooperation.

12 In the First Amended Complaint, DenSco alleges that U.S. Bank accepted for
13 redeposit at least 41 cashier's checks between January and April 2014, in the total amount
14 of \$6,931,048, and that the U.S. Bank Defendants "substantially assisted" Menaged by
15 providing banking services to Menaged that DenSco has defined as "routine," such as
16 accepting wire transfers and issuing and redepositing cashier's checks. DenSco alleges
17 that the U.S. Bank Defendants "knew" that Menaged was defrauding DenSco, making a
18 series of factual allegations that are not true. At no time did the U.S. Bank Defendants
19 know that Menaged was defrauding DenSco, nor that its performance of ordinary, routine
20 banking services was substantially assisting Menaged in doing so.

21 **II. LEGAL THEORIES**

22 **A. DenSco's Aiding and Abetting Claim Is Not Supported.**

23 The facts do not support DenSco's aiding and abetting claim against the U.S. Bank
24 Defendants. To be viable, aiding and abetting fraud claims require the following
25 elements: "(1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
26 (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of
27 duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in
28 the achievement of the breach." *Wells Fargo Bank v. Ariz. Laborers, Teamsters &*

1 *Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485 ¶ 34 (2002) (relying
2 also on Restatement of Torts (Second) § 876(b)). These allegations must be pled with
3 particularity. *See* Ariz. R. Civ. P. 9(b); *see also, e.g., Spudnuts, Inc. v. Lane*, 131 Ariz.
4 424, 425-26 (1982) (observing that Rule 9(b)’s requirement to state circumstances with
5 particularity applies when “fraud is claimed as a basis of an action for damages”).

6 As an initial matter, DenSco must prove that Menaged committed a fraud against
7 it. Regardless of whether it can do so, the U.S. Bank Defendants did not know Menaged
8 was defrauding DenSco, nor did U.S. Bank substantially assist or encourage Menaged to
9 do so. In fact, U.S. Bank did nothing other than behave like an ordinary depository bank
10 would be expected to behave, by offering run-of-the-mill services like accepting wire
11 transfers, and issuing and depositing cashier’s checks.

12 1. **The Evidence Does Not Support Knowledge.**

13 DenSco’s aiding and abetting claim does not rest on facts supporting the suggestion
14 that the U.S. Bank Defendants knew that they were aiding and abetting a fraud, as
15 opposed to just performing unremarkable bank functions for a customer. *Dawson v.*
16 *Withycombe*, 216 Ariz. 84, 102 ¶ 50 (App. 2007); *see also Wells Fargo Bank*, 201 Ariz. at
17 485 ¶ 33 (“Aiding and abetting liability is based on proof of a scienter...the defendants
18 must know that the conduct they are aiding and abetting is a tort.” (emphasis original)
19 (quoting *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186 (Minn. 1999))).
20 An inference of suspicious activity is not enough. *See Dawson*, 216 Ariz. at 102-03 ¶¶
21 50-52. Instead, the facts must give rise to a reasonable inference that the defendant had at
22 least “general awareness of the primary tortfeasor’s fraudulent scheme.” *Id.* at 102 ¶ 50;
23 *see also Bright LLC v. Best W. Int’l Inc.*, No. CV-17-00463-PHX-ROS, 2018 WL
24 4042122, at *7 (D. Ariz. July 27, 2018) (“[M]ere knowledge of suspicious activity is not
25 enough...[t]he defendant must be aware of the fraud.” (quoting *Stern v. Charles Schwab*
26 *& Co.*, No. CV-09-1229-PHX-DGC, 2010 WL 1250732, at *9-10 (D. Ariz. Mar. 24,
27 2010) (granting bank’s motion to dismiss because, even though bank “knew of unusual,
28 unprecedented, and unexplained level of activity” on a Ponzi schemer’s account, the

1 allegations did not support any inference that the bank had any actual knowledge))),
2 *reconsideration granted in part on other grounds*, 2018 WL 6738843 (Sept. 24, 2018);
3 *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1243-47 (M.D. Fla. 2013)
4 (finding victims of Ponzi scheme had not stated claim against the bank because the
5 allegations constituted “no more than ‘red flags,’” insufficient to give rise to an inference
6 of knowledge).

7 The facts do not support such an inference. There are no allegations that U.S. Bank
8 was a party to agreements or communications between DenSco and Menaged regarding
9 the loans, foreclosures, property purchases, or security agreements. There are no
10 allegations that U.S. Bank was aware of the terms of any of these agreements. Nowhere
11 does the First Amended Complaint even allege that U.S. Bank knew that the multiple,
12 individual payees on the cashier’s checks were in fact trustees at a public auction, *see* First
13 Am. Compl. ¶¶ 103, 121(b), or that U.S. Bank could have appreciated that the alleged
14 specific 41 redeposited checks at issue here means that “U.S. Bank knew that Menaged
15 was not using DenSco’s loan proceeds for their intended purpose,” *id.* ¶¶ 124, 132. Nor
16 do the allegations suggest why U.S. Bank would have any reason to tie together the
17 DenSco wire amounts and the cashier’s check amounts to establish their connection or
18 significance, particularly when the wires and cashier’s checks were for different amounts.
19 U.S. Bank is not accused of doing anything other than what a depository bank is expected
20 to do: accept wire transfers for deposit; issue cashier’s checks when requested; and
21 redeposit cashier’s checks when unused.

22 2. The Evidence Does Not Support Substantial Assistance.

23 To be liable for aiding and abetting, U.S. Bank’s assistance or encouragement in
24 the fraud must be “a substantial factor in causing the resulting tort,” Restatement of Torts
25 (Second) § 876(b), cmt. d; *see also Wells Fargo Bank*, 201 Ariz. at 485 ¶¶ 31, 34
26 (emphasizing Arizona courts’ reliance on Section 876 of the Restatement). There must at
27 least be “a causal connection between the defendant’s assistance or encouragement and
28

1 the primary tortfeasor's commission of the tort.” *Sec. Title Agency v. Pope*, 219 Ariz.
2 480, 491 ¶ 47 (App. 2008).

3 Ordinary banking activities, such as the activities undertaken by U.S. Bank
4 described in the First Amended Complaint, do not allow a reasonable inference of
5 substantial assistance or encouragement to be drawn. *Cf. Wells Fargo Bank*, 201 Ariz. at
6 489 ¶¶ 48-49 (recognizing other courts' view of ordinary course transactions constituting
7 “substantial assistance,” but only to extent that there was a heightened economic
8 motivation to aid in the fraud); *see also id.* ¶ 51 (acknowledging that it “may be possible
9 to infer the knowledge necessary for aiding and abetting liability” if a bank's “method or
10 transaction is atypical or lacks business justification” (quoting *Woodward v. Metro Bank*
11 *of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975))).

12 U.S. Bank is not alleged to have done anything other than what a depository bank
13 does in the ordinary course of its business. *Thuney v. Lawyer's Title of Ariz.*, No. 2:18-
14 CV-1513-HRH, 2019 WL 467653, at *5 (D. Ariz. Feb. 6, 2019) (“Processing day-to-day
15 transactions does not constitute substantial assistance unless the bank has an extraordinary
16 economic motivation to aid in the fraud.” (internal quotation marks and citation omitted)).
17 Specifically, the allegations are that U.S. Bank: accepted wire transactions as instructed,
18 First Am. Compl. ¶¶ 98, 101, 119-20, issued and deposited cashier's checks as instructed,
19 *id.* ¶¶ 105, 122, followed internal bank policies, *id.* ¶¶ 126-28, and, occasionally, that
20 supervisory employees waived certain policies in ways that were not at all unusual, and
21 which did not assist Menaged in the commission of his fraud, *id.* ¶¶ 90, 130-31.

22 **B. DenSco's Claim Is Barred by the Statute of Limitations.**

23 Claims for aiding and abetting fraud have a three-year statute of limitations.
24 A.R.S. § 12-543(3); *cf. Kisner v. Broome*, No. 1 CA-CV 16-0502, 2017 WL 6462245, at
25 *7 ¶ 31 (Ariz. App. Dec. 19, 2017) (confirming that statute of limitations for aiding and
26 abetting claim is same as for underlying action); *Zeman v. Baumkirchner*, No. 1 CA-CV
27 15-0228, 2016 WL 3176442, at *2 ¶ 9 n.6 (Ariz. App. June 7, 2016) (same). DenSco
28 alleges that without the involvement of the U.S. Bank Defendants, “Menaged could not

1 have conducted his fraudulent scheme against DenSco from December 2012 through
2 April 2014.” Compl. ¶¶ 37, 81; *see also id.* ¶ 87 (alleging that from April 2014 onward,
3 Mr. Menaged started banking with co-defendant Chase). Accordingly, DenSco was
4 required to file its claim against the U.S. Bank Defendants before May 2017, making it
5 untimely by more than two years. *Montano*, 202 Ariz. at 546 ¶ 4 (“[A]lthough dismissal
6 of an action based on expiration of the statute of limitations is generally disfavored,
7 claims that are clearly brought outside the relevant limitations period are conclusively
8 barred.” (internal citations omitted))

9
10 **C. DenSco’s Claim Is Barred by Contributory Negligence and/or**
Assumption of the Risk.

11 DenSco’s claim is barred by its own contributory negligence, which is “conduct on
12 the part of the plaintiff which falls below the standard to which he should conform for his
13 own protection, and which is a legally contributing cause co-operating with the negligence
14 of the defendant in bringing about the plaintiff’s harm.” Restatement (Second) of Torts §
15 463 (1965); *see also West v. Soto*, 85 Ariz. 255, 259 (1959) (citing Section 463 as to
16 contributory negligence). Likewise, “the touchstone of implied assumption of risk is
17 ‘consent’. ... It is based, fundamentally, on consent. ... In the implied assumption of risk
18 situation the consent is manifested by the plaintiff’s actions after he has been informed of
19 the nature and magnitude of the specific danger involved.” *Hildebrand v. Minyard*, 16
20 Ariz. App. 583, 585 (1972). DenSco’s negligence in—among other decisions—
21 continuing to loan to Menaged while failing to invest the nominal amount of time needed
22 to verify that Menaged was purchasing the properties he claimed to be purchasing was
23 negligent and / or should be deemed to constitute consent to such an extent that that it
24 precludes any liability on behalf of the U.S. Bank Defendants.

25 **III. WITNESSES EXPECTED TO BE CALLED AT TRIAL**

26 The U.S. Bank Defendants have not yet identified the witnesses it expects to call at
27 trial, but reserves the right to call the persons identified in Section IV, below.
28

1 **IV. PERSONS WITH RELEVANT KNOWLEDGE AND INFORMATION**

2 The following persons are expected to have knowledge regarding the
3 circumstances surrounding the subject matter of the action.

4 1. Yomtov Scott Menaged (Inmate Number: 74322-408, c/o Federal Bureau of
5 Prisons, 1529 West Highway 366, Safford, AZ 85546). Menaged is expected to have
6 knowledge regarding the details of the alleged fraud he perpetrated against DenSco and
7 his interactions with and representations to employees at U.S. Bank.

8 2. Veronica Castro (Address currently unknown, released from Federal Bureau
9 of Prisons March 19, 2020). Castro is expected to have knowledge regarding her work for
10 Menaged, Easy Investments, and Arizona Home Foreclosures, as well as her interactions
11 with and representations to employees at U.S. Bank.

12 3. Peter S. Davis, Receiver for DenSco (c/o Kenneth Frakes, Bergin, Frakes,
13 Smalley & Oberholtzer, PLLC, 4343 East Camelback Road, Suite 210, Phoenix, Arizona
14 85018). Mr. Davis is expected to have knowledge relevant to Chittick's actions as the
15 controlling individual of DenSco, as well as all records which may be attributed to
16 DenSco in this action to establish its and Chittick's knowledge of Menaged's allegedly
17 fraudulent activities.

18 4. One or more representatives of U.S. Bank National Association (c/o
19 Gregory J. Marshall, SNELL & WILMER L.L.P., One Arizona Center
20 400 E. Van Buren, Suite 1900, Phoenix, Arizona 85004-2202). U.S. Bank is expected to
21 have knowledge regarding its banking records and practices with reference to the accounts
22 of Menaged and Easy Investments.

23 5. Hilda Chavez (c/o Gregory J. Marshall, SNELL & WILMER L.L.P., One
24 Arizona Center, 400 E. Van Buren, Suite 1900, Phoenix, Arizona 85004-2202). Ms.
25 Chavez is the Branch Manager of the U.S. Bank Arrowhead location and is expected to
26 have knowledge regarding her interactions with Menaged and Castro during their visits to
27 U.S. Bank and the policies and routine banking practices of U.S. Bank.

28

6. Leslie Rocha (c/o Gregory J. Marshall, SNELL & WILMER L.L.P., One Arizona Center, 400 E. Van Buren, Suite 1900, Phoenix, Arizona 85004-2202). Ms. Rocha as the Branch Manager of the U.S. Bank Arrowhead location in 2013 and 2014, and is a District Manager for U.S. Bank. She is expected to have knowledge regarding bank and branch practices with reference to the accounts of Menaged and Easy Investments.

7. One or more representatives of JP Morgan Chase Bank, N.A. (c/o Nicole Goodwin, Jonathan H. Claydon, Greenberg Traurig, 2375 E. Camelback Road #700, Phoenix, Arizona 85016). JP Morgan Chase Bank is expected to have knowledge relevant to DenSco's claims against it for Count Two of the First Amended Complaint as to Menaged's activities in banking with JP Morgan Chase Bank.

8. Samantha Nelson (c/o Nicole Goodwin, Jonathan H. Claydon, Greenberg Traurig, 2375 E. Camelback Road #700, Phoenix, Arizona 85016). Ms. Nelson is expected to have knowledge relevant to DenSco's claims against her for Count Two of the First Amended Complaint as to Menaged's activities in banking with JP Morgan Chase Bank.

9. Vikram Dadlani (c/o Nicole Goodwin, Jonathan H. Claydon, Greenberg Traurig, 2375 E. Camelback Road #700, Phoenix, Arizona 85016). Mr. Dadlani is expected to have knowledge relevant to DenSco's claims against her for Count Two of the First Amended Complaint as to Menaged's activities in banking with JP Morgan Chase Bank.

10. Any witness necessary to provide foundation for any document identified or disclosed in this litigation.

11. Any witnesses identified by any party in their disclosures, discovery responses, or documents disclosed in this litigation.

V. STATEMENTS

The U.S. Bank Defendants identify the filings, depositions, and other records that are available at DenSco's website, <http://denscoreceiver1.godaddysites.com> (c/o Kenneth

1 Frakes Bergin, Frakes, Smalley & Oberholtzer, PLLC, 4343 East Camelback Road, Suite
2 210, Phoenix, Arizona 85018) from related actions, including the malpractice action
3 against DenSco's prior attorneys, *see Davis v. Clark Hill*, CV2017-013832; *see also In re*
4 *Menaged*, 2:16-bk-04268-PS (bankruptcy proceedings of Menaged); *United States v.*
5 *Menaged*, CR-17-00680-PHX-GMS(MHB) (federal proceedings against Menaged and
6 Castro); *Davis v. Smith, et al.*, CV2019-057398 (additional action brought by Receiver);
7 *Davis v. Fischer Family Holdings, L.L.C.*, CV2018-052830 (same). These cases include
8 depositions of Clark Hill attorneys, Menaged, and other individuals connected to
9 Menaged's activities and DenSco's relationship with Menaged.

10 **VI. EXPERT WITNESSES**

11 The U.S. Bank Defendants have not yet identified the expert witnesses it intends to
12 call at trial, but will supplement this disclosure in accordance with the Arizona Rules of
13 Civil Procedure.

14 **VII. DAMAGES**

15 The U.S. Bank Defendants are not seeking damages against DenSco, but reserve
16 their right to seek reimbursement of their attorneys' fees and costs for defending this
17 action in accordance with A.R.S. §§ 12-341 and 349 (providing that the court shall award
18 reasonable attorney fees and expenses upon a finding that a claim was brought without
19 substantial justification, among other things).

20 **VIII. TRIAL DOCUMENTS**

21 The U.S. Bank Defendants have not yet determined which documents it plans to
22 use as exhibits at the trial of this matter, but identify the documents described in Section
23 IX, below, without waiver of its objections to relevancy and admissibility.

24 **IX. RELEVANT DOCUMENTS**

25 Without conceding their relevancy or admissibility, U.S. Bank identifies the
26 following documents:

- 27 1. Deposit Account Agreement, effective February 11, 2013
28 (USB_DENSCO000001-27);

2. Deposit Account Agreement, effective May 31, 2014 (USB_DENSCO000028-54);
3. Copies of cashier's checks issued from the Easy Investments LLC account ending 4457, December 2012 through April 2014 (USB_DENSCO000055-669) (Confidential – Subject to Protective Order);
4. Copies of statements from the Easy Investments LLC account ending 4457, December 2012 through April 2014 (USB_DENSCO000670-995) (Confidential – Subject to Protective Order);
5. All filings, depositions, and other records that are available at DenSco's website, <http://denscoreceiver1.godaddysites.com>;
6. Plaintiff's Complaint and First Amended Complaint;
7. Plaintiff's Disclosure Statement and any supplements;
8. Plaintiff's responses to discovery requests; and
9. All documents identified or disclosed by any party in this matter.
10. U.S. Bank will supplement this disclosure in accordance with Rule 26.1(f)(2) as new or additional information is discovered or revealed.

X. INSURANCE POLICIES

The U.S. Bank Defendants have no insurance policy, reimbursement, or indemnity agreement that in all reasonable possibility would be called upon to respond in whole or in part to the claim in this lawsuit.

DATED this 6th day of November, 2020.

SNELL & WILMER L.L.P.

By: /s/Bradley R. Pollock

Gregory J. Marshall
Amanda Z. Weaver
Bradley R. Pollock
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
*Attorneys for Defendants U.S. Bank
National Association and Hilda H.
Chavez*

CERTIFICATE OF SERVICE

The foregoing was served via e-mail on the following parties this 6th day of
November, 2020.

Colin F. Campbell, Esq.
Geoffrey M. T. Sturr, Esq.
Timothy J. Eckstein, Esq.
Joseph N. Roth, Esq.
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012
ccampbell@omlaw.com
gsturr@omlaw.com
teckstein@omlaw.com
jroth@omlaw.com
Attorneys for Plaintiff

Nicole Goodwin, Esq.
Jonathan H. Claydon, Esq.
Greenberg Traurig
2375 E. Camelback Road #700
Phoenix, Arizona 85016
goodwinn@gtlaw.com
claydonj@gtlaw.com
*Attorneys for Defendants JP Morgan Chase
Bank, Samantha Nelson & Vikram Dadlani*

/s/Bradley R. Pollock

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