Nicole M. Goodwin, SBN 024593
goodwinn@gtlaw.com
Adrianna Griego Gorton, SBN 031836
gortona@gtlaw.com
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 800
Phoenix, Arizona 85016
T: (602) 445-8000
F: (602) 445-8100

Paul J. Ferak (*pro hac vice*)
ferakp@gtlaw.com
Jonathan H. Claydon (*pro hac vice*)
claydonj@gtlaw.com
GREENBERG TRAURIG, LLP
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
T: (312) 456-8400
F: (312) 456-8435

Attorneys for Defendants JPMorgan Chase Bank, N.A., Samantha Nelson f/k/a Samantha Kumbaleck, Kristofer Nelson, Vikram Dadlani, and Jane Doe Dadlani

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

DEFENDANT SAMANTHA NELSON AND KRISTOFER NELSON'S MOTION FOR SUMMARY JUDGMENT

(Assigned to the Hon. Dewain Fox)

(Oral Argument Requested)

Defendant Samantha Nelson ("Ms. Nelson") and her husband Kristofer Nelson, pursuant to Rule 56(a) of the Arizona Rules of Civil Procedure, move for summary judgment in their favor on all claims. This Motion is supported by the following Memorandum of Points and Authorities, the separately filed Combined Statement of Facts ("SOF"), and the attachments incorporated therein.

MEMORANDUM OF POINTS AND AUTHORITIES

DenSco Investment Corporation ("DenSco"), a hard money lender, lost millions of dollars in a multimillion-dollar fraud scheme first orchestrated by Scott Menaged ("Menaged") that began sometime in 2012, more than two years before Menaged conducted a single transaction at JPMorgan Chase Bank, N.A. ("Chase"), and later continued due to the participation and support of DenSco.

Peter S. Davis, as receiver for DenSco, has targeted Ms. Nelson and her husband and asserted claims that Ms. Nelson "aided and abetted" Menaged's fraud because Ms. Nelson was an assistant branch manager at a Scottsdale bank branch when Menaged banked with Chase between April 2014 and June 2016. Following 35 depositions taken in the more than 28 months of discovery in this case, all of the evidence, even from Menaged, confirms that Ms. Nelson had no knowledge of a fraud. All of the evidence also confirms that Ms. Nelson had no involvement with Menaged's business or the relationship between Menaged and DenSco. The evidence also confirms that Ms. Nelson received nothing from Menaged. Nevertheless, the Receiver sued Ms. Nelson and her husband for aiding and abetting fraud and for violating Arizona's civil RICO statute. Those claims are overreaching and fail as a matter of law for numerous independent reasons.

Foremost, as established in Chase's separate motion for summary judgment, the Receiver's claims cannot stand in light of the undisputed facts that: (1) Denny Chittick discovered that Menaged was taking monies from DenSco without obtaining a first lien in November 2013 (SOF ¶ 14); and (2) from that point forward DenSco's founder, president and sole employee, Denny Chittick ("Chittick"), conspired with Menaged and

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operated DenSco as a Ponzi scheme by soliciting new investments under false pretenses and repaying dividends from those new investments. As described in Chase's motion, these undisputed facts give rise to numerous legal arguments that bar the claims currently asserted before this Court.

Additionally, there is no evidence that Ms. Nelson had actual knowledge of a fraud during the time she worked at the Scottsdale branch, much less that she provided substantial assistance or caused any damage to DenSco. In fact, the evidence and deposition testimony is clear that Ms. Nelson had no knowledge of any fraud and had no knowledge of the lending relationship between DenSco and Menaged such that she could ever have known of any alleged misrepresentations made by Menaged to obtain loans from DenSco. Absent any evidence of such knowledge, or of Ms. Nelson's provision of substantial assistance to Menaged to carry out a fraud, the Receiver's claims must fail. There is no basis for keeping Ms. Nelson and her husband in this case.

In sum, the undisputed material facts demonstrate that Ms. Nelson and her husband are entitled to summary judgment on five separate grounds.

1. The Receiver lacks standing to assert his claims. The Receiver has admitted on numerous occasions that Chittick learned Menaged was defrauding DenSco by no later than November 2013, and that upon learning of the fraud, DenSco conspired with Menaged to continue lending to Menaged, misrepresented DenSco's true financial condition, and solicited new investments in an unsuccessful effort to make the company profitable again. (SOF ¶¶ 14, 48, 143, 148-53.) Chittick's participation in this fraud is imputed to DenSco and bars the Receiver from asserting his claims against Ms. Nelson because Arizona law prohibits a tarnished entity from recovering damages that it helped to cause.

2. The Receiver admits that DenSco could not have reasonably relied on any Menaged representation after learning of fraud by Menaged's company in November 2013. Before a plaintiff can state a viable aiding and abetting action, it must first demonstrate the existence of an underlying tort. A critical component of a fraud

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claim is ***justifiable*** reliance. Given DenSco's binding admissions as to when it uncovered the fraud, and the Receiver's binding testimony that DenSco could not have reasonably continued doing business with Menaged after that point as a matter of law, DenSco could not have justifiably relied on Menaged's subsequent representations.

3. The Statute of Limitations bars the Receiver's claim. DenSco was required to bring any claim based on Menaged's conduct within three years. *See* A.R.S. § 12-543(3) (aiding-and-abetting fraud); A.R.S. § 13-2314.04 (racketeering). It is undisputed that DenSco, through Chittick, knew that Menaged's fraud continued after he began banking at Chase at the latest by December 2014—and certainly by the spring of 2016 when Chittick and Menaged discussed their scheme in a recorded phone conversation—yet the Receiver, standing in DenSco's shoes, did not initiate this lawsuit until August 16, 2019.

4. There is no evidence that Ms. Nelson had actual knowledge of the fraud, defeating the Receiver's aiding-and-abetting and racketeering claims. Despite extensive discovery, the Receiver has come up with no evidence that Ms. Nelson had actual knowledge of Menaged's illegal conduct—as he must to establish his aiding and abetting claim and racketeering claims under Arizona law. Indeed, it is undisputed that Ms. Nelson had no knowledge of any fraud by Menaged or of the details of the lending relationship between Menaged and DenSco.

5. The racketeering claim also fails because the Receiver cannot establish a pattern of underlying racketeering activity by Menaged. To prove his racketeering claim, the Receiver must put forth evidence of two related and continuous predicate acts listed in A.R.S. § 13-2301(D)(4), but misconduct in connection with a securities fraud cannot establish a pattern of racketeering as a matter of law. Here, the Receiver premises his racketeering claims on Menaged's role in a scheme with DenSco to defraud its investors in violation of A.R.S. § 13-2314.04(A), so the Receiver's racketeering claim against Ms. Nelson fails as a matter of law. Additionally, even assuming a requisite predicate act, the Receiver has offered no evidence to support a finding of continuity.

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Backed into a corner by his own admissions and the lack of evidence, the Receiver's claims fail—there is no basis for this matter proceeding any further. Summary judgment should be granted for Ms. Nelson and her husband.

I. RELEVANT FACTUAL BACKGROUND

Ms. Nelson hereby incorporates by reference as if fully set forth herein the factual sections I(A)-(C) in the contemporaneously filed motion for summary judgement of JPMorgan Chase Bank, N.A.

As far as Ms. Nelson specifically, there is no record evidence (testimony or otherwise) showing that Ms. Nelson knew of any fraud in relation to Menaged's accounts or that Menaged was allegedly making misrepresentations to DenSco. The undisputed facts confirm:

- Ms. Nelson began working at the Scottsdale branch in early 2014 and had no prior relationship with Menaged. (SOF ¶¶ 5, 79.)
- Ms. Nelson was not involved with opening Menaged's accounts. (*Id.* ¶ 66.)
- Ms. Nelson's interactions with Menaged were limited to performing requested account transactions. (*Id.* ¶¶ 71-74.)
- [redacted] (*Id.* ¶ 71.)
- Ms. Nelson had no knowledge of the details of the business relationship between Menaged and DenSco. (*Id.* ¶ 77.)
- Ms. Nelson never lifted any holds on Menaged's deposits or verified his account funds for third-parties. (*Id.* ¶ 76.)
- Ms. Nelson had no personal or social relationship with Menaged. (*Id.* ¶¶ 78-79.)
- Ms. Nelson had no interaction with Menaged after he stopped banking at chase. (*See id.* ¶¶ 78-79 (noting Nelson had no personal relationship with Menaged).)
- Ms. Nelson received no compensation or anything else because of the Menaged relationship. (*Id.* ¶ 80.)

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- Ms. Nelson, a working mom with two young children, has had a stellar career with Chase, advancing from a banker at a young age to being a branch review analyst today. (*Id.* ¶ 5.)

Further confirming the overreaching and meritless nature of the Receiver's claims, [redacted] (*Id.* ¶ 69.) [redacted] (*Id.* ¶ 70.) Ms. Nelson did not know Menaged was engaged in any fraud or wrongful conduct, as he informed her that the transactions were for his business records:

[redacted]

(SOF Ex. 39 at 64:7-13.)

Menaged also testified that he agreed that Ms. Nelson was unaware of the fraud he and DenSco were committing:

[redacted]

(SOF Ex. 16 at 189:1-8.)

There is no credible basis for the Receiver's overreaching claims against Ms. Nelson and her husband to continue.

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II. STANDARD OF REVIEW

Summary judgment is appropriate where, as here, "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). Courts should grant summary judgment where, after viewing the evidence presented in a light most favorable to the non-moving party, there is no genuine dispute as to any material fact. *See Rudinsky v. Harris*, 231 Ariz. 95, 98 (App. 2012). Chase is entitled to summary judgment on all the Receiver's claims. Where "no reasonable juror could conclude" that a party could be responsible for the alleged harm based on the evidence produced, "it would effectively abrogate the summary judgment rule to hold that the motion should be denied …." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310–11, 802 P.2d 1000, 1009–10 (1990) (reversing trial court's denial of motion for summary judgment where the record indicated the chances were "one out of one hundred that … the movant was a tortfeasor…").

III. ARGUMENT

A. The Receiver lacks standing to bring any of his claims against Chase.

Ms. Nelson hereby adopts and incorporates by reference as if fully set forth herein the argument set forth in section III(A) of the contemporaneously filed motion for summary judgment of JPMorgan Chase Bank, N.A.

B. The Statute of Limitations for the Receiver's Claims Has Expired.

Ms. Nelson hereby adopts and incorporates by reference as if fully set forth herein the argument set forth in section III(B) of the contemporaneously filed motion for summary judgment of JPMorgan Chase Bank, N.A.

C. There is No Evidence to Establish Any Underlying Tort to Support the Aiding and Abetting Fraud Claim.

Ms. Nelson hereby adopts and incorporates by reference as if fully set forth herein the argument set forth in section III(C) of the contemporaneously filed motion for summary judgment of JPMorgan Chase Bank, N.A.

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D. The Receiver Cannot Establish the Elements of an Aiding and Abetting Fraud Claim against Ms. Nelson.

To succeed on an aiding and abetting claim, the Receiver must also set forth evidence demonstrating that: **(1)** Ms. Nelson ***knew*** Menaged's conduct constituted a tort; and **(2)** Ms. Nelson substantially assisted or encouraged Menaged in the achievement of the tort. *See Stern v. Charles Schwab & Co.*, 2010 WL 1250732, at *8, at *23 (D. Ariz. Mar. 24, 2010) (*"Stern I*") (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, 38 P.3d 12, 23 (Ariz. 2002)). But the Receiver has no evidence to support either of these elements.

1. Ms. Nelson Had No Knowledge of Menaged's Scheme.

Even if there could be a fraud on DenSco based on the undisputed facts of this record (which is not possible), the Receiver must prove Ms. Nelson ***actually knew*** Menaged's conduct was a tort. *Dawson*, 216 Ariz. at 103; *see also Stern I*, 2010 WL 1250732, at *8 ("[M]ere knowledge of suspicious activity is not enough. The defendant must be aware of the fraud." (relying on *Ariz. Laborers*, 201 Ariz. at 485 ¶ 33, 38 P.3d at 23) (internal citations and quotation marks omitted))). Specifically, Ms. Nelson must have been "***aware*** that [the fraudster] ***did or would in fact***" perpetrate the specific fraud. *Dawson*, 216 Ariz. at 103. (emphasis added). As set forth above, the undisputed material facts show that Ms. Nelson had no knowledge of Menaged's supposed fraud or any misrepresentations made to DenSco.

Because there is no evidence that Ms. Nelson knew of Menaged's fraud, or had knowledge about the nature or details of DenSco and Menaged's lender/borrower relationship, the Receiver cannot establish actual knowledge to support an aiding and abetting claim and there is no basis for the claims against Ms. Nelson and her husband proceeding further. *See Dawson,* 216 Ariz. at 102 (no aiding and abetting fraud claim could exist where there was "no evidence in the record that either [defendant] were even aware of the fraudulent scheme to procure the loan."); *see also El Camino Resources, LTD v. Huntington Nat. Bank*, 722 F. Supp. 2d 875, 920 (W.D. Mich. 2010) (granting summary judgment where there was no "direct evidence that [bank] had actual knowledge

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that [its customer] was defrauding plaintiffs or converting their funds, or even that the Bank was generally aware of the fraudulent scheme").

Equally baseless is the Receiver's unsupported theory that Ms. Nelson is liable for aiding and abetting Menaged because Menaged's conduct was so unusual that Ms. Nelson should have known he was engaged in fraud. This is simply not the standard and would create a precedent that is unsupported by Arizona law. *See Minotto v. Van Cott*, No. 1 CA-CV 15-0159, 2016 WL 3030129, at *4 (Ariz. Ct. App. May 26, 2016) (dismissing aiding and abetting claim where allegations that defendant "*should* have known" did not plead "a level of knowledge sufficient to satisfy the elements of aiding and abetting tortious conduct").

[redacted] *See, e.g., In re Agape Litig.*, 681 F. Supp. 2d 352, 363 (E.D.N.Y. 2010) ("allegations showing [defendant bank] had generalized suspicions about fraudulent activity did not suffice to raise an inference that the bank had actual knowledge of the fraudulent scheme ….").[1] [redacted]

[1] *See also NCA Inv'rs Liquidating Tr. v. TD Bank, N.A.*, 2019 Bankr. LEXIS 3632, at *23–29 (Bankr. D. Del. Nov. 25, 2019) (frequently bouncing checks or transfers between and among same accounts do not support an inference of actual knowledge of wrongdoing); *Zhao v. JPMorgan Chase & Co.*, 17 Civ. 8570 (NRB), 2019 U.S. Dist. LEXIS 40673, at *13 (S.D.N.Y. Mar. 13, 2019) ("knowledge of frequent withdrawals, wire transfers to accounts in countries recognized as money laundering havens, and the single transfer recall request" do not imply actual knowledge); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 426 (S.D.N.Y. 2007) (suspicious withdrawals of large amounts of cash inconsistent with customer's business indicate, at most, only constructive knowledge of scheme); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, No. 98-CV-4960, 1999 WL 558141, at *7–8 (S.D.N.Y. July 30, 1999) (finding no inference of actual knowledge despite allegations of suspicious transfers, some of which were flagged as fraudulent).

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[redacted] The Receiver's positions are as ridiculous as they are groundless.

Finally, the Receiver cannot simply point to emails copying Ms. Nelson with information for cashier's checks to argue that Ms. Nelson's knowledge of a massive fraud scheme by Menaged and DenSco may be inferred from the circumstances presented. Such an inference is wholly unreasonable and insufficient on this record to establish actual knowledge of the specific fraud that Menaged is alleged to have conducted because there is ***zero*** evidence that Ms. Nelson was "aware of the fraudulent scheme to procure the [DenSco] loan[s]." *Dawson*, 216 Ariz. at 102 (holding that actual knowledge of fraud could not be inferred based on defendants' awareness that the third-party soliciting loans from plaintiff had a "dishonest character"). This result is compelled by the binding precedent in *Dawson*. There, the aiding and abetting claim was premised on allegations that the defendants aided and abetted the fraud of a third-party who solicited a capital loan for a start-up company. *See Dawson*, 216 Ariz. at 95. Specifically, the "actionable representation" made by the third-party to Dawson was a statement regarding the "priority of the Dawson loan." *Id.* at 102. The appellate court overruled the trial court and held that it should have granted the defendant judgment as a matter of law because there was "no evidence of any communication between [defendants] and the primary tortfeasors [] about the terms of the loan, including the priority of the loan, or any assurances that were made or would be made in order to procure that loan." *Id.* at 102-03. Put differently, there was no evidence that the defendants had any knowledge or awareness of the statements and assurances that constituted the fraud they were alleged to have aided and abetted.

The same is true here. There is no evidence that Ms. Nelson had knowledge that Menaged was accepting loan funds from DenSco into the AZHF account and using them as part of a fraudulent scheme. (SOF ¶¶ 70, 77, 81.) There is no evidence that Ms. Nelson had knowledge of the details of DenSco and Menaged's lending relationship or the

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communications between them regarding their loan arrangements. (*See id.* ¶ 77.) There is no evidence that Ms. Nelson had knowledge that Menaged was using fraudulent statements to procure loan funds from DenSco. (*See id.* ¶¶ 70, 77, 81.) Thus, as in *Dawson*, the aiding and abetting claims fails. *See Dawson*, 216 Ariz. at 103.

The facts here are nothing like the circumstances in *Wells Fargo* where the defendant bank was found to have actual knowledge of fraudulent statements by one of its borrowers/customers to another lender. There, the evidence was undisputed that the bank: (i) knew of its customer's duty to provide accurate financial information to the plaintiff; (ii) knew that its customer provided the plaintiff with false information in financial statements that misstated the value of the customer's real estate development because the bank had conducted an appraisal that valued the development at one half of the value in the financial statements; and (iii) knew that the customer omitted to state that its loan with the bank was in default. *See* 201 Ariz. at 485-86. What is more, in that case, the bank's own executives admitted in deposition testimony that they were aware that the customer's listed real estate values "were inaccurate" and that the bank was "concerned" that the customer had provided "intentional misstatements" to the plaintiff." *Id.* at 486-87. As the Arizona Supreme Court's decision shows, to establish actual knowledge for aiding and abetting the defendant must have ***actual knowledge*** of at least some false representation or omission by the tort-feasor to the victim of the fraud. *See id.* at 487-88. No such evidence exists here, as Ms. Nelson did not have knowledge of any representation to DenSco by Menaged that was the basis for DenSco providing loan funds to AZHF. Because the uncontested evidence establishes that Ms. Nelson lacked such knowledge, this Court should enter summary judgment in favor of Ms. Nelson on the Receiver's aiding and abetting claim.

2. Ms. Nelson Did Not Substantially Assist Menaged.

For this element, DenSco must establish that Ms. Nelson substantially assisted Menaged in the commission of his fraud. *See Stern v. Charles Schwab & Co., Inc.*, No. CV-09-1229, 2009 WL 3352408, at *7 (D. Ariz. Oct. 16, 2009) ("*Stern II*"). "Proof

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of substantial assistance requires a showing that [the defendant's] conduct was 'a substantial factor in causing the [plaintiff's] harm.'" *Id.* at * 8 (quoting *In re Am. Cont'l Corp.*, 794 F. Supp. 1424, 1434–35 (D. Ariz. 1992)).

For all of the same reasons detailed above, there is no basis for claiming that Ms. Nelson substantially assisted with Menaged and DenSco's scheme. At most, the evidence shows that Ms. Nelson processed Menaged's transactions at the Scottsdale branch, just as she did for countless other customers in the course of helping to manage a branch that regularly processed 15,000 to 25,000 transactions per week. (SOF ¶ 67, 71-74.) But, "processing day-to-day transactions" is not substantial assistance unless the bank has an '***extraordinary*** economic motivation to aid in the fraud.'" *Stern II*, 2009 WL 3352408, at *8 (quoting *Ariz. Laborers*, 38 P.3d at 27) (emphasis added). There is no evidence that Ms. Nelson acted with the requisite "extraordinary" motivation, as there is no evidence that she received any financial benefit as a result of the AZHF account, let alone an extraordinary benefit. The showing necessary to establish "extraordinary economic motivation" is a high one under Arizona law. *Compare Ariz. Laborers*, 38 P.3d at 27 (holding that the bank had an extraordinary motivation when assisting in the fraud would ensure that the customer would not default on a loan worth millions of dollars), *with Stern II*, 2009 WL 3352408, at *8–9 (allowing a customer "to open and continue maintaining" an account, "permitting transactions in the millions of dollars, and accepting deposits and transferring money" is not sufficient to establish substantial assistance). There is nothing in the record to support this element, and the Receiver's concocted version of events and his effort to improperly expand controlling Arizona law should be flatly rejected.

E. No Evidence Supports an Arizona Civil RICO Claim Against Ms. Nelson.

The Receiver's overreach in this case is further exemplified by his RICO claim against Ms. Nelson and her husband. Arizona's racketeering statute allows a private cause of action by a person who is injured by a "pattern of racketeering activity." A.R.S. § 13-2314.04(A); *see also Hannosh v. Segal*, 235 Ariz. 108, 111, 328 P.3d 1049, 1052

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(Ariz. Ct. App. 2014). Proving a "pattern of racketeering activity" requires establishing at least two related and continuous predicate acts listed in A.R.S. § 13-2301(D)(4). *See* A.R.S. §13–2314.04(T)(3). Here, the undisputed evidence confirms that the Receiver's racketeering claim against Ms. Nelson and her husband is meritless for at least four reasons.

1. The Racketeering Statute Expressly Excludes DenSco and Menaged's Securities Fraud From The Definition of "Racketeering."

Arizona's racketeering statute expressly provides "no person may rely on any conduct that would have been actionable as fraud in the purchase or sale of securities to establish an action under this section …." A.R.S. § 13-2314.04(A). Securities fraud is defined, in relevant part, as "[e]mploy[ing] any device, scheme or artifice to defraud," "[m]ak[ing any untrue statement of material fact, or omit[ting] to state any material fact," or "[e]ngag[ing] in any transaction, practice or course of business which operates or would operate as a fraud or deceit" "in connection with a transaction or transactions … involving an offer to sell or buy securities …." A.R.S. § 44-1991(A). Courts broadly construe this exception to encompass even facts that could "state a claim under a non-securities-related predicate act" where "the allegations that form the basis of the predicate act occur 'in connection with' securities fraud." *Sell v. Zions First Nation Bank*, CV-05-0684 PHX SRB, 2006 WL 322469, at *10 (D. Ariz. Feb. 9, 2006) (construing parallel provision in federal RICO statute).

Here, the Receiver premises his racketeering claims on Menaged's role in a scheme that involved DenSco defrauding its investors in connection with DenSco's offering of securities, so the Receiver's racketeering claim against Ms. Nelson fails as a matter of law. The Receiver has repeatedly admitted that DenSco conspired with Menaged to conceal the double-liening fraud and DenSco's resulting insolvency from investors, and that "after December 31, 2012, DenSco operated as a Ponzi investment scheme" by "raising and utilizing new investor money to pay older DenSco investors." (SOF ¶ 150.) Indeed, the Arizona Corporation Commission prosecuted DenSco for

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"Fraud in Connection with the Offer and Sale of Securities" because of these actions. (SOF ¶ 146 (alleging violations of A.R.S. § 44-1991).) Given that these undisputed facts establish that Menaged's alleged misconduct was connected to DenSco's securities fraud, the statutory securities fraud exception applies here. *See Sell*, 2006 WL 322469 at *10 (applying exception and dismissing RICO claims where receivership entities engaged in Ponzi scheme and were "sued under securities fraud laws"); *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 280 (2d Cir. 2011) (affirming dismissal of federal RICO claims against Chase premised on processing Ponzi schemer's wire transfers because scheme was not a valid predicate act under securities fraud exception).

2. The Receiver Cannot Establish that Menaged Committed Racketeering Acts that Fit the Statutory Definitions.

Notwithstanding the securities fraud exception, the undisputed facts also show that the Receiver cannot introduce undisputed evidence establishing that Menaged committed any of the predicate offenses enumerated in Arizona's racketeering statute, as the Receiver must do to establish his racketeering claims. As set forth in the Chase Defendants' Response to Plaintiff's Motion for Partial Summary Judgment on Underlying Pattern of Racketeering (the "MPSJ Resp."), the Receiver cannot demonstrate that Menaged's conduct falls within the definition of the unlawful predicate acts listed in A.R.S. § 13-2301(D)(4).

Ms. Nelson hereby adopts and incorporates by reference as if fully set forth herein the argument set forth in sections (C)(1)-(3) of the Chase Defendants' response to the Receiver's motion for partial summary judgment; which established that:

(1) Menaged's conduct does not meet the statutory definition of theft because once DenSco voluntarily wired funds into the AZHF account they became Menaged's, such that Menaged could have not converted or stolen the money as a matter of law. (*See* MPSJ Resp. at p. 9);

(2) Menaged's conduct does not fall within the statutory definition of a scheme or artifice to defraud because: (i) the undisputed evidence shows that Chittick could

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not have reasonably or justifiably relied on Menaged's post-November 2013 representations as a matter of law; and (ii) the false pretense much be such that it deceives someone of "ordinary prudence," which does not include an experienced lender such as Chittick who should have taken appropriate industry standard precautions to verify Menaged's statements and protect the DenSco collateral. (*See id.* at pp. 10-12); and

(3) Menaged's conduct does not constitute money laundering under the stature because: (i) the Receiver cannot establish that Menaged conducted a transaction using "racketeering proceeds;" and (ii) Menaged's transactions did not involve the use of forged or falsified checks. (*See id.* at pp. 12-15).

3. Even Assuming A Predicate Act, There Is No Evidence of Continuity.

Even assuming the Receiver had proved the existence of underlying predicate acts—which he has not—he has still failed to establish an underlying ***pattern*** of unlawful activity because he has made no attempt to show that the acts were related or continuous. *See Piper v. Gooding & Co., Inc.,* 334 F. Supp. 3d 1009, 1020 (D. Ariz. 2018) ("A 'pattern of racketeering activity' means that there must be at least two ***related*** and ***continuous*** acts of racketeering.") (internal citation and quotation marks omitted). And Courts have consistently declined to find continuity where—as here—the scheme involves a limited number of perpetrators and victims and was directed at a single goal. *See Glen Flora Dental Ctr., Ltd. v. First Eagle Bank*, No. 17-cv-9161, 2018 U.S. Dist. LEXIS 153579, at *19 (N.D. Ill. Sep. 10, 2018) (concluding no continuity arose from a single scheme to defraud a single victim, even though "injury" resulted from "numerous transactions" with that victim); *see also FD Prop. Holding, Inc. v. US Traffic Corp.*, 206 F. Supp. 2d 362, 372-73 (E.D.N.Y. 2002) (courts "have generally held that where the conduct at issue involves a limited number of perpetrators and victims and a limited goal, the conduct is lacking in closed-ended continuity."); *see also Lifelite Med. Air Transp., Inc. v. Native Am. Air Services, Inc.*, 198 Ariz. 149, 153, ¶ 13, 7 P.3d 158, 161-62 (Ariz. Ct. App. 2000) (noting the Arizona legislature "incorporated the federal requirement that plaintiff

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demonstrate a 'pattern of racketeering activity'" along with the requirements that it be "related" and "continuous").

The Receiver defines Menaged's unlawful conduct as obtaining DenSco loan proceeds under the guise that he would use the proceeds to acquire properties, but that he, in fact, used the proceeds for personal gain. Even as framed by the Receiver, these assertions establish a scheme with one perpetrator affecting a single purported victim—namely, DenSco. Moreover, the scheme demonstrates a single goal: to borrow funds via misrepresentations of property purchases for the purpose of using the loan proceeds for personal gain instead of investment. While there may have been multiple transactions involved in effectuating the scheme, that does not change the fact that the scheme itself was singularly focused. Thus, the undisputed facts cannot support a dispositive finding that Menaged's actions were continuous and thus created a "pattern" of racketeering. *See Bernstein v. Misk*, 948 F. Supp. 228, 238 (E.D.N.Y. 1997) (no closed-ended continuity found in scheme which lasted four and a half years with only one major perpetrator, one group of purchaser victims, and a single, non-complex scheme to obtain financing for purchase of property and a default on a loan); *see also FD Prop. Holding*, 206 F. Supp. 2d at 372-73 (collecting cases).

4. Ms. Nelson Had No Knowledge of Menaged's Scheme.

For claims against natural persons—like Ms. Nelson and her husband—the Receiver must establish that they "authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of [Menaged]." A.R.S. § 13–2314.04(L). To meet this standard, the Receiver must establish that Ms. Nelson had actual knowledge or conscious awareness that Menaged's conduct was criminal in nature. *See Digital Sys. Eng'g, Inc. v. Bruce-Moreno*, No. 1 CA-CV 09-0574, 2010 WL 5030808, at *6 (Ariz. Ct. App. Nov. 16, 2010) ("Both 'ratified' and 'recklessly tolerated' call for a construction that imputes knowledge or conscious awareness. That is, one who ratifies or recklessly tolerates the conduct of another ***must necessarily have knowledge or conscious awareness*** that the conduct is of a criminal nature in order to be found liable.") (emphasis

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 800
PHOENIX, ARIZONA 85016
(602) 445-8000

added). As explained more fully above, the record here is devoid of evidence demonstrating that Ms. Nelson had knowledge or awareness that Menaged's conduct was criminal in nature. (*See supra,* pp. 4-6.) Because nothing in the record can establish that Ms. Nelson knew of Menaged's allegedly illegal conduct, this court should enter summary judgment in Ms. Nelson's favor on the racketeering claim.

Tellingly, because the Receiver is presumably aware that he is unable to demonstrate the actual knowledge his claim requires, the Receiver argued for a lower standard in his recently withdrawn partial motion for summary judgment on liability of USBank, N.A. defendant Hilda Chavez. In what could only have been a purposeful attempt to avoid the appellate court's ruling in *Bruce-Moreno*, the Receiver failed to cite that decision and instead relied on Black's Law Dictionary definitions of "authorize," "recklessly," and "tolerate" to imply that actual knowledge of criminal conduct is not required for liability. (*See* Apr. 19, 2023 Motion for Partial Summary Judgment on Liability of Hilda Chavez, p 9.) This argument fails to cite the governing law and is yet another example of the Receiver's contrived positions in this case: *Bruce-Moreno* controls, and the Receiver's failure to introduce any evidence that Ms. Nelson knew of Menaged's illegal conduct warrants summary judgment in her favor on the racketeering claim.

IV. CONCLUSION

There is no basis for this matter to continue against the Nelsons based on the undisputed facts in this record, and the Receiver's overreaching efforts to target them for the past four plus years are unsupportable. For the foregoing reasons, this Court should enter summary judgment in favor of Ms. Nelson and her husband on both the Receiver's claims.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 800
PHOENIX, ARIZONA 85016
(602) 445-8000

RESPECTFULLY SUBMITTED this 31 day of May, 2023.

GREENBERG TRAURIG, LLP

By:*/s/ Nicole M. Goodwin*
Nicole M. Goodwin
Adrianna Griego Gorton
Paul J. Ferak *(pro hac vice)*
Jonathan H. Claydon *(pro hac vice)*
Attorneys for Defendants JPMorgan Chase Bank, N.A., Samantha Nelson f/k/a Samantha Kumbaleck, Kristofer Nelson, Vikram Dadlani, and Jane Doe Dadlani

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 800
PHOENIX, ARIZONA 85016
(602) 445-8000

ORIGINAL of the foregoing e-filed with the Clerk of Court this 31 day of May 2023.

COPY of the foregoing electronically distributed this 31 day of May 2023 to:

Hon. Dewain Fox

COPY of the foregoing served via TurboCourt e-Service and E-Mail this 31 day of May 2023 to:

Colin F. Campbell
Geoffrey M. T. Sturr
Timothy J. Eckstein
Joseph N. Roth
John S. Bullock
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012
ccampbell@omlaw.com
gsturr@omlaw.com
teckstein@omlaw.com
jroth@omlaw.com
jbullock@omlaw.com
Attorneys for Plaintiff

Gregory J. Marshall
Amanda Z. Weaver
SNELL & WILMER, L.L.P.
One Arizona Center
400 E. Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202
gmarshall@swlaw.com
aweaver@swlaw.com

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 800
PHOENIX, ARIZONA 85016
(602) 445-8000

David B. Chenkin (*pro hac vice*)
Kenneth C. Rudd (*pro hac vice*)
ZEICHNER ELLMAN & KRAUSE, LLP
1211 Avenue of the Americas, 40th Floor
New York, NY 10036
dchenkin@zeklaw.com
krudd@zeklaw.com

Attorneys for U.S. Bank National Association and Hilda Chavez

/s/ Tammy Mowen
Employee, Greenberg Traurig

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 800
PHOENIX, ARIZONA 85016
(602) 445-8000