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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PETER S. DAVIS, as Receiver of DENSCO INVESTMENT CORPORATION, an Arizona corporation, Plaintiff, v. U.S. BANK, NA. a national banking organization; HILDA H. CHAVEZ and JOHN DOE CHAVEZ, a married couple; JPMORGAN CHASE BANK, N.A., a national banking organization; SAMANTHA NELSON f/k/a SAMANTHA KUMBALECK and KRISTOFER NELSON, a married couple, and VIKRAM DADLANI and JANE DOE DADLANI, a married couple, Defendants.	NO. CV2019-011499 **DEFENDANT JPMORGAN CHASE BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Hon. Dewain Fox) (Oral Argument Requested)

Defendant JPMorgan Chase Bank, N.A. ("Chase"), pursuant to Rule 56(a) of the Arizona Rules of Civil Procedure, moves for summary judgment in its 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 exhibits thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

DenSco Investment Corporation ("DenSco"), a hard money lender, lost millions of dollars in a fraud scheme first orchestrated by Scott Menaged ("Menaged") that began sometime in 2012, more than two years before Menaged conducted a single transaction at Chase, and later continued due to the participation and support of DenSco. DenSco claims that Chase aided and abetted Menaged's multi-year fraud because Menaged banked with Chase from April 2014 to June 2016, and Menaged used his business account at Chase to receive loan proceeds from DenSco.

The claim brought by Peter S. Davis, as receiver for DenSco, however, 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 operated DenSco as a Ponzi scheme by soliciting new investments under false pretenses and repaying dividends from those new investments. As described below, these undisputed facts give rise to numerous legal arguments that bar the claims currently asserted before this Court. Moreover, there is no evidence that Chase had actual knowledge of Menaged's scheme, much less that Chase provided substantial assistance or caused any damage to DenSco. The undisputed material facts demonstrate that Chase is entitled to summary judgment on four independent grounds, any one of which commands judgment in Chase's favor.

1. The Receiver lacks standing to assert his claim. The Receiver has admitted on numerous occasions that DenSco—through its principal 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

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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 claim against Chase because Arizona law prohibits a tarnished entity from recovering damages that it helped to cause.

2. DenSco could not have reasonably relied on any of Menaged's representations after learning of fraud by Menaged's company in November 2013—even the Receiver admits this. 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 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). It is undisputed that DenSco, through Chittick, knew that Menaged's fraud continued after he began banking at Chase by December 2014 at the latest—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, far outside the applicable limitations period.

4. There is no evidence in the record that any Chase employee had actual knowledge of the fraud. Despite extensive discovery over the past seven (7) years, the Receiver has come up with no evidence that any Chase employee had actual knowledge of Menaged's illegal conduct. There is no evidence that any Chase branch employee had actual knowledge of Menaged's fraud, and it is undisputed that Chase's anti-money-laundering investigators concluded—on four separate occasions—that Menaged's transactions with DenSco appeared to be legitimate and consistent with the companies' expected type of business.

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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 Chase.

I. FACTUAL BACKGROUND

A. The Undisputed Evidence Shows Chittick and Menaged Conspired to Convert DenSco Into a Ponzi Scheme.

DenSco was an Arizona hard-money lending corporation in operation from 2001-2016, and Chittick was DenSco's only director, employee and shareholder. (SOF ¶ 1.) DenSco made short-term, high-interest loans to foreclosure specialists who bought homes that were being foreclosed upon, usually through a trustee's sale. (*Id.* ¶ 6.) DenSco raised funds to make these loans from investors and promised that the loans were safe because, among other things, DenSco would make only first-position loans, and no single borrower would comprise more than 10-15% of DenSco's loan portfolio. (*Id.* ¶ 9.) Despite these representations, by November 1, 2013, DenSco had made 43% of its total loans to just one borrower—Menaged. (*Id.* ¶ 17.)

It is undisputed that in November 2013, at latest, Chittick learned that Menaged's company had taken DenSco loan funds ***without*** obtaining a first-position lien on the properties he was to purchase with the funds. This was not an isolated incident—Chittick learned that Menaged had failed to take appropriate security many times over. (*Id.* ¶¶ 14-17, 25, 46.) As a result of Menaged's scheme, DenSco's investment portfolio was significantly undersecured, and DenSco had been insolvent for nearly a year. (*Id.* ¶ 16.) Chittick made no effort to investigate or report the fraudulent transactions. (*Id.* ¶ 24.)

Nonetheless, Chittick became concerned that if DenSco's investors discovered the truth, they would pull their investments from DenSco. He, therefore, strategized a plan with Menaged to cover up DenSco's insolvency and make up DenSco's losses. (*Id.* ¶¶ 23-24.) Although Chittick had a legal obligation to disclose the fraud to his investors, he never did so. (*Id.* ¶¶ 27-28.) Instead, he entered into agreements with Menaged to forbear collecting the amounts Menaged owed on loans made prior to November 2013, and

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transferred more money to Menaged in the hopes Menaged could generate enough profits to make DenSco whole, a decision the Receiver admits breached DenSco's duties to its investors. (*Id.* ¶¶ 24, 31, 34, 39-46, 153.) The Receiver further admits in sworn testimony that it was unreasonable for Chittick to continue doing business with Menaged after learning of this fraud. (*Id.* ¶ 22, 34.)

Menaged's misappropriation of funds was possible only because—contrary to customary industry practices—DenSco wired loan proceeds directly to Menaged instead of first requiring proof of purchase and then wiring loan funds directly to a trustee or escrow account. (*Id.* ¶¶ 18, 32.) DenSco did not change this practice after learning of Menaged's fraud. (*Id.* ¶¶ 33, 49, 119.) DenSco further failed to implement any other industry-standard safeguards, such as looking up readily available online property records to confirm Menaged's property purchases. (*Id.* ¶¶ 33, 49, 119)

Throughout this period of insolvency, Chittick raised the funds needed to make these new loans to Menaged by soliciting new investments without disclosing to investors DenSco's losses, Menaged's fraud, and the true makeup of DenSco's portfolio, actions which the Receiver, himself, has explained on multiple occasions effectively converted DenSco into a Ponzi Scheme. (*E.g.*, *id.* ¶ 148.) In the Receiver's own words:

- "[A]fter a partial financial reconstruction of DenSco, the Receiver determined that as of December 31, 2012, ***DenSco became insolvent and essentially became a Ponzi Scheme*** as DenSco's assets were insufficient to pay the necessary interest and principal payments to DenSco's investors." (*Id.* ¶ 148.)
- "[D]espite being insolvent, DenSco knowingly continued to raise new money from investors, which was utilized to pay DenSco's obligations to its existing investors. With a clear pattern of DenSco raising and utilizing new investor money to pay older DenSco investors, ***the Receiver determined that after December 31, 2012, DenSco operated as a Ponzi investment scheme***." (*Id.* ¶ 150.)
- Payments made to investors after DenSco became insolvent were fraudulent transfers made "***in furtherance of a Ponzi scheme***." (*Id.* ¶ 150.)
- "Chittick failed to institute or follow proper management and control of DenSco's business operations which enabled and contributed to the fraud committed against DenSco by Menaged. Chittick was aware of the fraud by

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> at least November 27, 2013. Despite his ***actual knowledge of the fraud by Menaged***, Chittick continued to accept monies for investors into DenSco, and continued to make loans to Menaged and his related entities, adding to the liabilities of DenSco which could not be met." (*Id.* ¶ 151; SOF Ex. 2 at JPMC-SOF_000009.)

B. No Chase Employee Knew of the Menaged/DenSco Scheme.

Five months after Chittick learned of Menaged's fraud, Menaged opened a bank account with Chase for his company Arizona Home Foreclosures ("AZHF"), to which DenSco directly wired Menaged's loan proceeds in 2014 and 2015. (SOF ¶ 52.) Menaged purchased cashier's checks with the DenSco-wired loan proceeds, took pictures of those checks, then redeposited checks the same day. (*Id.* ¶¶ 94, 106.) At all times, Menaged's activities were conducted with funds that were the property of AZHF because DenSco had wired the funds to AZHF for use. To the extent Menaged was using those funds improperly, the undisputed evidence shows that no Chase employee had any knowledge of Menaged's fraud.

1. No Chase Branch Employee Had Actual Knowledge.

The Receiver claims that three Chase branch employees knew of Menaged's alleged fraud and provided assistance to Menaged in furtherance of that fraud: Vikram Dadlani ("Dadlani"), the branch manager, Samantha Nelson ("Nelson"), the assistant branch manager, and Susan Lazar ("Lazar"), a private client banker. All three testified under oath that they knew nothing about Menaged's use or misuse of DenSco loan funds. There is no evidence to the contrary. There is also no evidence that any of these three employees did anything more than provide routine banking services to Menaged.

<u>First</u>, during Dadlani's short stint as branch manager (about one year), Dadlani and Menaged had hardly any interaction with each other, as would be expected. (SOF ¶¶ 4, 64.) Dadlani was not involved in opening AZHF's Chase account, and he had no knowledge of Menaged's business operation, or of the particulars of Menaged's account transactions:

> Q. Were you aware he was doing wire transfers to DenSco?
> A. I wasn't aware.

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Q. Were you aware that DenSco was depositing money into his account?
A. I was not aware.
Q. Were you aware that he was taking money from DenSco and repaying prior loans to DenSco?
A. I wasn't aware that he was taking money for DenSco. (SOF Ex. 8 at 109.)

Although Menaged sometimes included Dadlani on emails requesting cashier's checks, Dadlani testified he that he did not remember personally preparing any checks for Menaged, nor did he recall seeing Menaged take pictures of the checks or know the purpose or frequency of Menaged's cashier's checks. (SOF ¶¶ 58-61.) Finally, Menaged testified that he never told Dadlani about his and DenSco's fraudulent conduct. (*Id.* ¶ 64.)

Second, Nelson's interactions with Menaged were limited to performing certain requested cashier check transactions in accordance with Chase policies and procedures. (*Id.* ¶¶ 71-74.) Though Menaged sent her emails requesting checks to have them prepared as he requested and to "easily copy and paste the information," it was not unusual for a customer to email Nelson. (*Id.* ¶ 71.) When completing transactions, Chase's transaction-processing software showed only the account name and the available balance. (*Id.* ¶ 73.) Nelson had no personal relationship with Menaged, and she never lifted any holds on his deposits or verified his account funds for third-parties. (*Id.* ¶¶ 76, 79.)

Nelson's testimony confirms that she did not know Menaged was engaged in fraudulent activity, as he told her he was obtaining cashier's checks for recordkeeping:

Q. And during all those interactions, you never talked with him about what his business was or why he needed the cashier's checks or where he was getting the money from?
A. I did ask why he got cashier's checks.
Q. And what did he say?
A. It was for bookkeeping.

(SOF Ex. 39 at 64:7-13.) Menaged also testified that Nelson was unaware of the fraud he and DenSco were committing. (SOF ¶ 81.)

Nelson submitted an unusual activity referral shortly after Menaged opened the AZHF account because "the transactions look[ed] different." (SOF ¶ 69.) When she asked Menaged the purpose of the cashier's check transactions, she "was told it was for

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bookkeeping …. There was nothing else that seemed different about the transactions, so I assisted the customer like I would normally assist a customer." (*Id.* ¶ 70.)

Third, Lazar also had no knowledge of Menaged's fraud. As a personal banker, Lazar was responsible for opening accounts for customers and managing relationships with certain private banking clients. (*Id.* ¶ 82.) Lazar would review a customer's banking activity only in isolated instances if needed to respond to customer requests. (*Id.* ¶¶ 84-85.) As a personal banker, Lazar did not work on the teller line or assist customers with day-to-day transactions. (*See id.*) Lazar was not even aware that Menaged was having cashier's checks issued and redeposited:

> Q. Were you aware that Mr. Menaged was having cashier's checks issued and then not using them for their intended purpose and redepositing them into the account?
>
> A. No. (SOF Ex. 42 at 51:22-25.)

Menaged confirmed that he did not tell Lazar that he was engaged in fraud or that he was doing anything illegal. (SOF ¶ 88.) Lazar went on maternity leave in December 2014, never returned to work at Chase, and did not have any contact with Menaged after leaving her employment with Chase. (*Id.* ¶ 89.)

2. No Chase AML Employee Had Actual Knowledge.

No one in Chase's AML Investigations Unit (the "AML Unit")—the department that reviews automated and manual referrals for potentially unusual account activity—knew of Menaged's scheme, either. (SOF ¶¶ 90-110.) The AML Unit is comprised of two layers of employees: alert analysts and AML investigators. (*Id.* ¶ 91.) Alert analysts review manual account referrals and automated account alerts to determine whether potentially unusual transactions should be escalated to an AML investigator. (*Id.*) The alert analyst has only two options: **(1)** close the referral/alert; or **(2)** escalate—no analyst makes a determination whether transaction activity is fraudulent or illegal. (*Id.*) If a referral or alert is escalated, the investigator conducts a more in-depth review and decides whether the activity warrants the filing of a report to government regulators. (*Id.*)

Over the 15 months that Menaged banked at Chase, alert analysts escalated certain

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referrals and alerts to AML investigators for review. On four occasions, after conducting thorough reviews of Menaged's banking activity and research concerning Menaged, AZHF, and DenSco, those AML investigators concluded that the source of funds into AZHF's account—primarily DenSco—appeared to be legitimate, and that AZHF's transactions appeared legitimate and consistent with the nature of his public-facing business:

- **July 29, 2014:** "Based on the review of the account activity during this investigation and the information obtained from the referral, sources funding the account appear legitimate and other account activity appears consistent with a consumer account." (*Id.* ¶ 101.)
- **July 30, 2014:** "Given the business description and review of the transaction history, the activity appears normal and expected for this type of business. Google searches of the business signer, and other parties associated shows an internet presence in the real estate sector. Although transactions are high dollar, they are transparent and appear to be for typical business activity (for this type of business)." (*Id.* ¶ 98.)
- **December 2, 2014:** "The above activity is consistent with the LOB of Arizona Home Foreclosures LLC as they are regularly receiving loans to assist with purchasing properties, then they sell the properties and payback [sic] initial loans to DenSco Investment Corporation." (*Id.* ¶ 103.)
- **April 23, 2015:** "Arizona Home Foreclosures, LLC is a real estate company in Arizona that specializes on the purchase and resale of foreclosed properties. The primary sources of funds are inbound federal wires from DenSco Investments. DenSco provides the short term loan that enables Arizona Home Foreclosures LLC to purchase the properties. There are multiple cashier check redeposit[s] into the account. This is normal activity in the real estate industry. When purchasing properties at auctions the buy[er] must provide proof that they have the funds available. This is commonly done with the purchase of cashier['s] checks. Each check has the property's address listed that is to be purchase[d]." (*Id.* ¶ 107.)

None of the investigators or analysts who reviewed Menaged's account activity were based in Arizona. (*Id.* ¶ 110.) None of them met or interacted with Menaged. (*Id.*)

C. After Densco and Menaged's Scheme Collapsed, the Receiver Was Appointed Over DenSco Because DenSco Committed Securities Fraud.

In April 2016, Menaged filed for personal bankruptcy. (SOF ¶ 136.) Chittick became increasingly concerned that the truth of DenSco's financial condition would come

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to light, and on July 28, 2016, Chittick committed suicide. (*Id.* ¶¶ 137-143.) Before his death, he drafted a letter to DenSco investors confessing to his conspiracy with Menaged. (*Id.* ¶ 143.) The Arizona Corporation Commission filed a complaint against DenSco for securities fraud, and the court presiding over that case appointed the Receiver. (*Id.* ¶ 146.)

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). 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.

"As a matter of sound judicial policy," Arizona courts have "long required that persons seeking redress … must first establish standing to sue." *Bennett v. Brownlow*, 211 Ariz. 193, 195, 119 P.3d 460, 462 (Ariz. 2005) (internal citations omitted). In order "to establish standing," Arizona courts "require that petitioners show a particularized injury to themselves." *Id*. at 463.

Under Arizona law, receivers "stand[] in the shoes of the entity [they] represent[]" and inherit only the "'rights, causes and remedies … which were available to'" that entity. *See Gravel Res. of Ariz. v. Hills*, 217 Ariz. 33, 38, 170 P.3d 282, 287 (Ariz. Ct. App. 2007) (quoting 65 Am. Jur. 2d *Receivers* § 100). Thus, "the property of an entity in receivership includes" only the "'causes of action available to that entity.'" *Id*. Consistent

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with Arizona law, the Receiver in this litigation was appointed in a limited capacity: He was empowered to stand in DenSco's shoes, taking authority only over the assets belonging to DenSco, subject to the same legal limitations and defenses DenSco would have possessed. (SOF ¶ 2.) *Compare with Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1309 (11th Cir. 2020) (receiver appointed "'to protect the assets of [the Receivership Entities] … from being sold, transferred, alienated or otherwise dissipated until the resolution of the instant [state court] proceeding.'").

This appointing language expressly precludes the Receiver from pursuing his aiding and abetting claim against Chase because DenSco was not injured by—and, in fact, helped perpetrate and benefitted from—Menaged's scheme. A receiver standing in the shoes of a tarnished entity that benefitted from a Ponzi scheme lacks standing to bring claims for aiding and abetting on behalf of the entity because the corporation cannot be said to have been injured from a scheme it helped to perpetrate. *See Isaiah*, 960 F.3d at 1307 ("[T]he Ponzi schemers' torts cannot properly be separated from the Receivership Entities, and the Receivership Entities cannot be said to have suffered any injury from the Ponzi scheme that the Entities themselves perpetrated"); *see also Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 622 (9th Cir. 1987) (where a receiver represents a company and its affiliates, but not the company's beneficiaries, the receiver lacks standing to assert state-law fraud claims that lie with the third-party beneficiaries).[1]

The undisputed record conclusively establishes that DenSco, through Chittick, was a co-conspirator with Menaged in perpetrating the fraud that injured DenSco's investors. In November 2013, Chittick "discovered that Menaged was taking monies from DenSco without obtaining a first lien" on the properties that Menaged told Chittick he would purchase. (*Id.* ¶ 14.) It is undisputed that DenSco's failure to ensure its loans were secured by first-position liens both belied DenSco's representations to investors and breached

[1] Courts also routinely hold that bankruptcy trustees (the direct parallel to civil receivers) lack standing to assert third-party claims. *See Caplin v. Marine Midland Grace Tr. Co. of NY*, 406 U.S. 416 (1972); *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1200-03 (11th Cir. 2003); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988).

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DenSco's fiduciary duty to its investors. (*Id.* ¶ 153.) But instead of ceasing business with Menaged and taking action to recover the losses that had mounted as of that time, Chittick conspired with Menaged for the next two-and-a-half years to prolong the fraud and conceal the true makeup of DenSco's portfolio from its investors. (*See id.* §§ II.b-c, i-l.)

Specifically, the undisputed record establishes that between learning of the fraud in November 2013, and his death in July 2016, Chittick: **(1)** entered into agreements with Menaged—a known fraudster[2]—to continue providing money to Menaged with the aim of generating enough profits to recoup DenSco's losses; **(2)** elected not to implement any industry-standard hard-money lending practices to ensure DenSco's future loans were properly secured; **(3)** began loaning funds to Menaged "for the purpose of making an offer" on a property (without requiring that the sale go through or that the funds be returned if the offer was not accepted); **(4)** doctored DenSco's accounting records to make the company appear profitable and conceal losses; **(5)** repeatedly lied to his investors about the types of loans he was making with their money; **(6)** solicited investments without making the disclosures required by law; and **(7)** made cash distributions to himself and his minor children totaling nearly $700,000 with the knowledge that DenSco was insolvent. (*Id.* §§ II.b-c, i-l.) The record further reflects—and the Receiver admits—that Chittick's actions to cover up DenSco's losses violated his fiduciary duties and amounted to fraud against his investors. (*Id.* ¶¶ 34, 148-150.)

Because Chittick was DenSco's sole owner, director, employee, and shareholder (SOF ¶ 1), DenSco was Chittick's alter ego and his actions and knowledge are imputed to DenSco (and, consequently, to the Receiver) under Arizona law. This is true regardless of whether the "incorporation [was] for fraudulent purposes" or "if after organization the

[2] The Receiver has made much of his theory that Chittick could have believed Menaged's cousin was responsible for misappropriating DenSco's loan funds, but this theory is a red herring. Even assuming Chittick believed the story, such naivete legally cannot justify Chittick's response to learning DenSco had been defrauded of millions of dollars by Menaged's company. It is undisputed that, upon hearing the story, Chittick and DenSco conspired with Menaged to commit securities fraud by concealing DenSco's losses and lying to investors to raise more than $5 million in additional funds. (SOF ¶¶ 147-153.)

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corporation is employed for fraudulent purposes." *Butler v. American Asphalt & Contracting Co.*, 25 Ariz. App. 26, 30, 540 P.2d 757, 761 (Ariz. Ct. App. 1975). Here, it is undisputed that Chittick had full control over DenSco, and that after November 2013, he converted the company into a Ponzi scheme (*Id*. ¶¶ 148-150), so the alter ego doctrine applies. *See Jenkins v. Comm'r of Internal Revenue*, T.C. Memo 2021-54, 43 (U.S.T.C. 2021) (applying Arizona law and imputing knowledge of company's sole director where director controlled all company voting shares and used the company to commit "host of … crimes" that Arizona's "alter ego doctrine is specifically meant to stop.").

Chittick and DenSco were full participants in (and in fact, profited from) Menaged's fraud, as the Receiver admitted in his First Amended Complaint, alleging:

> Chittick breached his fiduciary duties to DenSco and its investors by causing DenSco to (i) make 2,712 new loans to Menaged after the First Fraud for which DenSco has suffered losses in excess of $25 million; (ii) obtain more than $15 million from investors who were never told of Chittick's mismanagement of DenSco, the First Fraud, and the Forbearance Agreement; and (iii) misdirect investors' money to fund the "work out" contemplated by the Forbearance Agreement rather than use the money as promised to investors when they invested.

Davis v. U.S. Bank, et al., CV 2019-011499, Receiver's First Am. Compl. (Apr. 1, 2020). This Court has held that the Receiver is bound by his earlier pleading admissions, and he cannot about-face now simply because they are inconvenient for his current claims. *See Davis v. U.S. Bank, et al., CV 2019-011499*, Under Advisement Ruling at 9 n.2 (Sept. 10, 2021).[3] The Receiver, standing in DenSco's shoes, cannot assert a claim for the same injury DenSco itself caused. *See Isaiah*, 960 F.3d at 1307; *Credit Managers Ass'n*, 809 F.2d at 622.

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

Claims for aiding and abetting fraud have a limitations period of three years.

[3] The Receiver also admitted as much in his probate claim against Chittick's estate, asserting that Chittick was liable for fraud and "aiding and abetting Yomtov Scott Menaged in his torts against DenSco." (SOF Ex. 2 at Ex. 2 at JPMC-SOF_000009.) *See also KCI Rest. Mgmt. LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, 488, 341 P.3d 1156, 1159 (Ariz. Ct. App. 2014) (rejecting party's attempt to rebut inconsistent admissions made in prior litigation).

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See A.R.S. § 12-543(3). "The statute of limitations in a fraud case begins to run when the plaintiff by reasonable diligence could have learned of the fraud, whether or not he actually learned of it." *Peck v. Waterman*, No. 2 CA-CV 2004-0173, 2006 Ariz. App. Unpub. LEXIS 384, at *10 (Ariz. Ct. App. June 6, 2006) (cleaned up).

Here, the Receiver has produced evidence that DenSco, through Chittick, knew of Menaged's continued fraud by no later than December 2014. (SOF Ex. 17 at JPMC-SOF_00206.) *See Phoenix Children's Hosp., Inc. v. Grant*, 228 Ariz. 235, 239, 265 P.3d 417, 421 (Ariz. Ct. App. 2011) ("[T]he knowledge of a corporate agent is imputed to the corporation if it is acquired by the agent within the scope of his or her employment and relates to a matter within his or her authority." (quotations omitted)). Thus, any cause of action by DenSco against the Chase Defendants expired in December 2017—or by spring 2019 at the latest given that Menaged and Chittick discussed the scheme in a recorded telephone call shortly after Menaged filed for bankruptcy. (SOF ¶ 137.) Because the Receiver did not file his initial complaint in this litigation until August 16, 2019, the statute of limitations bars this action in its entirety. *See Peck*, 2006 Ariz. App. Unpub. LEXIS 384 at *13-29 (concluding limitations period on fraud claim expired and did not toll based on evidence that claimant knew of or could have timely investigated potentially fraudulent transactions)

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

To establish an aiding and abetting claim against Chase, the Receiver must first prove that Menaged committed an underlying tort. *See Dawson v. Withycombe*, 216 Ariz. 84, 102, 163 P.3d 1034, 1052 (Ariz. Ct. App. 2007) (aiding and abetting liability requires proving that "primary tortfeasor's conduct constituted a tort"); *see also AGA Shareholders, LLC v. CSK Auto, Inc.,* 589 F. Supp. 2d 1175, 1191–92 (D. Ariz. 2008) ("aiding and abetting [is a] derivative tort[] for which a plaintiff may recover only if it has adequately pled an independent primary tort"). Under Arizona law, an "essential element" of fraud "is actual, justifiable reliance on the alleged misrepresentation." *In re*

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Gorilla Cos., LLC, 454 B.R. 115, 118 (Bankr. D. Ariz. 2011) (citing *Kuehn v. Stanley,* 208 Ariz. 124, 128, 91 P.3d 346, 350 (Ariz. 2004)). And as a matter of law, a party cannot reasonably or justifiably rely on a representation it knows, or has reason to know, to be false. *See In re Kirsh,* 973 F.2d 1454, 1458–60 (9th Cir. 1992) (citing Restatement (Second) of Torts § 541 (1977).).

Here, the Receiver's admissions and undisputed facts establish that DenSco, through Chittick, was aware of AZHF/Menaged's fraud by November 2013. (SOF ¶ 14.) In January 2014, DenSco received a demand letter stating that Menaged had fraudulently obtained from DenSco as many as 125 loans. (*Id.* ¶ 25.) The undisputed facts, therefore, show DenSco had actual knowledge that Menaged had fraudulently obtained and squandered DenSco loan funds months before Menaged opened an account at Chase for AHZF. Consequently, and as a matter of law, DenSco could never have reasonably or justifiably relied on any representation by Menaged after January 2014, and the Receiver cannot establish the necessary elements of the fraud underlying his aiding and abetting claim against Chase. *See Stanley Fruit Co. v. Ellery*, 42 Ariz. 74, 78, 22 P.2d 672, 674 (Ariz. 1933) ("a party is not entitled to a verdict [on a fraud] if by an ordinary degree of caution the party complaining could have ascertained the falsity of the representations complained of"); *In re Kirsh,* 973 F.2d at 1458–60 (sophisticated creditor had not justifiably relied on the debtor's representations because there was no excuse for relying on the debtor rather than obtaining a title report). The Receiver agrees. (SOF ¶ 32.)

D. The Receiver Cannot Establish the Elements of Aiding and Abetting Fraud.

To succeed, the Receiver must also set forth evidence demonstrating that: **(1)** Chase ***knew*** Menaged's conduct constituted a tort; and **(2)** Chase substantially assisted 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)). Fatal to his claim, the Receiver has no

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evidence to support either of these elements.

1. No Chase Employee Had Actual Knowledge of the Scheme.

The Receiver must prove Chase ***actually knew*** Menaged's conduct was a tort. *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) (cleaned up)). Specifically, the defendants must have been "***aware*** that [the fraudster] ***did or would in fact***" perpetrate the specific fraud. *Dawson*, 216 Ariz. at 103. Here, the undisputed evidence shows that no Chase employee had actual knowledge of Menaged's fraudulent conduct or any misrepresentations made to DenSco.

First, there is no evidence Dadlani knew of Menaged's fraud. *See supra* § I.B.1.

Second, the Receiver also cannot introduce any evidence Nelson knew of Menaged's fraud. *See supra* § 1. Although Nelson submitted an unusual activity referral because she initially thought that Menaged's transactions "look[ed] different," she relied on Chase's AML team to close his account if it was warranted, and accepted Menaged's explanation that the check purchases were for bookkeeping. (SOF ¶ 69.) Considering that Nelson reported Menaged's banking activity on two occasions, it is illogical to contend, as the Receiver does, that she was a willing participant in Menaged and DenSco's fraud. Indeed, that Nelson reported Menaged's account activity compels the opposite inference: the last thing a bank employee involved in a Ponzi scheme would do is inform her superiors of potential red flags on the account used to further the scheme.[4]

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[4] The law is clear that suspicions of unusual activity are insufficient to satisfy the actual knowledge standard. *See, e.g., 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).

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Third, the Receiver has no evidence that Lazar knew of Menaged's fraud, either. *See supra* § I.B.1. Based on the nature of her role—*i.e.*, she did not conduct teller transactions—she was not even aware that Menaged was having cashier's checks issued and redeposited. (SOF ¶ 86.) Given that this is the method of the supposed fraud that the Receiver alleges occurred, Lazar simply did not have actual knowledge of the conduct that is the basis of this case.

Fourth, the evidence also shows that Chase's AML Unit reviewed Menaged's account and transactions and concluded that the transactions appeared to be legitimate. *See supra* § I.B.2. The written records of the AML investigators demonstrate that they had no knowledge of fraud by Menaged, as they documented their conclusions that DenSco and AZHF appeared—based on all publicly available records—to be complementary businesses that were conducting transactions that appeared to be appropriate for entities involved in real estate. (SOF ¶¶ 90-110.) ***Four*** separate investigators reached this same conclusion on ***four*** separate occasions over the course of 15 months, indicating plainly that none of them had actual knowledge of a fraud.

Despite any speculation that the Receiver may conjure that bank employees "must have known" or "should have known" of Menaged's fraudulent conduct, that is not the standard. In any event, the record evidence and deposition testimony shows that no Chase employee was aware of any of specific communications or loan agreements between Menaged and DenSco, and had no knowledge Menaged's fraudulent scheme to procure loan funds from DenSco. Therefore, the Receiver cannot establish actual knowledge to support an aiding and abetting claim against Chase. *See Dawson,* 216 Ariz. at 102 (no aiding and abetting fraud claim 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 that [its customer] was defrauding plaintiffs or converting their funds,

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or even that the Bank was generally aware of the fraudulent scheme").[5]

2. Chase Did Not Substantially Assist Menaged.

Finally, the Receiver must also establish that Chase substantially assisted Menaged in the commission of his fraud. *See Stern v. Charles Schwab & Co., Inc.*, 2009 WL 3352408, at *7 (D. Ariz. Oct. 16, 2009) ("*Stern II*"). "Proof of substantial assistance requires a showing that [the defendant's] conduct was a substantial factor in causing the [plaintiff's] harm." *Id.* at * 8 (quotations omitted).

But "processing day-to-day transactions"—the most the Receiver can establish any Chase employee did for Menaged—"does not constitute 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 in this record that any Chase employee acted with the requisite "extraordinary" motivation. *See 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" are simply not enough to plead substantial assistance); *see also Neilson v. Union Bank of Cali.*, 290 F. Supp. 2d 1101, 1122 (C.D. Cal. Oct. 20, 2003) ("[O]rdinary fees …, even fees calculated on the basis of the amount of assets held in an account, do not satisfy the 'personal gain or financial advantage' requirement"). The only "benefit" the Receiver can show are ordinary account and service fees, which is insufficient to prove substantial assistance. *See Neilson*, 290 F. Supp. 2d at 1122; *Stern II*, 2009 WL 3352408, at *7.

IV. CONCLUSION

This Court should enter summary judgment in favor of Chase.

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[5] To the extent that the Receiver attempts to show that Chase "should have known" of the fraud based on unusual transaction activity, that is simply not the standard. *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").

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RESPECTFULLY SUBMITTED this 31 day of May, 2023.

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