GREENBERG TRAURIG, LLP
ATTORNEYS AT LAW
SUITE 700
2375 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016
(602) 445-8000

Nicole M. Goodwin, SBN 024593
goodwinn@gtlaw.com
Aaron T. Lloyd, SBN 027987
lloyda@gtlaw.com
Attorneys for JPMorgan Chase Bank, N.A.

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.

CLARK HILL PLC, a Michigan limited liability company; DAVID G. BEAUCHAMP and JANE DOE BEAUCHAMP, husband and wife,

Defendants.

Case No. CV2017-013832

NON-PARTY JPMORGAN CHASE BANK, N.A.'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL TO COMPLY WITH SUBPOENA DUCES TECUM

(Assigned to Hon. Daniel Martin)

ORAL ARGUMENT REQUESTED

Non-Party JPMorgan Chase Bank, N.A. ("Chase"), by and through its undersigned counsel, hereby responds to the Motion to Compel filed by Defendants Clark Hill PLC and David G. Beauchamp (collectively "Defendants") on March 4, 2019.

INTRODUCTION

Defendants, who have been sued by the Receiver of DenSco Investment Corporation ("DenSco") for legal malpractice for breaching their duty to properly represent and counsel DenSco, seek to point the finger at Chase by invoking Arizona's non-party at fault statute and asserting that Chase should somehow be held responsible for a portion of DenSco's alleged losses arising from Defendants' malpractice. But Defendants' position overlooks that a financial institution, such as Chase, owes no duty

to a third-party non-customer, such as a DenSco, as a matter of settled law. As such, there is simply no duty that Chase could have breached that would allow an apportionment of any damages Defendants owe to DenSco. Defendants have forced Chase—a non-party to the present action, and one of the more than twenty-five individuals and/or entities noticed as non-parties at fault by Defendants—to take the unenviable position of protecting Chase's privileged, confidential and proprietary information from disclosure in a case in which Chase is not even a party and as to which there is no relevance.

Further, Defendants' motion omits to mention that Chase has already produced to the Receiver **all** the underlying account and transactional records relating to the former customer, Yomtov "Scott" Menaged ("Menaged"), who allegedly defrauded DenSco and from whom Defendants allegedly failed to protect DenSco. Defendants have copies of these documents from party discovery in this case and fail to explain or substantiate any reason why Chase should be burdened with additional discovery obligations—especially confidential and proprietary information—as a non-party. The underlying account transaction records and statements provide Defendants with sufficient information to confirm that there is no factual basis for pinning any liability on Chase. For all these reasons, Defendants' motion should be denied.

RELEVANT BACKGROUND

On October 16, 2017, DenSco filed a complaint against Defendants, asserting a claim for legal malpractice and a claim for aiding and abetting breach of fiduciary duties, in relation to a fraud committed against DenSco by Menaged. DenSco alleges that it relied on Defendants to provide legal advice relating to its "hard money" lending business and that in January 2014, Defendants learned that the representations DenSco had made to its investors were untrue as a result of Menaged's fraud. (Compl. at ¶¶2-3.) Specifically, DenSco alleges that in as early as June 2013, and by no later than January 2014, Defendants received information making clear that Menaged—DenSco's largest borrower—had defrauded DenSco by obtaining loans for properties where DenSco's position was not actually backed by a first-position deed of trust. DenSco labels this the

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

"First Fraud." (*Id.* at ¶¶39, 54.)

DenSco further alleges that despite having this information in hand, Defendants essentially did nothing to properly provide legal counsel. DenSco alleges that: Defendants did not advise DenSco to cease doing business with Menaged; Defendants did not advise DenSco to cease taking new investor funds; Defendants did not advise DenSco to undertake an investigation of Menaged's fraud; Defendants did not advise DenSco to make new disclosures; and Defendants did not advise DenSco to seek recovery from Menaged. (*Id.* ¶¶73-75.) DenSco alleges that Defendants effectively did nothing to protect DenSco and its investors and, instead, assisted in conduct that allowed Menaged to expand his fraudulent scheme into what DenSco terms the "Second Fraud." DenSco alleges that after Defendants allowed DenSco to continue doing business with Menaged, Menaged would not actually purchase properties with the funds he borrowed from DenSco but would instead provide DenSco with fake sale receipts and pictures of cashier's checks that were obtained from US Bank and Chase, but never actually used. (*Id.* at ¶¶91-93.)

On June 7, 2018, Defendants filed a Notice of Non-Parties at Fault ("Notice") identifying twenty-six (26) third-parties, including Chase, whose alleged "fault" supposedly caused the damages claimed by DenSco. Defendants assert in the Notice that they should be held less culpable for their legal malpractice because Menaged banked at Chase, and assert that Chase did not "alert anyone to the suspicious activities" that Menaged allegedly engaged in. (Notice at p. 17.) Notwithstanding that Chase had no knowledge of any supposedly suspicious conduct of Menaged and even crediting Defendants' conclusory assertion in the Notice about Chase, "under Arizona law a bank owes no duty to disclose even known fraudulent activity of a customer's account to other others unless a special or fiduciary relationship exists between the parties." *Ferring v. Bank of America, N.A.*, No. CV-15-1168, 2016 WL 407315, at *3 (D. Ariz. Feb. 3, 2016) (citing *Kesselman v. Nat'l Bank of Ariz.*, 188 Ariz. 419, 421 (App. 1996)). Defendants' motion fails to explain how its theory of Chase's purported liability remains viable

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

considering this settled rule of law.

On January 8, 2019, Defendants issued a Subpoena Duces Tecum ("Subpoena") to Chase, which sought broad and all-encompassing categories of documents and communications relating not only to Menaged's account and transactions at Chase, but also Chase's confidential internal policies and procedures; confidential and proprietary employee personnel files; and information relating to Chase's investigation of Menaged that is protected by an absolute privilege under the Bank Secrecy Act and its implementing regulations.

On February 4, 2019, Chase provided its responses and objections to the Subpoena to Defendants. Several of the requests in the Subpoena were satisfied by Chase's prior production of all underlying transaction and account records for Menaged's account. Among other things, Chase objected to Defendants' Subpoena on undue burden, privilege, confidentiality, and relevance grounds. On February 11, 2019, Chase and Defendants engaged in a "meet and confer" telephone conference. Despite multiple rounds of meeting and conferring, Defendants were unwilling to reach a resolution and, on March 4, 2019, filed the motion, which seeks an order compelling Chase to produce documents responsive to Request Nos. 3, 4, 5, 6, 7, 8, and 11. Defendants break these requests into the following categories:

- Documents relating to "any investigation or disciplinary actions taken by Chase related to Menaged" (Request Nos. 6 and 7);
- Chase's internal policies and procedures relating to cashier's checks, withdrawals of funds and compensation structures (Request Nos. 3, 4, 5 and 11); and
- Chase communications with Menaged (Request No. 8).

(Motion at p. 5.)

This information sought by Defendants—beyond the Menaged account records—is irrelevant and there is no basis to impose a burden on a non-party to produce confidential and proprietary information. The motion should, therefore, be denied.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

ARGUMENT

A. Defendants' Subpoena Imposes an Undue Burden on Chase and Is Based on a Fundamentally Flawed Assertion of Non-Party Liability

Rule 45(e)(1)(A) of the Arizona Rules of Civil Procedure places an affirmative duty on attorneys to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Absent good cause, a subpoena may not seek production of materials that have already been produced in the action or that are available from parties to the action." Defendants have failed to meet their affirmative duty, as they seek overly broad and unduly burdensome discovery from a non-party.

Chase's non-party status should inform the lens through which the Court assesses Defendants' motion. Chase is not a party to the action, and as such, cannot bring a Rule 12 motion ahead of any discovery obligations, and cannot assert any potential defenses to the allegations that Defendants are propounding in the public forum. To require Chase to take on the burden of identifying, reviewing, preparing, and producing proprietary information such as confidential personnel files and internal policies and procedures runs counter to the well-regarded legal notion that a non-party responding to a subpoena is entitled to *greater* protection that a party responding to discovery. *See Laxalt v. McClatchy*, 116 F.R.D. 455, 457 (D. Nev. 1986) ("The rule is well established that nonparties to litigation enjoy greater protection from discovery than normal parties."); *Intermec Techs. Corp. v. Palm, Inc.*, 2009 U.S. Dist. LEXIS 132759, at *7 (N.D. Cal. May 15, 2009) (holding subpoena protections apply "doubly when the respondent is a non-party"); *Beinin v. Ctr. for the Study of Popular Culture*, 2007 U.S. Dist. LEXIS 22518, at *6 (N.D. Cal. March 16, 2007) (recognizing courts keep the "distinction between a party and nonparty in mind" when determining the "propriety of a nonparty's refusal to comply with a subpoena[.]").

Further, Defendants' stated basis for naming Chase as a non-party at fault is not well-founded. To utilize the Arizona non-party at fault statute as an affirmative defense (or partial affirmative defense), the defendant "must … offer evidence at trial that the

non-party was comparatively negligent." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, 540 (App. 2009) (citing A.R.S. § 12-2506(F)(2)). Indeed, as the appellate court further held in *A-Tumbling T-Ranches*, the "defendant must show that the non-party owed a duty to the plaintiff, that the duty was breached and that the breach caused injury to the plaintiff." *Id.* (citing *Ocotillo W. Joint Venture v. Superior Court*, 173 Ariz. 486, 488 (App. 1992)). Here, Defendants cannot identify any such duty owed by Chase to DenSco. The law is well-settled that banks do not "owe a duty to non-customers." *Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, 601 (App. 2013). In the absence of any duty owed by Chase to a non-customer, such as DenSco, Defendants' claim as to non-party liability is unfounded and cannot support the intrusive third-party discovery Defendants seek from Chase.

Where the requested documents are not relevant, any burden whatsoever imposed on a nonparty is, by definition, an undue burden. *See St. Paul Mercury Ins. Co. v. Homes*, 2015 WL 7077450 *2 (E.D. Cal. Nov. 13, 2015). Consequently, Defendants' request for Chase to locate, review and produce all communications and emails with its former customer Menaged over a multi-year period would impose an undue burden. In light of the lack of relevance, as detailed below, Chase should not be forced to bear this burden.

B. Defendants' Request for "Investigative Reports" Impermissibly Seeks the Production of Privileged Documents

Defendants' motion seeks to compel production of "documents related to any investigation [Chase] may have undertaken related to" Menaged's alleged fraud. (Motion at p. 8). The motion must be denied in this respect because it seeks to infringe on the absolute privilege accorded to documents reflecting or relating to bank investigations of suspicious and/or potentially fraudulent activity.

Under the Bank Secrecy Act and regulations promulgated by the Office of the Comptroller of Currency, when a bank detects a known or suspected violation of federal law or a suspicious transaction related to money laundering, the bank must file a Suspicious Activity Report ("SAR") to an officer or agency designated by the secretary

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

of the treasuring, using a form prescribed by the comptroller. *See* 31 U.S.C. § 5318; 12 C.F.R. §§ 21.11. Banks are prohibited from responding to a discovery request for a SAR or any information that would potentially reveal the existence of a SAR. *See* 12 C.F.R. § 21.11(k)(1)(i). The prohibition constitutes an "unqualified discovery and evidentiary privilege" that cannot be waived. *Whitney Nat'l Bank v. Karam*¸ 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004).

Defendants concede in the motion the existence of the SAR privilege, but materially understate its scope and applicability. Not only does the privilege apply to the actual SAR itself—it extends to any information that would potentially reveal whether a SAR exists. *See* 12 C.F.R. § 21.11(k)(1)(i). The rationale for this edict is important to recognize—the release of such information could compromise an ongoing law enforcement investigation, tip off a criminal wishing to evade detection, reveal the methods by which banks are able to detect suspicious activity, adversely affect a bank's timely, appropriate, and candid reporting of suspicious transactions, and increase the risk that bank employees or others involved in the preparation of a SAR could become targets for retaliation. *See* Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75, 576, 75, 578 (Dec. 3, 2010); *see also Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

The SAR Privilege is "not limited to documents that contain an explicit reference to a [SAR]." *See Norton v. U.S. Bank Nat. Ass'n*, 179 Wash. App. 450, 460-61 (2014). The OCC states that the SAR privilege reaches "to material prepared by the national bank as part of its process to detect and report suspicious activity." Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,579. Importantly, the SAR Privilege covers documents related to a bank's internal inquiry or review of accounts at issue, including a bank's internal methods or policies of tracking unusual patterns in banking activity in general, or what kinds of transactions trigger internal "red flag" alerts and internal forms used in a bank's process for detecting suspicious activity. *See Norton*, 179 Wash. App. at 462; *Union Bank of Calif. v. Superior Court*, 130 Cal. App. 4th 378, 395

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

(2005). Lastly, a bank itself cannot waive this unqualified discovery and evidentiary privilege, even to support its own defense in a case. *See, e.g., Cotton*, 235 F. Supp. 2d at 814.

Here, there is no doubt that Defendants seek to compel Chase's production of documents and communications that are absolutely protected by the SAR privilege. Through many of their subpoena requests to Chase, Defendants have sought information concerning, among other things, (a) whether certain Chase bank employees received warnings in relation to Menaged's transaction history; (b) whether certain adverse actions or investigations were implemented because of Menaged's transaction history; and (c) whether any disciplinary action was taken against certain Chase bank employees in relation to Menaged's banking history. To the extent that Chase is in possession of any documents or communications evidencing a responsiveness to these categories, they would potentially reveal the existence of a SAR and are thus protected by the SAR privilege. Consequently, any such documents cannot be produced in accordance with federal law. *See Helge v. Druke*, 136 Ariz. 434, 438 (App. 1983) (holding neither by a subpoena duces tecum, nor by any other procedure, may a party obtain privileged documents)[1]; *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1218 (M.D. Fla. 2013) (adopting an expanded view of the SAR privilege to cover documents that are "of an evaluative nature intended to comply with federal reporting requirements.").

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

[1] In Request No. 6, Defendants seek production of the full personnel files for three Chase employees who worked at the branch bank where Menaged opened his Chase accounts. Disclosure of such information would infringe employee privacy rights and is simply not warranted. Defendants argue—in conclusory fashion—that production of personnel files should be ordered because they would show whether the employees participated in Menaged's "scheme." (Motion at p. 9.) This argument is misplaced because, as explained above, all documents relating to any investigation of Menaged and suspected money-laundering are absolutely privileged. Nevertheless, Chase respectfully submits that the personnel files for Samantha Kumbalek, Susan Lazar and Vikram Dadlani do not contain any documents relating to the circumstances alleged by DenSco. Chase is willing to present copies of these files to the Court for an *in camera* review for confirmation.

C. Defendants' Requests for Internal Policies, Procedures and Compensation Practices Seek Confidential Information Without Sufficient Justification

Arizona courts hold that "relevancy rather than admissibility is the test in determining whether evidence sought by a subpoena duces tecum is proper." *Helge*, 136 Ariz. at 438. "The extent to which a subject matter is determined irrelevant must necessarily vary in accordance with the particular issues and facts of the individual case." *Jolly v. Superior Court of Pinal County*, 112 Ariz. 186, 191 (Ariz. 1975). In addition, the discovery must be proportional to the needs of the case and the burden and expense of the discovery cannot outweigh the likely benefit. *See* Ariz. R. Civ. P. 26(b)(1). As detailed above, Defendants' motion fails to explain how Chase owed a duty to DenSco or breached any duty to DenSco that could give rise to an apportionment of comparative fault. Defendants, therefore, cannot articulate a reason why these confidential documents are relevant to establishing Chase's comparative fault as it relates to the claims being asserted by DenSco against Defendants.

Here, Defendants' Request Nos. 3, 4, 5, and 11 seek the production of Chase's various internal policies and procedures concerning Menaged's account, cashier's checks, customer withdrawals and deposits, and regional and branch compensation structures. None of Defendants' requests for these internal policies and guidelines are relevant. Even assuming for the sake of argument only that Defendants could point to some duty that Chase could have owed to DenSco, Chase's internal policies and procedures will not aid in resolving the matters at issue. As Arizona appellate courts have held, "account opening and screening procedures exist to protect the banks, not strangers with whom the banks do no business." *Gilbert Tuscany*, 232 Ariz. at 603. Further, as the federal district court stated in *Ferring*, there is no basis to find that a bank's "internal policies put in place to comply with anti-money laundering laws are directed at protecting [an individual customer] and not just [the bank] itself." *Ferring*, 2016 WL 407315 at *5.

Given that: (i) Chase owes no duty to a non-customer as a matter of law; and (ii) internal policies and guidelines cannot form the basis of a bank's duty to a customer—

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

let alone a non-customer such as DenSco—the motion should be denied as to these requests seeking internal policies and procedures. There is no basis to find them relevant to any attempt to assess comparative fault against Chase.

CONCLUSION

Defendants have copies of all transactional records for Menaged's accounts. There is no justification for requiring any further production of confidential and proprietary internal information, and certainly no justification for intruding on the absolute SAR privilege. For these reasons and all the foregoing reasons, Non-Party JPMorgan Chase Bank, N.A. respectfully requests that this Court deny Defendant Clark Hill PLC's and David G. Beauchamp's Motion to Compel.

DATED this 25th day of March 2019.

GREENBERG TRAURIG, LLP

By: */s/ Nicole M. Goodwin*
Nicole M. Goodwin
Aaron T. Lloyd
Attorneys for JPMorgan Chase Bank, N.A.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

ORIGINAL of the foregoing filed via AZTurboCourt this 25th day of March 2019.

COPY delivered via AZTurboCourt this 25th day of March 2019 to:

Hon. Daniel Martin
Maricopa County Superior Court Judge

COPY of the foregoing e-served via AZTurboCourt this 25th day of March 2019 to:

Colin F. Campbell
Geoffrey M. T. Sturr
Joshua M. Whitaker
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012
ccampbell@omlaw.com
gsturr@omlaw.com
jwhitaker@omlaw.com
Attorneys for Plaintiff

John E. DeWulf
Marvin C. Ruth
Vidula U. Patki
Coppersmith Brockelman, PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
jdewulf@cblawyers.com
mruth@cblawyers.com
vpatki@cblawyers.com
Attorneys for Defendants

/s/ Carolyn Smith
Employee, Greenberg Traurig

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000