Colin F. Campbell, 004955
Geoffrey M. T. Sturr, 014063
Timothy J. Eckstein, 018321
Joseph N. Roth, 025725
John S. Bullock, 034950
BriAnne N. Illich Meeds, 036094
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 640-9000
ccampbell@omlaw.com
gsturr@omlaw.com
teckstein@omlaw.com
jroth@omlaw.com
jbullock@omlaw.com
billichmeeds@omlaw.com

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation,

Plaintiff,

v.

U.S. Bank, NA, a national banking organization; Hilda H. Chavez and John Doe Chavez, a married couple; JP Morgan Chase Bank, N.A., a national banking organization; Samantha Nelson f/k/a Samantha Kumbalek and Kristofer Nelson, a married couple; and Vikram Dadlani and Jane Doe Dadlani, a married couple,

Defendants

No. CV2019-011499

PLAINTIFF RECEIVER'S RESPONSE TO DEFENDANT JPMORGAN CHASE BANK N.A.'S MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Dewain D. Fox)

Plaintiff Peter S. Davis, as Receiver of DenSco Investment Corporation ("DenSco"), responds in opposition to the motion for summary judgment filed by Defendant JPMorgan Chase Bank N.A. ("Chase").

I. FACTUAL BACKGROUND.

A. DenSco's Business.

The facts in this case are highly contested. In 2001, Denny Chittick founded DenSco, a hard-money lender. (Plaintiff's Combined Statement of Facts ¶ 1.) DenSco loaned monies at 18-percent interest to persons or entities purchasing properties at foreclosure sales to fix and flip for a profit. (*Id.*) DenSco would secure promissory notes to flippers through mortgages and/or deeds of trust. (*Id.*) It obtained capital by offering unsecured general-obligation notes at 11-percent interest to investors. (*Id.* ¶ 3.) DenSco's lawyer, David Beauchamp of Clark Hill, prepared and updated Private Offering Memoranda for DenSco's investors every two years outlining the parameters of DenSco's business, and advised DenSco on its lending procedures. (*Id.* ¶¶ 1, 18.)

From the beginning, DenSco was a one-man band owned and operated by Chittick, who tried to make the operations of the business simple. (*Id.* ¶¶ 4–5.) One way he simplified the process was by sending monies directly to his borrowers, who bought properties from trustees at foreclosure sales. (*Id.* ¶ 5.) DenSco's undoing came at the hands of Scott Menaged, Clark Hill, and Chase. Menaged, through his company, Arizona Home Foreclosures ("AZHF"), was a DenSco borrower. Unbeknownst to Chittick, Menaged became a gambling addict and a con man. (*Id.* ¶ 6.) He is now incarcerated for fraud crimes in a federal penitentiary. (*Id.*)

B. Menaged's Misconduct.

Initially, and for several years beginning in 2007, Menaged had a problem-free relationship with DenSco. (*Id.* ¶ 8.) In 2013, however, Menaged began obtaining loans from both DenSco and another hard-money lender to buy the same property. (*Id.* ¶ 10.) For example, if Menaged needed $100,000 to buy a property, he would borrow $100,000 from DenSco and $100,000 from another lender. He would use one of the loans to buy

the property, but double-lien the property in favor of both DenSco and the other lender. (*Id.*) As a result, Menaged received $100,000 to spend as he wanted. (*Id.*) That scheme came crashing down in November 2013 when another hard-money lender learned it was a victim of the scheme. (*Id.* ¶ 11.) In late November, Menaged told Chittick that his wife had cancer and that he had left the day-to-day business to his cousin. (*Id.*) He said that, distracted with the duties of caring for his wife, he only later discovered that his cousin had double-liened the properties, taking one of the loans for himself and escaping to Israel with the money. (*Id.*)

In early January 2014, after one of the other hard-money lenders threatened in writing to sue DenSco unless its loans were paid first, Menaged continued to blame his cousin and promised to develop a work-out plan with DenSco. (*Id.* ¶¶ 12–13.) Menaged assured Chittick that he would put more capital and his own profits back into the AZHF business to repay DenSco and help it manage its way out of the shortfall. (*Id.* ¶ 13.) Chittick concluded that the plan would work and sought advice from Beauchamp, DenSco's lawyer. (*Id.*)

Chittick asked Menaged, for all future loans, to provide a copy of a certified cashier's check listing the property for which DenSco wired money, as well as a copy of the trustee's receipt evidencing the property's purchase. (*Id.* ¶ 34.) Menaged agreed, but, switched to new fraud tactics. (*Id.* ¶¶ 34–35.) From January 2014 to April 2014, Menaged sent his employee, Veronica Castro, to U.S. Bank to purchase cashier's checks. (*Id.* ¶ 35.) She would purchase a cashier's check for a specific property, photograph the check, and immediately redeposit the check as not used for its intended purpose. (*Id.*) Castro would then forge a trustee's receipt and email a copy of the unused check and forged receipt to Chittick. U.S. Bank issued 60 such cashier's checks. (*Id.*) In April 2014, close to the signing of the forbearance agreement, Menaged switched banks to Chase. (*Id.* ¶ 36.)

On April 9, Menaged set up a Chase account. Menaged went from a small west-side Fry's grocery store U.S. Bank location to Chase's much larger 90th St. and Shea

Boulevard branch (the "Chase Branch"). (*Id.* ¶ 36.) At the larger Chase Branch, Menaged quickly escalated the number of cashier's checks he was asking for to huge monthly volumes. As described below, over a 15 month period, Chase issued over 1,344 cashier's checks—multiple cashier's checks nearly each business day—that were photographed, immediately redeposited, and never used for their intended purpose.[1] (*Id.*)

C. Clark Hill's Involvement.

DenSco's lawyer, Clark Hill partner David Beauchamp, drafted all of its Private Offering Memoranda and advised DenSco on its lending procedures. (*Id.* ¶ 18.) Chittick raised the double-lien issues with Beauchamp in January 2014 upon discovery. (*Id.* ¶ 19.) Although Clark Hill should have advised Chittick to end its lending relationship with Menaged in light of the First Fraud, to stop offering general-obligation notes to investors, to update disclosures to the investors, and to wind down the business, it instead negotiated a forbearance agreement between DenSco and AZHF in which DenSco would continue lending money to Menaged. (*Id.* ¶¶ 26–30.) Chittick specifically asked Clark Hill about the propriety of sending money directly to Menaged—given the assumption that DenSco was protected by receiving pictures of cashier's checks and trustee receipts, which together documented AZHF's purchase of properties with DenSco funds—and believed that Clark Hill approved that process. (*Id.* ¶ 30.)

As Menaged pledged to put more capital into the business and work out the double liens, Clark Hill advised Chittick that he could continue to raise money from noteholders and delay notifying investors while the agreement was negotiated. (*Id.* ¶ 29.) Once the forbearance agreement was signed, Clark Hill said that DenSco could continue delaying

[1] [redacted]

notice. (*Id.*)

The Receiver sued Clark Hill in a separate lawsuit for aiding and abetting a breach of fiduciary duty to the DenSco noteholders. *Peter Davis v. Clark Hill PLC et al.*, CV2017-013832 (Maricopa County Superior Court). This Court can take judicial notice that the *Clark Hill* Court found a *prima facie* case for punitive damages and the Receivership Court approved a Clark Hill settlement in 2020.

D. Chase's Policies and AML Department.

In April 2014, Menaged opened an AZHF account at the Chase Branch. (*Id.* ¶ 36.) In Chase, Menaged found a partner willing to issue 1,344 cashier's checks that were immediately redeposited as not used for the purpose intended, despite a lack of business justification for obtaining cashier's checks never intended to be used. (*Id.*)

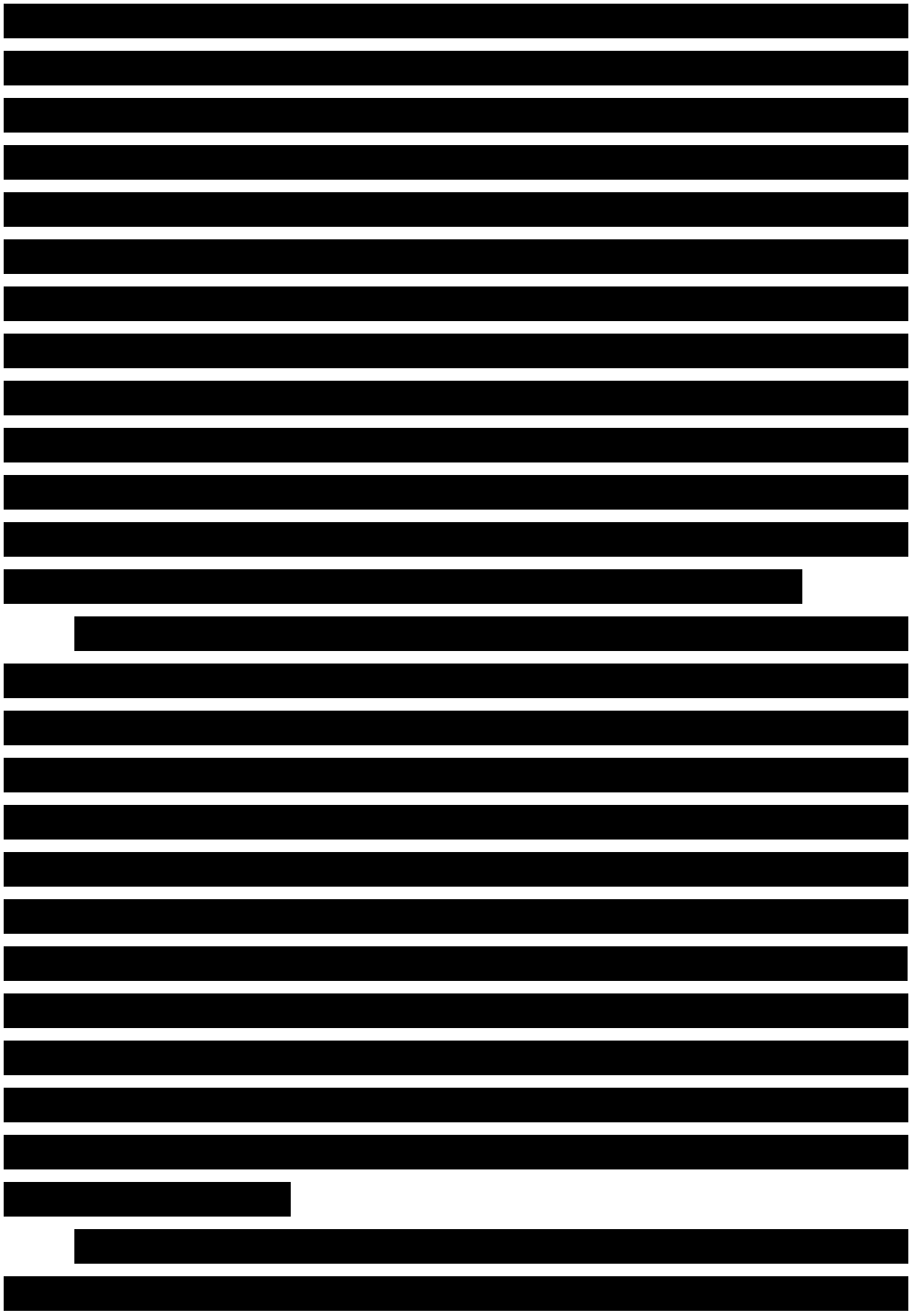
[redacted]

[redacted]

E. Chase's Actions and Reviews of Menaged's Misconduct.

[redacted]

[2] Although the Halo records are plainly relevant and this civil action was filed in August 2019, Chase did not produce the Halo internal log notes until January 2022. Even then, Chase only produced a subset of the records. The Receiver did not receive any hard copies of the Excel documents, which were in large part unreadable, until the summer of 2022 and received the native files even later. (*Id.* ¶¶ 155–58.)



[redacted]

[3] In depositions, all Chase AML investigators testified that they had not talked to anyone at the Chase Branch, and the investigator notes in Halo state that nobody talked to any branch employees. (*Id.*) That is not true. Aside from Molina, late in the case Chase disclosed the Bo Pearson e mail disclosing a telephone call and e mail. Also, some comments made by analysts and investigators had to have come from the branch.

[redacted]

F. Chittick's Suicide.

While Chittick and Clark Hill thought DenSco was working its way out of debt, Menaged was running his latest fraud, despite a forbearance agreement blessed by Clark Hill and new procedures approved by Beauchamp. As was U.S. Bank, which has now settled, Chase was instrumental in the execution of Menaged's Ponzi scheme by issuing the cashier's checks for specific properties, watching Menaged photograph them, redepositing them immediately as not used for their intended purpose, and facilitating Menaged's personal use of DenSco's funds.

Like all Ponzi schemes, Menaged's scheme could not sustain itself. (*Id.* ¶ 198.) After a divorce, Menaged filed for bankruptcy in 2016. (*Id.*) Over time, Chittick realized that all of Menaged's promises to pay the loans were unfulfilled, and the bankruptcy would implode DenSco's business. (*Id.* ¶ 199.) Chittick wrote three final letters—to his investors, his sister, and his ex-wife, before committing suicide in July 2016. (*Id.*)

II. ARGUMENT.

Chase's motion for summary judgment is substantively flawed. Chase muddies both the facts and the law. For example, on the issue of reliance, Chase never once talks

[4] Mr. Gaia has produced two case-in-chief reports. His January 10, 2022, report is attached to the Plaintiff Receiver's Combined Statement of Facts as Ex. B, attachment 1. His November 1, 2022 report is attached as Ex. B, attachment 2.

about Clark Hill, even though it names Clark Hill as a non-party at fault and has an expert on Clark Hill's malpractice. Chase wants to ignore, for purposes of this motion, that Chittick consulted with lawyers and justifiably relied on their advice. On the law, Chase ignores controlling authorities that foreclose any argument that DenSco is somehow deprived of a remedy because of its own employee's misconduct.

A. The Receiver's Claims Do Not Fail As a Matter of Law Based on DenSco's Alleged Fault.

Chase asserts that the Receiver cannot sue it for aiding and abetting a fraud because DenSco was a willing participant in the scheme. Its argument rests on a fundamental mischaracterization of the facts and flawed view of the law.[5]

1. DenSco Had No Involvement in the Fraud at Issue.

As an initial matter, Chase conflates the fraud committed by Menaged on DenSco—which is at issue in this case—and DenSco's compliance with general obligations to noteholders—which is not. In straining to find a way to blame DenSco, Chase ignores the clear distinctions and muddles the record, undermining its own motion.

The evidence shows that Chittick was not an active or willing participant in Menaged's fraud, either with the first scheme regarding double-liens or the second scheme regarding sham property purchases. Chittick was the victim of Menaged's deceit. Chittick was unaware of the first fraud until late November 2013, at which time Menaged crafted an excuse about his cousin. Going forward, Chittick relied on his legal counsel and new lending measures, including receiving copies of specifically designated cashier's checks, which Chase willingly provided, and trustee's receipts. Each of the loans at issue in this case, arising from Chase cashier's checks, followed the protocol approved by his lawyers.

[5] Nelson and Dadlani advance the same arguments in support of their own motions for summary judgment, and this section equally addresses those arguments.

2. Any Fault by DenSco Would Be Apportioned by the Jury.

Even if conduct by DenSco or Chittick impacted Chase's liability, Chase ignores the governing law. In any case "for personal injury, property damage or wrongful death," the "relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact." A.R.S. §§ 12-2506(A), (C). The jury must "allocate the responsibility of each actor in direct proportion to that person's percentage of fault," and it "may consider the conduct of both parties and nonparties" all at the same time. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 54 ¶ 15 (1998), *abrogated on other grounds by State v. Fischer*, 242 Ariz. 44 (2017) (internal quotation marks and citation omitted). The statute encompasses "all types of fault committed by all persons." *Id*. at 54 ¶ 19 (quoting *Thomas v. First Interstate Bank*, 187 Ariz. 488, 489 (App. 1996)).

"Fault" has an "extremely broad" definition. *Hutcherson*, 192 Ariz. at 54 ¶ 17. Fault means "an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages . . . including negligence in all of its degrees, contributory negligence, assumption of risk. . . ." A.R.S. § 12-2506(F)(2). Accordingly, the jury not only compares the negligence of parties, but the law "permit[s] the comparison of negligence with strict liability," "reckless, willful, or wanton conduct," and "intentional" conduct. *Hutcherson*, 192 Ariz. at 54-55 ¶¶ 17, 20; *see also Graves v. N.E. Servs., Inc.*, 345 P.3d 619, 629 ¶ 49 (Utah 2015) (interpreting parallel language as requiring jury's authority over fault to "encompass intentionally tortious activity").

Because of Arizona's pure comparative fault statutory scheme, many common law loss-shifting doctrines that automatically allocate liability no longer apply. Most directly, A.R.S. § 12-2506 "eliminated the harshness of an all-or-nothing contributory negligence defense." *Hutcherson*, 192 Ariz. at 54 ¶ 15. The law also dispenses with other common law rules that automatically allocate fault or liability, including the "original tortfeasor rule," *Cramer v. Starr*, 240 Ariz. 4, 10 ¶ 22 (2016); the longstanding rule of joint and several liability in strict liability products cases, *State Farm Ins. Cos. v. Premier*

Manufactured Sys., Inc., 217 Ariz. 222, 228 ¶ 26 (2007); and the "doctrine of avoidable consequences," *Law v. Super. Ct.*, 157 Ariz. 147, 153-54 (1988). Rather than apply these doctrines that pre-determine liability allocation, Arizona requires that "the relative degrees of fault" of all parties and nonparties "shall be determined and apportioned as a whole at one time by the trier of fact." A.R.S. § 12-2506(C).[6]

Therefore, if Chase believes that some fault should be apportioned to DenSco and/or Chittick, then it must persuade the jury. Even if Chittick's fault could be attributed to a receiver—and, as set out below, it cannot—the Arizona Constitution provides that the "defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." Ariz. Const. art. XVIII, § 5. This provision means that neither the common law nor a statute may "provide that 'the antecedent conduct of a person injured is an absolute bar to the recovery of damages from one otherwise liable for the injury.'" *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 277-78 ¶ 9 (App. 2006) (quoting *City of Tucson v. Fahringer*, 164 Ariz. 599, 601-02 (1990)).

Nor does Chase's characterization of DenSco's conduct matter, as the label of the defense (be it *in pari delicto* or honest director or contributory negligence) is irrelevant: the Arizona Constitution requires that "in all cases" issues of "contributory negligence . . . be left to the jury, even if the rule or statute directing otherwise attaches some other name to the defenses." *Fahringer*, 164 Ariz. at 603. As hard as it might try, Chase will be "unable to cite any Arizona authority barring, as a matter of law, recovery by a tort plaintiff who was engaged in criminal conduct at the time of the injury." *Sonoran Desert Investigations, Inc.*, 213 Ariz. at 281 ¶ 24.

3. Chittick's Actions Cannot Be Attributed to the Receiver.

The Receiver, DenSco, and Chittick cannot be treated as one and the same. Even

[6] As explained above, Chase also cannot argue that DenSco and Menaged somehow acted in concert in connection with the misconduct at issue to avoid the statute's application. *See* A.R.S. § 12-2506(D)(1).

where a corporation is operated by a Ponzi schemer,[7] it is still in the eyes of the law a separate legal entity with its own rights and duties. *See Donell v. Kowell*, 522 F.3d 762, 777 (9th Cir. 2008) ("[T]he corporations created by the scheme operator were 'robotic tools' of the operator, but nonetheless separate legal entities in the eyes of the law."). The Receiver is not the culpable party, but instead a person the Receivership Court appointed to protect and recover DenSco's assets. Once a receiver is appointed, any wrongdoer is removed and the receiver becomes entitled to recover on behalf of the wronged entity. *See Wiand v. Leei*, 753 F.3d 1194, 1202 (11th Cir. 2014) ("[O]nce the Ponzi schemer is removed and the receiver is appointed, the receivership entities are no more the 'evil zombies' of the Ponzi operator but are "[f]reed from his spell."). The doctrine of *in pari delicto* therefore cannot be asserted against the Receiver. *See FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver"); *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("[T]he defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated.").

Once the Receiver was appointed, DenSco was freed from the impact of Chittick and became entitled to recover for the harm it suffered when Menaged used its funds for unauthorized purposes. *See Warfield v. Alaniz*, 453 F. Supp. 2d 1118 (D. Ariz. 2006) (receiver had standing to bring state law claims on behalf of corporation, because corporation, rather than merely defrauded investors, was harmed when funds were transferred for unauthorized purposes); *Donell*, 533 F.3d at 777 ("The Receiver has standing to bring this suit because, although the losing investors will ultimately benefit . . . , the Receiver is in fact suing to redress injuries that [the corporation] suffered when its managers caused [it] to commit waste and fraud.").

B. The Statute of Limitations Does Not Bar the Receiver's Claims.

Claims for aiding and abetting fraud are subject to a three-year statute of

[7] Chittick was not a Ponzi schemer. He was a victim of a conman, who in the Second Fraud ran a pure Ponzi scheme, using new loans to pay old loans.

limitations. *See* A.R.S. § 12-543. Suit was filed within three years of the Receiver's appointment in August 2016, and within three years of discovering the use of the Chase cashier's checks in the fraud and Chase's complicity in issuing and redepositing checks that were not used for their intended purpose.

The soonest a statute of limitations begins to run is when a receiver is appointed. *See Wing v. Dockstander*, 2010 WL 5020959, at *3 (D. Utah. Dec. 3, 2010) ("it defies reason that the Receiver could discover the transaction before his own appointment"); *Seaman v. Sedgwick*, 2011 WL 13393442, at *4 (C.D. Cal. Aug. 31, 2011) ("When a company is controlled by wrongdoers who fraudulently conceal their misdeeds from investors, the statute of limitations cannot begin to run until a receiver is appointed."); *Stenger v. World Harvest Church, Inc.*, CIV.A.1:04CV00151-RW, 2006 WL 870310 (N.D. Ga. Mar. 31, 2006) at *8-10 (entities not charged with discovery until receiver appointed); *Sale v. Jumbleberry Enters. USA, Ltd.*, No. 20-20716-Civ, 2021 WL 7542953 (S.D. Fla. June 18, 2021) (same); *Quilling v. Cristell*, CIV.A. 304CV252, 2006 WL 316981, at *6-7 (W.D.N.C. Feb. 9, 2006) (fraud only discoverable once receiver appointed); *In re Blackburn*, 209 B.R. 4, 13 (Bankr. M.D. Fla. 1997) (treating receiver's appointment as start of statute of limitations clock); *F.D.I.C. v. Williams*, 60 F. Supp. 3d 1209, 1212 (D. Utah 2014) (same); *Wiand v. Meeker*, 572 F. App'x 689, 692 (11th Cir. 2014) (same). Here, the Receiver was appointed on August 18, 2016. His complaint was filed on August 16, 2019, within three years of appointment. The Court need go no further in dismissing the statute-of-limitations defense. The Receiver notes, however, that actual discovery—and the corresponding start of the limitations period—occurred later than his appointment, when he discovered Chase's involvement in the fraud.

C. Whether DenSco Justifiably Relied on Menaged's Misrepresentations Is a Question of Fact.

To pursue his aiding-and-abetting claims, the Receiver must first establish that Menaged's conduct constituted fraud, which in turn requires establishing the tort's elements. Among the elements are those relating to reliance: the plaintiff did not know

that the representation was false, the plaintiff relied on the truth of the representation, and the plaintiff's reliance was reasonable and justified under the circumstances. Revised Arizona Jury Instructions (Civil), Commercial Torts 24 Common Law Fraud (7th ed.); *see also In re Gorilla Cos. LLC*, 454 B.R. 115, 118 (D. Ariz. 2011) ("An essential element of claims for fraud . . . is actual, justifiable reliance on the alleged misrepresentation."). Chase argues incorrectly that Menaged did not commit fraud because Chittick could not justifiably rely upon Menaged's misrepresentations. Here Chase is stepping into the shoes of Menaged. If Menaged made this argument in defense of a suit by DenSco, its impropriety would be exposed, because a con man cannot escape liability by arguing that a victim should not have believed his lies. As in this case, "once a party requests assurances, the alleged tortfeasor cannot misrepresent such assurances and then contend the alleged victim had no right to rely on such representations." *Dawson v. Withycombe*, 216 Ariz. 84, 98 ¶ 35 (App. 2007). For every Chase check, Menaged represented he was using DenSco's money, in the form of a cashier's check, to buy a property.

Further, one "may rightfully rely upon a misrepresentation of fact even when he may have discovered the falsity of the statement by a simple investigation." *Id.* ¶ 34. This principle applies even to someone that did not examine public records, such as those in real estate transactions. *See In re Kirsh*, 973 F.2d 1454, 1458–59 (9th Cir. 1992). Only when the recipient receives a representation that, to him, is obviously false can that person, as a matter of law, not justifiably rely on it. *See id.* at 1458. Thus, the Court applies a "subjective standard which takes into account the knowledge and relationship of the parties themselves" when determining reliance. *Id.*; *see also St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 316 (1987) (looking to the party's "own information and intelligence," a subjective standard, when assessing whether reliance was actual and justifiable).

In any event, "[w]hether reliance is justified generally is a question of fact for the jury." *Sun Life Assurance Co. of Canada (U.S.) v. Friendship Found., Inc.*, No. CV-08-713-PHX-SRB, 2010 WL 11519178, at * 4 (D. Ariz. Apr. 13, 2010). Here, DenSco,

through Chittick, relied in fact on Menaged's misrepresentations. Continued lending by DenSco to Menaged was conditioned upon the receipt of copies of cashier's checks and trustee's receipts to trace DenSco's funds to the purchase of specific properties. As to whether the reliance was justifiable, Chase also glaringly omits any mention of Clark Hill. Chittick did not act on his own. He addressed Menaged's double-liens with his lawyers, who blessed the forbearance agreement, the delay in advising investors, and the manner in which Chittick continued to make loans to DenSco.

D. Whether Chase Aided and Abetted Fraud Is a Question of Fact.

1. The Applicable Standards and Chase's Knowledge.

To establish liability for aiding and abetting, Plaintiff must show that (1) Chase knew Menaged's conduct constituted a breach of duty and (2) Chase substantially assisted Menaged in that breach. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485 (2002). Knowledge need only reach the level of "general awareness," rather than comprehensive understanding. *Id.* at 488 ¶ 45 ('"The knowledge requirement' can be met, 'even though the bank may not have known of all the details of the primary fraud.'") (citation omitted.). Knowledge also may be inferred from the circumstances. *See id.*

When assessing a corporation's knowledge, individual bits of knowledge known to an employee are not viewed separately, but rather must be taken together to determine what a corporation knows. *See id.* ¶ 47 ("Although the facts . . . are unremarkable taken in isolation, we find that taken together, they present what should have been a jury issue on the question of aiding-and-abetting liability.") (quoting *Metge v. Baehler*, 762 F.2d 621, 630 (8th Cir. 1985)). Chase cannot run away from its collective knowledge.[8] Under the Restatement (Third) Of Agency § 5.03 (2023 Update), "notice of a fact that an agent

[8] Chase's employees frequently testified to a lack of recollection. Yet, a particular employee's inability to recall does not nullify the employer's knowledge of the facts. Instead, "[i]f an agent learns a material fact when a relationship of agency exists with a particular principal, the principal is charged with notice of the fact although the agent forgets the fact or claims to have forgotten it at a later time . . . ." Restatement (Third) Of Agency § 5.03 cmt b (2023 Update).

knows or has reason to know is imputed to the principal." And, as comment c explains, "[o]rganizations are treated as possessing the collective knowledge of their employees and other agents[] when that knowledge is material to the agents' duties."[9]

The First Circuit imputed the collective knowledge of a bank's employees to the bank after a customer repeatedly presented multiple checks to tellers, none of which individually amounted to $10,000, but which—once combined into a single withdrawal—exceeded $10,000 and triggered obligations under the Currency Transaction Reporting Act. *U.S. v. Bank of New England*, N.A., 821 F.2d 844 (1st Cir. 1987). The court explained the need to consider the bank's collective knowledge:

> [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly. Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Id. at 856 (internal citation omitted). Likewise, Chase's general awareness of Menaged's fraud can be shown through the combined knowledge of individual bank employees, which is properly attributable to Chase. [redacted]

[9] Arizona has consistently followed the Restatement (Third) of Agency § 5.03. *See FTC v. Elec. Payment Sols. of Am. Inc.*, No. CV-17-02535-PHX-SMM, 2021 WL 3661138, at *10 (D. Ariz. Aug. 11, 2021); *Bilyeu v. Morgan Stanley Long-Term Disability Plan*, No. CV-08-02071-PHX-SRB, 2015 WL 4134447, at *11 (D. Ariz. June 2, 2015); *Empire W. Title Agency, L.L.C. v. Talamante*, 234 Ariz. 497, 500 (2014). Regardless, "[i]n the absence of law to the contrary, Arizona follows the Restatement." *Webster v. Culbertson*, 158 Ariz. 159, 162 (1988).

2. Chase's Willful Blindness and Conscious Disregard of Menaged's Fraud.

Efforts to avoid knowing the full extent of a fraud or other tort—whether characterized as "willful blindness," "conscious avoidance," or similar terminology—also can support a finding of the requisite degree of knowledge. Arizona courts routinely apply the willful blindness doctrine in criminal cases to establish knowledge. *See e.g.*, *State v. Haas*, 138 Ariz. 413, 420 (1983) ("[T]he jury could easily have concluded that even if defendant had no actual knowledge of the fraud, he was aware of the high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth."); *State v. Diaz*, 166 Ariz. 442, 445 (App. 1990) (knowledge could be inferred from evidence indicating Defendant "acted with a conscious purpose to avoid learning the tru[th]" and that "[a]ny self-imposed ignorance cannot protect [the Defendant] from criminal responsibility"), *vacated in part on other grounds*, 168 Ariz. 363 (1991). If willful blindness or conscious avoidance can establish knowledge in Arizona criminal cases, it should be sufficient in civil cases.

Although Arizona courts have not addressed the willful-blindness doctrine in the civil context, courts outside the state often apply it when determining whether knowledge exists to impose secondary liability. *See. e.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 756 (2011) (explaining in patent case that evidence "was plainly sufficient to support a finding of . . . knowledge under the doctrine of willful blindness"); *In re Agape Litig.*, 773 F. Supp. 2d 298, 309 (E.D.N.Y. 2011) (suggesting that cases rejecting conscious avoidance may no longer be in minority and stating that "conscious avoidance requires looking at whether a plaintiff has plausibly alleged that a defendant made certain decisions specifically to avoid attributable knowledge of the underlying fraudulent scheme"); *Env'l. Equip. & Serv. Co. v. Wachovia Bank, N.A.*, 741 F. Supp. 2d 705, 726–27 (E.D. Pa. 2010) (willful blindness is sufficient to constitute knowledge under Pennsylvania law); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007) ("[T]he Court sees no reason to spare a putative aider and abettor who consciously avoids

confirming facts that, if known, would demonstrate the fraudulent nature of the endeavor he or she substantially furthers."); *Hoffman v. Stamper*, 867 A.2d 276, 302 (Md. 2005) (willful blindness suffices to show actual knowledge under Maryland law).

Evidence supporting a finding of willful blindness or establishing the requisite knowledge includes conduct that lacks a business purpose or other atypical practices. *See Wells Fargo*, 201 Ariz. at 489 ¶ 51 ("[I]f [a] . . . method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.") (citation omitted); *see also El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) ("[A] bank's atypical banking practices can indeed provide circumstantial evidence of actual knowledge."); *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) ("A party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge.").

Whether a defendant had the requisite knowledge is a question of fact and generally inappropriate for resolution on summary judgment. *See Wells Fargo*, 210 Ariz. at 490 ¶ 58 ("These facts raise inferences sufficient to take the issue to the jury . . . ."); *see also Petersen-Dean Inc. v. Folk*, No. 15-cv-05522 NC, 2016 WL 3951661, at *5 (N.D. Cal. July 22, 2016) ("The determination of willfulness . . . is generally a question of fact for the jury.").

III. CONCLUSION.

Chase's motion should be denied because it asks the Court to do what a trial court may not do at summary judgment—judge the credibility of witnesses, weigh the quality of the evidence, or choose among competing or conflicting inferences; these are "jury functions, not those of the judge." *Orme School v. Reeves*, 166 Ariz. 301, 309, 311 (1990). As our Supreme Court has long made clear, where a material issue "concerns the state of mind or intent of one of the parties, summary judgment normally is not appropriate." *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 429 (1982). On this disputed record, the Court cannot accept Chase's denial that its employees knew of Menaged's fraud when the documentary evidence is to the contrary or draw the inferences

Chase asks it to draw about Chittick's state of mind. *See Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 488 (1986) ("Since there will seldom be direct evidence, the problem in most cases is to determine state of mind from indirect evidence, to draw, in other words, an inference. Inferences are for the finder of fact, unless only one inference may be drawn."). As the facts viewed in the light most favorable to the Receiver show—and as the jury will find when it hears the testimony of Menaged, Chase's employees, and others and considers the records submitted with this Response—Chase knew Menaged was defrauding DenSco and knowingly participated in Menaged's scheme *every day for months on end, over a thousand times*, and helped Menaged successfully conceal his scheme from DenSco. Chase cannot avoid having a jury weigh this evidence. Its motion should be denied.

DATED this 21st day of July, 2023.

OSBORN MALEDON, P.A.

By /s/Colin F. Campbell
Colin F. Campbell
Geoffrey M. T. Sturr
Timothy J. Eckstein
Joseph N. Roth
John S. Bullock
BriAnne N. Illich Meeds
2929 North Central Avenue, Suite 2000
Phoenix, Arizona 85012

Attorneys for Plaintiff

This document was electronically filed and copy delivered*/e-served via the AZTurboCourt eFiling system this 21st day of July, 2023, on:

Honorable Dewain D. Fox*
Maricopa County Superior Court
101 West Jefferson, ECB-412
Phoenix, Arizona 85003

Nicole M. Goodwin
Adrianna Griego Gorton
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 800
Phoenix, Arizona 85016
goodwinn@gtlaw.com
gortona@gtlaw.com
hershbergera@gtlaw.com
aranat@gtlaw.com

Paul J. Ferak
Jonathan H. Claydon
GREENBERG TRAURIG, LLP
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
ferakp@gtlaw.com
claydonj@gtlaw.com

Attorneys for Defendant JP Morgan Chase Bank, N.A., Samantha Nelson f/k/a Samantha Kumbalek, Kristofer Nelson, Vikram Dadlani, and Jane Doe Dadlani

Gregory J. Marshall
Taryn J. Gallup
Amanda Z. Weaver
SNELL & WILMER, LLP
400 East Van Buren Street, Suite 1900
Phoenix, Arizona 85004-2202
gmarshall@swlaw.com
tgallup@swlaw.com
aweaver@swlaw.com
ehenry@swlaw.com
pdooley@swlaw.com

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

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

/s/Karen McClain
9955463