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09/13/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-011499 09/10/2021

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

PETER S DAVIS

COLIN F CAMPBELL

v.

U S BANK N A, et al.

AMANDA Z WEAVER

NICOLE GOODWIN
TIMOTHY ECKSTEIN
GREGORY J MARSHALL
PAUL J. FERAK
JUDGE DANIEL MARTIN

UNDER ADVISEMENT RULING

Pending before the Court is Defendants' April 7, 2021 Motion to Dismiss Counts Three through Eight of Plaintiff's Third Amended Complaint ("TAC"), Plaintiff's May 3, 2021 Response, and Defendants' May 28, 2021 Reply. The Court heard oral argument on July 16, 2021, at which time the matter was taken under advisement. Having considered the arguments presented, and for the reasons set forth herein, the Court enters its ruling granting the motion in part, and denying the motion in part. The motion is granted as to Counts Three through Six (aiding and abetting conversion, and aiding and abetting breach of fiduciary duty). The motion is further granted as to Defendants U.S. Bank, N.A. ("U.S. Bank") and JP Morgan Chase Bank, N.A. ("Chase") on Counts Seven and Eight (civil racketeering). The motion is denied as to Defendants Hilda Chavez ("Chavez"), Samantha Nelson ("Nelson") and Vikram Dadlani ("Dadlani") on Counts Seven and Eight (civil racketeering).[1]

[1] Nelson and Dadlani are Chase branch employees. Chavez is a U.S. Bank branch manager. Nelson, Dadlani and Chavez are referred to collectively as the "Bank Employee Defendants." U.S. Bank, Chase and the Bank Employee Defendants are referred to collectively as the "Bank Defendants."

FACTUAL BACKGROUND

Plaintiff Peter S. Davis is the court-appointed receiver ("Plaintiff" or "Receiver") of DenSco Investment Corporation ("DenSco"). Until July 2016, DenSco made "hard money" loans to "foreclosure specialists" to purchase foreclosed homes, which were intended to be subject to a first position deeds of trust to secure repayment of the loans. Yomtov Scott Menaged ("Menaged"), through his companies Easy Investments, LLC ("Easy Investments") and Arizona Home Foreclosures, LLC. ("AZHF"), was one such borrower.

DenSco began making "hard money" loans to Menaged in 2007. Over the years, Menaged developed a "personal friendship and a business relationship" with Denny Chittick ("Chittick"), DenSco's sole shareholder, sole director, and only employee, such that DenSco put its "trust and confidence in Menaged's integrity and fidelity." TAC at ¶ 24. Menaged betrayed that trust by perpetrating two fraudulent schemes against DenSco.

Chittick discovered the first fraudulent scheme (the "First Fraud") in November 2013. Rather than purchasing foreclosed properties with the funds borrowed from DenSco, Menaged used the loan proceeds for other purposes. When confronted by Chittick about the First Fraud, Menaged falsely claimed that his "cousin" had masterminded and perpetrated the fraud while he was distracted caring for his wife who had cancer. Chittick believed Menaged's story and agreed that DenSco would continue loaning money to Menaged and his companies in order to work out the problem created by the cousin's fraud. DenSco relied on Menaged's representations and trusted that all future loan proceeds would be used for the intended purpose of purchasing foreclosed properties. DenSco and Menaged agreed to a "work out" plan and DenSco trusted Menaged's integrity and fidelity to effectuate the plan.

The work out plan is reflected in numerous communications between Chittick and Menaged beginning in December 2013 and a Term Sheet signed in January 2014. DenSco and Menaged also entered into a Forbearance Agreement in April 2014, which generally provided that Menaged would make certain payments and take other action in exchange for DenSco forbearing its rights on the prior defaulted loans.

In January 2014, DenSco agreed to continue loaning money to Menaged for the purchase of homes at trustees' sales and established new procedures to prevent further misappropriation. Under the new procedures, DenSco agreed to continue wiring money to Menaged's accounts. For each loan, Menaged was required to provide DenSco copies of: (1) the individual cashier's checks payable to the trustee conducting the sale, with DenSco's name and the address of the property to be purchased in the memo line; and (2) the receipt from the trustee documenting Menaged's purchase of the property identified on the cashier's check.

Despite the new procedures, Menaged devised a second scheme (the "Second Fraud") to defraud DenSco. Each week beginning in January 2014, Menaged emailed to DenSco lists of specific foreclosed properties he claimed he had successfully bid on at trustee's sales and the purchase price for each. DenSco then wired the money to purchase the properties to Menaged's business accounts at U.S. Bank and Chase. Menaged instructed the banks to issue a cashier's check for each property made payable to the trustee, with DenSco and the property address printed in the memo line of each check. Rather than use the cashier's check to purchase foreclosed properties, Menaged took a photo of each check, which he sent to DenSco, and immediately redeposited the check into the same account. Menaged then sent DenSco false deeds, contracts and receipts documenting fictitious real estate purchases. Menaged used the money redeposited in his accounts for personal use or other business activities. This process was repeated for more than 1,400 transactions, involving more than $300 million in loans. Menaged's assistant, Veronica Castro ("Castro"), assisted him in carrying out the Second Fraud.

According to the Receiver, Menaged was able to carry out the Second Fraud only with the assistance of the Bank Defendants. The Bank Defendants knew DenSco was wiring money to Menaged's accounts to purchase foreclosed properties. The Bank Defendants issued the cashier's checks payable to a trustee for the purchase of a specific property. The Bank Defendants printed DenSco's name and the property address in the memo line of each check. The Bank Defendants witnessed Menaged making copies of the checks and assisted him in immediately redepositing the checks. The Bank Defendants knew Menaged had not purchased the identified properties and was using the loan proceeds to pay off personal credit card debt and funding unrelated business activities.

Nelson at Chase was suspicious of Menaged's activity and in April and May 2014, submitted two unusual activity reports. Chase opened an internal investigation for "money laundering concerns." In April 2014, Chase employees began stamping the back of each cashier's check with the notation "Not Used For Intended Purposes."

Menaged filed for Chapter 7 bankruptcy in April 2016. Menaged lied to DenSco about the Second Fraud, falsely claiming its money was safely held at Auction.com.

Chittick died by suicide in July 2016, unaware of the Second Fraud. The Receiver was appointed on August 18, 2016, and filed this action against the Bank Defendants on August 16, 2019. The TAC alleges the following eight causes of action: aiding and abetting fraud (Counts One and Two); aiding and abetting conversion (Counts Three and Four); aiding and abetting breach of fiduciary duty (Counts Five and Six); and civil racketeering (Counts Seven and Eight). The Bank Defendants have moved to dismiss Counts Three through Eight.

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) is to test the sufficiency of the complaint. In evaluating a complaint's sufficiency, the Court must take as true "'all well-pleaded factual allegations and indulge all reasonable inferences from those facts,' but need not accept conclusory statements." *Goldberger v. State Farm Fire & Cas. Co.*, 247 Ariz. 261, 262, ¶ 4, 448 P.3d 302, 303 (Ct. App. 2019) (*quoting Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9, 284 P.3d 863, 867 (2012). The Court will grant the motion only if the plaintiff is not entitled to relief "under any facts susceptible of proof in the statement of the claim." *ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 289, ¶ 5, 246 P.3d 938, 940 (Ct. App. 2010) (*quoting Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996)).

Ordinarily, the Court can only consider the complaint itself when adjudicating a Rule 12(b)(6) motion. *Coleman*, 230 Ariz. at 356, ¶ 9, 284 P.3d at 867. The Court can, however, consider contracts and other matters referenced in a complaint without converting the motion to a motion for summary judgment. *Id*. Thus, the Court can consider the Forbearance Agreement attached as Exhibit A to the Motion to Dismiss. *See ELM Retirement Center*, 226 Ariz. at 289, ¶¶ 6-8, 246 P.3d at 940 (trial court's consideration of purchase contract attached to motion to dismiss did not convert it to a motion for summary judgment).

DISCUSSION

Aiding and Abetting Conversion

An aiding and abetting claim requires commission of an underlying tort. *Wells Fargo Bank v. Ariz. Laborers, Teamsters, & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002). Here, the Receiver alleges Menaged committed the underlying tort of common law conversion, which the Bank Defendants substantially assisted. The Bank Defendants argue that the aiding and abetting conversion claims fail because there is no underlying claim of conversion against Menaged.

"'Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" *Miller v. Hehlen*, 209 Ariz. 462, 472, ¶ 34, 104 P.3d 193, 203 (Ct. App. 2005) (*quoting Restatement (Second) of Torts* § 222A(1) (1965). To maintain an action for conversion, "the plaintiff must have the right to immediate possession of the property at the time of the conversion." *Koss Corp. v. American Express Co*., 233 Ariz. 74, 90, ¶ 52, 309 P.3d 898, 914 (Ct. App. 2013), as amended (Sept. 3, 2013) (*quoting Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (Ct. App.2004).

Money is fungible and generally cannot be converted. There is no action for conversion for money that is simply a debt. *Universal Marketing and Entertainment, Inc. v. Bank One of Arizona, N.A.*, 203 Ariz. 266, 270, ¶ 15, 53 P.3d 191, 195 (Ct. App. 2002). Arizona, however, follows the "modern rule", which holds that money can be converted if the money can be "described, identified or segregated, and an obligation to treat it in a specific manner is established." *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 91, 510 P.2d 400, 402 (1973).

The Bank Defendants argue there was no conversion here because DenSco relinquished any possessory interest in the loaned funds when it wired the money into Menaged's unrestricted business accounts. The Bank Defendants further argue that because DenSco was not a payee on the cashier's checks it had no possessory interest in the checks.

The Receiver contends that Menaged converted the DenSco loan proceeds by having cashier's checks issued, redepositing them and then using the funds for his own purposes rather than purchasing foreclosed properties as agreed. The Receiver urges that "DenSco's money was separately identified and segregated for a particular use when wired to Menaged" and each cashier's check included DenSco's name and the property address to be purchased. Because Menaged agreed to use the funds for a particular purpose, the purchase of foreclosed homes, he converted the funds by using them for his own purposes.

The parties have identified four Arizona cases that address when a party may have a possessory interest in money at the time of conversion. The first such case is *Autoville*, 20 Ariz. App. 89, 510 P.2d 400. In *Autoville*, the plaintiff agreed to advance money to finance the purchase of automobiles to be sold on defendant's lot with the understanding that plaintiff would receive the amount advanced plus a service fee as vehicles were sold. *Id.* at 90, 510 P.2d at 401. Defendant sold the vehicles, deposited the proceeds in the corporate account and immediately withdrew the funds for the personal use of the shareholders. *Id*. at 91, 510 P.2d at 402. The court of appeals found that the sale of the vehicles triggered an obligation of the defendant to pay the debt, but there was no evidence that "the specific sales proceeds were set aside in a special account" and the debt could have "been discharged from a source other than the sale proceeds." *Id.* at 92, 510 P.2d at 403. Thus, the court concluded that plaintiff had a claim for breach of contract, but not conversion because he had no right of possession in the sales proceeds. *Id*.

In the second case, *Universal Marketing*, 203 Ariz. 266, 53 P.3d 191, the plaintiff wired $50,000 into an unrestricted Bank of America account belonging to plaintiff's agent to be used to purchase a business. *Id.* at 268, ¶ 3, 53 P.3d at 193. While in the agent's account, the funds were garnished by Bank One, the agent's judgment creditor. *Id.* at ¶ 4, 53 P.3d at 193. The court held plaintiff did not have a conversion claim against Bank One because it had no immediate right to possession of the funds, finding that plaintiff had relinquished its possessory interest when it deposited the funds, unsegregated and undifferentiated, into the agent's ordinary unrestricted

account. *Id* at 268-69, ¶¶ 7-14, 53 P.3d at 194-95. The court, however, suggested that plaintiff could have a conversion claim if the funds had been "'deposited in a bank under a special deposit agreement having the characteristics of a bailment contract' or '... delivered for safe keeping, to which the keeper claims no title and which money is required and intended to be kept segregated, substantially in the form in which it was received.'" *Id.* at 269, ¶ 9, 53 P.3d at 194 (*quoting Houston Nat'l Bank v. Biber,* 613 S.W.2d 771, 774-75 (Tex. Civ. App. 1981)).

In the third case, *Case Corp.,* 208 Ariz. 140, 91 P.3d 362, a security agreement gave the lender a security interest in equipment sales proceeds. The court held that the lender had a conversion claim for the sales proceeds even though the defendant had commingled the proceeds with other funds. *Id* at 145-46, ¶ 23. 91 P.3d at 367-68. *Case Corp* distinguished *Autoville* and *Universal Marketing* because of the security interest. The security interest allowed "the proceeds to be identified even when they [were] commingled with other funds." *Id.* at 146, ¶ 24, 91 P.3d at 368.

The Receiver relies on the final case, *Koss*, 233 Ariz. 74, 309 P.3d 898. In *Koss*, a Koss employee embezzled millions of dollars from Koss and used the money to pay her personal American Express credit card. *Id* at 77-78, ¶ 3, 309 P.3d at 901–02. Koss sued American Express for conversion "based on its control over Koss funds transferred by the wire transfers and cashier's checks." *Id.* at 78 ¶ 6, 309 P.3d at 802. The court stated the embezzled funds could be the subject of conversion because "[t]he money was segregated and described by the amounts of the checks." *Id*. at 90, ¶ 55, 309 P.3d at 914. The court explained that Koss had a possessory interest in the funds represented by the cashier's checks and wire transfers, which American Express interfered with when it cashed the checks knowing of the employee's fraud and misuse of company funds. *Id.* The court recognized, however, that Arizona rejects a conversion claim when "the funds cannot be described, identified or segregated and there is no obligation to treat the funds in a specific manner. *Id.* at ¶ 57, 309 P.3d at 914.

The Receiver claims that DenSco's money was separated and segregated for a particular use when it wired the funds to Menaged's accounts and that the money was not deposited in an "indistinct pool of money." The TAC, however, alleges otherwise. The TAC acknowledges that DenSco funds were not segregated but were commingled with funds from other sources. Approximately 78% of the money in the U.S. Bank Easy Investments account consisted of DenSco loan proceeds. TAC at ¶ 52. Approximately 96% of Menaged's Chase account consisted of money wired by DenSco. Although the majority of funds in Menaged's accounts were funds from DenSco, the funds were not segregated and set aside in a separate, distinct accounts. There is no conversion claim for money that is not identifiable and separate for other funds. *Autoville,* 20 Ariz. App. At 91, 510 P.2d at 402.

Moreover, there is no allegation that the accounts were restricted in any way. Thus, like the plaintiff in *Universal Marketing*, DenSco lost any possessory interest in the loan proceeds by depositing the funds in an unrestricted account. Once it deposited the money in Menaged's accounts, DenSco lost the right of possession and the right to control the funds. DenSco could have deposited the loan monies in an escrow, trust or another type of restricted account in which it retained some right of possession or control, but that did not occur here. By depositing the loan proceeds in Menaged's unrestricted, unsegregated accounts, DenSco lost any right to immediate possession.

Further, unlike *Case Corp*, there is no allegation DenSco retained a security interest in the funds at the time of deposit. The TAC alleges that the loans were to be secured by first position deeds of trust on the properties purchased, but there is no allegation that DenSco had a security interest of any kind in the actual loan proceeds at the time they were deposited in Menaged's accounts.

Koss does not support the Receiver's position. In *Koss*, the employee fraudulently embezzled funds directly from her employer's account, without authorization, to pay her personal expenses. The plaintiff in *Koss* never relinquished its possessory interest in the funds in its account. Here, in contrast, DenSco wired funds to Menaged's unrestricted, unsegregated accounts. Menaged then issued cashier's checks from his own account, which the TAC acknowledges he was authorized to do. TAC at ¶ 32.

The Receiver argues that because the loans were made for a specific purpose the funds were converted when not used for the intended purpose. The Receiver's position is not supported by *Autoville* and the other Arizona cases, which clearly hold that a conversion claim for money only exists if the funds are separated and identifiable. Because DenSco did not take steps to separate the loan proceeds, it has no conversion claim.

The Receiver further argues that DenSco had a possessory interest in the funds represented by the cashier's checks, noting that every cashier's check included DenSco's name and the address of the property to be purchased. The Receiver, however, cites no authority supporting the idea that being named in the memo line somehow gave DenSco a possessory interest in the checks. DenSco was not the payee and, as discussed above, had no possessory interest in the accounts on which the checks were drawn. Menaged was the remitter as he purchased the cashier's checks drawn on his accounts. *See* A.R.S. § 47-3103(A)(11). As the remitter, Menaged had possession and the legal right to negotiate the cashier's checks. *See* A.R.S. § 47-3301, Official UCC cmt. (a person entitled to enforce an instrument includes "a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person").

The Receiver may certainly have claims for fraud and breach of contract against Menaged. But, on the facts alleged, there is no claim for conversion because DenSco did not have a possessory interest in the loan proceeds. Thus, the TAC does not state a claim for aiding and abetting conversion against the Bank Defendants.

Aiding and Abetting Breach of Fiduciary Duty

The Bank Defendants argue that the aiding and abetting breach of fiduciary duty claim must be dismissed because the TAC does not support the underlying tort of breach of fiduciary duty. Defendants assert that the relationship between DenSco and Menaged was merely a business relationship between a lender and borrower and that the factual allegations do not support an inference that a fiduciary relationship existed between them.

In Arizona, fiduciary duties can arise by the nature of the relationship between the parties or by agreement. A fiduciary relationship is formed when "something approximating business agency, professional relationship, or family tie" induces a trusting party to relax the care and vigilance it would ordinarily exercise." *Cook v. Orkin Exterminating Co., Inc*., 227 Ariz. 331, 334, ¶ 14, 258 P.3d 149, 152 (Ct. App. 2011). Typically, for a fiduciary relationship to exist, one party must be "bound to act for the benefit of the other" and the relationship must involve "great intimacy, disclosure of secrets, or [e]ntrusting of power." *Id.*

"Generally, commercial transactions do not create a fiduciary relationship unless one party agrees to serve in a fiduciary capacity." *Id.* Typically, a lender-borrower relationship is not fiduciary in nature. *See, e.g., Urias v. PCS Health Sys., Inc.,* 211 Ariz. 81, 118 P.3d 29 (Ct. App. 2005); *McAlister v. Citibank,* 171 Ariz. 207, 212–13, 829 P.2d 1253, 1258–59 (Ct. App. 1992). Long-term business relationships and friendships, without more, do not give rise to a fiduciary relationship. *See Lytikainen v, Schaffer's Bridal LLC*, 409 F. Supp. 3d 767, 778 (D. Ariz. 2019) ("trusting long-term business relationship" and "friendship" was not enough to state a fiduciary duty claim under Arizona law).

Although the existence of a fiduciary relationship is typically a question of fact, a plaintiff still must plead the facts supporting the existence of a fiduciary relationship to withstand a motion to dismiss. *Cook*, 227 Ariz. at 336, ¶ 21, 258 P.3d at 154. Conclusory allegations—such as "a fiduciary duty exists"—are "not entitled to be assumed true." *Cruz v. United States,* 219 F. Supp. 2d 1027, 1039 (N.D. Cal. 2002).

The Receiver argues a fiduciary relationship existed between Menaged and DenSco. The TAC alleges that DenSco "put trust and confidence in Menaged and relied upon him as a fiduciary to effectuate the "work out" plan." TAC at ¶ 29. However, "[m]ere trust in another's competence or integrity does not suffice" to create a fiduciary relationship. *Standard Chartered PLC v. Price*

Waterhouse, 190 Ariz. 6, 24, 945 P.2d 317, 335 (Ct. App. 1996), as corrected on denial of reconsideration (Jan. 13, 1997).

The Receiver further claims the fiduciary relationship is reflected in the communications between Menaged and Chittick after the First Fraud was discovered and in the January 2014 Term Sheet. TAC ¶ 29. The Receiver, however, fails to explain how the communications and the Term Sheet established a fiduciary relationship. The TAC contains no specific allegations about the contents of those documents that would suggest a fiduciary relationship existed.

The Receiver further maintains that a fiduciary relationship could be "inferred" from the Forbearance Agreement because DenSco agreed to forebear collecting funds that Menaged owed the company from the First Fraud. Although a commercial contract can create a fiduciary relationship when a party agrees to serve in a fiduciary capacity, *Urias*, 211 Ariz. at 87, ¶ 32, 118 P.3d at 35, there is nothing in the Forbearance Agreement suggesting Menaged agreed to serve as a fiduciary. In fact, the Forbearance Agreement, which expressly provided that it did not create a "joint venture or partnership arrangement between or among [DenSco] and [AZHF, Easy Investments and Menaged]," seems to disclaim any fiduciary relationship. Motion to Dismiss Ex. A, Forbearance Agreement § 6(I). Further, the Forbearance Agreement does not vest any authority in Menaged to act as DenSco's agent.

The Receiver asserts that a lender-borrower relationship can give rise to fiduciary duties, citing *Thomas v. Wells Fargo Bank Nat'l Ass'n*, 866 F. Supp. 2d 1101, 1108 (D. Ariz. 2011). In *Thomas*, however, the plaintiff placed loan proceeds into an escrow and "gave [the lender] the authorization to manage [the loan proceeds] for a particular purpose." No similar facts are alleged here. The DenSco loan proceeds were not placed in escrow or trust to be managed by Menaged for DenSco.

The TAC alleges a "friendship and business relationship" and that Chittick had trust and confidence in Menaged's integrity. Those allegations are not sufficient to establish a fiduciary relationship. Here, there are no factual allegations of great intimacy, disclosure of secrets, or the entrusting of power. To the contrary, the TAC alleges that after learning of the First Fraud, DenSco retained counsel and implemented new procedures to ensure a fraud would not happen again.

Based on the foregoing, The Court finds that the TAC fails to allege facts supporting a fiduciary relationship between Menaged and DenSco. Thus, the claims for aiding and abetting breach of fiduciary duty must be dismissed.[2]

[2] Because the Court has determined the TAC does not state a claim for aiding and abetting conversion and aiding and abetting breach of fiduciary duty it is not necessary for the Court to address whether the claims are barred by the two-year statute of limitations in A.R.S. § 12-542. It is also not necessary to decide whether the UCC's three-year statute of limitations, A.R.S. § 47-3118(G), applies to common law conversion claims. It does, however, appear that

Civil Racketeering

Bank Employee Defendants

Arizona's racketeering statute allows a private cause of action by a person who is injured by a "pattern of racketeering activity." A.R.S. § 13-2314.04(A); *Hannosh v. Segal*, 235 Ariz. 108, 111, ¶ 7. 328 P.3d 1049, 1052 (Ct. App. 2014). "Racketeering," in pertinent part, is defined as any act committed for financial gain, chargeable or indictable under the law where the act occurred and punishable by more than a year imprisonment involving certain enumerated crimes. A.R.S. § 13–2301(D)(4)(b). Acts of racketeering include theft, money laundering, and a scheme or artifice to defraud. A.R.S. §§ 13–2301(D)(4)(b)(v), (xx), (xxvi). A "pattern of racketeering activity" means that there must be at least two related and continuous acts of racketeering. A.R.S. § 13–2314.04(T)(3). Thus, a complaint asserting a civil racketeering claim must allege that (1) the plaintiff "has been injured by a violation of § 13–2301(D)(4)(b), the predicate offense," (2) the predicate act was done for "financial gain," and (3) the act was "chargeable and punishable by imprisonment for more than one year." *Hannosh*, 235 Ariz. at 112, ¶ 8, 328 P.3d at 1053.

A.R.S. § 13–2314.04(L) provides in part that a "natural person" is not liable for the racketeering activity of another person unless that person "authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the other." The TAC alleges that Menaged engaged in a pattern of racketeering activity by committing acts of theft and money laundering and engaging in a scheme or artifice to defraud for financial gain. The TAC further alleges that the Bank Employee Defendants are liable for civil racketeering because they "authorized, ratified, and recklessly tolerated" Menaged's misconduct. TAC at ¶¶ 153, 163. The TAC describes in detail the how the Bank Employee Defendants allegedly assisted and recklessly tolerated Menaged's illegal conduct. The Court finds that these allegations are sufficient to state a claim for civil racketeering against the Bank Employee Defendants.

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the claims are barred by a two-year limitations period. The initial Complaint was filed on August 16, 2019. The Receiver stated in the TAC that in November 2016, he issued subpoenas to U.S. Bank and Chase and that in the spring and summer of 2017, he performed a "complete forensic recreation of Menaged's banking activity". TAC at ¶ 111. In paragraph 81 of the First Amended Complaint, the Receiver stated that he "finally understood the extent and losses constituting the Second Fraud, and the substantial assistance U.S. Bank and Chase provided to Menaged when it completed an initial draft of that forensic recreation of Menaged's banking activity on or about June 13, 2017." Thus, by his own admission, having performed a "complete forensic" review and having an understanding of the Bank Defendants' "substantial assistance" by June 2017, the Receiver was aware of the Bank Defendants' alleged involvement and the basis for the claims against them more than two years before this action was filed. The Receiver is bound by the factual admissions in his pleadings. *See Brenteson Wholesale, Inc. v. Arizona Pub. Serv. Co*., 166 Ariz. 519, 522, 803 P.2d 930, 933 (Ct. App. 1990); *Black v. Perkins*, 163 Ariz. 292, 293, 787 P.2d 1088, 1089 (Ct. App.1989).

The Bank Employee Defendants argue that the TAC fails to allege that they engaged in acts of racketeering for financial gain. The TAC alleges that the U.S. Bank and Chase Defendants were "motivated" to assist Menaged in the transaction to keep him as a customer and that by keeping him as a customer the Bank Employee Defendants "benefited personally in the form of additional compensation." TAC at ¶ 63, 95. Defendants claim these allegations are insufficient.

There seems to be some confusion about what the racketeering statute requires concerning the financial gain element. A.R.S. § 13-2301(D)(4)(b) provides that certain predicate acts of racketeering, including fraud, money laundering and scheme or artifice to defraud, must have been "committed for financial gain." Thus, the statute requires that the illegal acts themselves be committed for financial gain. The statute does not require that a "natural person," who is liable for authorizing, ratifying or recklessly tolerating the unlawful conduct of another, must also act for financial gain. *See* A.R.S. § 13-2314.04(L).

The TAC alleges that Menaged committed acts of racketeering, including fraud, money laundering and a scheme or artifice to defraud, and that he committed these illegal acts for financial gain. Those allegations are sufficiently pleaded in the TAC. It is not necessary for Plaintiff to allege that the Bank Employee Defendants authorized or participated in Menaged's conduct for financial gain.

U.S. Bank and Chase

Under Arizona law, an Enterprise, defined as "any corporation, partnership, association, labor union or other legal entity," A.R.S. § 13-2301(D)(2), is generally not liable for racketeering acts of its employees and agents. Rather, an Enterprise is only liable for civil racketeering based on the conduct of an agent if a "director or high managerial agent performed, authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the agent." A.R.S. § 13-2314.04(L). A bank is only liable for civil racketeering based on money laundering when the agent involved in receiving or transferring the laundered funds on behalf of the bank knew that the funds were the proceeds of an offense and "a director or high managerial agent performed, authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct" of the agent. In short, to state a claim for civil racketeering against a bank, the plaintiff must allege that "a director or high managerial agent performed, authorized, requested, commanded, ratified or recklessly tolerated" the illegal conduct.

Defendants argue that the TAC fails to state a civil racketeering claim against U.S. Bank and Chase because it does not allege that a director or high managerial agent was involved in any racketeering acts. Defendants assert that the five bank employees identified in the TAC, Nelson, Chavez, Dadlani, Wanta and Lazar, cannot be considered directors or high managerial agents.

The racketeering statute, which is part of the criminal code, does not define "director or high managerial agent." The Receiver does not disagree that "director" should be given the definition in A.R.S. § 10-801 *et seq*., which refers to corporate directors as those responsible for "the business and affairs of the corporation." The Receiver has not alleged that any director of U.S Bank or Chase was involved in the racketeering acts alleged here.

The term "high managerial agent" is defined twice in the Arizona statutes. A.R.S. § 4-210(B)(1), concerning liquor licensing, and A.R.S. § 13-305(B)(2), in the criminal code, define "high managerial agent" to mean "an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy."

The Receiver argues that because "high managerial agent" is not defined the term should be given its common, plain meaning. Thus, he asserts that "high managerial agents" should include "those employees with authority to approve transactions involving racketeering proceeds," as well as "employees with significant supervisory authority, those with the power to amend, waive or implement bank policy, and those who engage in discretionary acts that could potentially authorize, ratify, or recklessly tolerate a racketeering act." Response at 10. At oral argument, the Receiver suggested the definition should include anyone who is authorized to approve a transaction. The Receiver cites no authority for these overly broad definitions. It seems the Receiver is trying to create a definition that suits this case, rather than a definition that is consistent with legislative intent and the purpose of the civil racketeering statute.

The Court is persuaded that "high managerial agent", as used in the racketeering statute, means those persons who have authority to formulate enterprise policy. The legislature used this definition on two occasions, including in another provision of the criminal code. The Court sees no compelling reason to apply a different definition. This definition is consistent with the legislature's intention to restrict "the scope of defendants potentially liable in a private RICO action." *See Marsh v. Coles*, 238 Ariz. 398, 405, ¶ 16, 361 P.3d 383, 390 (Ct. App. 2015). Further, in the criminal context, corporations are only liable for the criminal acts of their directors and "high managerial agents" and not for conduct of lower level employees. *See State v. Far W. Water & Sewer Inc*., 224 Ariz. 173, 192, ¶ 64, 228, P.3d 909, 928 (Ct. App. 2010) (COO and supervisor in charge of safety program were "high managerial agents"). Although courts will at times interpret statutes using the common meaning of undefined terms, *Melendez v. Hallmark Ins. Co*., 232 Ariz. 327, 330, ¶ 10, 305 P.3d 392, 395 (Ct. App. 2013), Plaintiff's proposed definitions are not based on any common or plain understanding of the words "high managerial agent."

There is no dispute that the five bank employees identified in the TAC were not involved in formulation of bank policy. Defendants Nelson, Chavez, and Dadlani are branch employees. Julia Wanta is a U.S. Bank Vice President who was assigned to serve as Menaged's Private Banking Relationship Manager to oversee and facilitate Menaged's relationship with the bank.

TAC at ¶ 44. Wanta allegedly "authorized, ratified or recklessly tolerated the account activity that Chavez directed and supervised." TAC at ¶ 46. But, there is no allegation that Ms. Wanta has any authority concerning the formulation of bank policy.

Susan Lazar is a Chase Private Client Banker who was assigned to oversee Menaged's accounts and facilitate his banking relationship with Chase and "communicated regularly with Menaged about his business, his relationship with DenSco, and his banking activity at Chase." TAC at ¶ 67. As is the case with Ms. Wanta, there is no allegation Ms. Lazar was involved in formulating bank policy.

Because the TAC fails to allege that a director or high managerial agent "performed, authorized, requested, commanded, ratified or recklessly tolerated" the illegal conduct of its agents, the civil racketeering claim against U.S. Bank and Chase must be dismissed.

U.S. Bank and Chase further argue that under A.R.S. § 13-2314.04(L) they can only be liable for the racketeering acts committed by their agents. The TAC alleges that Menaged, Castro and "others" engaged in acts of theft, money laundering and schemes or artifices to defraud. TAC at ¶¶ 146-150, 156-160. The TAC alleges that U.S. Bank and Chase "authorized, ratified and recklessly tolerated the conduct of Menaged, Castro and others." TAC at ¶¶ 153, 163. The TAC alleges that bank employees Chavez, Nelson and Dadlani aided and abetted Menaged and Castro's illegal conduct but does not allege that these employees themselves committed any predicate act of racketeering. Aiding and abetting criminal conduct is not an enumerated predicate racketeering offense. *See* A.R.S. § 13-2301(D)(4) (enumerating predicate offenses). The TAC makes no allegation that any employee committed a predicate racketeering offense. Nor does the TAC allege that Menaged or Castro were agents of U.S. Bank or Chase. The failure of the TAC to allege that an agent of U.S. Bank or Chase committed racketeering acts is another reason why the racketeering claims against U.S. Bank and Chase must be dismissed.

DISPOSITION

IT IS ORDERED granting in part and denying in part Defendants' Motion to Dismiss Counts Three Through Eight of Plaintiff's TAC. Counts Three through Six of the TAC for aiding and abetting conversion and aiding and abetting breach of fiduciary duty are dismissed against all Defendants. Counts Seven and Eight for civil racketeering are dismissed only against Defendants U.S. Bank and Chase.

IT IS FURTHER ORDERED denying the Motion to Dismiss as to Counts Seven and Eight for civil racketeering against Defendants Chavez, Nelson and Dadlani.