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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE COUNTY OF MARICOPA

PETER S. DAVIS, as Receiver of DENSCO INVESTMENT CORPORATION, an Arizona corporation, Plaintiff, vs. 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 KUMBALECK and KRISTOFER NELSON, a married couple; and VIKRAM DADLANI and JANE DOE DADLANI, a married couple. Defendants.	Case No.: CV2019-011499 **PLAINTIFF'S RESPONSE TO CHASE DEFENDANTS' MOTION TO SUSPEND BRIEFING ON THE CHASE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT** (Assigned to the Hon. Daniel Martin) **(Oral Argument Requested)**

Plaintiff, Peter S. Davis, as Receiver of DenSco Investment Corporation ("Receiver"), hereby submits his response to the *Motion to Suspend Briefing on the Chase Defendants' Motion to Dismiss Plaintiff's Original Complaint* ("Motion") filed by JP

Morgan Chase Bank, NA, Samantha Nelson fka Samantha Kumbalek, Kristopher Nelson, Vikram Dadlani and Jane Doe Dadlani (collectively "Chase" or "Chase Defendants"). This response also serves as an objection to portions of the Chase Defendants and the US Bank Defendants *Non-Opposition to the Receiver's Motion for Leave to File an Amended Complaint*.

I. Introduction.

A. The Banks' Motions to Dismiss.

The US Bank Defendants and the Chase Defendants (collectively referred to as "the Banks") filed nearly identical Motions to Dismiss arguing that:

1. The Receiver's claims are time-barred under the statute of limitations.

2. The Receiver did not allege facts that the Banks in this case *knew* of Menaged's underlying fraud that they were aiding and abetting.

3. The Receiver did not allege facts that the Banks *substantially assisted* in that fraud.

4. The Chase Defendants also argued (uniquely) that there was no underlying fraud because DenSco could not reasonably rely on any misrepresentation given by Menaged.

B. The Receiver's Response and Alternative Motion For Leave to Amend.

The Receiver responded to the Banks' Motions to Dismiss on March 2, 2020. The Receiver also filed a Motion for Leave to file a First Amended Complaint as part of his response.

The Receiver did this because the Court should rule on the Banks' Motions to Dismiss *first*. If the Court is inclined to grant these Motions, then it should allow the Receiver to Amend its Complaint in accordance with his Motion for Leave.

As it relates to the Banks' statute of limitations defenses, the Receiver argued that under the Doctrine of Adverse Domination, the claim could not accrue until after the Receiver was appointed.

Alternatively, the Receiver also included "discovery-allegations" in its proposed First Amended Complaint that set forth the facts as to how it discovered that the Banks aided and abetted Menaged in defrauding DenSco. The Receiver pointed out to the Court that "*before* granting a Rule 12(b)(6) motion to dismiss, the Receiver should be given an opportunity to amend the complaint if such amendment cures its defects. *Dube v. Likens*, 216 Ariz. 406, 415, ¶ 24, 167 P.3d 93, 102 (App. 2007)." The purpose of the First Amended Complaint is strictly to cure the alleged defects with the Complaint raised by the Banks' Motions to Dismiss.

The "discovery allegations" and the "adverse domination allegations" are the only changes in the First Amended Complaint. Importantly, these allegations simply supplement the Receiver's Complaint. They do not change the cause of actions against the Banks or make new allegations against the Banks. The Receiver did not make any substantive changes to the allegations related to (1) the Banks' knowledge of Menaged's underlying fraud; or (2) how the Banks aided and abetted Menaged.

C. The Banks' Attempt at Getting a Second Bite at The Apple.

While the Banks assert they do not oppose the Receiver's motion for leave to file his First Amended Complaint, the problem is that they have asserted "a full reservation of rights and defenses to the claims asserted in the First Amended Complaint." In other words, the Banks want to reserve the right to file new 12(b)(6) motions on the same arguments that are addressed in their current Motions to Dismiss. The Banks essentially want a second bite at the apple.

For the following reasons, the Court should (1) deny the Chase Defendants' Motion to Suspend Briefing on the Chase Defendants' Motion to Dismiss Plaintiff's Original Complaint; (2) rule on the Banks' Motions to Dismiss and; and (3) if necessary, the Receiver's Motion for Leave to Amend. In that order.

II. The Receiver Was Required to File Both a Response to the Banks' Motion To Dismiss and a Motion For Leave To Amend.

The law required that the Receiver file its Response and a Motion to Leave in conjunction with its Response to the Motions to Dismiss or risk having the Court grant the Motions to Dismiss with prejudice. Appellate courts have routinely rejected a plaintiff's attempt to amend a complaint to cure purported defects when the plaintiff did not file a motion for leave to amend before the trial court. *Wigglesworth v. Mauldin,* 195 Ariz. 432, 439, 990 P.2d 26, 33 (App. 1999) (upholding dismissal with prejudice under rule 12(b)(6) because Plaintiff "never sought leave to amend the complaint" and the amendments would have been futile); *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 519 n. 11, 168 P.3d 917, 927 (App. 2007), aff'd in part, vacated in part,

("When ruling on a motion to dismiss pursuant to Rule 12(b)(6), Ariz.R.Civ.P., a trial court should give the non-moving party an opportunity to amend its complaint if such an amendment will cure its defects. Cullen, however, never requested leave to amend his complaint and does not raise this issue on appeal. Accordingly, we do not address it.") (internal citations and quotations omitted).

Here, if the Receiver *only* filed his Response to the Banks' Motion to Dismiss, and the Court granted their Motions with prejudice, the Receiver may not have the opportunity to amend his Complaint to cure any alleged defects. Under these cases, if a plaintiff fails to file a Motion for Leave to Amend the Complaint with a Response to a Motion to Dismiss, he does so at his own peril. The common practice—and the most prudent one in these circumstances—is to file them together and in the alternative. That is what the Receiver did here.

III. The Chase Defendants Are Incorrect on The Law.

The Banks are wrong that filing a Motion for Leave to Amend renders the original Complaint moot. Procedurally, that Motion has not been granted, the First Amended Complaint hasn't been filed, and the Motion for Leave won't be considered until the Court rules on the Banks' Motion to Dismiss.

Again, the proposed First Amended Complaint is to cure any alleged deficiencies. The Court must <u>first</u> decide if there are, in fact, deficiencies. And the only way to do that is to rule on the Banks' Motion to Dismiss <u>first</u>.

Also, the Chase Defendants cite two cases for their argument that filing the Motion for Leave to Amend renders their Rule 12(b)(6) motions moot. Neither one

applies to this case.

A. *Campbell v. Deddens,* 21 Ariz. App. 295, 518 P.2d 1012 (App. 1974).

The Chase Defendants cite *Campbell v. Deddens*, 21 Ariz. App. 295, 297, 518 P.2d 1012, 1014 (App. 1974), for the proposition that an amended complaint supersedes the original complaint. The Banks, however, did not inform the court that the key to that holding is that the amendment must be "material". Indeed, the Court of Appeals clarified the materiality requirement in a subsequent case, *Paragon Bldg. Corp. v. Turner*, 119 Ariz. 238, 240 (App. 1978); citing *Collins v. Streitz*, 47 Ariz. 146, 153, 54 P.2d 264, 267 (1936)("It is, of course, true, as a general proposition of law, that the original complaint performs no further function as a pleading when an amended complaint is filed, because the latter usually sets up a new cause of action, modifies the one already pleaded, or brings in a new party or parties, but it does not supersede the original in every particular.").

This is not a novel idea. A newly amended Complaint does not always supersede the original. In the context of a default, if a defendant files an answer to a complaint, and the plaintiff later amends, the plaintiff cannot default the defendant if he fails to answer the amended complaint if the amended complaint does not materially alter the claims against the defendant that he already answered. As 49 C.J.S. Judgments § 267 points out:

> Where the plaintiff amends his or her declaration or complaint so as to change the cause of action, or add a new one and thereby abandons the original issues, judgment by default may be taken against the defendant if he or she fails to file a new or amended answer or plea within the time allowed therefor, despite the fact that the original

> answer or plea is still on file. This rule does not apply, however, where the amendment is merely to formal or immaterial matters and does not *change the cause of action, or make any new substantial allegation against the defendant*. Nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint, as amended.
>
> *Where the amendment does not supersede the original complaint, but rather supplements it, the amendment merges with the original* and does not require an additional notice to the defendant for entry of a default judgment for failure to timely file an answer.

In this case, the Receiver added "discovery allegations" in its proposed First Amended Complaint to clearly distinguish the two frauds Menaged perpetrated and to address *when* the Receiver discovered the Second Fraud and the Banks' involvement in it. The Receiver also added allegations of the breaches of fiduciary duty by DenSco's sole officer and director to support the Receiver's adverse domination argument.

These allegations do not materially alter the claims against the Banks. They do not "*change the cause of action, or make any new substantial allegation against*" the Banks. 49 *C.J.S. Judgments* § 267. Rather, the newly allegations "*supplement"* the claims. *Id.* They are simply in response to the Banks' argument that the Receiver's claims are time barred by the statute of limitations.

The Receiver *did not materially amend* the allegations related to the aiding and abetting claims against the Banks. *In fact, the Receiver did not alter the facts alleging that the Banks knew Menaged was defrauding DenSco and how the Banks assisted Menaged in doing so.*

The First Amended Complaint has not been filed. It will not be filed unless the Court determines that First Amended Complaint is necessary to cure the arguments

asserted by the Banks' Motions to Dismiss.

B. *Nickolas v. Bank of N.Y. Mellon*, 2019 WL 1130093 (D. Ariz. Mar. 12, 2019).

The Chase Defendants next cite an unpublished district court opinion, *Nickolas v. Bank of N.Y. Mellon*, Case No. CV-19-00166-PHX-DWL, 2019 WL 1130093, at *1 (D. Ariz. Mar. 12, 2019). Setting aside whether the Banks should be citing this case at all, it does not apply. In *Nickolas*, the defendants filed a motion to dismiss. The parties agreed and "understood" that the filing of an amended complaint would render the motion to dismiss moot, and then stipulated to the filing of the amended complaint (and this is a distinguishing fact). *Id.* Despite this understanding, the plaintiff filed a response to the motion to dismiss and tried to convert it as a motion for summary judgment. *Id.* The defendant then filed a motion to clarify the status of the motion to dismiss. *Id.* The Court held that it shared defendants' confusion "as to why Plaintiff would seek and obtain [defendants'] consent" to filing the amended complaint and then file such responses. The basis of that confusion was that the parties understood that the amended complaint would render the motion to dismiss moot.

These facts do not exist in this case. Here, when the parties discussed this issue before the Banks filed their Motions to Dismiss, the Receiver made it clear that it would take a two-prong approach to their Motions. First, The Receiver would file a Response in an effort to defeat the Rule 12(b)(6) Motions on their face. Alternatively, the Receiver would seek leave to amend to cure any purported deficiencies in the Complaint. Attached as **Exhibit "A"** are copies of emails whereby the Receiver informed

the Banks of this two-prong approach. The Receiver never (1) asked for a stipulation to amend or, (2) agreed that it would render the Banks' Rule 12(b)(6) Motions moot.

IV. There Is No Reason to Suspend Briefing on The Underlying Motion Because the Banks Have Several Opportunities to Make Their Arguments.

In his Response to the Banks' statute of limitations defenses, the Receiver argues that (1) the Court should deny the Banks' Rule 12(b)(6) Motions under the Doctrine of Adverse Domination, and (2) if not, the Court should allow the First Amended Complaint to go forward because the "discovery-allegations" contained in it cure any alleged defect.[1] The Banks have several opportunities to set forth their positions on these issues.

First, in their reply in support of their motions to dismiss, the Banks can tackle (among other things) the issue as to whether the doctrine of adverse domination tolls the statute of limitations for the Receiver.

Second, in their responses to the Motion for Leave (and their replies), the Banks will have the opportunity to argue that the Court should grant their Motions and not allow the First Amended Complaint to go forward because it would be futile.

The Receiver does not believe that these arguments will prevail, but the point is that all issues are nearly briefed, and the Banks will suffer no prejudice because they will have the full opportunity to argue these issues as they see fit.

[1] This was made clear to the Banks in "meet and confers" and emails. To the extent there was some confusion, the Receiver filed contemporaneously with this Response a clarification of this intent.

V. Granting the Banks' Motion to Suspend would Waste Time and Judicial Resources.

Let's think about the Banks' procedural posture. They want to file new Rule 12(b)(6) motions on the First Amended Complaint. If they make different arguments than their Rule 12(b)(6) motions, then the Receiver will have the right to amend and cure again in light of those new arguments. Then, if the Banks are consistent, they will not oppose the proposed newly amended complaint, and reserve the right to make another Rule 12(b)(6). This cycle can go on and on.

The proper way is that the Court rule on all the issues raised now. The Banks are not prejudiced at all. Again, as it relates to the Statute of Limitations, the Banks can set forth the reasons why the Court should grant their Motions. And in their Replies and Responses to the Motion for Leave, the Banks can argue that the proposed First Amended Complaint is futile. As it relates to the other issues in the Banks' Motions to Dismiss, there were no material amendments and all they have to do is file their Replies so the Court can rule. There is no reason to start over.

VI. All Issues Related to the Banks' Motion to Dismiss Are Ripe to Be Decided; We Are Just Waiting on the Banks.

In his proposed First Amended Complaint, the Receiver made no material or substantive changes to his Complaint related to the Banks' other arguments—their knowledge of Menaged's fraud, their substantial assistance, and DenSco's reasonable reliance.

Those issues have been briefed. The Banks' Replies are due in short order.[2] It does not make any sense that the Banks can file *new* Rule 12(b)(6) Motions on the same claims and the same allegations, even though those claims and allegations have not been substantively altered. In the interest of judicial economy, the Court should decide those issues as briefed in the pending Motions to Dismiss, the Receiver's Responses, and the Banks' Replies. We should not have to re-hash arguments that are already made and are pending before the Court now. Nor should the Banks get to re-work their arguments.

VII. Conclusion.

The bottom line is that the Banks just want a mulligan. It is clear what the Banks are trying to do here. They filed their Rule 12(b)(6) Motions, which were anemic in legal support. The Receiver filed his Responses citing scores of cases as to why the Court should deny their Motions. Now that the Receiver has made his arguments, the Banks want another bite at the apple.

For these reasons, the Court should proceed as follows:

1. Deny the Chase Defendants' Motion to Suspend.
2. Rule on the Banks' pending Motions to Dismiss when fully briefed.
3. If necessary, decide the Receiver's Motion for Leave.

[2] The Receiver did offer an extension for the Banks' filing of their replies in light of schedules and spring break, but the Banks never responded nor have the parties filed the required notice. Attached as **Exhibit "B**" are copies of emails whereby the Receiver extended his offer of an extension. The Receiver has notified that the Banks that if any open extension was granted, it has been revoked and requested the filing of their Replies on or before April 1, 2020. This courtesy will give the Banks 30 days to file their Replies.

DATED this 18th day of March, 2020.

Bergin, Frakes, Smalley & Oberholtzer, PLLC

/s/ Ken Frakes
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Ken Frakes
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ORIGINAL filed electronically this 18th day of March, 2020 via TURBOCOURT with:

Maricopa County Superior Court
www.turbocourt.com

And a copy mailed and/or emailed this 18th day of March, 2020 to:

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By: /s/ Kristine Berry

EXHIBIT A

Ken Frakes

From: Ken Frakes
Sent: Tuesday, February 18, 2020 11:30 AM
To: Marshall, Greg
Cc: Weaver, Amanda Z.
Subject: RE: US Bank

Thanks.

Oppose, and then in the alternative amend. I can set forth the discovery of the claim for SOL. But there is case law related to when it begins to run in Receiver cases. So I think I can get over that hurdle one way or the other.

As for the other two issues—knowledge and substantial assistance—as of now, I think we have enough.

KF

From: Marshall, Greg <gmarshall@swlaw.com>
Sent: Tuesday, February 18, 2020 11:25 AM
To: Ken Frakes <kfrakes@bfsolaw.com>
Cc: Weaver, Amanda Z. <aweaver@swlaw.com>
Subject: RE: US Bank

That would be fine Ken, do you intend to oppose or amend?

Gregory J. Marshall
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From: Ken Frakes <kfrakes@bfsolaw.com>
Sent: Tuesday, February 18, 2020 11:16 AM
To: Marshall, Greg <gmarshall@swlaw.com>
Subject: US Bank

[EXTERNAL]

Greg,

May I have until 3/2 to file my response? Some personal things came up last week and I am a few days behind. Thanks.

Ken Frakes

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B | F | S | O

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Ken Frakes

From: Ken Frakes
Sent: Tuesday, February 4, 2020 10:43 AM
To: claydonj@gtlaw.com
Cc: goodwinn@gtlaw.com; FerakP@gtlaw.com
Subject: RE: Davis vs. US Bank, et al.

John,

I am good with this. Just two things:

1. I have not elected to amend the complaint at this time. When I see the substance of your argument, I may amend with our Response to the Motion to Dismiss. That is the most efficient way to proceed, especially in light of US Bank's Motion.

2. The extension is fine. I would prefer to work out any objection related to the discovery requests. Often, parties play games with objections and force motions to compel, etc. Let me know if you have any objections to the discovery requests. We might be able to cure them short of court involvement by narrowing the scope or clarifying.

KF

From: claydonj@gtlaw.com <claydonj@gtlaw.com>
Sent: Tuesday, February 4, 2020 9:17 AM
To: Ken Frakes <kfrakes@bfsolaw.com>
Cc: goodwinn@gtlaw.com; FerakP@gtlaw.com
Subject: Davis vs. US Bank, et al.

Ken,

Following up on our recent emails and calls, this email confirms that because you have elected not to amend your complaint, we will proceed with filing the motion to dismiss on behalf of the Chase Defendants.

As we discussed on our call last week, I requested that you agree to extend the deadline for responding to the discovery requests that you sent during the meet and confer process until the court has addressed the initial pleading issues. You indicated that you did not object to that request and suggested that it might make sense to have the date continued to the date that the Chase Defendants would have to do their initial disclosures, but that you would have to check with your client.

Please let us know by the close of business on Wednesday, February 5th whether you agree to extend the deadline for response to the discovery requests until 30 days after the Chase defendants file a responsive pleading, as necessary, to the current complaint or any amended complaint.

Thanks,
Jon

Jonathan H. Claydon
Shareholder

Greenberg Traurig, LLP

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EXHIBIT B

Ken Frakes

From: Ken Frakes
Sent: Wednesday, March 11, 2020 1:13 PM
To: claydonj@gtlaw.com; Marshall, Greg
Subject: Motions to Dismiss

Gents:

I've given your proposal some though and discussed it with others. For the reasons we discussed, I don't think it is a good idea, so I can't agree to it. As it stands now, you have a Reply due in support of your Motion to Dismiss and a Response due to my Motion for Leave. As always, I will try to work with you regarding response and reply dates. I know it is spring break time. Let me know what you need and we can the extensions on file.

Ken Frakes

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