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[additional co-defendants listed on the signature page]

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 KUMBALECK and KRISTOFER NELSON, a married couple, and VIKRAM DADLANI and JANE DOE DADLANI, a married couple,

Defendants.

NO. CV2019-011499

DEFENDANTS' MOTION TO DISMISS COUNTS THREE THROUGH EIGHT OF PLAINTIFF'S THIRD AMENDED COMPLAINT

(Assigned to the Honorable Daniel Martin)

(Oral Argument Requested)

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JPMorgan Chase Bank, N.A., Samantha and Kristofer Nelson, Vikram and Jane Doe Dadlani, U.S. Bank National Association, and Hilda Chavez (collectively "Defendants") hereby move to dismiss Counts Three, Four, Five, Six, Seven, and Eight of the Third Amended Complaint ("TAC") filed by DenSco Investment Corporation ("DenSco"), through Peter S. Davis ("Receiver"). These counts assert new claims for aiding and abetting conversion, aiding and abetting breach of fiduciary duty, and civil racketeering–each of which fails because they have not and cannot be properly pleaded.

MEMORANDUM OF POINTS AND AUTHORITIES

DenSco was a lender that made short-term "hard money loans" to enable the purchase of foreclosed homes sold at trustee's sales. (TAC ¶ 1.) DenSco began doing business with Scott Menaged and his companies Easy Investments, LLC and Arizona Home Foreclosures, LLC sometime prior to 2013, when Menaged held himself out to be a purchaser of foreclosed homes and borrowed money from DenSco to purchase them. (*Id.* ¶¶ 23–24.) DenSco alleges that it made "hard money loans" to Menaged and his companies both before ***and after*** DenSco became aware that Menaged was defrauding DenSco by not using the loan funds to purchase foreclosed homes. (*Id.* ¶¶ 24–29.) Specifically, DenSco alleges that it wired money to Menaged and his companies for the purchase of foreclosed homes. (*See, e.g., id.* ¶ 3.)

When DenSco discovered Menaged's fraud in November 2013, DenSco did not cease doing business with Menaged or report him to the authorities, but instead executed a forbearance agreement. (*Id.* ¶ 31.) Despite its knowledge that Menaged had just duped it out of almost $40 million, DenSco doubled down and, pursuant to a supposed "work out" plan, continued to disburse funds directly to Menaged's companies without any protective measures such as payments to a trustee or escrow agent, and agreed to proceed with Menaged based on his promise to provide copies of cashier's checks and receipts for the foreclosed homes he was supposedly purchasing. (*Id.* ¶¶ 29, 32.) DenSco claims that Menaged continued to perpetrate a fraud on DenSco "by obtaining, but then redepositing, cashier's checks, and then creating false deeds, contracts and receipts documenting the fictitious purchase of real estate at a trustee's sale." (*Id.* ¶ 34.) DenSco alleges that Defendants are liable for losses it incurred in Menaged's scheme because they allowed Menaged to obtain the cashier's checks from his own company accounts and to redeposit those same funds into the same accounts. (*Id.* ¶¶ 57–58, 81–82.)

Based on these allegations, DenSco attempts to plead new claims in the TAC for aiding and abetting conversion, aiding and abetting breach of fiduciary duty, and civil racketeering. DenSco's new claims, however, fail as a matter of law. DenSco fails to explain how the claims—subject to a two-year statute of limitation—could be timely given that the Receiver itself admits that it knew of the purported fraud by June 2017. That infirmity aside, there is no conversion because DenSco fails to allege any facts establishing that Menaged exercised wrongful dominion over the redeposited cashier's checks. Similarly, DenSco fails to allege any facts supporting the existence of a fiduciary relationship between Menaged and DenSco. In fact, DenSco has always agreed that the relationship between it and Menaged was an arm's length lender-debtor relationship, out of which no fiduciary duty claim could possibly arise. Finally, DenSco also fails to allege the required elements of a civil racketeering claim. There is no basis for these newly pleaded claims.[1]

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LEGAL STANDARD

The affirmative defense of statute of limitations is properly raised in a motion to dismiss where it appears from the face of the complaint that the claim is barred. *Dicenso v. Bryant Air Conditioning Co.*, 131 Ariz. 605, 606 (1982). A complaint is also properly dismissed when it fails to plausibly allege facts that, if proven, could not support the elements of a claim. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008) (en banc); *Hannosh v. Segal*, 235 Ariz. 108, 111 ¶ 4 (App. 2014). The pleading standard is even higher for claims sounding in fraud, like those raised in the TAC's civil

[1] Defendants hereby preserve and do not waive for the purposes of appeal their prior arguments regarding the insufficiency of the allegations in support of DenSco's claim for aiding and abetting fraud.

racketeering claim. To state fraud-based claims, a complaint must "plead all the elements" of the claim with particularity, *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 155–56 ¶ 53 (App. 2009) (internal quotation marks omitted); Ariz. R. Civ. P. 9(b), and it must identify which party it alleges participated in any particular fraudulent conduct, *see Steinberger v. McVey ex rel. Cty. of Maricopa*, 234 Ariz. 125, 141-42 ¶¶ 73-75 (App. 2014).

ARGUMENT

I. The TAC's Claims for Aiding and Abetting Conversion and Breach of Fiduciary Duty are Time-Barred.

DenSco's new aiding and abetting tort claims asserted in Counts Three through Six are subject to a two-year statute of limitation.[2] *See* A.R.S. § 12-542. The Receiver, however, has already expressly alleged in the First Amended Complaint that it discovered its purported tort claims against Defendants on June 13, 2017. Specifically,

> The Receiver 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.

(First Amended Complaint ¶ 81.) Given this clear discovery allegation, the new claims for aiding and abetting in the TAC are time-barred by the two-months-late August 2019 filing of the original Complaint. *See, e.g.*, *Brenteson Wholesale, Inc. v. Ariz. Pub. Serv. Co.*, 166 Ariz. 519, 522 (App. 1990) ("Statements in a pleading are admissible against the party making them as proof of facts admitted therein.").[3]

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[2] DenSco argued in the motion for leave to file the Second Amended Complaint that the aiding and abetting conversion claim was intended to be a claim for aiding and abetting conversion under Article 3 of the Arizona Uniform Commercial Code ("UCC"). However, the TAC fails to cite to a single provision of the UCC, and—in any and all events—fails for the reasons detailed below. But, to the extent that this Court finds that the claim is one for aiding and abetting common law conversion subject to a two-year limitation period, it, too, is time-barred.

[3] Defendants' prior Motions to Dismiss also made clear that judicial admissions by the Receiver in the related litigation against Clark Hill evidenced that DenSco was fully aware that Menaged was engaged in fraud in November 2013. While the Court indicated that those facts were outside of the pleadings here, there can be no doubt that the Receiver knew of the so-called "second fraud" by June 13, 2017, given this plain allegation.

II. The Allegations Do Not Support an Underlying Conversion, So Counts Three and Four Are Properly Dismissed.

An aiding and abetting claim requires the commission of an underlying tort. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters, & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485 ¶ 34 (2002). According to DenSco's reply in support of the motion for leave to file the Second Amended Complaint, the UCC's provision defining conversion of a negotiable instrument (found in Chapter Three of Title 47 (Negotiable Instruments)) is the tort underlying Counts Three and Four.[4] But Arizona precedent and straightforward principles of statutory interpretation confirm that Menaged did not "convert" any negotiable instruments that belonged to DenSco because (1) Menaged was authorized to negotiate the cashier's checks; and (2) DenSco did not have a property interest in the cashier's checks.

a. Menaged Was Authorized By Law to Re-Deposit the Unused Cashier's Checks, So Doing So Was Not a Conversion.

DenSco alleges that after it ***wired*** money to Menaged, Menaged would obtain cashier's checks payable to trustees and then, instead of purchasing foreclosed homes, he would "redeposit the checks" into his business accounts from which they were drawn. (*See, e.g.*, TAC ¶¶ 50, 53, 57.) According to DenSco, the alleged act of conversion in this chain of events occurred at its ***end***: "Menaged exercised wrongful dominion over DenSco's property by re-depositing the DenSco Loan Proceeds and using on a personal basis" the funds.[5] (*Id.* ¶¶ 123, 128.) DenSco's theory is wrong as a matter of law.

Once DenSco wired the funds to Menaged and Defendants issued cashier's checks payable to third-party trustees, Menaged became a "remitter," or the person who

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[4] DenSco cites A.R.S. § 47-3119(G) in the reply (page 2); however, this appears to be a typo: Section 47-3119 does not have a subsection (G), and Section 47-3118(G) explicitly addresses a three-year statute of limitations.

[5] Because the "DenSco Loan Proceeds" were paid to Menaged and his businesses by ***wire***, (TAC ¶¶ 50, 52, 74, 76), these transactions fall outside UCC Chapter Three, and Menaged's alleged misuse of those funds cannot support UCC Chapter Three conversion as a matter of law. *See* A.R.S. § 47-4A101, *et seq.*; *Koss Corp. v. Am. Exp. Co.*, 233 Ariz. 74, 81 ¶ 18 (App. 2013), *as amended* (Sept. 3, 2013) ("Fund or wire transfers are governed by Article 4A of the UCC . . . [which] is intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article." (internal quotation marks and citation omitted)).

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"purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser." A.R.S. § 47-3103(A)(11). As a remitter, Menaged was a "'[p]erson entitled to enforce' [the] instrument[s]." A.R.S. § 47-3301. Specifically, as "a remitter that has received an instrument from the issuer but ***has not yet transferred or negotiated the instrument to another person***," Menaged was entitled to enforce each of the cashier's checks. A.R.S. § 47-3301, Official UCC cmt. (emphasis added). Thus, Menaged remained authorized to negotiate the unused cashier's checks, and the act of doing so cannot be a UCC Chapter Three conversion because the UCC does not impose liability on someone entitled to enforce the underlying negotiable instruments.

UCC's Section 3-420 covers cases involving forged or missing indorsements, negotiated ***without the consent*** of those authorized to negotiate them. *See* UCC § 3-420 Official cmt 1 ("[A]n instrument is converted if it is taken by transfer other than a negotiation from a person not entitled to enforce the instrument or taken for collection or payment from a person not entitled to enforce the instrument or receive payment."). That is not what happened here, as DenSco does not allege that Menaged negotiated the cashier's checks with forged or missing indorsements. Arizona courts are in accord with this view. *See, e.g.*, *San Tan Irr. Dist. v. Wells Fargo Bank*, 197 Ariz. 193, 194 (App. 2000) (explaining "conversion claim was based on bank accepting for deposit checks that, while payable to San Tan, had a forged endorsement [sic.] placed thereon by San Tan's bookkeeper, Glenda Miller, who deposited the checks into her personal account at Wells Fargo"); *Antseliovich v. JP Morgan Chase Bank NA*, No. 1 CA-CV 16-0515, 2018 WL 2016021, at *2 ¶¶ 7-8 (Ariz. App. May 1, 2018) (reversing dismissal of conversion claim when checks "made jointly payable" but cashed lacking indorsement of co-payee); *see also, e.g.*, *Koss*, 233 Ariz. at 88 ¶ 47 ("Nothing in A.R.S. § 47-320 attempts to provide a cause of action for statutory conversion of property based on" "the cashing of checks by the person authorized to receive payment.").

As in *Koss*, A.R.S. § 47-320 does not provide a claim for UCC Chapter Three conversion under these facts, when the person (Menaged) negotiating the instruments (the

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cashier's checks) was authorized to do so. And without the underlying tort of conversion, no aiding and abetting claim against Defendants can lie. *See Wells Fargo Bank*, 201 Ariz. at 485 ¶ 34 (requiring an underlying tort for an aiding and abetting claim to exist).

b. DenSco Had No Property Interest in the Redeposited Checks Capable of Supporting a Conversion.

Further, the re-deposited checks were not the property of DenSco over which Menaged could have exercised wrongful dominion or control under Arizona's definition of conversion. *See* A.R.S. § 47-3420(A) ("The law applicable to conversion of personal property applies to instruments.") Conversion, under Arizona law, encompasses only "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 (App. 2005) (quoting Restatement (Second) of Torts § 222A(1) (1965)). But DenSco was not the payee of the checks entitled to enforce them, never had possession of the checks, and fails to allege that it had any possessory interest in the checks. In fact, the opposite is true: DenSco alleges that it loaned funds to Menaged and his companies and thus ***relinquished*** any right to dominion or control over the funds once they landed in Menaged's business accounts with Defendants and became comingled and indistinguishable from the funds therein. (TAC ¶¶ 50, 52, 74, 76.) *See also Koss*, 233 Ariz. at 90 ¶¶ 54-55 (confirming Arizona's view that unsegregated money is not ordinarily the subject of a conversion claim). Thus, DenSco's allegations, at best, amount to nothing more than an unfulfilled monetary obligation, which does not give rise to a conversion claim as a matter of law. *See Liberty Life Ins. Co. v. Myers*, No. CV 10-2024-PHX-JAT, 2013 WL 530317, at *13 (D. Ariz. Feb. 12, 2013) ("Money is not the proper subject of a conversion claim when the claim is used merely to collect on a debt that could be satisfied by money generally."); *see also Ariz. Radiation Therapy Mgmt. Servs. Inc. v. Translation Rsch. Mgmt., LLC*, No. 15-cv-11138, 2015 WL 6384318, at *3 (D. Ariz. Oct. 22, 2015) (dismissing a conversion claim because the "debt . . . could be satisfied by money").

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DenSco's allegations confirm this result. DenSco alleges that the purported conversion was Menaged's act of redepositing the "DenSco Loan Proceeds," but ignores that DenSco lacked possessory rights over those checks or the funds they represented once DenSco wired the funds into Menaged's business accounts. (*See, e.g.*, TAC ¶¶ 123, 128 (focusing only on Menaged's "wrongful dominion over DenSco's property by redepositing and using on a personal basis the DenSco Loan Proceeds").) That is: (1) DenSco wired money to Menaged's bank accounts, which did not constitute the total amount of funds in those accounts (*id.* ¶¶ 50, 52, 74, 76); (2) Menaged or his agent obtained cashier's checks (*id.* ¶¶ 53–55, 78–80); and (3) ***only then*** did Menaged or his agent re-deposit some of those cashier's checks (*id.* ¶¶ 57, 90). Upon wiring the funds, DenSco not only relinquished an immediate right of possession or control over those funds, but also affirmed the existence of a debtor/creditor relationship that could be satisfied by means of repayment from any funds of Menaged or his businesses, not just those particular dollars that DenSco wired over.

Arizona precedent compels this conclusion. *See, e.g.*, *Universal Mktg. & Entm't, Inc. v. Bank One of Ariz., N.A.*, 203 Ariz. 266, 268 ¶ 6 (App. 2002). In *Universal*, the plaintiff (Universal) wired $50,000 into the general account of a Bank of America customer as an intended loan. *Id.* at 267–68 ¶¶ 2–3. Those funds were then garnished by a judgment creditor, after which Universal sued the judgment creditor for conversion. *Id.* ¶¶ 2–4. The Court of Appeals held that Universal had no possessory interest in the funds it deposited into the Bank of America account. *Id.* at 268 ¶¶ 5–7. Specifically, the Court stated that "[t]he proper plaintiff in a conversion action is one who had the right to immediate possession of the chattel at the time of the alleged conversion." *Id.* at ¶¶ 6–8. Universal, like DenSco here, never had the right to ***immediate possession*** of the disputed funds, rendering its conversion claim defective as a matter of law.

The Court of Appeals' opinion in *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 91–92 (App. 1973) is also instructive. The plaintiff in *Autoville* advanced funds to purchase used automobiles and then turned those vehicles over to defendants, after which

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he was supposed to receive shares of proceeds when the vehicles sold. *See* 20 Ariz. App. at 90–91. However, the defendants "liquidated all vehicles on the lot, deposited most of the proceeds in the[ir] corporate account … and immediately withdrew the funds in the form of certified checks." *Id.* at 91. Yet, even though fees were to be paid upon the sale of specific vehicles, the Court of Appeals determined that obligation could have been discharged "from a source ***other than*** the sale proceeds" such that there was no claim of conversion available as a matter of law. *Id.* at 92 (emphasis added).

As *Universal* and *Autoville* establish, there was no underlying conversion by Menaged, so there can be no aiding and abetting liability by Defendants. Once DenSco wired the funds to Menaged's business accounts, DenSco no longer had an immediate right to possess the funds, just as the court held in *Universal*. And like the defendants in *Autoville*, Menaged could have repaid DenSco's loans with separate funds (certainly that was the intent, (*see, e.g.*, TAC ¶ 1)), not the same funds DenSco wired. As a result, DenSco's aiding and abetting conversion theory is properly dismissed.

III. DenSco's Lender-Borrower Relationship with Menaged Did Not Create a Fiduciary Duty, So Counts Five and Six Must Be Dismissed.

At base, this case is about a relationship between a hard money lender, DenSco, and its borrower, Menaged. Yet, Counts Five and Six allege that Defendants aided and abetted Menaged in "breach[ing] his fiduciary duties" purportedly owed to DenSco as part of that "business relationship." (TAC ¶¶ 133–135, 139–41). But DenSco offers no factual allegations that justify even an inference that a fiduciary relationship existed between Menaged and DenSco, or that Defendants knew or could have known Menaged was supposedly his lender's fiduciary. The most DenSco alleges is that Menaged had a "friendship and a business relationship" with DenSco principal Denny Chittick. (TAC ¶ 24.) Such factual allegations unquestionably do not support the conclusion that Menaged was anything other than a debtor to DenSco.

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a. DenSco Has Not (and Cannot) Plead Facts That Could Show DenSco and Menaged Had a Fiduciary Relationship.

Arizona courts have consistently declined to find a fiduciary duty "when the relationship between the parties arises from an arms-length commercial transaction." *Rindlisbacher v. Steinway & Sons Inc.*, No. CV-18-01131-PHX-MTL, at *28-29, 31 (D. Ariz. Oct. 30, 2020) (collecting cases). Indeed, Arizona courts have specifically rejected the proposition that a lender-borrower relationship is fiduciary in nature. *See, e.g., Urias v. PCS Health Sys.*, 211 Ariz. 81, 87 ¶ 32 (App. 2005) (holding that a debtor-creditor relationship does not create a fiduciary duty); *Gould v. M&I Marshall & Isley Bank*, 860 F. Supp. 2d 985, 989 (D. Ariz. 2012) ("[I]t is well settled in Arizona that a mortgage lender does not owe a fiduciary duty to a borrower."); *McAlister v. Citibank (Ariz.), a Subsidiary of Citicorp*, 171 Ariz. 207, 212–13 (App. 1992) (holding that the fact that a borrower was a long-time customer of a lender did not create a fiduciary relationship). DenSco puts forth no allegations suggesting that Menaged and DenSco engaged in anything other than a lender-borrower relationship. The TAC expressly asserts that DenSco was a "hard money lender" and that it made "loans" to Menaged and his companies. (TAC ¶ 24.) This relationship is classically non-fiduciary under Arizona law, such that there never existed any fiduciary duty for Menaged to have breached.

Despite this clear result under Arizona law, the TAC attempts to cure the flaws of the prior pleading and recast the relationship by offering new allegations that Menaged had a long business relationship with DenSco and a friendship with the company's owner. (TAC ¶ 24.) But an arms-length transaction does not transmute into a fiduciary one merely because the parties to the transaction are also longtime business partners and friends. *See Lytikainen v. Schaffer's Bridal LLC*, 409 F. Supp. 3d 767, 778 (D. Ariz. 2019) (under Arizona law, a "trusting long-term business relationship" and "friendship" with another party "isn't enough to plausibly state that [the other party] owed . . . a fiduciary duty"); *Rhoads v. Harvey Publ'ns, Inc.*, 145 Ariz. 142, 144, 149 (Ariz. App. 1985) (finding no fiduciary relationship between parties in a 23-year business relationship); *Klinger* *v. Hummel*, 11 Ariz. App. 356, 359 (1970) (finding no fiduciary relationship between buyer and seller in real estate transaction even though "the parties had known each other for a long time," "were friends," and only one party "was experienced in real estate transactions while the [others] were not"). Nor does a relationship become fiduciary merely because one party (i.e. DenSco) volunteers trust in another (i.e. Menaged)—the only other basis offered by the TAC. (TAC ¶¶ 24, 29, 32, 33.) Rather, "[a] commercial contract creates a fiduciary relationship ***only*** when one party ***agrees*** to serve in a fiduciary capacity." *Urias*, 211 Ariz. at 87 ¶ 32 (emphasis added). "Mere trust in another's competence or integrity does not suffice." *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 24 (App. 1996), *as corrected on denial of reconsideration* (Jan. 13, 1997).

Neither did any fiduciary relationship exist because of the January 2014 agreement in which DenSco agreed it would forbear suing Menaged for under-securing prior loans it made to him and his businesses, in exchange for Menaged paying certain sums and taking other actions (the "'work out' plan").[6] That is, nothing about that agreement suggests a fiduciary relationship beyond DenSco's conclusory allegation that it decided to rely upon Menaged. (TAC ¶ 29.) This is particularly so, considering that the "'work out' plan" was a commercial contract. As *Urias* confirms, "[a] commercial contract creates a fiduciary relationship ***only*** when one party ***agrees*** to serve in a fiduciary capacity." 211 Ariz. at 87 ¶ 32 (emphases added). Yet DenSco does not—and cannot—allege that Menaged agreed to act as a fiduciary in the "'work out' plan." *See, e.g.*, *id.* ("If [a party] had intended to create a fiduciary relationship, it could have negotiated for specific language in the Agreement to that effect. The Agreement does not contain such language."). At bottom, all the TAC alleges as to the "'work out' plan" is that DenSco believed that Menaged would comply with the terms of the contract the parties executed. (TAC ¶ 33 ("Chittick

[6] What DenSco calls the "'work out' plan" (TAC ¶¶ 29, 31-33) is in fact the Forbearance Agreement previously filed in accordance with the public records exception. (*See* U.S. Bank's May 6, 2020 Motion to Dismiss, n.4 and Ex. A.) Given that Menaged's theft from Densco led to the "'work out' plan," it is rather absurd to cast Menaged as acting on Densco's behalf.

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and DenSco continued to rely on Menaged's integrity and fidelity in fulfilling the commitments that Menaged and his entities had made to effectuate the 'work out' plan.").) If that were enough to create a fiduciary duty, every commercial contract would carry fiduciary obligations. That is undeniably not what Arizona law provides.

b. DenSco Has Not (and Cannot) Plead Facts that Could Show Defendants Knew of any Fiduciary Relationship between DenSco and Menaged.

Moreover, there are no allegations capable of supporting the conclusion that Defendants knew or should have known that Menaged was a fiduciary of his lender, DenSco. There are no allegations that Defendants were a party to agreements or communications between DenSco and Menaged regarding the loans, foreclosures, property purchases, or security agreements, or anything at all that might raise an inkling in Defendants that Menaged was not only DenSco's borrower, but also its fiduciary. The closest the TAC comes to pleading awareness is the general allegation that Menaged told Defendants that he was in the residential foreclosure business and that DenSco funded his transactions, and that Defendants generally knew of Menaged's "business relationship with DenSco"—a relationship the Complaint establishes as that of lender and borrower. (*See* TAC ¶¶ 48-49, 51, 71-72.) These allegations do not and cannot support the inference that Defendants knew or should have known that Menaged was in fact his lender's "fiduciary." Nor is there any way to amend the TAC to cure this deficiency.

Therefore, because the underlying tort of breach of fiduciary does not lie as a matter of law, Count Five and Six's third-party aiding and abetting theory must be dismissed. *See Gould*, 860 F. Supp. 2d at 989–90 (dismissing negligent and fraudulent failure to disclose claims because no fiduciary duty—needed to trigger an obligation to disclose—ran from lender to borrower).

IV. DenSco Does Not Possess a Viable Racketeering Claim.

"Arizona RICO allows a private cause of action for racketeering" where there exists a "'pattern of racketeering,'" meaning that "there must be at least two related and continuous acts of racketeering." *Hannosh*, 235 Ariz. at 111 ¶ 7 (quoting A.R.S. § 13-

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2314.04(T)(3)). To survive a motion to dismiss, a complaint asserting an Arizona RICO claim must (1) allege "that the plaintiff has been injured by a violation of § 13-2301(D)(4)(b)"; (2) identify a RICO "predicate offense"; (3) allege "that the act was done for financial gain"; and (4) allege that the act "was chargeable and punishable by imprisonment for more than one year." *Hannosh*, 235 Ariz. at 112 ¶ 8 (internal citation and quotations omitted).

Crucially, the Arizona RICO statute creates liability against an "enterprise"—a category that includes U.S. Bank and Chase—only for the racketeering acts of its agents, and then, only when a "director or high managerial agent" of the enterprise "authorized, requested, commanded, ratified or recklessly tolerated" the predicate offense. A.R.S. § 13-2314.04 (L). The allegations in the TAC do not plead these elements with specificity, so the RICO claims must be dismissed.

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a. DenSco Fails to Allege Facts That Show a Director or High Managerial Agent Was Involved in any Supposed Racketeering Acts.

DenSco's RICO claims against Defendants fail because DenSco has pointed to no facts that could show a director or high managerial agent of U.S. Bank or Chase was involved in any racketeering acts, as it must to survive a motion to dismiss. Arizona law does not provide for civil RICO liability for "enterprises,"[7] unless a "director or high managerial agent" of the enterprise "performed, authorized, requested, commanded, ratified or recklessly tolerated" the predicate offense. A.R.S. § 13-2314.04 (L). The statute further narrows the circumstances in which banks may be liable based on a RICO predicate of money laundering, requiring that banks

> shall not be held liable in damages or for other relief pursuant to this section for conduct proscribed by section 13-2317, subsection B, paragraph 1 … unless [] the person or agent acquiring or maintaining an interest in or transporting, transacting, transferring or receiving the funds on behalf of the defendant **did so knowing that the funds were the proceeds of an offense <u>and</u> that a director or high managerial agent** performed, authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the person or agent.

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[7] These include "any corporation, association, labor union or other legal entity," such as U.S. Bank and Chase. A.R.S. § 13-2301(D)(2), -105(17).

A.R.S. § 13-2314.04(L) (emphasis added).[8] The purpose of these requirements is to prevent plaintiffs from recovering "significant RICO remedies against defendants who ha[ve] only oblique relationships to the underlying wrongdoing." *Marsh v. Coles*, 238 Ariz. 398, 405 ¶ 16 (App. 2015).

Arizona law plainly excludes the identified bank employees—Wanta, Chavez, Dadlani, Nelson, and Lazar—from its definition of "director or high managerial agent." In Arizona, the definition of a "director"—set forth in Title 10 of the laws governing Corporations and Associations—refers to ***corporate*** (i.e. enterprise-wide) directors responsible for "the business and affairs of the corporation." A.R.S. § 10-801 *et seq*. To wit, managers and/or assistant managers of local bank branches appear nowhere in such descriptions, much less a branch employee simply assigned to assist a customer with his or her banking needs. (TAC ¶¶ 44, 67.)

Similarly, the Arizona legislature has consistently defined "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***." A.R.S. § 4-210(B)(1) (liquor licensing); A.R.S. § 13-305(B)(2) (criminal code).[9] Indeed, in the criminal context, corporations are liable only for the acts of their "***corporate*** director[s] or … and high managerial agent[s]," and conduct of "lower level employees" does not implicate the enterprise as a matter of law. *See State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 197 ¶ 87 (App. 2010), *as amended* (May 4, 2010) (emphasis added) (approving jury instructions for criminal enterprise liability based on conduct of "corporate director or a high managerial agent"). Arizona, therefore, has made an intentional choice to limit the

[8] The bank provision pertains to "money laundering" that occurs where a party "[a]cquires or maintains an interest in, transacts, transfers, transports, receives or conceals the existence or nature of racketeering proceeds knowing or having reason to know that they are the proceeds of an offense." A.R.S. § 13-2317(B)(1).

[9] The Arizona criminal code's definition of "high managerial agent" mirrors the one set forth in the Model Penal Code's section defining corporate responsibility for the criminal acts of its agents. That standard defines "high managerial agent" to include only those "having duties of such responsibility that his conduct may fairly be assumed to represent the ***policy of the corporation***." Model Penal Code § 2.07(4)(c) (emphasis added).

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term and exclude employees like bank branch managers who do not possess this authority. This statutory election is significant, given that numerous states have explicitly opted to do what Arizona has not, extending the definition of "high managerial agent" to include agents responsible for "the supervision of subordinate employees in a managerial capacity." *See, e.g.*, M.R.S. § 562.056.3(2) (Missouri).

Nowhere in the TAC does DenSco allege that any of the bank employees who worked with Menaged had such authority. Rather, the TAC clearly establishes that Defendants Chavez, Dadlani, and Nelson were local branch employees responsible only for day-to-day customer transactions such as creating cashier's checks and processing deposits and withdrawals. (TAC ¶¶ 54–55, 57, 79–80, 82.) And DenSco's effort to cure this fundamental flaw in the TAC by identifying two new, non-defendant, bank employees—U.S. Bank's Julia A. Wanta and Chase's Susan Lazar—adds nothing of substance to the analysis.

As to U.S. Bank, the <u>sum total</u> of the TAC allegations are that Wanta was "assigned … to oversee and facilitate Menaged's relationship with US Bank." (TAC ¶ 44). But this sole allegation cannot, as a matter of law, support an inference that Wanta was a "high managerial agent" of an enterprise as large as a national banking association. Indeed, it fails to even allege that Wanta was responsible for the supervision of any subordinate employees in a managerial capacity, nor can it. This deficiency separately and independently entitles U.S. Bank and Chavez to dismissal of Count Seven.

As to Chase, the TAC alleges that Lazar 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 ¶ 67.) These allegations also fail to show that Lazar had any supervisory authority, nor any authority sufficient to be a "high managerial agent" and merely implicate responsibilities very far down the chain from the "director or high managerial agent" of a national bank whose involvement would be required to support a viable RICO claim.

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Nothing in Arizona caselaw suggests that oversight of individual accounts, or supervision of two branch bank employees—standing alone—qualifies someone as a "high managerial" employee. *Cf. Far W. Water & Sewer*, 224 Ariz. at 192 (concluding in criminal context that defendants were "high managerial agents" because they held positions as President, Chief Operating Officer, member of the Board of Directors, and high-level supervisor, and they "formulated and developed [corporate] policies and practices" including "ma[king] decisions and t[aking] actions regarding training, safety and equipment necessary for" implementing those policies). And though the TAC states that "high managerial agents … authorized, ratified, and recklessly tolerated" Menaged and Castro's conduct (TAC ¶¶ 153, 163), "a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8," *Cullen*, 218 Ariz. at 419, let alone the heightened pleading standard that applies to fraud-based RICO claims, *see Royston v. Waychoff*, No. 1 CA-CV 19-0340, 2020 WL 4529621, at *1-2 (Ariz. App. Aug. 6, 2020).

In sum, DenSco does not—and cannot in good faith—allege that any of the identified local branch employees possessed the authority to "formulat[e] enterprise policy," particularly under the heightened pleading standard that applies to fraud-based RICO claims. *See Marsh*, 238 Ariz. at 403 (concluding that "a finder of fact could never" find that a corporation or its agent "'authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct' of the illegal enterprise that deprived the Investors of their monies" where plaintiff had "alleged no such conduct" (quoting A.R.S. § 13-2314.04(L)). Nor can DenSco cure its factual deficiency with vague references to unidentified "higher-level employees" (TAC ¶¶ 68, 153, 163), *see Steinberger*, 234 Ariz. at 141–42 (requiring identification of alleged fraudster under Rule 9(b)). DenSco, therefore, cannot sustain its RICO claim to the extent that it requires the involvement of such an agent.

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b. DenSco's RICO Claims Fail Because DenSco Has Not Alleged that Any U.S. Bank or Chase Agents Committed Racketeering Acts.

Further, enterprises are liable under the Arizona RICO statute only for racketeering acts committed by their own agents. A.R.S. § 13-2314.04(L). ("An enterprise shall not be held liable in damages or for other relief pursuant to this section ***based on the conduct of an agent***, unless the fact finder finds by a preponderance of the evidence that a director or high managerial agent performed, authorized, requested, commanded, ***ratified or recklessly tolerated the unlawful conduct of the agent***." (emphases added)). Here, the TAC identifies only racketeering acts committed by Menaged and Castro and premises all defendants' liability on their supposed authorization/ratification/reckless toleration of Menaged and Castro's conduct. (TAC ¶¶ 153, 163 (alleging that defendants "authorized, ratified and recklessly tolerated the conduct of Menaged, Castro and others and are therefore liable for it.")). The TAC makes no allegations (because it cannot) that Menaged and Castro were agents of Chase or U.S. Bank, and dismissal is warranted as a result.

The Arizona RICO statute does not recognize enterprise liability for racketeering acts committed by non-agents. *See* A.R.S. § 13-2314.04(L); *Marsh*, 238 Ariz. at 405 ¶ 16 (noting that the Arizona legislature enacted § 13-2314.04(L) "[i]n reaction to abuses by private plaintiffs seeking significant RICO remedies against defendants who had only oblique relationships to the underlying wrongdoing" with the intent to "narrow the remedies available to private RICO plaintiffs"). Here, the wrongdoing that the bank employees allegedly committed are not—as a matter of law—independent acts that could support enterprise RICO liability. Instead, the TAC alleges only that bank employees aided and abetted ***Menaged and Castro's conduct***. But aiding and abetting a tort is not a cognizable racketeering predicate offense both because it is not enumerated in the RICO statute, and because it is a civil violation that is not punishable by more than a year in prison. *See* A.R.S. § 13-2301(D)(4) (defining "Racketeering" to include acts involving listed violations punishable by more than one year in prison); *Holeman v. Neils*, 803 F. Supp. 237, 245 (D. Ariz. 1992) ("To establish a violation under § 13–2314(A), the plaintiff must show that he suffered damage or injury as the result of racketeering and that the act which caused the injury … ***was one of the illegal acts <u>enumerated</u> in the statute*** and ***was chargeable and punishable in accordance with the requirements of the statute***" (emphases added)); *Franzi v. Koedyker*, 157 Ariz. 401, 406 (App. 1985) (rejecting RICO claim premised on perjury or false swearing because neither offense is listed as predicate offense in § 13-2301(D)(4)). Because DenSco does not and cannot allege that any agent of U.S. Bank or Chase committed predicate offenses listed in the statute, the RICO claims against U.S. Bank and Chase must be dismissed.

c. DenSco Does Not Allege that Any Employee of U.S. Bank or Chase Engaged in Racketeering Acts for Financial Gain.

DenSco's RICO claims independently fail because DenSco has not alleged facts from which the Court could reasonably conclude any U.S. Bank or Chase employee acted ***for financial gain***—a required element of the offense. *Hannosh*, 235 Ariz. at 112 ¶ 8. The TAC's conclusory allegations that the U.S. Bank and Chase defendants were "motivated" to keep Menaged as a customer or ***may have*** received additional compensation for retaining his account (TAC ¶¶ 63, 95), are not rooted in any factual allegations, and, therefore, cannot support a RICO claim.

Regardless, any alleged "motivation" would be far too removed from financial gain to sufficiently plead RICO. "[I]ndirect and attenuated" financial benefits simply do not suffice. *See Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1066-67 (D. Ariz. 2012), *aff'd sub nom Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013) (concluding allegations of "an indirect and attenuated financial benefit" as a result of an alleged RICO predicate "does not make the operation one that was committed for financial gain"); *see also Priestley v. Two Houses in Buckeye*, No. CV16-4126 PHX DGC, at *6 (D. Ariz. May 9, 2017) (rejecting bare allegation that RICO predicate "inescapabl[y]" conferred a financial benefit as too attenuated and "unsupported by factual allegations").

<u>CONCLUSION</u>

For the foregoing reasons, Counts Three, Four, Five, Six, Seven, and Eight should be dismissed.

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RESPECTFULLY SUBMITTED this 7th day of April, 2021.

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GOOD FAITH CONSULTATION CERTIFICATE

JPMorgan Chase Bank, N.A., Samantha and Kristofer Nelson, Vikram and Jane Doe Dadlani, U.S. Bank National Association, and Hilda and John Doe Chavez (collectively "Defendants") in accordance with Rules 7.1(h) and 8.1(e)(4), ARIZ. R. CIV. P., hereby certify that their counsel and counsel for the Receiver have conferred via telephone to determine whether an amendment would cure any of the alleged pleading deficiencies set forth in Defendants' Motion to Dismiss. Having conferred, counsel for the parties are unable to agree that the alleged pleading deficiencies Defendants raise in their motion are curable by permissible amendment.

ORIGINAL of the foregoing e-filed with the Clerk of Court this 7th day of April, 2021.

COPY of the foregoing electronically distributed this 7th day of April, 2021 to:

Hon. Daniel Martin

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