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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

REPLY SUPPORTING MOTION TO DISMISS FIRST AMENDED COMPLAINT

(Assigned to the Hon. Daniel Martin)

(Oral Argument Requested)

In a futile attempt to defeat U.S. Bank's motion to dismiss, Plaintiff DenSco Investment Corporation ("DenSco") asks this Court to rely on an unpled contention that is entirely absent from the First Amended Complaint, and to draw unreasonable inferences from the otherwise unremarkable factual allegations regarding U.S. Bank's activities described therein. As if that weren't enough, DenSco then asks the Court to save its long ago time-barred claim by relying on a legal doctrine never before adopted by any Arizona state court – the so-called "adverse domination doctrine" – which should not apply in this situation for myriad reasons. For the reasons further explained below, this Court should dismiss the First Amended Complaint against Defendants U.S. Bank National Association

("U.S. Bank") and Hilda H. Chavez (collectively, the "U.S. Bank Defendants"), with prejudice.

I. DENSCO'S CLAIM AGAINST THE U.S. BANK DEFENDANTS IS TIME-BARRED.

DenSco presents several arguments designed to rebut the fact that its claim against the U.S. Bank Defendants is long time-barred, but all of those arguments fail. Regardless of whether Menaged's fraud is separated into two separate frauds under the artificial monikers of First and Second, or treated as the one continuous course of fraudulent conduct that it was, the factual allegations establish that DenSco was aware of the fraud through the Forbearance Agreement it negotiated and executed with Menaged, which was executed ***after*** U.S. Bank's alleged involvement was complete. Or, at the very least, DenSco is barred from seeking shelter in its ignorance of the relevant facts that any reasonable diligence would have revealed. Nor do the factual allegations support the inference that DenSco's principal, Chittick, was anything other than a well-meaning, but ultimately foolhardy director, to which the adverse domination doctrine should not apply, even if this Court chooses to be the first to recognize this doctrine as Arizona law.

A. DenSco's Rapid Repayment Contention Is New and Untenable.

For the very first time, DenSco argues—in its Response to the Motion to Dismiss—that "the evidence will show" that Menaged's fraud was difficult to detect because Menaged would "pay off previous loans with the new loans [at] a very rapid pace—in days or less than two weeks." (Resp. at 9:2-4.) So the argument goes, "[t]here was no point to check [the public records] because Menaged had already 'paid back' DenSco with later loans before Chittick could have any suspicion that DenSco was being defrauded." (*Id.* at 9:18-21.) DenSco's attempt to explain away its lack of reasonable diligence in not checking publicly recorded documents and therefore failing to detect Menaged's fraud so that a timely claim could be filed, fails for at least three reasons:

First, the Court's consideration of DenSco's new "rapid repayment" contention is impermissible because it is not pled in the First Amended Complaint. *See, e.g., Schneider*

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v. Cal. Dep't of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). "In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Id.* (emphasis original)); *see also id.* ("The court may not ... take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)." (quoting *2 Moore's Federal Practice*, § 12.34[2] (Matthew Bender 3d ed.))); *Anserv Ins. Servs., Inc. v. Albrecht*, 192 Ariz. 48, 49 ¶ 5 (1998), *as corrected* (July 7, 1998), *as corrected* (July 31, 1998) ("Because Arizona has substantially adopted the Federal Rules of Civil Procedure, we give great weight to the federal interpretations of the rules."). Accordingly, DenSco's exposition of this additional contention is properly ignored, as any reliance on it would be improper.

Second, even if this Court could consider DenSco's "rapid repayment" contention, it simply underscores the lack of any injury fairly traceable to U.S. Bank's alleged conduct. That is, if DenSco now contends that Menaged repaid all of the loan proceeds that were deposited into Menaged's U.S. Bank account with subsequently taken loans in which U.S. Bank was not involved, then U.S. Bank's conduct is not what injured DenSco, as those loans were repaid. Rather, DenSco's injury was caused by the later taken loans that Menaged did not repay, the proceeds of which were presumably deposited with co-defendant Chase.[1] Thus, if DenSco wishes to rely on this new rapid repayment contention, it has still pled itself out of a cause of action against the U.S. Bank Defendants.

And third, even accepting DenSco's new "rapid repayment" contention as true, it clearly put DenSco on notice—through the exercise of reasonable diligence—that something was terribly amiss. *See ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290

[1] U.S. Bank has no way of knowing whether Menaged repaid the loans whose proceeds were deposited into Menaged's U.S. Bank account, but notes that U.S. Bank's alleged involvement ended in April 2014 (*see* First Am. Compl. ¶ 139), after which time subsequently taken loans were presumably deposited into Menaged's accounts with co-defendant Chase.

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¶ 12 (App. 2010) (stating that "a tort claim accrues when a plaintiff knows or '***with reasonable diligence should know***' of the defendant's wrongful conduct," disallowing "a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim" (internal citation omitted) (quoting *Doe v. Roe*, 191 Ariz. 313, 324 ¶ 12 (1998)). Specifically, Menaged's "rapid repayment" of DenSco's loans—wherein older loans were paid off "in a matter of days or weeks" from what Chittick believed were "proceeds received from selling properties to repay the loans," (Resp. at 9:13-14)—would have been plain notice of a Ponzi scheme. *See, e.g.*, *United States v. Sencan*, 629 F. App'x 884, 887 (11th Cir. 2015) ("The modus operandi of a Ponzi scheme is to use newly invested money to pay off old investors and convince them that they are earning profits rather than losing their shirts." (citation omitted)). Thus, accepting DenSco's new contention as true would only add to the list of reasons why it cannot invoke the discovery rule.

B. DenSco's Unreasonable Inferences and Stretched Conclusions Are Properly Disregarded.

In addition to relying upon a brand-new contention in its Response, DenSco also doubles down on its own post-hoc characterizations of Menaged's fraudulent activity—however, the Court is not required to accept these tenuous descriptions as true. "[W]ell-pleaded allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417 (App. 1989).

As is evident from the First Amended Complaint, and underscored by DenSco's Response, the First and Second Frauds—through which DenSco acknowledges discovery of the First in 2014, but denies knowledge of the Second until at least December 2016—are no more than unwarranted conclusions that serve only to obfuscate DenSco's lack of reasonable diligence. *See Aldabbagh*, 162 Ariz. at 417. Specifically, DenSco argues that challenging its artificial characterization of Menaged's scheme as two separate frauds is equivalent to "disregard[ing] the facts" and an example of "refusing to take the

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Receiver's allegations as true." (Resp. at 5.) But that argument is baseless: according to DenSco's allegations, the First Fraud consisted of DenSco sending funds "directly to Menaged" for the purchase of foreclosed homes, believing that DenSco "w[as] the only lender and would be the only secured creditor in first position." (First Am. Compl. ¶¶ 20, 23, 25.) Likewise, the Second Fraud ***also*** consisted of "DenSco continu[ing] to fund hard money loans to Menaged for the purchase of real estate from foreclosure auctions," (*id.* at ¶ 37), by wiring money directly to Menaged (*id.* at ¶ 95), and once again believing that DenSco's interest would be secured in first position. (*See* Resp. at 6:13-14 (citing First Am. Compl. ¶ 59).)

DenSco ignores that the U.S. Bank Defendants ***did*** treat the well-pled allegations as true, but that the reasonable inferences to be drawn from those allegations are that Menaged's fraud was continuing, and DenSco was aware of it, as exhibited by the Forbearance Agreement entered in April 2014—the same month U.S. Bank's role allegedly ended. (*See* First Am. Compl. ¶ 139 (alleging that from April 2014 onward, Menaged started banking with co-defendant Chase)). DenSco's separation of the fraud into two buckets is entirely artificial and an unreasonable inference to draw from the factual allegations. Thus, the discovery rule provides no shelter to DenSco. The statute of limitations has long run.

C. <u>The Adverse Domination Doctrine Does Not Save DenSco's Claim.</u>

No Arizona state court has recognized the adverse domination doctrine as law in Arizona, which DenSco's Response fails to acknowledge—other than implicitly, by not citing any Arizona state court case supporting its application. *See, e.g.*, *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d 927, 934 (D. Ariz. 2017) (predicting that Arizona would adopt the doctrine, but nonetheless observing that "no Arizona court has ever held that the doctrine applies in Arizona . . . ."). And there is simply no good reason for this Court to apply it here. The adverse domination doctrine is "an equitable doctrine that tolls statutes of limitations for claims by corporations against officers, directors, lawyers, and accountants for so long as [the] corporation is controlled by those acting

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against its interests." 13 A.L.R. 7th Art. 3 (2016); *see also In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d at 933–34 ("The doctrine [of adverse domination] tolls the accrual of a cause of action based on the premise that a corporation does not have knowledge of a claim until the wrongdoing directors are no longer in control."). This is plainly not the situation here.

First, even DenSco acknowledges that Chittick took action to resolve Menaged's fraud by entering into the "Forbearance Agreement believing that this was the best way to recover the funds that it discovered had been misappropriated." (Resp. at 6:6-8 (citing First Am. Compl. ¶¶ 35-38).) Indeed, the Response acknowledges and even argues that Chittick was—in good faith—attempting to act ***in DenSco's best interests***, not ***against*** DenSco's interests. This situation does not serve the policy underlying the adverse domination doctrine, where Chittick, as the director and sole shareholder, undertook foolhardy, but otherwise innocent action in working for DenSco's best interests. The fact that Chittick's decision did not ultimately bear the desired fruit does not mean he was acting adverse to DenSco's interests.

Second, the adverse domination doctrine is intended for the corporation on behalf of its shareholders or non-wrongdoing directors. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The test is that once the facts giving rise to possible liability are known, ***the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue***." (emphasis added) (quoting *Int'l Rys. Cent. Am. v. United Fruit Co.*, 373 F.2d 408 (2d Cir. 1967))); *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d 927, 934 (D. Ariz. 2017) ("The causes of actions that plaintiffs are asserting could not have been discovered until the third-party CEO was appointed and could objectively review the conduct of the shareholders and the Harmon defendants."). This makes particular sense, because directors under Arizona law "[m]ust consider the effect of a proposed action or inaction on the shareholders . . . in determining what is in the best interests of the corporation." A.R.S. § 10-830(D)(1). But here, by contrast, the Receiver was ***not*** appointed to represent

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the interests of the sole shareholder and director. *Compare and see, e.g.*, *Ariz. Corp. Comm'n v. DenSco Inv. Corp.*, CV2016-014142, Order Appointing Receiver, filed Aug. 18, 2016, *with, e.g.*, *Pachulski v. Lanco Real Estate*, 876 F.2d 897 (9th Cir. 1989) (properly dismissing claim as time barred because "no minority interests [of shareholders or directors] required protection through the application of the adverse domination doctrine").

As cases addressing the adverse domination doctrine demonstrate, claiming Chittick adversely dominated DenSco is the equivalent of trying to fit a square peg into a round hole. Chittick was the sole shareholder and only director, but the doctrine is contemplated to apply where the corporation includes more than one shareholder and director. *See, e.g.*, *In re Bill Johnson's Restaurants, Inc.*, 255 F. Supp. 3d at 931 (describing multiple shareholders and directors). And in *United Fruit Co.* (from which the Ninth Circuit examined the adverse domination doctrine, *see Mosesian*, 727 F.2d at 879), the Second Circuit declined to toll the statute of limitations under the adverse domination doctrine, because "[w]hile the odds may have been against the likelihood that [the] board of directors would have authorized an antitrust action . . . the possibility can by no means be dismissed as negligible." 373 F.2d at 414. Here, Chittick entered into the Forbearance Agreement on behalf of DenSco as an alternative to filing suit, thereby acknowledging that DenSco had a claim against Menaged, but attempting to resolve it rather than ignoring it.

Thus, even if this Court were inclined to be the first to adopt the adverse domination doctrine as the law of Arizona, this is not the case for it. As set forth above, DenSco has not cited a basis for applying the adverse domination doctrine here, where Chittick was the only shareholder and director of DenSco, and is alleged to have acted in good faith in DenSco's best interests.

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II. THE REASONABLE INFERENCES TO BE DRAWN FROM THE ALLEGATIONS DO NOT SUPPORT ANY AIDING AND ABETTING CONDUCT.

A. Actual knowledge cannot be reasonably inferred from the factual allegations.

DenSco fails to present a reasonable inference based upon its well-pleaded factual allegations that the U.S. Bank Defendants *knew* that Menaged was defrauding DenSco. Rather, the only reasonable inference to be drawn is that U.S. Bank was behaving as an ordinary depository institution would have behaved: by offering run-of-the-mill services like accepting wire transfers, and issuing and depositing cashier's checks.

In the Response, DenSco highlights the phrase "general awareness," but gives short shrift to the remainder of the standard articulated in *Dawson v. Withycombe*: that the secondary tortfeasor must have a "general awareness of the primary tortfeasor's ***fraudulent scheme***." 216 Ariz. at 102 ¶ 50 (emphasis added). Regardless, DenSco argues that U.S. Bank "knew" of the fraudulent scheme for these reasons: (1) Menaged told the U.S. Bank Defendants he was in the business of purchasing foreclosed homes; (2) Menaged told U.S. Bank that DenSco loaned him money; (3) U.S. Bank compiled DenSco's wire transfers into bank statements (an automated process); (4) U.S. Bank would prepare cashier's checks "approximately equal to the amount of the wire transfer";[2] and (5) U.S. Bank would redeposit the cashier's checks into the account from which they were drawn when Menaged did not use them.[3] (Resp. at 13-14.)

But absent well-pled allegations that U.S. Bank was privy to the DenSco/Menaged loan agreements or otherwise knew Menaged was prohibited from using the funds DenSco loaned him for any purpose other than purchasing the particular foreclosed properties the cashier's checks were issued to purchase, it is entirely unreasonable to infer that the U.S.

[2] The Court does not need to accept this conclusion as true, because the allegations are that the cashier's checks were actually $10,000 less than loaned amounts, as U.S. Bank explained in its Motion. (Mot. at 14 n.9.)

[3] Although DenSco attempts to sneak in the additional detail that Menaged transferred the amounts from these cashier's checks into his personal account, those allegations are not pled and thus not properly considered here. (Resp. at 14:12-13)

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Bank Defendants had even a general awareness of Menaged's fraudulent scheme such that its performance of ordinary banking services could be viewed as aiding and abetting conduct.[4] Stated another way, it would be entirely unreasonable for U.S. Bank to have refused to perform the ordinary banking services it did even if all of the well-pled factual allegations are proven true. This is even more true if this Court considers DenSco's additional—and strikable—"rapid repayment" of loans allegation: if Menaged repaid the DenSco loans when cashier's checks were redeposited, it would be even more unreasonable to infer the U.S. Bank Defendants' general awareness of Menaged's fraud. Indeed, even the Receiver contends that he had to "perform[] a complete forensic recreation of Menaged's banking activities" to "finally underst[and] the facts and losses involving the Second Fraud," because the "Second Fraud was difficult—***if not impossible***—to detect without the Receiver's through [sic] forensic accounting." (Resp. at 7, 9 (emphasis added).)

B. <u>Substantial Assistance Is Not Supported by the Allegations.</u>

DenSco does nothing to respond to U.S. Bank's argument that its alleged aiding and abetting conduct amounted to nothing more than ordinary banking activities, which

[4] And any of the unpublished or otherwise distinguishable extra-jurisdictional cases DenSco lumps into a footnote (Resp. at 13 n.7) further underscore that the U.S. Bank Defendants' activities here were the provision of ordinary banking activities. *Contra, e.g.*, *Mansor v. JPMorgan Chase Bank, N.A.*, 183 F. Supp. 3d 250, 260 (D. Mass. 2016) (describing "international wire transfers to countries with an increased risk for potential money laundering"); *Arreola v. Bank of Am., Nat. Ass'n*, No. CV 11-06237 DDP PLAX, 2012 WL 4757904, at *1 (C.D. Cal. Oct. 5, 2012) (describing providing continued "suspicious banking services" despite "several internal 'red flags'" after employee "accepted bribes from Rangel, and in return released holds on funds before the expiration of required waiting periods, authorized the deposit of funds into the account of entities not listed as payees, [and] failed to file reports for large cash transactions"); *Benson v. JPMorgan Chase Bank, N.A.*, No. C-09-5272 EMC, 2010 WL 1526394, at *4 (N.D. Cal. Apr. 15, 2010) (addressing a Ponzi scheme when "the amount of time required to service these accounts was so significant that it prompted senior employees to recommend the installation of a remote banking system"); *Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N, 2015 WL 13034513, at *10 (N.D. Tex. Apr. 21, 2015) (finding bank's knowledge adequately alleged when wrongdoer was "transferring CD proceeds out of his SG Suisse accounts into his own personal bank accounts" and to Caribbean bank accounts, "despite regulatory warnings concerning the Antiguan finance industry"); *Anderson v. U.S. Bank Nat. Ass'n*, No. A13-0677, 2014 WL 502955, at *7 (Minn. Ct. App. Feb. 10, 2014) (scrutinizing particular banking activity when plaintiffs did not allege that provision of the same "was anything other than an ordinary banking service").

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does not constitute "substantial assistance" as a matter of law.[5] *Thuney v. Lawyer's Title of Ariz.*, No. 2:18-CV-1513-HRH, 2019 WL 467653, at *5 (D. Ariz. Feb. 6, 2019) ("Processing day-to-day transactions does not constitute substantial assistance unless the bank has an extraordinary economic motivation to aid in the fraud." (internal quotation marks and citation omitted)).

DenSco's comparison to the unreported and improperly cited *Alesii v. Bank of Am., N.A.* case provides no support for its position.[6] (Resp. at 15:20-22; 16:16-20). As distinguished from the factual allegations here, the bank in *Alesii* was accused of aiding and abetting fraud "by repeatedly allowing [the fraudster] to immediately return cashier's checks drawn on the Joint Account and deposit the proceeds in the [fraudster's] Account." *Alesii v. Bank of Am., N.A.*, No. 1 CA-CV 13-0462, 2014 WL 7341292, at *1 ¶ 4 (Ariz. App. Dec. 23, 2014) (mem. dec.). Here, U.S. Bank is alleged to have accepted unused cashier's checks back into the same account from which those funds were drawn. Moreover, the defendant bank in *Alesii* did not challenge the legal sufficiency of the plaintiffs' aiding and abetting allegations, so the Court of Appeals never reached the question of whether accepting cashier's checks for redeposit could support an aiding and abetting fraud claim against a bank. *Id.* at ¶¶ 4, 17 ("The Bank moved to dismiss the aiding and abetting claim on the grounds that Arizona law prohibits an employer's vicarious liability when the employee did not commit the underlying fraud. . . . We reject the Bank's argument that claims for conspiracy and aiding and abetting fraud are 'functionally identical' for the purpose of applying the *Baker* court's 'double' vicarious liability analysis.").

[5] DenSco again argues that the U.S. Bank Defendants waived certain policies, fully ignoring U.S. Bank's point that the alleged waiver of policy did nothing to assist Menaged's fraud. *See* Mot. at 15 n.11.

[6] *Alesii* is an unpublished memorandum decision from the Arizona Court of Appeals, which is neither binding, nor even persuasive, authority, and should not have been cited here pursuant to the Arizona Supreme Court Rules. *See* Ariz. Supreme Ct. R. 111(c)(1), (2) (allowing citation of memorandum decisions for persuasive value only if issued in ***2015 or after***, and requiring indication of "memorandum decision" in the citation).

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Furthermore, DenSco again relies on its circular argument that, because it "alleged" that the U.S. Bank Defendants "knew" that Menaged was defrauding DenSco, they are culpable for substantial assistance by their knowledge while performing "routine banking services." (Resp. at 15-16.) Yet this circular argument fails for the same reason argued above. If there is no reasonable inference of knowledge, then DenSco's argument on substantial assistance also fails. As it should.

III. CONCLUSION

For the foregoing reasons, this Court should dismiss the U.S. Bank Defendants with prejudice.

DATED this 29th day of June, 2020.

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