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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 MOTION TO DISMISS FILED BY THE U.S. BANK DEFENDANTS

(Assigned to the Hon. Daniel Martin)

(Oral Argument Requested)

Plaintiff, Peter S. Davis, as Receiver of DenSco Investment Corporation ("Receiver"), hereby responds to the Motion to Dismiss filed by U.S. Bank Nat'l Assoc. ("U.S. Bank") and Hilda Chavez (the "U.S. Bank Defendants"). The Motion should be denied because (1) the Receiver filed his Complaint less than three years after he discovered the Second Fraud and the facts involving the aiding and abetting claim against the U.S. Bank Defendants, and (2) the Receiver sufficiently alleged that the U.S. Bank Defendants knew and substantially assisted Menaged in furtherance of the Second Fraud.

I. FACTUAL BACKGROUND

Yomtov Scott Menaged ("Menaged") defrauded DenSco in excess of $46 million dollars from 2011 to 2016. *See* First Amended Complaint ("FAC") at ¶ 16. He and his companies, Arizona Home Foreclosures, LLC and Easy Investments, accomplished this by two separate and distinct fraudulent schemes promulgated upon the unwitting victim DenSco.

Menaged orchestrated the "First Fraud" between 2011 and 2013. (FAC ¶ 24.) Essentially, DenSco's lax lending practices enabled Menaged to obtain two mortgages on real estate that he purchased at foreclosure auctions. (FAC ¶¶ 23-25.) Both lenders believed they were the only lender and would be the only secured creditor in first position. (FAC ¶ 23.)

DenSco discovered the First Fraud in November 2013. (FAC ¶ 26.) Rather than immediately pursuing legal action, DenSco instead elected to enter into a Forbearance Agreement whereby Menaged guaranteed the repayment of $37,420,120.47 to DenSco, agreed to liquidate other assets valued at approximately $4 to $5 million, and use rental income from his properties and other means to repay the amounts owed. (FAC ¶¶ 35-36.)

DenSco continued doing business with Menaged as a means to recover the losses caused by the First Fraud. (FAC ¶¶ 37-42.) DenSco added safeguards for future loans by requiring Menaged to provide copies of the specific cashier's checks issued by Menaged's banks made payable to the respective foreclosure trustee with the property address in the memo line, as well as a copy of the receipt which Menaged received from the foreclosure trustee for the purchase of a real property at a trustee's sale. (FAC ¶¶ 46-47.)

Unfortunately, Menaged contrived a second fraudulent scheme (the "Second Fraud") designed to circumvent these additional safeguards to obtain over 1,400 new loans from DenSco between January 2014 and June 2016. (FAC ¶¶ 48-53.) Amazingly, Menaged convinced both U.S. Bank and Chase to issue actual cashier's checks, complete with the name of the Trustee who he pretended was conducting a foreclosure sale of a parcel of real estate. (FAC ¶¶ 103-105; 151-153.) Each cashier's check contained the address of the property supposedly being purchased and had DenSco's name in the memo line, further memorializing the purported use of DenSco's funds. *Id*. Tragically, Menaged and the U.S. Bank Defendants knew that Menaged never intended to use over 1,400 cashier's checks to purchase property. Menaged, with the material assistance of the U.S. Bank Defendants, took a picture of each cashier's check to send to DenSco and then immediately re-deposited the check into his bank account. (FAC ¶¶ 102-112.) Menaged then falsified a trustee's sales receipt purporting to evidence the purchase of a real property that never happened. (FAC ¶ 112.) These forged sales receipts typically contained information directly from the cashier's check issued and redeposited by U.S. Bank, providing further legitimacy to DenSco. *Id*.

Denny Chittick was the sole owner, shareholder, officer, and employee of DenSco. (FAC ¶ 2). Chittick committed suicide on July 28, 2016. (FAC ¶ 68.) He did not know about the Second Fraud before his death. (FAC ¶ 69.) He knew that Menaged filed for Chapter 7 bankruptcy in April 2016, at a time when Menaged and his companies owed DenSco $30 million in loans. (FAC ¶¶ 62-63.) Menaged lied to Chittick and told him that DenSco's money was safe and being held at Auction.com, an online marketplace for foreclosure buyers. (FAC ¶ 64.) Menaged also lied and told Chittick that he could retrieve the money owed to DenSco from Auction.com as soon as the bankruptcy action was discharged. (FAC ¶ 65.) Menaged told Chittick that the bankruptcy court would seize the money if it discovered it. (FAC ¶ 66.) He also threatened to testify that Chittick was complicit in the First Fraud if Chittick told anyone about Auction.com. (FAC ¶ 67.) Based on these misrepresentations, Chittick believed that DenSco's money was tied up at Auction.com pursuant to some

agreement, the details of which he did not fully understand, and that Menaged was unable to repay DenSco the money owed until after the bankruptcy matter was discharged. (FAC ¶ 70.)

The Receiver was appointed on August 18, 2016. Through diligent efforts and exhaustive investigation, the Receiver first discovered the existence and nature of the Second Fraud in approximately December 2016, although the full extent of it would not be known until at least June 2017. (FAC ¶¶ 71-82.) During this investigation, the Receiver came to understand how the U.S. Bank Defendants aided and abetted Menaged to commit the Second Fraud through the substantial assistance they provided that allowed him to "issue" over 1,400 cashier's checks whose sole purpose was to be photographed so that Menaged could present them as legitimate to DenSco. *Id*. The Receiver subsequently filed his Complaint on August 16, 2019, which is well within three years after discovering the Second Fraud. [1]

II. LEGAL ANALYSIS

A. The Receiver Filed Its Complaint Within Three Years After Discovering Both the Facts Constituting the Second Fraud and U.S. Bank's Role in It.

U.S. Bank argues the Receiver's claims are time barred because DenSco had knowledge of Menaged's fraud as early as November 27, 2013, and no later than April 16, 2014 when it executed the Forbearance Agreement. This argument is premised upon this Court taking the Receiver's allegations *as false*, rather than true, which is improper, and ignores the material distinction between the First Fraud and the Second Fraud.

1. A Statue of Limitations Cannot Run Before the Tort Occurred

The Receiver alleged that U.S. Bank had knowledge of, and substantially and materially assisted Menaged in committing, the Second Fraud. (FAC ¶¶ 125, 129, 131-132.) The Receiver further alleged that Menaged and U.S. Bank worked together to create, photograph, and then immediately redeposit at least 41 cashier's checks in the total amount of $6,931,048, and that U.S. Bank knew Menaged was using these cashier's checks to commit

[1] Even if the Receiver discovered the fraud on the first day of his appointment, the complaint is still timely.

the Second Fraud. (FAC ¶¶ 114-115.) The aiding and abetting claims are thus directed solely at the Second Fraud, which began in January 2014.[2] (FAC ¶ 49.)

U.S. Bank argues the statute of limitations accrued as early as November 27, 2013, when DenSco discovered the First Fraud. The Receiver, however, alleged U.S. Bank aided and abetted Menaged in perpetrating the *Second* Fraud starting in January 2014. The statute of limitations cannot begin to run *before* U.S. Bank aided and abetted Menaged's fraud.

Courts should not apply the statute of limitations in such a way that (1) either immunizes defendants from torts that that have not occurred; or (2) shortens the limitation period such that the plaintiff would not have the full period of time to investigate and discover the facts of the underlying claim. U.S. Bank's application of the statute of limitations does not serve the statutory purpose of eliminating stale claims. Nor does it accord with Arizona's general policy favoring resolution of disputes on the merits. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 590 (1995).

If the statute of limitations began to run in November of 2013, then it began to run before U.S. Bank ever committed the tort, and would have expired a mere three months after the Receiver was appointed and well before the Receiver discovered the facts surrounding the Second Fraud and U.S. Bank's involvement. This would either immunize U.S. Bank for its tortious conduct that had not yet occurred, or drastically shorten the length of the statute of limitations by such an extent that DenSco would have had mere months to discover U.S. Bank's bad acts and to bring this claim. Such a result would not serve the statutory purpose of eliminating stale claims. *Gust*, 182 Ariz. at 590 (statutes of limitations serve primarily "to protect defendants and courts from stale claims where plaintiffs have slept on their rights.")

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[2] The First Amended Complaint clearly distinguishes the First Fraud from the Second Fraud. Menaged perpetrated the First Fraud from 2011 through November 2013 when DenSco discovered it. (FAC ¶¶ 24, 26.) Menaged perpetrated the Second Fraud from January 2014 through June 2016. (FAC ¶ 49.) Although there are some inconsistencies regarding when U.S. Bank aided and abetted the Second Fraud, undersigned counsel clarified the aiding and abetting allegations involve U.S. Bank's conduct from January through April 2014. The Receiver can rectify this through an amended pleading if required.

2. The Cause of Action Did Not Accrue Until the Receiver Discovered U.S. Bank Aided and Abetted the Second Fraud

When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury. *Gust,* 182 Ariz. at 591. Arizona applies the discovery rule to calculate limitations periods. *Id*. at 599. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id*. at 588. The plaintiff must "possess a minimum requisite of knowledge sufficient to identify that a wrong has occurred and caused injury." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32 (1998). The plaintiff must also have reason to connect the "what" to a particular "who." *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 22 (2002).

The statute of limitations for aiding and abetting fraud is three years pursuant to A.R.S. § 12-543(3), which provides that a cause of action for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Here, any statute of limitations did not accrue until the Receiver discovered, or through the exercise of reasonable diligence might have discovered, that U.S. Bank aided and abetted Menaged in furtherance of the Second Fraud. *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 358 (App. 1985) (holding that the discovery date in A.R.S. § 12-543 begins at the time the defrauded party, by exercise of reasonable diligence, might have discovered the fraud); *see also Merck & Co, Inc. v. Reynolds*, 559 U.S. 633, 651-653 (2010) (statute of limitations begins when plaintiff discovers or a reasonably diligent plaintiff would have discovered the facts constituting the violation; discovery of facts that only put a plaintiff on "inquiry notice" does not automatically begin the running of the limitations period).

U.S. Bank argues there is no distinction between the First Fraud and the Second Fraud and that Menaged committed only one continuous fraudulent scheme, which DenSco discovered in November 2013. While this argument may be convenient for U.S. Bank, it disregards the facts and is another example of refusing to take the Receiver's allegations as true and urging the Court to do the same.

The First Amended Complaint sets forth in detail the history of both the First Fraud and the Second Fraud, including how and when Menaged committed each separate fraud, and how each fraud was discovered. (FAC ¶¶ 16-82.) In particular, the Receiver alleged how after DenSco discovered the First Fraud, it entered into a Forbearance Agreement with Menaged whereby DenSco agreed to forbear its rights and remedies against Menaged, provided that Menaged repaid the amounts owed to DenSco. (FAC ¶ 35.) DenSco entered into the Forbearance Agreement believing that this was the best way to recover the funds that it discovered had been misappropriated. (FAC ¶¶ 35-38.)

As part of the Forbearance Agreement, DenSco agreed to lend additional money to Menaged for the purchase of real estate from foreclosure auctions. (FAC ¶ 37.) DenSco agreed to do this in an effort to help Menaged repay the substantial amounts that were misappropriated by the First Fraud. (FAC ¶ 38.) Menaged took advantage of this by devising an entirely new scheme to defraud DenSco. (FAC ¶¶ 47-61.) DenSco believed Menaged was using the loan proceeds for their intended purpose of purchasing foreclosed properties. (FAC ¶ 59.) Had DenSco known that Menaged was not using the loan proceeds for their intended purpose, it would have put a stop to it just as it did when it discovered the First Fraud.

"To determine when a cause of action accrues, an analysis of the elements of [the cause of action] is necessary. *Thompson v. Pima Cty*., 226 Ariz. 42, 45, ¶ 10 (App. 2010), quoting *Dub. V. Likins*, 216 Ariz. 406, 411, ¶ 7 (App. 2007). Claims of aiding and abetting tortious conduct require proof of three elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach. *Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 485, ¶ 34 (2002). The aiding and abetting claim against U.S. Bank did not accrue until the Receiver discovered the facts supporting these elements.

The Receiver was appointed on August 18, 2016. (FAC ¶ 3.) A few days later, the Receiver first became vaguely aware of the lending procedures DenSco and Menaged used

after the First Fraud. (FAC ¶ 72.) The Receiver immediately began an investigation to track the funds DenSco loaned to Menaged. (FAC ¶ 73.) The Receiver discovered that Menaged did not use the funds obtained from DenSco for the purpose they were intended. (FAC ¶ 74.) The Receiver obtained a forensic image of Menaged's computers and cell phone on or around October 3, 2016, in which it located emails from Menaged to Chase. (FAC ¶¶ 75-76.) The Receiver deposed Menaged on October 20, 2016 and issued subpoenas to U.S. Bank and Chase in November 2016. (FAC ¶¶ 77-78.) The Receiver ultimately performed a complete forensic recreation of Menaged's banking activities. (FAC ¶ 80.) It was only when the Receiver completed an initial draft of that forensic investigation on or around June 13, 2017, that if finally understood the facts and losses involving the Second Fraud. (FAC ¶ 81.)

These and other allegations in the First Amended Complaint, which must be assumed as true for purposes of the motion to dismiss, show that Receiver's aiding and abetting claims against the U.S. Bank Defendants did not accrue until on or around June 13, 2017. These allegations demonstrate that it was the Receiver's thorough and painstaking investigation that uncovered the Second Fraud. That investigation began after the Receiver was appointed on August 18, 2016. The Receiver filed its Complaint on August 16, 2019, less than three years after his appointment. The statute of limitations does not, therefore, bar the Receiver's claims.

Finally, the cases cited by U.S. Bank in support of its argument that there was only one continuous fraud do not help the analysis. None of those cases involved the situation here where the victim discovers the fraudulent conduct, reaches an agreement with the perpetrator for repayment of the misappropriated funds, and is then unknowingly defrauded a second time. Those cases simply have no bearing on the issue presented in this case.

3. Even under a Continuous Fraud Theory, Claims for Menaged's Misconduct after November 2013 Did Not Accrue Until Discovery.

Even assuming there was just one continuous fraud, applying the statute of limitations in the manner urged by U.S. Bank is inconsistent with case law recognizing partial survival of claims otherwise time-barred where the underlying acts arise from continuing duties and

discrete instances of performance. *See Doe*, 191 Ariz. at 325, ¶ 39 & n.12 (declining to address questions regarding application of statute of limitations on separate or continuous tort theory, but noting a 1906 Arizona case posing a hypothetical repeated-trespass scenario and stating that purpose and effect of the statute of limitations would not be served were years-later claim barred with respect to recent trespasses "for no other reason than ... tolerat[ion of] [some of] the acts for years beyond the period of statutory limitation" (second alteration in original)).[3]

The allegations in the First Amended Complaint, which must be accepted as true, clearly set forth that while DenSco discovered Menaged's fraudulent conduct through November 2013, it did not know that Menaged continued to defraud it after that date as Menaged, with U.S. Bank's help, went to great lengths conceal the truth from DenSco. It was not until after the Receiver was appointed that Menaged's fraudulent conduct after November 2013, as well as the U.S. Bank's Defendants' tortious conduct, became known.

4. U.S. Bank's Public Records Argument Is Based on a Misunderstanding of the Facts and Raises a Fact Issue

U.S. Bank contends Chittick failed to exercise reasonable diligence by not checking public records to ensure Menaged used the DenSco Loan Proceeds to purchase the foreclosed properties. If it had done so, U.S. Bank argues, DenSco would have discovered the Second Fraud and this precludes the Receiver from utilizing the discovery rule. This argument demonstrates a fundamental misunderstanding of the mechanics of the Second Fraud, which

[3] *Anonymous Wife v. Anonymous Husband*, 153 Ariz. 573, 578 (1987) (holding that stepfather's claim for child-support reimbursement from child's biological father was not wholly time-barred because biological father had continuing obligation, meaning that new cause of action for reimbursement accrued each time stepfather expended funds from his share of community estate to support child); *Builders Supply Corp. v. Marshall*, 88 Ariz. 89, 95 (1960) (holding that claim for breach of contract based on underpayments was not wholly time-barred because each successive underpayment constituted separate breach).

made it difficult to detect.[4]

The evidence will show that what made Menaged's Second Fraud so difficult to detect is that he would pay off previous loans with the new loans and a very rapid pace—in days or less than two weeks.[5] Newly recorded documents, however, are often not available on-line to the public for 5 to 10 business days, and Trustee Deeds may not be recorded for weeks, maybe months, after the trustee sale. Indeed, the very statute cited by U.S. Bank provides that recordation should take place within *sixty days after* the transfer. A.R.S. § 33-411.01. Essentially, Menaged was taking advantage of the delay in recording to convince DenSco with a legit cashier's check and bogus receipt, that the property was purchased. Chittick never had reason to check public records to confirm that the transfer deeds had been recorded because Menaged "repaid" the previous loans from the funds of new DenSco loans in a matter of days or weeks, well before the recordation of transfer was accessible on-line to the public.

Chittick believed Menaged used the proceeds received from selling properties to repay the loans. Instead, Menaged used DenSco's own money from new loans to repay the previous loans. To cover the funds he misappropriated, Menaged simply generated more fake foreclosure sales. After Menaged "paid back" DenSco's certain loans, those transactions were closed out and there was never a need to check the public records to ensure that Menaged was really purchasing the property.

Put another way, "reasonable diligence" did not require Chittick to check the public records to ensure that Menaged purchased the properties. There was no point to check them because Menaged had already "paid back" DenSco with later loans before Chittick could have any suspicion that DenSco was being defrauded. Therefore, the Second Fraud was difficult—if not impossible—to detect without the Receiver's through forensic accounting. *Gust*, 182

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[4] This argument is also premised on the notion that a party has constructive notice of publicly recorded documents. It does not necessarily follow that documents that are *not* recorded provide constructive notice that the documents do not exist.

[5] This too highlights the distinction between the First Fraud and the Second Fraud.

Ariz. at 589.

Additionally, U.S. Bank's argument effectively blames the victim by turning the discovery rule on its head. This "Monday morning quarterback" approach would improperly insulate almost every wrongdoer at the expense of the victim. Any victim of fraud could have done more in hindsight to discover the fraud. An employee who embezzles millions over a several-year period is not absolved because the employer could have discovered the embezzlement by performing an independent audit when the embezzlement first began. U.S. Bank's argument also conveniently ignores all of the added measures and precautions DenSco added after discovering the First Fraud, as well as the great lengths Menaged went to, with U.S. Bank's assistance, to actively conceal the Second Fraud from DenSco.

Finally, while U.S. Bank's argument that any reasonable investigation would have uncovered the Second Fraud, that is not for this Court to decide on a motion to dismiss. Questions of reasonableness are typically for the fact finder to determine.

5. <u>The Statute of Limitations Could Not Accrue Before the Receiver's Appointment Under the Doctrine of Adverse Domination</u>

The adverse domination doctrine tolls the statute of limitations while an entity is controlled or dominated by individuals engaged in conduct that is harmful to the entity. *F.D.I.C. v Jackson*, 133 F.3d 694, 698 (9th Cir. 1998); *Warfield v. Carnie*, 2007 WL 1112591, at *15 (N.D. Tx. April 13, 2007). The doctrine applies where the directors' control of a corporation reasonably prevented others from discovering the directors' wrongdoing. *Resolution Trust Corp. v. Blasdell*, 930 F. Supp. 417, 429-430 (D. Ariz. 1994). It recognizes that an entity is paralyzed to protect itself against officers and directors who have engaged in wrongdoing by ensuring the statute of limitations begins to run only when the wrongdoers lose control of the entity. *Shapo v. O'Shaughnessy*, 246 F. Supp. 2d 935, 953 (N.D. Ill. 2002).

While the adverse domination doctrine typically applies to an entity's claims asserted against its own wrongdoing officers and directors, courts have also applied it to toll an entities' claims against third parties under the theory that the wrongdoing officers and

directors would not bring claims against culpable third parties on behalf of the entity out of fear that it would bring their own misconduct to light. *See, e.g., Damian v. A-Mark Precious Metals, Inc*., 2017 WL 6940515, at *4-5 (C.D. Cal. Aug. 28, 2017) (holding the adverse domination doctrine applies to claims against third parties); *In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig*., 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (applying the adverse domination doctrine against a law firm that was alleged to have been part of the wrongdoing); *Admiralty Fund v. Peerless Ins. Co*., 143 Cal.App.3d 379, 390 (Cal. App. 1983) (holding that the adverse domination doctrine could apply in a suit against a third-party insurance company where the plaintiff corporation claimed that it was prevented from discovering its loss until the "wrongdoer employees" were removed).

If U.S. Bank is right that there was just one continuous fraud and Chittick continued lending money to Menaged despite knowledge of it, that would be a clear breach of the fiduciary duties he owed to DenSco and the adverse domination would certainly apply to toll the statute of limitations until after the Receiver was appointed. The adverse domination doctrine also applies if, as the Receiver has alleged, Chittick was not aware of the mechanics of the Second Fraud or of the substantial assistance U.S. Bank provided. There is ample evidence that Chittick, as the sole owner, director and shareholder of DenSco, breached his fiduciary duties to DenSco by, among other things, engaging in a course of conduct designed to conceal the full nature and extent of the First Fraud from DenSco's investors and creditors. This included, among other things, an effort to conceal the First Fraud from the investors, how his own failures allowed the First Fraud to occur, and how his agreement to a workout plan (the Forbearance Agreement) with Menaged in response to the First Fraud was not in the best interests of DenSco, its investors and other creditors, and opened the door to allow Menaged to orchestrate the Second Fraud.[6] (FAC ¶¶ 29-45.)

[6] These and other issues regarding Chittick's breaches of his fiduciary duties to DenSco have been addressed at length in the Receiver's companion litigation also before this Court, *Davis v Clark Hill*, CV2017-013832. Those pleadings are a matter of public record.

Because Chittick, who had total control of DenSco, breached his fiduciary duties to DenSco to prevent his own misconduct from coming to light, the statute of limitations on DenSco's claims against the U.S. Bank Defendants is tolled until the date of the Receiver's appointment, which was less than three years before the Receiver filed the Complaint.

B. The Receiver Alleged That U.S. Bank Knew of Menaged's Scheme.

U.S. Bank argues that the Receiver failed to allege that U.S. Bank had knowledge of Menaged's fraudulent scheme. This is wrong. The Receiver alleged numerous facts demonstrating that U.S. Bank was "generally aware" of Menaged's fraudulent scheme.

1. "General Awareness" May Be Inferred from The Circumstances.

Arizona law requires that "defendants must know that the conduct they are aiding and abetting is a tort." *Wells Fargo Bank v. Arizona Laborers,* 201 Ariz. 474, 485 (2002). This requirement is satisfied by showing "*general awareness*" of the primary tortfeasor's scheme. *Dawson v. Withycombe*, 216 Ariz. 84, 102 (App. 2007) (emphasis added). "A showing of actual and complete knowledge of the tort is not uniformly necessary . . . [and] can be met, even though the bank may not have known of all the details of the primary fraud—the misrepresentations, omissions, and other fraudulent practices." *Wells Fargo Bank*, 201 Ariz. at 488, 38 P.3d at 26. Instead, "such knowledge may *be inferred from the circumstances*." *Id.* at 485, 38 P.3d at 23 (emphasis added).

The *Wells Fargo Bank* court held that the following evidence is sufficient to raise the inference that the bank knew the perpetrator was engaged in a fraud: (1) the bank knew the perpetrator was making representations to the plaintiff related to the fraudulent scheme; and (2) the bank knew that these representations were false. *Id.* at 488 (bank knew perpetrator made representations related to his financial condition to Plaintiff and bank knew that those representations were false).

In Arizona and other jurisdictions[7], courts have also held that a plaintiff properly alleged an aiding and abetting claim against a credit card company when, like a bank, it accepts wire transfers while knowing that the funds were fraudulently obtained and were used for the defrauder's benefit. *Koss Corp. v. American Exp. Co.*, 233 Ariz. 74, 93, ¶ 65 (App. 2013) (a bank/credit card company may be liable for aiding and abetting the fraud by its customer without owing any duty to the victim).

2. The Receiver's Allegations Re U.S. Bank's General Awareness.

Here, the Receiver has sufficiently alleged that U.S. Bank knew, and was generally aware, of Menaged's fraudulent scheme. The Receiver alleged that U.S. Bank knew that the funds DenSco loaned to Menaged were for purchased properties, but Menaged used those funds for his own personal gain. The allegations are as follows:

- U.S. Bank knew that Menaged was in the business of purchasing foreclosed properties because he told U.S. Bank, and other U.S. Bank Defendants expressed interest in purchasing a foreclosed home. (FAC ¶¶ –115-117).

- U.S. Bank knew that DenSco loaned money to Menaged and AZHF for the

[7] Mass.: *Mansor v. JPMorgan Chase Bank N.A.*, 183 F. Supp. 3d 250, 270-72 (D. Mass. 2016)(knowledge can be inferred when the bank knew investors expected the funds to be used for the purpose of purchasing CDs, and the bank knew the perpetrators were not using the investment funds for the intended purpose because it could see that no money was being used for investment activity and that the perpetrator was transferring the investment funds to their own personal accounts); Cal.: *Arreola v. Bank of Am. Nat. Ass'n,* 2012 WL 4757904 *3 (C.D. Ca. 2012)(banks can be liable for aiding and abetting when tortfeasor's bank accounts received investor funds, and knew that tortfeasor transferred the funds to his personal accounts); *Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 1526394, (N.D. Cal. 2010)(bank knew that that none of the investor funds were being used to purchase any securities, but instead, were being wired to offshore bank accounts or being used to pay for the tortfeasor's personal expenses); Tex: *Rostain v. Trustmark Nat'l Bank*, 2015 WL 1303 4513 10-11 (N.D. Tex. 2015)(plaintiff adequately plead scienter by alleging that the bank knew the tortfeasor's funds in his account were investment proceeds, and knew that the tortfeasor was transferring those funds into his own personal accounts); Minnesota: *Anderson v. U.S. Bank Nat. Ass'n*, 2014 WL 502955, (Minn. App. 2014)(knowledge inferred when there were incongruities between the tortfeasor's claimed business activities and his actual account transactions "inconsistent with any legitimate business activity").

purchase of foreclosed homes because (1) he told U.S. Bank this; and (2) DenSco would wire money to U.S. Bank and was listed as the "originator" of that wire transfer. (FAC ¶¶ 118-119).

- U.S. Bank knew that nearly all of the funds in Menaged's accounts consisted of DenSco loan proceed because U.S. Bank accepted the wire transfers from DenSco, kept records of AZHF's account transactions, and compiled this information in bank statements. (FAC ¶ 97-98).

- U.S. Bank knew that the DenSco loan proceeds were to be used to purchase foreclosed properties because after DenSco wired the funds to Menaged's or Easy Investment's U.S. Bank accounts, U.S. Bank would prepare cashier's checks approximately equal to the amount of the wire transfer, made payable to a particular trustee, and the cashier's check memorialized the purpose of the funds was for the purchase of a foreclosed property because it stated "DenSco Payment [property address]" in the memo lines. (FAC ¶¶ 93-105, 115-121).

- U.S. Bank knew that Menaged was not using the DenSco loan proceeds to purchase the foreclosed properties identified, but rather for his own gain, because U.S. Bank would re-deposit the cashier's checks into Menaged's account, transfer the DenSco funds into his personal account, and knew that Menaged was withdrawing the DenSco loan proceeds in the form of cash. (FAC ¶¶ 106-107, 113, 120-124).

These allegations show U.S. Bank knew, and was generally aware, Menaged was defrauding DenSco and that Menaged did not use the incoming funds for any legitimate banking or investment activity. *Mansor*, 183 F. Supp. 3d at 270-72; *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003)(the bank utilized atypical banking procedures to service the tortfeasor's accounts, raising an inference that they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business).

U.S. Bank seems to argue that the Receiver's allegations related to the "general awareness requirement" are really that U.S. Bank "should have known" of Menaged's fraudulent scheme because of various "red flags". However, the Receiver does not allege that U.S. Bank should have known of Menaged's fraud because of various red flags. Rather, the Receiver is very clear that U.S. Bank knew and was generally aware of Menaged's fraud.

C. The Receiver Alleged That U.S. Bank Substantially Assisted Menaged.

U.S. Bank next argues that the Receiver did not allege sufficient facts that U.S. Bank substantially assisted Menaged in his fraudulent scheme. Not true.

"[S]ubstantial assistance by an aider and abettor, can take many forms, but means more than a little aid." *Wells Fargo Bank*, 201 Ariz. at 488 (2002). "[S]ubstantial assistance does not mean assistance that is necessary to commit the fraud. *The test is whether the assistance makes it easier for the violation to occur, not whether the assistance was necessary.*" *Id*. at 489, 38 P.3d at 27 (emphasis added). For example, "executing transactions, even ordinary course transactions, can constitute substantial assistance under some circumstances, such as where there is an extraordinary economic motivation to aid in the fraud." *Id.* Indeed, "[o]rdinary business transactions a bank performs for a customer can satisfy the substantial assistance element of an aiding and abetting claim … [k]nowledge is the crucial element." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 955 (9th Cir. 2006).

For example, in *Rotstain v. Trustmark Nat'l Bank*, the plaintiffs alleged that numerous bank defendants aided and abetted a fraudulent scheme involving the sale of fake certificates of deposits ("CDs"). 2015 WL 13034513, at *1 (N.D. Tex. 2015). The court concluded that the bank "substantially assisted" the fraudulent scheme simply because the bank continued to maintain the perpetrators' account despite knowledge of the fraudulent scheme. *Id.* at *11. The court reasoned, that "[b]y providing even routine banking services for the [fraudulent] scheme, Defendants inherently facilitated the financial transactions and operations that formed the lifeblood of the [fraudulent] scheme." *Id.*

Courts have held—like in this case—a bank that repeatedly allowed the tortfeasor to immediately return cashier's checks drawn on the investment account and deposit the proceeds in the tortfeasor's personal account is an unusual and highly suspicious transaction. *Alesii v. Bank of Am., N.A.*, 2014 WL 7341292 (Ariz. App. 2014).

1. <u>U.S. Bank Assisted Menaged By Providing Routine Banking Services While Knowing That Menaged Was Defrauding DenSco.</u>

First, the Receiver has alleged that U.S. Bank continued to furnish Menaged routine

banking services despite knowing that he was defrauding DenSco. (FAC ¶ 125-132). These services included, but are not limited to:

- accepting wire transfers from DenSco knowing that the DenSco Loan Proceeds were not going to be used for their intended purpose of purchasing homes in foreclosure proceedings. (FAC ¶ 126, 132);
- creating cashier's checks knowing that they consisted of DenSco Loan Proceeds and were not going to be used for their intended purpose. (FAC ¶ 126, 132);
- redepositing the cashier's checks for Menaged into his accounts knowing that they consisted of DenSco Loan Proceeds and that Menaged would use the redeposited DenSco Loan Proceeds for his own benefit. (FAC ¶ 126, 132);
- allowing Menaged to withdraw substantial amounts of DenSco Loan Proceeds in the form of cash. (FAC ¶ 126, 132); and
- transferring DenSco Loan Proceeds from Menaged's AZHF Accounts to his other accounts at U.S. Bank. (FAC ¶ 126, 132).

The Receiver alleged that not only did these transactions make it easier for Menaged to defraud DenSco, but Menaged could not have done it without the U.S. Bank Defendant's material assistance. (FAC ¶ 133). These facts alone establish that the U.S. Bank Defendants substantially assisted Menaged. *Alesii v. Bank of Am., N.A.*, No. 1 CA-CV 13-0462, 2014 WL 7341292, (Ariz. App. 2014) (allowing an aiding and abetting claim to go forward because the bank repeatedly allowed the tortfeasor to immediately return cashier's checks drawn on the investment account and deposit the proceeds in the tortfeasor's personal account, an unusual and highly suspicious transaction).

The U.S. Bank Defendants argue the Receiver did not allege that U.S. Bank had a heightened economic motivation to materially assist Menaged in his scheme to defraud DenSco. The Receiver disagrees. The Receiver alleged Menaged moved millions of dollars through his U.S. Bank accounts, $6,931,048.00 to be exact, and assisted Menaged based on its own economic motivation. (FAC ¶¶ 134-136). If having this volume of money pass through the U.S. Bank Defendant's accounts does not provide U.S. Bank with an obvious

"heightened" economic motivation, or its role in creating illegitimate cashier's checks for no legitimate banking purpose, then nothing is.[8]

Despite what U.S. Bank argues, these are not routine banking services. Menaged and the U.S. Bank Defendants worked together to create, and then immediately redeposit at least 41 cashier's checks totaling almost $7 million, which Menaged used for his personal benefit. This is not, as U.S. Bank argues, the typical depositor-bank relationship. Likewise, it is not routine to issue, photograph, and immediately redeposit many cashier's checks during the banking relationship.

2. U.S. Bank Actively Assisted Menaged In Using the DenSco Loan Proceeds For his Own Benefit.

Second, U.S. Bank assisted Menaged in defrauding DenSco by actively assisting Menaged using the DenSco loaned funds for his own gain by, among other things, overriding bank policies and making large amounts of cash available for Menaged's use. (FAC at ¶¶ 127-131). *See, Anderson v. U.S. Bank Nat. Ass'n*, 2014 WL 502955 (Minn. Ct. App. 2014) (Bank facilitated huge wire transfers out of the tortfeasor's stated business purpose; Bank allowed unusual and large withdrawals of cash and facilitated those withdrawals by setting up a system to ensure that the branch had enough cash on hand to accommodate the tortfeasor's large withdrawals).

III. CONCLUSION

Based upon the foregoing, Plaintiff urges this Court to deny the Motion to Dismiss filed by the U.S. Bank Defendants, and allow this case to proceed on the merits.

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[8] However, to avoid any confusion in this matter, the Receiver alleges in the First Amended Complaint that: "Because Menaged and U.S. Bank re-deposited the cashier's check 41 times totaling almost $7 million, and U.S. Bank knew that Menaged was not using DenSco's loan proceeds for their intended purpose, U.S. Bank knew that the cashier's check scheme had no legitimate banking or business purpose, and despite this, continued to provide Menaged banking services because of its own heightened motivation of maintaining accounts worth millions of dollars." (FAC ¶ 124.)

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