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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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS THREE THROUGH EIGHT OF PLAINTIFF'S THIRD AMENDED COMPLAINT

(Assigned to the Honorable Daniel Martin)

(Oral Argument Requested)

DenSco's Response to the Motion to Dismiss ("Response") cannot remedy the material flaws of Counts Three through Eight of the TAC, and its new claims for aiding and abetting conversion, aiding and abetting breach of fiduciary duty, and civil racketeering fail as a matter of law. Because these new claims have not and cannot be properly pleaded, Defendants request that this Court grant Defendants' Motion to Dismiss.

ARGUMENT

I. DenSco's Opposition Re-Confirms that Its Claims Are Time-Barred.

DenSco's claims for aiding and abetting conversion and breach of fiduciary duty are subject to a two-year statute of limitations that—by DenSco's own admission—expired two months before DenSco filed its original complaint. *See* A.R.S. § 12-542; *see also* First Am. Compl. ¶ 81. DenSco's arguments as to why these time-barred claims should survive underscore that allowing them to continue would serve only to waste time and expense, and they must be dismissed.

In an attempt to avoid this result, DenSco cites back to general statements in its Reply in support of its Motion for Leave to File the Second Amended Complaint for the position that there is somehow a "factual dispute as to the date of discovery." (Reply for Mot. Leave to file SAC, at 4.). But that argument ignores the fact that DenSco acknowledged in that ***same filing*** that "[t]he proposed amendments do not contradict prior allegations, let alone ones of substance." (*Id.* at 10.) Thus, DenSco's substantive and unequivocal assertions regarding the Receiver's discovery/understanding of "the extent and losses constituting the Second Fraud, and the substantial assistance U.S. Bank and Chase provided to Menaged" in June 2017 (FAC ¶ 81) continue to control. *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."); *see also Garrett v. Platt*, No. 1 CA-CV 20-0195, at *4 ¶ 10 (App. Dec. 29, 2020) (noting public records "are not outside the pleading and may be considered in a motion to dismiss"). This Court should not let DenSco discard its earlier admissions because they are now inconvenient. DenSco is

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bound by the fact that its aiding-and-abetting claims accrued in June 2017, and they are plainly time-barred.

Equally baseless is DenSco's assertion that it is suing for conversion under the UCC—arguing that "[t]he Receiver's claim is for using an ***instrument***" and that the three-year statute of limitations therefore applies (Resp. at 4 (emphasis added)). As shown below, it is obvious that DenSco has failed to set forth a viable claim for UCC conversion of an instrument, so the UCC's longer statute of limitations does not apply.

II. The TAC's Allegations Do Not Support an Underlying Conversion.

a. *Koss* is Distinguishable, and DenSco's Reliance on It Is Misplaced.

The Receiver's opposition and its contrived conversion claim are nonsensical: The Receiver ignores that a party cannot sue for conversion based on authorized transactions—here, both DenSco's wire transfers to Menaged's deposit account and Menaged's issuance and redeposit of cashier's checks. Glossing over the key material difference between *Koss* and this case, DenSco ignores this and argues that it has properly pled a conversion claim. (Resp. at 5-6 (citing *Koss Corp. v. American Express Co.*, 233 Ariz. 74 (App. 2013)).) But as Defendants established in their Motion, authorization of the underlying transactions negates a conversion claim as a matter of law. UCC § 3-420 covers cases involving forged or missing indorsements, negotiated ***without the consent*** of those authorized to enforce 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.").

The necessary lack of consent/authority ***to negotiate the instrument*** was the key factor in *Koss* (as it is in all properly pleaded negotiable instrument conversion claims), where an employee was accused of issuing checks from her employer's bank account without authorization and using them to pay her personal American Express credit card. *See Koss*, 233 Ariz. at 77 ¶ 3 (employee "paid her American Express bills and other third parties by using cashier's checks drawn on [her employer's] bank accounts").

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In stark contrast, that is undeniably ***not*** what DenSco alleges here. DenSco expressly alleges that Menaged issued and then redeposited checks from his ***own*** bank account, which he clearly had authority to do and which DenSco does not dispute. *Koss*, therefore, has no application to the circumstance here, where Menaged was fully authorized to do what he did—namely, have cashier's checks issued from his own bank accounts, and then as remitter redeposit those checks into the accounts from which they were drawn when those checks went unnegotiated.

b. Whether DenSco's Aiding and Abetting Conversion Claims Are Founded on the UCC or the Common Law, the Remitter Rule Is Fatal.

Though DenSco equivocates between the UCC and the common law as the authority for its conversion theory, the TAC is devoid of any reference to the UCC, making DenSco's claim common-law based. (TAC ¶¶ 122-31.) Nevertheless, in its Response brief, DenSco asserted initially that its conversion claim was founded on the UCC—demonstrably to take advantage of the longer three-year statute of limitations afforded to such claims. (*See, e.g.*, Resp. at 4) ("The conversion claim is also timely under the UCC's three-year statute of limitations …."). But a mere two pages later in the Response, DenSco then argues that "[t]he TAC clearly states a claim for common law conversion." (*Id.* at 6.) While DenSco's scattershot approach and continued shifting of positions only confirms the baseless and contrived nature of its claim, the difference is ultimately irrelevant. Whether under common law or the UCC, Menaged's action of redepositing cashier's checks into the accounts from which they were drawn was not a conversion under the remitter rule.[1]

Here, accepting DenSco's argument that the UCC applies means that Menaged had the right to negotiate the cashier's checks as the remitter of those checks. *See* A.R.S. § 47-

[1] While the UCC incorporates common-law conversion, it does so ***only*** to the extent not otherwise preempted by the UCC. Section 47-3420(A) states "the law applicable to conversion of personal property applies to instruments," but the principles of "law and equity" supplement the UCC "[u]nless displaced by the particular provisions of this title." 47-1103(B). *Koss* confirms this. 233 Ariz. at 80 ¶ 17 ("The U.C.C. does not preempt common-law causes of action unless particular provisions of the U.C.C. displace those actions."); *see also id.* ("[W]hen a provision of the Arizona version of the U.C.C. displaces the common-law on that issue, the common-law no longer applies . . . ."). Thus, common-law conversion can exist in harmony with the UCC, but only if not otherwise curtailed by the UCC, as it is here.

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3103(A)(11) (defining remitter as one who "purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser"); *see also* A.R.S. § 47-3301 (defining a "'[p]erson entitled to enforce' [the] instrument"). 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 cashier's check. A.R.S. § 47-3301, Official UCC cmt. (emphasis added). *Koss* also does not support DenSco's position, because there is no argument that Menaged lacked authority to redeposit the cashier's checks back into the accounts from which they were drawn. He clearly did. In its Response, DenSco presents no contrary argument, leaving Defendants' argument entirely unrebutted.[2] Simply put, DenSco's conversion theory does not work under its very own factual allegations.

c. DenSco Relinquished Any Immediate Right to Possess the Funds Once Wired to Menaged's Accounts with Defendants.

Also baseless is DenSco suggestion that the funds DenSco wired somehow remained segregated once reaching Menaged's accounts. There is no allegation to support this, nor could there be. The facts are undisputed that DenSco transferred the funds to a deposit account and the law is clear that money in a bank account is fungible. Rather than grapple with the realities of the transactions that it alleges occurred, DenSco conflates the wiring of the funds into Menaged's accounts with the cashier's checks later issued from those accounts as the "segregated" funds. (Resp. at 6.) But this position is baseless and ignores that once each wire transfer was deposited into Menaged's accounts with Defendants, they lost any identity as an individual and segregated item of property, and DenSco relinquished any right to their immediate possession. (TAC ¶¶ 52, 76 (acknowledging Menaged's

[2] DenSco suggests in its introduction, but does not argue, that the appearance of the word "remitter" on the memo line of a cashier's check somehow has independent legal significance sufficient to defeat black-letter law under the UCC. (Resp. at 4 (citing Ex. A to Resp.).) DenSco offers no authority for this position, which is unsurprising given that it is entirely unsupported. *See, e.g.*, *In re Spears Carpet Mills, Inc.*, 86 B.R. 985, 993 (Bankr. W.D. Ark. 1987), *aff'd sub nom. Spears Carpet Mills, Inc. v. Century Nat. Bank of New Orleans*, 85 B.R. 86 (W.D. Ark. 1988) (holding that remitter notations on a cashier's check are "of no legal effect."). The reality remains that as a matter of law, there was only one remitter for the cashier's checks—Menaged.

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business accounts held other funds beyond DenSco's wired funds)); *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). DenSco's right was not a possessory one, but rather a right to be repaid for the loans given from other funds, the repayment of which was to be secured by real estate liens. Based on DenSco's own allegations, the aiding and abetting conversion claim is properly dismissed. *See Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 91-92 (1973) (holding that no conversion claim existed as a matter of law where the claimed obligation could have been discharged "from a source other than the sale proceeds").

III. DenSco's Relationship with Menaged Did Not Create a Fiduciary Duty.

DenSco's strained effort to manufacture a basis for a fiduciary relationship between Menaged and DenSco finds no support in its pending complaint or governing law. DenSco fails to cite ***any*** Arizona law supporting the position that its allegations are sufficient, and ignores clear Arizona precedent to the contrary. Indeed, DenSco—while mistakenly claiming that Defendants have misstated the holding of *Urias v. PCS Health Sys.*, 211 Ariz. 81, 87 ¶ 32 (App. 2005)—***itself*** mischaracterizes that case by refusing to acknowledge the Court of Appeals' clear focus on the lack of language in the agreement creating a fiduciary relationship. DenSco argues that "the parties [in *Urias*] *expressly disclaimed* in their agreement any additional responsibilities." (Resp. at 8 (emphasis original).) DenSco cites to the contract language in *Urias* that "the parties 'are independent contractors' and that 'they shall have no other legal relationship under or in connection with this Agreement.'" *Urias*, 211 Ariz. at 85 ¶ 18. However, those facts are ***not*** what the Court of Appeals relied on in determining that no fiduciary relationship existed. Rather, the Court of Appeals explicitly stated that a "commercial contract creates a fiduciary relationship ***only when one party agrees to serve in a fiduciary capacity***." *Id.* at 87 ¶ 32 (emphasis added). The contract at issue "did not purport to ***create*** a fiduciary relationship," and the agreement "d[id] not ***contain*** such language" affirmatively creating a fiduciary relationship. *Id.* (emphases added). That is, the Court of Appeals did not concentrate on the supposed "express disclaimer" in holding that there was no fiduciary relationship. Instead, it determined that

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the absence of language ***affirmatively creating*** a fiduciary relationship demonstrated that no such relationship existed.

This is exactly the case here where DenSco cannot point to any contractual language evidencing a DenSco-Menaged fiduciary relationship. DenSco does not grapple with this language, presumably because it has no rejoinder, especially given that it has alleged no fact supporting the existence of a such a fiduciary relationship. DenSco instead seeks to deflect by highlighting a non-precedential federal court decision, while expansively stating "Arizona courts have held" that fiduciary duties may arise from lender-borrower or debtor-creditor relationships. (Resp. at 8; citing *Thomas v. Wells Fargo Bank, Nat. Ass'n*, 866 F. Supp. 2d 1101, 1107 (D. Ariz. 2012), as the ***only*** District of Arizona case supporting that broad proposition).) But *Thomas* is not at all analogous, and its citation as an outlier reveals the lack of merit for DenSco's untenable position. The plaintiff in *Thomas* placed the home improvement loan proceeds he borrowed from his lender into escrow and ***affirmatively*** "gave [his lender] the authorization to manage them for a ***particular purpose***, namely the hiring of a third party to complete the improvement" on his personal home if the plaintiff failed to complete the improvements of his own accord. *Thomas* at 1107-08 (emphasis added); *see also id.* at 1108 (characterizing the parties' dealings as a "fiduciary ***type*** relationship" (emphasis added)). That scenario and level of management is a far cry from the undisputed lender and borrower relationship that DenSco alleges existed between DenSco and Menaged. *See id.* at 1107 ("Typically, a lender-borrower relationship is not fiduciary in nature.")

And though *Cook v. Orkin Exterminating Co., Inc.* recognized the proposition that a fiduciary relationship requires "peculiar intimacy or an express agreement to serve as a fiduciary," the court stated such in relation to a "business transaction involving one party with greater skill, knowledge, or training," like a termite exterminator for residential homeowners. 227 Ariz. 331, 334 ¶ 15 (App. 2011). DenSco has not alleged that Menaged purportedly had greater skill, knowledge, or training in the relevant subject matter (hard-money real estate lending), and *Cook* does not provide analysis on such facts in any event.

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Especially given the allegations that DenSco itself was experienced in the real-estate-lending business, DenSco's Response cannot clear the high bar that a fiduciary relationship requires in a commercial setting between a lender and borrower or a debtor and a creditor.

Finally, DenSco's allegations cannot support an inference that Defendants knew or should have known that Menaged was his lender's "fiduciary," and DenSco cannot amend the TAC to cure this deficiency. Because the underlying tort of breach of fiduciary duty does not lie as a matter of law, Counts Five and Six are properly dismissed.

IV. DenSco's Racketeering Claims Against Defendants Fail.

a. The Receiver Concedes that Defendants Are Not Liable for Racketeering Acts of Non-Agents.

The Receiver has failed to address, and, therefore, has effectively waived any challenge to Defendants' arguments in the motion to dismiss that: (1) Defendants cannot be held liable for racketeering acts committed by Menaged and Castro; and (2) the alleged wrongdoing committed by bank employees does not amount to racketeering. *See, e.g.*, *Doe v. Dickenson*, No. CV-07-1998-PHX-GMS, 2008 WL 4933964, at *5 (D. Ariz. Nov. 14, 2008) (The "Court is entitled to treat Plaintiffs' failure to respond as waiver of the issue and consent to Defendants' argument.").

As explained in Defendants' motion, Arizona's RICO statute creates a cause of action against an "enterprise"—a category that allegedly includes U.S. Bank and Chase—only for racketeering acts committed by ***enterprise agents***. *See* A.R.S. § 13-2314.04(L).[3]

[3] DenSco confusingly asserts that in the context of "an action against a bank for "transacting or transferring funds," it need only "allege that the bank's agent knew 'that the funds were the proceeds of an offense and that a director or high managerial agent performed, authorized … ratified or recklessly tolerated the [agent's] unlawful conduct.'" (Response at 9-10) (quoting A.R.S. § 13-2314.04(L).) DenSco, however, quotes A.R.S § 13-2314.04(L) out of context. **First**, the quoted provision applies only to RICO claims predicated on money laundering; it does not apply to DenSco's claims to the extent they are predicated on theft or fraud. **Second**, the excerpted portion of A.R.S. § 13-2314(L) (applicable only to banks or financial institutions) follows a sentence defining the elements of ***any*** claim for RICO liability against ***any*** enterprise regardless of the predicate act, and limits such liability to the acts of enterprise agents. Thus, the provision that DenSco incorrectly portrays as setting forth ***the only requirements*** for pleading any bank liability under the RICO statute actually sets forth an additional requirement (scienter) for pleading RICO liability against a specific subset of enterprises (banks) based on a specific enumerated offense (money laundering).

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Yet, DenSco grounds its RICO claims against Defendants in acts it alleges were committed by Menaged and Veronica Castro, who are ***not*** agents of Chase or U.S. Bank. (TAC ¶¶ 153, 163.). Because Arizona law does not recognize enterprise RICO liability based on the actions of non-agents, DenSco's RICO claims have no basis in Arizona law and must be dismissed. *See Hogan v. Wash. Mut. Bank, N.A.*, 230 Ariz. 584, 586 (2012) (recognizing entitlement to dismissal where "plaintiff should be denied relief as a matter of law given the facts alleged" (internal quotation omitted)).

Further, the wrongful acts the individual bank employees allegedly committed do not amount to racketeering predicate offenses. Under Arizona's RICO statute, only enumerated racketeering offenses punishable by more than a year in prison can support a RICO claim. *See* A.R.S. § 13-2301(D)(4); *Holeman v. Neils*, 803 F. Supp. 237, 245 (D. Ariz. 1992) ("To establish a violation under § 13–2314(A), the plaintiff must show that … the act which caused the injury … ***was one of the illegal acts enumerated in the statute*** and ***was chargeable and punishable in accordance with the requirements of the statute***" (emphases added)). But here, the TAC alleges only that certain bank employees aided and abetted Menaged and Castro's conduct. Such aiding and abetting allegations (however mistaken) amount only to civil torts that are neither enumerated in the Arizona RICO statute, nor punishable by imprisonment. Because DenSco cannot identify ***any conduct*** by a bank agent that could amount to a racketeering offense, it cannot state a RICO claim against Defendants.

b. Arizona Principles of Statutory Construction Do Not Support DenSco's Interpretation of "High Managerial Agent."

Because the Receiver's failure to cite a valid racketeering predicate act—alone—supports dismissal of the RICO claims, this Court need not decide the meaning of "high managerial agent," and Defendants address this argument only for the sake of completion.

Continuing its game of smoke and mirrors, DenSco next advocates for an overly broad and unsupported construction of the term "high managerial agent" that includes all "employees with authority to approve transactions involving racketeering proceeds." (Resp.

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at 10.) But under Arizona law, DenSco cannot supply its preferred "plain meaning" for the term "high managerial agent" because the term has already been defined in other Arizona statutes*, see, e.g.*, Model Penal Code § 2.07(4)(c) (including only those "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation"), and these definitions must be reconciled with the term "high managerial agent" in Arizona's RICO statute. Arizona courts do not conjure up novel definitions for terms that already have been defined under other provisions of Arizona law. Rather, "the meaning … is determined by looking to statutes which relate to the same person or thing and which have a purpose similar to that of the statute being construed." *Old Adobe Off. Props., Ltd. v. Gin*, 151 Ariz. 248, 251 (App. 1986); *see also Newman v. Select Specialty Hospital-Arizona, Inc.*, 239 Ariz. 558, 566 ¶ 36 (App. 2016) (interpreting "costs" in one statute by reference to other Arizona statutes). Here, the Arizona legislature already has defined "high managerial agent" in statutes that—like the RICO statute—define the scope of corporate liability for agent actions, and limit that liability by reference to the actions of officers of a corporation or enterprise "or any other agent … in a position of comparable authority with respect to the ***formulation of corporate policy***." A.R.S. § 4-210(B)(1) (liquor licensing); A.R.S. § 13-305(B)(2) (criminal code) (emphasis added). What the legislature has consistently done as it defined this term is make clear that a "high managerial agent" is a high-level employee who has responsibility for formulation of corporate policy, *i.e.*, someone like Denny Chittick at DenSco, and not branch level bank employees for national banks with tens of thousands of employees. DenSco has not provided any basis to accept an alternate definition of "high managerial agent" in light of the legislature's clear and consistent definition of this term.

The legislative history of A.R.S. § 13-2314.04(L), also refutes the broad interpretation DenSco solicits. When first enacted, Arizona's private and state civil RICO statutes were coextensive, leading to "abuses by private plaintiffs … against defendants who had only oblique relationships to the underlying wrongdoing." *Marsh v. Coles*, 238 Ariz. 398, 404-05 ¶¶ 15-16 (App. 2015). To cure this problem, the legislature enacted

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a separate, private civil RICO statute that restricted "the scope of defendants potentially liable in a private RICO action," *id*., by expressly limiting enterprise liability predicated on racketeering acts committed by agents ***and*** ratified by a "high managerial agent," A.R.S. § 13-2314.04(L). Limiting the definition of "high managerial agent" to those involved in formulating enterprise policy, therefore, is consistent with the legislative intent to provide a narrow path to corporate RICO liability. *See Collins v. Stockwell*, 137 Ariz. 416, 420 (1983) ("[T]he cardinal rule of statutory construction is that we must, if possible, ascertain the intent of the Legislature.").

c. The Receiver Has Failed to Allege Facts that Could Plausibly Support High Managerial Agent Involvement.

Given this definition of "high managerial agent" under Arizona law, DenSco's RICO claims against Defendants must fail. Employees of local bank branches like those the TAC identifies—Chavez, Dadlani, Nelson, Julia Wanta, and Susan Lazar—are plainly excluded from any definition of "director or high managerial agent." *See* A.R.S. § 10-801 *et seq.* (discussing "directors"); A.R.S. § 4-210(B)(1) ("high managerial agent"); A.R.S. § 13-305(B)(2) (same). (TAC ¶¶ 15, 17, 18, 44, 67.) And DenSco has failed to allege facts from which this Court could conclude that any of the named employees are involved in formulating bank policy. (*See* TAC ¶¶ 153, 163; Defs.' Mot. Dismiss at 15.) DenSco's claims cannot overcome such failures, even under Ariz. R. Civ. P. 8(a),[4] and the RICO claims must be dismissed. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008) (en banc) ("[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy . . . Rule 8.").

d. The Receiver's Unauthorized Supplement Neither Amends the Allegations, Nor Changes the Analysis.

In its unauthorized supplement to its Response brief (*see* DenSco's Notice of Newly Discovered Facts), DenSco distracts from the legal insufficiency of its RICO allegations

[4] DenSco's allegations make plain that what DenSco attempts to cast as conversion and breach of fiduciary is, at bottom, a straightforward claim for aiding and abetting fraud by Menaged against DenSco. This Court should apply the heightened standard of Rule 9(b) to these claims. *See Cestro v. LNV Corp.*, No. CV10-1507-PHX-NVW, 2010 WL 4642488, at *2-3 (D. Ariz. Nov. 9, 2010) (analyzing allegations of wrongdoing "sounding in fraud" under heightened pleading standard).

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with facially irrelevant information about an unrelated and subsequently dismissed investigation by the U.S. Attorney's Office in the Southern District of New York related to the Anti-Money-Laundering (AML) practices of U.S. Bank's corporate parent (U.S. Bancorp), *see United States v. U.S. Bancorp*, 1:18-CR-00150-LAK, ECF No. 18 (filing nolle prosequi, dismissing the matter), and a settlement with the Comptroller of the Currency memorialized in a Consent Judgment that neither admitted nor denied any wrongdoing. (¶II.(1).)

As a threshold matter, DenSco's Notice does not relate to Chase at all, and therefore has no bearing whatsoever on Chase's grounds for dismissal. And, with respect to U.S. Bank's well-taken grounds for dismissal, the allegations in the Notice are not pleaded in the TAC, so cannot be relied upon to attempt to defeat the Motion to Dismiss that pleading, and the Notice adds nothing of substance to the analysis.

First, neither the Deferred Prosecution Agreement ("DPA"), nor the Consent Judgment, is evidence of anything, because neither reflects an actual adjudication. *See, e.g.*, *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) ("This is a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues. Consequently, it cannot be used as evidence in subsequent litigation between that corporation and another party."). In fact, U.S. Bank specifically stated in the Consent Judgment that it "neither admits nor denies any wrongdoing." (¶II.(1).) Likewise, the DPA distinctly states that U.S. Bancorp (who is not a party here) "may raise defenses and/or assert affirmative claims in any proceedings brought by private and/or public parties so long as doing so does not contradict the Statement of Facts or such representations." (¶16.)

Second, the DPA and Consent Judgment would be entirely inadmissible in any event. That conclusion holds true under Arizona Rule of Evidence 408[5] *and* under the hearsay

[5] Even though the DPA includes a Statement of Facts, the DPA as a whole was the product of a settlement between U.S. Bank's parent corporation and the United States Attorney's Office for the Southern District of New York, and therefore falls squarely into Rule 408's prohibition on settlement-related evidence. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1055 (9th Cir. 2015) ("The rule [Fed. R. Evid. 408] has been

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rule. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. On Apr. 20, 2010*, 2012 WL 425164, at *3 (E.D. La. Feb. 9, 2012). Even if the DPA's Statement of Facts "involve[s] a party opponent" within the meaning of Rule 801(d)(2), the DPA as a whole "constitute[s] compromised claims that are not admissible under Rule 408." *See, e.g.*, *In re Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc.*, 2016 WL 10706086, at *6 (N.D. Ind. Oct. 28, 2016) (refusing to apply Rule 801 to FTC consent decree because it was inadmissible under Rule 408). So too is the Consent Judgment, as "[the public records exception] does not make any investigative findings per se admissible," and courts do not allow Rule 803(8) to be used as a backdoor through which otherwise inadmissible evidence under Rule 408 may be smuggled. *See, e.g.*, *SEC v. Goldstone*, 317 F.R.D. 147, 158 n.12 (D.N.M. 2016) (collecting cases); *United States v. Wheeler*, 81 F.3d 171, at *3 (9th Cir. 1996) (mem. dec.) (finding consent decree inadmissible hearsay where findings of fact not admitted).

Third, and most critically, DenSco fails to show how the omissions described in the DPA or the Consent Judgment are in any way relevant in this case, nor can they. There are no allegations that U.S. Bank violated the federal AML laws described in the DPA, no argument that DenSco could base a private right of action on such violations, and no explanation of how U.S. Bank's defenses contradict the DPA's Statement of Facts. Indeed, no private right of action exists under the Bank Secrecy Act based on performance of the statute's monitoring requirements. *See Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, 602 ¶ 17 (App. 2013). And the AML reporting described in the DPA is entirely secret from the public under the Bank Secrecy Act, so any such materials (including

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interpreted to bar admission of civil consent decrees to prove the governments' allegations."); *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, No. 1:00-CV-2838-WBH, 2008 WL 9358563, at *3 (N.D. Ga. Apr. 23, 2008) (acknowledging "the high public policy value of encouraging entities and individuals to settle their disputes with the SEC and similar governmental agencies charged with the regulation of industry," and recognizing admitting such evidence "would likely have a chilling effect on future attempts by the SEC to settle similar cases as companies that are the subject of an SEC investigation would necessarily weigh the benefits of a settlement against the possible damage that the settlement would do to their prospects in pending or future litigation").

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whether any even exist) could not be the subject of discovery in this case. *See, e.g.*, 12 C.F.R. § 21.11(k) ("No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR").

Simply stated, none of the materials described in DenSco's unauthorized supplement show how the TAC allegations support a RICO claim against U.S. Bank, let alone Chase (which is not even mentioned in the supplement). And even if the existence of this dismissed investigation and the Consent Order *had* been pled in the TAC, it would be of no legal effect because: (1) Arizona's RICO statute still does not recognize enterprise liability based on racketeering acts committed by ***non-agents***, which is all that is alleged here; (2) the conduct of the bank agents alleged in the TAC does not amount to a predicate act under the RICO statute; and (3) there is no allegation that any bank high managerial agent had any involvement with the conduct alleged. The fact that the Receiver thought it necessary to make this last-gasp filing only serves to further emphasize the TAC's failure to allege a RICO claim under Arizona law.

CONCLUSION

For all the foregoing reasons, Counts Three through Eight of the TAC should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 28th day of May, 2021.

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