Colin F. Campbell, No. 004955
Geoffrey M. T. Sturr, No. 014063
Timothy J. Eckstein, No. 018321
Joseph N. Roth, No. 025725
John S. Bullock, No. 034950
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
ccampbell@omlaw.com
gsturr@omlaw.com
teckstein@omlaw.com
jroth@omlaw.com
jbullock@omlaw.com

Attorneys for Plaintiff

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.

US Bank, N.A., 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

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

(Assigned to Hon. Daniel Martin)

(Oral Argument Requested)

Defendants' Motion to Dismiss Counts Three through Eight of the Third Amended Complaint ("Motion") should be denied. The Receiver properly pled Counts 3 through 8 in the Third Amended Complaint ("TAC") and Defendants' arguments, some now made for third time, lack merit. Put briefly:

- Plaintiff's claims are not time-barred and are subject to the discovery rule.

- Defendants' conversion arguments were rejected in *Koss Corp. v. American Express Co.*, 233 Ariz. 74 (App. 2013).
- The well plead facts are sufficient to proceed to discovery.

MEMORANDUM OF POINTS AND AUTHORITIES

The Well-Pleaded Facts

From July 2001 to July 2016, DenSco Investment Corporation raised approximately $85 million from investors, telling them that *(i)* it would make short-term "hard money" loans to "specialists" who were buying foreclosed homes, and *(ii)* the loans would be "secured through first position trust deeds" so DenSco would, in the event of a default, recover the loaned funds by taking possession of the property. (TAC ¶ 1.)

Yomtov Menaged ("Menaged") defrauded DenSco in two distinct frauds. In the first, which ended in late 2013, he borrowed money from DenSco and another lender using the same property as security, leaving DenSco undersecured on hundreds of properties. Menaged used the borrowed funds for his own purposes. (*Id.* ¶ 2.)

In early 2014, DenSco established new procedures to ensure Menaged used its loans to acquire property secured by first position loans by, among other things, wiring monies to accounts that Menaged maintained with defendants US Bank, N.A. and JP Morgan Chase Bank, N.A., and then having Menaged provide copies of cashier's checks that on their face were to be used to purchase specific properties. In the second fraud, Menaged evaded these procedures by not using these checks for their intended purpose, immediately redepositing them, and converting the funds for his personal use. (*Id.* ¶ 3.)

Nearly every business day between January 2014 and June 2015, for more than 1,400 transactions, Defendant banks, their named employees and senior managers substantially assisted, authorized, ratified, and recklessly tolerated Menaged's unlawful conduct. Defendants knew that Menaged was in the business of purchasing foreclosed properties and had a fiduciary relationship with DenSco, and that DenSco wired Menaged

monies to issue cashier's checks for the specific purpose of purchasing foreclosed properties. Defendants knew Menaged did not use these funds for their intended purpose because, almost immediately after they were issued (during the same bank visit), Menaged re-deposited these cashier's checks in accounts he controlled and used the money for personal and unrelated business expenses. (*Id.* ¶¶ 4-6.)

Defendants substantially assisted and recklessly tolerated Menaged's theft by:

- preparing a cashier's check for each transaction;
- stamping "Not Used for Intended Purposes" on most checks;
- observing Menaged or his agent photograph the fronts of the checks;
- preparing deposit slips and assisting Menaged in immediately re-depositing the cashier's checks;
- avoiding bank policies to help Menaged make immediate cash withdrawals;
- transferring money to Menaged's personal accounts; and
- helping him use the money to pay casinos and other personal expenses

Through their knowledge and assistance, Defendants aided and abetted Menaged in defrauding DenSco, converting DenSco's monies, and breaching his fiduciary duties to DenSco. (*Id.* ¶¶ 7-8.)

Menaged defrauded DenSco, stole its property, and laundered the money DenSco wired to him to purchase these properties. Defendants transacted, transferred or received DenSco's money knowing that it belonged to DenSco and not Menaged, and that funds were the proceeds of Menaged's theft, fraud scheme and money laundering. (*Id.* ¶ 9.)

The Court should ignore the banks' factual allegations outside the well-pleaded facts

Defendants go outside the pleadings and make fact arguments suitable for their future summary judgment motion, not an opposition to a motion to dismiss. The Court should not consider these allegations. For example, Defendants allege that when Menaged requested a cashier's check payable to a trustee, Menaged became a "remitter."

The U.S. Bank-certified checks, however, list DenSco and the property it was purchasing in the remitter line on the check. (*See* U.S. Bank certified check attached as Exhibit A.) Although Plaintiff's conversion claim does not require DenSco to be the remitter, there are certainly fact issues as to who U.S. Bank listed as the remitter on its cashier's checks.

ARGUMENT

None of the banks' arguments shows a failure to state a claim. This case should proceed to the discovery stage. *See State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983) (reversing dismissal of private racketeering claim).

I. The Receiver's claims are not barred by the statute of limitations.

Repeating the failed argument from their Opposition to DenSco's Motion for Leave to File Second Amended Complaint, Defendants again raise the statute of limitation. As stated in the Receiver's Reply (at 3-7), there is a factual dispute as to the date of discovery. For purposes of this Motion to Dismiss, the Court must accept the well-pleaded facts; those facts (assumed true, as the Court must) show that the aiding and abetting conversion and aiding and abetting breach of fiduciary duty claims are timely. *Coulter v. Grant Thornton*, LLP, 241 Ariz. 440, 444 ¶¶ 7-8 (App. 2017).

The conversion claim is also timely under the UCC's three-year statute of limitations (A.R.S. § 47-3118(G)), not the two-year limit the banks argue. The Receiver's conversion claim is for using an instrument. Under A.R.S. § 47-3420(A), "[t]he law applicable to conversion of personal property applies to instruments." Because a specific limitations period governs over a general, the UCC's three-year statute of limitations applies. *Monroe v. Ariz. Acreage LLC,* 246 Ariz. 557, 562 ¶ 17 (App. 2019) (applying A.R.S. § 47-3118(A) over A.R.S. § 12-544(3) for enforcement of negotiable instruments). *See also id.* ("The defense of the statute of limitations in not favored . . . and where two constructions are possible, the longer period of limitations in preferred.") (internal quotation omitted). To apply the general statute also cuts against "the overarching

policies of the U.C.C.—particularly simplicity and uniformity in commercial transactions—by providing that, in Arizona as elsewhere," the same statute of limitations applies to conversion of a negotiable instrument. *Monroe*, 246 Ariz. at 563 ¶ 21.

II. The Receiver alleges facts that support a conversion claim against Menaged.

The Receiver alleges that Menaged converted DenSco's Loan Proceeds by issuing cashier's checks for the purchase of specific properties, and then redepositing those checks and using those funds for unrelated expenses. The TAC alleges that Defendants aided and abetted this conversion by (1) preparing for each loan a cashier's check, (2) stamping on the back of nearly every check "Not Used for Intended Purposes," (3) observing Menaged or his agent photograph the fronts of the checks, (4) preparing deposit slips and assisting Menaged in immediately re-depositing the cashier's checks, (5) overriding bank policies to expedite Menaged's cash withdrawals, (6) transferring monies to Menaged's personal accounts, and (7) helping Menaged use these funds to pay debts he owed to various casinos and other personal expenses. (TAC ¶¶ 4–9.)

A. Menaged's conduct is conversion under *Koss.*

This set of facts plainly states a cause of action under *Koss Corp. v. American Express Co.*, 233 Ariz. 74 (App. 2013). There, a Koss employee embezzled $16,000,000 by wiring funds from Koss accounts to pay charges on her personal American Express account. *Id*. at 77 ¶ 3. Koss sued American Express, alleging it failed to act when its employee recognized this was a clear case of embezzlement. *Id*. at 78 ¶ 5. By accepting wire transfers and cashier's checks, Koss alleged, American Express aided and abetted the embezzlement and committed common law conversion.[1] *Id*. at 78 ¶ 6. The trial court dismissed the claims as pre-empted by the Uniform Commercial Code. *Id*. at 78 ¶ 8.

[1] Because "Koss's common law claims [did] not arise out of the fund transfer transactions, but rather from the retention of funds allegedly known to be embezzled," the Court held that these claims were not preempted by Article 4 of the UCC. *Id*. at 86 ¶ 39.

As to common law conversion and negotiable instruments, the UCC states:

> The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payments with respect to the instrument for a person not entitled to enforce the instrument or receive payment.

A.R.S. § 47-3420(A).

Rejecting American Express's argument that UCC Article 3 preempted common law conversion, the Court held that such a claim was allowed where the misconduct concerned the cashing of checks by a person authorized to do so knowing that the funds had been stolen, as is the case here. *Koss*, 233 Ariz. at 88 ¶ 47. The Court further held that "Arizona law recognizes that a party can bring an action for conversion for converting the proceeds of a check." *Id*. at 90 ¶ 53 *citing* A.R.S. § 47-3420(A).

B. DenSco Had an Interest in Its Loan Proceeds.

"Money can be the subject of a conversion action if the funds can be described, identified, or segregated and there is an obligation to treat the funds in a specific manner." *Id*. at 90 ¶ 54. The TAC alleges that each transfer of DenSco's money was separately identified and segregated for a particular use when wired to Menaged; it was not an indistinct pool of money loaned to Menaged. Indeed, every cashier's check included the name "DenSco," the address of the property for which the check was designated, and the sum to cover the purchase of that property. Further, each transfer came with an obligation to use those particular funds "in a specific manner," namely the purchase of particular property, not the re-transfer into Menaged's personal accounts to fund his lifestyle and gambling. (TAC ¶¶ 123, 128.) Beyond an interest in fungible amounts of money, DenSco had "a possessory interest in the funds *represented by the cashier's checks* . . . which [Menaged] allegedly interfered with when [he] cashed the checks." *Id*.. at 90 ¶ 55 ("[t]he money was segregated and described by the amounts of the checks"). The TAC clearly states a claim for common law conversion. *See also Case Corp. v. Gehrke*, 208 Ariz.

140, 143 ¶ 11 (App. 2004) (conversion occurs when a party exercises "wrongful dominion or control" over personal property "inconsistent with the rights of another").

There is no support for the banks' argument that DenSco lost a possessory interest in its monies once wired to Menaged. The cases on which the banks rely (at 7–8) do not help their argument, as both involve the failure to repay a debt that can be satisfied by money generally, not an obligation to treat specific money in a specific manner, or funds identified and segregated for a particular purpose. *See Autoville Inc. v. Friedman*, 20 Ariz. App. 89, 92 (1973); *Universal Mktg. v. Bank One of Arizona, N.A.*, 203 Ariz. 266, 270 ¶ 15 (App. 2002) ("[A]n action for conversion will not lie for money that is simply a debt."); *Gehrke*, 208 Ariz. 140, 145 ¶ 22 ("In a case like *Autoville* or *Universal Marketing*, it is entirely correct to assert that ***without some further means of identifying the proceeds at issue***, such as segregation, no conversion action would lie.") (emphasis added).

III. Menaged owed DenSco a fiduciary duty.

The TAC alleges that Menaged's relationship with DenSco was a relationship of special trust, not, as Defendants characterize, an arms-length commercial relationship between borrower and lender. Because the well plead allegations establish a fiduciary relationship of which Defendants were aware, this claim cannot be dismissed.

A. The Receiver has alleged facts that demonstrate that Menaged and DenSco had a fiduciary relationship.

Whether a fiduciary relationship exists is a fact-specific inquiry that turns on the circumstances of the parties' endeavor. Outside of a few categorically fiduciary relationships—attorney-client, principal-agent, doctor-patient—courts can find a fiduciary relationship if certain factors are present or a party expressly assumes fiduciary obligations. In the former, a fiduciary relationship exists where there is "something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise.'"

Taeger v. Catholic Family and Cmty. Servs., 196 Ariz. 285, 290 ¶ 11 (App.1999). This is shown by a "peculiar reliance in the trustworthiness of another" or by "great intimacy, disclosure of secrets, or intrusting of power." *Id.* at 291 ¶ 15, (citations omitted); *see also* Black's Law Dictionary (11th ed. 2001) (defining "fiduciary" as "[s]omeone who must exercise a high standard of care in managing another's money or property").

Arizona courts have held that lender-borrower or debtor-creditor relationships may give rise to fiduciary duties. *See e.g. Thomas v. Wells Fargo Bank Nat'l Ass'n*, 866 F. Supp. 2d 1101, 1108 (D. Ariz. 2011) (holding that authorization to use "$85,000 dollars for a particular purpose created a fiduciary type relationship between" borrower and lender). Here, the TAC alleges facts from which a court could find that a fiduciary relationship existed between Menaged, his companies, and DenSco. Specifically, the TAC alleges that DenSco put its trust and confidence in Menaged and ***relied upon him as a fiduciary*** to effectuate the "work out" plan. (TAC ¶ 29.) It further alleges that DenSco's special reliance can be inferred from the numerous written communications between Menaged and DenSco's principal, Denny Chittick, after the discovery of the first fraud, as well as the Term Sheet signed between the companies. (*Id.*) A fiduciary relationship may also be inferred from the forbearance agreement, where DenSco agreed to forebear collecting funds that Menaged owed the company so that Menaged could attempt to repay the funds. (*Id.* ¶ 31.) These allegations support a finding that Menaged's and DenSco's relationship was hardly a standard commercial arms-length transaction, as would be necessary to grant Defendants' motion on this claim.

Defendants rely on *Urias v. PCS Health Sys.*, 211 Ariz. 81, 87 ¶ 32 (App. 2005) for the proposition that a commercial agreement creates a fiduciary duty only if a party expressly assumes fiduciary responsibilities. This misstates the holding, as the parties there *expressly disclaimed* in their agreement any additional responsibilities. *Id.* at 33 ¶ 18. Subsequent decisions have recognized that an express assumption of fiduciary

responsibility is not required—even where the fiduciary duty arises from a commercial contract. *See e.g. Wells Fargo*, 866 F. Supp. 2d at 1107–1108 (finding fiduciary type relationship based on borrower-lender agreement without express assumption of fiduciary duties); *Cook v. Orkin Exterminating Co. Inc*., 227 Ariz. 331, 334 ¶ 15 (App. 2011) (explaining that a fiduciary relationship "requires peculiar intimacy *or* an express agreement to serve as a fiduciary") (emphasis added).

Whether a fiduciary duty exists here is a fact question that can only be decided at a later stage of this case. *Cook*, 227 Ariz. at 334 ¶ 13 ("Whether a fiduciary relationship exists is generally a question of fact unless the evidence would be insufficient to support a verdict, in which case the court may rule as a matter of law.").

B. The Receiver has alleged that bank employees knew of this fiduciary relationship.

The Receiver has alleged that Defendants knew Menaged was breaching his fiduciary duties to DenSco. (*See* TAC ¶¶ 135, 141.) The complaint specifically alleges that Defendants knew of Menaged's business relationship with DenSco. (TAC ¶¶ 51,72.) As with the question of whether a fiduciary relationship existed between Menaged and DenSco, the extent of Defendants' knowledge of Menaged's relationship to DenSco is a fact question to be decided at a later stage.

IV. The Receiver has alleged a valid racketeering claim.

To survive a motion to dismiss, a complaint for civil racketeering need only allege that one sustained a reasonably foreseeable injury resulting from an enumerated act that is punishable for more than one year (including theft, money laundering, and scheme or artifice to defraud) that was committed for financial gain. A.R.S. §§ 13-2301(D)(4), 13-2314.04(A), 13-2314.04(T)(3). In an action against a bank for transacting or transferring funds, the complaint must 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." A.R.S. § 13-2314.04(L). The TAC alleges these elements. In Count 7, the TAC alleges that the "US Bank Defendants, including high managerial agents, authorized, ratified and recklessly tolerated" Menaged's and Castro's theft, money laundering and fraud scheme. (TAC ¶¶ 144-53). In Count 8, the same allegations are made against the "Chase Defendants, including high managerial agents . . . ." (TAC ¶¶ 154-63.) Defendants ignore the TAC's clear, plain, and sufficient allegations, and ask this Court to dismiss these claims based on a misreading of the law and because Defendants believe Plaintiff will not discover facts sufficient to prove each of these elements. The Court should reject these arguments. At this stage, where the Defendants have not even provided full discovery, the case should proceed on the well pleaded facts.

A. "High managerial agent" must be read consistent with the Legislature's intent to provide some ability to recover against a bank for money laundering.

The term "high managerial agent" is not defined anywhere in the statutes governing Arizona racketeering law.[2] In interpreting statutory language, the Court uses "the common meanings of terms that are not defined by statute." *Melendez v. Hallmark Ins. Co.*, 232 Ariz. 327, 330 ¶ 10 (App. 2013). The plain meaning of "high managerial agent" in the context of a statute that provides for a private cause of action against banks for their agents' money laundering suggests that those words be read to include those employees with authority to approve transactions involving racketeering proceeds. This would include employees with significant supervisory authority, those with the power to amend, waive or implement bank policy, and those who engage in discretionary acts that could potentially authorize, ratify, or recklessly tolerate a racketeering act.

[2] "High managerial agent" is not among the tens of defined terms in A.R.S. § 13-2301 or the several terms defined in A.R.S. § 13-2314.04(T).

Ignoring the lack of a definition in the racketeering statutes, and seeking to avoid a plain reading of the "high managerial agent" consistent with the purpose behind the civil racketeering statute, Defendants ask this Court to import the definition used in two unrelated statutes. (Mot. at 13, citing A.R.S. § 4-120(B)(1) (liquor licensing) and A.R.S. § 13-305(B)(2) (enterprise criminal liability), both of which define "high managerial agent" as "an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy"). The Court should reject this approach for several reasons. First, there is no indication the Legislature intended these definitions to apply to an action for civil remedies for racketeering, as it did not cross-reference or refer to either of these statutes anywhere in Title 13, Chapter 23. Second, there is not a single racketeering case in which a court has adopted the definitions used in these other statutes. Third, these statutes are on their own terms explicitly limited to their narrow subject matters – regulatory liquor licensing and criminal liability for enterprises. Both statutes implicate very different policy concerns than exist in a private right of action for civil racketeering. There is no rationale for Defendants' proposed importation of the definitions from these unrelated statutes.

Should the Court adopt that definition of high managerial agent as "an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy," it must reject Defendants' proposed interpretation of those words, as it would lead to an absurd result. Defendants argue that no branch manager could be a high managerial agent, as none has the authority to formulate policy for "an enterprise as large as a national banking association." (Mot. at 14.) Defendants do not explain what constitutes the formation of corporate policy or who among their tens of thousands of employees has that authority, only that none of the employees identified by name in the TAC meet that threshold. Implicitly, Defendants argue that only those few officers who formally approve corporatewide policy would qualify.

That makes no sense. The agents most likely to engage in racketeering acts – indeed, the agents best positioned to authorize, ratify, or recklessly tolerate transactions involving funds they know to be racketeering proceeds are bank managers or assistant managers. If they are excluded as "high managerial agents" because they cannot decide corporatewide policy and those with authority to adopt policy are excluded because they have little involvement in individual transactions and insufficient customer interactions to know if monies are racketeering proceeds, there is no single person who can create liability for a bank under A.R.S. § 13-2314.04(L). Under Defendants' reading, the Legislature created a claim for a private cause of action against a bank for its agents' racketeering acts only to make that claim impossible to prosecute. The Court should reject this reading, as the statute "must be given a sensible construction that accomplishes the legislative intent and which avoids absurd results." *Arizona Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233 (App. 1996). Indeed, "[i]t is presumed that the Legislature does intend to do a futile act when it enacts a statute." *Id.*

The Court can avoid this problem by using the plain meaning of the words "high managerial agent" in context or by rejecting Defendants' proposed narrow application of "authority with respect to the formulation of enterprise policy." *State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 182 ¶ 11 (App. 2010). A more reasonable reading of that authority – one consistent with the Legislature's intent to provide some avenue for private racketeering claims against banks – would include management of other employees and the implementation of corporate policy. *See id.* at 192 ¶ 64 (holding that state presented substantial evidence that defendants were "high managerial agents" under A.R.S. § 13-305(B), in part, through showing that individuals had "authority over other employees" and "made decisions and took actions regarding training, safety and equipment"); *State v. Community Alternatives Missouri, Inc.*, 267 S.W.3d 735, 744 (Mo. App. 2008)

(concluding that "evidence was sufficient for jury to find that [agent] supervised subordinate employees in a managerial capacity").

B. The Receiver has alleged facts that would show that a high managerial agent authorized, ratified, and recklessly tolerated racketeering acts.

However the Court defines the term "high managerial agent," the Receiver has alleged facts sufficient to state a claim. Arizona is a notice pleading state such that a complaint need only set forth a short and plain statement showing the plaintiff is entitled to relief. Ariz. R. Civ. P. 8(a).[3] It "'is not necessary to allege the evidentiary details of a of plaintiff's claim for relief.'" *Verduzco v. American Valet*, 240 Ariz. 221, 225 ¶ 9 (App. 2016) *citing* Daniel J. McAuliffe & Shirley J. McAuliffe, Arizona Civil Rules Handbook at 21 (2015 ed.). Rather, "'[t]he test is whether enough is stated to entitle the pleader to relief on some theory of law susceptible to proof under the allegations made.'" *Id*. citing McAuliffe & McAuliffe, supra, at 144.[4]

In a racketeering claim against a bank, Arizona law requires only an allegation that a "high managerial agent" authorized, ratified or recklessly tolerated the underlying transactions or transfers that constitute an act of racketeering. A.R.S. § 13-2314.04. The Receiver alleges facts that would satisfy these elements. As noted above, the Receiver alleges that the bank defendants, "including high managerial agents," authorized, ratified

---

[3] Although fraud claims must be plead with particularity, Defendants' motion concerns three non-fraud-based claims. Defendants cite to no authority that a non-fraud claim that involves what can be alleged as fraudulent conduct is subject to the heightened pleading standard under Rule 9(b).

[4] Defendants cite (at 15) *Royston v. Waychoff*, No. 1 CA-CV 19-0320, 2020 WL 4529621, at *1-2 (Ariz. App. Aug. 6, 2020) for the proposition that "a heightened pleading standard [] applies to fraud-based RICO claims." In fact, *Royston* involved a number of claims, including ones for fraud and fraud-based racketeering. Although the Court noted that "fraud must be pled with particularity," *id*. at *1, ¶ 3 nowhere did it apply that standard to the fraud-based racketeering claims. Further, the Receiver's racketeering includes money laundering and theft, in addition to fraud-based racketeering.

and recklessly tolerated multiple racketeering acts. In support of these conclusions, the Receiver alleges that, for 40 transactions involving nearly $7 million, the US Bank Defendants (1) printed cashier's checks that on their face designated DenSco's funds to be used to purchase specific properties, only to allow those checks to be used for some other purpose, including to pay off Menaged's personal debts, (2) assisted Menaged in obtaining cash withdrawals of these funds, including by changing national bank policy regarding the amount of cash on hand, and (3) violated policy that required a several-day hold on funds redeposited through cashier's checks, allowing Menaged immediate access to these monies. (TAC ¶¶ 50-62). Likewise, the Receiver alleges that the Chase Defendants, among other things, for 1,344 transactions involving more than $320 million explicitly designated to purchase real properties for DenSco (1) printed on the backs of nearly every cashier's check "not used for intended purpose," (2) immediately re-deposited nearly every check in Menaged's account, (3) helped transfer those monies to Menaged's personal accounts, (4) advised Menaged to structure his withdrawals to avoid internal reporting policies, (5) intervened with Chase's fraud department to allow Menaged to use his funds at casinos, and (6) violated Chase policies regarding multi-day holds on wire-transferred funds, 5-7 day holds on re-deposited cashier's checks, and in person signatures for cashier's checks. (*Id*. ¶¶ 80-94.)

The Receiver has alleged these facts without any discovery. The Receiver expects to find additional facts that support these allegations, potentially involving individuals and high managerial agents not specifically named in the TAC. At the close of discovery, Defendants can remake in a motion for summary judgment what they are effectively arguing here – that there are not sufficient facts to support a finding that a high managerial agent authorized, ratified or recklessly tolerated these racketeering acts. Assuming these well-plead facts as true, there is no basis now to grant Defendants' motion to dismiss.

C. The Receiver alleges that the Defendants engaged in racketeering acts for financial gain.

The Receiver alleges that the Defendants "were motivated to assist Menaged in these transactions to keep Menaged as a banking customer" and that by doing so, they personally "benefitted in the form of additional compensation." (TAC ¶¶ 63, 95). Defendants contend that these allegations are insufficient to show that Defendants acted for financial gain because (1) the allegation that Defendants "may have" received additional compensation is speculative and "not rooted in any factual allegations," and (2) Defendants' receipt of compensation is "too far removed from financial gain to sufficiently plead RICO." (Mot. at 17.)

In their first argument, Defendants manufacture and then rely on the phrase "may have" that is nowhere in the TAC. They further ignore the clear allegation that Defendants "benefitted personally in the form of additional compensation." It is hard to state financial gain more clearly, and whatever argument exists about the number and detail of factual allegations is, of course, premature, given procedural posture of the case and Defendants' motion.

The Court should further reject the argument that Defendants' assistance of Menaged's racketeering acts increased their compensation is too "indirect and attenuated." (Mot 17.) The case to which Defendants cite, *Donahoe v. Arpaio*, 869 F. Supp., 2d 1020, 1066-67 (D. Ariz. 2012), involved an allegation that the then-Sheriff and County Attorney benefitted financially in the form of increased campaign donations that resulted from their separate investigation and prosecution of plaintiffs. Applying the rule of lenity, the court there found that the possibility of campaign contributions was too attenuated from the core of the RICO claim, which concerned a law enforcement unit that "operated for the purpose of investigating and prosecuting purported political enemies" of the then-sheriff and county attorney. *Id*. In other words, the underlying acts were not

themselves racketeering as they were not intended to create a financial benefit, but to punish political enemies. Here, Defendants and Menaged were motivated only by their desire to benefit financially.

CONCLUSION

The Third Amended Complaint alleges facts that support claims for aiding and abetting conversion, aiding and abetting breach of fiduciary duty and civil racketeering. These claims are timely brought and supported by well plead facts. The Court should deny Defendants' Motion.

DATED this 3rd day of May, 2021.

OSBORN MALEDON, P.A.

/s/ Timothy J. Eckstein
Colin F. Campbell
Geoffrey M. T. Sturr
Timothy J. Eckstein
Joseph N. Roth
John S. Bullock
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012-2793

Attorneys for Plaintiff

This document was electronically filed and served via AZTurboCourt this 3rd day of May, 2021, on:

Honorable Daniel Martin
c/o Irene Jones, JA
Maricopa County Superior Court
101 West Jefferson, ECB-412
Phoenix, Arizona 85003
Irene.Jones@JBAZMC.Maricopa.Gov

/ / /

/ / /

Gregory J. Marshall
Amanda Z. Weaver
Bradley R. Pollock
SNELL & WILMER, LLP
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
gmarshall@swlaw.com
aweaver@swlaw.com
bpollock@swlaw.com

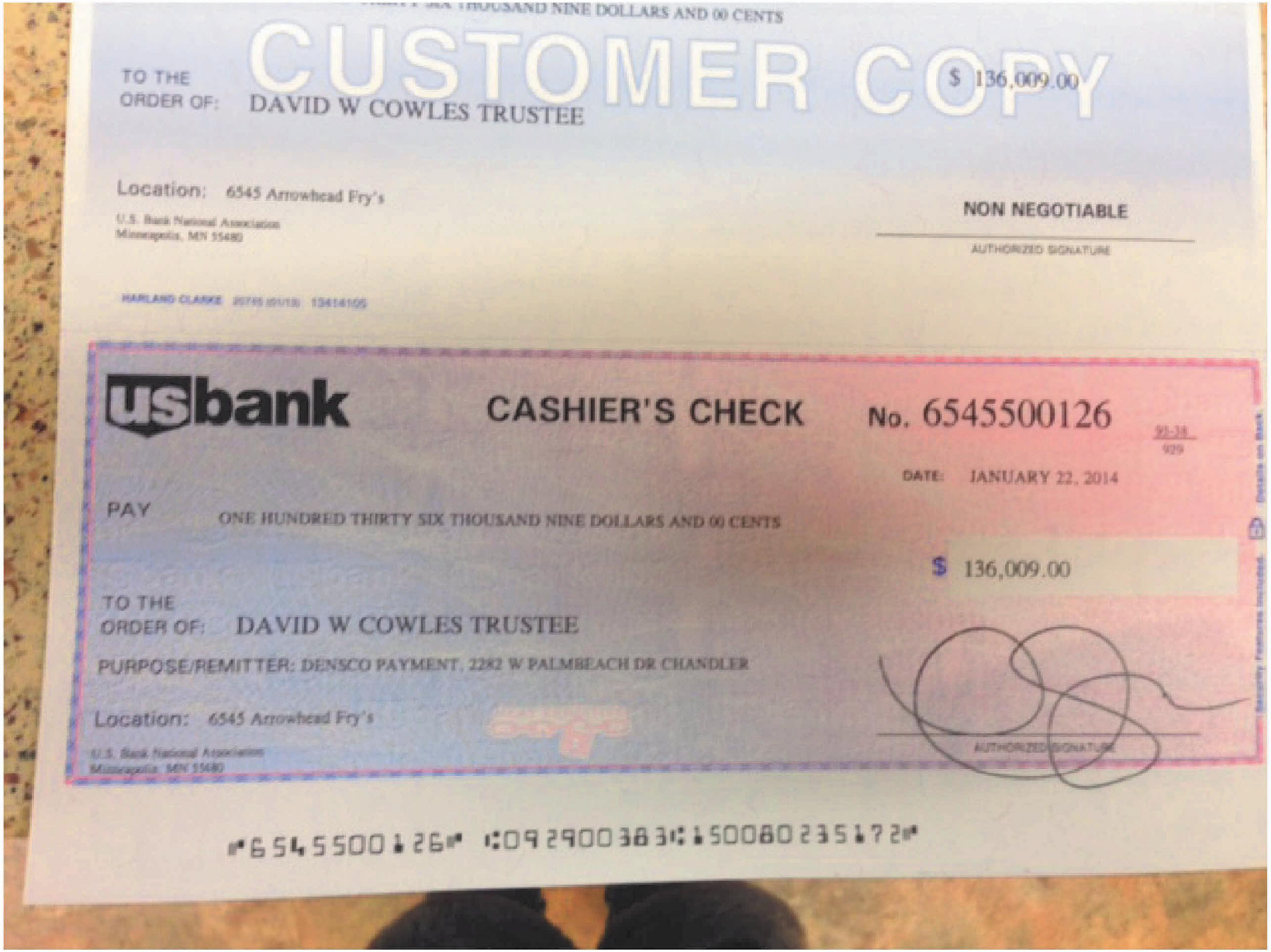
Attorneys for Defendants U.S. Bank National Association and Hilda H. Chavez

Nicole Goodwin
Paul J. Ferak
Jonathan H. Claydon
GREENBERG TRAURIG
2375 E. Camelback Road #700
Phoenix, Arizona 85016
goodwinn@gtlaw.com
ferakp@gtlaw.com
claydonj@gtlaw.com

Attorneys for Defendants JP Morgan Chase Bank, N.A., Samantha Nelson f/k/a Samantha Kumbaleck, Kristofer Nelson, Vikram Dadlani, and Jane Doe Dadlani

/s/ J. Rial

EXHIBIT A


ONE HUNDRED THIRTY SIX THOUSAND NINE DOLLARS AND 00 CENTS
CUSTOMER COPY
TO THE ORDER OF: DAVID W COWLES TRUSTEE
$ 136,009.00
Location: 6545 Arrowhead Fry's
U.S. Bank National Association
Minneapolis, MN 55480
NON NEGOTIABLE
AUTHORIZED SIGNATURE
HARLAND CLARKE
usbank
CASHIER'S CHECK
No. 6545500126
DATE: JANUARY 22, 2014
PAY ONE HUNDRED THIRTY SIX THOUSAND NINE DOLLARS AND 00 CENTS
$ 136,009.00
TO THE ORDER OF: DAVID W COWLES TRUSTEE
PURPOSE/REMITTER: DENSCO PAYMENT, 2282 W PALMBEACH DR CHANDLER
Location: 6545 Arrowhead Fry's
U.S. Bank National Association
Minneapolis, MN 55480
AUTHORIZED SIGNATURE
⑈6545500126⑈ ⑆092900383⑆150080235172⑈

R-002704