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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

15 **IN THE COUNTY OF MARICOPA**

16 Peter S. Davis, as Receiver of DenSco
17 Investment Corporation, an Arizona
18 corporation,

19 Plaintiff,

20 v.

21 U.S. Bank, NA, a national banking
22 organization; Hilda H. Chavez and John
23 Doe Chavez, a married couple; JPMorgan
24 Chase Bank, N.A., a national banking
25 organization; Samantha Nelson f/k/a
26 Samantha Kumbalek and Kristofer Nelson,
27 a married couple; and Vikram Dadlani and
28 Jane Doe Dadlani, a married couple,

Defendants.

No. CV2019-011499

**PLAINTIFF'S NINTH
SUPPLEMENTAL RULE 26.1
DISCLOSURE STATEMENT RE
LEGAL THEORIES ON WILLFUL
BLINDNESS AND JOINT AND
SEVERAL LIABILITY, BOX 96**

For its Ninth Supplemental Disclosure Statement, Plaintiff Peter S. Davis, as Receiver of DenSco Investment Corporation, sets forth the following in addition to its prior disclosure statements:

1 **II. Legal Basis of Claims**

2 **A. The facts will show that US Bank and Chase had actual knowledge**
3 **of the facts of Menaged’s fraud and were willfully blind to**
4 **Menaged’s fraud.**

5 The seminal Arizona case on aiding and abetting is *Wells Fargo Bank v. Ariz.*
6 *Laborers, Teamsters & Cement Masons Local No. 395 Pension*, 201 Ariz. 474 (2002).
7 Several principles arise from the case. First, to evaluate an aiding-and-abetting claim, the
8 facts must be viewed holistically. This is because facts may be “unremarkable taken in
9 isolation,” but when “taken together,” present “a jury issue on the question of aiding and-
10 abetting liability.” *Wells Fargo Bank*, 210 Ariz. at 488 ¶ 47 (quoting *Metge v. Baehler*,
11 762 F.2d 621, 630 (8th Cir. 1985)).¹

12 The “knowledge” and “substantial assistance” elements of aiding and abetting are
13 not strict. Knowledge “may be inferred from the circumstances,” and “[a] showing of
14 actual and complete knowledge of the tort is not uniformly necessary.” *Wells Fargo Bank*,
15 210 Ariz. at 485 ¶ 36, 488 ¶ 45. Summary judgment on this issue is inappropriate where
16 “facts raise inferences sufficient to take the issue to the jury.” *Id.* at 490 ¶ 58.

17 In the criminal context, Arizona courts have repeatedly rejected the argument that
18 there must be evidence that a defendant actually knew the full extent of a fraud or other
19 criminal activity to support a finding of knowledge. *See e.g., State v. Haas*, 138 Ariz. 413
20 (1983); *State v. Fierro*, 220 Ariz. 337, 338-39, ¶¶ 4-5 (App. 2008) (affirming conviction
21 for transporting marijuana even though the state presented no evidence of direct

22 ¹ The appeals court in *Dawson* approved a jury instruction that provided:

23 the jury had to find [the party alleged of aiding and abetting] ‘had
24 actual knowledge of the fraud’ . . . To establish actual knowledge of
25 the fraud plaintiff is not required to show that a defendant had
26 complete knowledge of all facts related to the fraud. It is enough if
27 you conclude that a defendant has general awareness of the fraud and
28 knew that a fraud was being committed. A defendant’s knowledge of
the fraud may be inferred from circumstantial evidence.

Dawson v. Withycombe, 216 Ariz. 84, 103 ¶ 52 n.16.

1 knowledge);² *State v. Diaz*, 166 Ariz. 442 (App. 1990), *vacated in part on other grounds*,
2 168 Ariz. 363 (1991). Instead, courts in Arizona have explained that a jury may find
3 knowledge if there is evidence that (1) the Defendant was aware that there was a high
4 probability that the fraud or other crime was occurring and (2) the Defendant took
5 conscious steps to avoid discovering the fraud. *Haas*, 138 Ariz. at 420 (“the jury could
6 easily have concluded that even if [the Defendant] had no actual knowledge of the fraud,
7 he was aware of the high probability that the scheme was fraudulent and deliberately shut
8 his eyes to avoid learning the truth.”).

9 Courts outside Arizona have applied the willful blindness doctrine in the civil
10 context. *See. e.g., Global-Tech Apps. Inc. v. SEB S.A.*, 563 U.S. 754 (2011) (in a patent
11 case, explaining that “evidence in this case was plainly sufficient to support a finding of
12 . . . knowledge under the doctrine of willful blindness.”). Indeed, there is “no reason to
13 spare a putative aider and abettor who consciously avoids confirming facts that, if known,
14 would demonstrate the fraudulent nature of the endeavor he or she substantially furthers.”
15 *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349 (S.D.N.Y.
16 2007) (holding that evidence of conscious avoidance can demonstrate knowledge in civil
17 aiding and abetting fraud and breach of fiduciary duty claims). The Banks in this case
18 should not be able to stick their heads in the sand to avoid liability for the fraud they aided
19 and abetted.

20 Here, the Banks were generally aware of the fraud being committed by Menaged.
21 And the Banks took deliberate steps to not discover more information about the ongoing
22 fraud. For example, by failing to maintain adequate anti-money laundering practices, the
23 Banks took deliberate actions to avoid detecting any fraud that may have been occurring

24
25 ² In *Fierro*, the jury was instructed that:

26 The State is required to show the defendant knew that he was
27 transporting marijuana. That knowledge can be established . . . by
28 showing that the defendant was aware of the high probability that the
package[s] contained marijuana, and that he acted with conscious
purpose to avoid learning the true contents of the packages.

1 at their branches. US Bank admitted as much. US Bank’s deferred prosecution agreement
2 confirmed that it willfully and criminally failed to maintain an adequate money laundering
3 system during the relevant time period. US Bank employees stamped “Not Used For
4 Intended Purposes” on many of the checks Menaged redeposited. The stamped checks
5 listed DenSco, not Menaged, as the remitter for the transaction.

6 Finally, any evidence that the Banks were willfully blind here can also support a
7 finding of actual knowledge. *El Camino Resources Ltd. v. Huntington Nat’l Bank*, 722 F.
8 Supp. 2d 875, 923 (W.D. Mich. 2010) (“[A] bank’s atypical banking practices can indeed
9 provide circumstantial evidence of actual knowledge.”); *Woodward v. Metro Bank of*
10 *Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) (“[I]f the method or transaction is atypical . . . , it
11 may be possible to infer the knowledge necessary for aiding and abetting liability.”).
12 These questions must go to a jury. *Wells Fargo Bank*, 210 Ariz. at 488 ¶ 47.

13 **B. US Bank and Chase are jointly and severally liable with Menaged.**

14 A.R.S. § 12-2506(D)(1) provides that a party is jointly and severally liable if they
15 acted in concert with another person. Acting in concert means entering into a conscious
16 agreement to pursue a common plan or design to commit an intentional tort and actively
17 took part in that intentional tort.

18 “Acting in concert” applies to only intentional torts. A.R.S. § 12-2506(F)(1).
19 Thus, an agreement to do something negligent or reckless is not enough. To act in concert,
20 persons must be “substantially certain” that their actions will have a harmful consequence.
21 *Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 100 ¶ 17 (App. 2008).

22 “Acting in concert” does not require that the Banks knew, in advance, the
23 “financial losses” DenSco would incur. Rather, “acting in concert” requires only that they
24 agreed to an intentional tort and thus were substantially certain of a harmful consequence.
25 *Id.*; see also, e.g., *Granewich v. Harding*, 985 P.2d 788, 795 (1999) (allegations that
26 lawyers entered into agreement with corporation’s directors to breach fiduciary duties
27 sufficed to state claim for “joint liability on the part of defendant lawyers as persons acting
28 in concert”); Restatement (Third) of Torts: Liab. for Econ. Harm § 27 TD, cmt. c (2018)

1 (“The defendant held liable as part of the conspiracy must have intended to bring about
2 *the tortious wrong* that was the subject of the agreement.” (emphasis added)).

3 A “conscious agreement” is similar to a civil conspiracy, in which two or more
4 persons “agree to accomplish an unlawful purpose or to accomplish a lawful objective by
5 unlawful means, causing damages.” (Mot. at 9-10 (quoting *Wells Fargo*, 201 Ariz. at
6 489)). A conspiracy “may be inferred from the nature of the acts, the relationship of the
7 parties, the interests of the conspirators, or other circumstances.” *Mohave Elec. Co-op.,*
8 *Inc. v. Byers*, 189 Ariz. 292, 306 (App. 1997) (citation omitted).

9 And legally, evidence of “aiding and abetting” often *also* happens to be evidence
10 of “acting in concert,” even though the elements of each are different. *See, e.g., Dube v.*
11 *Likins*, 216 Ariz. 406, 413 ¶ 15 (App. 2007) (describing aiding and abetting as
12 “[s]imilar[.]” to civil conspiracy); Restatement (Third) of Torts: Liab. for Econ. Harm § 27
13 TD, cmt. a (2018) (“Many claims of conspiracy can also be viewed as cases of aiding and
14 abetting.”).

15 “Acting in concert” also requires “actively taking part” in the agreed-upon
16 intentional tort. A.R.S. § 12-2506(F)(1).

17 **RELEVANT DOCUMENTS**

18 The contents of Depository Box 96 with the exceptions on the attached inventory
19 list.

20 DATED this 24th day of August, 2021.

21 OSBORN MALEDON, P.A.

22
23 By _____

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26 *Samantha Nelson, Kristofer Nelson,*
27 *Vikram Dadlani, and Jane Doe Dadlani*

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9110921

Inventory of Box 96—the yellow and orange items are not included.

Description	Produced?
USB drive containing images from Denny Chittick's iPhone and iPad	Yes
USB drive containing Denny Chittick's Yahoo emails	Yes
QuickBooks files and audio file of recorded conversation between Scott Menaged and Denny Chittick	Yes
09/06/16 cover letter, privilege log, and CD containing electronic copies of the corporate logs/journals maintained by Denny Chittick	Yes
08/31/16 cover letter and USB drive containing various electronic files extracted from Denny Chittick's computer	Yes
09/29/16 cover letter and USB drive containing miscellaneous restored DropBox files	Yes
08/31/16 cover letter, privilege log, and DenSco legal files (redacted and unredacted): Legal 2012, Legal 2013, Legal 2014, 2016 Legal	Yes
10/24/16 cover letter, privilege log, and hard drive containing Denny Chittick's Yahoo emails	Yes
Hard drive and backup drive each containing data extracted by Forensic Consulting Solutions from American Furniture's computer and Scott Menaged's computer	COMPUTER IMAGES CONTAIN MALWARE/NOT PRODUCED
Hard drive and backup drive each containing data extracted by Forensic Consulting Solutions from Scott Menaged's iPhone, and AOL email account	Yes
Thumb drive containing "Hot Docs" identified by FCS from aforementioned devices	Yes
Thumb drive containing data extracted from Scott Menaged's iPhone	Yes
Transcripts and exhibits from the deposition of Yomtov Scott Menaged (09/23/19-09/24/19)	Yes
Transcript and exhibits from the deposition of Samantha Nelson (12/05/19)	Yes
Transcript and exhibits from the deposition of Vikram Dadlani (12/12/19)	Yes
Unusual Activity Reports filed by Samantha Nelson [JPMC001188 / R000048]	Yes
Simon Consulting, LLC's invoices for receivership fees incurred during 08/01/16-12/31/18 [Receiver005197-005542]	Yes
Settlement Agreement between the Receiver and Clark Hill PLC, et al. [R024255-024265]	Yes
Cover letter dated 04/20/21 from Michelle Burns at Osborn Maledon and enclosed hard drive containing images of Denny Chittick's devices (prepared by USA Forensics)	Previously produced to Chase and US Bank

1 **VERIFICATION**

2
3 Pursuant to Rule 8(h), Ariz.R.Civ.P., I, Peter S. Davis, as receiver for Plaintiff,
4 DenSco Investment Corporation, an Arizona corporation, verify under penalty of perjury
5 the foregoing is true and correct:

- 6 1. DenSco Investment Corporation is the Plaintiff for the above-entitled action.
7
8 2. I have read Plaintiff's Eighth Supplemental Rule 26.1 Disclosure Statement,
9 dated August 20, 2021, and know the contents thereof.
10
11 3. I have read the foregoing Plaintiff's Ninth Supplemental Rule 26.1 Disclosure
12 Statement and know the contents thereof.
13
14 4. The statements and matters alleged are true of my own personal knowledge as
15 the receiver for DenSco Investment Corporation, except as to those matters
16 stated upon information and belief, and as to such matters, I reasonably believe
17 them to be true.

18
19 **DATED** this 24th day of August, 2021.

20
21 **DENSCO INVESTMENT**
22 **CORPORATION, an Arizona corporation**

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By: Peter S. Davis
Its: Receiver