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[Additional co-defendants and counsel listed on signature page]

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' OPPOSITION TO DENSCO'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** (Assigned to the Honorable Daniel Martin) (Oral argument requested)

Defendants JPMorgan Chase Bank, N.A., Samantha and Kristofer Nelson, and Vikram and Jane Doe Dadlani (the "Chase Defendants) and U.S. Bank National

Association and Hilda H. Chavez (the "U.S. Bank Defendants") oppose Plaintiff's Motion for Leave to File Second Amended Complaint (the "Motion") on the grounds that the requested amendment rises to the level of bad faith and should not be permitted as a matter of law. The amendment purports to impermissibly revoke the Receiver's prior binding admission that it learned of Defendants' allegedly tortious conduct by June 13, 2017, at the latest (*see* First Amended Complaint (the "FAC"), ¶ 81)—a factual allegation upon which the Receiver relied in opposing Defendants' Motions to Dismiss—and replace it with a new later discovery date, all in a thinly veiled attempt to bring two new claims within the statute of limitations that would be undeniably time-barred under the operative FAC. Under Arizona law, this litigation tactic falls within the definition of bad faith and warrants denial of the Receiver's Motion.[1]

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RELEVANT BACKGROUND

In April 2020, the Plaintiff Receiver, on behalf of DenSco Investment Corporation ("DenSco"), sought leave to amend its original Complaint to allege that the purported tortious activity involving Defendants was not discovered until the Receiver completed a forensic accounting on June 13, 2017. The Receiver sought this amendment for the express purpose of identifying the date the Receiver discovered the so-called "second fraud" to counter Defendants' motion to dismiss arguments that the aiding and abetting fraud claim was time-barred by the three-year statute of limitations (*see* Pl.'s Mot. For Leave to File FAC, p. 8), as the tortious conduct allegedly occurred beginning in early 2014. Specifically, the Receiver pled that he "finally understood the extent and losses constituting the Second Fraud, and the substantial assistance U.S. Bank and Chase provided to Menaged, when it completed an initial draft of that forensic recreation of Menaged's banking activity on or about June 13, 2017." (FAC ¶ 81.) Based on this factual

[1] The newly proposed legal claims fail for other reasons too: the factual allegations do not support an underlying conversion or breach of fiduciary duty that Defendants could have aided and abetted, and the predicate acts of Plaintiff's newly proposed RICO claim are not pled with the requisite particularity. In opposing amendment on grounds of bad faith, Defendants do not waive their right to move to dismiss the Proposed SAC on these grounds, and others, should amendment be permitted notwithstanding this objection.

allegation, the Receiver took the position that DenSco had three years to file suit from June 13, 2017, for its claim governed by a three-year limitations period, and timely did so in August 2019.

Now, however, with the Motion for Leave to File Second Amended Complaint, the Receiver's recently substituted counsel seeks to *revoke* that curative allegation and delete entirely the clear and unambiguous assertion that the Receiver discovered the "second fraud" on June 13, 2017. In its place is something new, an allegation implying that the Receiver did not discover Defendants' allegedly tortious misconduct until December 8, 2017—the date upon which the Receiver alleges that he interviewed the fraudster, Scott Menaged ("Menaged"). The reason for this new allegation—and the deletion of the assertion in the currently operative FAC that the Receiver discovered the "second fraud" on June 13, 2017—is clear: the Receiver seeks to manipulate its timing allegations to assert new claims for aiding and abetting conversion and breach of fiduciary duty—each of which is governed by a two-year statute of limitation. These claims are undeniably time-barred as a matter of law given the Receiver's admitted knowledge of the "second fraud" as of June 13, 2017, and the Receiver's failure to file a complaint within two years of that date.

Put simply, this is tactical gamesmanship that should not be countenanced. Indeed, the only rational conclusion is that the Receiver discovered and had knowledge of the so-called "second fraud" on June 13, 2017—as the Receiver stated in the FAC—after completing its investigation and forensic accounting. To attempt to revoke this admission—despite the Receiver's decision not to do so in the FAC following eight full months of consideration after the original Complaint's filing, and despite the Receiver having relied on the admission to oppose Defendants' Motions to Dismiss—and now imply that the Receiver did not discover the "second fraud" to bring suit until December 2017 lays bare the Receiver's motivation for seeking this amendment. The truth of these diverging facts has always been within the Receiver's exclusive knowledge, since before this lawsuit was ever filed. It offends reason to suggest that a change in counsel somehow

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altered the *factual* reality of which moment marked the discovery of the basis for the claims the Receiver seeks to bring.

ARGUMENT

In Arizona, "[a] court may deny leave to amend if it finds," among other things, "bad faith." *Carranza v. Madrigal*, 237 Ariz. 512, 515 ¶ 13, 354 P.3d 389, 392 (2015). As detailed below, the procedural history in this litigation demonstrates that the removal of the discovery date in the FAC and attempt to swap in a new allegation into the proposed Second Amended Complaint ("Proposed SAC") constitutes bad faith in the form of a case-contradicting addition pled to reorient the facts and to try to shield otherwise time-barred causes of action from dismissal, such that leave to amend should not be granted under Rule 15(a)(2), Ariz. R. Civ. P.

On August 16, 2019, the Receiver filed the original Complaint and pled one count each against Defendants, alleging that Defendants aided and abetted Menaged in his purported fraud against DenSco. Defendants each moved to dismiss the original Complaint, respectively, on February 3 and February 5, 2020. The lead argument in each motion sought dismissal based on the three-year statute of limitations for aiding and abetting fraud claims. Defendants' argument was straightforward: because the alleged misconduct involving any Defendant supposedly started in early 2014, the August 2019 filing was at least one full year too late, requiring dismissal under the three-year time bar. (*See* U.S. Bank Defs.' Mot. to Dismiss the Original Compl., at 3–5; Chase Defs.' Mot. to Dismiss the Original Compl., at 8–9.)

On April 1, 2020, the Receiver filed the now-operative FAC, seeking to cure the timing defect in its original Complaint by invoking Arizona's "discovery rule," whereby "a tort claim accrues when a plaintiff knows or with reasonable diligence should know of the defendant's wrongful conduct." *Elm Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290 ¶ 12, 246 P.3d 938, 941 (App. 2007) (internal citation and quotations omitted). The FAC maintained aiding and abetting fraud as its sole theory of liability, but it newly specified

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June 13, 2017, as the accrual date for that tort claim. Specifically, the Receiver's FAC alleges:

> The Receiver finally understood the extent and losses constituting the Second Fraud, and the substantial assistance U.S. Bank and Chase provided to Menaged, when it completed an initial draft of that forensic recreation of Menaged's banking activity on or about June 13, 2017.

(FAC ¶ 81.)

The Receiver doubled down on this June 13, 2017 accrual date in response to Defendants' Motions to Dismiss the FAC, arguing against a time bar dismissal, in part, by specifically asserting that "[i]t was only when the Receiver completed a draft of that forensic investigation on or around June 13, 2017, that he finally understood the facts and losses involving the Second Fraud. [T]he Receiver's claims against [Defendants] did not accrue until around June 13, 2017." (*See* Pl.'s Resp. to the Chase Defs.' Mot. to Dismiss the FAC, at 6; Pl.'s Resp. to the U.S. Bank Defs.' Mot. to Dismiss the FAC, at 7.)[2]

Thereafter, and subsequent to this Court's denial of Defendants' Motions to Dismiss the aiding and abetting fraud claims, the Court granted the Receiver's unopposed motion to substitute counsel on October 29, 2020. One month later, on November 30, 2020, newly-substituted counsel filed the subject Motion seeking to amend the complaint yet again by way of the Proposed SAC. In its Motion, the Receiver states that "[b]ecause the Second Amended Complaint merely adds new legal theories that rest on previously alleged facts, leave to amend should be granted." (Mot. at 2.) This assertion, however, is inaccurate. Changing the date the Receiver discovered significant events *is* a factual alteration. Plus, the Receiver's argument misrepresents the obvious import of the proposed amendment, as two of the three new claims are time-barred if the allegation that the Receiver discovered the "second fraud" on June 13, 2017, remains operative.

[2] Defendants' Motions to Dismiss also made clear that judicial admissions by the Receiver in the related litigation against Clark Hill evidenced that DenSco was fully aware that Menaged was engaged in fraud in November 2013, nearly six years before DenSco commenced this action. Now, the Proposed SAC also seeks to revoke the allegations in the FAC expressly alleging that DenSco knew of Menaged's fraud in November 2013. Defendants expressly reserve and do not waive their right to rely on these judicial admissions as grounds for summary judgment.

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Alongside a new statutory civil racketeering charge, the Proposed SAC adds two claims each against Defendants for aiding and abetting conversion and breach of fiduciary duty. (*See, e.g.,* Proposed SAC, attached to Mot. as Ex. 1, ¶¶ 119–40.) Under A.R.S. § 12-542, these two new aiding and abetting torts carry two-year statutes of limitations. This means that, under the unambiguous June 13, 2017 discovery allegation date in the FAC, the claims would be time-barred by the two-months-late August 2019 filing of the original Complaint.

Confronted with this inconvenient fact—that the Receiver had long since signed and filed the FAC containing the June 13, 2017 discovery date allegation that bars its newly theorized avenues for recovery—the Receiver appears to have surmised a workaround. First, the Proposed SAC ***removes*** the above-quoted allegation concerning the Receiver's discovery of Defendants' alleged tortious misconduct on June 13, 2017, and replaces it with this: "In the spring and summer of 2017, the Receiver performed a complete forensic recreation of Menaged's banking activity." (Proposed SAC, Mot. Ex. 1, ¶ 108.) Second, the Proposed SAC supplies a new date certain in the concluding paragraph of an emboldened section entitled, "**DISCOVERY OF THE SECOND FRAUD**." That new allegation reads:

> On December 8, 2017, counsel for the Receiver interviewed Menaged who testified under oath regarding the Second Fraud and his involvement with US Bank and Chase.

(*Id.* ¶ 109.)[3] The implication of this fact alteration is self-evident. By attempting to recast a new date of discovery—December 8, 2017—the Receiver now directly contradicts both its allegation in the FAC and its assertion in the oppositions to the Motions to Dismiss that it discovered the "second" fraud on June 13, 2017. Indeed, this "new" fact of a December 2017 discovery date, never before asserted in the pleadings or motion papers, is before the Court for the exclusive purpose of attempting to render the new aiding and

[3] The Receiver previously "deposed" Menaged on October 20, 2016 (*see* FAC ¶ 77), but this factual allegation bearing on claim discovery (among others) is also inexplicably removed from the Proposed SAC.

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abetting claims timely—at the express expense of prior factual representations upon which the Receiver and this Court relied.[4]

Time and again, courts find that this specific tactic—amending a complaint to avoid statute of limitations dismissal—constitutes bad faith in the Rule 15(a)(2) amendment context. *See In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig.*, MDL No. 2775, 2020 WL 407136, at *3–4 (D. Md. Jan. 24, 2020) (denying leave to amend where "plaintiffs seek to retract their theory of accrual and add facts to the [] complaints in an attempt to avoid dismissal," which tactic amounts to "bad faith"); *Echols v. CSX Transp., Inc.*, No. 3:16CV294, 2017 WL 2569734, at *4 (E.D. Va. June 13, 2017), *aff'd*, 700 F. App'x 267 (4th Cir. 2017) (denying leave to amend where the proposed amended complaint "changes the date on which [the plaintiff] contends he began to experience respiratory problems in order to have his claims fit within the applicable limitations period"); *Good v. Howmedica Osteonics Corp.*, Nos. 15-cv-10133, 15-cv-10134, 2015 WL 8175256, at *8–9 (E.D. Mich. Dec. 8, 2015) (denying leave to amend where plaintiffs' request for "leave to amend [] to avoid dismissal on statute of limitations grounds" would "not be brought in good faith," as such amendment would have required plaintiffs to remove "pertinent facts from their complaints," including "the time at which plaintiffs believe they were first defrauded").[5]

These attempts to avoid statutes of limitation are just one strain of a more broadly disheartening trend, where plaintiffs assert competing allegations of fact across multiple pleadings that contradict one another. *See Airs Aromatics, LLC v. Op. Victoria's Secret*

[4] Not only did the Receiver rely upon these factual representations in opposing Defendants' Motions to Dismiss, but he was successful in obtaining his requested relief. (*See* Minute Entry, Aug. 14, 2020.) To enable this gamesmanship would promote an unfair advantage that doctrines like judicial estoppel are designed to prevent. *See, e.g.*, *In re Marriage of Thorn*, 235 Ariz. 216, 222 ¶ 27, 330 P.3d 973, 979 (App. 2014) ("[J]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal citation and quotations omitted).

[5] Federal cases applying the Federal Rules of Civil Procedure are entitled to "great weight," "[b]ecause Arizona has substantially adopted the Federal Rules of Civil Procedure." *Anserv Ins. Serv., Inc. v. Albrecht,* 192 Ariz. 48, 49 ¶ 5, 960 P.2d 1159, 1160 (1998) (en banc).

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Store Brand Mgmt., Inc., 744 F.3d 595, 600 (9th Cir. 2014) (affirming district court's refusal to permit an amended complaint, as "[a] party cannot amend pleadings to directly contradict an earlier assertion made in the same proceeding") (internal citation and quotations omitted); *ecoNugenics, Inc. v. Bioenergy Life Sci., Inc.*, 355 F. Supp. 3d 785, 794 (D. Minn. 2019) (denying leave to amend where plaintiff attempted to "delete damaging admissions from its complaint to render its claims plausible" after the court relied on the admission to find there was no plausible claim); *Davis v. Complete Auto Recovery Servs., Inc.*, No. CV JKB-16-3079, 2017 WL 6501761, at *2 (D. Md. Dec. 18, 2017) (denying leave to amend where plaintiff's "turnabout from the premise of her prior amended complaint [] is in bad faith"). And here, as detailed above, this is not the first time the Receiver is amending its pleading or trying to distance itself from prior court filings regarding when it was on notice of the fraud at issue.

In short, had the Receiver truly not discovered the alleged misconduct at issue until a one-on-one interview it conducted with Menaged on December 8, 2017, that fact would have been alleged in either of its first two complaints. Instead, this alleged interview date was never referenced until new counsel apparently decided to remove the express allegation of the June 13, 2017 discovery date to backdoor new causes of action into the case that had shorter statutes of limitation. Absent the cover of the newly-alleged discovery/accrual date, the Receiver's claims for aiding and abetting conversion and breach of fiduciary duty are time-barred as a result of the judicial admission in the FAC that the Receiver had full knowledge of the so-called "second fraud" twenty-six months before the original Complaint was filed. For this reason, the proposed amendment not only rises to the level of bad faith, but is also futile with respect to the new aiding and abetting claims. *See Tovrea v. Nolan*, 178 Ariz. 485, 490, 875 P.2d 144, 149 (App. 1993) (affirming trial court's denial of leave to amend where "an amendment [] would have been futile" because the "statute of limitations had expired on [plaintiffs'] claims"). This attempted manipulation of the discovery accrual date is not permitted under Rule 15, and the Motion should be denied as a result.

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff's Motion for Leave to File Second Amended Complaint be denied. In the alternative, Defendants request that the Court (i) strike Paragraph 108 from the Proposed SAC, and (ii) strike the aiding and abetting conversion and aiding and abetting breach of fiduciary duty counts (Counts Three – Six) as futile, for reason of their being time-barred by the two-year statute of limitations' accrual on June 13, 2017.

RESPECTFULLY SUBMITTED this 4th day of January 2021.

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ORIGINAL of the foregoing e-filed with the Clerk of Court this 4th day of January, 2021.

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