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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Concord Servicing Corporation,
10 Plaintiff,

11 v.

12 JPMorgan Chase Bank, N.A., et al.,
13 Defendants.

No. CV-12-00438-PHX-JAT

ORDER

14 Pending before the Court are Defendant's Motion for Summary Judgment (Doc.
15 147), the parties' Stipulated Motion for Leave to File Under Seal (Doc. 149), and
16 Plaintiff's Motion for Partial Summary Judgment (Doc. 145). The Court now rules on the
17 motions.

18 **I. Background**

19 Plaintiff Concord Servicing Corporation ("Concord") is a loan serving provider.
20 (Doc. 146-1 at 2). During January 2009 to February 2011, Concord was the loan servicer
21 for Grupo Costamex, S.A. de C.V.; Holiday Club Management Co., Ltd.; Holiday Clubs
22 Ltd.; Resort Interval, Inc.; Royal Experience, S.A. de C.V.; and Travel Experience, S.A.
23 de C.V. (collectively, "Costamex"). (*Id.*) Costamex is in the business of marketing and
24 selling timeshare memberships. (*Id.* at 3). As the loan servicer for Costamex, Concord
25 processed payments and refunds to Costamex's customers. (*Id.*)

26 In 2003, Concord opened a bank account (the "Refund Account") with Defendant
27 JPMorgan Chase Bank, N.A. ("Chase")'s predecessor Bank One. (*Id.*) Concord draws
28 checks on the Refund Account when, upon the instructions of Concord's customers, it

1 issues refunds to its customers' clients. (*Id.*) During January 2009 to February 2011,
2 Victor Aguilar was an employee of Costamex and the primary contact for Concord with
3 respect to its servicing of Costamex's accounts. (*Id.*) Costamex authorized Aguilar to
4 instruct Concord to issue refunds to Costamex's customers. (*Id.* at 3; Doc. 157 at 2).
5 Concord never issued a refund check to a customer of Costamex except when Costamex
6 instructed Concord to do so. (*Id.* at 3). Concord understood Aguilar to be the Costamex
7 employee with authority to authorize the issuance of Costamex customer refunds. (Doc.
8 148 ¶ 8; Doc. 158 ¶ 8).

9 Between January 2009 and February 2011, Aguilar instructed Concord to issue the
10 221 refund checks at issue (the "Refund Checks") to Costamex customers. (Doc. 146 at
11 3; Doc. 157 at 3). Aguilar instructed Concord to issue the Refund Checks and send them
12 directly to him instead of the customers because Aguilar needed to attach "additional
13 paperwork" to be provided to the customers. (Doc. 146-1 at 32; Doc. 148-2 at 16).
14 Aguilar supplied the names of the payees and dollar amounts for each of the Refund
15 Checks. (Doc. 148 ¶ 10; Doc. 158 ¶ 10). Upon Aguilar's instruction and keeping in line
16 with its role as a servicer, Concord issued the Refund Checks without determining
17 whether a refund was actually owed to the payees. (Doc. 148 ¶ 11; Doc. 158 ¶ 11). In
18 fact, Concord could not refuse to comply with Costamex's instructions to issue refund
19 checks to Costamex's customers. (Doc. 158-1 at 12).

20 Concord and Costamex each maintained separate systems to track transactions on
21 Costamex's customer accounts. (Doc. 148 ¶ 14; Doc. 158 ¶ 14). Costamex provided
22 Concord with daily spreadsheets of transactions initiated on Costamex's system and
23 Concord provided Costamex with daily information on transactions Concord processed
24 on behalf of Costamex (including refund check transactions). (Doc. 148 ¶ 15; Doc. 158 ¶
25 14). Aguilar had access to Concord's computer system to compare Concord's data with
26 Costamex's and verify that the systems accurately reflected Costamex's transactions.
27 (Doc. 158-1 at 12). Concord does not know if Aguilar manipulated Costamex's system to
28 hide his check fraud. (Doc. 148 ¶ 18; Doc. 158 ¶ 18).

1 Chase is without knowledge as to whether the Refund Checks were fraudulently
2 indorsed, (Doc. 157 ¶ 14), but according to Concord, the Refund Checks were endorsed
3 by someone other than their named payees and were either cashed or deposited at
4 Mexican banks, (Doc. 146 ¶ 14). Concord offers the testimony of one hundred payees
5 named on the Refund Checks, each of whom testifies that he or she did not request or
6 indorse the corresponding check. *See* (Doc. 146 at 5-19). It is undisputed that the Refund
7 Checks were accepted at depository banks for payment and subsequently presented to
8 Chase for payment in the ordinary course of banking. (Doc. 148 ¶ 19). Chase processed
9 the Refund Checks and posted them to Concord's account. (*Id.* ¶¶ 20-22). At the time it
10 paid the Refund Checks, Chase had no knowledge that any of the indorsements on the
11 Refund Checks were unauthorized. (*Id.* ¶ 23).

12 During the July 2009 to February 2011 time period when the Refund Checks were
13 drawn, Chase provided monthly account statements to Concord. (*Id.* ¶ 29). These
14 statements identified all checks paid against the Refund Account and included images of
15 both sides of every check. (*Id.* ¶ 29). This information was also available to Concord
16 through online banking services. (*Id.* ¶¶ 30-31). Although Concord reconciled its monthly
17 statements for the Refund Account, it never reviewed copies of its paid checks. (*Id.* ¶ 32).

18 In February 2011, Concord reviewed some of the Refund Checks and discovered
19 that although the checks were payable to different Costamex customers, they had been
20 indorsed and deposited in a single Mexican bank account. (*Id.* ¶ 36). In January 2012,
21 Concord filed this lawsuit against Chase and subsequently informed Chase, for the first
22 time, of the particular checks that it alleged Chase had improperly paid. (*Id.* ¶¶ 42-43).

23 **II. Motions for Summary Judgment**

24 Chase moves for summary judgment on Concord's claims, asserting that both
25 Uniform Commercial Code ("UCC") section 3-405 as well as the parties' deposit
26 agreement preclude Chase from being liable for the unauthorized checks.¹ (Doc. 147 at

27
28 ¹ Chase's motion violates Local Rule of Civil Procedure 56.1(e) because it fails to
cite to the paragraphs in Chase's statement of facts supporting assertions for all material
facts relied upon in the motion. *See* LRCiv 56.1(e); (Doc. 147 at 2) ("Chase respectfully

1 1). Concord moves for partial summary judgment on its claims as to one hundred of the
2 221 checks, arguing that Chase improperly charged its account for checks that were not
3 properly payable. (Doc. 145 at 1, 7).

4 **A. Summary Judgment Standard**

5 Summary judgment is appropriate when “the movant shows that there is no
6 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
7 of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely
8 disputed must support that assertion by . . . citing to particular parts of materials in the
9 record, including depositions, documents, electronically stored information, affidavits, or
10 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by
11 “showing that materials cited do not establish the absence or presence of a genuine
12 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
13 *Id.* 56(c)(1)(A), (B). Thus, summary judgment is mandated “against a party who fails to
14 make a showing sufficient to establish the existence of an element essential to that party’s
15 case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*
16 *Catrett*, 477 U.S. 317, 322 (1986).

17 Initially, the movant bears the burden of pointing out to the Court the basis for the
18 motion and the elements of the causes of action upon which the non-movant will be
19 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
20 the non-movant to establish the existence of material fact. *Id.* The non-movant “must do
21 more than simply show that there is some metaphysical doubt as to the material facts” by
22 “com[ing] forward with ‘specific facts showing that there is a *genuine* issue for trial.’”
23 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
24 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the
25 evidence is such that a reasonable jury could return a verdict for the non-moving party.
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant’s bare

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refers the Court to the SOF for discussion of all relevant facts.”). Failure to discuss the
necessary facts in the motion is often tantamount to an unauthorized page limit extension,
and is not looked upon favorably by the Court.

1 assertions, standing alone, are insufficient to create a material issue of fact and defeat a
2 motion for summary judgment. *Id.* at 247–48. However, in the summary judgment
3 context, the Court construes all disputed facts in the light most favorable to the non-
4 moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

5 **B. UCC § 3-405**

6 **1. Legal Standard**

7 Generally, a bank may charge against its customer’s account only those items that
8 are properly payable. *See* A.R.S. § 47-4401(A) & cmt. 1. A check bearing a forged
9 indorsement is not properly payable. *Id.* cmt. 1. However, UCC § 3-405 provides an
10 exception under which a check bearing a fraudulent indorsement may nonetheless
11 properly payable. *See* A.R.S. § 47-3405. Section 3-405 provides:

12 B. For the purpose of determining the rights and liabilities of
13 a person who, in good faith, pays an instrument or takes it for
14 value or for collection, if an employer entrusted an employee
15 with responsibility with respect to the instrument and the
16 employee or a person acting in concert with the employee
17 makes a fraudulent indorsement of the instrument, the
18 indorsement is effective as the indorsement of the person to
19 whom the instrument is payable if it is made in the name of
20 that person. If the person paying the instrument or taking it
21 for value or for collection fails to exercise ordinary care in
22 paying or taking the instrument and that failure substantially
23 contributes to loss resulting from the fraud, the person
24 bearing the loss may recover from the person failing to
25 exercise ordinary care to the extent the failure to exercise
26 ordinary care contributed to the loss.

27 C. Under subsection B, an indorsement is made in the name
28 of the person to whom an instrument is payable if:

1. It is made in a name substantially similar to the name of
that person; or

23 A.R.S. § 47-3405(B), (C). The terms “employee,” “fraudulent indorsement,” and
24 “responsibility” are defined as follows:

25 1. “Employee” includes an independent contractor and
26 employee of an independent contractor retained by the
27 employer.

28 2. “Fraudulent indorsement” means:

* * *

1 (b) In the case of an instrument with respect to which the
2 employer is the issuer, a forged indorsement purporting to be
that of the person identified as payee.

3 3. "Responsibility" with respect to instruments means
4 authority to:

5 * * *

6 (d) Supply information determining the names or addresses of
7 payees of instruments to be issued in the name of the
8 employer;

9 (e) Control the disposition of instruments to be issued in the
10 name of the employer; or

11 (f) Act otherwise with respect to instruments in a responsible
12 capacity.

13 A.R.S. § 47-3405(A).

14 The bank asserting the defense of UCC § 3-405 "bears the initial burden of
15 proving that an employer entrusted an employee with 'responsibility' for the instrument
16 in question" as defined in § 3-405(A)(3). *San Tan Irrigation Dist. v. Wells Fargo Bank*, 3
17 P.3d 1113, 1117 ¶ 15 (Ariz. Ct. App. 2000). "If the bank proves the employer entrusted
18 the employee with responsibility, and also proves that it acted in 'good faith,' the loss
19 from the transaction is shifted from the bank to the employer." *Id.* ¶ 16. However, the
20 employer can share the loss with the bank if the employer proves that the bank failed to
21 exercise ordinary care with respect to the transaction. *Id.*; *see also* A.R.S. § 47-3405(B).

22 "Section 3-405 is based on the belief that the employer is in a far better position to
23 avoid the loss by care in choosing employees, in supervising them, and in adopting other
24 measures to prevent forged indorsements on instruments payable to the employer or fraud
25 in the issuance of instruments in the name of the employer." A.R.S. § 47-3405 cmt. 1.
26 This comports with the UCC's policy that "the loss resulting from a forged indorsement
27 should fall upon the party best able to prevent it." *Lewis v. Tel. Emps. Credit Union*, 87
28 F.3d 1537, 1550 n.12 (9th Cir. 1996) (quoting *Intelogic Trace Texcom Grp., Inc. v.*
Merchants Nat'l Bank, 626 N.E.2d 839, 840 (N.D. Ind. 1993)).

1 **2. Analysis**

2 Concord argues that Chase is not entitled to claim the defense of UCC § 3-405
3 because Chase has not proven that (1) Aguilar was an agent or employee of Concord, (2)
4 Concord entrusted Aguilar with responsibility for issuing the Refund Checks, and (3)
5 Chase paid the Refund Checks in good faith.

6 **a. Aguilar’s Status as Agent or Employee**

7 Because UCC § 3-405 applies only if an employee makes a fraudulent
8 indorsement of the instrument, Chase bears the burden of proving that Aguilar was
9 Concord’s “employee” as that term is defined in the statute. *See San Tan*, 3 P.3d at 1117
10 ¶ 15. Concord argues that no employment relationship existed between it and Aguilar,
11 and Aguilar did not perform any services for Concord, only for Costamex. (Doc.159 at
12 11).

13 The facts of this case are strikingly similar to those of *Guardian Life Insurance*
14 *Company of America v. Chemical Bank*, 666 N.Y.S.2d 897 (Sup. Ct. 1997). In *Guardian*
15 *Life*, the insurance agent and wrongdoer, Rutberg, worked with a particular insurance
16 agency that had issued policies underwritten by Guardian Life Insurance Company of
17 American (“Guardian”). 666 N.Y.S.2d at 898. Rutberg’s scheme was to telephone
18 Guardian and request the issuance of a check for a life insurance loan or policy dividend
19 on a named policy holder’s account, knowing that the customer had not requested any
20 such check. *Id.* Guardian issued checks and sent them not to the customers, but to
21 Rutberg, who subsequently forged the customers’ indorsements and cashed the checks.
22 *Id.*

23 Guardian sued its drawee bank to recover the proceeds of the checks, arguing the
24 bank improperly paid on forged indorsements. *Id.* Although the parties disputed whether
25 Rutberg had been an employee or agent of Guardian within the meaning of insurance
26 law, the court found that the operative question was instead “whether Guardian was in the
27 best position to prevent the loss.” *Id.* at 899. Accordingly, the court rejected a formalistic
28 analysis of agency and concluded that Rutberg was Guardian’s agent for purposes of § 3-

1 405:

2 Rutberg was a sufficient agent of Guardian that it relied on
3 him for the issuance of checks, without any documentation
4 from the policy holder [or any other agencies or anyone else
5 at Rutberg's agency]. The checks were concededly drawn by
6 Guardian in the policy holder's name solely at Rutberg's oral
7 request. Guardian could have, but did not, exercise reasonable
8 control over the checks by having them sent directly to the
9 registered address of the policy holder or by sending the
10 policy holder a notice that a check had been sent to the
11 "Agent of Record." Patently Guardian was in the best
12 position to prevent the losses by its practices and supervision
13 of the persons who directed the authorization of the checks . .
14 ..

15 *Id.* at 899-900.

16 The facts of the present case are indistinguishable from those in *Guardian Life*.²
17 Here, it is undisputed that Aguilar's instructions to Concord were sufficient to cause
18 Concord to issue checks according to payees and amounts supplied by Aguilar. Concord
19 could have exercised reasonable control over the Refund Checks by sending them
20 directly to the named payees, but failed to do so. Another instructive case is *LifeUSA*
21 *Insurance Company v. Continental Bank, N.A.*, 1996 WL 18974, at *1, 6 (N.D. Ill. Jan.
22 18, 1996), in which the court concluded that an insurance agent who had falsified an
23 annuity application to an underwriter for the purpose of obtaining and fraudulently
24 indorsing a refund check was an agent for purposes of § 3-405. There, the court relied
25 upon a written agency agreement as well as other evidence to conclude that the drawer
26 had authorized the agent to supply it "with the information it needed to prepare a refund
27 check in the event an insured wished to cancel the policy." 1996 WL 18974, at *6.

28 Concord argues, however, that Aguilar could not have been its agent or employee
because Aguilar was an employee of Costamex, not Concord. (Doc. 159 at 11). But as in
Guardian Life, Aguilar's status as an employee (or agent) of a non-party to the issuance

² Although Concord attempts to distinguish *Guardian Life* as a product of the special relationship between an insurance agent, broker, and underwriter, the court in that case explicitly rejected any such distinction: "The court need not resolve the insurance law question, . . . for the issues posed by the UCC do not involve what the responsibilities of the parties were with respect to the placing of insurance and the entitlement to commission." 666 N.Y.S.2d at 899.

1 and negotiation of the Refund Checks does not preclude him from also serving as an
2 agent to Concord for purposes of § 3-405. As one treatise explains:

3 No distinction should be made in terms of whether the agent
4 or employee is a general or special agent or employee, or is a
5 full-time or temporary employee, or is a borrowed employee,
6 or an employee provided by a service agency. The only
7 significant element is whether the drawer had authorized the
particular person to prepare the instrument in question or
supply the information from which the commercial paper
could be prepared.

8 It is not essential that the agent involved in the impostor
9 situation be on the payroll of the drawer as long as the agent
10 is in fact entrusted by the drawer company with taking the
11 information from the drawer's incoming goods department to
12 its bookkeeping department, on the basis of which
information the bookkeeping department prepares checks,
which it then entrusts to the agent for delivery to the payees,
the "agent" supplying false information of goods not actually
received and then forging the names of the payees of the
checks entrusted to the agent for delivery to the payees.

13 6 Lawrence, Lawrence's Anderson on the Uniform Commercial Code § 3-405:112 (3d.
14 ed. 2013). Thus, Aguilar's status as a person authorized by Concord (through its
15 relationship with Costamex) to supply the information for Concord's preparation of
16 checks is sufficient to render him an agent for purposes of § 3-405.³ As an agent of
17 Concord, Aguilar was an "employee" of Concord within the particular meaning of that
18 term as defined in § 3-405.

19 **b. Aguilar's Responsibility for the Refund Checks**

20 To succeed on its § 3-405 defense, Chase must also prove that Concord entrusted
21 Aguilar with responsibility with respect to the Refund Checks. *See* A.R.S. § 47-3405(B).
22 Because "responsibility" as defined in § 3-405 includes "[supplying] information
23 determining the names or addresses of payees of instruments to be issued in the name of
24 the employer" and "[controlling] the disposition of instruments to be issued in the name
25 of the employer," Chase has clearly met its burden of proof on this element. The
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27 ³ The Court finds Chase's citations to *Witten Productions, Inc. v. Republic Bank &*
28 *Trust Co.*, 401 S.E.2d 388 (N.C. Ct. App. 1991) and *Thompson Maple Products, Inc. v.*
Citizens Nat'l Bank of Corry, 234 A.2d 32 (Pa. Super. Ct. 1967) unpersuasive. Therefore,
the Court need not address Concord's objections to those cases. *See* (Doc. 159 at 12).

1 undisputed evidence shows that Concord allowed Aguilar to supply the names and
2 addresses of the payees as well as the dollar amounts of the Refund Checks. Concord's
3 argument to the contrary (Doc. 159 at 13) is wholly unsupported.

4 **c. Chase's Good Faith**

5 Finally, Chase must also prove that it paid the Refund Checks in good faith. *See*
6 A.R.S. § 47-3405(B). Good faith is defined as, for purposes of UCC Article 3, as
7 "honesty in fact and the observance of reasonable commercial standards of fair dealing."
8 A.R.S. § 47-3103(A)(4). Concord does not challenge whether Chase observed reasonable
9 commercial standards of fair dealing but argues that because "Chase includes no
10 discussion of the honesty in fact component in its analysis," Chase fails to establish that it
11 paid the Refund Checks in good faith.⁴ (Doc. 159 at 14).

12 "Honesty in fact" under UCC Article 3 "is tested by a subjective standard,
13 inquiring into the actual state of mind of the party." *San Tan*, 3 P.3d at 1117 ¶ 13.
14 Honesty in fact requires only "a pure heart and an empty head." *First Interstate Bank of*
15 *Or., N.A. v. Wilkerson*, 876 P.2d 326, 330 (Or. Ct. App. 1994). Thus, a drawer acts with
16 honesty in fact when it pays a check believing it to be properly payable. *See Me. Family*
17 *Fed. Credit Union v. Sun Life Assurance Co. of Can.*, 1999 ME 43 ¶¶ 18-23, 727 A.2d
18 335, 340-42 (1999) (discussing honesty in fact in the context of evolving requirements
19 for holder in due course status).

20 Concord's assertion that Chase has failed to prove honesty in fact is at best
21 disingenuous because Chase offered undisputed evidence that at the time it paid the
22 Refund Checks it had no knowledge that the indorsements were unauthorized. (Doc. 148
23 ¶ 23; Doc. 158 ¶ 23). Concord offers no controverting evidence on this point.
24 Accordingly, Chase has proven that it acted with honesty in fact when it paid the Refund

25
26 ⁴ The Court nonetheless concludes that Chase observed reasonable commercial
27 standards of fair dealing. *See Scott D. Leibling, P.C. v. Mellon PSFS (NJ) Nat'l Ass'n*,
28 710 A.2d 1067, 1071-72 (N.J. Super. Ct. Law Div. 1998) (computerized check
processing system followed reasonable commercial standards); *Guardian Life Ins. Co. of*
Am. v. Weisman, 223 F.3d 229, 233-35 (3d Cir. 2000) (drawee bank has no duty to
review payee indorsements).

1 Checks.

2 **3. Conclusion**

3 Because Chase has established the elements of its UCC § 3-405 defense, it is not
4 liable to Concord for its payment of the Refund Checks. Concord entrusted Aguilar, as an
5 employee for purposes of § 3-405, with responsibility for the Refund Checks when it
6 allowed Aguilar to instruct Concord to issue checks on behalf of Costamex’s customers.
7 Chase paid the fraudulently-indorsed Refund Checks in good faith because it had no
8 knowledge that the indorsements were fraudulent and its observance of reasonable
9 commercial standards of fair dealing did not mandate that it review the payee
10 indorsements. Consequently, Aguilar’s fraudulent indorsements were as effective as if
11 made by the payees of the Refund Checks themselves. *See* A.R.S. § 47-3405(B).

12 Because the Refund Checks had effective indorsements pursuant to § 3-405, they
13 were properly payable and as properly payable instruments, Chase was entitled to charge
14 against Concord’s account for their payment.⁵ *See* A.R.S. § 47-4401(A). Consequently,
15 Concord’s claim against Chase for wrongful payment of the 221 Refund Checks fails as a
16 matter of law and Chase is entitled to summary judgment.⁶ For this reason, the Court

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18 ⁵ At oral argument, Concord cited *City of Phoenix v. Great Western Bank & Trust*,
19 712 P.2d 966 (Ariz. Ct. App. 1985) for the proposition that a bank is required to recredit
20 its customer’s account for the amount of checks paid but not properly payable. *City of*
21 *Phoenix* indeed recites this general proposition, but only before discussing the exception
to this rule for fictitious payees. *See* 712 P.2d at 969. The court ultimately affirmed the
trial court’s grant of summary judgment in favor of the bank. *See id.* at 974. Thus, to the
extent *City of Phoenix* is germane, it fails to support Concord’s argument that Chase must
recredit Concord for the Refund Checks.

22 ⁶ Concord makes a curious argument that evinces a misunderstanding of the
23 fundamentals of summary judgment procedure. Namely, Concord argues that its motion
24 should be granted because Chase failed to demonstrate that Concord is “not entitled to
25 judgment as a matter of law” or that a genuine issue of material fact existed in response
26 to Concord’s statement of facts. (Doc. 161 at 1-2, 5). Concord attempts to separate its
27 claim under A.R.S. § 47-4401 from the UCC § 3-405 defense of A.R.S. § 47-3405. (*Id.* at
28 2). Incredibly, Concord implies that the Court could grant *both* its motion for partial
summary judgment and Chase’s motion for summary judgment because “Chase’s belief
that it might establish the applicability of those defenses which . . . are the subject of
Chase’s own motion for summary judgment, does not preclude the granting of
[Concord’s] Motion.” (*Id.*) Concord accuses Chase of “erroneously conflating its
burden as the non-moving party” with that of the moving party. (*Id.*)

Concord later repeats this argument: “Because [Concord’s] Motion concerns only

1 need not address the parties' remaining arguments.

2 **III. Stipulation to Seal**

3 The parties have stipulated to seal portions of Chase's Motion for Summary
4 Judgment and supporting statement of facts pertaining to a confidential settlement
5 agreement between Concord and Costamex regarding the Refund Checks. (Doc. 149).
6 The Court has not relied upon any of the sealed material in ruling on the parties' motions.
7 Moreover, for the reasons discussed earlier in this Order, the Court finds that the redacted
8 portion of Chase's Motion for Summary Judgment is sufficient to support an entry of
9 judgment for Chase. Accordingly, the Court will deny the stipulation.

10 **IV. Conclusion**

11 For the foregoing reasons,

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22 Concord's claim against Chase under A.R.S. § 47-4401, Chase's claim that one or more
23 Chase defenses preclude Concord's claim or limit Concord's damages is irrelevant.
24 Chase, as the non-moving party, has failed to meet its burden of coming forward with
25 evidence from which a jury could reasonably render a verdict in its favor on Concord's
claim against it." (*Id.* at 5) (emphasis in original).

26 Thus, under Concord's view of summary judgment, the moving party apparently
27 has the right to select which statutes are at issue and may prohibit the non-moving party
28 from raising relevant and dispositive legal authorities not mentioned in the moving
party's arguments. This is not the case. If Chase's defenses are valid, then Concord is not
entitled to judgment as a matter of law regardless of whether there is a genuine issue of
material fact. Chase's defenses are both relevant and dispositive of this case, and it is
Concord, not Chase, who errs in applying the summary judgment standard.

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IT IS ORDERED that Stipulated Motion for Leave to File Under Seal (Doc. 149) is denied. The lodged sealed filings (Docs. 150 and 151) are stricken but shall remain under seal. The Court has not considered the sealed filings (Docs. 150 and 151) in making its determination.

IT IS FURTHER ORDERED granting Defendant's Motion for Summary Judgment (Doc. 147).

IT IS FURTHER ORDERED denying Plaintiff's Motion for Partial Summary Judgment (Doc. 145).

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment for Defendant and terminate this case.

Dated this 24th day of June, 2014.



James A. Teilborg
Senior United States District Judge