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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Rachel Krupa,

10 Plaintiff,

11 v.

12 5 & Diner N 16th Street LLC, *et al.*,

13 Defendants.  
14

No. CV-20-00721-PHX-JJT

**ORDER**

15 At issue is Plaintiff and Counterdefendant Rachel Krupa’s Motion to Dismiss  
16 (Doc. 21, MTD) Defendant and Counterclaimant 5 & Diner N. 16<sup>th</sup> Street, LLC’s  
17 counterclaims (Doc. 11, Answer and Counterclaims), to which Defendant and  
18 Counterclaimant filed a Response (Doc. 31, Resp.). The Court finds the matter appropriate  
19 for decision without oral argument. *See* LRCiv 7.2(f). For the reasons below, the Court will  
20 grant Plaintiff’s Motion for lack of subject matter jurisdiction.

21 **I. BACKGROUND**

22 Plaintiff and Counterdefendant Rachel Krupa filed the Complaint against  
23 Defendants 5 & Diner N. 16th Street, LLC (“5 & Diner”), L.P.M. Holding Company, Inc.,  
24 and JY Foods, LLC, alleging violations of the Americans with Disabilities Act (“ADA”)  
25 (Doc. 1, Compl.). 42 U.S.C. 12101, *et seq.* 5 & Diner filed an Answer, which asserted state  
26 law counterclaims of Conversion, Breach of Duty of Loyalty, and Civil Conspiracy.  
27 Plaintiff moves to dismiss the counterclaims under Fed. R. Civ. P. 12(b)(1), arguing the  
28 Court lacks supplemental jurisdiction.

1 Plaintiff's Complaint alleges that all Defendants are responsible for the conduct at  
2 issue but only 5 & Diner asserted the state law counterclaims at issue; therefore, the Court's  
3 Order will discuss the allegations as they relate to 5 & Diner.

4 **A. Plaintiff and Counterdefendant Rachel Krupa's Allegations**

5 Plaintiff alleges that she started working for Defendant 5 & Diner in or about 2010  
6 and was either a director or manager throughout the entirety of her employment. (Compl.  
7 ¶¶ 11-12.) At all relevant times, Plaintiff had a disability that substantially limited a major  
8 life activity but was qualified to handle the essential responsibilities of her role. (Compl.  
9 ¶¶ 13-14.) In 2016, Plaintiff informed Defendant that her medical provider had suggested  
10 work restrictions due to her disability and requested reasonable accommodations pursuant  
11 to the ADA. (Compl. ¶¶ 15-16.) Plaintiff alleges that after she requested the  
12 accommodations, Defendant hired a non-disabled individual to replace her; however, this  
13 individual was subsequently terminated for gross misconduct in the workplace. (Compl.  
14 ¶¶ 18-20.) Defendant then demoted Plaintiff from Director to Manager and hired a different  
15 non-disabled employee as her replacement. (Compl. ¶¶ 21-22.)

16 Plaintiff alleges that in early August 2018, she injured herself at work and  
17 exacerbated her disability on or around September 18, 2018. (Compl. ¶¶ 23-24.) On  
18 September 26, 2018, Mr. Watson, 5 & Diner's owner, informed Plaintiff that he was  
19 terminating her employment due to her disability. (Compl. ¶¶ 26-27.) Defendant  
20 subsequently hired a non-disabled individual to replace Plaintiff. (Compl. ¶ 28.) Plaintiff  
21 alleges that Defendant's actions were discriminatory and retaliatory in violation of the  
22 ADA.

23 **B. Defendant and Counterclaimant 5 & Diner's Allegations**

24 Defendant alleges a different timeline for Plaintiff's employment with 5 & Diner. It  
25 alleges that Plaintiff worked as a server before being promoted twice, first to General  
26 Manager in 2004 and then to Regional Manager in November 2009. (Counterclaim ¶¶ 5-7.)  
27 5 & Diner then added multiple locations over the next two years; because of this growth,  
28 Defendant promoted Plaintiff to Director of Operations, putting her in charge of the

1 operations of multiple 5 & Diner locations. (Counterclaim ¶¶ 9-11.) In July 2018, 5 &  
2 Diner, which had already closed multiple locations for other reasons, decided to  
3 permanently close the Scottsdale location due to substantial fire damage. (Counterclaim  
4 ¶¶ 12-13.)

5 In September 2018, Defendant alleges that it asked Plaintiff to remove various items  
6 from the Scottsdale location, including a meat slicer, tables and chairs, cleaning chemicals,  
7 popcorn machine, jukeboxes, and other items that were previously used when the 5 & Diner  
8 Scottsdale location was open, to a storage unit owned by Defendant. (Counterclaim ¶¶ 14-15.)

9 On September 28, 2018, Defendant terminated Plaintiff's employment.  
10 (Counterclaim ¶ 17.) Subsequently, in October 2018, Defendant discovered that many of  
11 the items from the Scottsdale location were not in the storage locker. (Counterclaim ¶ 18.)

12 In January 2019, it was discovered that Plaintiff and her husband, Mark Krupa, were  
13 selling the items on a social media website. (Counterclaim ¶ 19.) Defendant sent a letter on  
14 January 8, 2019 to Plaintiff demanding that she return the items allegedly taken from the  
15 Scottsdale 5 & Diner, but Plaintiff did not return the requested items. (Counterclaim  
16 ¶¶ 20-21.) Defendant alleges that Plaintiff sold the items at issue. (Counterclaim ¶ 22.)

## 17 **II. LEGAL STANDARD**

18 "A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may  
19 attack either the allegations of the complaint as insufficient to confer upon the court subject  
20 matter jurisdiction, or the existence of subject matter jurisdiction in fact." *Renteria v.*  
21 *United States*, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006) (citing *Thornhill Publ'g Co. v.*  
22 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). "Where the jurisdictional  
23 issue is separable from the merits of the case, the [court] may consider the evidence  
24 presented with respect to the jurisdictional issue and rule on that issue, resolving factual  
25 disputes if necessary." *Thornhill*, 594 F.2d at 733; *see also Autery v. United States*,  
26 424 F.3d 944, 956 (9th Cir. 2005) ("With a 12(b)(1) motion, a court may weigh the  
27 evidence to determine whether it has jurisdiction."). The burden of proof is on the party  
28

1 asserting jurisdiction to show that the court has subject matter jurisdiction. *See Indus.*  
2 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990).

### 3 **III. ANALYSIS**

4 This Court has federal question jurisdiction over Plaintiff’s ADA claims under  
5 28 U.S.C. § 1331. Defendant does not allege either federal question or diversity jurisdiction  
6 for its three state law counterclaims; rather, it invokes this Court’s supplemental  
7 jurisdiction under 28 U.S.C. § 1367. (Resp. at 2.) Plaintiff moves to dismiss the  
8 counterclaims for lack of subject matter jurisdiction on two bases. First, she argues that the  
9 counterclaims do not form “part of the same case or controversy” for the purpose of  
10 § 1367(a). (MTD at 3–5.) In the alternative, Plaintiff argues that the Court should decline  
11 to exercise supplemental jurisdiction pursuant to § 1367(c)(4).<sup>1</sup> (MTD at 6.)

12 Under 28 U.S.C. § 1367, federal courts may, in specific instances, maintain  
13 supplemental jurisdiction over claims and counterclaims which have no other basis for  
14 jurisdiction in federal court. A court has jurisdiction over state law claims “that are so  
15 related to claims” brought under the Court’s federal question jurisdiction “that they form  
16 part of the same case or controversy under Article III.” 28 U.S.C. § 1367. In determining  
17 whether such a claim forms part of the same “case or controversy,” the Court must  
18 determine whether the federal claim and the state law claim arise from the same “common  
19 nucleus of operative fact.” *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir. 2005)  
20 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)); *Bahrapour v. Lampert*,  
21 356 F.3d 969, 978 (9th Cir. 2004).

22 Closely related to the Court’s jurisdictional limit under § 1367 is Federal Rule of  
23 Civil Procedure 13, which governs the process by which a defendant may allege  
24 counterclaims. A counterclaim may be compulsory or permissive. If a counterclaim “arises  
25 out of the transaction or occurrence that is the subject matter of the opposing party’s claim,”  
26 it is compulsory and must be raised in response to the opposing party’s claim unless an

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28 <sup>1</sup> Because the Court finds it lacks supplemental jurisdiction under § 1376(a), it declines to  
address Plaintiff’s contention that there are “other compelling reasons for declining  
jurisdiction” under § 1376(c)(4).

1 exception applies. Fed. R. Civ. P. 13(a). Thus, under Rule 13(a), a court must consider  
2 whether “the essential facts of the various claims are so logically connected that  
3 considerations of judicial economy and fairness dictate that all the issues be resolved in  
4 one lawsuit.” *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987).  
5 All other counterclaims are permissive and need not be raised in the same lawsuit.<sup>2</sup> Fed. R.  
6 Civ. P. 13(b).

7 Prior to the passage of § 1367, courts relied on the distinction between compulsory  
8 and permissive counterclaims to determine whether jurisdiction over a counterclaim was  
9 proper absent an independent basis for subject matter jurisdiction. *See Sparrow v. Mazda*  
10 *Am. Credit*, 385 F. Supp. 2d 1063, 1066 (E.D. Cal. 2005) (collecting cases). Although  
11 § 1367 now governs the limits on supplemental jurisdiction, the distinction between  
12 permissive and compulsory counterclaims still proves useful. For example, if a  
13 counterclaim is compulsory, the Court has supplemental jurisdiction because a  
14 counterclaim “which arises out of the same transaction or occurrence” as the plaintiff’s  
15 claim also necessarily arises from the same “common nucleus of operative fact.” *See id.* at  
16 1067 (“The § 1367 test for supplemental jurisdiction is broader than the test for compulsory  
17 counterclaims . . .”). However, because the test for supplemental jurisdiction is broader  
18 than the test under Rule 13(a), a counterclaim arising from a different transaction or  
19 occurrence may still arise from a “common nucleus of operative fact,” thus satisfying the  
20 test for jurisdiction under § 1367. *See id.*; *see also Rothman v. Emory Univ.*, 123 F.3d 446,  
21 454 (7th Cir. 1997); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212–13 (2d Cir. 2004).

22 Here, the Court does not have supplemental jurisdiction under § 1367(a) because  
23 the Plaintiff’s ADA claims and Defendant’s state law counterclaims do not arise from a  
24 “common nucleus of operative fact.” *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th  
25 Cir. 2005) Plaintiff’s ADA claims depend on her proving that Defendant terminated her  
26 employment due to her disability, whereas Defendant’s state law counterclaims turn on  
27 whether it can prove that Plaintiff unlawfully took possession of equipment at the

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28 <sup>2</sup> Thus, a permissive counterclaim is one which does not arise out of the same transaction  
or occurrence that is the subject matter of the opposing party’s claim.

1 Scottsdale 5 & Diner. Importantly, Defendant was unaware of Plaintiff’s alleged  
2 conversion of the 5 & Diner equipment when it decided to terminate her employment and  
3 thus the alleged conversion played no role in its decision. (Counterclaim ¶¶ 17-18.) The  
4 only commonality between Plaintiff’s claims and Defendant’s counterclaims is that they  
5 both relate to Plaintiff’s employment with Defendant. Multiple courts have held that  
6 employment alone is insufficient to confer supplemental jurisdiction on state law claims.  
7 *See, e.g., Poehler v. Fenwick*, No. 15-cv-01161-JWS, 2015 WL 7299804, at \*2 (D. Ariz.  
8 Nov. 19, 2015) (finding the “existence of an employment relationship” alone insufficient  
9 to establish supplemental jurisdiction); *Shearon v. Comfort Tech Mech. Co.*, 2014 WL  
10 1330751, at \*3 (E.D.N.Y Mar. 31, 2014) (“the only discernible factual connection or  
11 overlap between Plaintiff’s federal ADA claim and state-law fraud claim is the background  
12 circumstance of Plaintiff’s employment relationship. . . . This bare link does not establish  
13 supplemental jurisdiction.”)

14 Defendant contends that beyond Plaintiff’s employment with 5 & Diner, there are  
15 further overlapping facts. First, Defendant argues that Plaintiff’s responsibilities as  
16 Director of Operations put her in position to allegedly convert Defendant’s equipment.  
17 While this argument focuses on Plaintiff’s responsibilities as an employee as the common  
18 link, rather than just the existence of the employment relationship, it has similar problems.  
19 Plaintiff’s specific responsibilities as Director of Operations are not operative facts in either  
20 of the parties’ claims.<sup>3</sup> Defendant also contends that the fire and subsequent closure of the  
21 Scottsdale 5 & Diner are overlapping operative facts between Plaintiff’s claims and  
22 Defendant’s counterclaims because these events were the bases for Plaintiff’s termination  
23 as well as the reason that she needed to remove the equipment from the Scottsdale location.  
24 Defendant appears to argue that a potential affirmative defense – 5 & Diner had valid  
25 reasons to terminate Plaintiff’s employment due to the decreasing number of restaurants –

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27 <sup>3</sup> Defendant may argue that Plaintiff’s responsibilities as Director of Operations are  
28 operative facts in its breach of duty of loyalty claim because Plaintiff owed Defendant a  
duty of loyalty in this role. However, the breach of duty of loyalty claim ultimately turns  
on whether Plaintiff illegally took control of and refused to return the 5 & Diner equipment.  
(Counterclaim ¶ 28.)

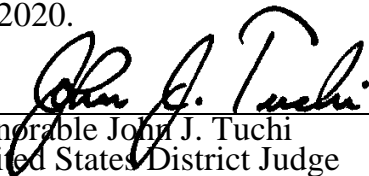
1 overlaps with the circumstances that put Plaintiff in a position to commit the alleged  
2 conversion. This is insufficient to confer supplemental jurisdiction; Plaintiff's assignment  
3 to remove equipment because of the fire is tangential to the operative facts of Defendant's  
4 counterclaims.

5 Even if sufficient overlap existed between the operative facts of Defendant's  
6 affirmative defense and its counterclaims, it would not dictate that the Court exercise  
7 supplemental jurisdiction. While courts have held that supplemental jurisdiction exists due  
8 to the overlap of affirmative defenses and counterclaims, *see e.g. Coleman v. Dish Network*  
9 *LLC*, 2017 WL 6888289 at \*4-5 (C.D. Cal. Nov. 22, 2017), many others have declined to  
10 confer jurisdiction on this basis. *See e.g. Ader v. SimonMed Imaging Inc.*, 324 F. Supp. 3d  
11 1045, 1051-52 (D. Ariz. 2018);<sup>4</sup> *Lawrence & Assocs., Inc. v. Amdocs Champaign, Inc.*,  
12 2007 WL 390732, at \*3 (E.D. Mo. Jan. 31, 2007) ("the issue is whether the counterclaims  
13 and the claims, not the potential affirmative defenses to those claims, are so related as to  
14 form the same case or controversy.") Importantly, Fed. R. Civ. P. 13 and § 1367 do not  
15 discuss the relationship between claims and an affirmative defense as a basis for  
16 supplemental jurisdiction.

17 For these reasons, the Court will grant Plaintiff's Motion to Dismiss Defendant's  
18 state law counterclaims for lack of subject matter jurisdiction.

19 **IT IS ORDERED** granting Plaintiff's Motion to Dismiss (Doc. 21) and dismissing  
20 5 & Diner's counterclaims for lack of subject matter jurisdiction.

21 Dated this 28th day of December, 2020.

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23 \_\_\_\_\_  
24 Honorable John J. Tuchi  
25 United States District Judge

26 <sup>4</sup> The *Ader* and *Poehler* courts held there are unique reasons to decline to exercise  
27 supplemental jurisdiction over state law counterclaims in FLSA cases, which Defendant  
28 correctly notes are absent from cases brought under the ADA. However, these reasons  
were only relevant to the courts' discussions of "other compelling reasons for declining  
jurisdiction" based on 1376(c)(4). *Poehler*, 2015 WL 7299804 at \*2; *Ader*, 324 F. Supp. at  
1052 n. 3. The courts' reasoning for declining to exercise supplemental jurisdiction under  
§ 1367(a) is analogous and relevant here.