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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

15 PASKENTA BAND OF NOMLAKI
16 INDIANS, et al.,

17 Plaintiffs,

18 v.

19 INES CROSBY, et al.,

20 Defendants.

Case No. 2:15-cv-00538-GEB-CMK

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS ROBERT M. HANESS AND
HANESS & ASSOCIATES, LLC'S
MOTION TO DISMISS [FED. R. CIV. P.
12(b)(6)]**

Date: July 27, 2015
Time: 9:00
Judge: Hon. Garland E. Burrell, Jr.
Courtroom: 10, 13th Floor

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1 Defendants Robert M. Hanes and Hanes & Associates, LLC (together, “Hanes”) hereby
2 move to dismiss the claims brought by Plaintiffs Paskenta Band of Nomlaki Indians and Paskenta
3 Enterprises Corporation’s (together, “the Tribe”) contained in the Tribe’s First Amended
4 Complaint (“Complaint”) in their entirety and without leave to amend.

5 **I. INTRODUCTION**

6 Pursuant to a verbal agreement with Associated Pension Consultants, Inc. (“APC”), Mr.
7 Hanes provided his services as an actuary to APC on a flat-fee basis in his capacity as the
8 principal and owner of Hanes & Associates, LLC. APC administered the Tribal Pension Plan¹
9 benefitting Defendants Ines Crosby, John Crosby, Leslie Lohse, Larry Lohse (the “RICO
10 Ringleaders”), and Sherry Meyers.² As the actuary for the Tribal Pension Plan, Hanes
11 performed a single task: certifying that enough contributions were made to the Plan to meet the
12 minimum funding requirements for that year. The Tax Code requires that an actuary sign a
13 schedule B form certifying that the plan does not have a funding deficiency. Schedule B does not
14 require an actuary to consider whether the plan has been overfunded, the reasonableness of the
15 salaries or benefits paid to the plan participants, or certify any other information about the plan.
16 Hanes provided this service not only for the Tribal Pension Plan, but for roughly 200 other
17 retirement benefits plans administered by APC.

18 Prior to Hanes receiving any information about the Tribal Pension Plan, or even learning
19 about the existence of this Plan, the five beneficiaries, or the Tribe, numerous steps were taken to
20 draft, set up, and administer the Plan. The Tribal Pension Plan was proposed allegedly by Moore.
21 The RICO Ringleaders then enlisted the services of an administrator—APC. APC then designed
22 the plan, based on information provided by the RICO Ringleaders. The information that an
23 administrator needs to design a plan typically includes the employees’ ages and incomes, and the
24 desired benefits levels. After designing the Plan, APC then provided the proposed plan to the
25 employer—here, the five beneficiaries. Once the proposal was approved, plan documents were
26

27 ¹ The pension plan (“Tribal Pension Plan” or “Plan”) and 401(k) (“Tribal 401(k)”) at issue are
referred to together as the “Tribal Retirement Plans.”

28 ² Together, these five Defendants are referred to as the “five beneficiaries.”

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1 created—a step also performed by APC. After signing the plan documents, the Tribal Pension
2 Plan existed and contribution could be made into the plan. APC then provided a valuation,
3 informing the plan beneficiaries about the minimum and maximum amounts that can be paid into
4 the plan for the year. Each of these steps was taken without Hanes's knowledge or involvement.

5 Hanes first learned about the Tribal Pension when APC requested that Hanes provide
6 Schedule B certification for the Plan after the first plan year was completed. The Schedule B was
7 required for the Plan to file a tax return. Hanes received only three pieces of information to
8 make this certification: a census, provided by APC and certified by the Plan trustees; the
9 valuation performed by APC; and the Plan provisions. The census for this Plan, as with any other
10 plan, certifies that the number of employees in the Plan is correct, and states their ages, incomes,
11 and benefits level. Upon certifying that the plan was sufficiently funded, based on the census, the
12 valuation, and the plan provisions, Hanes certified that the Plan was sufficiently funded and sent
13 the information and the Schedule B certification back to APC. When the Plan terminated in
14 2009, APC asked Hanes to prepare documents, based on information provided by APC, and that
15 APC would give to Plan participants as part of the final distribution.

16 In short, the entirety of Hanes's relationship with, and knowledge of, the RICO
17 Ringleaders consists solely of the limited information provided to Hanes by APC during the time
18 Hanes rendered actuarial services for APC. Hanes's relationship with, and knowledge of, the
19 Tribe is utterly nonexistent. Hanes has never met with the beneficiaries of the Plan. Indeed,
20 Hanes has never seen or spoken to the five beneficiaries. Hanes's sole responsibility, as actuary
21 for the Plan, was to ensure that the level of contributions into the Plan adequately funded the Plan
22 for that year. Hanes had no knowledge, or even reason to suspect, that the RICO Ringleaders
23 were engaged in fraudulent or unfair dealings the Tribe. Indeed, Hanes did not know other
24 members of the Tribe *existed* outside of the Plan's five beneficiaries because the certified census
25 did not reflect the existence of any other employees.

26 Despite this complete lack of knowledge regarding both the RICO Ringleaders and the
27 Tribe, the Tribe brings claims against Hanes for negligence, breach of fiduciary duty of
28 undivided loyalty, breach of fiduciary duty of reasonable care, aiding and abetting conversion and

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1 breaches of fiduciary duty by other defendants, and restitution based on Hanes's supposed duties
2 to the Tribe. But neither the conclusory and formulaic allegations in the Complaint nor the law
3 provide support for these claims. Accordingly, the Tribe's claims against Hanes should be
4 dismissed without leave to amend for failure to state a claim upon which relief can be granted.

5 **II. RELEVANT FACTUAL ALLEGATIONS**³

6 The Tribal Pension Plan, established in 2003, had only five participants: the RICO
7 Ringleaders and Sherry Myers. (ECF No. 30 at 60.) The Tribe claims that Hanes, in its capacity
8 as actuary for the Tribal Pension Plans, assisted the RICO Ringleaders in siphoning millions of
9 dollars from the Tribe for their personal benefit. (ECF No. 30 at 18.) The Tribe makes
10 generalized and conclusory allegations that Hanes helped set up and administer the Tribal
11 Retirement Plans to assist the RICO Ringleaders' theft and fraud. (ECF No. 30 at 61-61.) But
12 the Complaint also specifically alleges that Moore came up with the idea of installing the Tribal
13 Pension Plan to benefit the RICO Ringleaders, and that Moore and APC helped establish the
14 Tribal Retirement Plans. (ECF No. 30 at 60, 61.) The Complaint further alleges that the RICO
15 Ringleaders routinely consulted Moore and APC about the Tribal Retirement Plans. (ECF No. 30
16 at 61.) Later, according to the Complaint, Moore and APC set up and administered the Tribal
17 401(k). (ECF No. 30 at 66.)

18 According to the Tribe, certain factors indicated that the Tribal Retirement Plan's purpose
19 was to benefit the RICO Ringleaders and harm the Tribe. (See, e.g., ECF No. 30 at 64.) These
20 include "employing an extraordinarily high retirement benefit goal in the plan's actuarial
21 formula"; "setting vesting and expected retirement age in the Tribal Pension Plan in a manner
22

23 ³ In a complaint numbering over 200 pages, the Tribe makes detailed factual allegations against
24 the RICO Ringleaders, claiming that they conspired to steal millions of dollars from the Tribe
25 through numerous illegal tactics, including siphoning money from bank accounts and through the
26 Tribal Retirement Plans. Yet these 200 pages contain only very limited factual allegations against
27 Hanes, the majority of which are conclusory and formulaic, presenting no actual facts.
28 Significantly, those few allegations that are made against Hanes lump together five Defendants:
Hanes (itself two Defendants), Garth Moore and Garth Moore Insurance and Financial Services,
Inc. (together "Moore"), and APC. The Complaint refers to this group as the Abettor Defendants.
In the interest of brevity, Hanes provides the following summary of the allegations against
Hanes.

1 extraordinarily favorable to RICO Ringleader Ines Crosby”; “causing the early termination of the
2 Tribal Pension Plan immediately after it was fully funded for RICO Ringleader Ines Crosby”; and
3 “structuring and administering the Tribal 401(k) with the overriding purpose of maximizing the
4 benefits for the RICO Ringleaders.” (ECF No. 30 at 63-66). The Tribe alleges that as a
5 “retirement professional,” Hanes “knew” these factors indicated the Tribal Retirement Plans’
6 purpose to benefit the five beneficiaries at the Tribe’s expense. (See, e.g., ECF No. 30 at 64.)
7 The Tribe therefore claims that it lost over \$4 million to the pockets of the five beneficiaries due
8 to the Tribal Retirement Plans. (ECF No. 30 at 59.)

9 motion to dismiss standard

10 Federal Rule of Civil Procedure 8(a)(2) requires a party’s pleading to contain “a short and
11 plain statement of the claim showing that the pleader is entitled to relief.” Kearns v. Ford Motor
12 Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting Fed. R. Civ. P. 8(a)(2)). Thus, to survive a
13 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead “enough
14 facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550
15 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009). Claims for relief are
16 plausible only when the plaintiff alleges facts sufficient to “allow[] the court to draw the
17 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at
18 663. Factual allegations need not be detailed in most cases, but “must be enough to raise a right
19 to relief above the speculative level.” Twombly, 550 U.S. at 555. “While legal conclusions can
20 provide the framework of a complaint,’ neither legal conclusions nor conclusory statements are
21 themselves sufficient, and such statements are not entitled to a presumption of truth.” Falcocchia
22 v. Saxon Mortg., Inc., 709 F. Supp. 2d 860, 865 (E.D. Cal. 2010) (quoting Iqbal, 556 U.S. at
23 664).

24 Accordingly, the law prescribes a two-step process for evaluation of whether claims are
25 properly pled. “The Court first identifies the non-conclusory factual allegations, and the court
26 then determines whether these allegations, taken as true and construed in the light most favorable
27 to the plaintiff, ‘plausibly give rise to an entitlement to relief.’” Baldain v. Am. Home Mortg.
28 Serv., Inc., No. 2:09-cv-00931-LKK-GGH, 2010 WL 56143, *7 (E.D. Cal. Jan. 5, 2010) (quoting

1 Iqbal, 556 U.S. at 664). The Court should dismiss the claim if it contains only “[m]ere
2 conclusory statements,” “naked assertions,” or a formulaic recitation of the elements of a claim.
3 Iqbal, 556 U.S. at 663 (citing Twombly, 550 U.S. at 555).

4 **III. LEGAL ARGUMENT**

5 For the reasons set forth below, each of the Tribe’s claims against Hanes fails to state a
6 claim upon which relief can be granted and should therefore be dismissed.

7 **A. The Tribe Fails to State Claims for Breach of Fiduciary Duties Against Hanes**

8 The Tribe fails to state a prima facie case against Hanes for breach of fiduciary duties to
9 the Tribe because Hanes owes the Tribe no fiduciary duties. “The elements of a cause of action
10 for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage
11 proximately caused by that breach.” Knox v. Dean, 205 Cal. App. 4th 417, 432 (2012) (citing
12 City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 483
13 (1998)).

14 Here, Hanes has no fiduciary duty to the Tribe under California law for three distinct
15 reasons. First, California courts recognize that “[a] fiduciary relationship is any relation existing
16 between parties to a transaction wherein one of the parties is duty bound to act with the utmost
17 good faith for the benefit of the other party.” Wolf v. Superior Court, 107 Cal. App. 4th 25, 29
18 (2003), as modified on denial of reh’g (Mar. 20, 2003) (citing Herbert v. Lankershim, 9 Cal. 2d
19 409, 483 (1937); In re Marriage of Varner, 55 Cal. App. 4th 128, 141 (1997); Rickel v. Schwinn
20 Bicycle Co., 144 Cal. App. 3d 648, 654 (1983)). “A fiduciary relationship ordinarily arises where
21 a confidence is reposed by one person in the integrity of another, and in such a relation the party
22 in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence,
23 can take no advantage from his acts relating to the interest of the other party without the latter's
24 knowledge or consent” Id. In short, “[t]he essence of a fiduciary or confidential relationship
25 is that the parties do not deal on equal terms, because the person in whom trust and confidence is
26 reposed and who accepts that trust and confidence is in a superior position to exert unique
27 influence over the dependent party.” Beery v. State Bar, 43 Cal. 3d 802, 813 (1987) (citing
28 Barbara A. v. John G., 145 Cal. App. 3d 369, 383 (1983)). The traditional examples of fiduciary

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1 relationships—“trustee/beneficiary, directors and majority shareholders of a corporation, business
2 partners, joint adventurers, and agent/principal”—underscore these principles. Wolf, 107 Cal.
3 App. 4th at 30 (citations omitted).

4 Here, there is no fiduciary relationship because Tribe and Hanes are not “parties to a
5 transaction” and the Tribe reposed no confidence in Hanes. See Wolf, 107 Cal. App. 4th at 29.
6 Indeed, because the Tribe is not a beneficiary of the Tribal Retirement Plans, Hanes and the
7 Tribe did not “deal” with each other at all. See Beery, 43 Cal. 3d at 813. Hanes “dealt” only
8 with his client, APC, and only entered into a “transaction” with APC. Hanes’s relationship with
9 APC is entirely typical of the actuary-administrator relationship. The Ninth Circuit has
10 recognized as much, holding that retirement plan beneficiaries are third parties to an actuary’s
11 contract with a plan administrator. Paulsen v. CNF Inc., 559 F.3d 1061, 1079, 1083 (9th Cir.
12 2009). Conversely, an actuary is a third party to the relationships between the plan, the plan
13 administrator, and the plan participants and trustees. See id. at 1083. Thus, not only is the Tribe
14 a third party to Hanes’s contract with APC, it is also a third party to any relationship Hanes
15 possibly had with the five beneficiaries arising from their status as the third party beneficiaries of
16 Hanes’s contract with APC. Hanes quite obviously did not fulfill a role akin to a lawyer,
17 trustee, director, or business partner for the Tribe. None of the hallmarks of a fiduciary
18 relationship are present here. Because the Tribe was neither a party to Hanes’s contract with
19 APC, nor a third-party beneficiary of that contract, Hanes and the Tribe have no relationship
20 whatsoever.

21 Second, and relatedly, Hanes cannot have fiduciary relationship with the Tribe because
22 the Tribe does not, and cannot, allege that Hanes “*knowingly* undert[ook] to act on behalf and for
23 the benefit of” the Tribe. Comm. on Children’s Tele., Inc. v. Gen. Foods Corp., 35 Cal. 3d 197,
24 221 (1983), superseded by statute on another ground as stated in Californians for Disability
25 Rights v. Mervyn’s, LLC, 39 Cal. 4th 223, 228 (2006) (emphasis added). Logically, because
26 Hanes did not enter a transaction with the Tribe and had no relationship with the Tribe, Hanes
27 cannot have knowingly “undertaken to act on behalf and for the benefit of” the Tribe. Id. The
28 Complaint does not contain a single allegation showing that Hanes undertook to act either on the

1 Tribe's behalf or for the Tribe's benefit. The allegations about the actions that the Moore,
 2 Hanes, and APC undertook for the Tribal Retirement Plans and the five beneficiaries are
 3 irrelevant to this analysis, as those allegations do not show that *anyone* undertook to act on behalf
 4 of the Tribe, rather than on behalf of the Tribal Pension Plan or the five beneficiaries.

5 Even if the Court does find that the actions allegedly undertaken to set up and administer
 6 the Plan for the five beneficiaries are relevant, these allegations are still insufficient to establish
 7 that Hanes knowingly undertook actions on the Tribe's behalf. In fact, these allegations
 8 pointedly exclude Hanes and make clear that only Moore and APC—not Hanes—knowingly
 9 undertook to act on the five beneficiaries' behalf. For example, the Complaint alleges that Moore
 10 and APC worked with the RICO Ringleaders to set up the Tribal Pension Plan and provided
 11 "advice and direction" in doing so. (ECF No. 30 at 61.) The Complaint also alleges that the
 12 RICO Ringleaders "routinely consulted" with Moore and APC, and that Moore "came up with the
 13 idea to install retirement plans for the RICO Ringleaders." (ECF No. 30 at 61.) With regard to
 14 the Tribal 401(k), the Complaint does not allege involvement by Hanes at all. (ECF No. 30 at
 15 66-67.) These allegations starkly contrast with the allegations against Hanes and demonstrate
 16 Hanes's distinct *lack* of knowledge in performing actuarial services as part of a contract with
 17 APC. Thus, not only did Hanes do *nothing* to undertake acts on the Tribe's behalf, he also did
 18 absolutely nothing on behalf of the five beneficiaries—*only* Moore and APC did.⁴ Hanes
 19 undertook to act only as an actuary pursuant to its contract with APC, on behalf of its client APC,
 20 and did so only long after the plan was created and implemented.

21 Third, the Complaint contains not a single allegation showing that Hanes and the Tribe
 22 "enter[ed] into a relationship which imposes that undertaking as a matter of law." Comm. on
 23 Children's Tele., 35 Cal. 3d at 221. Not only does the Complaint reveal that Hanes and the Tribe
 24 *never* entered into any relationship whatsoever, the law does not give ERISA retirement plan
 25 actuaries any fiduciary duty to plan beneficiaries, let alone to third parties to the plan. "An
 26

27 ⁴ To the extent this Court finds that the Complaint successfully alleges that Moore and APC *did*
 28 undertake to act on behalf of the Tribe through these actions, these allegations make clear that
 Hanes, who remained completely apart from these actions, did not.

1 ERISA fiduciary includes anyone who exercises discretionary authority over the plan's
 2 management, anyone who exercises authority over the management of its assets, and anyone
 3 having discretionary authority or responsibility in the plan's administration.” Mertens v. Hewitt
 4 Assocs., 948 F.2d 607, 610 (9th Cir. 1991) aff'd, 508 U.S. 248 (1993) (citing 29 U.S.C. §
 5 1002(21)(A); Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625
 6 (9th Cir. 1987)). In general, ERISA does not regulate the relationship between an actuary and the
 7 beneficiaries of the plan, and “[a] party ‘rendering professional services to a plan *is not a*
 8 *fiduciary* so long as he does not exercise any authority over the plan in a manner other than by
 9 usual professional functions.’” Id. (quoting Nieto v. Ecker, 845 F.2d 868, 870 (9th Cir. 1988))
 10 (emphasis added). Thus, “[p]rofessional service providers such as actuaries become liable for
 11 damages when they cross the line from advisor to fiduciary.” Santomenno v. Transamerica Life
 12 Ins. Co., 2013 WL 603901, *5 (C.D. Cal. Feb. 19, 2013) (quoting Mertens, 508 U.S. at 262).

13 Here, the Complaint is devoid of allegations even suggesting that Hanes crossed this line.
 14 The Complaint alleges that Hanes rendered professional services to the Tribal Pension Plan as an
 15 actuary. It does not allege that Hanes exercised discretion over the Plan, or authority outside of
 16 its professional obligations, in any manner whatsoever. (ECF No. 30 at 18, 59-68.) And,
 17 importantly, even if Hanes did cross that line, its exercise of discretion and authority would
 18 create a fiduciary duty only to the five beneficiaries—not to the Tribe. Hanes is aware of no
 19 case creating a fiduciary duty under ERISA, or any other law, between an actuary for a retirement
 20 plan and third parties to the retirement plan.

21 Accordingly, the Tribe fails to state claims for breach of fiduciary duties upon which relief
 22 can be granted and these claims should be dismissed without leave to amend.

23 **B. The Tribe Fails to State a Claim for Negligence Against Hanes.**

24 The Tribe’s negligence claim against Hanes suffers from essentially the same flaw as the
 25 claims for breach of fiduciary duty: Hanes owed the Tribe no duty. “Under California law,
 26 ‘[t]he threshold element of a cause of action for negligence is the existence of a duty to use due
 27 care toward the interest of another that enjoys legal protection against unintentional invasion.’”
 28 Paulsen, 559 F.3d at 1077 (citing Bily v. Arthur Young & Co., 3 Cal. 4th 370 (1992)). “Whether

1 a duty of ordinary care exists is a question of law.” Id. (citing Glenn K. Jackson Inc. v. Roe, 273
2 F.3d 1192, 1196-97 (9th Cir. 2001)).

3 Paulsen addressed whether actuaries owe a general duty of care and discussed this issue at
4 length. There, plan participants brought a negligence claim against the firm that provided
5 actuarial services for the plan. Id. The Ninth Circuit explained that a general duty of due care,
6 “giving rise to [a] negligence claim[,] runs from a third-party actuary, i.e., a non-fiduciary service
7 provider, to the plan participants as intended third party beneficiaries *of the actuary's service*
8 *contract.*” Id. at 1083. The court also explicitly held that that an actuary “does not generally owe
9 a duty of ordinary care to the” employees who received benefits under the plan for which the
10 actuary provided services, because they were not the actuary’s clients. Id. at 1080. Paulsen thus
11 makes clear that Hanes did not generally owe a duty of care even to the Plan’s five beneficiaries,
12 as they were not Hanes’s client. Instead, Hanes’s client was APC and Hanes owed only APC a
13 general duty of care.

14 Paulsen left open the possibility that an actuary may owe a duty of care to the third party
15 beneficiaries of the actuary’s contract with the plan administrator. Id. Those third parties are, of
16 course, the plan participants. Here, however, the only participants in the Tribal Pension Plan
17 were the RICO Ringleaders and Defendant Myers. Thus, under Paulsen, if Hanes owed a duty
18 of care to *any* third parties, it would be a duty to the five beneficiaries.⁵ Moreover, this duty
19 could only be imposed after a determination that the RICO Ringleaders and Defendant Myers
20 were third party beneficiaries of Hanes and APC’s contract—this duty is not imposed
21 automatically.

22 But Paulsen does not hold, or even suggest, that an actuary may owe a duty to individuals
23 with no interest in a plan and who received no benefits from the plan. Indeed, Hanes had not
24 found any case imposing a duty of care in this situation. Actuaries would need to determine
25 whether all individuals who could receive benefits under a retirement plan actually were receiving
26 benefits, and engage in a full-blown investigation of the organization or employer that set up the

27 _____
28 ⁵ The Complaint does not contain sufficient factual allegations to show that Hanes owed these five individuals a general duty of care either.

1 plan. This type of thorough investigation is far outside the realm of the narrow duties an actuary
 2 has: to determine whether the contributions to a plan meet the minimum funding requirements
 3 such that the plan is adequately funded for the plan year. Accordingly, the Ninth Circuit
 4 recognized in Paulsen that “imposing such a duty could lead to potential liability for an actuary
 5 that is far out of proportion with its fault.” 559 F.3d at 1078. Additionally, imposing “a duty of
 6 ordinary care . . . would have the probable effect of decreasing the availability of actuarial
 7 services; increasing the cost of actuarial services generally; increasing clients’ indemnification
 8 obligations to retained actuaries; and increasing insurance costs for both actuaries and clients.”
 9 Id. Together, “[t]hese factors weigh against the probability that increased liability exposure
 10 would increase the accuracy of actuarial services, especially when such services do not involve
 11 precise, verifiable science,” id., and mandate against imposing a duty of care in this situation.

12 Accordingly, the Tribe fails to state a claim for negligence against Hanes, and the Court
 13 should dismiss this claim without leave to amend.

14 **C. The Tribe Fails to State a Claim Against Hanes for Aiding and Abetting Conversion**
 15 **and Breaches of Fiduciary Duty by the Rico Ringleaders and Defendant Myers.**

16 “A defendant is liable for aiding and abetting another in the commission of an intentional
 17 tort, including a breach of fiduciary duty if the defendant ‘knows the other’s conduct constitutes a
 18 breach of duty and gives substantial assistance or encouragement to the other to so act.’” Nasrawi
 19 v. Buck Consultants LLC, 231 Cal. App. 4th 328, 343 (2014), review denied (Feb. 25, 2015)
 20 (citing Casey v. U.S. Bank Nat’l Ass’n, 127 Cal. App. 4th 1138, 1144 (2005)). “The elements of
 21 a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party’s breach of
 22 fiduciary duties owed to plaintiff; (2) defendant’s actual knowledge of that breach of fiduciary
 23 duties; (3) substantial assistance or encouragement by defendant to the third party’s breach; and
 24 (4) defendant’s conduct was a substantial factor in causing harm to plaintiff.” Id. (citations
 25 omitted). Because conversion is an intentional tort, the same analysis applies. See Impac
 26 Warehouse Lending Grp. v. Credit Suisse First Boston LLC, 270 Fed. App’x 570, *572 (9th Cir.
 27 2008) (unpublished opinion) (citing Neilson v. Union Bank of Cal., 290 F. Supp. 2d 1101, 1118
 28 (C.D. Cal. 2003)).

1 The Tribe’s allegations against Hanes consist primarily of conclusory and formulaic
 2 recitations of the elements of this cause of action. Stripping away these allegations reveals that
 3 the Tribe fails to adequately plead even the first element—that Hanes had actual knowledge of
 4 the RICO Defendants⁶ alleged breaches of their fiduciary duties to the Tribe.⁷ “California law
 5 requires that a defendant have actual knowledge of tortious activity before it can be held liable as
 6 an aider and abettor, and federal courts have found that the phrase ‘knew or should have known’
 7 does not plead actual knowledge.” Gonzales v. Lloyds TSB Bank, PLC, 532 F. Supp. 2d 1200,
 8 1206 (C.D. Cal. 2006) (citing Neilson, 290 F. Supp. 2d at 1118-19). This standard has also been
 9 described as requiring “that the defendant have *actual knowledge* of the *specific primary wrong*
 10 the defendant substantially assisted” or that “the complaint must allege the defendant’s actual
 11 knowledge of the specific breach of . . . duty for which it seeks to hold the defendant liable.”
 12 Simi Mgmt. Corp. v. Bank of Am. Corp., No. C-11-05573-DMR, 2012 WL 259865 (N.D. Cal.
 13 Jan. 27, 2012) (quoting In re First Alliance Mortg. Co., 471 F.3d 977, 993 (9th Cir. 2006); Casey,
 14 127 Cal. App. 4th at 1151 (emphasis in original)). Additionally, aiding and abetting “necessarily
 15 requires a defendant to reach a conscious decision to participate in tortious activity for the
 16 purpose of assisting another in performing a wrongful act.” Howard v. Superior Court, 2 Cal.
 17 App. 4th 745, 749 (1992).

18 The allegations in the Complaint addressing Hanes’s actual knowledge of the RICO
 19 Defendants intentional torts are as follows:

- 20 • “Abettor Defendants Moore, Hanes and APC substantially assisted the RICO
 21 Defendants in unlawfully misappropriating Tribal money through this means, and
 22 did so with the requisite knowledge and/or in violation of their independent duties
 23 to the Tribe.” (ECF No. 30 at 60.)

24 _____
 25 ⁶ Along with the RICO Ringleaders, the “RICO Defendants” include Defendants Ted Pata, Juan
 26 “Jon” Pata, Chris Pata, Sherry Myers, and Frank James—all individuals with whom, according to
 27 the Complaint, Hanes has never had contact, and the majority of whom, according to the
 28 Complaint, were not beneficiaries of the Plan.

⁷ Should this Court find that the Tribe fails to state a claim against the RICO Ringleaders and
 Defendant Myers for breach of their fiduciary obligations and/or conversion, the Tribe’s claim
 against Hanes for aiding and abetting that conduct necessarily fails.

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- “Abettor Defendants Moore, Hanes and APC set up and/or administered the Tribal Retirement Plans knowing that the RICO Defendants intended to, and did, use them to convert moneys of the Tribe, cause the Tribe to pay themselves grossly excessive and unauthorized compensation, and/or violate their fiduciary duties to the Tribe, and substantially assisted them in this effort.” (Id. at 60-61.)
- “Several factors are indicative of the fraudulent nature of the Tribal Retirement Plans and the substantial assistance in accomplishing this fraud knowingly provided by Abettor Defendants Moore, Hanes and APC, or at least provided in violation of their duties to the Tribe.” (Id. at 61.)
- Hanes, Moore, and APC “knowingly assisted the RICO Ringleaders set up and administer the Tribal Retirement Plans in a way that excluded participation of any member of the Tribal Council” other than the five beneficiaries, which Moore, Hanes, and APC “knew” was “improper.” (Id. at 62.)
- That the Tribal Pension Plan “was shut down after only five years because it was never intended to be a long-term bona fide retirement plan for the benefit of all present and future employees of the Tribe; rather it was intended to do exactly what it did, provide a means to quickly divert huge sums of Tribal money into the pockets of the RICO Ringleaders. Abettor Defendants Moore, Hanes, and APC knew this” (Id. at 64.)
- “[T]he RICO Ringleaders structured [the Tribal Pension Plan]” to “impose a tremendous cash drain on the contributing employer. . . . Abettor Defendants Moore, Hanes, and APC knew this and assisted in its accomplishment.” (Id. at 65.)
- “Like any good thieves, [the RICO Ringleaders] understood getting away from the scene of the crime with the stolen money is the most important part of the theft. Defendants Moore, Hanes, and APC were aware of this purpose and assisted in the early termination of the Tribal Pension plan at the RICO Ringleaders’ instructions and for their benefit.” (ECF No. 30 at 66.)

1 Other allegations relate to Hanes “knowingly” disregarding its alleged duties to the Tribe,
 2 or “knowing” the requirements and permissible purposes of ERISA plans. (See ECF No. 30 at
 3 61-62.) All of these allegations amount to nothing more than legal conclusions and conclusory
 4 statements “not entitled to a presumption of truth.” Falcocchia, 709 F. Supp. 2d at 865 (quoting
 5 Iqbal, 556 U.S. at 664). The Complaint distinguishes between Moore, Hanes, and APC’s actions
 6 only by alleging that Hanes was the actuary (ECF No. 30 at 18) and by setting out allegations
 7 about Moore and APC alone. (See, e.g., ECF No. 30 at 67 (allegations only relating to APC and
 8 Moore).)

9 When contrasted with the more specific pleadings in the Complaint, it is clear just how
 10 “naked” the allegations about Hanes are. For example, although the Complaint alleges that
 11 Hanes knew about the “Tribal Retirement Plans,” and assisted in setting up and administering
 12 the “Tribal Retirement Plans,” the Complaint’s specific allegations reveal that only Moore and
 13 APC had any involvement with the Tribal 401(k). Hanes acted as the actuary only for the Tribal
 14 Pension Plan and there is nothing in the Complaint indicating that Hanes knew anything about
 15 the Tribal 401(k). Nonetheless, the Complaint alleges, many times, that Hanes knew facts
 16 relating to the “Tribal Retirement Plans.” Similarly, the conclusory allegations that discuss
 17 forming, structuring, and administering of the Tribal Pension Plan include Hanes, but the
 18 specific allegations about the Plan show that only Moore and APC set up and administered it.
 19 (ECF No. 30 at 61 (stating that “the RICO Ringleaders indicated that they worked with and
 20 received advice and direction from Abettor Defendant Moore and APC in setting up and
 21 administering the Tribal Retirement Plans.”). Because the allegations about Hanes’s knowledge
 22 are conclusory, and are belied by the specific factual allegations in the Complaint, they cannot
 23 establish that Hanes *actually knew* about the RICO Ringleaders alleged intentional torts, much
 24 less that Hanes made a “conscious decision to participate in tortious activity for the purpose of
 25 assisting [the RICO Ringleaders] in performing a wrongful act.” Howard, 2 Cal. App. 4th at 749.

26 The Complaint also formulaically attributes “knowledge” to Hanes based on its status as
 27 a “retirement professional.” The facts that allegedly gave Hanes “knowledge” based on this
 28 “status” include the following:

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- 1 • Treasury Regulation 1.401-1(b)(3), 26 C.F.R. 1.401-1(b)(3) provides that a
2 retirement “plan must benefit the employees in general,” and cannot be “designed
3 as to amount to subterfuge for the distribution of profits” to only certain specially
4 favored individuals.” (ECF No. 30 at 62.)
- 5 • “[T]he prohibition against using a retirement plan as a ‘subterfuge for the
6 distribution of profits’ to only certain specially chosen individuals,” and the IRS
7 requirement that “a plan must be established with the intent to be a ‘permanent,’
8 not ‘temporary’ program.” (Id. at 63.)
- 9 • That “employing such an extraordinarily high retirement benefit goal was
10 indicative of the Tribal Pension Plan’s purpose as a subterfuge for diversion of
11 Tribal money” (Id. at 64.)
- 12 • That “Treasury Regulation 401-1(b)(2) states . . . ‘[t]hus, although the employer
13 may reserve the right to change or terminate the plan, and to discontinue
14 contributions thereunder, the abandonment of the plan for any reason other than
15 business necessity within a few years after it has taken effect will be evidence that
16 the plan from its inception was not a bona fide program for the exclusive benefit of
17 employees in general. . . .” (Id. at 65-66.)

18 The Tribe alleges that Hanes “knowingly” disregarded these rules and regulations, and
19 “structured and administered the Tribal Pension Plan in a way that was clearly indicative of the
20 RICO Ringleaders’ intent to use the Tribal pension Plan as a short-term and highly effective
21 mechanism to divert a huge amount of Tribal money very quickly to the RICO Ringleaders”
22 (See ECF No. 30 at 62, 63, 64, 65-66.)

23 The problem with these allegations is three-fold. First, like the allegations discussed
24 above, they are conclusory. They purport to attribute actual knowledge to Hanes based solely on
25 its status as a “retirement professional.” These allegations also lump together Moore, Hanes, and
26 APC, failing to distinguish in any way between the individuals and companies, and the
27 knowledge, or lack thereof, that each of those Defendants had. Such allegations do not, and
28 cannot, show actual knowledge by Hanes. Second, even assuming that these allegations

1 successfully establish Hanes knew about these rules and regulations, that knowledge does not
 2 equate to Hanes knowing that APC and Moore did not follow them in administering and setting
 3 up the Plan. Third, even assuming that these allegations are sufficient to withstand Twombly and
 4 Iqbal and establish (1) that Hanes actually knew about these rules, and (2) that Hanes actually
 5 knew that they were not followed, these allegations *still* do not sufficiently allege that Hanes
 6 actually knew that the RICO Defendants were committing the intentional torts of conversion and
 7 breach of fiduciary duty. At best, then, these allegations suggest that Hanes *should have known*
 8 that the Plan favored the five beneficiaries as the result of its potential, and alleged, non-
 9 compliance with these rules. Allegations that Hanes allegedly should have known fail to satisfy
 10 the first element required to plead a claim for aiding and abetting. Gonzales, 532 F. Supp. 2d at
 11 1206 (citing Neilson, 290 F. Supp. 2d at 1118-19).⁸

12 Finally, and most importantly, these allegations make absolutely clear that Hanes knew
 13 absolutely nothing about the RICO Defendants who were not beneficiaries of the Plan. Indeed,
 14 the Complaint does not so much as allege he knew these other individuals existed, as they were
 15 not beneficiaries under the Plan. He cannot, therefore, have known that they were allegedly
 16 committing breaches of their fiduciary duties and converting the Tribe's funds.

17 Accordingly, the Complaint does not, and cannot, adequately plead facts showing that
 18 Hanes had actual knowledge. The Court should therefore dismiss, without leave to amend, the
 19 Tribe's claim against Hanes for aiding and abetting for failure to state a claim upon which relief
 20 can be granted.

21 **D. The Tribe Fails to State a Claim Against Mr. Hanes in His Individual Capacity.**

22 The Tribe purports to state claims not only against Hanes & Associates for performing its
 23 limited role as an actuary for the Plan, but also against Mr. Hanes. The Tribe alleges that Mr.

24 _____
 25 ⁸ The Tribe's allegations regarding Hanes's "substantial assistance" are equally as conclusory
 26 and formulaic as those regarding actual knowledge. The conclusory allegations regarding actual
 27 knowledge are further problematic for the "substantial assistance" prong because substantial
 28 assistance is only possible where there is actual knowledge. See Richard B. LeVine, Inc. v. Higashi, 131 Cal. App. 4th 566, 579 (2005). Thus, because the Tribe fails to plead actual knowledge, the Tribe likewise does not adequately allege that Hanes substantially assisted the RICO Ringleaders in their alleged commission of intentional torts.

1 Hanes “is Hanes & Associates, LLC’s owner, principal, and registered agent.” (ECF No. 30 at
 2 17.) The Tribe then proceeds to indiscriminately group Hanes & Associates and Mr. Hanes
 3 together for the entirety of the Complaint. The Tribe thereby impermissibly attempts to pin
 4 liability on Mr. Hanes as an individual for the actions of Hanes & Associates as a corporation,
 5 without any allegations supporting Mr. Hanes’s own liability. It is true, of course, that directors
 6 and officers of a corporation may be liable for torts committed by them on the corporation’s
 7 behalf. PMC, Inc. v. Kadisha, 78 Cal. App. 4th 1368, 1339 (2000), as modified on denial of reh’g
 8 (Apr. 7, 2000); see also 5 Witkin, Summary 10th (2005) Torts, § 33, p. 94 (citations omitted).
 9 But “[d]irectors or officers of a corporation do not incur personal liability for torts of the
 10 corporation merely by reason of their official position, unless they participate in the wrong or
 11 authorize or direct that it be done.” Id. (quoting U.S. Liab. Ins. Co. v. Haidinger-Hayes, Inc. 1
 12 Cal. 3d 586, 595 (1970)). They may, however, incur personal liability if they participate in the
 13 wrong or authorize or direct that it be done. Id. “This liability does not depend on the same
 14 grounds as piercing the corporate veil . . . but rather on the officer or director's personal
 15 participation or specific authorization of the tortious act.” Id. at 1380 (citing Frances T. v.
 16 Village Green Owners Ass’n, 42 Cal. 3d 490, 503-504 (1986)).

17 Here, the Complaint contains absolutely no allegation establishing, much less suggesting,
 18 that Mr. Hanes personally participated in the alleged wrong or authorized or directed that it be
 19 done. Without explanation or justification, the allegations lump together the individual, Mr.
 20 Hanes, and the company, Hanes & Associates, making it impossible to decipher which actions
 21 and intentions are attributable to the company and which are attributable to the individual.
 22 References to the “Abettor Defendants” or “Moore, Hanes, and APC,” which lump together five
 23 Defendants, only exacerbate the problem. These allegations seek to impose liability on Mr.
 24 Hanes solely by virtue of his position as the “owner, principal, and registered agent” of the
 25 corporation. Because the law does not impose liability under these facts, this Court should
 26 dismiss all of the Tribe’s claims against Mr. Hanes without leave to amend.

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1 **E. The Tribe Fails to State a Claim Against Hanes for Restitution Because Restitution**
2 **is Not a Cause of Action.**

3 Finally, federal courts routinely recognize that “while restitution is available as a remedy
4 for plaintiffs’ other causes of action, it is not a standalone cause of action in California”
5 Littlehale v. Hain Celestial Grp., Inc., 2012 WL 5458400, at *1 (N.D. Cal. July 2, 2012); see also
6 Johnson v. Bank United F.S.B., 2010 WL 5287551, at *5 (E.D. Cal. Dec. 17, 2010) (restitution is
7 not a cause of action but a remedy). Because no cause of action for restitution exists, the Tribe
8 cannot successfully state a claim for restitution. Accordingly, the Court should dismiss this claim
9 without leave to amend.

10 **F. The Tribe Should Not Be Permitted to Amend its Complaint.**

11 Federal Rule of Civil Procedure 1 provides that the Rules “should be construed and
12 administered to secure the just, speedy, and inexpensive determination of every action and
13 proceeding.” Fed. R. Civ. P. 1. As set forth above, Rule 8 requires that the complaint provide “a
14 short and plain statement of the claim showing that the pleader is entitled to relief.” In
15 contravention of these clear directives, the Tribe has, to date, filed two complaints, each
16 approximately 200 pages in length—almost 400 pages of allegations. Courts grant leave to
17 amend only where amendment would not be futile. Foman v. Davis, 371 U.S. 178, 182 (1962).
18 In other words, dismissal without leave to amend is proper if it is clear that “the complaint could
19 not be saved by any amendment.” Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048,
20 1056 (9th Cir. 2007). In light of the two extremely lengthy complaints already filed in this action,
21 it is difficult to imagine that the Tribe could allege anything more that might change the analysis.
22 Because leave to amend would be futile, Hanes requests that this Court dismiss the Tribe’s
23 claims against Hanes without leave to amend.

24 **IV. CONCLUSION**

25 Reading the complaint in the light most favorable to the Tribe, the Tribe nonetheless fails
26 to state plausible claims for relief against Hanes for breach of fiduciary duties, negligence,
27 aiding and abetting, and restitution. The Tribe also fails to state any claims against Mr. Hanes in
28 his individual capacity. Accordingly, Hanes requests that this Court dismiss the Tribe’s twenty-

1 eighth, twenty-ninth, thirtieth, thirty-first, and thirty-third claims for relief as alleged against
2 Hanes, in their entirety and without leave to amend.

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5 DATED: May 15, 2015

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7 By: /s/ Avalon C. Johnson

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