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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PASKENTA BAND OF NOMLAKI INDIANS; and **PASKENTA ENTERPRISES CORPORATION**,

Plaintiffs,

v.

INES CROSBY; **JOHN CROSBY**; **LESLIE LOHSE**; **LARRY LOHSE**; **TED PATA**; **JUAN PATA**; **CHRIS PATA**; **SHERRY MYERS**; **FRANK JAMES**; **UMPQUA BANK**; **UMPQUA HOLDINGS CORPORATION**; **CORNERSTONE COMMUNITY BANK**; **CORNERSTONE COMMUNITY BANCORP**; **JEFFERY FINCK**; **GARTH MOORE**; **GARTH MOORE INSURANCE AND FINANCIAL SERVICES, INC.**; **ASSOCIATED PENSION CONSULTANTS, INC.**; **HANESS & ASSOCIATES, LLC**; **ROBERT M. HANESS**; **THE PATRIOT GOLD & SILVER EXCHANGE, INC.**; and **NORMAN R. RYAN**,

Defendants,

QUICKEN LOANS, INC.; **CRP 111 WEST 141ST LLC**; **CASTELLAN MANAGING MEMBER LLC**; **CRP WEST 168TH STREET LLC**; and **CRP SHERMAN AVENUE LLC**,

Nominal Defendants.

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

PLAINTIFFS' OPPOSITION TO (1) THE RICO DEFENDANTS' FED. R. CIV. P. 12(B)(1) MOTION TO DISMISS; (2) THE UMPQUA DEFENDANTS' FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS; (3) THE CORNERSTONE DEFENDANTS' FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS; (4) APC'S FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS AND 12(F) MOTION TO STRIKE; (5) THE HANESS DEFENDANTS' FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS; AND (6) THE MOORE DEFENDANTS' FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS

Date: July 27, 2015
Time: 9:00 a.m.
Courtroom: 10
Judge: Hon. Garland E. Burrell, Jr.

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INTRODUCTION

No motion to dismiss challenges the allegations of widespread and coordinated embezzlement committed here by Defendants Ines Crosby, John Crosby, Leslie Lohse, and Larry Lohse (collectively, the "RICO Ringleaders"), who along with Defendants Ted Pata, Juan "Jon" Pata, Chris Pata, Sherry Myers, and Frank James (collectively with the RICO Ringleaders, the "RICO Defendants") organized a scheme to loot millions of dollars of the Tribe's money through sham retirement accounts; the purchase of a luxury home, custom sports cars, travel in private jets, and other lavish personal enrichment; and serial withdrawals from the Tribe's bank accounts that were outright thievery. The RICO Defendants move to dismiss for lack of subject matter jurisdiction, asserting issues concerning sovereignty and interpretation of a tribal constitution that have nothing to do with the common law theft and breaches of duty imposed by California law that are at the heart of this RICO scheme.

To be sure, the RICO Defendants are uniquely blameworthy as they lived extravagant lifestyles on the Tribe's dime, but they could not have done it by themselves. The RICO Defendants' theft and self-dealing required the participation of the Umpqua Defendants, the Cornerstone Defendants, the Moore Defendants, the Haness Defendants, and the Patriot Defendants (collectively, the "Abettor Defendants"). The Abettor Defendants are professionals, and many of them were the Tribe's trusted advisors, and thus breached their own duties to the Tribe. The Abettor Defendants raise a host of issues in their motions to dismiss, quarreling with the Tribe's allegations concerning the bases for the duties owed; disclaiming knowledge of the RICO Defendants' wrongdoing, where the abusive nature of the self-dealing at issue was as blatant as it was flagrant; and relying on fig leafs, such as the wrongdoing of other Defendants, or (in the case of the Umpqua Defendants) a coerced release that was shamelessly procured when the Tribe was at its most vulnerable. None of these motions have merit.

BACKGROUND

I. Factual Background

As set forth in the First Amended Complaint ("FAC"), over the course of well over a decade, the RICO Defendants engaged in a conspiracy that resulted in their theft of over $60

million dollars from the Tribe. ¶¶ 5-8, 27-36, 165-372.[1] So callous to the welfare of the Tribe were the RICO Defendants that, after the Tribe terminated the RICO Ringleaders' employment in April 2014, the RICO Defendants launched a series of cyber-attacks against the Tribe's computer systems, including those of its casino (the "Casino"), not only causing the Tribe very significant direct and indirect financial losses but also destroying immense amounts of data, ¶¶ 393-412, and even sent armed thugs to the Casino to disrupt its operations, ¶¶ 413-418, all in a transparent attempt to evade liability and coerce the Tribe into letting them back into the senior employment positions that had allowed them to steal from the Tribe for so many years.

The RICO Defendants received substantial support from financial institutions: Defendants Umpqua Bank ("Umpqua") and Umpqua Holdings Company (collectively with "Umpqua," "Umpqua Defendants"), Cornerstone Community Bank ("Cornerstone Bank"), Cornerstone Community Bancorp ("Cornerstone Bancorp"), and the President and CEO of both Cornerstone Bank and Cornerstone Bancorp, Jeffrey Finck (collectively the "Cornerstone Defendants"). ¶¶ 37-45. Through their affirmative participation and failures to act despite their knowledge of the RICO Defendants' thefts, these financial institutions played significant roles in the RICO Defendants' scheme.

Defendants further were aided in their fraudulent scheme by certain retirement benefits providers: Associated Pension Consultants, Inc. ("APC"), Haness & Associates and Robert M. Hannes (collectively "Haness"), and Garth Moore Insurance and Financial Services, Inc. and Garth Moore (collectively "Moore"), who facilitated the establishment of illegal retirement accounts on behalf of some RICO Defendants, which diverted to them millions of dollars from the Tribe, and then facilitated the RICO Defendants' sudden premature withdrawal of this money in the wake of their termination from employment. ¶¶ 46-52.

They further were aided in their fraudulent scheme by The Patriot Gold & Silver Exchange, Inc. and its owner Norman R. Ryan (collectively, the "Patriot"). ¶¶ 53-54.

A. RICO Defendants Structure and Execution of the Scheme[2]

[1] Unless otherwise noted, all references herein are to the FAC.
[2] In their Motion to Dismiss, the RICO Defendants do not challenge the sufficiency of the allegations plead against them; rather, their challenge rests solely on jurisdictional grounds. As

The RICO Ringleaders, who were senior employees of the Tribe, positioned themselves so as to gain substantial control of the money held by the Tribe and, its principal non-casino business vehicle, PEC. They used this control to steal from the Tribe through means including, *inter alia,* withdrawing large amounts of cash, writing themselves and each other thousands of dollars in checks, paying massive personal credit card bills, and directly paying for on ostentatious life of private jet travel, luxury sporting events, and sports cars, all from the Tribe's bank accounts, ¶¶ 277-372, and causing the Tribe to pay them extraordinary amounts of non-retirement and retirement compensation, ¶¶ 175-276. All of this was done **without** the Tribe's authorization. ¶¶ 175-372. In an attempt to coerce the Tribe into allowing them back into these positions, after being terminated from the in April 2014, and to destroy evidence of their over a decade-long scheme, the RICO Defendants launched a series of cyber attacks against the Tribe and sent armed thugs to the Casino to disrupt its organization. ¶¶ 393-418.

1. The RICO Ringleaders Used Their Control of the Tribe's Bank Accounts to Embezzle Millions of Dollars from the Tribe

As senior employees of the Tribe, the RICO Ringleaders withdrew and spent money out of Tribal bank accounts at will and without the Tribe's authorization, withdrawing large lump sums from Tribal accounts for personal use, ¶¶ 281-284, 287, writing themselves and each other checks for hundreds of thousands of dollars payable from Tribal accounts, ¶¶ 285, 288, 290-294, engaging in complex transactions using the Tribe's money that resulted in that money going into the RICO Ringleaders' pockets, ¶¶ 295-323, otherwise using Tribal accounts to pay for extravagant expenses, including private jets, luxury houses and expensive cars, and monthly personal credit card bills in the tens and even hundreds of thousands of dollars, ¶¶ 324-361, and spreading the Tribe's money around to friends, relatives, and their co-RICO Defendants, 362-369. These thefts were principally conducted from Tribal accounts at Defendants Umpqua Bank and Cornerstone Bank and, as discussed herein, these Defendants were not bystanders to this scheme; rather, the RICO Ringleaders received substantial assistance from these institutions, given with

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such, Plaintiffs' have provided the Court with only a brief factual overview of the specific relevant allegations against the RICO Defendants.

knowledge and in breach of duties owed to the Tribe.

2. RICO Defendants, Without Authorization, Took Millions of Dollars in Non-Retirement and Retirement Compensation from the Tribe

The millions that the RICO Defendants stole from the Tribe's bank accounts, summarized above and detailed in the FAC, was in addition to millions of dollars that the RICO Defendants took in unauthorized non-retirement and retirement compensation from the Tribe and its various businesses.

Between just 2002 and the first three and half months of 2014, from the Tribe, its business, and/or affiliated organizations: John Crosby collected at least approximately $5.5 million in nonretirement compensation, ¶¶ 184-186, 256-258; Ines Crosby collected at least approximately $3.7 million, ¶¶ 192, 272; Larry Lohse collected at least approximately $3.8 million, ¶¶ 200-202, 262-264; Leslie Lohse collected at least approximately $3.5 million ¶¶ 205, 267-269. This compensation was not authorized by the Tribe and was outrageously excessive, irrespective of its authorization. ¶¶ 175-212, 252-272.

In addition, the RICO Defendants used unauthorized and excessive Tribal retirement compensation packages to facilitate their fraudulent scheme. ¶¶ 213-252. Specifically, the RICO Ringleaders, without authorization, caused the Tribe to set up and invest in two retirement plans, a defined benefit plan ("Tribal Pension") and 401(k) ("Tribal 401(k)") (collectively, "Tribal Retirement Plans"). *Id*. The only individuals permitted to participate in the Tribal Retirement Plans were the RICO Ringleaders and RICO Defendant Sherry Myers, no other Tribal employees were given an opportunity to participate. *Id.* The Tribal Retirement Accounts were set up and administered in order to facilitate the transfer of as much Tribal money as possible, as fast as possible, to the RICO Ringleaders. ¶ 219. As a result, between just 2004 and 2013, the Tribe invested in the Tribal Retirement Plans: at least approximately $1.7 million on behalf of Ines Crosby, including over $571,000 in a single year, ¶¶ 228-231; at least approximately $1 million on behalf of Larry Lohse, including almost $390,000 in a single year, ¶¶ 233-235; at least approximately $1 million on behalf of Leslie Lohse, including approximately $372,000 in a single year, ¶¶ 237-240; at least approximately $650,000 on behalf of John Crosby, including almost

$260,000 in a single year, ¶¶ 244-246. Soon after their termination, recognizing their fraudulent scheme was likely to soon be uncovered, the RICO Ringleaders and RICO Defendant Sherry Myers liquidated their Tribal 401(k) accounts, so as to prevent the Tribe from recovering its stolen money deposited in these accounts. ¶ 224(b).

Defendants APC, Haness, and Moore knowingly substantially assisted these RICO Defendants by setting up and administering these Tribal Retirement Plans, and subsequently allowing the RICO Ringleaders to fraudulently liquidate their Tribal 401(k). ¶ 224.

3. The RICO Defendants Launched a Series of Cyber-Attacks Against the Tribe and Sent Armed Thugs to Disrupt the Casino, in an Effort to Regain Their Positions and Destroy Evidence of Their Crimes

Following the RICO Ringleaders termination in April 2014, the RICO Defendants launched three successive highly destructive cyber-attacks against the computer-system of the Tribe and its Casino. ¶¶ 393-412. RICO Ringleader Leslie Lohse has publically admitted to having done so. ¶ 411. As result of the attacks, the Tribe lost hundreds of thousands of dollars, as well as large amounts of data, much of which the RICO Defendants deleted in order to evade liability for their past criminal conduct. ¶¶ 407-410. The Tribe is informed that a criminal investigation of the cyber attack is currently being conducted by the DOJ.

When the cyber-attacks failed to coerce the Tribe into allowing the RICO Ringleaders back into their positions with the Tribe, as the RICO Defendants had hoped, ¶ 412, the RICO Defendants took the extraordinary step of sending armed thugs to the Casino to disrupt its operations. ¶¶ 413-417.

B. The RICO Defendants Received Substantial Assistance in Their Scheme

The RICO Defendants' scheme to defraud the Tribe was substantially assisted by a host of Defendants.

1. Abettor Defendant Banks

a. Umpqua

The RICO Ringleaders' withdrawals from the Tribal account at Umpqua were frequent, in substantial amounts, and suspicious in nature. Over the course of several years, RICO Ringleaders and RICO Defendant Sherry Myers stole millions of dollars of the Tribe's money by

withdrawing it in large lump sums or writing checks to themselves from the Tribe's bank accounts at Umpqua. ¶ 281. By far, RICO Ringleader Ines Crosby was the largest perpetrator. Ms. Crosby regularly went to Umpqua's Orland, California branch to make unauthorized withdrawals and cash checks made payable to "Cash" or "Umpqua Bank" from Tribal accounts. ¶ 283. She often dealt with the same tellers and employees. *Id.* Ms. Crosby withdrew approximately **$756,344** in 2013 and early 2014 alone. ¶ 284.

In addition to the amount and frequency of these withdrawals, Ms. Crosby structured these withdrawals so as to avoid federal reporting requirements which are triggered by withdrawals of $10,000 or more. Examples include, without limitation, fifteen checks for exactly $7,500 made out to "Cash" by Ms. Ines, and cashed at the Umpqua branch in Orland between January 2013 and March 2014. ¶ 286. In several instances, within two weeks or less of Ms. Crosby's $7,500 cash withdrawal, she then cashed checks at the Umpqua branch in Orland made out to "Cash" in smaller denominations of between $1,000 and $6,500. *Id.*

Given the totality of the circumstances, Umpqua knew or had reason to know of the RICO Ringleaders illicit conduct.

b. Cornerstone

The RICO Ringleaders also stole millions of dollars of the Tribe's money from the PEC accounts held at Cornerstone bank, with the substantial assistance of Cornerstone and its President and CEO Jeffrey Finck. ¶ 42. Conveniently, RICO Ringleader John Crosby was an original member of the bank's Board of Directors. *Id.*[3] Moreover, the Tribe was a minority shareholder in the bank. *Id.* As alleged in detail in the FAC, Cornerstone and Finck facilitated the RICO Ringleaders' conversion of millions of dollars of Tribal money. *See e.g.,* ¶¶ 352, 361.

The theft of Tribal assets from Cornerstone was brazen RICO Ringleaders John Crosby and Larry Lohse converted millions of dollars in Tribal money for their personal use from the Tribe's PEC accounts at Cornerstone Bank. *See* ¶¶ 287, 288. For example, in September and October 2011, Mr. Crosby made nearly **$300,000** in checkless withdrawals from Cornerstone

[3] Since the FAC was filed, the Tribe has come to learn that Mr. Crosby was also one of the original promoters of Cornerstone Bank, and, in fact, made the decision to hire Jeffrey Finck as President and CEO.

Bank which he used to purchase cashier's checks to Corning Ford where he bought luxury automobiles – including two $75,000 plus pickup trucks for RICO Defendants John and Ted Pata as bribes to keep them quiet about the RICO Ringleaders' thefts. ¶ 287. Additionally, with substantial assistance from Cornerstone Bank and Finck, Mr. Crosby withdrew **$838,434.14** from the PEC account at Cornerstone to purchase a luxury home for himself ("Deer Hollow Property"). ¶ 321. Soon thereafter, Mr. Crosby took out a $200,000 home equity line of credit ("HELOC") secured by the Deer Hollow Property from Cornerstone. Six months later, he took out another loan secured by the Deer Hollow Property for approximately $417,000 but in order to complete this loan somehow convinced Cornerstone Bank and Finck to subordinate their original loan, although doing so made no economic sense. ¶ 322.

Moreover, as detailed in the FAC, Mr. Crosby and Mr. Lohse regularly wrote each other large checks from the PEC account at Cornerstone. For example, between December 2010 and June 2013, the two exchanged checks totaling approximately $400,000. *See* ¶ 288.

Cornerstone Bank's employees, management, and executives, including Mr. Crosby and Finck, for years knowingly assisted the RICO Ringleaders in these conversions and in return received large profits on the accounts of the Tribe and the Tribe-owned businesses – the Tribe was one of the largest, if not, the largest, depositor at the bank. ¶ 643.

Following the RICO Ringleaders removal in April 2014, Cornerstone Bank and Finck, realizing the illicit conduct they had aided and abetted, held the Tribe's money hostage unless and until the Tribe signed a document releasing the Cornerstone Defendants from liability. ¶ 645. However, this release is null and void, as discussed *infra*. Cornerstone Bank was aware that without the Tribe's access to money they held on their behalf, the ability of the Tribe and Tribe owned businesses to operate would be severely and irreparably damaged. ¶¶ 647. Moreover, Cornerstone misrepresented to the Tribe its active role in the RICO Defendants conduct to the detriment of the Tribe. ¶ 646.

2. Abettor Defendant Retirement Compensation Providers

The RICO Ringleaders, with substantial assistance from certain retirement compensation providers, set up retirement compensation accounts through which they converted approximately

$4.4 million of Tribal money for their own benefit and to the detriment of the Tribe. ¶ 213. Defendants APC, Moore, and Haness knowingly assisted the RICO Defendants in setting up and administering these illegal retirement plans. As detailed in the FAC, these Tribal Retirement Plans: improperly excluded all employees of the Tribe but for the RICO Ringleaders and RICO Defendant Sherry Myers; were improperly established and modified without Tribal Council authorization; were established as an illegal short-term mechanism to divert large sums of money to the RICO Defendants; and, with the full knowledge of APC, the Tribal 401(k) was fraudulently liquidated to the Tribe's detriment. ¶¶ 221-227.[4]

a. APC

APC served as the third- party administrator for the Tribal Retirement Plans. APC repeatedly assisted the RICO Ringleaders in establishing, administering, modifying and funding the Tribal Retirement Plans as the RICO Ringleaders saw fit in order to achieve their goal of diverting as much Tribal money as possible to themselves, without requiring proof of any Tribal Council authorization. APC, *inter alia,* facilitated the fraudulent liquidation of the Tribal 401(k) accounts in late June and Early July 2014 without receiving authorization from the Tribe but rather allowing RICO Ringleader John Crosby, who had not held any position with the Tribe since April 2014, to sign the employer authorization section of the liquidation paperwork for himself and the other RICO Ringleaders. ¶ 224.

b. Moore

Moore served as financial advisor to the Tribe. In that capacity, Moore, *inter alia,* knowingly structured and administered the Tribal Pension Plan in a way that facilitated the RICO Ringleaders' intent to use the Tribal Pension Plan as an illegal short-term mechanism to divert a huge amount of Tribal money very quickly to the RICO Ringleaders, and provided the RICO Ringleaders substantial assistance in accomplishment of this goal. ¶ 223. In reward for this assistance, in addition to generous compensation for the work, the Casino sponsored Garth Moore's son's racecar. ¶ 227.

[4] The Internal Revenue Service ("IRS") is investigating certain RICO Defendants of suspected violations of federal law.

c. Haness

Haness served as actuary for the Tribal Retirement Plans. In this capacity, Haness, *inter alia*, assisted in structuring the Tribal Retirement Plans so as to utilize an actuarial formula which set the target retirement benefit, vesting and expected retirement age, and exclusive nature of the Tribal Retirement Plans in a fashion which was extraordinarily beneficial to the RICO Ringleaders' and RICO Defendant Sherry Myers and to the detriment of the Tribe. ¶ 223.

II. Procedural Background

On March 15, 2015, Plaintiffs filed the original complaint in this action. *See* Dkt. 1. On April 17, 2015, Plaintiffs filed the FAC. *See* Dkt. 30. Pursuant to a stipulated briefing schedule, Defendants filed their motions to dismiss on May 15, 2015, which are set for hearing on July 27, 2015. *see* Dkt. 27. In all, seven motions to dismiss were filed.

A. RICO Defendants

The RICO Defendants, as well as Defendants The Patriot Gold and Silver Exchange, Inc., and Norman Ryan, filed a joint motion to dismiss on the basis that this Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) ("RICO Defendants' Motion to Dismiss"). *See* Dkt. 52-1. As set forth herein, the contentions made by the RICO Defendants lack merit. Notably, the RICO Defendants did not challenge the legal sufficiency of any of the claims alleged against them in the FAC, including claims under RICO and the CFAA. *See* ¶¶ 431-508.

Additionally, on May 15, 2015, the RICO Defendants filed their Motion to Stay, *see* Dkt. 5. Notably, the RICO Defendants' Motion to Stay is largely premised on the basis that the RICO Ringleaders were employees of the Tribe and "the Tribe's allegations against Defendants relate to Defendants' employment with the Tribe." Dkt. 55 at 5. Now, these same Defendants attempt to frame this dispute as intra-tribal, apparently abandoning their assertion that the case involves an employment dispute.

B. Umpqua

Umpqua Bank and Umpqua Holdings Corporation filed their Motion to Dismiss Plaintiffs' First Amended Complaint ("Umpqua's Motion to Dismiss"), *see* Dkt. 46, in which they seek to dismiss each claim asserted against them in the FAC on the grounds that: (1)

Plaintiffs have failed to state causes of action for common law negligence because Umpqua had no duty to supervise the activity of the Tribe's accounts, and that the Bank Secrecy Act does not create a duty upon which Plaintiffs can rely; (2) Plaintiffs have failed to state claims for statutory negligence because Plaintiffs' do not allege the existence of a forged document; (3) Plaintiffs' aiding and abetting claims fail on the grounds that Plaintiffs fail to allege facts which establish Umpqua had knowledge of the misappropriations; (4) Plaintiffs' breach of contract claims fails on the basis that Plaintiffs do not properly allege the existence of a contract; and (5) Plaintiffs' claim for restitution should be dismissed because that is not an independent cause of action. *See id.*

C. <u>APC</u>

APC's Motion to Dismiss First Amended Complaint and to Strike Portions of First Amended Complaint ("APC's Motion to Dismiss"), *see* Dkt. 53-1, asserts that the FAC should be dismissed as to APC on the grounds that: (1) Plaintiffs fail to allege any claims against APC by Plaintiff PEC; (2) Plaintiffs fail to allege that they suffered any injury caused by APC; (3) Plaintiffs' claims for breach of fiduciary duty fail because Plaintiffs have failed to show that APC owed any duty to Plaintiffs; (4) Plaintiffs' claims for aiding and abetting should be dismissed because Plaintiffs do not allege APC's knowledge of the fraud; (5) Plaintiffs' claim for restitution fails because it is not an independent cause of action; and (6) each of Plaintiffs' claims is barred by the applicable statute of limitations. Further, APC asks the Court to strike Plaintiffs' claims for punitive damages.

D. <u>Cornerstone</u>

Cornerstone's Motion to Dismiss, *see* Dkt. 50-1, argues that Plaintiffs' claims fail as a matter of law because: (1) Plaintiffs' released Cornerstone from all claims; (2) Plaintiffs' breach of fiduciary duty claims fail because Cornerstone owed no duty to Plaintiffs; (3) Plaintiffs' claims for common law negligence should be dismissed because the fraudulent payments alleged were presumptively authorized; and (4) Plaintiffs' claims for statutory negligence fail because Plaintiffs do not allege the existence of a forged endorsement as required.

E. <u>Hannes</u>

In Haness' Motion to Dismiss, *see* Dkt. 51-1, Hannes asserts: (1) Plaintiffs' claims for

1 breach of fiduciary duty fail because Haness owed no fiduciary duty to the Plaintiffs; (2)
2 Plaintiffs' claims for negligence fail because Haness didn't owe the Tribe a duty of care; (3)
3 Plaintiffs fail to state a claim against Mr. Hannes in his individual capacity; and (4) Plaintiffs
4 claim for restitution fails because it is not an independent cause of action.

5 **F. Moore**

6 Moore's Motion to Dismiss, *see* Dkt. 54-1, echoes the RICO Defendants' Motion to
7 Dismiss on jurisdictional grounds. Moore asserts that this Court lacks jurisdiction because the
8 dispute at issue is purely intra-tribal.

9 **G. Quicken**

10 Nominal Defendant Quicken Loans, Inc.'s Motion to Dismiss ("Quicken's Motion to
11 Dismiss"), *see* Dkt. 45, seeks to dismiss the claims against them on the grounds that Quicken is a
12 disinterested bystander and Plaintiffs do not accuse Quicken of any wrongdoing.

13 **LEGAL STANDARD**

14 **I. Fed. R. Civ. P. 12(b)(1)**

15 Defendants make what is referred to as a "facial attack" concerning the Court's subject
16 matter jurisdiction to hear the claims contained in the FAC in that Defendants "assert[] that the
17 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction"
18 over them. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
19 Accordingly, "[t]he factual allegations of the complaint are presumed to be true, and the motion is
20 granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction."
21 *Westlands v. NRDC*, 276 F. Supp. 2d 1046, 1049 (E.D. Cal. 2003); *see also Wolfe v. Strankman*,
22 392 F.3d 358, 362 (9th Cir. 2004). Furthermore, in evaluating the facial challenge, "the court
23 construes allegations in the complaint in the light most favorable to the plaintiff" and "looks to
24 the complaint and attached documents, as well as to facts that are judicially noticeable or
25 undisputed," in resolving a facial jurisdictional challenge Rule 12(b)(1). *Doe v. Mann*, 285 F.
26 Supp. 2d 1229, 1232 (N.D. Cal. 2003); *see also Costo v. United States,* 248 F.3d 863, 866 (9th
27 Cir. 2001).

28 Federal courts have an "unflagging obligation…to exercise the jurisdiction given them."

1 *Colorado River Conservation District et al., v. United States*, 424 U.S. 800, 817 (1976). As such,
2 "[j]urisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and
3 must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678 (1946)." *Sun Valley*
4 *Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 140 (9th Cir. 1983). This requires
5 showing that "'the alleged claim under the Constitution or federal statutes clearly appears to be
6 immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is
7 wholly insubstantial and frivolous.'" *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711
8 F.2d 138, 140 (9th Cir. 1983) (quoting *Bell*, 327 U.S. at 682-83).

9 On a motion to dismiss for lack of subject matter jurisdiction, proof of jurisdictional facts
10 may be supplied by affidavit, declaration, or any other evidence properly before the court, in
11 addition to the pleadings challenged by the motion. Fed. R. Civ. Pro. 12(b)(1), 28 U.S.C.A; *Green*
12 *v. U.S.*, 630 F.3d 1245 (9th Cir. 2011).

13 **II. <u>Fed. R. Civ. P. 12(b)(6)</u>**

14 When evaluating a Rule 12(b)(6) motion, a court must accept as true all allegations of
15 material facts that are in the complaint and must construe all inferences in the light most
16 favorable to the non-moving party. *Moyo v. Go*mez, 32 F.3d 1382, 1384 (9th Cir. 1994). Rule
17 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of
18 the claim showing that the pleader is entitled to relief. Fed. R. Civ. Pro. 8(a)(2). "Specific legal
19 theories need not be pleaded so long as sufficient factual averments show that the claimant may
20 be entitled to some relief." *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001). Dismissal of a
21 complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to
22 state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
23 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
24 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
25 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "And, of course, a well-pleaded complaint may
26 proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a
27 recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation omitted).

28 **<u>ARGUMENT</u>**

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I. <u>This Court Has Subject Matter Jurisdiction to Hear the Tribe's Claims; and RICO Defendants' Argument to the Contrary Lacks Any Merit</u>

This Court has the subject matter jurisdiction to hear the Tribe's claims based on several statutory provisions: First, and most generally, the Court has federal question jurisdiction under 28 U.S.C. § 1331, as the Tribe has stated claims under RICO, 18 U.S.C. §§ 1961 *et seq.* and the CFAA, 18 U.S.C. § 1030 against the RICO Defendants. *See* ¶¶ 431-508. Indeed, the RICO Defendants do not challenge the plausibility or sufficiency of the Tribe's allegations on which these claims are based. *See* Dkt. 52-1. Second most generally, based on these claims and that the Tribe's governing body is federally recognized, the Court has jurisdiction under 28 U.S.C. § 1362, which provides:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.".

28 U.S.C. § 1362; *see* ¶¶ 24, 431-508.

Third, based on the Tribe's RICO claim, specifically, the Court has subject matter jurisdiction based on 18 U.S.C. § 1964(a), (c). *See* ¶¶ 22, 431-501. And fourth, the Court has ancillary jurisdiction over the Tribe's pendent California state law claims under 28 U.S.C. § 1367. *See* ¶¶ 509-582.[5]

The RICO Defendants do not, and cannot, dispute that the Tribe's claims meet the requirements for federal subject matter jurisdiction under any of these statutes. Fifty-five years ago, the Supreme Court found it "now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751

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[5] The FAC does not enumerate each and every statutory provision under which the Court has jurisdiction. *See* ¶ 22. But it is not necessary to list them to invoke them. *See McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990) (a plaintiff "is not required to state the statutory or constitutional basis for his claim, only the facts underlying it"). Thus, for example, just because the FAC expressly references 28 U.S.C. § 1331, but not section 1362, does not mean that the Tribe "waived" section 1362 as a basis for this Court's subject matter jurisdiction. *See id.* The facts alleged generate subject matter jurisdiction under section 1362 and that is all that is necessary to invoke that provision. *Id.*

1 F.2d 1113, 1115 (9th Cir. 1985) (addressing application of general statutes to Indian tribes and
2 their instrumentalities and developing narrow exceptions to presumption of applicability). Again,
3 the RICO Defendants ***do not challenge the sufficiency of the Tribe's allegations against them***
4 ***under any of the several different provisions of federal law*** under which the Tribe brings claims
5 against them, based on any of these limited exceptions or otherwise, *see* Dkt. 52-1. Accordingly,
6 the Court has an "unflagging obligation . . . to exercise the jurisdiction given" to it to hear these
7 federal law claims by the Tribe. *Colorado River*, 424 U.S. at 817; *accord, e.g., Eastern Band of*
8 *Cherokee Indians v. Griffin,* 502 F.Supp. 924, 928 (1980) (quickly disposing of challenges by
9 tribe members to the court's jurisdiction under 28 U.S.C. § 1362 to hear the tribe's federal law
10 claims against them).

11 The RICO Defendants argue the Court should, nonetheless, ignore that unflagging
12 obligation based on a rule of jurisdiction that, according to the Ninth Circuit, is a component "of
13 tribal sovereign immunity" (also referred to by the court as "tribal immunity"), under which
14 courts may decline to hear a suit that, while not naming a tribe as a defendant, seeks to do an "end
15 run around" the tribe's sovereign immunity by asking the court to resolve, in place of the tribe, a
16 live issue of tribal membership or governance and, in so doing, threatens the sovereignty and
17 related rights of self-determination and self-government of Indian tribes. *Lewis v. Norton*, 424
18 F.3d 959, 963 (9th Cir. 2005);[6] *cf* Dkt. 52-1 at 17-20, 23-28.[7] However, the RICO Defendants

19 [6] It is arguable the Ninth Circuit's characterization this rule as one going to subject matter
jurisdiction is inaccurate, and that a pleading-stage challenge based on tribal immunity when the
20 tribe is not a defendant should be brought, not under Fed. R. Civ. Pro. 12(b)(1) for lack of subject
matter jurisdiction, but rather Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim on which relief
21 can be granted. The existence of sovereign immunity from suit deprives a court of subject matter
jurisdiction. *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007). However,
22 it is axiomatic that sovereign immunity from suit belongs to the sovereign; thus, it can only be
invoked by the Tribe *qua* sovereign, by an arm or subordinate organization of the Tribe, or by a
23 governmental officer of the Tribe. *Miller v. Wright,* 705 F.3d 919, 923-24, 928 (9th Cir. 2012).
Accordingly, because no tribe was before the court in *Lewis*, there arguably was no basis to
24 invoke sovereign immunity and, instead, the issue arguably was whether the plaintiffs stated a
cognizable cause of action or properly could *apply* a federal law to a tribe through the named
25 federal defendants. *See Donovan*, 751 F.2d 1113, 1116 (9th Cir. 1985). The same holds true here.
The RICO Defendants cannot invoke the sovereign immunity of the Tribe; they do not represent
26 the Tribe and are not current tribal officials, but rather are individuals. The Tribe, as the
sovereign, controls whether or not its immunity is invoked. *See Oklahoma Tax Comm'n v. Citizen*
27 *Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 509 (1991). Thus, an additional basis
on which to deny the RICO Defendants' Motion is that the RICO Defendants have presented no
28 ground on which to challenge the subject matter jurisdiction of the Court, let alone one with

tellingly avoid citation to *Lewis* and even avoid using the term "tribal immunity" to describe the doctrine on which their argument is based. *Cf. Southern Pacific Transp. Co. v. Pub. Utilities Com.*, 716 F.2d 1285, 1291 (9th Cir. 1983) (characterizing a party's failure to mention binding adverse authority as a "dereliction of duty to the court"). Instead, relying almost exclusively on three out-of-circuit opinions—*In re Sac & Fox Tribe of the Miss. in Iowa / Meskwaki Casino Litig.* ("*Sac & Fox*"), 340 F.3d 749 (8th Cir. 2003), *Smith v. Babbitt* ("*Smith*"), 100 F.3d 556 (8th Cir. 1996), and *Miccosukee Tribe of Indians v. Cypress* ("*Miccosukee I*"), 975 F.Supp.2d 1298 (S.D. Fla. 2013)—they posit an expansive rule under which federal courts are deprived of their subject matter jurisdiction to hear federal law claims, if, irrespective of whether, like here, the tribe itself has brought the claims, if (a) those claims in any way involve questions touching on tribal governance, live or otherwise, or (b) adjudicating those claims would require any interpretation or application of tribal law. *See* Dkt. 52-1 at 17-28.

The reason RICO Defendants do not cite, in support of this broad averment, *Lewis*—or, for that matter, any authority from this circuit other than a footnote from an unpublished Eastern District of California opinion, *see* Dkt. 52-1 at 18 (citing without discussion *Alturas Indian Rancheria v. Salazar*, No. 10–1997-LKK/EFB, 2011 WL 587588, at *2 n. 1 (E.D. Cal., Feb. 9, 2011))—in support of this broad averment is that *Lewis* and other Ninth Circuit cases ***<u>are contrary to the averment</u>***. As discussed below, *Lewis* and other cases from this circuit make clear that, as a basis to deny subject matter jurisdiction, tribal immunity has <u>no</u> application (1) where, as here, the tribe itself is the plaintiff ***<u>or</u>*** (2) where, as here, the court is <u>not</u> being asked to resolve any **<u>live</u>** dispute of tribal government or membership. Indeed, as also discussed below, both *Sac & Fox* and *Smith* stand for the same rule; and to the extent *Miccosukee I* stands for a different rule, it is contrary not only to binding Ninth Circuit precedent, but to these cases as well. Furthermore, as also discussed below, binding Ninth Circuit precedent (again, unmentioned by the RICO Defendants) explicitly sanctions the interpretation and application of tribal law by federal courts

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merit.

[7] The RICO Defendants are joined in this argument only by the Moore Defendants. *See* Dkt. 54-1 at 4-11.

when necessary to adjudicate claims brought under federal law, *Alto v. Black*, 738 F.3d 1111, 1122-1124 (9th Cir. 2013), as do certain of the RICO Defendants' own authorities. Once again, to the extent *Miccosukee I* stands for a different rule, it is contrary to not only binding Ninth Circuit precedent but to these cases as well.

Accordingly, there is no merit to the RICO Defendants' argument that—notwithstanding the clear Congressional grant to the Court of jurisdiction to hear the Tribe's federal law and pendent state law claims, *see* 28 U.S.C. §§ 1331, 1362, 1367; 18 U.S.C. § 1964—the Court should close its doors to the Tribe, on the ground that the Court, in resolving certain non-core issues raised by the Tribe's federal and California state law claims, may be called on to interpret and apply a small amount of tribal law and analyze a limited amount of the RICO Defendants' *past* conduct as Tribal employees in light thereof. Thus, their Motion to Dismiss, which is based entirely on this argument, should be denied.

A. No Rule Denies Federal Courts Subject Matter Jurisdiction Over Cases, Such as This, Brought by Indian Tribes Themselves Under Federal Law

While the RICO Defendants try hard to obscure the fact—for example, describing the instant action as having been "filed by the current leadership" and referring through their brief to the Tribe as "the Freeman Council" *see* RICO Ds' Mtn. at 3—it is uncontroverted and incontrovertible that the instant action was brought by the Tribe itself pursuant to the authority of its undisputed federally-recognized government. *See* ¶ 24; *accord* RICO Ds' Mtn. at 7 (recognizing the legitimacy of the election of the current Tribal government); RICO Ds' Stay Mtn. at 2 (acknowledging that this action was brought by the Tribe and claiming that it was therefore subject to arbitration based on purported agreements between the RICO Ringleaders and the Tribe); Declaration of John Murray in Support of RICO Ds' Stay Mtn. ("Murray Dec.") , Ex. 1 ("Arbitration Demand") (stating in the RICO Ringleaders' demand for arbitration, defining the Tribe as: "Paskenta Band of Nomlaki Indians is a federally recognized Indian tribe").[8] Because

[8] The RICO Defendants' Motion to Stay, Dkt. 50, and declarations submitted therewith, are the proper subject of judicial notice as previous filings in the instant case. *See* Plaintiffs' Request for Judicial Notice in Support of Plaintiffs' Omnibus Opposition to Defendants' Motion to Dismiss ("RJN") No. 1.

1 this case was brought by the Tribe itself the doctrine on tribal immunity has no applicability to
2 this case and cannot form a basis for the Court to refuse its jurisdiction to hear it.
3 The doctrine of tribal immunity "protects Indian tribes." *Cook v. AVI Casino Enters*., 548
4 F.3d 718, 725 (9th Cir. 2008). Accordingly, tribal immunity is almost exclusively invoked as a
5 basis to deny subject matter jurisdiction ***in cases in which an Indian tribe is sought to be made a***
6 ***defendant***. *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015 (9th Cir. Cal. 2007). The
7 Ninth Circuit, in *Lewis,* slightly expanded tribal immunity as a basis to deny subject matter
8 jurisdiction in a limited number of cases, in which an Indian tribe is not named as a defendant, but
9 which, nonetheless, ask the court to provide relief of a type that only a tribe itself has the
10 authority to provide, such as declaring someone a member of the tribe or determining the makeup
11 of its current government. *Lewis*, 424 F.3d at 961-963 (citing *inter alia Smith*, 100 F.3d at 559);
12 *accord Sac & Fox*, 340 F.3d at 763; *Smith*, 100 F.3d at 559. The court's stated reason for doing so
13 was to prevent plaintiffs from attempting, in this way, to execute an "end run around tribal
14 immunity." *Lewis*, 424 F.3d at 963. As explained by the Ninth Circuit in its discussion of *Lewis*
15 in a different case, "to adjudicate [the] action [in *Lewis*] would require the court to evaluate the
16 merits of the plaintiffs' claim to membership under tribal law--in effect, to review the tribe's own
17 determination and intervene in its actions vis-a-vis its own members," something which, if
18 brought via a claim directly against the tribe, would be barred under standard rules of tribal
19 immunity. *Alto*, 738 F.3d at 1122 (citing *Alvarado*, 509 F.3d at 1015); *accord Lewis*, 424 F.3d at
20 763 (opining that the plaintiffs did not directly sue the tribe there "because they recognized that
21 tribal immunity would create, at the least, a serious obstacle").
22 As the foregoing makes clear, it is nonsensical to argue, as the RICO Defendants have
23 done, that the tribal immunity doctrine can be expanded even further to include cases in which
24 Indian tribes have themselves chosen to bring claims in federal court. An Indian tribe suing in
25 federal court cannot sensibly be described as attempting an "end run around tribal immunity."
26 *Lewis*, 424 F.3d at 963. As mentioned, tribal immunity "protects Indian tribes," and is theirs to
27 enforce as they choose. *Cook*, 548 F.3d at 725. It would be not only absurd, but absurdly
28 paternalistic, to claim, as the RICO Defendants effectively do, *see* Dkt. 52-1 at 17-19, that a tribe

is not free to pursue its federal law claims in federal court on the ground that the tribe could have chosen, instead, to have pursued such claims through its own institutions. *Accord Alvarez v. Tracy*, 773 F.3d 1011, 1023, n. 14 (9th Cir. 2014) (warning courts against substituting their judgment for that of tribes as to what legal processes to employ, as to do so "turns comity on its head and replaces it with the very paternalism the Supreme Court has discouraged"). Indeed, the Ninth Circuit made clear in *Lewis* that the same waiver rules that apply in traditional tribal immunity contexts apply in situations subject to its expanded definition of the doctrine. *See Lewis* at 962 (discussing *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989)). In other words, because the doctrine exists to protect tribes, its protections are theirs to waive and it can't be turned around and used *against* tribes as way for third parties to avoid responding to claims brought *by* tribes against them in federal court.

Indeed, applying the doctrine in this way—which only the court in *Miccosukee I* appears to have ever been done, *cf. Miccosukee Tribe of Indians of Fla. v. Lewis* ("*Miccosukee II*"), No. 3D14-277, 40 Fla. L. Weekly D 752, 2015 Fla. App. LEXIS 4214 (March 25, 2015) (explicitly declining to follow *Miccosukee I* on this issue in a closely related case)[9]—would frustrate the very concerns for tribal self-government and self-determination that animate the Ninth Circuit's decision in *Lewis* and the decisions on which the RICO Defendants purport to rely. *See Lewis*, 424 F.3d at 961 (grounding its decision on the holding by "[t]he Supreme Court [in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)] . . . that Indian tribes are distinct, independent political communities that retain their original natural rights' in matters of local self-government") (internal quotation omitted); *cf.* Dkt. 52-1 at 18-19 (averring that their asserted broad rule flowed from the fact that "'Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations'") (quoting *Smith*, 10 F.3d at 558); *see also Miccosukee I*, 975 F.Supp.2d at 1305 (quoting the same from *Smith*); *Sac & Fox*, 340 F.3d 763-764 (grounding its holding on the fact that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'")

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[9] For example, the plaintiff in *Sac & Fox*, 340 F.3d at 763 was not the tribe itself, but rather certain tribe members seeking to gain control of it, and in *Smith*, 100 F.3d at 558, the tribe, again, was not the plaintiff, rather a group of tribe members and non-tribe members were the plaintiffs.

(quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). As several courts have recognized, ***the decision by a tribe to pursue its claims in federal or state court is, itself, an expression of its rights to self-determination***.

For example, *In Altheimer & Gray v. Sioux Mfg. Corp*., 983 F.2d 803 (7th Cir. 1993), the Seventh Circuit affirmed the district court's decision that it had jurisdiction based on a forum selection clause in a contract to which a tribal entity was a party—notwithstanding protests by the tribal entity that it should be freed of the obligations of the clause based on the doctrine of exhaustion of tribal remedies—on the ground that to do otherwise "would . . . undercut the Tribe's self-government and self-determination" manifested in its decision to enter into the agreement containing the clause. *Id*. at 815. Failing to provide a federal forum in this context, the court found, would undermine important policies of tribal self-government as the tribal entity had "actively [sought] the federal forum" in the contract by "explicitly agree[ing] to submit to the venue and jurisdiction of federal and state courts located in Illinois." *Id*. at 815; *see also generally, e.g. Ransom v. Babbitt*, 69 F.Supp.2d 141, 153, 155 (D.D.C. 1999) (finding that the invocation by the Interior Board of Indian Affairs ("IBIA") of "the rhetoric of tribal exhaustion and federal non-interference with tribal affairs" as a basis for its refusal to recognize the effort by the tribe to resolve certain issues via tribal referenda was "disingenuous at best") (cited by RICO Defendants, Dkt. 52-1 at 18).

Similarly, in *Miccosukee II*, the Florida Court of Appeal explicitly refused to follow *Miccosukee I* in a closely related case, rejecting an effort by the defendants there, based on the holding of *Miccosukee I*, to avoid the court's jurisdiction over claims brought against them by the tribe. In explaining its decision, the court held as follows, using language closely on point to the issues before this Court on the RICO Defendants' Motion:

> The ***purpose of the legal recognition of tribal sovereignty is to protect the Tribe***. Courts should be wary of interpreting this doctrine in a manner that immunizes non-tribal members, particularly from suits brought by the Tribe in State courts for violations of State law. Using the doctrine in such a manner ***flips the doctrine on its head***. ***Instead of providing protection, this interpretation damages the Tribe by depriving it of remedies*** against non-tribal wrongdoers.

Miccosukee II, 2015 Fla. App. LEXIS 4214 at *4 (emphasis added).

The United States Supreme Court, in *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g,* 467 U.S. 138 (1984), a case, like this, brought by a tribe, also rejected the proposition that doctrines of sovereign immunity created to protect tribal interests in self-governance could be invoked—as the RICO Defendants attempt to do here and the defendant attempted to do there—to frustrate a tribe's decision to pursue its claims in non-tribal venues:

> Despite respondent's arguments, we fail to see how the exercise of state-court jurisdiction in this case would interfere with the right of tribal Indians to govern themselves under their own laws.
>
> . . .
>
> As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. ***The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself*** and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.[10]

Id. at 148-149. (emphasis added).

The policy reasons in favor of respecting the Tribe's decision, here, to pursue its claims against the RICO Defendants before this Court are even stronger than those animating the decisions in *Sioux Mfg. Corp.*, *Miccosukee II*, and *Three Affiliated Tribes*. First, in *Sioux Mfg. Corp*, 983 F.2d at 815, notwithstanding an affirmative decision to invoke a federal forum pursuant to a contractual commitment, the tribal entity resisted; in contrast, the Tribe has directly sought a federal forum here. *See* FAC. Thus, to deprive this Tribe of its choice of a forum would undermine the prerogative of a sovereign tribal government even more then it would have in *Sioux Mfg. Corp*. Second, the fact that the Tribe, here, seeks to pursue its federal law claims before a federal court does not make the situation merely analogous to those presented in *Miccosukee I I* and *Three Affiliated Tribes*, in which the courts found policies of tribal self-governance supported respect for the tribes' choices, there, to pursue their state law claims in state court; Congress, in enacting 28 U.S.C. § 1362—which eliminated, exclusively for Indian tribe plaintiffs, the amount in controversy requirement that, at the time, generally applied for federal question jurisdiction—evidenced its strong intention that federally recognized Indian

[10] Notably in this regard, the RICO Defendants nowhere aver that the Tribe has any tribal court system set up to hear the Tribe's claims against them.

tribes be given every possible opportunity to proceed with federal claims in federal court, just as this Tribe is doing pursuant to its FAC. *Accord, e.g.,* Gross Dec., Ex. A (legislative history of 28 U.S.C. § 1362 noting in favor of the section's enactment, "the unique relationship which exists between [tribes] and the Federal Government" and that under the section, if enacted, "the tribes would . . . have access to the Federal courts through their own attorneys").[11] Thus, holding, as the RICO Defendants ask the Court to do, that, based on a doctrine premised in the protection of Indian tribes' rights to self-government and self-determination, this Tribe should be barred from choosing to pursue its federal law claims in federal court would not only turn the doctrine of tribal immunity on its head but also frustrate the clear will of Congress.

Accordingly, there is no merit whatsoever to the argument by the RICO Defendants that this Court can forgo its unflagging obligation to hear the Tribe's federal law claims against the RICO Defendants on the basis of a doctrine that was created to protect the interests of the Tribe. The ability to hold accountable past government employees for their conduct is at the core of a people's right to self-governance; and thus, "the well-established federal policy of furthering Indian self-government," *Santa Clara Pueblo*, 426 U.S. at 62, would be remarkably disserved if the Court disregarded the Tribe's sovereign decision to employ the power of the federal court system in its efforts to do so. The Tribe respectfully submits the RICO Defendants' Motion should be denied.

B. No Rule Denies Federal Courts Subject Matter Jurisdiction Over Cases, Such as This, in Which the Courts Are *Not* Asked to Resolve Any Live Dispute of Tribal Governance or Membership

A related but independently sufficient basis on which to deny the RICO Defendants' Motion to Dismiss is that the instant case in no way asks the Court to resolve any live issue of

[11] In light of this clear statement of Congress's intent to make federal courts especially open to claims brought by Indian tribes, the *Miccosukee I* court's suggestion that a tribe has less rights in federal court than the "shareholders suing its [sic] company's officers" is particularly erroneous. *Miccosukee I*, 975 F.Supp.2d at 1307 (finding that while "applicable law permits shareholders to bring suit against its officers for certain wrongs; the same open courthouse door policy is not afforded sovereign Indian nations when the dispute arises within its domain"). It should also be noted also that a far more accurate analogy to the situation in *Miccosukee I* and here is not a suit by a shareholders against their company's officers (which would have to be brought derivatively), but rather a suit *by a company* against its *former officers*. *Accord generally* RICO Ds' Stay Mtn. at 5 (describing the RICO Ringleaders as "employees of the Tribe" and stating "the Tribe's allegations against Defendants relate to Defendant's [sic] employment with the Tribe").

1 tribal governance or membership. In the same way that the RICO Defendants seek, in their brief,
2 to obscure the fact that the instant case was brought by the federally recognized Tribe itself, not
3 by any faction thereof, *see supra*, the RICO Defendants seek to misleadingly portray the instant
4 case as seeking resolution by the court of a live political dispute over makeup of the lawful
5 government of the Tribe. *See, e.g.* RICO Ds' Mtn. at 2 ("[T]his case is a governance dispute
6 internal to the Paskenta Band of Nomlaki Indians"), 3 ("That dispute stems from political
7 animosity between supporters of the Lohse Administration and the Freeman Council."). This is
8 nonsense.

9 As the RICO Defendants elsewhere admit, ***the make-up of the Tribe's government is not***
10 ***in dispute***: an election was held on September 13, 2014 ("September 13th Election"), at which the
11 current Tribal Council was elected with overwhelming support of the Tribe's membership. *See*
12 Dkt. 52-1 at 7 (acknowledging the September 13th Election of the current Tribal Council, without
13 dispute as to its legitimacy);[12] *see also* Declaration of Geraldine Freeman in Support of RICO Ds'
14 Stay Mtn. ("G. Freeman Dec."), Dkt. No. 55-2, at 2 (member of former Tribal Council
15 renouncing any claim to position following September 13th Election) Declaration of David
16 Swearinger in Support of RICO Ds' Stay Mtn. ("D. Swearinger Dec."), Dkt. No. 55-3, at 2
17 (same); Declaration of Allen Swearinger in Support of RICO Ds' Stay Mtn. ("A. Swearinger
18 Dec."), Dkt. No. 55-4, at 2 (same).[13] The instant case, therefore, as a matter of logic, cannot be
19 described as seeking resolution by the Court of "a governance dispute internal to the Paskenta
20 Band of Nomlaki Indians," as no such dispute exists. *Cf.* Dkt. 52-1 at 2. A court cannot be asked

21 [12] Notwithstanding a stray accusation to the contrary in their Stay Mtn. at 5, the RICO Defendants
22 also acknowledge that the Tribe is addressing tribal membership issues through its own processes, *see* Dkt. 52-1 at 7, and nowhere in their Motion to Dismiss aver that the through the instant
23 action, the Tribe is seeking resolution by this Court of whether any particular person is or is not a member of the Tribe. Indeed, it would be nonsensical for the Tribe, which has the authority to
24 decide, itself, who is and is not a member, to give up that authority to this Court and then seek to convince the Court to reach a result that the Tribe would otherwise have been able to directly
25 effect. *Cf. Smith*, 10 F.3d at 558-559 (claims brought by members and non-members of the tribe who sought to have the court render a decision on tribal membership that was different from the
26 decision already rendered on the issue by the tribe).
[13] The Declaration of Geraldine Freeman in Support of RICO Ds' Stay Mtn. ("G. Freeman
27 Dec."), Dkt. No. 55-2, Declaration of David Swearinger in Support of RICO Ds' Stay Mtn. ("D. Swearinger Dec."), Dkt. No. 55-3, Declaration of Allen Swearinger in Support of RICO Ds' Stay
28 Mtn. ("A. Swearinger Dec."), Dkt. No. 55-4, are the proper subjects of judicial notice as previous filings in the instant case. *See* RJN No 1.

to resolve a dispute that does not exist.

It is, however, not hard to surmise why the RICO Defendants would seek to mischaracterize the instant case in this way: with the exception of *Miccosukee I*—which the RICO Defendants aver is indistinguishable from this case and which, as discussed herein, was clearly wrongly decided—all of the authority that the RICO Defendants cite in purported support of their argument that the Court may decline to fulfill its unflagging obligation to hear the Tribe's claims establishes only a (not uniformly followed) rule that federal courts may decline to hear a case if doing so would require that they intrude into the internal affairs of an Indian tribe and resolve a live dispute over tribal membership or government. Ninth Circuit authority (which, again, the RICO Defendants largely ignore) stands for the same thing. As the purpose of the doctrine of tribal immunity that animates these decisions is, as discussed above, to protect and encourage tribal self-government and self-determination, this makes perfect sense: tribal self-government is frustrated when federal courts step-in and resolve live disputes over who constitutes the lawful government of the tribe, but it is not frustrated at all (but rather highly bolstered and supported) where, as here, a tribe itself, at the direction of its federally recognized and undisputed government, seeks the assistance of federal courts in holding former tribal employees responsible for committing numerous violations of federal law against it.

Virtually all of the RICO Defendants' authority, including *Miccosukee I*, as well as (more importantly) governing Ninth Circuit authority concerning tribal immunity and the closely related doctrine of exhaustion of tribal remedies, is fundamentally premised on the Supreme Court's instructions in *Santa Clara Pueblo* that federal courts should "avoid[] unnecessary ***intrusions*** on tribal governments." *Santa Clara Pueblo*, 436 U.S. at 67 (emphasis added);[14] *see, e.g., Alvarez*, 773 F.3d at 1021-22; *Lewis*, 424 F.3d at 960; *Smith,* 100 F.3d at 559; *Miccosukee I*, 975 F.Supp.2d at 1305; *see also Sac & Fox* 340 F.3d at 763 (resting its decision in large part on

[14] It should be noted that this foundation provides additional support for the argument *supra* that the tribal immunity doctrine described in *Lewis* has no application where, as here, the Tribe itself, pursuant to the wishes of its government, has chosen to bring the action. A court cannot sensibly be described as "intruding" on tribal governments when it is ***acting on claims brought by that tribal government***.

1 *United States v. Wheeler*, 435 U.S. 313, 322 (1978), in the Supreme Court analogously affirmed
2 Indian tribe's "right of internal self-government"). Accordingly, with the notable exception of
3 *Miccosukee*, when courts have declined to hear matters on the ground that they concern an issue
4 of tribal governance or membership, their decisions are not motivated by the *subject matter* of the
5 issues, in-and-of-themselves, but rather the courts' disinclinations to insert themselves into and
6 ***resolve a live dispute*** over such matters. This, of course, comports with the principle protecting
7 tribal self-government that underlie these decisions.

8 For example, in *Sac & Fox*, one of three cases on which the RICO Defendants purport to
9 heavily rely, *see* Dkt. 52-1 at 22-23, the principal relief sought by the plaintiffs, a group of tribal
10 members, was that the Court intervene in a dispute between them and another group of tribal
11 members, and declare the plaintiffs the lawful government of the tribe. *See Sac & Fox*, 340 F.3d
12 at 752. The Eighth Circuit affirmed the district court's dismissal of the case, on the ground that
13 the plaintiffs sought "***a form of relief*** that the federal courts cannot provide, namely, "***resolution***
14 ***of the internal tribal leadership dispute***." *Id.* at 763. The same is true of: another of the three
15 cases on which the RICO Defendants principally rely, *Smith*, 100 F.3d at 557 (agreeing with the
16 district court's refusal to decide a "conflict [that] concerns nothing more than the Tribe's
17 membership determinations," which "***needs to be resolved*** at the tribal level") (emphasis added);
18 the only decision by a court from this circuit cited by the RICO Defendants in support their
19 argument, *Alturas Indian Rancheria v. Salazar*, 2011 WL 587588, at *2 n. 1 (finding it "beyond
20 this court's jurisdiction ***to determine*** who is or isn't the 'real' Alturas Indian Rancheria," in a live
21 dispute between two groups claiming that authority); the Ninth Circuit's decision in *Lewis*, 424
22 F.3d at 960, 963 (agreeing with the district court that individuals could not seek an order by
23 federal court "they are entitled to recognition as members" in a live "intra-tribal membership
24 dispute"); and various decisions of other district courts from this circuit, *see, e.g., Timbisha*
25 *Shoshone Tribe v. United States DOI,* No. 11-cv-00995-MCE-DAD, 2011 U.S. Dist. LEXIS
26 51892, at *15 (E.D. Cal. May 16, 2011) (finding, in a decision denying a preliminary injunction
27 motion, that the plaintiffs were unlikely to prevail on their claims because, in the context of a live
28 dispute over who constituted the tribe's legal government, the court did not have the jurisdiction

1 to "determine whether Plaintiffs are entitled to sue on the Tribe's behalf[,] . . . [as] [t]his
2 determination ***would require the Court to resolve*** the parties' enrollment and election disputes")
3 (emphasis added); *Picayune Rancheria of Chukchansi Indians v. Henriquez*, No. 13-01917, 2013
4 U.S. Dist. LEXIS 181744, at *8 (D. Ariz. Dec. 30, 2013) (finding, in the context of a live dispute
5 over who constituted the tribe's legal government, the court did not have jurisdiction because
6 "***resolution of the claims would require this Court to recognize*** the Ayala faction over other
7 factions") (emphasis added).[15]

8 In contrast, when a claim merely *involves* issues of tribal governance or membership but
9 does not require a federal court to *resolve* a live dispute concerning tribal governance or
10 membership, the overwhelming weight of authority—including binding Ninth Circuit precedent
11 and the RICO Defendants' own cases—indicates that a court's otherwise lawful jurisdiction is
12 unaffected. For example, the Ninth Circuit, in *Alto,* found that the district court had the
13 jurisdiction to review, under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 501 et seq.,
14 a decision by the Bureau of Indian Affairs ("BIA") to affirm an Indian tribe's disenrollment
15 decision of the plaintiff and his relatives and issue a preliminary injunction in the context
16 thereof—despite the tribe's argument "that the court's preliminary injunction order depended on
17 jurisdictionally impermissible interpretations of tribal law and . . . subjects the Band to
18 'substantial inequities,' by providing relief running against the Band's self-governance and
19 property interests." *Alto*, 738 F.3d at 1119. In addition to rejecting the proposition that federal
20 courts lacked the authority to interpret tribal law when necessary to resolve federal law claims
21 (discussed below), the court found (in the context of Rule 19 analysis) that the tribe's rights to
22 self-governance would not be violated as an order by the court would require the BIA, not the
23

24 [15] The erroneousness of *Miccosukee I*'s contrary holding that a federal court can close its doors to an Indian tribe seeking to bring claims against persons responsible for past conduct, the
25 adjudication of which would not require the resolution of any live dispute over tribal governance or membership, is highlighted by *Miccosukee I*'s purported grounding of that holding in these and
26 other cases that stand for the proposition that tribal sovereignty concerns are only triggered when there is a risk of a federal court ***intruding*** into a live dispute over tribal governance or
27 membership. *See Miccosukee I*, 975 F.Supp.2d at 1305-1307 (relying extensively on *Smith* and *Sac & Fox*, also discussing *Santa Clara Pueblo* and *Longie v. Spirit Lake Tribe*, 400 F.3d 586,
28 589 (8th Cir. 2005) (declining to resolve a live dispute over ownership of tribal land brought by a tribe member against his tribe)).

tribe, to take actions and the tribe had previously delegated the authority in question to the BIA. *See id.* at 1127, 1129; *see also Ransom*, 69 F.Supp.2d at 150-151 (while recognizing that "courts take care not to intervene into internal tribal affairs," reaching an analogous result in a challenge to decisions by the BIA and IBIA validating a tribal constitution). Similarly, when the Ninth Circuit, in *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975), was called on to determine whether a tribal law enforcement officer had authority to make an arrest in question—a question which did not require it to resolve any live dispute over the make-up of the tribe's government but rather to analyze the action of that government in light of the tribe's constitution—the court made that determination without questioning its authority to do so. *See id*. at 1179 (9th Cir. 1975); *see also Alturas*, 2011 WL 587588, at *4 (while indicating that it would not resolve the live dispute as to who was the rancheria's lawful government, allowing a competing tribal faction to intervene in order to protect its rights in that live dispute).

The court in *Sac & Fox,* one of the principal decisions on which the RICO Defendants purport to rely, in fact, made exactly this distinction between claims whose adjudication would require the court to *resolve* a live dispute over the make-up of the tribe's government and claims that merely *involve* issues of tribal governance, but do not require any such resolution. In its examination of the district court's dismissal of plaintiffs' RICO claims, it affirmed that decision, not on the ground that such claims *involved* any issue of tribal governance, but rather because in order to adjudicate whether any predicate offense had occurred and whether the competing tribal council's constituted a RICO enterprise, the court would have to resolve a live dispute over the make up of the tribe's current government. 340 F.3d at 767.

In contrast, here, in order to adjudicate the Tribe's claims under RICO and other federal and California state laws, the Court will not be required to resolve any such live dispute. No such dispute exists; and, accordingly, the RICO Defendants do not argue that the RICO Ringleaders are the lawful government of the Tribe and thus their conduct cannot constitute predicate offenses or that they or the RICO Defendants, as a whole, are the current lawful government of the Tribe and so cannot constitute a RICO enterprise. *Cf Sac & Fox,* 340 F.3d at 767. Indeed, as mentioned, the RICO Defendants do not challenge the sufficiency of *any* of the Tribe's allegations, including

that the RICO Defendants constituted an enterprise or that they committed numerous RICO predicates. *See* ¶¶ 431-501. Therefore, there is no danger, here, that the Court, in adjudicating the Tribe's claims will intrude on the Tribe's right to self-government. Setting aside the arguable absurdity of the proposition that a court could ever be accused of violating a Tribe's right to self-government in adjudication of a case brought by the Tribe itself, *see supra*, no adjudication of any component of the Tribe's claims would require the Court to resolve any live dispute over who constitutes the Tribe's government or who are the Tribe's members. The Tribe's claims quite simply do not turn on those issues, but rather the legality under federal and California state law of the conduct of a group of individuals and businesses that over the course of well over a decade stole millions from the Tribe, launched cyber attacks against its computer systems, and/or substantially assisted others in the commission of those wrongs. *Accord Alto,* 738 F.3d at 1124. The RICO Defendants' argument that the Court has no jurisdiction to hear those claims, despite Congress's specific grants of authority for it to do so, *see* 28 U.S.C. §§ 1331, 1362, 1367; 18 U.S.C. § 1964(a), (c), on the ground that "[t]his case is a governance dispute internal to the Paskenta Band of Nomlaki Indians," Dkt. 52-1 at 2, is simply false and is without basis in the law. *Accord, e.g., Cheyenne-Arapaho Tribes of Oklahoma v. Beard,* 554 F. Supp. 1, 4 (W.D. Okla. 1980) ("[T]he Court is not persuaded that the issue of alleged individual misconduct by the defendant tribal officials in the application of tribal funds presented in Plaintiffs' Complaint is a political question not justiciable by the federal courts as the Defendants contend. Nor does Defendants' contention that federal courts lack jurisdiction over civil causes of action arising between Indians within 'Indian Country' appear to be supported by any statute or decision.").[16]

[16] The *Miccosukee I* court refused to follow the decision by the W.D. of Okla. in *Cheyenne-Arapaho* on the basis that "[t]he district court came to these conclusions without any citation to legal authority, and grounded its finding in its primary holding that the court had subject matter jurisdiction pursuant to 28 U.S.C. § 136 [sic]." *Miccosukee I*, 925 F.Supp.2d at 1307-1308. The *Miccosukee I* court is correct that twenty-three years after the *Cheyenne-Arapaho* decision the Tenth Circuit in *Kaw Nation v. Springer*, 341 F.3d 1186 (10th Cir. 2003), reached a different result concerning the existence of a private right of action under 28 U.S.C. § 1163. However, the language quoted above from *Cheyenne-Arapaho* was not "grounded" in that holding, but rather its rejection of arguments similar to those the RICO Defendants raise here. Furthermore, as the *Miccosukee* decision is, as discussed herein, not legally sound and directly contrary to binding Ninth Circuit precedent, its disregard of *Cheyenne-Arapaho* on the basis that the latter's contrary conclusion was reached "without any citation to legal authority" is not convincing.

Thus, the RICO Defendants' Motion on this basis should be denied.

C. Any Minimal Need by the Court to Apply Tribal Law to Adjudicate the Tribe's Federal and California State Law Claims Does *Nothing* to Diminish the Court's Subject Matter Jurisdiction

The other argument that the RICO Defendants offer in support of their averment that the Court should ignore its jurisdiction to adjudicate the Tribe's federal law and ancillary California state claims is that such adjudication will require "interpretation and application of Tribal law" by the Court. Dkt. 52-1 at 19. While this argument may track the erroneous reasoning in *Miccosukee I*,[17] it is directly contrary to Ninth Circuit precedent, in which the proposition that federal courts lack the authority to interpret or apply tribal law when necessary to resolve a claim under federal law has been squarely and explicitly rejected. *See Alto*, 738 F.3d at 1124. Thus, while as discussed below, adjudication of the core of the Tribe's claims will not require the Court to interpret or apply any tribal law; even if it did, the Court's jurisdiction to hear such claims would be unaffected.

As discussed *supra*, the plaintiffs in *Alto* challenged, under the APA, the BIA's decision to affirm their disenrollment decision that had been made by an Indian tribe. *See Alto*, 738 F.3d at 1116-1117. The tribe, after being granted the right to intervene following the district court's issuance of a preliminary injunction, "moved to dissolve the injunction for lack of jurisdiction" on the ground, *inter alia,* "that the court's preliminary injunction order depended on jurisdictionally impermissible interpretations of tribal law." *Id.* at 1119. Specifically, the tribe, there, argued that because the challenge to the decision by the BIA depended, at its core, on a determination whether the BIA was correct in its interpretation and application of tribal law, there was no federal question jurisdiction. *Id.* at 1122. The Ninth Circuit rejected that argument finding that federal question jurisdiction did exist under the APA and holding "[t]hat the substantive law to be

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[17] The *Miccosukee I* court held that it lacked subject matter jurisdiction *inter alia* on the ground that resolution of the plaintiff's claims "necessarily involves interpretation of the Tribal Constitution." 975 F.Supp.2d at 1306. In its decision declining to follow *Miccosukee I*, the Florida Court of Appeal cited Ninth Circuit authority reaching the opposite result. *See Miccosukee II,* 2015 Fla. App. LEXIS 4214, at *3 (citing *Ortiz-Barraza*, 512 F.2d 1176 with the parenthetical: "in prosecution for violation of federal laws, federal court analyzed constitution and laws of Papago Tribe and determined Papago police officer acted within his authority in making stop and arrest of non-tribal member").

applied in this case is tribal law does not affect our jurisdiction over an APA challenge to the BIA's decision." *Id.* at 1124. "The federal question for § 1331 purposes is whether the BIA violated the APA; that it is claimed to have done so in a case involving application of tribal law does not matter, any more than it would matter to § 1331 jurisdiction over an APA case involving an issue of state law." *Id.*

The same reasoning holds true here. Federal question for 28 U.S.C. § 1331 and 28 U.S.C. § 1362 purposes here is whether the RICO Defendants violated RICO and the FCFAA. *See* ¶¶ 431-501, 502-508. That the Court may, on the margins of these claims, be required to engage in a limited interpretation of tribal law in making determinations—such as whether, by virtue of their positions as Tribal Gaming Commissioners, RICO Defendants Ted and Juan Pata constituted "executive officers," as the term is used in California's anti-bribery law, Cal. Pen. Code § 67, *see id.*, ¶¶ 453-457—"does not matter, any more than it would to § 1331 jurisdiction over a [RICO] case involving [alleged bribery of former California state official, whose status as an "executive officer" would be determined under] state law." *Alto*, 738 F.3d at 1124.

As the *Alto* court noted, it was not alone in reaching the conclusion that federal question jurisdiction is not lost simply because if in order to resolve a claim sounding in federal law a court is required to interpret and apply tribal law, even if the matters to which the tribal law is applied involve issues of tribal membership and/or governance. *See Alto*, 739 F.3d at 1123, 1123, n. 9 (collecting and discussing authority from the Ninth Circuit and elsewhere); *see also Ransom*, 69 F.Supp.2d at 151-152 (finding, based on the application of tribal law to the facts before it in APA challenge, that the BIA and IBA "failed to fulfill their responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government"); *see also generally, e.g., Ortiz-Barraza*, 512 F.2d at 1980 (finding in resolution of appeal of conviction "that the actions of the Papago Council, taken together with the Papago Constitution and the applicable [tribal] law previously discussed, clearly establish the authority of a tribal police officer" to make the challenged appeal and resolving it on that basis).

In light of this authority, the RICO Defendants' argument that this Court should decline the jurisdiction given to it by Congress, via 28 U.S.C. §§ 1331, 1362, 1367 and 18 U.S.C. §

1964(a), (c), on the ground that in resolving certain non-core issues raised by the Tribe's federal and California state law claims, the Court may have to interpret and apply tribal law is simply wrong. Thus, the RICO Defendants' Motion should be denied.

D. Even if *Arguendo Miccosukee I* Correctly States the Law, There Would Still Be No Basis for the Court to Disregard Its Unflagging Obligation to Hear the Tribe's Claims

As discussed above, the heavy weight of authority, including, in particular, that of the Ninth Circuit and Supreme Court, holds that a federal court cannot decline to hear claims over which it otherwise has subject matter jurisdiction on the basis that it involves issues of tribal governance or membership if *either* (1) the claims are being brought by the Indian tribe, itself, *or* (2) the court is not being asked to resolve any live dispute over tribal governance or membership. The heavy weight of authority further rejects the proposition that such jurisdiction is in any way diminished by the need to interpret or apply tribal law in resolving federal law claims. However, assuming *arguendo*, that *Miccosukee I* was correct in holding that a federal court is free to disregard its federal question jurisdiction if in order to resolve that claim it must decide whether the "Defendants' wrongful acts exceeded the authority [an Indian] Tribe bestowed on them as contemplated in the Tribe Constitution," even if the claims are brought by the tribe itself and even if the claims do not ask the court to resolve a live dispute of tribal governance or membership, *Miccosukee I*, 975 F.Supp.2d at 1306, the Court would still have no basis to disregard its jurisdiction to hear the Tribe's claims here, as at their core, the Tribe's claims do not require the Court to interpret tribal law or make determinations regarding the RICO Defendants' governmental authority.

This case is fundamentally about four senior ***employees*** of the Tribe who took advantage of their positions of trust with the Tribe to organize and conduct an over decade-long conspiracy to defraud the Tribe out of millions of dollars. *See* ¶¶ 431-582. The RICO Defendants, in their Stay Motion, admit as much. RICO Ds' Stay Mtn., at 5 (describing the RICO Ringleaders as "employees of the Tribe" and "the Tribe's allegations against Defendants [as] relat[ing] to Defendant's [sic] employment with the Tribe"). Indeed, as the RICO Defendants also admit, only one of the RICO Defendants, Leslie Lohse, ever held any elected position with the Tribe, *see* Dkt.

52-1 at 4, and no other member of the previous Tribal Council is named as a defendant, *see* RICO Ds' Stay Mtn. at 5; *see also* FAC. Furthermore, according to the Fraudulent Employment Agreements on which the RICO Ringleaders have sought almost entirely to rely in justifying their theft of millions from the Tribe, *see* ¶¶ 377-392, when Ms. Lohse was engaged in the bulk of the conduct out of which the Tribe's claims arise she was acting, not as its elected Treasurer, but rather as its employee in the position of "Political Director." Murray Dec., Ex. [1-D][18] Accordingly, the Court, in determining whether the RICO Defendants committed the alleged predicate offenses, will not be called on to examine whether the RICO Defendants exceeded any authority given to them under the Tribe's constitution, but rather the much more prosaic question of whether the RICO Defendants engaged in an over decade-long pattern of theft from their employer, the Tribe. *Cf. Formax, Inc. v. Hostert,* 841 F.2d 388, 391 (Fed. Cir. 1988) (analyzing the adequacy of RICO claims plead by an employer against its former employee).

There is also no basis for the RICO Defendants' suggestion that resolution of the Tribe's claims against the RICO Defendants would place the Court in the position of having to determine whether a particular Tribal Council properly held authority at any particular time. *Cf.* Dkt. 52-1 at 27 (claiming that adjudication of the Tribe's RICO and CFAA claims, respectively, "would first require resolution of which Tribal Council - the Lohse Council or the Freeman Council - was authorized to access the Paskenta Tribal bank accounts . . . [and to] access the Paskenta Tribe's computer databases"). Preliminarily, it should be noted that these arguments, premised on the existence of competing Tribal Councils, are not based on any allegations contained in the FAC and thus are irrelevant to resolution of the RICO Defendants' facial challenge to the Court's jurisdiction. *See Costo,* 248 F.3d at 866; *cf.* Dkt. 52-1 at 2-7 (reciting purported "facts" without citation to the FAC or anything else); furthermore, they are simply wrong. As an initial matter, the only period during which there existed a dispute over who constituted the lawful Tribal Council was during a five month period in 2014, *see* Dkt. 52-1 at 5-7, whereas the Tribe alleges a pattern of fraud and theft by the RICO Defendants that started well over a decade before. *See* ¶¶

[18] The Declaration of John Murray in Support of RICO Ds' Stay Mtn. ("Murray Dec."), Dkt. 55-5, is the proper subjects of judicial notice as a previous filing in the instant case. *See* RJN No 1.

175-212. The suggestion that adjudicating claims based on that conduct would require the court to determine who was the lawful government of the Tribe during a five month period in 2014 is nonsensical. Maybe more to the point, the Tribe nowhere alleges that *any* Tribal Council, improperly, unlawfully, or otherwise provided the RICO Ringleaders authorization to treat the Tribe's money as though it was their own. Rather, the Tribe specifically alleges that such conduct was not authorized at all, and that the purported employment agreements based on which the RICO Ringleaders exclusively rely for such authorization are forgeries. *See* ¶¶ 377-392. Thus, the RICO Defendants' claim that the Court in resolving the Tribe's RICO and related claims will be required to resolve "which Tribal Council - the Lohse Council or the Freeman Council - was authorized to access the Paskenta Tribal bank accounts," Dkt. 52-1 at 27, is nothing but hand-waving transparently intended to distract and mislead the Court.

Similarly baseless is the RICO Defendants' bold suggestion that they can avoid liability under the CFAA for launching multiple and immensely destructive cyber-attacks against the computer systems of the Tribe following their termination, by proving they were "authorized . . . [to] access the Paskenta Tribes computer databases." Dkt. 52-1 at 27. First, regardless whether the RICO Defendants can prove in defense to this claim (a question which in-and-of-itself, again, has no relevance to a facial challenge to jurisdiction) that some group of people they claim constituted the lawful Tribal Council gave them such authorization is not relevant in light of the Tribe's allegations that they hacked into the Tribe's computer systems and destroyed huge amounts of data therein "with the intent to defraud the Tribe" and the applicable law. ¶ 504; *see, e.g., Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006); *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc*., 556 F. Supp. 2d 1122, 1131 (E.D. Cal. 2008), *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc*., 119 F. Supp. 2d 1121, 1125 (W.D. Wash. 2000). Furthermore, the CFAA law imposes liability on not just those who act "without authorization" but also those who have "exceeded their authorization," *United States v Nosal*, 676 F3d 854 (9th Cir. 2012); and the RICO Defendants nowhere have claimed that they were authorized to delete evidence of their illegal conduct and other data contained on the Tribe's computer systems, as they are specifically alleged to have done, *see* ¶¶ 395-412.

In short, the RICO Defendants' averment that "the allegations in this case are the direct result of the Paskenta Tribal Council (only one of which is a defendant here) allegedly failing to comply with Paskenta Tribal law," is simply not true. Dkt. 52-1 at 2. The allegations of this case directly arise from the conduct of four high-level employees of the Tribe, the RICO Ringleaders, who abused their high-level position and the access it gave them to the Tribe's money to grotesquely enrich themselves at the Tribe's expense through a more than decade-long pattern of fraud. *See* ¶¶ 82-361; *accord* RICO Ds' Stay Mtn., at 5. That the Tribe alleges the RICO Defendants were able to get away with the scheme so long, in part, because the Tribal Council at the time was not as attentive as it could otherwise have been, *see* ¶ 110, is as relevant to a determination of the RICO Defendants' liability here, as the question whether or not a shopkeeper was adequately minding her store in a shoplifting case. *See,* Cal. Pen. Code § 484(a) (defining theft without reference to any standard of care required of the victim)*; cf. Neder v. United States*, 527 U.S. 1, 24-25 (1999) ("[R]equirement [] of 'justifiable reliance' . . . plainly ha[s] no place in the federal [wire and mail] fraud statutes."). The RICO Defendants' desperate attempt to seize on these (obviously contextual) allegations in the FAC as a basis to aver that the Tribe's "claims are inextricably intertwined with internal Paskenta Tribal governance and the interpretation and application of Paskenta Tribal law," Dkt. 52-1 at 3; *see also id.* 2 (quoting ¶ 110), is exemplary of the meritless character of their argument as a whole that this Court lacks the jurisdiction to hear the Tribe's claims.

The RICO Defendants argue: "The case at hand is virtually indistinguishable from *Miccosukee* [*I*] and should therefore be dismissed for lack of subject matter jurisdiction." Dkt. 52-1 at 23. It's not. The instant case is distinguishable from *Miccosukee I* on multiple grounds. Thus, even if *Miccosukee I* was not wrongly decided and contrary to binding Ninth Circuit law, it still would not support the RICO Defendants' argument. This Court incontrovertibly has subject matter jurisdiction of this case based on 28 U.S.C. §§ 1331, 1362, 1367, as well as 18 U.S.C. § 1964(a), (c), and nothing that the RICO Defendants have argued (misleadingly or otherwise) alters that. Thus, the Tribe respectfully submits the RICO Defendants' Motion and that of the Moore Defendants, who join them in it, should be denied.

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II. Plaintiffs Plausibly Pleaded Their Eighteenth, Twentieth, and Twenty-First Claims for Relief Against the Umpqua Defendants

The Umpqua Defendants seek dismissal of Plaintiffs' Eighteenth, Nineteenth, Twentieth, Twenty-First, and Thirty-Third Claims for Relief. *See* Dkt. 46.

Plaintiffs oppose the Umpqua Defendants' motion with regard to the Eighteenth, Twentieth, and Twenty-First Claims for Relief. Plaintiffs do not oppose the motion with regard to the Nineteenth Claim for Relief for statutory negligence pursuant to California Commercial Code Section 3405(b) (Dkt. 46 at 9). Further, Plaintiffs do not oppose the Umpqua Defendants' motion with regard to the Thirty-Third Claim for Relief, provided that by doing so they are not limited or prejudiced in their ability to seek restitution as a remedy if appropriate. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) (although restitution may not be standalone cause of action, a defendant must pay restitution if he or she is unjustly enriched at the expense of another).

A. Allegations Specific to the Umpqua Defendants

Plaintiffs allege that Umpqua Bank allowed the RICO Ringleaders to "simply withdraw[] it in large lump sums from the Tribe's bank accounts" millions of dollars. ¶ 281. RICO Ringleader Ines Crosby frequently wrote checks for large sums of money made out to "Cash" or "Umpqua Bank," which on its face is a practice that raises red flags. ¶ 283. Dozens of withdrawals were made in suspicious fashion, creating a pattern that simply couldn't have been missed. ¶ 284. Indeed, in just seventeen months RICO Ringleader Crosby brazenly withdrew about three quarters of a million dollars with the assistance of the Umpqua Defendants, who were trained in federal regulations and therefore knew that the withdrawals were triggered to avoid bank's Currency Transaction Report ("CTR") requirements. ¶¶ 38-41, 286.

B. Plaintiffs Plausibly Pleaded the Umpqua Defendants' Negligence (Eighteenth Claim for Relief

Umpqua asks this Court to dismiss Plaintiffs' negligence claim on the false premise that it owed no duty to Plaintiffs. Dkt. 46 at 4-7. But it is well established that banks do owe a duty of reasonable care to depositors with whom it contracts, such as Plaintiffs here. *See, e.g.*, *Neilson v.*

Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1143 (C.D. Cal. 2003); *Software Design & Application v. Hoefer & Arnett*, 49 Cal. App. 4th 472, 479 (1996); *Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 813 (Cal. 1978). Indeed, Umpqua's own authority recognizes this duty. *See Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 543 (1998); *Das v. Bank of America, N.A.*, 186 Cal. App. 727, 741 (2010).

Nonetheless, Umpqua relies heavily on *Chazen* and selectively quotes portions of the opinion that concern claims for conversion—not negligence—brought by third parties against banks with whom it had no contractual relationship. Dkt. 46 at 4-6. There, the court held that the bank was not negligent with regard to the plaintiffs because they were "third parties, unknown to the bank, who were not parties to the deposit agreements," and therefore the bank owed them no duty of care. *Chazen*, 61 Cal. App. 4th at 543. The court went on, however, to note a critical distinction in the duty of care owed by a bank to its depositors:

> In analyzing appellants' claim of negligence, we must first distinguish between negligent performance of a bank's duties toward depositors and breach of a duty of care owed to third parties. It is well established that a bank has a duty to act with reasonable care in its transactions with its depositors . . . . The duty is an implied term in the contract between the bank and its depositor.

Id. at 543 (internal quotations and citations omitted).

The holding in *Chazen* therefore has no application here because the Tribe is the depositor who contracted with Umpqua when it opened its account with the bank. Therefore the bank owes the Tribe a duty of reasonable care. The RICO Defendants' actions triggered internal processes at the bank that were more than sufficient to put the bank on notice that the RICO Defendants were misusing the Tribe's funds. Once it was on notice that the funds were being misused, Umpqua had a duty to notify the Tribe at the very least.

In particular, banks owe a "duty of reasonable care to their clients to ensure the accuracy, legitimacy, and existence of [their] assets . . . ." *Neilson*, 290 F. Supp. 2d at 1143 (plaintiffs adequately pled negligence by alleging "the Banks breached this duty by failing to ensure accuracy, by commingling the assets of [plaintiff's] accounts, and by allowing [the organizer of a Ponzi scheme] to accept the Club members' funds even though the Banks knew he was not a

registered investment advisor"). A bank also breaches the "standard of reasonable care expected of a bank" when it fails to adhere to custom and practice in the banking industry. *See Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 813 (Cal. 1978) (bank breached duty of reasonable care when it failed to require signatures of both co-executors before processing withdrawals, resulting in reasonably foreseeable injury to plaintiff estate).

1. Umpqua Breached Its Duty to Adhere to Custom and Practice in the Banking Industry

"Under California law, a bank's failure to follow internal procedures and standard banking practices in monitoring accounts may breach duties implicit in the contract between a bank and its depositors." *Consolidated Pioneer Mortg. Entities v. San Diego Sav. & Loan (In re Consolidated Pioneer Mortg. Entities)*, 1999 U.S. App. LEXIS 517, at *8-9 (9th Cir. Cal. Jan. 13, 1999) (holding that plaintiff's claim that the defendant bank "violated internal procedures and standard banking practices in relation to a depositor . . . state[d] a negligence claim sufficient to survive a Rule 12(b)(6) motion to dismiss"). *Accord Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 813 (Cal. 1978)).

As alleged in the FAC, Umpqua failed to follow its own internal procedures. ¶¶ 591, 593. These internal policies and procedures required Umpqua to investigate suspicious activities and notify the Tribe, among other things. Umpqua's failure to do so constitutes negligence.

2. Under California Financial Code Section 1451, Umpqua Was Not Authorized to Honor RICO Defendants' Checks

Umpqua argues that California Financial Code Section 1451 insulates them from liability because it creates a presumption that a bank can honor a check drawn by a person authorized to use that account. Dkt. 46 at 5. But this presumption does not apply where, as here, there is constructive or actual knowledge of wrongdoing:

> If a deposit is made in a bank to the credit of a person as trustee, the bank is charged with notice that the funds are received in fiduciary capacity. The bank is not liable for the misappropriation of trust funds by the trustee, however, *unless the bank has knowledge, actual or constructive, of such misappropriation*. . . . The bank is authorized to honor withdrawals from an account on the signatures authorized by the signature card, which serves as a contract between the depositor and the bank for the handling of the account. So long as the checks drawn on the

> account are signed in conformity with the signature card, and *absent any knowledge of a misappropriation*, the bank is free from liability for honoring a check drawn in breach of trust.

Blackmon v. Hale, 1 Cal. 3d 548, 556 (Cal. 1970) (internal quotations and citations omitted, italics added). In the present case, as alleged in the FAC, Umpqua knew that the RICO Defendants were misappropriating the Tribe's funds. ¶¶ 591, 593. As discussed in the context of Umpqua aiding and abetting the RICO Defendants, a jury could reasonably infer that Umpqua had actual knowledge of the RICO Defendants' scheme to misappropriate the Tribe's money because Umpqua knew that the RICO Ringleaders were withdrawing vast sums of the Tribe's money; that they were using checks smaller than $10 thousand to avoid triggering reporting requirements; that they were repeatedly making checks out to Cash and to the bank; that they were using the money for things unrelated to Tribe business, such as luxury pickup trucks, lavish vacations, gold, jet travel, home improvements and attending sports events, among other things. ¶¶ 8, 10, 155, 166, 281-286, 325, 334, 350.Taken together, these allegations are more than adequate to show that Umpqua had actual knowledge of the RICO Defendants' conversion and breach of fiduciary duty. *See Simi Mgmt. Corp. v. Bank of Am., N.A*., 930 F. Supp. 2d 1082, 1100 (N.D. Cal. 2013).

3. Under California Commercial Code Section 4401, Umpqua Was Not Authorized to Honor Defendants' Checks

Umpqua argues that California Commercial Code Section 4401 requires the Court to "presume that withdrawals made by authorized signers are for a proper purpose." 46 at 5. But section 4401 has no application here. The provision merely allows a bank to pay a customer's "item" even if doing so will put the customer's account into overdraft, *if* the item "is authorized by the customer." As stated in the FAC, the Tribe did not authorize any of the checks or withdrawals utilized by the RICO Defendants to misappropriate the Tribe's funds. ¶¶ 5, 171, 276, 278, 281. Section 4401 does not alleviate a bank of its duty to exercise reasonable care in administering its customers' accounts. Umpqua breached this duty, and was negligent.

C. Plaintiffs Plausibly Pleaded the Umpqua Defendants' Breach of Contract (Twentieth Claim for Relief)

Umpqua argues that Plaintiffs fails to identify the contracts with sufficient detail to state a claim for breach of contract. This is false. Plaintiffs allege that "The Tribe, as a depositor, and Umpqua Bank entered into contracts concerning each of the of the accounts that the Tribe opened at Umpqua Bank, including without limitation Umpqua Tribal Account X, Umpqua Tribal Account Y, and Umpqua Tribal Account Z." ¶ 612. Umpqua has unwittingly shown that this is sufficiently detailed. "[T]he 'relationship of bank and depositor is founded on contract, which is ordinarily memorialized by a signature card that the depositor signs upon opening the account.'" Dkt. 46 at 4 (quoting *Chazen*, 61 Cal. App. 4th at 537). The contracts to which the FAC refers are the contracts between the Tribe and Umpqua that are memorialized on signature cards held by the bank, as made clear by Umpqua's Motion to Dismiss and *Chazen*.

Umpqua admits that it owed the Tribe a *contractual* duty to use reasonable care in the administration of Plaintiffs' accounts. Dkt. 46 at 13. As stated in *Chazen*: "It is well established that a bank has a duty to act with reasonable care in its transactions with its depositors . . . . The duty is an implied term in the contract between the bank and its depositor." *Id.* at 543 (internal quotations and citations omitted). Accordingly, a failure to honor this duty to act with reasonable care is not only negligence, it is also breach of contract.

A bank breaches this duty to act with reasonable care by:

- "failing to ensure accuracy, by commingling the assets of [plaintiff's] accounts, and by allowing [the organizer of a Ponzi scheme] to accept the Club members' funds even though the Banks knew he was not a registered investment advisor." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1143 (C.D. Cal. 2003);
- Failing to adhere to the custom and practice of the industry. *Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 8099 (Cal. 1978);
- Failing to adhere to its own internal policies and procedures as recorded in its operations manual. *Id.*

In the present case, the FAC alleges that Umpqua did not comply with its own internal policies and procedures when it allowed and facilitated the RICO Defendants' systematic looting

of the Tribe's accounts. ¶¶ 591, 593, 597. By failing to comply with its own internal policies and procedures, Umpqua breached its duty to use reasonable care with respect to the Tribe's accounts. Because the duty to use reasonable care is an implied term of the contract, Umpqua breached its contract with Plaintiffs.

D. Plaintiffs Plausibly Pleaded the Umpqua Defendants' Aiding and Abetting of the RICO Defendants' Conversion and Fiduciary Duty Breaches (Twenty-First Claim for Relief)

"Under California law, liability for aiding and abetting the commission of an intentional tort may attach in two ways: if a defendant (1) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act. . . or (2) gives substantial assistance to the other in accomplishing a tortious result and the entity's own conduct, separately considered, constitutes a breach of duty to the third person." *Simi Mgmt. Corp. v. Bank of Am., N.A.*, 930 F. Supp. 2d 1082, 1098 (N.D. Cal. 2013) (quotations omitted). "The first of these two methods of proof requires that the defendant have actual knowledge of the specific primary wrong the defendant substantially assisted." *Id.* "A plaintiff may prove actual knowledge through inference or circumstantial evidence. For example, in the banking context, atypical banking procedures or transactions lacking business justification may help give rise to the conclusion that a bank had actual knowledge of the specific wrongdoing in question." *Id.* at 1099. "Generally, courts have found pleadings sufficient if they allege generally that defendants had actual knowledge of a specific primary violation." *Neilson v. Union Bank of Cal., N.A.,* 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) (holding that indications that the bank "utilized atypical banking procedures to service [the primary defendant's] accounts, rais[ed] an inference that they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business").

In *Simi*, a car dealership's chief financial officer had embezzled millions of dollars from the dealership. *Id.* at 1084. The dealership sued Bank of America, alleging among other things that it had aided and abetted embezzlement, conversion and breach of fiduciary duty by the CFO. *Id.* at 1098. The judge named many of the same activities alleged in the FAC here in holding that

1 the plaintiff had presented sufficient evidence that the bank had actual knowledge of conversion
2 and breach of fiduciary duty by the CFO:
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> prolific use of cashiers checks; making Plaintiff's checks out to the bank or "cash;" using Plaintiff's funds to pay for goods and services unlikely connected to Plaintiff's business; . . . and performing some transactions in increments under $10,000, could lead a jury to reasonably infer that BofA knew that Reichart was embezzling Plaintiff's funds. That fact that BofA knew that Reichart was Plaintiff's CFO, could also add to a reasonable inference of actual knowledge of Reichart's breach of fiduciary duty to Plaintiff.

8 *Id.* at 1100. Based on the reasonable inferences created by these allegations, the court
9 denied the bank's motion for summary judgement.
10 Though *Simi* involved a motion for summary judgment, the fundamental reasoning
11 behind the court's decision would apply with equal force to a motion to dismiss. In the
12 present case, Plaintiffs have alleged that the RICO Defendants engaged in numerous
13 instances of all of these activities. ¶¶ 281-286. The fact that the RICO Ringleaders were
14 all part of the Tribal leadership and one was on the Tribal Council (¶¶ 27-31, 88-89) adds
15 a reasonable inference that Umpqua knew the RICO Ringleaders were breaching their
16 fiduciary duty to the Tribe. Taken together, these allegations create a reasonable inference
17 that Umpqua had actual knowledge of the RICO Defendants scheme.
18 Another case which denied a motion for summary judgement where the
19 accumulation of circumstantial evidence created a reasonable inference of "actual
20 knowledge" was *Scarff v. Wells Fargo Bank, N.A.*, 2005 U.S. Dist. LEXIS 40441, at *19
21 (N.D. Cal. Dec. 16, 2005). In *Scarff,* an executive at a bank with personal responsibility
22 for the plaintiff's account worked closely with the plaintiff's bookkeeper over a period of
23 five years in a way that created a reasonable inference that the executive knew of the
24 bookkeeper's conversion of the plaintiff's funds. Evidence that the bank executive
25 approved of an arrangement under which the plaintiff's banking statements were sent to
26 the bank executive's own assistants, that she countersigned fraudulent loan extension
27 documents in without witnessing the other signature (both atypical banking procedures),
28 and that she accepted gifts from the primary defendant and possibly lied about whether

she reported the gifts, led the court to conclude that the plaintiff had presented sufficient evidence to show that the bank had actual knowledge of the primary defendant's actions. *Id.* at 20-23.

Contrary to Umpqua's assertions, Plaintiffs have alleged sufficient suspicious activity by the RICO Ringleaders to create a reasonable inference that Umpqua had actual knowledge of the RICO Defendants' misappropriation of the Tribe's funds. Plaintiffs alleged that Umpqua knew that the RICO Ringleaders were withdrawing vast sums of the Tribe's money; that they were using checks smaller than $10 thousand to avoid triggering reporting requirements; that they were repeatedly making checks out to Cash and to the bank; that they were using the money for things unrelated to Tribe business, such as luxury pickup trucks, lavish vacations, gold, jet travel, home improvements and attending sports events, among other things. Taken together, these allegations are more than adequate to show that Umpqua had actual knowledge of the RICO Defendants' conversion and breach of fiduciary duty. ¶¶ 8, 10, 155, 166, 281-286, 325, 334, 350.

III. Plaintiffs Plausibly Pleaded Their Twenty-Second, Twenty-Third, and Twenty-Fourth Claims for Relief Against the Cornerstone Defendants

The Cornerstone Defendants submit arguments seeking dismissal of Plaintiffs' Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Thirty-Third Claims for Relief. *See* Dkt. 50 (Notice and Motion), 50-1 (Memorandum of Points & Authorities). Though the Cornerstone Defendants give notice that they seek dismissal of Plaintiffs' Twenty-Sixth and Twenty-Seventh Claims for Relief—alleging, respectively, breach of contract and aiding and abetting the RICO Defendants' conversion of Tribal properties and monies—they submit no arguments specifically supporting dismissal of these claims. Dkt. 50 at 2; ¶¶ 690-708. However, the Cornerstone Defendants assert that dismissal is warranted for all of Plaintiffs' claims against them on the basis of a purported affirmative defense. *See* Dkt. 50-1 at 4-14.

Plaintiffs oppose the Cornerstone Defendants' motion with regard to the Twenty-Second, Twenty-Third, and Twenty-Fourth Claims for Relief, and they oppose the Cornerstone Defendants' efforts to dismiss all of Plaintiffs' claims against them on the basis of a purported affirmative defense. Plaintiffs do not oppose the Cornerstone Defendants' motion with regard to

the Twenty-Fifth Claim for Relief for statutory negligence pursuant to California Commercial Code Section 3405(b) (Dkt. 50-1 at 18).

A. Allegations Specific to the Cornerstone Defendants

The Tribe, PEC and other Tribe-owned businesses have maintained numerous accounts with Cornerstone Community Bank ("Cornerstone Bank" or "Bank") since it opened for business in October 2006. *See* ¶ 42. While the Cornerstone Defendants frame their relationship with Plaintiffs as little more than a bank-depositor one (Dkt. 50-1 at 2), the degree of interaction among Cornerstone Bank, Jeffrey Finck (President and CEO), and the RICO Ringleaders—specifically John Crosby—during the period relevant to Plaintiffs' claims demonstrates that the Bank's relationship with the Tribe while it was under the RICO Ringleaders' control was more than simple depository relationship. *See, e.g.*, ¶¶ 42, 287, 295, 318, 320, 322, 327, 332, 335, 343, 349-351.

During the period relevant to Plaintiffs' claims, the Tribe was a minority shareholder in Cornerstone Bank and, later, Cornerstone Community Bancorp ("Community Bancorp"), its bank holding company. *See* ¶ 42. John Crosby sat on the Cornerstone Bank Board of Directors at various times during the period relevant to Plaintiffs' claims. *See* ¶¶ 42, 260.

The RICO Ringleaders concentrated the deposits and other accounts of most, if not all, Tribal entities and businesses at Cornerstone Bank. *See* ¶ 42. From the outside, it was certainly unusual for a small community bank like Cornerstone Bank to hold millions of dollars on deposit. The RICO Ringleaders and Cornerstone Bank, however, knew that the Bank's large deposits and its executives' significant compensation were the result of a quid pro quo arrangement with the RICO Ringleaders. *See* ¶ 295. That is, Cornerstone was permitted to benefit from the Tribe's largess in exchange for providing the RICO Ringleaders unfettered and improper access to Tribal money and the use of bank services in furtherance of their scheme to defraud the Tribe. *See* ¶ 287-288.

Cornerstone Bank—with Mr. Finck running point—assumed a significant role in providing substantial assistance with and facilitation of the RICO Ringleader's years-long process of draining money from the various Cornerstone Bank accounts for the Tribe and Tribe-owned

businesses (*e.g.*, PEC) and converting it for their own personal use. *See* ¶¶ 318, 320-322, 332. Cornerstone Bank, Mr. Finck and the Bank's other executives and employees had actual knowledge of the RICO Ringleaders' conversions of Tribal money and their breaches of fiduciary duties to the Tribe, but they said nothing about it to the Tribe and did nothing to stop it. *See* ¶¶ 632-650. While Cornerstone Bank and Mr. Finck kept silent, they continued to profit from their relationships with the RICO Ringleaders. *See* ¶ 644.

As part of Cornerstone Bank's substantial assistance to the RICO Ringleaders, they facilitated many atypical banking transactions that triggered the scrutiny of the Bank's automated internal controls, as well as the attention of Bank personnel trained to recognize and scrutinize the propriety of such transactions. Nonetheless, the RICO Ringleaders were permitted by Cornerstone Bank and Mr. Finck to avoid this scrutiny and ultimately complete these questionable transactions. *See, e.g.*, ¶¶ 632-650. For example, Cornerstone Bank facilitated the following transactions:

- Facilitating John Crosby's withdraw of over $838,434.14 from a PEC account to purchase a cashier check he then used to purchase a luxury home ("Deer Hollow Property") (*See* ¶ 287);
- Providing Mr. Crosby a home equity line of credit ("HELOC") for approximately $200,000 secured by the Deer Hollow Property approximately four months after it was purchased with money cashed out of a PEC account (*See* ¶ 321);
- Making the economically irrational decision to subordinate its HELOC on the Deer Hollow Property six months after Mr. Crosby got it to give the first position to a $417,000 loan Mr. Crosby procured from Quicken Loans, Inc. (*See* ¶ 322);
- Facilitating Mr. Crosby's spending over $660,000 of the Tribe's money to make improvements on the Deer Hollow Property ¶ 323);
- Permitting Mr. Crosby to make huge cash withdrawals from PEC accounts, including withdrawals made between 2011 and 2014 of more than $1,500,000.00 ¶ 287); and
- Permitting Mr. Crosby and RICO Ringleader Larry Lohse to write checks to

themselves and each other, worth more than $580,000 in total, from 2011 to 2014. ¶ 288).

These transactions—as well as many other atypical, high-value ones intended only to benefit the RICO Ringleaders or those they chose—were facilitated by Cornerstone Bank and concealed from the Tribe for years. *See* ¶ 644. Only after the RICO Ringleaders were removed from power on April 12, 2014, and after the new tribal leadership was installed, did Cornerstone Bank, by and through Mr. Finck, alert a tribal employee that the Tribe should look into the RICO Ringleaders' suspicious banking activities in a specific PEC account. *See id*.

B. <u>The Cornerstone Defendants Cannot Dismiss All of Plaintiffs' Claims Against Them Based on a Purported Affirmative Defense</u>

The Cornerstone Defendants argue that all of the Tribe's claims should be dismissed because of a release they obtained under the threat of freezing the Tribe's funds. There are significant fact issues concerning this release—including whether it was properly obtained, its scope, and whether another release governs—and the release they rely on cannot be incorporated by reference.

Because the FAC alleges little more than the existence of the "release", the Cornerstone Defendants request that the Court incorporate by reference into the Complaint the Amended and Restated Defense and Indemnity Agreement between Cornerstone Bank and the Tribe, dated May 19, 2014 ("May 19 Amendment"). *See* Dkt. 50-1 at 4-7; Dkt. 50-2 (Declaration of Jeffrey Finck) at Ex. A. The Cornerstone Defendants make no mention at all of the first Defense and Indemnity Agreement between the Bank and the Tribe, dated April 22, 2014 ("April 22 Agreement"). *See* Declaration of Ambrosia Rico ("Rico Decl") at Ex. 1.

Predictably, the Cornerstone Defendants assert that the May 19 Amendment contains the terms of the "release" *See* Dkt. 50-1 at 4-5. They rely on Paragraph 7 of the May 19 Amendment to "unambiguously establish" the Tribe's purported "release" of the Cornerstone Defendants from liability, as well as the Tribe's purported waiver of California Civil Code Section 1542's protections against the release of unknown claims ("Section 1542"). *See id*. The Cornerstone Defendants seek incorporation of this release and waiver language to challenge on the pleadings

Plaintiffs' allegations that the "release" executed with Cornerstone Bank was "ineffective" as to "claims that the Tribe did not know or suspect to exist in its favor at the time . . . [it] execut[ed] the release." *See* Dkt. 50-1 at 5-7, 12-14; ¶ 648.

1. Legal Standard Regarding Affirmative Defenses as a Basis for Dismissal on a Motion to Dismiss

A plaintiff need not anticipate or overcome affirmative defenses its complaint. *See U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003); *Perez v. Sun Pac. Farming Coop., Inc.*, No.15-CV-00259-KJM-SKO, 2015 U.S. Dist. LEXIS 73986, at *5-*6 (E.D. Cal. June 8, 2015) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). A complaint may successfully state a claim for relief even though there is a defense to that claim. *See Brownmark Films, LCC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). The presence of a potential affirmative defense does not render the claim for relief invalid because these defenses typically turn on "matters extraneous to the plaintiffs' prima facie case" and therefore not before the court on a motion to dismiss. *See id*, 682 F.3d at 690; *Queen's Med. Ctr. v. Kaiser Foundation Health Plan, Inc*., 948 F. Supp. 2d. 1131, 1143 (D. Haw. 2013) (citation omitted).

A defendant typically can seek dismissal of a case on the basis on an affirmative defense either through a Rule 12(c) Motion for Judgment on the Pleadings or a Rule 56 Motion for Summary Judgment pursuant to Rule 12(d). *See Brownmark*, 682 F.3d at 690.[19] However, an affirmative defense may serve as the basis for dismissal on a Rule 12(b)(6) motion where the defendant shows some obvious bar to securing relief on the face of the complaint. *See Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) ("[T]he assertion of an affirmative defense may be considered properly on a motion to dismiss where the 'allegations in the complaint suffice to establish' the defense.") (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)). This happens when a

[19] *See id*. at 690 ("[T]here is no need to enlarge the role of 12(b)(6) motions, as there are already two other rules [*i.e.* Rule 12(c) and Rule 56] that address the situation of dismissing baseless suits before discovery."). *See also Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963, 975-976 (7th Cir. 2013) (finding that the district court dismissed the case at issue "under the wrong rule," *i.e.*, Rule 12(b)(6), and cautioning that motions relying on affirmative defenses should be made under Rule 12(c), "since an affirmative defense is external to the complaint"). The Cornerstone Defendants rely exclusively on *Yassan* and *Brownmark* to support their request for incorporation by reference, but ignore the the cases' clear guidance on not bringing Rule 12(b)(6) motions based on affirmative defenses. *See* Dkt. 50-1 at 4-5.

plaintiff unintentionally alleges facts—taken as true—that establish an affirmative defense, thus rendering their claims implausible:

> In a situation involving the barring effect of an affirmative defense, the claim is stated adequately from that perspective, but in addition to the claim the contents of the complaint includes matters of avoidance that effectively vitiate the pleader's ability to recover on the claim. . . . [T]he problem is not that the plaintiff merely has anticipated the defendant's answer and tried to negate a defense he believes his opponent will attempt to use against him; rather, the plaintiff's own allegations show that a defense exists that legally defeats the claim for relief.

Charles Alan Wright & Arthur R. Miller, 5B Federal Practice and Procedure § 1357, at 708-13 (3d ed. 2004). *See, e.g., Jones,* 549 U.S. at 215 ("If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative defense . . . ."); *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005)(Although "complaints do not have to anticipate affirmative defenses to survive a motion to dismiss, . . . [an] exception occurs where . . . the allegations of the complaint set forth everything necessary to satisfy the affirmative defense . . . .") (citing *Gomez*, 446 U.S. at 640).

If the affirmative defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper. *See Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). *See also Ascarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1008-1009 (9th Cir. 2014) (reversing dismissal pursuant to Rule 12(b)(6) where interpretation of settlement agreement raised a factual dispute).

2. <u>The "Release" is Not Facially Apparent in the Complaint</u>

Plaintiffs' allegations regarding the "release" have not pleaded them out of court. The Complaint alleges practically nothing about the "release" other than why Plaintiffs entered into it with the Bank. *See* ¶¶ 645-648. The Complaint provides no details regarding the "release" pertaining to its scope or terms other than its release of Cornerstone Bank and its executives. *See id.* The Complaint does not name the document in which the "release" was memorialized, nor does it specify when the "release" was executed. Only four out of the Complaint's 763 paragraphs contain any allegations about the "release," but three out of these four paragraphs—¶¶ 646-648—are dedicated to pleading the deception, coercion and/or duress involved in Cornerstone Bank's procurement of the "release" and the impact of such unlawful actions on its validity and

effectiveness. Accordingly, it is misleading for the Cornerstone Defendants to assert that the "release" is "repeatedly" referenced in the Complaint. *See* Dkt. 50-1 at 4, 5.

3. The Cornerstone Defendants' Request for Incorporation by Reference Should be Denied Because It Raises Disputed Issues of Facts Regarding the "Release" Inappropriate for Resolution at the Pleading Stage

The Cornerstone Defendants' efforts to conclusively determine—even before the start of discovery—whether Plaintiffs have waived their rights to bring suit against them has raised a clear factual dispute. They request the incorporation by reference into the Complaint certain waiver and release provisions cherry-picked from the May 19 Amendment to serve their interests but, while the same time they have not been forthcoming about the April 22 Agreement's existence. It is premature at this time for the Court to make a definitive and potentially dispositive decision regarding which "release" is referred to in the Complaint (*i.e.*, the release provisions found in the April 22 Agreement versus the May 19 Amendment's provisions). The Cornerstone Defendants' request for incorporation by reference should be denied.

There is, in fact, good reason to challenge the Cornerstone Defendants' misleading representations that the May 19 Amendment is the "release" "repeatedly referenced" in the Complaint. *See* Dkt. 50-1 at 4, 5. While the May 19 Amendment is, in fact, an agreement among the Tribe and Cornerstone Bank that contains liability release language and a waiver of Section 1542's protections against the release of unknown claims (Dkt. 50-2 at ¶ 7), it was not the first such agreement in time. The April 22 Agreement was executed by Cornerstone Bank and the Tribe within ten days of the RICO Ringleaders' ouster. *See* Rico Decl. Ex. 1 at Preamble, ¶¶ A-B. Between April 12 and 22, 2014, the new Tribal leadership was—as is pleaded in the Complaint and stated in the April 22 Agreement—desperate to get access to Tribal deposits to avoid "severe and irreparable harm to the economic interests of the Tribe and its members." *See* ¶¶ 647; Rico Decl. Ex. 1 at ¶ F. The May 19 Amendment, however, was executed nearly a month after the April 22 Agreement, at which time the new Tribal leadership had been in place for more than a month and had been able to access Tribe and Tribe-owned business accounts during that time. *See* Dkt. 50-2 at ¶ M (the May 19 Amendment "facilitate[d] [Cornerstone Bank's] preservation of the

1 status quo with respect to the [Tribe] and the Tribal Entities' businesses"). Considering the
2 closeness in time of the April 22 Agreement's execution to the new Tribal leadership's urgent
3 need for access to its deposit accounts after April 12, as well as the fact that the May 19
4 Amendment is simply an amended agreement, the Tribe's the April 22 Agreement—and not the
5 May 19 Amendment—clearly is the document containing the "release" referenced in the
6 Complaint. Accordingly, incorporation of the May 19 Amendment by reference therefore would
7 be misleading.

8 The differences between these two agreements add clarity to the "release" issue the
9 Cornerstone Defendants have put at center of their motion to dismiss. Comparing the April 22
10 Agreement to the May 19 Amendment reveals that there are at least two key issues pertaining to
11 the "release" that likely caused the Cornerstone Defendants to keep the April 22 Agreement out
12 of the record.

13 ***First,*** the April 22 Agreement makes clear that the Tribe did not agree to a waiver of all
14 unknown claims in their first "release" executed with Cornerstone Bank. The release language in
15 the April 22 Agreement, paragraph 5, is much narrower than the release provisions at paragraph 7
16 of the May 19 Amendment. It clearly contains no language that can be construed or interpreted in
17 any way as a waiver of Section 1542's protections pertaining to unknown claims:

18 . . . the Tribal Entities hereby forever release, discharge and convenant not to sue
19 the Bank Parties from any and all claims, demands, controversies, actions, causes of action, obligations, liability, costs, expenses, attorneys' fees defenses of any
20 character whatsoever, nature or kind, in law or inequity, that they or any member of the Tribe, including but not limited to the Current Council, may have against
21 Bank, including without limitation, all claims, damages, and causes of action that arise from or are related to the Accounts, the Minutes, the Resolutions or the
22 Threatened Liability, that may have accrued on or before the date of this Agreement.

23 *Compare* Rico Decl. Ex. 1 at ¶ 5 *with* Dkt. 50-2, Ex. A at ¶ 7.

24 This release language comports with Plaintiffs' allegation that the "release" is ineffective
25 as to unknown claims. ¶ 648. Plaintiffs' discovery of this release language is fatal to the
26 Cornerstone Defendants' convoluted effort to argue their purported "release" affirmative defense
27 on their motion to dismiss. Their arguments focus solely on incorporating by reference the May
28 19 Amendment's release and waiver language so as to contradict paragraph 648. *See* Dkt. 50-1 at

12-14. The April 22 Agreement proves theirs to be a wasted effort.

Second, the May 19 Amendment is invalid due to of a lack of consideration. A side-by-side comparison of the April 22 Agreement and the May 19 Amendment illustrates how little difference exists between the two agreements, save the significant expansion of the release language and Section 1542 waiver language in the May 19 Amendment, paragraph 7, as recognized above. *Compare* Rico Decl. Ex. 1 *with* Dkt. 50-2, Ex. A. The changes to paragraph 7 all inure to Cornerstone Bank's benefit. *Compare* Rico Decl. Ex. 1 at ¶ 5 *with* Dkt. 50-2, Ex. A at ¶ 7. However, nowhere in the May 19 Amendment does it appear that Cornerstone Bank provided the Tribe with any addition consideration in exchange for the expanded liability releases and the waiver of Section 1542's protections. In the April 22 Agreement, paragraph H, states that the Tribe entered into the agreement "[i]n order to induce the Bank to take and refrain from taking certain actions concerning the Accounts," *i.e.*, the proposed interpleader action addressed in paragraph F. *See* Rico Decl. Ex. 1 at ¶ H. Cornerstone Bank offers the exact same consideration the Tribe in the May 19 Amendment. *See* Dkt. 50-2, Ex. A at ¶ 7.

It is long-standing law in California that "an agreement adding to the terms of an existing agreement between the same parties and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it." *Main St. & A.P.R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 305 (1900). The Tribe's agreement to expand the scope of the liability releases it granted the Bank, in addition to waiving Section 1542's provisions are certainly "onerous" new terms that limit the Tribe's ability to recover from a larger group of people with regard to both known and unknown claims. *See id*. It appears all Cornerstone Bank offered in return was to continue to refrain from interpleading the Tribe's bank accounts. If the May 19 Amendment is unenforceable due to lack of consideration, then the April 22 Agreement would be in effect, and Plaintiffs would face no barrier to moving forward against the Cornerstone Defendants in this action.

To be clear, Plaintiffs' submission of the April 22 Agreement herewith is not a request that the Court convert the Cornerstone Defendants' motion to dismiss to a Rule 56 motion for summary judgment. Plaintiffs seek only to correct the Cornerstone Defendants'

misrepresentations regarding the factual record pertaining to the "release" and to make clear the disputed issues of fact on this issue.. Accordingly, the Cornerstone Defendants' request for incorporation by reference of the May 19 Amendment is improper and unwarranted here. See *Queen's Med. Ctr.*, 948 F. Supp. 2d. at 1143 (D. Haw. 2013) (declining to incorporate documents where the arguments the documents support raise factual disputes inappropriate for resolution at the pleading stage). However, should the Court decide to incorporate by reference the May 19 Amendment for purposes of deciding the Cornerstone Defendants' Rule 12(b)(6) motions, Plaintiffs respectfully request that it do the same with regard to the April 22 Agreement. *See* Rico Decl. Ex. 1.

4. <u>Plaintiffs Have Plausibly Pleaded Other Bases Why the "Release" Was "Null and Void" Upon Its Execution.</u>

The Cornerstone Defendants seek to bolster the validity of their "release" by moving to dismiss the allegations in ¶¶ 646-647 regarding their deceitful and coercive procurement of it from the new Tribal leadership following the RICO Ringleaders' ouster. *See* Dkt. 50-1 at 8-12.

a. <u>Plaintiffs Have Plausibly Pleaded Fraudulent Inducement as Basis for Voiding the Release</u>

Plaintiffs allege that they were "induced to enter into [the "release"] . . . by Cornerstone Bank's intentional and/or negligent misrepresentation and/or fraudulent omission of facts concerning the substantial assistance it gave the RICO Ringleaders in their tortious conduct to the detriment of the Tribe." ¶¶ 646. The Cornerstone Defendants argue only that Cornerstone owed no duty to Plaintiffs to reveal anything pertaining to their unlawful assistance of the RICO Ringleaders prior to their procuring the "release," nor did they have any to disclose "transactions made in compliance with California Financial Code section1451. *See* Dkt. 50-1 at 8.

The Cornerstone Defendants are far off the mark on this point. As an initial matter, the Tribe is a minority shareholder of the Bank (¶ 42). Accordingly, the Tribe is owned fiduciary duties of care and loyalty by the Bank's officers (e.g., Mr. Finck) and directors (*e.g.*, RICO Ringleader John Crosby. *See Pittleman v. Pearce,* 6 Cal. App. 4th 1436, 1441 (1992) ("minority shareholders are owed a fiduciary duty by both the corporation and the majority shareholders"); *see also Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345. Disclosure is a key part of the

1 duty of loyalty owed shareholders. "The duty of loyalty arises not from a contract but from a
2 relationship." *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 410 (2007). "Where such a
3 relationship arises, the agent assumes 'a fiduciary duty to act loyally for the principal's benefit in
4 all matters connected with the agency relationship.'" *Id*. To that end, the Cornerstone Defendants
5 were duty-bound to provide information in their knowledge to the Tribe—as its shareholder—to
6 the extent that information inured either to the Tribe's benefit or injury.
7 As the Complaint makes clear, Cornerstone Bank and Mr. Finck both were well aware of the
8 RICO Ringleaders tortious and unlawful conversion of Tribal moneys (*e.g.*, 632-674, and they
9 should have conveyed that information to the Tribe.

10 **b. Plaintiffs Have Plausibly Pleaded Economic Duress as a Basis**
11 **for Voiding the Release**

12 To state a claim for economic duress, a plaintiff must plead: (1) a wrongful act; (2) which
13 coerces a reasonably prudent person faced with no reasonable alternatives; (3) who succumbs to
14 the pressure. *Rich & Whillock, Inc. v. Ashton Development, Inc.,* 157 Cal. App. 3d 1154, 1158
15 (1984). As Defendant Cornerstone notes, *Rich & Whillock* upheld a claim for economic duress on
16 the basis that "The assertion of a claim known to be false or a bad faith threat to breach a contract
17 or to withhold a payment may constitute a wrongful act for purposes of the economic duress
18 doctrine." *Id.* at 1159. As the decision notes, "The underlying concern of the economic duress
19 doctrine is the enforcement in the marketplace of certain minimal standards of business ethics."
20 *Id.* That the law favors efficient resolution of disputes does not offer financial institutions like
21 Cornerstone carte blanche to hold their account holders over a barrel in the event of any dispute—
22 and particularly where the dispute concerns *the undisclosed fraudulent conduct of the party*
23 *withholding the funds.* Complaint ¶¶ 645, 647. This It is difficult to imagine a more prototypical
24 case for application of the duress doctrine.

25 The Tribe clearly alleges duress here. The Tribe alleges it succumbed to the pressure
26 because it signed the "release" under the threat of having its assets frozen, a fact that Cornerstone
27 does not dispute. *See* ¶¶ 645, 647. The Tribe has pleaded economic duress more than sufficiently
28 to move past the pleading stage. *See Uniwill v. City of Los Angeles,* 124 Cal. App. 4th 537, 545

(2009) (reversing trial court's dismissal with prejudice of a plaintiff's claim on the basis that plaintiff's allegations "include facts which may state a cause of action . . . for rescission and restitution for economic duress").

Even if there was indeed a "legitimate dispute" concerning tribal leadership warranting an asset freeze as the Cornerstone Defendants claim (Dkt. 50-1 at 11), the fact of that dispute does not immunize Cornerstone from the charge that its leveraging of that dispute was wrongful, especially where it did not disclose to the Tribe its knowledge of, and involvement in, the theft that is at the heart of this litigation. Indeed, the release sought by the Cornerstone Defendants here does not involve the rightful ownership of the assets they threatened to freeze—it concerns the theft of millions of dollars in the preceding years. As the Tribe has pled duress, any argument by the Cornerstone Defendants to the contrary would merely raise a factual issue entirely unavailing at the pleading stage. *California Micro Devices, Inc. v. Van Kampen Merritt*, 1990 U.S. Dist. LEXIS 15216, *26-27 (N.D. Cal. Nov. 7, 1990) (denying defendant's motion for summary judgment because "the issue of duress is a question of fact for the jury").

C. Plaintiffs Have Plausibly Pleaded the Cornerstone Defendants' Breaches of Fiduciary Duty (Twenty-Second and Twenty-Third Claims for Relief)

The Cornerstone Defendants allege that the relationship they have with the Tribe is strictly a bank-depositor relationship. That is incorrect. The Tribe is a shareholder of Cornerstone Bank and is accordingly owed both a duty of care and a duty of loyalty by the bank and its officers. *See* Section IV.B.4.a.

D. Plaintiffs Have Plausibly Pleaded the Cornerstone Defendants' Negligence (Twenty-Fourth Claim for Relief)

Cornerstone relies on California Financial Code section 1541 and California Commercial Code section 4401(a), arguing that these provisions insulate banks from the intentional acts of depositors about which those banks may not have knowledge. Dkt. 51-1 at 15-18. These contentions fail for the same reason: Plaintiffs allege that the Cornerstone Defendants had actual knowledge that the deposits were undertaken for an improper purpose. This knowledge is

demonstrated in the first instance by the fact that RICO Ringleader John Crosby was a board member at Cornerstone. ¶ 42. This allegation imputes knowledge to Cornerstone. *See AngioScore, Inc. v. TriReme Med., LLC*, 2014 U.S. Dist. LEXIS 126229, *14 (N.D. Cal. Sept. 9, 2014) ("[C]orporations know things through the persons that work for them."). Plaintiffs similarly allege that the Cornerstone Defendants have knowledge because its President and CEO, Jeffrey Finck, acknowledged to the Tribe after the RICO Ringleaders' ouster that he had knowledge of their wrongdoing with regard to transactions in a number of Tribe bank accounts. ¶ 644.

IV. Plaintiffs Plausibly Pleaded Their Twenty-Eighth, Twenty-Ninth, and Thirty-First Claims for Relief Against APC

APC moves to dismiss Plaintiffs' Twenty-Eighth, Twenty-Ninth, and Thirty-First Claims for Relief. *See* Dkt. 53 (Notice and Motion), 53-1 (Memorandum of Points & Authorities). APC also moves to strike Plaintiffs' allegations against it pertaining to punitive damages. Dkt. 53-1 at 14-18. APC does not seek dismissal of Plaintiffs' thirtieth claim for relief, in which Plaintiffs' allege common law negligence against APC. Dkt. 53; ¶¶ 728-732.

A. Allegations Specific to APC

APC served as the administrator for the Tribe's retirement and pension plans. These plans—a defined benefit plan and 401(k) (together, the "Tribal Retirement Plans")—were established for the purpose and effect of converting millions of dollars of Tribal money to the RICO Ringleaders and RICO co-Defendant Sherry Myers over a short period of time. In setting up and administering these plans, APC provided substantial assistance to the RICO Ringleaders to serve that purpose. The unlawful purpose and nature of these plans was evident, particularly to a firm experienced in setting up pension and retirement plans such as APC, from the characteristics of the funds and the circumstances surrounding their creation, implementation, and termination, which were atypical and outside of the ordinary course of business for such firms.

As retirement professionals who administer hundreds of pensions and similar programs, the atypical nature of the Tribal Retirement Plans would be obvious to APC. The Tribal Retirement Plans were enormously excessive in size. For example, the actuarial formula set the target retirement benefit at 245% of the highest pre-tax income in three consecutive years,

approximately four times higher than the industry standard. ¶ 223(a). By design, the Defendants canceled the plans after only five years—evidencing the intent to make high payments that could then be extracted in quick fashion. ¶ 223(c). Bona fide defined benefit plans and retirements plans are expected to be permanent so that employees can save for retirement. Id. Designing plans to facilitate short term gain rather than to establish a permanent program contravenes federal regulations. Id. APC knew this but nonetheless set the plans up, administered the plans, and advised other Defendants regarding these plans. Id. Indeed, the pension funds were designed as though the Tribe was the RICO Ringleaders' wholly owned small business from which APC, Moore, and Haness assisted them in extracting as much money as possible as quickly as possible. ¶ 220. The Tribe, however, is not a small company but a sovereign nation with hundreds of members. Id. Yet the plans were not offered to anyone else even though there were many other eligible participants, in contravention of federal regulations. ¶¶ 214, 221. The obviously abusive nature of the pension funds is further demonstrated by the fact that the handful of beneficiaries were almost exclusively the very persons that worked with APC to set up the funds, and their close family members. ¶ 223.

Similarly, APC set up the 401(k) plans so that the maximum allowable amount was paid each year. ¶ 224. APC then assisted the Ringleaders in liquidating prematurely the 401(k) plans after the Ringleaders were expelled from the Tribe, knowingly allowing Josh Crosby to sign employer authorization for early withdrawal even though he was no longer employed by the Tribe. Id. These liquidations were outside of the ordinary course of business, and in fact were fraudulent, as they were made after the facts concerning the RICO Ringleaders embezzlement had come to light in the summer of 2014. Id.

APC did more than create and administer the Tribal Retirement Plans. It exercised discretion in determining how the programs would be structured to comply with applicable regulations, ensuring that the scheme would evade regulatory scrutiny long enough to allow the RICO Ringleaders and co-Defendant Sherry Myers to cash them out. ¶ 223.

In exchange for performing all of these functions—with the obvious indications that the retirement plans were not above board—APC received "generous fees . . . paid by the Tribe" and

"received special additional consideration." ¶ 227.

B. The Tribe's Claims Against APC are Timely

APC contends that all of Plaintiffs' claims against it are time-barred. Mot. 11-14. This argument fails, however, because it does not address Plaintiffs' detailed allegations sufficient to toll the statute of limitations under the discovery rule, the fraudulent concealment doctrine, and the continuing violation doctrine. ¶¶ 419-430. Nor does it grapple with allegations that APC liquidated some of the retirement accounts in June and July 2014, after the facts concerning the RICO Ringleaders massive embezzlement had come to light. ¶ 224.

APC's arguments fail under the discovery rule, which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Aryeh*, 55 Cal. 4th at 1192 (citations omitted). Similarly, the "doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale." *Id.*; *see also Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931 (1994) ("It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.") "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.'" *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005) (citations omitted). "In other words, plaintiffs are required to conduct a reasonable investigation *after becoming aware of an injury*, and are charged with knowledge of the information that would have been revealed by such an investigation." *Id.* at 808 (emphasis added).

The FAC demonstrates that Plaintiffs did not discover—nor could they have discovered through reasonable investigation—the existence of their injury or Defendants' wrongful conduct until April 2014, when the RICO Ringleaders were removed from control of the Tribe. ¶ 420. The only participants in the Tribal Retirement Plans were the RICO Ringleaders and co-RICO Defendant Sherry Myers. ¶ 214. The Tribal Council was unaware of, and did not authorize, the creation and administration of these plans that provided over $4.4 million in retirement

compensation. ¶¶ 213, 215. Furthermore, no other Council member or employee of the Tribe or Casino was given the opportunity to participate in the plans. ¶ 215. It is therefore unreasonable to input knowledge to the Tribe, particularly when these specific types of plans required authorization from the Tribal Council. ¶ 222. APC was aware of this requirement and was also aware that "no such authorizations were received." ¶ 222. APC's conduct amounts to fraudulent concealment by APC sufficient to toll the statute of limitations,[20] and at the very least, satisfies the discovery rule.

Plaintiffs have made additional allegations that further demonstrate fraudulent concealment and negate any suggestion that Plaintiffs should have discovered injury and wrongdoing. Indeed, Defendants "took extraordinary action to hide their scheme from discovery" such as "refusing to provide any information to other Tribal members, including members of the Tribal Council, concerning the Tribe's financial activities and the financial benefits that the RICO Ringleaders were taking from it," ¶ 422, preventing "any type of standard auditing or reporting of the Tribe's finances from occurring," ¶ 423, refusing to "engage in even the most basic bookkeeping," ¶ 423, manipulating the electoral process for selecting the Tribal Council, ¶ 424, threatening Tribal members who challenged their authority or sought information concerning their conduct, ¶ 424, purchasing the silence of certain persons, ¶ 425, destroying evidence of their conduct, ¶ 427, making misleading statements to conceal their scheme, ¶ 428, among others.

APC does little more than dispute the allegations of the FAC, which are entitled to a presumption of truth. In conclusory fashion, APC claims that "Plaintiffs knew facts going back to

[20] "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud. . . . Cases in which the defendant stands in a fiduciary duty to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a fraud. Thus the fact that a client lacks awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client. Postponement of accrual of the cause of action until the client discovers, should discover, the material facts in issue vindicates the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 188-189 (1971) (internal quotations and citations omitted).

2009. And suffered injury due to the alleged acts of APC in 2009." Mot. 13. Importantly, APC does not say *which facts* Plaintiffs knew in 2009. Indeed, APC does not identify *any fact* that would show knowledge, actual or constructive. Even if APC provided a modicum of specificity, it would at most give rise to a question of fact unsuitable for adjudication at the pleading stage. *See, e.g.*, *Fox*, 35 Cal. 4th at 810-11 (noting that the statute of limitations is "normally a question of fact" and holding that plaintiffs' relatively bare assertions were sufficient at the pleading stage).

Finally, even assuming that Plaintiffs had knowledge of the wrongful actions as early as 2009, their claims would still be timely under the continuing violation doctrine. Among other things, APC continued to administer the sham 401(k) program, even liquidating the retirement funds once the Tribe had discovered the scheme and the facts of the embezzlement had become widely known. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (continuing violation "starts the statutory period running again"); *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014). Plaintiffs allege that APC's participation was ongoing all the way through the summer of 2014, and thus the statute restarted in the summer of 2014. *See Poga Mgmt Ptnrs LLC v. Medfiler LLC*, 2014 U.S. Dist. LEXIS 111764, *27 (N.D. Cal. Aug. 12, 2014) ("The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them.") (*quoting Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185, 1192 (2013)). Thus where, as here, the acts are alleged to related, "[t]he doctrine permits recovery for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period." *Id.* at *27-28.

Given the ample allegations described above and APC's failure to identify a single fact relevant to the issue of knowledge, Plaintiffs' claims are timely under the discovery rule, the fraudulent concealment doctrine, and the continuing violation doctrine.[21]

[21] Plaintiffs filed their complaint on March 10, 2015, less than one year after it could have first discovered injury and Defendants' wrongful conduct, which was on or in April 2014, when the RICO Ringleaders were removed from control of the Tribe. ¶ 420. None of Plaintiffs' claims against APC have a statute of limitations shorter than two years. Mot. 11-12.

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C. Plaintiffs have Plausibly Pleaded APC's Breaches of Fiduciary Duty (Twenty-Eighth and Twenty-Ninth Claims for Relief)

3 APC disputes whether it owes a fiduciary duty to the Tribe. A fiduciary duty is imposed
4 where, as here, "one of the parties is in duty bound to act with the utmost good faith for the
5 benefit of the other party." *Herbert v. Lankershim*, 9 Cal.2d 409, 483 (1937). A fiduciary duty
6 can be found in "**any relation** existing between parties to a transaction wherein … a confidence is
7 reposed by one person in the integrity of another." *Id*. (emphasis added). When such a
8 relationship of confidence and trust is created, liability is imposed where the trusted party takes
9 "advantage from his acts relating to the interest of the other party without the latter's knowledge
10 or consent." *Id.* "The duty of a fiduciary embraces the obligation to render a full and fair
11 disclosure to the beneficiary of all facts which materially affect his rights and interests. Where
12 there is a duty to disclose, the disclosure must be full and complete, and any material concealment
13 or misrepresentation will amount to fraud." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6
14 Cal. 3d 176, 188-89 (1971). APC made no such disclosure here to the Tribe.

15 The members of the Tribe are a sovereign people, not a business that employs retirement
16 professionals to administer matters such as those that were entrusted to APC, or even a
17 government agency that regularly engages in directed commerce. ¶¶ 65-73, 79-82. By setting up
18 and administering the Tribe's pension plans and 401(k), APC performed discretionary acts on
19 behalf of the Tribe. ¶¶ 49, 218-22, 225-228. The Tribe specifically alleges that it "relied on APC
20 to ensure [the retirement plans] were ERISA compliant" (¶ 225), and relied on APC to create
21 retirement plans that were consistent with federal regulations governing such programs. ¶ 223.

22 Citing inapposite authorities that hold a mere contractual relationship does not ordinarily
23 create fiduciary duties,[22] APC argues that it merely "administered the Tribe's pension plans,"
24 which does not create a fiduciary relationship. Dkt. 53-1 at 6. This contention ignores Plaintiffs'
25 detailed allegations that demonstrate APC did more than just "administer" the plans but also

26 [22] *1-800 Contacts, Inc. v. Steinberg*, 107 Cal.App.4th 568, 592-93 (2003) (no claim for conspiring
27 to breach fiduciary duty where attorney owed no ongoing duty of loyalty to former client); *Wolf v.
Superior Court*, 107 Cal. App. 4th 25, 35 (2003) (contract among author, his agent, and a movie
production company did not create a fiduciary relationship because "contractual right [to an
28 accounting] does not itself convert an arm's length transaction into a fiduciary relationship").

1 "established" and "modified" the retirement plans so that they functioned as sham wealth-transfer
2 vehicles for a handful of the Tribe's employees, rather than the long-term retirement plans that
3 they purported to be. ¶¶ 220-221. This contention also ignores the discretionary role APC played
4 in advising the Tribe on compliance with applicable regulations (or rather, how to create the
5 appearance of compliance while subverting the very purposes of the retirement funds). ¶¶ 223,
6 225. This advice enabled the RICO Ringleaders to evade scrutiny of the retirement plans just long
7 enough to loot millions of the Tribe's dollars. For the same reason, APC's contention that it did
8 not act in "any type of trust relationship with the Tribe" (Dkt. 53-1 at 7-8) is contrary to the facts
9 alleged, which are entitled to a presumption of truth at this stage of the proceedings.[23] *Virtanen v.*
10 *O'Connell*, 140 Cal. App. 4th 688, 702-03 (2006) ("[I]t is hard to imagine how one can seriously
11 dispute that an escrow holder owes a fiduciary duty to the parties to the escrow, including the
12 party who has deposited property into the escrow.").

13 Perhaps recognizing this factor favors the imposition of a fiduciary relationship, APC
14 argues that "the ability to exploit a disparity of bargaining power between the parties does not
15 necessarily create a fiduciary relationship." Dkt. 53-1 at 7. The authority cited for that position,
16 however, only emphasizes the one-sided nature of the relationship between APC and the Tribe.
17 *See City of Hope Nat'l Med. Ctr. v. Genentech, Inc*., 43 Cal. 4th 375, 389 (2008). In that matter,
18 the court rejected the imposition of a fiduciary duty on Genentech, a biotechnology firm, who had
19 entered into "contractual negotiations" with a non-profit hospital where "both parties were
20 represented by counsel." *Id*. But even sophisticated parties can be owed a fiduciary relationship
21 where defendant has wide discretion over its interests. *See Cleveland v. Johnson*, 209 Cal.App.4th
22 1315, 1342-44 (2012) (stock promoter owed a fiduciary duty to start-up investor). In any event,
23 the Tribe pleads that there is unequal bargaining power, because the Tribe lacks the sophistication
24 of retirement professionals such as APC.
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27 [23] *Lix v. Edwards*, 82 Cal.App.3d 573, 578, (1978) and *Hannon Engineering, Inc. v. Reim*, 126 Cal.App.3d 415 (1981), cited by APC, do not consider the issue of whether a pension plan
28 administrator owes a fiduciary duty to a plan sponsor such as the Tribe, and impose no limit on the imposition of such a duty.

D. The Tribe has Plausibly Pleaded APC's Aiding and Abetting of the RICO Defendants' Conversion and Fiduciary Duty Breaches (Thirty-First Claim for Relief)

1. Contrary to APC's Arguments, Plaintiffs Do Not Allege RICO Claims Against APC

As with the Moore Defendants, APC misconstrues the FAC, arguing that the Tribe is attempting to impose RICO liability on them for aiding and abetting, when the Tribe pleads no such thing. *See* Section VII.C. This is therefore not a live issue needing resolution.

2. Plaintiffs' Have Pleaded Facts Sufficient to Plausibly Allege APC's Actual Knowledge

APC argues that the Tribe has failed to plead aiding and abetting because they have not alleged "actual knowledge of an intentional wrongdoing." Dkt. 53-1 at 9-11. APC does not dispute the other elements of aiding and abetting liability (*see* Section VI.E), and thereby concedes that they are pled here.

As a threshold matter, actual knowledge need not be plead with specificity. Instead, the allegations need only give rise to a "reasonable inference" of such knowledge. *Simi Mgmt. Corp. v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS 77233, at **15-16 (N.D. Cal. June 4, 2012); *Mosier v. Stonefield Josephson, Inc.*, 2011 U.S. Dist. LEXIS 124058, at *26 (C.D. Cal. Oct. 25, 2011) (holding that claims of aiding and abetting conversion were plausible and noting "the Court can also infer knowledge based on allegations that [defendant's] audits and audit reports did not comply with GAAS standards"); *Benson v. JPMorgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 37465, *8 (N.D. Cal. Apr. 15, 2010) (denying motion to dismiss complaint alleging that defendant bank had knowledge of and provided substantial assistance to operator of a Ponzi scheme); *In re First Alliance Mortg. Co.*, 471 F.3d 977, 999 (9th Cir. 2006) (fact that defendant "came upon red flags which were seemingly ignored was enough to establish actual knowledge under the California aiding and abetting standard"); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) (atypical banking procedures by tortfeasors "rais[ed] an inference" that bank defendant knew of the underlying Ponzi scheme).

APC mischaracterizes the FAC as containing only conclusory allegations of knowledge.

1 But the FAC contains very specific allegations establishing the requisite knowledge, including
2 multiple instances where APC designed and implemented atypical retirement and pension plans.
3 *See* ¶¶ 218-219 (general allegations of knowledge); ¶ 221 (plans limited to a few eligible
4 participants, in contravention of federal regulations); ¶ 220 (set up plans as though it was for a
5 wholly-owned small business rather than sovereign nation with hundreds of members); ¶ 223
6 (enormously excessive in size); ¶¶ 214, 221 (not offered to other eligible participants though there
7 were many); ¶¶ 220-221, 223 (designed to facilitate short term gain rather than permanent
8 program, in contravention of federal regulations); ¶ 223 (designed to be terminated as soon as
9 fully funded, in contravention of federal regulations); ¶ 224 (set up 401(k) so that maximum
10 allowable amount paid each year, liquidated 401(k) prematurely after Ringleaders kicked out of
11 Tribe, knowingly allowed John Crosby to sign employer authorization for early withdrawals even
12 though he was no longer employed); ¶ 225 (knowingly assisted Ringleaders in making investment
13 choices that were not compliant with ERISA). In exchange for performing these functions—with
14 the obvious indications that the retirement plans were not above board—APC received "generous
15 fees . . . paid by the Tribe" and "received special additional consideration." ¶ 227.

16 Given these specific allegations that demonstrate in great detail that APC knew of the
17 underlying conversion and breaches of fiduciary duty, the authorities cited by APC are easily
18 distinguishable. In *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 97 (2007), for example, the
19 plaintiff made the bare allegation that "PayPal knew the site was an illegal lottery but agreed [the
20 site] could use its payment system with the knowing intent to aid and abet [the site's] operation
21 because it could be profitable for PayPal." Plaintiffs here have alleged much more. Indeed, the
22 plans at issue here carried badges of fraud so obvious that APC, as experienced professionals in
23 administering retirement plans, must have known and understood the obvious unlawful purposes
24 of these funds. Regardless, *Schulz* did not require much more than a bare assertion of
25 knowledge—instead the court allowed claims to continue against two other defendants simply
26 because the plaintiff added the allegation that the defendants reviewed the website and
27 "recognized that it was an illegal lottery" and that he defendants gave substantial assistance
28 because they knew that doing so "would lend an aura of respectability and further encourage

participation."[24] Accordingly, APC's motion should be denied.

3. Plaintiffs' Have Pleaded Facts Sufficient to Plausibly Allege APC's Conduct Caused Injury to Plaintiffs

APC argues that the Tribe has failed to allege they are a cause in fact of Plaintiffs' injuries, invoking the superseding cause doctrine. Dkt. 53-1 at 4-5.[25]

Pointing to the RICO Ringleaders, APC argues that they cannot be liable for the Tribe's loss because the third parties caused the injury. Dkt. 53-1 at 4. But the Tribe does not need to allege that APC, alone, caused their injury. The mere fact that a fraudster is arguably more culpable is no hurdle to causation under a "substantial assistance" standard, however. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1130 (C.D. Cal. 2003) (allegations sufficiently alleged bank was liable as "substantial factor" in Ponzi scheme by providing line of credit to fraudster). As recently articulated by the California Supreme Court, "An act is a cause in fact if it is a necessary antecedent of an event. . . . [A] cause in fact is something that is a substantial factor in bringing about injury. The substantial factor test is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does cause harm is a substantial factor." *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal. 4th 291, 298 (2015) (internal quotations and citations omitted) (emphasis added). APC's actions—setting up and administering retirement plans—were causes in fact of Plaintiffs' damages.

Plaintiffs' allegations satisfy this test. Millions of dollars were diverted from the Tribe to the Tribal Retirement Plans. That injury could only come about due to APC's conduct—setting up and administering these obviously improper plans. Indeed, APC admits that its actions in

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[24] *Casey* is also distinguishable because the complaint contained no allegations that the defendant had knowledge of the primary wrong or the "object to be attained." Plaintiffs have alleged that here. [Cite paragraphs above]. Furthermore, *Casey* involved two conflicting principles—"one that strictly limits a bank's duties to nondepositors and another that extends tort liability to anyone who knowingly aids and abets the tort of another." *Id.* at 1151-52. That is not the case here.

[25] APC argues lack of causation requires dismissal of all the Tribe's claims. APC does not dispute, and therefore concedes, that the Tribe has pled all of the other elements of their cause of action for negligence. *See* Section VI.D (discussing elements of negligence).

establishing and administering the retirement plans "allowed others allegedly to benefit improperly[.]" (Mot. at 4). That is sufficient to be a cause in fact.

As for the superseding cause doctrine, APC again misapplies the test. "The general test of whether an independent intervening act, which operates to produce an injury, breaks the chain of causation is the foreseeability of that act. An act is not foreseeable and thus is a superseding cause of the injury if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen." *Schrimscher v. Bryson*, 58 Cal. App. 3d 660 (1976). Here, the foreseeable, indeed the obvious, result of setting up the retirement and pension plans at issue was that the RICO Ringleaders would convert Tribal funds. These funds—set up and administered by APC—were the mechanism for diverting millions of dollars. Indeed, that the RICO Ringleaders, who had regular contact with APC, would profit was precisely the point. There is no superseding cause here.

E. APC's Motion to Strike or to Dismiss Plaintiffs' Punitive Damages Claim Should be Denied

Finally, APC asks this Court to strike or dismiss Plaintiffs' claims for punitive damages. As with APC's motion generally, the argument here disregards critical factual allegations establishing the sufficiency of the FAC and instead focuses on a select group of allegations that it dubs "conclusory." Mot. 14, 17-18.

Under California Civil Code section 3294, a plaintiff may recover punitive damages where the defendant acts with oppression, fraud, or malice. Cal. Civ. Code § 3294(a). Despite describing at length the meaning of "oppression" and "malice," APC skips over "fraud," which is defined as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code § 3294(c)(3). Punitive damages are available where, as here, a defendant intentionally concealed from plaintiff material facts regarding its breaches of fiduciary duty. *Werschkull v. United Cal. Bank*, 85 Cal. App. 3d 981, 1001, 1008 (1978); *Tethys Bioscience, Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 2010 U.S. Dist. LEXIS 55010, *24 (N.D. Cal. June 4, 2010) (plaintiffs properly pled

"punitive damages for its breach of fiduciary duty claim based on a failure to disclose material facts"). As described above (*see, supra*, Section V.C), APC owed Plaintiffs a fiduciary duty as the administrator of the Tribe's retirement and pension plans. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d at 188-89. Rather than make the necessary disclosures, APC fraudulently concealed several facts material to Plaintiffs' rights and interests. In particular, APC set up and administered the Tribal Retirement Plans which were designed to "transfer as much Tribal money as possible, as fast as possible, to the RICO Ringleaders." ¶ 219. The circumstances surrounding the creation and maintenance of these plans demonstrate that APC knowingly provided substantial assistance to accomplish this goal, and in doing so, defrauded the Tribe, whom APC owed a fiduciary duty. The most obvious example is that APC allowed the abusive 401(k) retirement funds to be cashed out after the facts concerning the embezzlement had come to light. ¶ 224. In addition, among other dubious circumstances, these plans were set up as though they were for a wholly-owned small business rather than for a sovereign nation with hundreds of members (¶¶ 220-221); they were enormously excessive in size (¶ 223); they were designed to be terminated as soon as fully funded and were designed to facilitate short term gain rather than to establish a permanent program (in contravention of federal regulations) (¶ 223); the 401(k) plans were liquidated prematurely after the RICO Ringleaders were kicked out of the Tribe (¶ 224); and APC knowingly allowed John Crosby to sign employer authorization for early withdrawals even though he was no longer employed. ¶ 225. In sum, APC's conduct was fraudulent. Indeed, its conduct was so egregious that it would be subject to liability under the other prongs of section 3294, even if it owed no fiduciary duty to Plaintiffs.

V. Plaintiffs Plausibly Pleaded Their Twenty-Eighth, Twenty-Ninth, Thirtieth and Thirty-First Claims for Relief Against the Haness Defendants

The Haness Defendants move to dismiss Plaintiffs' Twenty-Eighth, Twenty-Ninth, Thirtieth and Thirty-First Claims for Relief. *See* Dkt. 51 (Notice and Motion), 51-1 (Memorandum of Points & Authorities).

A. Allegations Specific to the Haness Defendants and Relevant Admissions Drawn From Their Motion to Dismiss

The Haness Defendants performed certifications related to the administration of the Tribal Retirement Plans by APC. They knew that the Tribe was the sponsor of the plans, and that the RICO Ringleaders were the beneficiaries. *See* ¶ 218. At the time these certification services were performed, the RICO Ringleaders were employees of the Tribe, and any services performed by the Haness Defendants were in connection with the Tribe's provision of what it believed were employment benefits to the Tribe's employees. However, the Tribal Retirement Plans were designed not as retirement benefits, but as a means to convert the Tribe's money.

The Haness Defendants were not certifying plans for ordinary retirement and pension plans. The Tribal Retirement Plans were set up and administered as though the Tribe was the RICO Ringleaders' wholly owned small business from which the Haness Defendants—along with APC and the Moore Defendants—would assist them with extracting as much money as possible and as quickly as possible. ¶ 220. The plans were not set up as typical retirement accounts, which in order to obtain tax benefits are a permanent mechanism for retirement savings that benefits an employer's current and future employees generally, but instead operated as short-term vehicles to take money out of businesses or institutions in tax advantageous ways for a limited number of specially favored individuals. ¶ 220.

In their Motion, Haness Defendants admit familiarity with how the scheme operated. In order to provide the yearly tax form that was necessary to achieve the tax-exempt status the Ringleaders wanted, Haness Defendants made a certification based on three pieces of information: (1) "the plan provisions"; (2) "the ages, incomes, and benefit level" of the Ringleaders; and (3) "the valuation performed by APC." *Id.* Haness Defendants, which by their own admission perform certification services "for roughly 200 other retirement plans administrated by APC" (Dkt. 51-1 at 1), were surely in a position to recognize the badges of fraud in the way that the pension funds were set up, not as long-term investment vehicles, but as quick cash-out mechanisms. Indeed, Haness Defendants admit that they performed additional certification upon the cash-out of the pension funds in 2009. *See id.* at 2 ("[w]hen the Plan

terminated," Haness Defendants "prepare[d] documents, based on information provided by APC" that were given the Ringleaders "as part of the final distribution").

The FAC provides specific facts concerning the aspects of the Tribal Retirement Plans that surely raised red flags to the Haness Defendants who were familiar with the "provision" of pension funds. First, the Tribe alleges that the pension funds were to provide for many times the industry standard for only a handful of employees, and nobody else. The pension funds were set up "with an actuarial formula in which the target retirement benefit was set at 245% of the highest pre-tax income in three consecutive years, approximately 4 times higher than the industry standard." ¶ 223(a). Haness Defendants were aware of the abusive nature of the pension plan, because they received information concerning the Ringleaders' incomes and target benefit level, and then certified that this patently unsustainable plan was sufficiently funded.

Second, the amount of money transferred by the plans, combined with the fund having only a small number of participants, was a badge of fraud. The Haness Defendants knew and understood that it was unusual for a sponsor to create a plan for only a handful of employees, and then use that plan to transfer enormous amounts of money. Indeed, "***more than $1.5 million*** of Tribal money was diverted to Ms. Crosby through the Tribal Pension during the just five years of the plan's existence." ¶ 223(b) (emphasis in original).

Third, the early termination of the pension plans indicates that they were fraudulent from their inception. Federal regulations state that "the abandonment of the plan for any reason other than business necessity within a few years after it has taken effect will be evidence that the plan from its inception was not a bona fide program for the exclusive benefit of employees in general." ¶ 223(c) (quoting Treasury Regulation 401-1(b)(2)). Haness Defendants assisted in the early termination of the pension plans, preparing documents for the final distribution. *Id.*

The FAC generally alleges that the Haness Defendants were aware of the regulatory requirements related to retirement accounts and industry standards related to operating such accounts. ¶ 220. The certifications signed by Mr. Haness confirm that he was not only aware of the regulatory requirements, but that he had also reviewed the plan provisions and certified their truth and accuracy. *See* Gross Decl., Ex. __ ("[T]he information supplied in this schedule and

accompanying schedules, statements, and attachments … is true and accurate. Each prescribed assumption was applied in accordance with applicable law and regulations.").[26] The certification forms signed by Mr. Haness clearly identify the Tribe as the "Plan Sponsor."

B. Plaintiffs Allege Wrongdoing by Mr. Haness

The Haness Defendants argue that Plaintiffs fail to allege wrongdoing against Mr. Haness, and instead lump the Haness Defendants together. Dkt. 51-1 at 15-16. Their reliance on *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368 (2000), is misplaced. Although *PMC* sets forth the correct legal standard for imposing liability on a company's principal, it does not immunize Mr. Haness from liability here, as Plaintiffs allege he acted as the actuary for the Tribe's pension funds, and thus he is liable along with his firm. *Id.* at 1380 ("The legal fiction of the corporation as an independent entity was never intended to insulate officers and directors from liability for their own tortious conduct.").

Plaintiffs allege that Mr. Haness "is Haness & Associates, LLC's owner, principal, and registered agent." ¶ 51. It is a fair inference from these allegations that he either performed the actuarial services himself, or directed their performance. In any event, the admissions made in the Haness Defendants' Motion, combined with the documents signed by Mr. Haness himself, remove any ambiguity. Indeed, the Haness Defendants admit that "Mr. Haness provided his services as an actuary to APC on a flat-fee basis in his capacity as the principal and owner of Haness & Associates, LLC." Dkt 51-1 at 1. As if there were any doubt about personal participation, the documents Mr. Haness signed are signed "Robert M. Haness" on behalf of his firm. Gross Decl. Ex. __.

At bottom, the premise of the Haness Defendants' argument is that Mr. Haness is merely an "officer or director" of his firm. This contention is contrary to Plaintiffs' allegations, as the FAC does not allege that Mr. Haness' firm has any officers or directors, or is a corporation or other type of entity for which this argument may be appropriate.

[26] Plaintiffs have alleged in general terms that the Haness Defendants were aware of regulations governing pension plans, as well as the terms provisions. ¶¶ 218-223. Should the Court deem these allegations insufficient, Plaintiffs request leave to amend to add supporting details from plan documents available to them.

C. Plaintiffs Have Plausibly Pleaded The Haness Defendants' Breaches of Fiduciary Duty (Twenty-Eighth and Twenty-Ninth Claims for Relief)

The Haness Defendants make four arguments concerning why they owe Plaintiffs no fiduciary duty, none of which are availing.

First**,** the Haness Defendants argue that they were not parties to a transaction with the Tribe. Dkt. 51-1 at 6. As an initial matter, this is contrary to Plaintiffs' allegations. The FAC alleges that the Tribe was the sponsor of the Tribal Retirement Plans for which the Haness Defendants performed services, and that the Haness Defendants had full knowledge that the Tribe was the sponsor of the plans. ¶¶ 218-223.

It is immaterial whether the Tribe was a party to any contract with the Haness Defendants, because the Tribe was the intended beneficiary of the Tribal Retirement Plans ostensibly created to provide retirement benefits to Tribe personnel. None of the authorities the Haness Defendants reference demonstrate a need for contractual privity in order for a fiduciary relationship to exist. California law also has no such requirement. For example, in *Biakanja v. Irving*, 49 Cal.2d 647 (1958), the California Supreme Court held that professionals can be liable to economically injured third parties even though they are not in privity of contract, based on public policy considerations that are implicated here:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 650.

Plaintiffs' allegations satisfy the *Biankanja* factors. There can be no doubt the plans were set up for the Tribe and concerned its assets. Any harm related to the operation of these sham plans—which were designed to enrich only a handful of persons—was obvious and foreseeable. Surely, certifying a pension plan that bears a badge of fraud is the type of foreseeable harm to a plan sponsor that *Biankanja* contemplated. The RICO Ringleaders could not have pulled off the retirement and pension plan scheme without the Haness Defendants, whose certifications were

necessary on an ongoing basis and allowed the other Defendants to cash them out early. ¶¶ 223-224.

Second, the Haness Defendants argue that they cannot have a fiduciary duty to the Tribe because the Tribe cannot allege the Haness Defendants knowingly acted on behalf of the Tribe. Dkt. 51-1 at 6. This argument borders on absurdity, as both the FAC and the Haness Defendants' Motion are respectively rife with allegations and admissions regarding the fact that the Tribe was the sponsor of the Tribal Retirement Plans. Specifically, Plaintiffs alleges that the Haness Defendants provided services "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." ¶ 218*; see also* ¶ 221 (the Haness Defendants "knowingly assisted the RICO Ringleaders set up and administer the Tribal Retirement Plans); ¶ 223 (Haness Defendants "knowingly" assisted RICO Ringleaders in diverting funds through short-term cash outs of the pension funds). These nonconclusory allegations must be taken as true, as well as all reasonable inferences drawn in Plaintiffs' favor. Thus, the Haness Defendants' insistence that, despite being hired for the express purpose of rendering an actuarial opinion on the Tribal Retirement Plans, they had no knowledge of any relationship with the Tribe must be rejected at the pleading stage.[27]

Third, the Haness Defendants claim no fiduciary duty to the Tribe because they were not in a position to exercise discretion. *See* Dkt. 51-1 at 7-8. This too is an attempt to cabin Plaintiffs' allegations, which are more expansive than the circumscribed role the Haness Defendants describe for themselves in their motion to dismiss. The FAC alleges that the Haness Defendants helped administer the plans, and exercised discretion over aspects of the plan operations. *See*, *e.g.*, ¶ 52 (Haness Defendants' role included "setting up and administering retirement plans"). The certification Mr. Haness provided confirms that the Haness Defendants exercised discretion. It certifies that the information on the plan is accurate, and states "[e]ach prescribed assumption was applied in accordance with applicable law and regulations." Gross Decl. Ex. __. These facts

[27] The certifications signed by Mr. Haness confirm that he understood the Tribe was the plan sponsor. Gross Decl., Ex. __.

demonstrate that the Haness Defendants, acting as the Tribe's actuary, exercised discretion to certify these unusual plans. The FAC alleges that there were several atypical aspects of the pension plans, which rendered them inappropriate for lawful purposes. For example, the "target retirement benefit was set at 245% of the highest pre-tax income in three consecutive years," nearly four times the industry standard. This is exactly the type of red flag that the Haness Defendants disregarded when it signed-off on the plan to the detriment of the Tribe. ¶ 223(b).

Fourth, the Haness Defendants cite a number of authorities concerning the ambit of federal ERISA law, none of which directly address whether a professional services provider such as the Haness Defendants owes a fiduciary duty to a plan *sponsor*. Rather, these cases merely demonstrate that the role played by a professional determines whether they have a fiduciary duty *for purposes of ERISA law*.[28] The FAC asserts no claim against the Haness Defendants that rests on whether the Haness Defendants are fiduciaries under ERISA law. The issue is simply whether the Haness Defendants owed a fiduciary duty to the Tribe, a sponsor of the Tribal Retirement Plans, which is wholly governed by California common law. *See Simon Levi Co. v. Dun & Bradstreet Pension Servs.*, 55 Cal. App. 4th 496, 498 (1997) (holding that plan sponsor may sue pension administrator, and noting duties created by state law exist separate from those created by ERISA).

D. Plaintiffs Have Plausibly Pleaded The Haness Defendants' Negligence (Thirtieth Claim for Relief)

The Haness Defendants argue that Plaintiffs fail to state a claim for negligence because they owed the Tribe no legal duty. The Haness Defendants do not challenge any of the other

[28] *See Mertens v. Hewitt Assocs.*, 948 F.2d 607, 610 (9th Cir. 1991) (actuary who exercised no discretion is not a fiduciary to plan beneficiaries); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987) ("An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration."); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987); *Santomenno v. Transamerica Life Ins. Co.*, 2013 U.S. Dist. LEXIS 22354, *15 (C.D. Cal. Feb. 19, 2013) ("To say that ERISA defines fiduciary duty in functional terms is to say that such duty is determined not by a party's status but by particular actions taken with respect to plan. The same party can be both a fiduciary and a non-fiduciary, depending on the action it is taking.").

elements of a cause of action for negligence,[29] which is understandable given their admission that Plaintiffs' "allegations suggest that Haness *should have known* that the Plan favored the five beneficiaries as the result of its potential, and alleged, non-compliance with these rules." Dkt. 51-1 at 15 (emphasis in original).

It is well established that an actuary may owe a legal duty to beneficiaries to a pension plan, such as the Tribe. *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009) ("[actuary] may owe a duty to the Employees if they can be considered intended third party beneficiaries of [actuary's] service agreement"). Citing *Paulsen*, the Haness Defendants argue that actuaries do not owe a duty to pension plan sponsors, such as the Tribe. Dkt 51-1 at 9. *Paulsen* holds no such thing. There, the Ninth Circuit reversed a trial court order dismissing an actuary, holding that when a plaintiff is an intended beneficiary of a pension plan, an actuary owes a legal duty. *Id.* at 1078-1080. Therefore, contrary to the Haness Defendants' assertion, an actuary's liability does not extend merely to their client—but to the beneficiaries of the actuary's service.

Plaintiffs allege that the Tribe was a third-party beneficiary of the agreement between APC and the Haness Defendants, and this allegation is supported by the fact that the Haness Defendants were performing actuary services for the plans sponsored by the Tribe. ¶¶ 218-223. Under California law, a party is a third-party beneficiary if the contract was created for their benefit: "[i]t is not necessary that an express beneficiary be specifically identified in the relevant contract; he or she may enforce it if he or she is a member of a class for whose benefit the contract was created." *Outdoor Servs., Inc. v. Pabagold, Inc.*, 185 Cal. App. 3d 676, 681 (1986). [mark authority after fixed] This principle has been applied, for example, to professionals who administer health care funds: "we harbor no doubt that Blue Cross, as a third party claims administrator for a health care plan, owes a general duty of due care to plan members to avoid physical harm to them resulting from its administration of benefits under the plan." *Mintz v. Blue*

[29] "The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." *Budd v. Nixen*, 6 Cal.3d 195, 200 (1971).

Cross of California, 172 Cal. App. 4th 1594, 1616-1617 (2009).

The Haness Defendants argue that the principle recognized in cases such as *Paulsen* applies only to "participants," (Dkt. 51-1 at 9) but provide no reason why a plan sponsor would not also be a beneficiary. It is immaterial that the Tribe is not the ultimate recipient of the funds under the pension funds, because the Haness Defendants performed actuarial services on *money paid by the Tribe*. It is well-established that a plan beneficiary may sue plan administrators for negligence. *See Simon Levi Co. v. Dun & Bradstreet Pension Servs.*, 55 Cal. App. 4th 496, 498 (1997) (plan sponsor may sue third party administrator for negligence and breach of contract).

The Haness Defendants' position that it "owed only APC a general duty of care" because that was their "client" (Dkt. 51-1 at 9) strains credulity. The Haness Defendants were not administering the Tribal Retirement Plans at the request of APC, nor was APC the sponsor of the plans. It is also non-dispositive, as liability does not end at a "general duty," but instead includes "an additional class of persons who may be the practical and legal equivalent of 'clients.'" *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 406 (1992).

Finally, the Haness Defendants raise a host of policy arguments against the imposition of a negligence duty, *e.g.*, the increased cost of actuarial services, the increase of insurance costs, and the potential that liability would be out of proportion with fault. *See* Dkt. 51-1 at 10. Policy matters are irrelevant for purposes of a Rule 12(b)(6) motion; they do not impact the plausibility of Plaintiffs' claims for relief. Regardless, the paramount public policy risk here is that actuaries such as the Haness Defendants—who enabled favorable tax-treatment for the RICO Ringleaders' schemes by certifying the plan provisions on a yearly basis, and signed-off to cash out the "retirement fund" after only a few years—could act with impunity simply because APC sub-contracted to the Haness Defendants the duties related to actuary services for the plan. The Haness Defendants noted no irregularities in their annual certifications, and remained silent despite the obvious red flags raised by a five-employee plan that the Haness Defendants helped cash out after less than five years. This is exactly the type of willful blindness that tort law was designed to punish.

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E. Plaintiffs Have Plausibly Pleaded The Haness Defendants' Aiding and Abetting of the RICO Defendants' Conversion and Fiduciary Duty Breaches (Thirty-First Claim for Relief)

"To state an aiding and abetting claim against [actuary] based on that primary wrong, plaintiffs must allege (1) the Association's schemes to underfund the pension plan breached fiduciary duties it owed to plaintiffs; (2) [actuary] knew about the Association's conduct and resulting breaches; (3) [actuary] provided substantial assistance or encouragement to the Association in committing those breaches; and (4) [actuary]'s conduct was a substantial factor in harming plaintiffs." *Nasrawi v. Buck Consultants LLC*, 231 Cal. App. 4th 328, 343-44 (2014).

Plaintiffs plead all of these elements: (1) APC and Moore's scheme breached fiduciary duties owed to the Tribe when they set up retirement and pension plans with badges of fraud (¶ 218); (2) the Haness Defendants were aware of the breach (¶ 223(a)-(c)); (3) and (4) the scheme could not have been completed without the Haness Defendants, who applied an "Extraordinarily High" actuarial formula, signed off on funding for a plan that was obviously a short-term enrichment program for a handful of people, and cashed out the funds after less than five years (*id.*).[30]

Again disclaiming any knowledge of wrongdoing, the Haness Defendants argue that they are not liable for aiding and abetting conversion or breach of fiduciary duty. For purposes of aiding and abetting liability, "Defendants' actual knowledge may be averred generally according to Rule 9(b)." *Impac Warehouse Lending Group v. Credit Suisse First Boston Corp.*, 2006 U.S. Dist. LEXIS 101145, *10 (C.D. Cal. June 20, 2006). *See also Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) ("courts have found pleadings sufficient if they allege generally that defendants had actual knowledge of a specific primary violation")

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[30] Citing *Howard v. Superior Court*, 2 Cal. App. 4th 745, 749 (1992), the Haness Defendants argue that a defendant must make a "conscious decision" to assist another, but Plaintiffs allege exactly that. The Haness Defendants' reliance on *Gonzales v. Lloyds TSB Bank*, 532 F. Supp. 2d 1200, 1207 (C.D. Cal. 2006), is similarly misplaced, as Plaintiffs allege more than that the Haness Defendants "knew or should have known" of the breaches of duty—in taking steps to administer the sham pension funds, including signing off on the cash out—the Haness Defendants actually know of the wrongdoing. Simply put, a defendant can be liable for aiding and abetting a breach of fiduciary duty, even if it did not personally owe a duty to the injured party.

(emphasis added). Plaintiffs allege knowledge on behalf of the Haness Defendants generally and specifically, as the services rendered here were so unusual it raises the inference the Haness Defendants knew the Tribal Retirement Plans were being used to drain Tribal moneys. *Id.* (aider and abettor banks "utilized atypical banking procedures to service Slatkin's accounts, raising an inference that they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business"); *see also Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) ("A party who engages in atypical business transactions . . .may be found liable as an aider and abettor with a minimal showing of knowledge."); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) ("If the method or transaction is atypical . . . it may be possible to infer the knowledge necessary for aiding and abetting liability.").

Plaintiffs plead specific facts showing the Haness Defendants were aware of the underlying facts constituting conversion and breach of fiduciary duty by providing details concerning the atypical and unusual nature of the services provided by the Haness Defendants. Most prominently, as the Haness Defendants were aware of the Tribal Retirement Plans, they were aware that the five plan participants were receiving nearly four times the industry standard in targeted benefits. *See* ¶ 223(a). Moreover, these eye-popping benefits were being prepared—and an entire pension plan administered—for only five participants; whereas, no other Tribe member or employee received *any* benefits. ¶¶ 214, 223. This undoubtedly is a red flag, especially considering the administrative expense of setting up a pension fund. Indeed, for one beneficiary alone, the pension plan paid $1.5 million in five years. ¶ 223(b). The Haness Defendants argue that even if they understood the rules governing pension funds, and "actually knew that they were not followed," the Tribe would not have pled aiding and abetting liability. Dkt. 51-1 at 15. This contention is contrary to established law. Abundant authorities hold that knowledge of, and participation in, "atypical" transactions such as those at issue here are a sufficient basis to support aiding and abetting liability. *See, e.g. Neilson*, 290 F. Supp. 2d at 1120.

The Haness Defendants summarize almost two pages of allegations against them—most of which allege they "knowingly" participated in the scheme to create sham retirement and pension plans in order to transfer large amounts of cash to the RICO Ringleaders and RICO co-

Defendant Sherry Myers—and then argue that Plaintiffs somehow fail to allege "direct knowledge." See Dkt. 51-1 at 12-14. Plaintiffs have alleged both specific and general knowledge, as the Motion itself sets forth in detail. *See id*. Haness Defendants' contention should be rejected. Though the Haness Defendants rely on *Simi Mgmt. Corp. v. Bank of Am. Corp*., 2012 U.S. Dist. LEXIS 9669, *11 (N.D. Cal. Jan. 27, 2012), the case is inapposite, because in that action plaintiffs had only alleged that "statements heavily imply that BofA knew that Reichart was committing embezzlement and conversion, but stop short of the required direct assertion that BofA had actual knowledge of Reichart's specific wrongdoing and helped him carry it out." *Id*. Here, by contrast, Plaintiffs allege that the Haness Defendants took specific steps to carry out conversion of the Tribe's assets, e.g., by certifying abusive retirement and pension plans and helping to cash them out, with knowledge that they were participating in transactions that were atypical.[31]

VI. Plaintiffs Plausibly Pleaded Their Thirty-First Claim for Relief Against the Moore Defendants

The Moore Defendants move to dismiss only Plaintiffs' Thirty-First Claim for Relief, and therefore do not oppose Plaintiffs' Twenty-Eighth, Twenty-Ninth or Thirtieth Claims for Relief. *See* Dkt. 54 (Notice and Motion), 54-1 (Memorandum of Points & Authorities).

A. Allegations Specific to the Moore Defendants

As the Tribe's financial advisor, the Moore Defendants substantially assisted the RICO Ringleaders in setting up and administering sham retirement and pension plans that had the purpose and effect of converting millions of dollars of Tribal money all for the benefit of the RICO Ringleaders and RICO co-Defendant Sherry Myers." ¶ 48. The Tribal Retirement Plans were "atypical," *i.e.*, designed not as long-term retirement benefits for Tribal employees, but as a way to convert Tribal assets to the benefit of the RICO Ringleaders and Ms. Myers. ¶ 220. The 401(k) accounts were designed to pay out the maximum amount, and they were fraudulently

[31] The Haness Defendants argue that Plaintiffs' failure to allege facts showing they participated in the sham 401K plan somehow renders the allegations concerning the pension funds "naked." *See* Dkt. 51-1 at 13. Plaintiffs do not base any of their claims for relief against the Haness Defendants on the Tribe's 401K plan. This is a non-issue.

liquidated in 2013. ¶ 224. Mr. Moore was the architect of these cash-out schemes. ¶ 218. To reward Mr. Moore for his role in assisting the RICO Ringleaders and Ms. Myers, they provided him with special consideration, such as sponsoring his son's race car, in addition to his generous fees. *See* ¶ 227.

B. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims for Relief

Though they do not seek dismissal of Plaintiffs' claims on the basis of subject matter jurisdiction, the Moore Defendants argue the issue at length, asserting that Plaintiffs' claims are based on "an inter-tribal dispute over wrongful acts of tribe members exceeding their authority contrary to tribal constitution." Dkt. 54-1 at 7. The Moore Defendants' subject matter jurisdiction arguments (Dkt. 54-1 at 4-7, 10) are duplicative of those the RICO Defendants assert in support of their Rule 12(b)(1) motion and, accordingly, are addressed in Section IV.A. above.

C. Plaintiffs Have Plausibly Pleaded the Moore Defendants' Aiding and Abetting of the RICO Defendants' Conversion and Fiduciary Duty Breaches (Thirty-First Claim for Relief)

The Moore Defendants do not argue that Plaintiffs fail to plead the elements of aiding and abetting breach of fiduciary duty or conversion. Accordingly, they concede that Plaintiffs have pleaded they knowingly assisted in conversion and breaches of fiduciary duty by creating the Tribal Retirement Plans designed to convert Tribal assets. Instead, the Moore Defendants make two arguments to support dismissal of Plaintiffs' for aiding and abetting claim. Neither is persuasive. Indeed, none of the Moore Defendants' authorities concern state law claims brought for aiding and abetting an intentional tort.[32] The Moore Defendants' position, wholly unsupported by any authority, would eviscerate aiding and abetting liability altogether, except in the rare circumstances where the legislature provided for it. Accordingly, the Moore Defendants' motion should be dismissed because Plaintiffs properly state a claim against them for aiding and abetting conversion and breaches of fiduciary duties.

First, the Moore Defendants claim that Plaintiffs cannot bring RICO claims against them for aiding and abetting the RICO Defendants' RICO violations. *See* Dkt. 54-1 at 8-9 (relying on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) and

[32] Indeed, even APC recognizes this distinction. *See* APC Mot. 8.

1 *Salas v. Int'l Union of Operating Eng'rs*, 2015 U.S. Dist. LEXIS 20077 (C.D. Cal. Feb. 18,
2 2015)). That may be true, but Plaintiffs assert no such claim; they allege that the Moore
3 Defendants aided and abetted the RICO Defendants' conversion and breaches of fiduciary duty.
4 *See* ¶¶ 733-741. These are not claims brought under RICO. Accordingly, Plaintiffs' claims here
5 are distinguished from those at issue in *Salas*, which concerned the different issue of whether
6 aiding and abetting a predicate act could constitute racketeering activity for purposes of RICO
7 liability, and concluded that it could not. 2015 U.S. Dist. LEXIS 20077, at *20-21. Plaintiffs do
8 not bring a claim against the Moore Defendants under RICO. Oddly, the Moore Defendants admit
9 in their Motion that Plaintiffs confirmed this in meet and confer discussions. Dkt. 54-1 at 9 ("the
10 aiding and abetting claim against Moore is not a RICO-based claim").[33]

11 Second, the Moore Defendants contend that, even if the claim is not brought under RICO,
12 they are nonetheless immune from liability for aiding and abetting conversion and breaches of
13 fiduciary duties because those claims "are grounded in the RICO violation claims." Dkt. 54-1 at
14 9. This contention is based on a gross misreading of *Central Bank*. There, the Supreme Court
15 addressed the issue of whether "private civil liability under § 10(b) [of the Securities Exchange
16 Act of 1934] extends as well to those who do not engage in the manipulative or deceptive
17 practice, but who aid and abet the violation." *Central Bank*, 511 U.S. at 167. The Court in *Central*
18 *Bank* answered the question in the negative, reasoning that if Congress intended to impose aiding
19 and abetting liability, it would have provided such language in the text of the statute. *Id.* at 177-
20 78. Subsequently, the *Salas* court applied the same rule in the RICO context. *Salas*, 2015 U.S.
21 Dist. LEXIS 20077, at *20-21.

22 But those holdings do not extend to situations where the claim is not brought under RICO
23 (or some other federal statute that does not provide for aiding and abetting liability).[34] The Moore
24 Defendants' position, wholly unsupported by any other case,[35] would eviscerate aiding and

25 [33] The Moore Defendants' reliance on *Trachel v. Bucholz*, 2009 U.S. Dist. LEXIS 4219 (N.D.
26 Cal. Jan. 9, 2009) is misplaced. *See* Dkt. 54-1 at 10. That case, like *Salas*, also involved claims
brought under RICO. The plaintiffs there tried to use securities fraud allegations as the predicate
27 acts for their RICO claims, which was ***expressly prohibited*** by legislation. *Id.* at **9-12.
[34] Indeed, even APC recognizes this distinction. *See* APC Mot. 8.
28 [35] The Moore Defendants' reliance on *Trachel v. Bucholz*, 2009 U.S. Dist. LEXIS 4219 (N.D.
Cal. Jan. 9, 2009) is misplaced. That case, like *Salas*, also involved claims brought under RICO.

abetting liability altogether, except in the rare circumstances where the legislature provided for it. The rule in California, however, is that liability may be imposed for aiding and abetting an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Casey v. U.S. Bank Nat. Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005); *accord Quezada v. Loan Ctr. of Cal., Inc.*, 2008 U.S. Dist. LEXIS 96479, at *14 (E.D. Cal. Nov. 24, 2008). This same rule—rather than the one advocated by Defendants—was recently applied in *Mosier v. Stonefield Josephson, Inc.*, 2011 U.S. Dist. LEXIS 124058, at *26 (C.D. Cal. Oct. 25, 2011), where the court held that claims for **aiding and abetting conversion** were plausible. Accordingly, the Moore Defendants' motion should be dismissed because Plaintiffs properly state a claim against them for aiding and abetting conversion and breaches of fiduciary duties.

VIII. Restitution Is a Viable Claim for Relief Under California Law

Various Defendants move to dismiss Plaintiffs' restitution claim on the grounds that it is not an independent claim for relief. Dkt. 46 at 14; Dkt. 51-1 at 17; Dkt. 53-1 at 11. This is incorrect.

First of all, "California does recognize a claim for restitution." *Walters v. Fid. Mortg. of Cal., Inc.*, 2010 U.S. Dist. LEXIS 36839, at *34 (E.D. Cal. Apr. 14, 2010) (denying motion to dismiss unjust enrichment/restitution claim) (internal citations and quotations omitted). "To state a claim for unjust enrichment, a plaintiff must plead receipt of a benefit and the unjust retention of the benefit at the expense of another. . . . To prevail on a claim for restitution, a plaintiff need not establish bad faith on the part of the defendant, so long as the recipient of the funds was not entitled to the funds." *Copart, Inc. v. Sparta Consulting, Inc.*, 2015 U.S. Dist. LEXIS 74662, at *39 (E.D. Cal. June 9, 2015) (denying motion to dismiss unjust enrichment/restitution claim) (internal citations and quotations omitted).

The plaintiffs there tried to use securities fraud allegations as the predicate acts for their RICO claims, which was ***expressly prohibited*** by legislation. *Id.* at **9-12.

Umpqua misquotes *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) for the proposition that "[t]here is no cause of action in California for [restitution]." Dkt. 46 at 14. But what *Durell* actually says is, "There is no cause of action in California for *unjust enrichment*. Unjust enrichment is synonymous with restitution. There are several potential bases for a cause of action seeking restitution." *Durell* at 1370 (italics added). Clearly, the holding of *Durell* is precisely the opposite of what Umpqua claims. There *is* a cause of action for restitution in California.[36]

Finally, Umpqua disputes whether Plaintiffs' allegations are sufficient to meet the restitution standard. Plaintiffs have made detailed allegations that Umpqua aided and abetted the RICO Defendants in conversion of the Tribe's funds and breach of fiduciary duty owed to the Tribe. ¶¶ 281-286, 619-630. "[T]he restitutionary remedies of unjust enrichment and disgorgement are available for aiding and abetting breach of fiduciary duty." *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1481 (2014). Thus, Plaintiffs' claim for restitution is viable and is sufficiently pled.

LEAVE TO AMEND SHOULD BE GRANTED FREELY

If the Court grants any portion of the Defendants' several motions, Plaintiffs respectfully request that they be granted leave to amend. "[D]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *Petersen v. Boeing Co.,* 715 F.3d 276, 280 (9th Cir. 2013).

CONCLUSION

For the reasons set forth above, the Court should deny (1) the RICO Defendants' Rule 12(b)(1) Motion to Dismiss; (2) the Rule 12(b)(6) Motions to Dismiss filed by the Umpqua

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[36] As the court explained in *Sprint Nextel Corp. v. Welch*, 2014 U.S. Dist. LEXIS 2119, at *11-12 (E.D. Cal. Jan. 8, 2014), "There is a split in authority among California courts over whether 'unjust enrichment' is regarded as a cause of action. Courts that recognize a cause of action for 'unjust enrichment' regard the cause of action as having two elements: (1) the receipt of a benefit and (2) the unjust retention of the benefit at the expense of another. Courts that do not recognize a separate cause of action for 'unjust enrichment' regard such claims as synonymous with the California cause of action for restitution. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010). Under a cause of action seeking restitution, restitution may be awarded if a benefit is received by a person under circumstances such that it would be unjust for the person to retain it. *Id.*" (Some citations omitted.)

Defendants, the Cornerstone Defendants, APC, the Haness Defendants and the Moore Defendants; and (3) APC's Rule 12(f) Motion to Strike.

Dated: June 29, 2015

GROSS LAW, P.C.

By: *\/s/ Stuart G. Gross*
STUART G. GROSS

Dated: June 29, 2015

JOSEPH SAVERI LAW FIRM, INC.

By: */s/ Andrew M. Purdy*
ANDREW M. PURDY

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