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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,

CRP 111 WEST 141ST LLC;
CASTELLAN MANAGING MEMBER
LLC; CRP WEST 168TH STREET
LLC; and CRP SHERMAN AVENUE
LLC,

Nominal
Defendants¹.

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

**ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO
DISMISS THE FIRST AMENDED
COMPLAINT**

¹ Former Defendant Quicken Loans, Inc. ("Quicken") filed a dismissal motion. However, Plaintiffs voluntarily dismissed their claims against Quicken, which renders the motion moot and it is therefore denied.

1 The following Defendants seek dismissal of claims in
2 Plaintiffs' First Amended Complaint ("FAC"): Ines Crosby, John
3 Crosby, Leslie Lohse, Larry Lohse (collectively, the "Employee
4 Defendants"), Juan Pata, Chris Pata, Sherry Myers, Frank James,
5 The Patriot Gold & Silver Exchange, Norman R. Ryan (collectively,
6 with the Employee Defendants, "Pata Defendants"), Umpqua Bank,
7 Umpqua Holdings Corporation (collectively, "Umpqua Defendants"),
8 Cornerstone Community Bank, Cornerstone Community Bancorp,
9 Jeffery Finck (collectively, "Cornerstone Defendants"), Garth
10 Moore, Garth Moore Insurance and Financial Services, Inc.
11 (collectively, "Moore Defendants"), Associated Pension
12 Consultants, Inc. ("APC"), Robert M. Hanes, and Hanes &
13 Associates, LLC (collectively, "Hanes Defendants").

14 The Pata Defendants and Moore Defendants seek dismissal
15 under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack
16 of subject matter jurisdiction. Umpqua Defendants, Cornerstone
17 Defendants, Moore Defendants, APC, and Hanes Defendants seek
18 dismissal under Rule 12(b)(6) for failure to state a claim.

19 **I. FACTUAL ALLEGATIONS**

20 The following factual allegations in the FAC relate to
21 the motions. Plaintiff Paskenta Band of Nomlaki Indians ("the
22 Tribe") employed the Employee Defendants in executive roles for
23 more than a decade. Plaintiffs allege the Employee Defendants
24 used their positions to embezzle millions of dollars from the
25 Tribe and its principal business entity, the Paskenta Enterprises
26 Corporation ("PEC"). Plaintiffs allege the Employee Defendants
27 stole this money from Plaintiffs' bank accounts at Umpqua Bank
28 and Cornerstone Bank by withdrawing large sums for their personal

1 use, and that the Employee Defendants caused the Tribe to invest
2 in two unauthorized retirement plans for their personal benefit:
3 a defined benefit plan ("Tribal Pension Plan") and a 401(k)
4 ("Tribal 401(k)") (collectively "Tribal Retirement Plans").
5 Plaintiffs allege the Employee Defendants kept their activities
6 hidden from Plaintiffs through inter alia, harassment,
7 intimidation, and cyber-attacks on the Tribe's computers.

8 Plaintiffs further allege the remaining Defendants
9 knowingly assisted the Employee Defendants in aspects of their
10 scheme. Plaintiffs allege the Umpqua Defendants and the
11 Cornerstone Defendants controlled banks where Plaintiffs
12 maintained accounts and, despite knowing the Employee Defendants
13 were withdrawing money from these accounts for their personal
14 benefit, permitted the Employee Defendants to make withdrawals
15 and failed to notify Plaintiffs of the Employee Defendants'
16 actions. Plaintiffs also allege the Moore Defendants, as
17 Plaintiffs' financial advisors, and APC, as the third-party
18 administrator for the Tribal Retirement Plans, assisted the
19 Employee Defendants in setting up and administering the
20 unauthorized Tribal Retirement Plans, and that the Hanes
21 Defendants as actuaries for the Tribal Pension Plan, assisted the
22 Employee Defendants in setting up and administering that Plan.

23 **II. DISCUSSION**

24 **A. Subject Matter Jurisdiction**

25 Pata Defendants and Moore Defendants each argue this
26 lawsuit should be dismissed since the allegations in Plaintiffs'
27 FAC demonstrate the federal court lacks subject matter
28 jurisdiction over the lawsuit because Plaintiffs' claims "are

1 inextricably intertwined with internal [issues of] Paskenta
2 Tribal governance and the interpretation and application of
3 Paskenta Tribal law." (Tribal Defs. Not. Mot. & Mot. Dismiss
4 ("Pata Mot.") 3:9-10, ECF No. 52; see also Defs. Garth Moore and
5 Garth Moore Ins. & Fin. Servs., Inc.'s Not. Mot. & Mot. Dismiss
6 ("Moore Mot.") 4:24-26, ECF No. 52.)

7 Plaintiffs respond:

8 This Court has . . . subject matter
9 jurisdiction . . . based on several statutory
10 provisions: First, . . . the Court has
11 federal question jurisdiction under 28 U.S.C.
12 § 1331, as [Plaintiffs] ha[ve] stated claims
13 under RICO, 18 U.S.C. §§ 1961 et seq. and
14 under the [Computer Fraud and Abuse Act], 18
15 U.S.C. § 1030 Second [the court has
16 subject matter jurisdiction since] the
17 Tribe's governing body is federally
18 recognized, [and]. . . 28 U.S.C. § 1362
19 [states]:

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

27 Third, based on the . . . RICO claim,
28 specifically, the Court has subject matter
jurisdiction [under] . . . 18 U.S.C. §
1964(a), (c). And fourth, the Court has
ancillary jurisdiction over the . . . pendent
California state law claims under 28 U.S.C. §
1367.

23 (Pls.' Opp'n Mot. Dismiss ("Opp'n") 13:3-17, ECF No. 73.)

24 The Pata Defendants and the Moore Defendants make what
25 is considered a facial challenge to the federal court's subject
26 matter jurisdiction. "In a facial [challenge], the challenger
27 asserts that the allegations contained in the complaint are
28 insufficient on their face to invoke federal jurisdiction." Safe

1 Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).
2 When deciding a facial challenge, Plaintiffs are afforded the
3 same procedural protections as when faced with a motion to
4 dismiss for failure to state a claim under Rule 12(b)(6); namely,
5 the court "assume[s] [plaintiffs'] allegations to be true and
6 draw[s] all reasonable inferences in [their] favor." Wolfe v.
7 Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

8 Pata Defendants and Moore Defendants have not shown
9 that whatever they have referenced as "internal [issues of]
10 Paskenta Tribal governance and the interpretation and application
11 of Paskenta Tribal Law," deprives the federal court of subject
12 matter jurisdiction over Plaintiffs' claims. (Pata Mot. 3:9-10.)

13 Therefore each motion challenging the federal court's
14 subject matter jurisdiction is denied.

15 **B. Failure to State a Claim**

16 **1. Legal Standard**

17 "To survive a motion to dismiss, a complaint must
18 contain sufficient factual matter, accepted as true, to state a
19 claim to relief that is plausible on its face." Caviness v.
20 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir.
21 2010) (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009)). "A claim
22 has facial plausibility when the plaintiff pleads factual content
23 that allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged." Iqbal, 556 U.S.
25 at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556
26 (2007)). "Determining whether a complaint states a plausible
27 claim for relief . . . [is] a context-specific task that requires
28 the . . . court to draw on its judicial experience and common

1 sense.” Id. at 679. “For purposes of a motion to dismiss, we
2 accept all well-pleaded allegations of material fact as true and
3 construe them in the light most favorable to the nonmoving
4 party.” Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777,
5 783 (9th Cir. 2012).

6 **2. Actual Knowledge**

7 Umpqua Defendants, APC, and Haness Defendants each seek
8 dismissal of Plaintiffs’ claims in which Plaintiffs allege they
9 aided and abetted the Employee Defendants’ conversion of Tribal
10 assets and the Employee Defendants’ breach of their fiduciary
11 duty owed to Plaintiffs, contending the FAC fails to plausibly
12 allege the referenced Defendants had actual knowledge of the
13 Employee Defendants’ wrongdoing.² Umpqua Defendants and Haness
14 Defendants seek dismissal with prejudice.

15 “Liability may . . . be imposed on one who
16 aids and abets the commission of an
17 intentional tort if the person (a) knows the
18 other’s conduct constitutes a breach of duty
19 and gives substantial assistance or
20 encouragement to the other to so act or (b)
21 gives substantial assistance to the other in
22 accomplishing a tortious result and the
23 person’s own conduct, separately considered,
24 constitutes a breach of duty to the third
25 person.”

21 Casey v. U.S. Bank Nat’l Ass’n, 127 Cal. App. 4th 1138, 1144
22 (2005) (alterations in original) (citing Saunders v. Superior
23 Court, 27 Cal. App. 4th 832, 846 (1994)). “[A]iding and abetting

24 ² Moore Defendants also seek dismissal of what they refer to as
25 Plaintiffs’ claim against them for aiding and abetting the Employee
26 Defendants’ RICO violations, arguing the claim is not legally cognizable.
27 However, Plaintiffs’ only aiding and abetting claims against the Moore
28 Defendants allege they aided and abetted the Employee Defendants in converting
Tribal assets and aided and abetted the Employee Defendants in breaching the
fiduciary duty the Employee Defendants owed Plaintiffs under state law.
Therefore, the motion is denied because it has not been shown to concern an
actual controversy.

1 liability under California law, as applied by the California
2 state courts, requires a finding of actual knowledge," which
3 "requires more than a vague suspicion of wrongdoing." In re First
4 Alliance Mortg. Co., 471 F.3d 977, 993, n.4 (9th Cir. 2006).
5 "[T]o satisfy the knowledge prong [Plaintiffs must plausibly
6 allege], the defendant . . . [had] 'actual knowledge of [an
7 Employee Defendant's conversion or breach of fiduciary duty owed
8 to Plaintiffs.]" Id. at 993 (citation omitted).

9 **a. Umpqua Defendants**

10 Plaintiffs allege in the FAC the Umpqua Defendants had
11 actual knowledge of the Employee Defendants' conversion of Tribal
12 assets and of their breach of the fiduciary duty the Employee
13 Defendants owed to Plaintiffs, since "[Employee Defendant Ines]
14 Crosby would frequently go to Umpqua's Orland, California branch
15 and present checks from the Tribe's checking account made payable
16 to 'Cash' . . . for large sums" and the tellers would give her
17 the money. (FAC ¶ 283.) Plaintiffs allege the Orland branch "is
18 small with approximately four tellers" working at a time and "as
19 members of the Orland community [the Umpqua tellers] were aware
20 of the extraordinarily extravagant and luxurious life style
21 enjoyed by . . . Ines Crosby." (FAC ¶ 590.) Plaintiffs allege
22 Ines Crosby's withdrawals from Umpqua Bank "were remarkably large
23 relative to other withdrawal[s] from the branch;" and were often
24 large enough to "require[] Umpqua . . . to file a Currency
25 Transaction Report ("CTR") with the Internal Revenue Service."
26 (FAC ¶¶ 591-92.) Plaintiffs also allege the Umpqua Defendants
27 permitted Ines Crosby to pay her credit card bills through the
28 Tribe's account despite receiving "specific training" that this

1 could be "a means to disguise . . . illegal transactions" and
2 that the Umpqua tellers continued to serve Ines Crosby "after it
3 was widely reported in the local press that [she] . . . had been
4 . . . suspected of misappropriating millions of dollars." (FAC ¶¶
5 599, 594.)

6 Plaintiffs' allegations are insufficient to plead
7 plausible claims that the Umpqua Defendants had actual knowledge
8 of the Employee Defendants' alleged conversion of Tribal assets
9 or of the Employee Defendants' alleged breach of their fiduciary
10 duty owed to Plaintiffs. Therefore, these claims are dismissed.
11 However, Umpqua Defendants have not shown amendment would be
12 futile.

13 **b. APC**

14 Plaintiffs allege the manner in which the Employee
15 Defendants instructed APC to administer the Tribal Retirement
16 Plans indicated to APC that the Employee Defendants intended to
17 use these plans as a short-term vehicle to steal from the Tribe,
18 and that the Employee Defendants' instructions, coupled with
19 APC's retirement plan administration experience, are sufficient
20 to support drawing a reasonable inference that APC had actual
21 knowledge of the Employee Defendants' alleged thievery
22 intentions.

23 Specifically, Plaintiffs allege APC "set up and
24 administered" the Tribal Retirement Plans "as though the Tribe
25 was . . . [a] wholly owned small business" with few eligible
26 participants rather than a Tribal nation; assisted the Employee
27 Defendants in making choices that were not compliant with ERISA;
28 developed Tribal Retirement Plans designed for short-term funding

1 that could be cashed-out in five years; and allowed Defendant
2 John Crosby to sign documents authorizing early-withdrawals from
3 his 401(k), even after his employment with the Tribe had been
4 terminated. (FAC ¶¶ 220-225.)

5 These allegations are insufficient to plead a plausible
6 claim that APC had actual knowledge of the Employee Defendants'
7 alleged theft of Plaintiffs' money, since they do not plausibly
8 allege that APC knew the irregularity in the Tribal Retirement
9 Plans was the result of the Employee Defendants' intent to
10 convert Plaintiffs' funds. Therefore, the claim is dismissed.

11 **c. Hanes Defendants**

12 Plaintiffs allege that because the Hanes Defendants
13 are "retirement professionals," the manner in which the Employee
14 Defendants structured the Tribal Pension Plan indicated to the
15 Hanes Defendants that the Employee Defendants' intended "to use
16 the Tribal Pension Plan as a short-term investment to divert
17 Tribal funds." (FAC ¶ 223.) Plaintiffs allege in the FAC that the
18 Tribal Pension plan was set up "with an actuarial formula in
19 which the target retirement benefit was . . . approximately 4
20 times higher than the industry standard," (FAC ¶ 223(a)), and the
21 "retirement benefit qualification criteria [qualifying an
22 employee with five years of service who had attained the age of
23 65] . . . caused the Tribe to make . . . , extraordinarily high
24 contributions for Ines Crosby." (FAC ¶ 223(b).) Plaintiffs also
25 allege the Hanes Defendants were aware that terminating a
26 pension plan just a few years after its inception, as the
27 Employee Defendants ultimately did, is evidence that the plan
28 from the outset was not a bona fide retirement program. (FAC ¶

1 223(c).)

2 However, the FAC does not contain allegations that
3 support drawing a reasonable inference that the Hanes Defendants
4 had actual knowledge the alleged reason for the Tribal Pension
5 Plan's irregular structure was an intent to convert Tribal
6 assets. Therefore this claim is dismissed. However, Hanes
7 Defendants have not shown amendment would be futile.

8 **3. Duty**

9 Umpqua Defendants, Cornerstone Defendants, and Hanes
10 Defendants each seek dismissal of Plaintiffs' common law
11 negligence claim arguing the FAC fails to plausibly allege they
12 owed Plaintiffs' a duty of care, which is an element of a
13 negligence claim. Umpqua Defendants also seek dismissal of
14 Plaintiffs' breach of contract claim for the same reason. Umpqua
15 Defendants and Hanes Defendants seek dismissal with prejudice.

16 **a. The Banking Defendants**

17 Banks "ha[ve] a duty to act with reasonable care in
18 [their] transactions with depositors;" this duty "is an implied
19 term in the contract between the bank and its depositor." Chazen
20 v. Centennial Bank, 61 Cal. App. 4th 532, 543 (1998). However,
21 "[t]his contractual relationship does not involve any implied
22 duty to supervise account activity, or to inquire into the
23 purpose for which the funds are being used." Id. at 537.
24 California law "require[s] banking transactions to be processed
25 quickly and automatically," and "[u]nder this system favoring
26 expedited handling of funds transfers, a bank cannot be expected
27 to track transactions in fiduciary accounts or to intervene in
28 suspicious activities." Id. at 539. A "bank is not liable for the

1 misappropriation [of a customer's] funds by [its authorized
2 signatories], . . . unless the bank has knowledge, actual or
3 constructive, of such misappropriation." Blackmon v. Hale, 1
4 Cal.3d 548, 556 (1970) (emphasis added).

5 **i. Umpqua Defendants**

6 Plaintiffs allege Umpqua's tellers "receive training
7 concerning . . . federal and internal reporting requirements"
8 regarding the large cash transactions that the Employee
9 Defendants made at Umpqua Bank, and that these reporting
10 requirements put the Umpqua Defendants on inquiry notice of the
11 Employee Defendants' unlawful conduct and created a duty on the
12 part of the Umpqua Defendants to "inquir[e into] or
13 investigat[e]" these transactions. (FAC ¶¶ 591-93.)

14 Plaintiffs allege the Employee Defendants were
15 authorized by the Tribe to access Plaintiffs accounts, but do not
16 plausibly allege the Umpqua Defendants had actual or constructive
17 knowledge of the Employee Defendants' alleged misappropriation
18 since it has not been plausibly pled that transactions triggering
19 "federal and internal reporting requirements" indicate
20 misappropriation. Therefore, Plaintiffs negligence and breach of
21 contract claims are dismissed. However, Umpqua Defendants have
22 not shown amendment would be futile.

23 **ii. Cornerstone Defendants**

24 Plaintiffs argue they plausibly allege a negligence
25 claim against the Cornerstone Defendants since they allege
26 Jeffrey Finck, Cornerstone's CEO, "alerted a Tribal employee that
27 the Tribe should look at the suspicious activity that the
28 [Employee Defendants] had conducted with the Tribe's money

1 deposited in Cornerstone Bank.” (Opp’n 52:27-53:7; FAC ¶ 644.)

2 However, the allegation that Finck alerted a Tribal
3 employee to “suspicious activity” does not plausibly allege he or
4 any of other Cornerstone Defendants had actual or constructive
5 knowledge of the Employee Defendants’ conversion and breach of
6 the fiduciary duty they owed to Plaintiffs. Therefore, the
7 Cornerstone Defendants’ motion is granted.

8 **b. Hanes Defendants**

9 Plaintiffs argue the Hanes Defendants owed them a duty
10 of care since Plaintiffs were third party beneficiaries of the
11 Tribal Pension Plan, they sponsored the plan, and the Hanes
12 Defendants set up of the Tribal Pension Plan. (Opp’n 71:14-16.)

13 The Hanes Defendants reply that “[t]o qualify as
14 [being owed a duty of care] as a third party beneficiary of a
15 contract, the third party must show that the contract was made
16 expressly for his [or her] benefit” and the FAC does not allege
17 the Tribal Pension Plan was made for Plaintiffs’ benefit. (Reply
18 of Defs. Robert M. Hanes & Hanes & Assoc., LLC ISO Mot. Dismiss
19 FAC (“Hanes Reply”) 5:21-22; 6:3-6, ECF No. 84.)

20 California law generally states that the duty
21 of ordinary care owed by a supplier of
22 information [like an actuary] . . . does not
23 run to non-clients. However, California law
recognizes an exception to the general rule,
that such a supplier of information does owe
a duty to intended third party beneficiaries.

24 Paulsen v. CNF Inc., 559 F.3d 1061, 1080-81 (9th Cir. 2009).

25 Plaintiffs do not plausibly allege they are third-party
26 beneficiaries of the Tribal Retirement Plan. Therefore, this
27 claim is dismissed. However, the Hanes Defendants have not shown
28 amendment would be futile.

1 **4. Restitution**

2 Umpqua Defendants, APC, and Hanes Defendants seek
3 dismissal of Plaintiffs' restitution claims arguing no such claim
4 exists under California law. Plaintiffs do not oppose Umpqua
5 Defendants' motion, but oppose the motion concerning their claims
6 against APC and Hanes, arguing California law permits a
7 restitution claim.

8 Restitution "is synonymous with" unjust enrichment.
9 Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370 (2010).
10 "California courts are split on the question whether unjust
11 enrichment [and restitution] [are] viable cause[s] of action
12 under California law." In re TFT-LCD (Flat Panel) Antitrust
13 Litig., No. C-10-5625-SI, 2011 WL 4345435, at *3 (N.D. Cal. Sept.
14 15, 2011) (citing cases). However, the Ninth Circuit has stated:

15 [I]n California, there is not a standalone
16 cause of action for "unjust enrichment,"
17 which is synonymous with "restitution."
18 However, unjust enrichment and restitution
19 are not irrelevant in California law. Rather,
20 they describe the theory underlying a claim
21 that a defendant has been unjustly conferred
22 a benefit "through mistake, fraud, coercion,
or request." The return of that benefit is
the remedy "typically sought in a quasi-
contract cause of action." When a plaintiff
alleges unjust enrichment, a court may
"construe the cause of action as a quasi-
contract claim seeking restitution."

23 Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir.
24 2015) (citations omitted). "While the California courts have not
25 conclusively decided this question, . . . the court is bound by
26 the Ninth Circuit's interpretations of state law." Brown v. Gen.
27 Steel Domestic Sales, LLC, No. CV08-00779-MMM-(SHX), 2008 WL
28 2128057, at *5 (C.D. Cal. May 19, 2008). Therefore, Plaintiffs

1 restitution claim could be construed as a quasi-contract claim,
2 and since the movants have not shown the FAC fails to allege such
3 a quasi-contract claim, each dismissal motion is denied.

4 **5. Fiduciary Duty**

5 Cornerstone Defendants, APC and Hanes Defendants each
6 seek dismissal of Plaintiffs' breach of fiduciary duty claim
7 arguing they owed Plaintiff no such duty. APC and the Hanes
8 Defendants seek dismissal with prejudice.

9 A fiduciary relationship is any relation
10 existing between parties to a transaction
11 wherein one of the parties is duty bound to
12 act with the utmost good faith for the
13 benefit of the other party. Such a relation
ordinarily arises only where a confidence is
reposed by one person in the integrity of
another.

14 Wolf v. Superior Court, 107 Cal. App. 4th 25, 29 (2003)
15 (quotation marks omitted). "The essence of a fiduciary . . .
16 relationship is that the parties do not deal on equal terms,
17 because the person in whom trust and confidence is reposed . . .
18 is in a position to exert unique influence over the dependent
19 party." Richelle L. v. Roman Catholic Archbishop, 106 Cal. App.
20 4th 257, 271 (2003). "[B]efore a person can be charged with a
21 fiduciary obligation [to another], he [or she] must either
22 knowingly undertake to act on behalf and for the benefit of
23 another, or must enter into a relationship which imposes that
24 undertaking as a matter of law." Comm. On Children's Television,
25 Inc. v. General Foods Corp., 35 Cal. 3d 197, 221 (1983).

26 **a. Cornerstone Defendants**

27 Plaintiffs argue Cornerstone Defendants owed them a
28 fiduciary duty since "[t]he Tribe is a shareholder of Cornerstone

1 Bank and is accordingly owed" a fiduciary duty even if such a
2 duty is not present in an exclusively "strictly . . . bank-
3 depositor relationship." (Opp'n 52:17-19.)

4 Cornerstone Defendants reply that Plaintiffs
5 "conflate[] the duties owed to the Tribe as a shareholder with
6 those owed to the Plaintiffs as depositors," since Plaintiffs'
7 breach of fiduciary duty claim stems from Plaintiffs' bank
8 accounts with Cornerstone Bank. (Cornerstone Defendants' Reply
9 ISO Mot. Dismiss ("Cornerstone Reply") 12:2-3; 12:20-13:1, ECF
10 No. 85.) The Cornerstone Defendants further argue: "Nowhere does
11 the FAC allege that PEC was a shareholder" and therefore "the
12 Cornerstone Defendants clearly owed no fiduciary duty to PEC
13 under any theory." (Cornerstone Reply 12 n.3.)

14 Plaintiffs allege in the FAC that the Tribe and PEC
15 were account holders at Cornerstone Bank. "[U]nder ordinary
16 circumstances the relationship between a bank and its depositor
17 is that of a debtor-creditor, and is not a fiduciary one," and
18 therefore this relationship does not establish the Cornerstone
19 Defendants owed Plaintiffs a fiduciary duty. Lawrence v. Bank of
20 Am., 163 Cal. App. 3d 431, 437 (1985) However, the Tribe also
21 alleges it was a minority shareholder in Cornerstone Bank and in
22 this capacity, the Cornerstone Defendants owed it a fiduciary
23 duty of loyalty, which the Cornerstone Defendants breached by
24 remaining silent while Employee Defendant John Crosby used the
25 Tribe's accounts at Cornerstone bank for his personal benefit.
26 Plaintiffs have not plausibly alleged that any fiduciary duty of
27 loyalty that the Cornerstone Defendants owed the Tribe as a
28 minority shareholder extended to matters involving the Tribe's

1 bank account at Cornerstone bank. Therefore, the claim is
2 dismissed.

3 **b. Tribal Retirement Plan Defendants**

4 **i. APC**

5 APC argues it owed Plaintiffs no fiduciary duty since
6 the FAC "simply state[s] that APC administered the Tribe's
7 pension plans" and this assertion which "does not create a
8 fiduciary relationship" between APC and Plaintiffs. (Not. & Mot.
9 Def. Associated Pension Consultants, Inc. Dismiss FAC ("APC
10 Mot.") 6:17-18, ECF No. 53.)

11 Plaintiffs respond they sufficiently allege a fiduciary
12 relationship since "[b]y setting up and administering the Tribe's
13 pension plans and 401(k), APC performed discretionary acts on
14 behalf of the Tribe," and the Tribe "'relied on APC to ensure
15 [the retirement plans] were ERISA compliant.'" (Opp'n 58:17-21.)

16 Plaintiffs allege in the FAC that the Employee
17 Defendants "received advice and direction from . . . APC in
18 setting up and administering the Tribal Retirement Plans," and
19 APC "substantially assisted [the Employee Defendants] in making
20 investment choices with the funds invested in the plans." (FAC ¶¶
21 218, 225.) Plaintiffs also allege APC "was responsible for
22 ensuring that the plans remained ERISA compliant" and "repeatedly
23 assisted the [Employee Defendants] in establishing, modifying and
24 funding the Tribal Retirement Plans," and that Employee
25 Defendants and Sherry Myers were the only beneficiaries of the
26 Tribal Retirement Plans. (FAC ¶¶ 222, 225.)

27 These allegations are insufficient to plausibly allege
28 APC owed a fiduciary duty to Plaintiffs. Therefore, the claims

1 are dismissed.

2 **ii. Hanes Defendants**

3 The Hanes Defendants argue as actuaries for the Tribal
4 Pension Plan, they had no fiduciary relationship with Plaintiffs,
5 since Plaintiffs are not beneficiaries of the Plan.

6 Plaintiffs respond the Hanes Defendants owed them a
7 fiduciary duty because Plaintiffs allege the Hanes Defendants
8 knew the Tribe sponsored the Tribal Pension Plan and since
9 Plaintiffs were the plan's sponsor, they were "the intended
10 beneficiar[ies]" of the plan, and were owed a fiduciary duty.
11 (Opp'n 68:6-9; 68:11-12.)

12 Plaintiffs allege the Employee Defendants and Sherry
13 Myers were the only beneficiaries of the Tribal Pension Plan.
14 Plaintiffs' allegations do not plausibly allege a fiduciary
15 relationship between Hanes Defendants and Plaintiffs. Therefore,
16 Plaintiffs' claims are dismissed. However, Hanes Defendants have
17 not demonstrated amendment would be futile.

18 **6. Statutory Negligence**

19 Umpqua Defendants and Cornerstone Defendants each seek
20 dismissal of Plaintiffs' statutory negligence claim. Umpqua seeks
21 dismissal with prejudice. Plaintiffs do not oppose the motions,
22 but argue Umpqua Defendants have not shown leave to amend would
23 be futile. Therefore, the claims are dismissed with leave to
24 amend.

25 **7. Individual Claims**

26 **a. Cornerstone**

27 Cornerstone Defendants seek dismissal of each claim
28 alleged against them arguing "the Tribe released said defendants

1 from all such claims [in an agreement] executed in May of 2014.”
2 (Not. Mot. & Mot. of Cornerstone Defs.’ (Cornerstone Mot.”) 1:20,
3 ECF No. 50.) Cornerstone Defendants attach the agreement, titled
4 “Amended and Restated Defense and Indemnity Agreement,” on which
5 an execution date of May 19, 2014 is set forth, as Exhibit A to
6 their motion (“May 19 Agreement”). Cornerstone Defendants argue
7 the May 19 Agreement should be incorporated by reference into the
8 FAC since Plaintiffs “repeatedly refer to [it] in the FAC.”
9 (Cornerstone Mot. 5:4-6.)

10 Plaintiffs disagree that the FAC references the May 19
11 Agreement, arguing the agreement referenced in the FAC is a prior
12 agreement the parties entered on April 22, and state that the
13 later referenced agreement is attached as Exhibit 1 to the
14 Declaration of Ambrosia Rico, and is titled “Defense and
15 Indemnity Agreement” (“the April 22 Agreement”).

16 Plaintiffs allege in the FAC that after the Employee
17 Defendants employment with the Tribe was terminated, the
18 Cornerstone Defendants “refus[ed] to provide the Tribe access to
19 the Tribe’s money on deposit at Cornerstone Bank, unless and
20 until the Tribe released Cornerstone Bank . . . [from] claims
21 arising out of [its] wrongful conduct,” and therefore the release
22 agreement is “null and void” since it was “procured . . .
23 [through] intentional and/or negligent misrepresentations and/or
24 fraudulent omissions,” and economic duress. (FAC ¶¶ 645-647.)

25 Neither party disputes the authenticity of the April 22
26 Agreement or the May 19 Agreement and although the FAC references
27 a release agreement, it is unclear what agreement is referenced.
28 Since the Cornerstone Defendants have not shown that the May 19

1 Agreement is incorporated by reference into the FAC, its motion
2 is denied.

3 **b. APC**

4 APC seeks dismissal of the claims alleged against it
5 arguing the claims are barred by the statute of limitations,
6 Plaintiffs fail to plausibly allege APC caused Plaintiffs'
7 injuries, and the FAC lacks any allegations concerning APC's
8 conduct toward PEC. APC also seeks dismissal of, or in the
9 alternative, moves to strike, Plaintiffs' punitive damages claim.

10 **i. Statute of Limitations**

11 APC argues each of Plaintiffs' claims is governed by a
12 four-year statute of limitations period and Plaintiffs "complaint
13 was filed more than four years after Plaintiffs were allegedly
14 wronged and suffered injury." (APC Mot. 13:8-10.) The initial
15 complaint was filed March 10, 2015.

16 Plaintiffs respond that "[t]he FAC demonstrates that
17 they did not discover—nor could they have discovered through
18 reasonable investigation—the existence of their injury or
19 Defendants' wrongful conduct until April 2014, when the [Employee
20 Defendants] were removed from control of the Tribe." (Opp'n
21 55:23-25.)

22 "In ordinary tort and contract actions, the statute of
23 limitations . . . begins to run upon the occurrence of the last
24 element essential to the cause of action. The plaintiff's
25 ignorance of the cause of action, or the identity of the
26 wrongdoer, does not toll the statute." Neel v. Magana, Olney,
27 Levy, Cathcart & Gelfand, 6 Cal.3d 176, 187 (1971).

28 To align the actual application of the

1 limitations defense more closely with the
2 policy goals animating it, the [California]
3 courts and the [California] Legislature have
4 over time developed a handful of equitable
5 exceptions to and modifications of the usual
6 rules governing limitations periods. . . .
7 The "most important" of these doctrines, the
8 discovery rule, where applicable, "postpones
9 accrual of a cause of action until the
10 plaintiff discovers, or has reason to
11 discover, the cause of action."

12 Aryeh v. Canon Bus. Solutions, Inc., 55 Cal.4th 1185, 1192 (2013)
13 (quoting Norgart v. Upjohn Co., 21 Cal.4th 383 (1999)). "A
14 plaintiff has reason to discover a cause of action when he or she
15 'has reason at least to suspect a factual basis for its
16 elements.'" Fox v. Ethicon Endo-Surgery, Inc., 35 Cal.4th 797,
17 807 (2005) (quoting Norgart v. Upjohn Co., 21 Cal.4th 383
18 (1999)).

19 Plaintiffs allege they could not have discovered the
20 Employee Defendants alleged wrongdoing until April 2014 since the
21 Employee Defendants "took extraordinary action to hide their
22 scheme from discovery" by "refusing to provide any information to
23 other Tribal members, including members of the Tribal Council,
24 concerning the Tribe's financial activities," by "purposefully
25 prevent[ing] any type of standard auditing or reporting," by
26 "manipulat[ing] the electoral process by which the Tribal Council
27 was chosen," by "purchas[ing] the silence of persons who were in
28 a position to disclose their wrongful conduct," and by "ma[king]
repeated false claims that they were entitled to take all of the
benefit they stole from the Tribe." (FAC ¶¶ 422-426.) APC has not
shown that these allegations are insufficient to have postponed
the date on which Plaintiffs' causes of action accrued under the

1 applicable statute of limitations. Therefore its motion is
2 denied.

3 **ii. Injury**

4 APC argues each claim against it should be dismissed
5 since "[t]he FAC establishes that no act or omission by APC could
6 be the cause" of Plaintiffs' injuries since the Employee
7 Defendants "engaged in numerous [criminal] acts which create a
8 superseding cause." (APC Mot. 4:15-16; 5:15-16.)

9 Plaintiffs respond that a superseding cause only
10 prevents liability where it "breach[es] the chain of causation"
11 making the injury unforeseeable, and Plaintiffs' economic injury
12 was the foreseeable result of APC work setting up and
13 administering the Tribal Retirement Plans. (Opp'n 63:4-5; 63:7-
14 9.)

15 The general test of whether an independent
16 intervening act, which operates to produce an
17 injury, breaks the chain of causation is the
18 foreseeability of the act. An act is not
19 foreseeable and thus is a superseding cause of
20 the injury if the independent intervening act
21 is highly unusual or extraordinary, not
22 reasonably likely to happen.

19 Schrimsher v. Bryson, 58 Cal. App. 3d 660, 664 (1976).

20 Criminal conduct which causes injury will
21 ordinarily be deemed the proximate cause of
22 an injury, superseding any prior negligence
23 which might otherwise be deemed a
24 contributing cause. However "if the
25 likelihood that a third person may act in a
26 particular manner is the hazard or one of the
27 hazards which makes the actor negligent, such
28 an act whether innocent, negligent,
intentionally tortious or criminal does not
prevent the actor from being liability for
the harm caused thereby."

27 Koepke v. Loo, 18 Cal. App. 4th 1444, 1449 (1993) (quoting Vesely
28 v. Sager, 5 Ca.3d 153, 164 (1971) abrogated on other grounds by

1 Cal. Civ. Code § 1714).

2 Plaintiffs allege the Employee Defendants "received
3 advice and direction from" APC and "routinely consulted" with APC
4 regarding the Tribal Retirement Plans. (FAC ¶ 218.) Plaintiffs
5 allege "[s]everal factors are indicative of the fraudulent nature
6 of the Tribal Retirement Plans" and by "setting up and
7 administering the Tribal Retirement Plans in ways that would
8 never have been done for a financially accountable or healthy
9 business," APC caused harm to the Tribe. (FAC ¶¶ 219-220.)
10 Plaintiffs allege ERISA and Treasury Department regulations
11 prescribe retirement plans "must be created and administered with
12 the intention of creating a permanent mechanism for retirement
13 savings that benefits an employer's current and future employees
14 generally," yet the Tribal Retirement Plans were set up to only
15 benefit the Employee Defendants and Sherry Myers, and "excluded
16 participation of any [other] employees of the Tribe." (FAC ¶¶
17 220-221.) Plaintiffs further allege APC was aware that "[t]he
18 establishment and . . . modification" of the Tribal Retirement
19 Plan "required authorization from the Tribal Council," yet APC
20 set up and administered the Tribal Retirement Plans without
21 receiving authorization. (FAC ¶ 222.) Plaintiffs further allege
22 the IRS requires a retirement plan to be set up "with the intent
23 to be a permanent, not temporary program," yet APC:

24 structured and administered the Tribal
25 Pension Plan as a short-term . . . mechanism
26 to divert a huge amount of Tribal money . . .
27 quickly [by using] . . . an actuarial
28 formula in which the target retirement
benefit was . . . four times higher than the
industry standard, [and allowing an employee
to cash out after five years and as a
result,] . . . the Tribal Pension Plan was

1 shut down after only give years of existence
2 because it was too generous.

3 (FAC ¶ 223.) Plaintiffs allege APC allowed Employee Defendant
4 John Crosby to sign documents authorizing early-withdrawals from
5 his 401(k), even after his employment with the Tribe had
6 terminated. (FAC ¶ 224.)

7 Considering Plaintiffs' allegations in the FAC, APC has
8 not shown the Employee Defendants' alleged criminal conduct was a
9 superseding cause of Plaintiffs' harm. Therefore, APC's motion is
10 denied.

11 **iii. PEC**

12 APC argues each claim PEC alleges against it fails
13 "because the FAC is devoid of any allegations against APC
14 involving PEC." (APC Mot. 3:27-28.)

15 PEC does not respond to this argument. APC also filed a
16 reply brief in which it states PEC's silence evinces that this
17 portion of APC's dismissal motion should be granted without leave
18 to amend.

19 None of the allegations in the FAC state a claim
20 against APC on behalf of PEC. Therefore, PEC's claims against APC
21 are dismissed. Further, since PEC has not responded to APC's
22 dismissal argument, this failure to respond is construed as an
23 admission that granting leave to amend would be futile.
24 Therefore, this portion of APC's motion is granted without leave
25 to amend.

26 **iv. Punitive Damages**

27 APC argues the Tribe's punitive damages prayer against
28 it should be dismissed or in the alternative stricken since

1 "Plaintiffs' defective charging allegations are . . . unsupported
2 by facts that establish the requisite elements of malice,
3 oppression or fraud." (APC Mot. 17:25-26.)

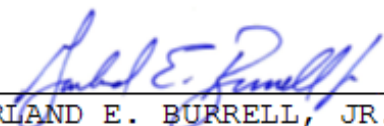
4 The Tribe responds it sufficiently pled that APC
5 committed fraud in the FAC, since it alleges that "[r]ather than
6 making the . . . disclosures [to the Tribe that APC was required
7 to make as a result of its fiduciary relationship with the
8 Tribe], APC fraudulently concealed several facts material to
9 Plaintiffs' rights and interests." (Opp'n 64:4-7.)

10 The Tribe's punitive damages prayer against APC is
11 predicated on fraud stemming from APC's breach of its fiduciary
12 duty to the Tribe; however, based on a ruling supra, the FAC
13 fails to plausibly allege APC owed the Tribe a fiduciary duty.
14 Therefore, APC's dismissal motion is granted.

15 **III. Conclusion**

16 For the stated reasons, the dismissal motions are
17 GRANTED in part and DENIED in part. Plaintiff is granted (21)
18 days leave from the date on which this order is filed to file a
19 Second Amended Complaint addressing the deficiencies in any
20 dismissed claim that was not dismissed without leave to amend.

21 Dated: August 13, 2015

22
23 
24 _____
25 GARIAND E. BURRELL, JR.
26 Senior United States District Judge
27
28