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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.; THE
PATRIOT GOLD & SILVER
EXCHANGE, INC.; GDK
CONSULTING LLC; and GREG
KESNER,

Defendants.

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

ORDER AND MEMORANDUM

The following Defendants seek dismissal of claims alleged in Plaintiffs Paskenta
Band of Nomlaki Indians and Paskenta Enterprises Corporation’s Third Amended
Complaint (“TAC”) under Federal Rule of Civil Procedure (“Rule”) 12(b)(6): Umpqua

1 Bank, Umpqua Holdings Corporation (collectively, the “Umpqua Defendants”) and
2 Associated Pension Consultants, Inc. (“APC”). Additionally, Garth Moore and Garth
3 Moore Insurance (collectively, “Moore”) seek dismissal of the claims alleged against
4 them under Rule 12(c). For the reasons set forth below, all three motions are
5 GRANTED with prejudice.¹

7 **FACTUAL ALLEGATIONS**²

8
9 The Paskenta Band of Nomlaki Indians (“the Tribe”) employed Ines Crosby, John
10 Crosby, Leslie Lohse and Larry Lohse (collectively, the “Employee Defendants”) in
11 executive positions for more than a decade. Plaintiffs contend that the Employee
12 Defendants used their positions to embezzle millions of dollars from the Tribe and its
13 principal business entity, the Paskenta Enterprises Corporation (“PEC”). According to
14 Plaintiffs, the Employee Defendants stole these funds from Plaintiffs’ bank accounts—
15 including accounts at Umpqua Bank—by withdrawing large sums for their personal use.
16 Plaintiffs further allege that the Employee Defendants caused the Tribe to invest in two
17 unauthorized retirement plans for the Employee Defendants’ personal benefit: a defined
18 benefit plan (“Tribal Pension Plan”) and a 401(k) (“Tribal 401(k)”) (collectively, “Tribal
19 Retirement Plans”). The Employee Defendants allegedly kept their activities hidden from
20 Plaintiffs by various means including harassment, intimidation and cyber-attacks on the
21 Tribe’s computers.

22 Plaintiffs go on to assert that Umpqua Defendants, APC and Moore knowingly
23 assisted the Employee Defendants in aspects of their scheme. They contend that the
24 Umpqua Defendants controlled banks where Plaintiffs maintained accounts and, despite
25 knowing the Employee Defendants were withdrawing money from these accounts for

26 ¹ Having determined that oral argument would not be of material assistance, the Court ordered the
27 motions submitted on the briefs in accordance with Local Rule 230(g).

28 ² Unless otherwise noted, the allegations in this section are drawn directly, and in some cases
verbatim, from the allegations of Plaintiffs’ Complaint.

1 their personal benefit, permitted the Employee Defendants to continue making
2 withdrawals and failed to notify Plaintiffs of the Employee Defendants' actions.
3 According to Plaintiffs, APC and Moore, as the third-party administrator for the Tribal
4 Retirement Plans and financial advisor, respectively, assisted the Employee Defendants
5 in setting up and administering the unauthorized Tribal Retirement Plans.

6 This Court previously granted motions to dismiss claims made against Umpqua
7 Defendants and APC in the Second Amended Complaint ("SAC"), ECF No. 132, for
8 failure to state a claim, albeit with leave to amend some of the dismissed claims, Mem. &
9 Order, ECF No. 203. In response, Plaintiffs filed their TAC. ECF No. 212. Once again,
10 Umpqua Defendants and APC filed motions to dismiss the claims against them for failure
11 to state a claim. ECF Nos. 228, 269. Moore also joined APC and the Umpqua
12 Defendants in moving to dismiss the claims against them. ECF No. 275.

13 14 **LEGAL STANDARD**

15 16 **A. Rule 12(b)(6)**

17 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
18 Procedure 12(b)(6),³ all allegations of material fact must be accepted as true and
19 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
20 Co., 80 F.3d 336, 337–38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain
21 statement of the claim showing that the pleader is entitled to relief' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell
23 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
24 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
25 detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of
26 his entitlement to relief requires more than labels and conclusions, and a formulaic

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28 ³ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

1 recitation of the elements of a cause of action will not do.” Id. (citation omitted). A court
2 is not required to accept as true a “legal conclusion couched as a factual allegation.”
3 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555).
4 “Factual allegations must be enough to raise a right to relief above the speculative level.”
5 Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal
6 Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain
7 something more than “a statement of facts that merely creates a suspicion [of] a legally
8 cognizable right of action”)).

9 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
10 assertion, of entitlement to relief.” Id. at 555 n.3 (citation omitted). Thus, “[w]ithout some
11 factual allegation in the complaint, it is hard to see how a claimant could satisfy the
12 requirements of providing not only ‘fair notice’ of the nature of the claim, but also
13 ‘grounds’ on which the claim rests.” Id. (citing Wright & Miller, supra, at 94–95). A
14 pleading must contain “only enough facts to state a claim to relief that is plausible on its
15 face.” Id. at 570. If the “plaintiffs . . . have not nudged their claims across the line from
16 conceivable to plausible, their complaint must be dismissed.” Id. However, “[a] well-
17 pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those
18 facts is improbable, and ‘that a recovery is very remote and unlikely.’” Id. at 556 (quoting
19 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

20 A court granting a motion to dismiss a complaint must then decide whether to
21 grant leave to amend. Leave to amend should be “freely given” where there is no
22 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
23 to the opposing party by virtue of allowance of the amendment, [or] futility of the
24 amendment.” Foman v. Davis, 371 U.S. 178, 182 (1962); see also Eminence Capital,
25 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as
26 those to be considered when deciding whether to grant leave to amend). Dismissal
27 without leave to amend is proper only if it is clear that “the complaint could not be saved
28 by any amendment.” Intri-Plex Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1056 (9th

1 Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon
2 Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (“Leave need not be
3 granted where the amendment of the complaint . . . constitutes an exercise in
4 futility”)).

5 **B. Rule 12(c)**

6 A Rule 12(c) motion challenges the legal sufficiency of the opposing party's
7 pleadings and operates in much the same manner as a motion to dismiss under Rule
8 12(b)(6). Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). The primary
9 distinction between a Rule 12(b)(6) motion and a motion for judgment on the pleadings
10 is timing. Rule 12(b)(6) motions are typically brought before the defendant files an
11 answer, while a motion for judgment on the pleadings can only be brought after the
12 pleadings are closed. See Fed. R. Civ. P. 12(c); Dworkin v. Hustler Magazine, Inc.,
13 867 F.2d 1188, 1192 (9th Cir. 1989). Generally, all defendants must have provided an
14 answer for the pleadings to be considered closed. See Watson v. County of Santa
15 Clara, No. C-06-04029, 2007 WL 2043852, at *1 (N.D. Cal. Jul. 12, 2007); William W.
16 Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before
17 Trial: California & 9th Circuit Edition §§ 9:323–24, Westlaw (database updated Mar.
18 2016). However, under certain circumstances, some courts have found Rule 12(c)
19 motions timely even before all defendants have filed answers. See, e.g., Whitson v.
20 Bumbo, No. C 07-05597 MHP, 2009 WL 1515597, at *4 (N.D. Cal. Apr. 16, 2009).

21 Although Rule 12(c) does not mention leave to amend, courts have discretion in
22 appropriate cases to grant a Rule 12(c) motion with leave to amend, or to simply grant
23 dismissal of the action instead of entry of judgment. See Longberg v. City of Riverside,
24 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004); Carmen v. S.F. Unified Sch. Dist., 982 F.
25 Supp. 1396, 1401 (N.D. Cal. 1997).

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1 **ANALYSIS**

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3 **A. Timeliness of Rule 12(c) Motion**

4 Plaintiffs argue that Moore’s Rule 12(c) motion for judgment on the pleadings
5 (“MJOP”) is premature because, “[t]hree defendants have not yet answered the TAC—
6 APC, Umpqua Bank, and Umpqua Holding Company.” Pls.’ Opp. to MJOP 4:17–21,
7 ECF No. 278. While the general rule is that a Rule 12(c) motion is premature when
8 made before all defendants have filed motions, some courts have exercised discretion to
9 allow such motions in certain situations where all of the defendants have not yet filed
10 answers. For example, in Noel v. Hall, No. CV99-649-AS, 2005 WL 2007876 (D. Ore.
11 Aug. 16, 2005), the court considered a Rule 12(c) motion when two of the defendants
12 failed to file an answer after more than five years, *id.* at *2. Likewise, in Moran v. Peralta
13 Community College District, 825 F. Supp. 891 (N.D. Cal. 1993), the court found the
14 pleadings “closed for purposes of” Rule 12(c) because the party that had not yet filed an
15 answer had not yet even been served, *id.* at 894; see also Redon v. Jordan, No.
16 13cv1765 WQH (KSC), 2015 WL 9244288, at *4 (S.D. Cal. Dec. 17, 2015) (finding a
17 Rule 12(c) motion timely under similar circumstances).

18 In this case, the circumstances are less extreme. All parties have been served,
19 and APC and Umpqua Defendants have simply opted to make motions to dismiss
20 instead of file answers. However, it makes little sense to require Moore to wait until APC
21 and the Umpqua Defendants file their answers before considering its dismissal request
22 under Rule 12(c). Cf. Whitson v. Bumbo, No. C 07-05597 MHP, 2009 WL 1515597
23 (N.D. Cal. Apr. 16, 2009) (“It makes no sense to require [one defendant] to wait for [a]
24 co-defendant[’s] answer before allowing [it] to file a Rule 12(c) motion . . .”). The
25 Umpqua Defendants’ and APC’s answers would have no effect on Moore’s Rule 12(c)
26 motion. Moreover, given that this Court is now dismissing the claims against APC and
27 the Umpqua Defendants with prejudice—removing the only parties that have yet to file
28 answers—it makes even less sense to refrain from ruling on Moore’s Rule 12(c) motion.

1 Doing so would simply require Moore to refile a new motion that is identical to the fully
2 briefed motion before the Court now.

3 **B. Negligence: Breach of Duty of Care**

4 Umpqua Defendants, APC and Moore seek dismissal of Plaintiffs' negligence
5 claims asserted against each of them, arguing the TAC fails to plausibly allege that they
6 owed Plaintiffs a duty of care, which is necessary to support Plaintiffs' allegations of
7 breach.

8 **1. Umpqua Defendants**

9 Banks "ha[ve] 'a duty to act with reasonable care in [their] transactions with
10 depositors"; this duty "is an implied term in the contract between the bank and its
11 depositor." Chazen v. Centennial Bank, 61 Cal. App. 4th 532, 543 (1998) (citation
12 omitted). However, "[t]his contractual relationship does not involve any implied duty 'to
13 supervise account activity' or 'to inquire into the purpose for which the funds are being
14 used.'" Id. at 537 (citations omitted). California law "require[s] banking transactions to
15 be processed quickly and automatically," and "[u]nder this system favoring expedited
16 handling of funds transfers, a bank cannot be expected to track transactions in fiduciary
17 accounts or to intervene in suspicious activities." Id. at 539. A "bank is not liable for the
18 misappropriation [of a customer's] funds by [its authorized signatories], . . . unless the
19 bank has knowledge, actual or constructive, of such misappropriation." Blackmon v.
20 Hale, 1 Cal. 3d 548, 556 (1970). Accordingly, the Umpqua Defendants breached a duty
21 of care owed Plaintiffs only if they knew the Employee Defendants were
22 misappropriating the Tribe's funds.

23 The Umpqua Defendants argue that Plaintiffs' allegations are insufficient because
24 Employee Defendants Ines Crosby and Leslie Lohse continued to be the Tribe's
25 authorized signers until Umpqua received written notice revoking such authorization and
26 thus Umpqua had no implied duty to supervise account activity, or to inquire into the
27 purpose for which Plaintiffs' funds were being used. Umpqua Defs.' Mot to Dismiss Pls.'
28 TAC ("Umpqua MTD") 6:24–7:12, ECF No. 228.

1 Plaintiffs, on the other hand, allege that Employee Defendant Ines Crosby was
2 consistently assisted in making large withdrawals from the Tribe's Umpqua Bank
3 accounts, TAC ¶ 362–67, ECF No. 212; that Ines Crosby's withdrawals triggered
4 scrutiny under both federally mandated and internal Umpqua Bank policies and
5 procedures, *id.* ¶ 394; and that Umpqua Bank continued to allow Ines Crosby to make
6 withdrawals after local press widely reported that Ines Crosby had been suspended from
7 the Tribe under suspicion of stealing or converting millions of dollars from the Tribe, *id.*
8 ¶ 390. The SAC relied on these same allegations. This Court dismissed the negligence
9 claims pled against the Umpqua Defendants, however, because none of these facts
10 plausibly alleged that the Umpqua Defendants had actual or constructive knowledge of
11 any wrongful behavior by the Employee Defendants.

12 In Plaintiffs' TAC, Plaintiffs provide no new allegations as to the Umpqua
13 Defendants. Plaintiffs merely reiterate that the Umpqua Defendants knew that the
14 Employee Defendants were under suspicion of stealing or converting millions of dollars
15 from the Tribe. These allegations in the SAC did not make it sufficiently plausible that
16 Umpqua Defendants had actual or constructive knowledge of any wrongdoing by the
17 Employee Defendants, nor did they make it sufficiently plausible that they breached any
18 duty of care toward Plaintiffs. Mem. & Order 8:2–6, ECF No. 203. Mere reiteration of
19 the same allegations, reordered and reworded, does not support a different result.

20 Accordingly, Plaintiffs have failed to state a claim of negligence against the
21 Umpqua Defendants and the Umpqua Defendants' motion to dismiss Plaintiffs'
22 negligence claim is GRANTED. Additionally, because Plaintiffs have failed to add any
23 new allegations despite being given leave to amend their SAC, it has become apparent
24 that further leave to amend would be futile. Thus, the negligence claim against Umpqua
25 Defendants is dismissed with prejudice.

26 2. APC

27 APC argues that Plaintiffs fail to plausibly allege APC breached a duty of care
28 owed to Plaintiffs. Memo. of P. & A. in Supp. of APC's Mot. to Dismiss ("APC MTD")

1 5:11–12, ECF No. 250. Specifically, APC argues that the mere fact the Tribe limited
2 plan participation does not on its own create a breach of duty on the part of APC, and
3 that Plaintiffs have not adequately pled APC knew of any wrongdoing on the part of the
4 Employee Defendants. Id. at 9:8–10:6.

5 To assert a claim of professional negligence, Plaintiffs must plausibly allege that
6 APC breached “the duty of the [defendant] to use such skill, prudence, and diligence as
7 other members of his profession commonly possess and exercise.” Budd v. Nixen,
8 6 Cal.3d 195, 200 (1971). Plaintiffs’ negligence claims rely on allegations that APC
9 knew or should have known of the Employee Defendants’ alleged misappropriation of
10 the Tribe’s funds. Plaintiffs allege that APC owed the Tribe a duty of care to not allow
11 the Employee Defendants to use its services to accomplish the Employee Defendants’
12 alleged unlawful purposes.

13 In their SAC, Plaintiffs alleged that APC followed the direction and instruction of
14 Employee Defendants John Crosby and Leslie Lohse to establish, administer and
15 terminate the Tribal Retirement Plans. SAC ¶ 228, ECF No. 132. Plaintiffs alleged that
16 the structure of the plans should have made APC aware of Employee Defendants’
17 unlawful use of the plan to steal from the Tribe. Id. ¶¶ 215–16. However, this Court
18 dismissed Plaintiffs’ claims because John Crosby and Leslie Lohse had apparent
19 authority to create, modify and terminate the Tribal Retirement Plans. Mem. & Order
20 9:27–10:2, ECF No. 203. Plaintiffs’ allegations, therefore, did not create a plausible
21 inference that APC breached any duty toward the Tribe that could survive a 12(b)(6)
22 motion. The same allegations made in the TAC are also insufficient to state a claim of
23 negligence against APC.

24 In the TAC, though, Plaintiffs have added new allegations concerning the
25 termination and liquidation of the Tribal 401(k). Plaintiffs allege that APC purposefully
26 delayed implementing a request to remove Defendant John Crosby as trustee of the
27 Tribal 401(k), allowing the Employee Defendants to use false documents to terminate
28 and liquidate the Tribal 401(k). TAC ¶¶ 289, 297, ECF No. 212. They argue that the

1 delay constitutes an “atypical” business practice that supports an inference of knowledge
2 of the Employee Defendants’ wrongdoing. Pls.’ Opp. to APC MTD 9:14–19, ECF
3 No. 276 (citing Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir.
4 1985); Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1120 (C.D. Cal.
5 2003)). By knowingly assisting the Employee Defendants in misappropriating the Tribe’s
6 assets, Plaintiffs claim, APC breached a duty of reasonable care owed to the Tribe. TAC
7 ¶¶ 265–66.

8 These allegations still fail to make APC’s knowledge sufficiently plausible to
9 support a viable negligence claim. Plaintiffs allege that APC purposefully delayed
10 removing Defendant John Crosby solely based on a form that was dated May 1, 2014.
11 Id. ¶ 289. However, mere receipt of a request to change plan trustees on May 1 does
12 not make it plausible that its implementation on July 1 was done with the object of aiding
13 the Employee Defendants’ alleged wrongdoing.⁴ Indeed, the plan document states that
14 a trustee must be given at least 30 days’ written notice before removing the trustee.
15 Decl. of William A. Munoz, Ex. B, § 8.08(B), at 83, ECF No. 280-2. While it is true that
16 the notice period can be waived “where the Employer reasonably determines a shorter
17 period or immediate removal is necessary to protect Plan assets,” id., Plaintiffs have not
18 alleged that any such a determination was made by Plaintiffs or communicated to APC.
19 Furthermore, Plaintiffs allege that changes to the Tribal 401(k) require authorization from
20 the Tribal Council, TAC ¶ 252, but Plaintiffs have not alleged that the Tribal Council
21 provided any authorization for the removal of John Crosby as plan trustee on May 1.

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23 ⁴ APC attached additional documents to its Reply in Support of its Motion to Dismiss. See Decl. of
24 William A. Munoz, Ex. A, ECF No. 280-1, Decl. of William A. Munoz, Ex. C , ECF No. 286-1. The
25 documents are all related to the change of plan trustees, such as additional forms APC claims were
26 required to effectuate a change of trustee. These documents challenge the account of the trustee change
27 included in Plaintiffs’ TAC and amount to a factual dispute, which is inappropriate at this stage of the
28 proceedings. Accordingly, the Court disregards them for the purposes of this motion. See United
States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“Affidavits and declarations . . . are not allowed as
pleading exhibits unless they form the basis of the complaint.”). Conversely, the plan document and the
email chain discussed infra were relied on by Plaintiffs in their TAC and form part of the basis of their
claims, so it is proper to consider them here. See Ecological Rights Found. v. Pac. Gas & Elec. Co.,
713 F.3d 502, 511 (9th Cir. 2013) (finding it proper to consider a document that was not attached to the
complaint when “the complaint ‘necessarily relies’ on that document”).

1 Accordingly, from the facts alleged, it is not sufficiently plausible that there was any
2 delay in John Crosby’s removal, much less that APC purposefully caused such a delay.

3 Therefore, Plaintiffs have not adequately pled that APC breached a duty of care
4 toward Plaintiffs, and APC’s motion to dismiss the claim of negligence against it is
5 GRANTED. Plaintiffs have been given multiple opportunities to state viable claims, but
6 have failed to do so. The vast majority of their arguments in support of their TAC were
7 already rejected by this Court in dismissing the SAC. Furthermore, the new allegations
8 found in the TAC appear to have been made in bad faith. Plaintiffs have misconstrued
9 the process of removing a plan trustee by ignoring the 30-day notice requirement in their
10 pleadings. Their allegations are also inconsistent. On the one hand, Plaintiffs allege
11 that changes made by Defendants to the Tribal Retirement Plans required formal
12 approval by the Tribal Council. But when Plaintiffs attempted to make a change—
13 remove John Crosby as trustee of the Tribal 401(k)—they allege that a single form
14 effects instant ratification. Because Plaintiffs have been given multiple opportunities to
15 state a claim and because their TAC evinces bad faith, the dismissal is with prejudice.

16 **3. Moore**

17 Plaintiffs’ allegations against Moore in their TAC parallel those made against
18 APC, arguing that the structure of the Tribal Retirement Plans should have made Moore
19 aware of their unlawful purpose. The only substantive difference in the allegations
20 against Moore is that it “came up with the idea for the Tribal Retirement Plans” and
21 referred the Employee Defendants to APC for the plans’ execution. TAC ¶¶ 263, ECF
22 No. 212.

23 These allegations do not make it sufficiently plausible that Moore breached any
24 duty toward the Tribe. “[C]om[ing] up with the idea” of creating retirement plans does not
25 necessarily mean that Moore knew the alleged improper purpose of the plans. Plaintiffs
26 do not allege, for example, that Moore advised the Employee Defendants to use
27 retirement plans to misappropriate the Tribe’s funds, nor do Plaintiffs allege any facts
28 that would make such an allegation plausible.

1 Plaintiffs also allege that Moore was involved in purposefully delaying the removal
2 of John Crosby as trustee of the Tribal 401(k). As described above, Plaintiffs have not
3 sufficiently pled that removing John Crosby as plan trustee on July 1, 2014 made
4 knowledge of the Employee Defendants' scheme sufficiently plausible. In fact, as to
5 Moore, the only plausible inference from the facts alleged is the opposite conclusion of
6 the one drawn by Plaintiffs.

7 On June 30, 2014, Moore employee Shelby Campiz allegedly wrote that "Andrew
8 Alejandro should be the trustee now of the 401k," not John Crosby. TAC at ¶ 277. APC,
9 however, responded by letting her know that the change was to be made on July 1. Id.
10 ¶ 279. Campiz replied that the new trustees would also be willing to sign off on the
11 allegedly unlawful liquidation of the Tribal 401(k). Decl. of Stuart G. Gross in Opp. to
12 APC MTD, Ex. A, ECF No. 277.⁵ The only plausible inferences from this alleged
13 exchange are: (1) Moore tried to remove John Crosby as plan trustee before July 1; and
14 (2) Moore believe that any alleged delay was immaterial. With nothing but innuendo,
15 Plaintiffs attempt to use these events to infer the exact opposite of the only rational
16 inferences possible.

17 Accordingly, Plaintiffs have not pled sufficient facts to show that Moore breached
18 any duty toward the Tribe and Moore's motion to dismiss the claim is GRANTED. The
19 allegations against Moore suffer from almost identical defects as those found in Plaintiffs'
20 allegations against APC, which Plaintiffs have already been given multiple opportunities
21 to amend. Further, the claims against Moore evince more bad faith than the claims
22 made against APC. Plaintiffs twist the meaning of the alleged email exchange to allege
23 the exact opposite of what is plain on its face. Thus, the dismissal is with prejudice.

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25 _____
26 ⁵ In Plaintiff's TAC, this section of the email exchange is omitted. See TAC ¶¶ 275–282, ECF
27 No. 212. Instead, the TAC alleges that "APC[] . . . was aware that the Tribe's leadership would not allow
28 the distribution to happen. Id. ¶ 283. However, in opposition to the APC MTD, Plaintiffs provided the full
email exchange. See Decl. of Stuart G. Gross in Opp. to APC MTD, Ex. A, ECF No. 277. As discussed
supra note 2, because the email exchange forms a basis of Plaintiffs' claims, it is proper to consider the
document in full, instead of the truncated version provided in Plaintiffs' TAC.

1 **C. Aiding and Abetting Claims**

2 Umpqua Defendants, APC and Moore each seek dismissal of Plaintiffs’ claims
3 that they each aided and abetted the Employee Defendants’ conversion of Tribal assets
4 and the Employee Defendants’ breach of their fiduciary duty owed to Plaintiffs. Umpqua
5 Defendants, APC and Moore contend that the TAC fails to plausibly allege that they had
6 actual knowledge of the Employee Defendants’ wrongdoing or that they were negligent
7 in any manner that substantially assisted the Employee Defendants in their alleged
8 wrongdoing against the Tribe.

9 Liability may . . . be imposed on one who aids and abets the
10 commission of an intentional tort if the person (a) knows the
11 other’s conduct constitutes a breach of duty and gives
12 substantial assistance or encouragement to the other to so
13 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.

14 Casey v. U.S. Bank Nat’l Ass’n, 127 Cal. App. 4th 1138, 1144 (2005) (alterations in
15 original) (citing Saunders v. Superior Court, 27 Cal. App. 4th 832, 846 (1994)). “[A]iding
16 and abetting liability under California law, as applied by the California state courts,
17 requires a finding of actual knowledge,” which “requires more than a vague suspicion of
18 wrongdoing.” In re First Alliance Mortg. Co., 471 F.3d 977, 993, n.4 (9th Cir. 2006).
19 “[T]o satisfy the knowledge prong, [Plaintiffs must plausibly allege] the defendant . . .
20 [had] ‘actual knowledge of the specific primary wrong the defendant substantially
21 assisted.’” Id. at 993 (quoting Casey, 127 Cal. App. 4th at 1145).

22 **1. Umpqua Defendants**

23 Although Plaintiffs claim in the TAC that the Umpqua Defendants had actual
24 knowledge of the Employee Defendants alleged conversion of Tribal assets, TAC ¶ 372,
25 ECF No. 212, the TAC does not contain sufficient facts to make such knowledge
26 plausible. As discussed above with regard to the negligence claim made against the
27 Umpqua Defendants, large withdrawals that triggered heightened scrutiny both before
28 and after the media widely reported that the Employee Defendants were under suspicion

1 of stealing or converting millions from the Tribe does not make it sufficiently plausible
2 that Umpqua Bank had knowledge of any wrongdoing. This is because Employee
3 Defendants Ines Crosby and Leslie Lohse continued to be the Tribe's authorized
4 signers. Also as discussed above, Plaintiffs have not adequately alleged that the
5 Umpqua Defendants breached any duty owed the Tribe.

6 Thus, the Umpqua Defendants' motion to dismiss the aiding and abetting claim
7 against the Umpqua Defendants is GRANTED. Because the aiding and abetting claim
8 suffers the same defects as the negligence claim against the Umpqua Defendants, the
9 dismissal is with prejudice.

10 **2. APC**

11 Plaintiffs claim that the delay in removing Employee Defendant John Crosby as
12 trustee of the Tribal 401(k) evinces knowledge of the Employee Defendants'
13 wrongdoing. TAC ¶¶ 289, 297, ECF No. 212. Plaintiffs also claim that the manner in
14 which APC structured and administered the Tribal Retirement Plans constitutes
15 negligence that afforded the Employee Defendants substantial assistance in their
16 scheme. Id. ¶¶ 244, 263–64.

17 However, as set forth above, Plaintiffs have not sufficiently pled that APC either
18 knew of Employee Defendants' scheme or breached any duty toward the Plaintiffs. The
19 mere structure of the plans does not make knowledge of any wrongdoing by the
20 Employee Defendants sufficiently plausible. Furthermore, Plaintiffs have failed to allege
21 sufficient facts that make it plausible that Defendant John Crosby's removal as trustee of
22 the Tribal 401(k) on July 1, 2014, even constituted a delay, much less evinces any
23 knowledge of unlawful activities. Accordingly, APC's motion to dismiss the aiding and
24 abetting claim is GRANTED. Because the aiding and abetting claim suffers from the
25 same defects as the negligence claim against APC, the dismissal is with prejudice.

26 **3. Moore**

27 Plaintiffs allege that Moore was involved in purposefully delaying the removal of
28 John Crosby as trustee of the Tribal 401(k). Id. ¶ 264. As described above, the only

1 plausible inferences from the facts alleged is the opposite conclusion of what Plaintiffs
2 claim. Plaintiffs also alleged that the structure of the Tribal Retirement Plans indicates
3 that Moore knew Employee Defendants were misappropriating the Tribe's funds. TAC
4 ¶¶ 263–64, ECF No. 212. Just as these claims fail to state a claim against APC, so too
5 do they fail to state a claim against Moore.

6 Thus, Moore's motion to dismiss the aiding and abetting claim against it is
7 GRANTED. Because it suffers from the same defects as the negligence claim made
8 against Moore, the dismissal is with prejudice.

9 **D. Breach of Contract**

10 Plaintiffs' breach of contract claim against Umpqua Defendants is predicated on
11 the same duty of inquiry as Plaintiffs' negligence claim. Therefore, for the reasons
12 already articulated, the breach of contract claim against the Umpqua Defendants is
13 DISMISSED with prejudice.

14 **E. Restitution (Quasi-Contract)**

15 [I]n California, there is not a standalone cause of action for
16 "unjust enrichment," which is synonymous with "restitution."
17 However, unjust enrichment and restitution are not irrelevant
18 in California law. Rather, they describe the theory underlying
19 a claim that a defendant has been unjustly conferred a
20 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."

21 Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015) (citations omitted).

22 Therefore, Plaintiffs' restitution claim is construed as a quasi-contract claim.

23 Plaintiffs base their quasi-contract claim on Moore allegedly providing assistance
24 to the Employee Defendants, knowing their intent to unlawfully convert the Tribe's funds.
25 Pls.' Opp. to MJOP 20:14–17. Plaintiffs allege that Moore received "generous fees" and
26 "special additional consideration" in exchange for Moore's assistance. TAC ¶ 269, ECF
27 No. 212. As discussed supra Section 2.c., Plaintiffs have failed to adequately allege that
28 Moore knowingly assisted the Employee Defendants' misappropriation of the Tribe's

1 funds that would make the collection of fees for their services unjust. Accordingly,
2 Plaintiffs have not adequately alleged any unjust enrichment that would support a quasi-
3 contract claim against Moore and Plaintiff’s claim in that regard is DISMISSED with
4 prejudice.

5 **F. Punitive Damages**

6 APC argues there is some uncertainty as to whether dismissal of punitive
7 damages is properly achieved via a Rule 12(b)(6) motion to dismiss or a Rule 12(f)
8 motion to strike. APC MTD 17:19–20. The Ninth Circuit has held that a motion to
9 dismiss is the correct vehicle due to the different standards on appeal between the two
10 motions. See Whittleston, Inc. v. Handi-Craft Co., 618 F.3d 970, 973–74 (9th Cir. 2010)
11 (“Rule 12(f) motions are reviewed for ‘abuse of discretion,’ whereas 12(b)(6) motions are
12 reviewed de novo. . . . Applying different standards of review, when the district court’s
13 underlying action is the same, does not make sense.” (citations omitted)). However,
14 some district courts have continued to use 12(f) motions to strike claims for relief barred
15 as a matter of law. See e.g., Garcia v. M-F Athletic Co., No. CIV. 11-2430 WBS GGH,
16 2012 WL 531008, at *4 n.4 (E.D. Cal. Feb. 17, 2012); I.R. v. City of Fresno,
17 No. 1:12_cv-00558 AWI GSA, 2012 WL 3879974, at *2 (E.D. Cal. Sept. 6, 2012). Here,
18 the motion is properly construed as brought under Rule 12(b)(6) because the sufficiency
19 of the pleading is at issue.

20 As discussed supra Sections 2.b, 3.b., Plaintiffs have not sufficiently pled either a
21 claim of negligence or a claim of aiding and abetting against APC. Accordingly, nor
22 have Plaintiffs sufficiently pled that APC acted with “oppression, fraud, or malice” as
23 required under California law and cannot recover punitive damages. Cal. Civ. Code
24 § 3294(a). Thus, the prayer for punitive damages from APC is DISMISSED with
25 prejudice.

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1 **CONCLUSION**

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3 For the stated reasons, Umpqua Defendants' Motion to Dismiss, ECF No. 228, is

4 GRANTED with prejudice as to Plaintiffs' common law negligence, breach of contract,

5 and aiding and abetting claims. APC's Motion to Dismiss, ECF No. 269, is GRANTED

6 with prejudice as to Plaintiffs' common law negligence claim, aiding and abetting claim,

7 and punitive damages prayer. Moore's Motion for Judgment on the Pleadings, ECF No.

8 275, is GRANTED with prejudice as to Plaintiffs' common law negligence, aiding and

9 abetting, and restitution/quasi-contract claims.

10 IT IS SO ORDERED.

11 Dated: October 18, 2016

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13 MORRISON C. ENGLAND, JR.
14 UNITED STATES DISTRICT JUDGE

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