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13 COMMUNITY BANCORP, and JEFFREY FINCK

14
15 UNITED STATES DISTRICT COURT

16 EASTERN DISTRICT OF CALIFORNIA

17 PASKENTA BAND OF NOMLAKI) CASE NO. 2:15-cv-00538-GEB-CMK
18 INDIANS; and PASKENTA)
ENTERPRISES CORPORATION,)

19 Plaintiffs,)
20 v.) **MEMORANDUM OF POINTS AND**
AUTHORITIES IN SUPPORT OF THE
CORNERSTONE DEFENDANTS' MOTION
TO DISMISS

21 INES CROSBY; JOHN CROSBY; LESLIE)
22 LOHSE; LARRY LOHSE; TED PATA;)
JUAN PATA; CHRIS PATA; SHERRY)
23 MYERS; FRANK JAMES; UMPQUA)
BANK; UMPQUA HOLDINGS)
24 CORPORATION; CORNERSTONE)
COMMUNITY BANK; CORNERSTONE)
25 COMMUNITY BANCORP; JEFFERY)
FINCK; GARTH MOORE; GARTH)
26 MOORE INSURANCE AND FINANCIAL)
SERVICES, INC.; ASSOCIATED)
27 PENSION CONSULT ANTS, INC.;)
HANESS & ASSOCIATES, LLC;)
ROBERT M. HANESS; THE PATRIOT)

DATE: July 27, 2015
TIME: 9:00 AM
DEPT.: Courtroom 10, 13th floor
JUDGE: Hon. Garland E. Burrell, Jr.

1 GOLD & SILVER EXCHANGE, INC.; and)
NORMAN R. RYAN,)
2 Defendants,)
3 QUICKEN LOANS, INC.; CRP 111 WEST)
141ST LLC; CASTELLAN MANAGING)
4 MEMBER LLC; CRP WEST 168TH)
STREET, LLC; and CRP SHERMAN A)
5 VENUE LLC,)
6 Nominal Defendants)
_____)

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1 **I. INTRODUCTION**

2 In their First Amended Complaint (the "FAC"), Plaintiffs Paskenta Band of Nomlaki
3 Indians (the "Tribe"); and Paskenta Enterprises Corporation (together with the Tribe,
4 "Plaintiffs"), set forth a seemingly endless array of allegations of wrongdoing by certain past
5 and/or current members of the tribe, Ines Crosby, John Crosby, Leslie Lohse, and Larry Lohse
6 (the "RICO Ringleaders") and Ted Pata, Juan "Jon" Pata, Chris Pata, Sherry Myers, and Frank
7 James (together with the RICO Ringleaders, the "RICO Defendants").¹ However, with patent
8 over-inclusion, Plaintiffs proffer spurious allegations of wrongdoing by Cornerstone
9 Community Bank, Cornerstone Community Bancorp, and Jeffrey Finck (collectively, the
10 "Cornerstone Defendants").

11 Essentially, Plaintiffs are seeking to hold the Cornerstone Defendants liable for the
12 alleged wrongdoing of the RICO Defendants on the grounds that the Cornerstone Defendants
13 did not do what Plaintiffs were unable to do – stop the RICO Defendants, who were officers of
14 the Tribe and who were given signing authority by the Tribe over all Tribal accounts at
15 Cornerstone Community Bank (the "Bank"), from abusing that authority. Such liability is not
16 warranted under current law.

17 Accordingly, the Cornerstone Defendants now bring this motion, pursuant to Federal
18 Rules of Civil Procedure ("FRCP") Rule 12(b)(6), for a dismissal of all claims set forth against
19 them in the FAC. All claims as to Cornerstone Defendants should be dismissed because the
20 Tribe released said defendants from all such claims in May of 2014. Even without said release,
21 the claims against the Cornerstone Defendants fail as a matter of law.
22
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24
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26 ¹The Cornerstone Defendants are adopting the use of the terms "RICO Ringleaders" and
27 "RICO Defendants," as well as other terms in the FAC, for the benefit of the reader and the sake
28 of consistency, and not to express an opinion as to the culpability of any party.

1 **II. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

2 Plaintiffs allege that the RICO Defendants took control of the Tribal government and
3 Paskenta Enterprises Corporation (“PEC”) and over the course of approximately 17 years
4 diverted tens of millions of dollars in Tribal money for their own personal benefit. Plaintiffs
5 further allege that numerous unrelated institutions, including the Cornerstone Defendants, gave
6 substantial assistance to the RICO Defendants in diverting said funds and are, therefore, aiders
7 and abettors of the alleged tortious acts of the RICO Defendants, and/or violated independent
8 duties owed to the Plaintiffs with regard to the transactions by which the RICO Defendants
9 allegedly diverted said funds.

10 In particular, Plaintiffs allege that the Cornerstone Defendants "at the direction of the
11 RICO Ringleaders, the Tribe and its businesses have conducted a substantial portion of their
12 banking with Cornerstone Community Bank.” See, FAC, 10:27-11:1. The essence of
13 Plaintiffs’ allegations against the Cornerstone Defendants is that the Cornerstone Defendants
14 allowed the RICO Defendants to divert funds from the Tribal accounts at the Bank by
15 processing transactions at the direction of the RICO Ringleaders (see FAC, 164:17- 21) and by
16 failing to investigate the propriety of the transactions in which the RICO Ringleaders were
17 involved (see FAC, 170:10-27).

18 However, and importantly, the FAC also alleges that the RICO Ringleaders were
19 **authorized signers** on the Tribal accounts at the Bank. With respect to John Crosby and
20 Larry Lohse, the FAC alleges, “Mr. Crosby took control over, and directed, the massive
21 amounts of Tribal money that flowed in and out of PEC's bank accounts, over which he and his
22 fellow RICO Ringleader Larry Lohse had signing authority," (see FAC, p. 123:17-19) and that
23 "Mr. Lohse also had signing authority for Cornerstone PEC Account X and Cornerstone PEC
24 Account Y..." See FAC, 125:21-22.

25
26 Regarding Ines Crosby, the FAC alleges that her position as Tribal Administrator gave
27 her signing authority over the accounts. Specifically, the FAC alleges, "The position of Tribal
28

1 Administrator gave [Ines Crosby] signing authority over the Tribe's bank accounts...". See
2 FAC, 50:10-12. Similarly the FAC at 124:23-26 avers "This position also gave Ms. Crosby
3 signing authority over certain Tribal bank accounts..."

4 As to Leslie Lohse, the FAC provides that, as the Tribe's elected Treasurer, Ms. Lohse
5 had authority over the accounts. See FAC, 7:20-21, 15:14-16. The FAC further alleges that as
6 the Treasurer, Ms. Lohse had authority to "'accept, receive, receipt for, preserve and safeguard
7 all funds in the custody of the Band and/ or the Tribal Council, and ... account therefor,' ensure
8 that '[a]ll checks drawn on the accounts of the Band...be signed by the Treasurer and the
9 Chairperson.'" See FAC, 19:14-18. Additionally, The FAC also alleges generally the RICO
10 Ringleaders control over the accounts. See FAC, 43:19-44:12.

11 Significantly, nowhere does the FAC allege that any, let alone all, of the RICO
12 Ringleaders were **not** authorized signers of the Tribal accounts at the Bank.

13 **III. LEGAL ARGUMENT**

14 **A. Standards for Granting Motions Pursuant to FRCP 12(b)(6).**

15 A defendant may object to the plaintiff's complaint for failing to state a claim on which
16 relief can be granted by filing a motion to dismiss pursuant to FRCP 12(b)(6). The purpose of
17 such a motion is to test the formal sufficiency of the plaintiff's statement of the claim for relief.
18 *Conley v. Gibson*, 355 US 41, 45-46 (1957); *Navarro v. Block*, 250 F3d 729, 732 (9th Cir.
19 2001).

20 In ruling on a motion to dismiss, the court must "accept all material allegations of fact
21 as true and construe the complaint in a light most favorable to the non-moving party." *Vasquez*
22 *v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). Courts are not, however, "bound to accept
23 as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 664,
24 (2009) [*Ashcroft*].

25 A Rule 12(b)(6) dismissal "can be based on the lack of a cognizable legal theory or the
26 absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica*

1 *Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a
2 plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell*
3 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929
4 (2007). Plausibility requires "more than a sheer possibility that a defendant has acted
5 unlawfully." *Ashcroft, supra*, 556 U.S. at 664. A claim has facial plausibility only when the
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
7 defendant is liable for the misconduct alleged. *Ibid.*

8 **1. The Release May Properly Be Considered in Support of the Motion.**

9 In ruling on a motion pursuant to FRCP 12(b)(6), a court may consider certain materials
10 under the doctrine of incorporation by reference. *United States v. Ritchie*, 342 F.3d 903, 908
11 (9th Cir. 2003). Under the incorporation by reference doctrine, a document not attached to a
12 complaint may be incorporated by reference into a complaint if the plaintiff refers extensively
13 to the document or the document forms the basis of the plaintiff's claim. *Ibid.* "The defendant
14 may offer such a document, and the district court may treat such a document as part of the
15 complaint, and thus may assume that its contents are true for purposes of a motion to dismiss
16 under Rule 12(b)(6)." *Ibid.* Here, the Cornerstone Defendants request that the Court
17 incorporate by reference the Amended and Restated Defense and Indemnity Agreement (the
18 "Release") into which the Tribe and the Bank entered on May 19, 2014, and which is
19 repeatedly referenced in paragraphs 645 through 648 of the FAC. (The Release is attached as
20 Exhibit A to the Declaration of Jeffrey Finck served and filed herewith.)

21 Releases are subject to the incorporation by reference doctrine. *Yassan v. J.P. Morgan*
22 *Chase and Co.*, 708 F.3d 963, 975 (7th Cir. 2013) (*Yassan*). In *Yassan*, the Court of Appeals
23 held that defendants could properly attach a copy of a release signed by plaintiff to a motion to
24 dismiss pursuant to FRCP Rule 12(b)(6) where the operative complaint repeatedly referenced
25 the release. *Ibid.* In so ruling, the Court of Appeals noted that "[a]t the dismissal stage, the
26 court is typically confined to the pleadings alone, but it is well-settled in this circuit that
27 documents attached to a motion to dismiss are considered part of the pleadings if they are
28

1 referred to in the plaintiff's complaint and are central to his claim." *Ibid.* (internal quotation
2 marks omitted).

3 Despite Plaintiffs' failure to attach the Release, it may be considered by the Court in
4 support of the Cornerstone Defendants' motion to dismiss inasmuch as Plaintiffs repeatedly
5 refer to the Release in the FAC, its contents are central to Plaintiffs' claims, and there is no
6 dispute as to its authenticity. The FAC repeatedly refers to the Release, and it is subsequently
7 incorporated by reference in all of Plaintiffs' claims against the Cornerstone Defendants. See
8 FAC, 167:20-168:25. As in *Yassan*, the Release is central to Plaintiffs' claims. There is no
9 dispute as to the authenticity of the Release, which was negotiated by counsel for the Tribe and
10 the Bank. Consequently, this Court may and should consider the contents of the Release in
11 deciding this motion. Indeed, this case is an ideal one for application of the incorporation by
12 reference doctrine, because the manifest and salutary purpose of doctrine is to prevent a
13 plaintiff from evading dismissal under Rule 12(b)(6) simply by failing to attach to his
14 complaint a document that proves his claim has no merit. *Brownmark Films, LLC v. Comedy*
15 *Partners*, 682 F.3d 687, 691 (7th Cir. 2012). Had Plaintiffs attached the Release to the FAC, it
16 would have been readily apparent that their claims against the Cornerstone Defendants are
17 wholly barred.

18 **B. Plaintiffs Released the Cornerstone Defendants from All Claims Asserted**
19 **Against the Cornerstone Defendants in the FAC.**

20 Plaintiffs' claims against the Cornerstone Defendants are barred because Plaintiffs
21 executed a release of the Cornerstone Defendants as part of the Release. Under the Release,
22 Plaintiffs released the Cornerstone Defendants from all claims they now attempt to assert
23 against them in the FAC.

24 The Release may properly be considered by the Court because the Release is
25 specifically referenced in the FAC even though it is not attached. Plaintiffs' efforts to evade the
26 effect of the Release, which include allegations of fraudulent inducement, economic duress,
27 and the purported inapplicability of the release to unknown claims, all fail as a matter of law.
28

1 **1. The Release Encompasses All of Plaintiffs’ Claims Against the**
2 **Cornerstone Defendants.**

3 Plaintiffs released all of their claims asserted against the Cornerstone Defendants in the
4 FAC when the Tribe executed the Release. The release of Plaintiffs’ claims is set forth in
5 Paragraph 7 of the Release, which states:

6 Effective as of the date of this Agreement, in further consideration for the
7 covenants, agreements and considerations provided by Bank pursuant to this
8 Agreement, and except as to Bank’s obligations under this Agreement, the Band
9 and the Tribal Entities hereby forever release, discharge, and covenant not to sue
10 the Bank Parties from any and all claims, demands, controversies, actions,
11 causes of action, obligations, liability, costs, expenses, attorneys’ fees, defenses
12 and damages of any character whatsoever, nature or kind, in law or in equity,
13 that they or any member of the Band, including but not limited to Council # 2,
14 may have against Bank, including, without limitation, **all claims, demands,**
15 **controversies, actions, causes of action, obligations, liability, costs, expenses,**
16 **attorneys’ fees, defenses and damages that arise from or are related to the**
17 **Accounts, the Minutes, the Resolutions, the TRO or the Threatened**
18 **Liability, that may have accrued on or before the date of this Agreement.** It
19 is the intention of the parties hereto that the foregoing release shall be effective
20 so as to bar all claims, demands, controversies, actions, causes of action,
21 obligations, liabilities, costs, expenses, attorneys’ fees and damages of
22 whatsoever character, nature and kind, known or unknown, suspected or
23 unsuspected, which arise from or are either related or unrelated to the Released
24 Claims, and **the parties hereto expressly acknowledge and waive any and all**
25 **rights and benefits conferred upon them by the provisions of Section 1542**
26 **of the California Code of Civil Procedure,** which provides:

17 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
18 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN
19 HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
20 RELEASE, WHICH IF KNOWN BY HIM OR HER, MUST HAVE
21 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
22 DEBTOR” [Emphasis added.]

22 Plaintiffs are the releasors of the Release. The Release was provided by “Band” and
23 “Tribal Entities,” defined in the Release to include Plaintiffs. *See* Release, at p. 1, ¶ A. “Band”
24 is defined as the “Paskenta Band of Nomlaki Indians” and the “Tribal Entities” is defined in
25 part to include the Band and “its affiliates, including but not limited to Paskenta Enterprises
26 Corporation.” *Ibid.* The Cornerstone Defendants are the releasees of the Release. *Id.*, at p. 4,
27 ¶ 7. The “Bank Parties” are defined in the Release to include the Cornerstone Defendants.
28 *Id.*, at p. 3, ¶ 3. “Bank Parties” is defined to include the “Bank,” defined as “Cornerstone

1 Community Bank”, and “all of the Bank’s officers, shareholders, directors, employees,
2 contractors, agents and attorneys.” *Ibid.*

3 As indicated in the paragraph quoted above, the scope of the Release is universal and
4 encompasses all of Plaintiffs’ claims. The Release covers all claims of any character
5 whatsoever that Plaintiffs may have against Cornerstone Defendants that accrued on or before
6 the date of the Release. *See* Release, at p. 4, ¶ 7. Moreover the Release specifically covers
7 claims arising from or related to the “Accounts” defined to include accounts maintained by
8 Plaintiffs at Cornerstone Community Bank. *Id.*, at p. 1, ¶ A. Moreover, the Release extends to
9 claims both known or unknown and includes a waiver of California Civil Code Section 1542.
10 *Id.*, at p. 4, ¶ 7.

11 The claims in the FAC in which the Cornerstone Defendants are named (i.e., the
12 twenty-second through twenty-seventh claims and the thirty-third claim) all fall within the
13 broad scope of the Release. The substantive factual allegations by Plaintiffs against the
14 Cornerstone Defendants are that said defendants assisted the RICO Defendants in the
15 conversion of funds from Tribal accounts at Cornerstone Community Bank. *See*, FAC, at
16 164:1-178:13. The Release is patently inclusive of these claims. Therefore, the Release bars
17 Plaintiffs’ claims in the FAC in their entirety. Accordingly, all of Plaintiffs’ claims against the
18 Cornerstone Defendants fail to state a claim upon which relief can be granted and must be
19 dismissed.

20
21 **2. The Release, as a Matter of Law, Is Not “Null and Void” as Alleged
by Plaintiffs.**

22 Plaintiffs proffer three reasons why the Release should be considered “null and void”
23 with respect to the claims against the Cornerstone Defendants as raised in the FAC. First,
24 Plaintiffs allege that the Tribe was fraudulently induced to execute the Release. *See*, FAC,
25 168:1-6. Next, Plaintiffs aver that they executed the Release “under duress and/or by
26 Cornerstone Bank’s coercion. *Id.*, at 168:7-18. Finally, Plaintiffs assert that the Release is
27 “ineffective” because “it purports to release claims that the Tribe did not know or suspect to
28

1 exist in its favor at the time.” *Id.*, at 168:19-25. Each of these assertions is unavailing as a
2 matter of law.

3 **a. Plaintiffs' Claim that the Release was Fraudulently Induced**
4 **Fails As a Matter of Law.**

5 In an effort to plead around the Release, Plaintiffs allege in the FAC that the Release is
6 null and void on the basis that the Tribe was fraudulently induced to enter into the Release
7 based on nondisclosure or misrepresentation of Cornerstone Defendants' alleged tortious
8 conduct. *See* FAC, at 168:1-6. Plaintiffs' purported defense to the Release fails as a matter of
9 law because: (1) the Cornerstone Defendants had no duty to reveal facts not disclosed to
10 Plaintiffs which fall within the scope of the release; and (2) the Cornerstone Defendants had no
11 duty to disclose facts that are not material, in part because the transactions alleged in the FAC
12 were authorized by the California Financial Code.

13 **(1) Cornerstone Defendants Had No Duty to Reveal Facts**
14 **That Fall Within the Scope of the Claims Being**
15 **Released.**

16 Essentially, Plaintiffs attempt to avoid the application of the Release by alleging that

17 [T]he Tribe was induced to enter into it, by Cornerstone Bank's
18 intentional and/or negligent misrepresentation and/or fraudulent
19 omission of facts concerning the substantial assistance it gave the RICO
20 Ringleaders in their tortious conduct to the detriment of the Tribe, as
21 well as Cornerstone Bank's related knowledge thereof, both of which
22 Cornerstone Bank was obligated to provide the Tribe.”

23 *See* FAC, at 168:1-6.

24 However, the Bank had no duty to disclose its alleged tortious conduct where the claims
25 arising out of that conduct are covered by the Release. *Yassan, supra*, 708 F.3d at 973-75. In
26 *Yassan*, as is the case here, plaintiff alleged that the release executed by plaintiff in favor of
27 defendant was fraudulently induced. *Id.* at 973. In rejecting this argument, the Court of
28 Appeals found that “[t]he fraud that Yassan alleges is not a separate fraud, but a fraud that ‘falls
squarely within the scope of the release.’” *Id.* at 975, quoting, *Centro Empresarial Cempresa*

1 *S.A. v. América Móvil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001 (N.Y. 2011). Thus, the Court of
2 Appeals concluded that the release of unknown fraud claims was valid even if the alleged
3 defrauder did not disclose his fraud to the party signing the release. *Id.* at 974. The Court of
4 Appeals went on to note that even if “[the bank in question] knowingly lied to Yassan about its
5 reasons for terminating him, Yassan's case fails because he subsequently released [the bank]
6 from all ‘potential claims [of] fraud.’” *Id.* at 976.

7 Moreover, the Cornerstone Defendants had no duty to reveal facts not disclosed to
8 Plaintiffs that fall within the scope of the claims being released because, as set forth below, the
9 Cornerstone Defendants were not in a fiduciary relationship with Plaintiffs. See, *infra*, p.14:6-
10 15:8. Therefore, even if the allegations of paragraph 646 of the FAC are true, Plaintiffs' claims
11 fail because those claims fall squarely within the scope of the Release.

12
13 **(2) Cornerstone Defendants had No Duty to Disclose
14 Transactions Made in Compliance with the California
15 Financial Code.**

16 As addressed more fully below, (See, *infra*, p. 15:18-16:24) the Cornerstone Defendants'
17 obligations and liability with respect to withdrawals by authorized signers is governed by
18 California Financial Code section 1451, which provides that a bank may honor any check,
19 receipt, or order of withdrawal from a commercial account when an authorized person on the
20 account makes a withdrawal. *People v. Mares*, 155 Cal. App. 4th 1007, 1014 (2007).

21 Throughout the FAC, Plaintiffs admit that the RICO Defendants had signing authority over the
22 accounts from which they are alleged to have withdrawn funds. Accordingly, Cornerstone
23 Defendants had no duty to disclose those withdrawals to the Tribe.

24 "The present banking system under which an enormous number of checks are processed
25 daily could not function effectively if banks were not required to make prompt and effective
26 decisions on whether to pay or dishonor checks. [Citations.]" *Los Angeles National Bank v.*
27 *Bank of Canton*, 31 Cal. App. 4th 726, 744 (1995), quoting *Town & Country State Bank v. First*
28 *State Bank*, 358 N.W.2d 387, 395 (Minn. 1984), Consequently, a "considerable burden would

1 be imposed on ... banks, and their customers if we were to find that those institutions had to
2 inquire into the activities of both the makers and payees of checks regarding the possibility of
3 internal fraud, and the flow of commerce would be substantially impeded." *Karen Kane v.*
4 *Bank of Am. Nat'l Trust and Sav. Ass'n., Inc.*, 67 Cal. App. 4th 1192, 1199 (1998) [finding that
5 defrauding scoundrel employees were responsible for company's loss, not bank that processed
6 fraudulent transactions]. Unquestionably, a bank's business customer has the better ability "to
7 police its own financial practices, to take steps to avoid being victimized by its employees, and
8 to obtain insurance against the acts of faithless employees. 'It is that person who has the most
9 control and the most to win or lose ... with whom the investigative tasks should rest.'" *Id.*,
10 quoting *Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.*, 49 Cal. App. 4th 472,
11 483 (1996).

12 Accordingly, Cornerstone Defendants had no duty to disclose the withdrawals to the
13 Tribe where the withdrawals were made by authorized signers of the accounts.

14 **b. Plaintiffs' Purported Defense to the Release on the Basis of**
15 **Economic Duress Fails Because, as a Matter of Law,**
16 **Cornerstone Defendants Did Not Commit a Wrongful Act.**

17 Plaintiffs allege in the FAC that the Release is null and void because the Tribe executed
18 the Release under economic duress. *See* FAC, at 168:7-18. Specifically, Plaintiffs aver that the
19 Bank threatened to withhold access to the funds in Tribal accounts held at the Bank unless the
20 Tribe executed the Release and that the Bank was aware that the Tribe would suffer severe and
21 irreparable harm to the economic interests of the Tribe and its members. *Ibid.* This purported
22 defense fails as a matter of law because Cornerstone Defendants did not commit any wrongful
23 act in allegedly threatening to hold funds in the accounts because of the competing claims
24 against the accounts as referenced in the Release.

25 "The doctrine of economic duress may come into play upon the doing of a wrongful act
26 which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable
27 alternative to succumb to the perpetrator's pressure. But courts are reluctant to set aside
28 settlements and will apply economic duress only in limited circumstances and as a last resort."

1 *Perez v. Uline, Inc.* 157 Cal. App. 4th 953, 959 (2007) (“*Perez*”) (internal quotation marks
2 omitted). "The assertion of a claim known to be false or a bad faith threat to breach a contract
3 or to withhold a payment may constitute a wrongful act for purposes of the economic duress
4 doctrine." *Rich & Whillock, Inc. v. Ashton Dev. Inc.*, 157 Cal. App. 3d 1154, 1159 (1984)
5 [finding economic duress where, among other things, there was no legitimate dispute as to the
6 amount owing plaintiff and defendant withheld payment of an acknowledged debt]. "Hard
7 bargaining, 'efficient' breaches and reasonable settlements of good faith disputes are all
8 acceptable, even desirable, in our economic system." *Ibid.*

9 "Required criteria that must be proven to invalidate a settlement agreement are: (1) the
10 debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the
11 debtor nevertheless refused in bad faith to pay and thereby created the economic duress of
12 imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created,
13 used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an
14 inequitably low amount." *Perez, supra*, 157 Cal. App. 4th at 959-60 [no economic duress in
15 plaintiff's execution of a settlement agreement where there was no evidence that defendant
16 knew it owed plaintiff money in addition to what was paid under the agreement].

17 Here, the Cornerstone Defendants did not act wrongfully in allegedly threatening to
18 hold funds in the accounts because there was a legitimate dispute between the Tribe and the
19 Bank as to which individuals were members of the tribal council of the Tribe and which
20 individuals had authority to transact business on the accounts. The Release specifically and
21 thoroughly sets forth the legitimate dispute between Plaintiffs and the Bank. The Tribe
22 acknowledged the dispute in the Release. Release, pp. 1-2.

23 The dispute set forth in the Release (and alluded to in the FAC) can be summarized as
24 follows: The Bank was informed by the Tribe that certain tribal council members had been
25 removed from membership of the tribal council and that certain individuals no longer had
26 authority to transact business on the accounts, and that new tribal council members were
27 elected and new individuals had authority over the accounts. However, the removed members
28

1 advised the Bank that the removal of members and signers was invalid, that the removed
2 members remained tribal council members, and that the former signers retained authority to
3 transact business on the accounts. Moreover, the removed members threatened the Bank with
4 liability if it denied the former signers access to the accounts and allowed the new replacement
5 signers access to the accounts. Release, pp. 1-2.

6 These competing claims as to which individuals of the Tribe had authority over the
7 accounts created a legitimate dispute between the Bank and the Tribe as to which individuals
8 had the right to access the accounts. In light of these competing claims, the Bank was entitled
9 to freeze the funds in the accounts and file an action in interpleader and deposit the funds with
10 the State Court.

11 The Release was entered into to induce the Bank not to interplead the funds and to
12 continue to process transactions on the accounts. As part of the Release, the Tribe agreed to
13 defend and indemnify the Bank from, among other things, claims arising out of the threatened
14 liability from the removed members and to release the Bank from all claims related to the
15 accounts. In the Release, the Tribe acknowledged the existence of the competing claims and
16 the Bank's right to interplead the funds in the accounts. Release, p. 2, ¶ F.

17 Because a legitimate dispute existed between the Bank and the Tribe as to who had
18 authority to withdraw funds from the accounts, the Bank did not commit a wrongful act by
19 allegedly threatening to withhold access to the accounts. Accordingly, Plaintiffs cannot claim
20 it executed the Release under economic duress.

21
22 **c. The Release Expressly Covered Unknown Claims and the**
23 **Release Contained a Waiver of California Civil Code Section**
24 **1542.**

24 Plaintiffs assert that the Release is ineffective to the extent that it purports to release
25 claims that the Tribe did not know or suspect to exist at the time of executing the Release. Such
26 an assertion fails as a matter of law because the Release expressly covers unknown claims and
27 contains a waiver of California Civil Code Section 1542. "In general, a written release
28

1 extinguishes any obligation covered by the release’s terms, provided it has not been obtained
2 by fraud, deception, misrepresentation, duress, or undue influence.” *Skrbina v. Fleming Co.,*
3 *Inc.*, 45 Cal. App. 4th 1353, 1360, 1366-69 (1966). “The general rule is that when a person
4 with the capacity of reading and understanding an instrument signs it, he is, in the absence of
5 fraud and imposition, bound by its contents, and is estopped from saying that its provisions are
6 contrary to his intentions or understanding...” *Id.* at 1367.

7 “Release, indemnity and similar exculpatory provisions are binding on the signatories
8 and enforceable so long as they are... ‘clear, explicit, and comprehensible in each [of their]
9 essential details. Such an agreement, read as a whole, must clearly notify the prospective
10 releasor or indemnitor of the effect of signing the agreement.” *Skrbina, supra*, 45 Cal. App. 4th
11 at 1368. “To be effective, a release need not achieve perfection...” *Ibid.*

12 In *Jefferson v. Cal. Dep’t of Youth Auth.*, 28 Cal. 4th 299 (2002) the court found that
13 where the release agreement quoted and waived Section 1542, the release unambiguously
14 established the parties’ intent that the release cover plaintiff’s claim. *Id.* at 306-07. The
15 *Jefferson* Court also held that “[I]n the absence of fraud, deception, or similar abuse—a release
16 of ‘all claims’ covers claims that are not expressly enumerated in the release.” *Ibid.*

17 In the instant case, the language of the Release unambiguously establishes that
18 Plaintiffs intended to and did, in fact, release all claims against Cornerstone Defendants,
19 including those claims that the Tribe did not know or suspect to exist at the time of executing
20 the Release. The release covers “any and all claims...of any character
21 whatsoever...including...all claims... that arise from or are related to the Accounts.” *See*
22 Release, at p. 4. The Release states that “[i]t is the intention of the parties hereto that the
23 foregoing release shall be effective so as to bar all claims...**known or unknown...suspected**
24 **or unsuspected**, which arise from or are either related or unrelated to the Released Claims.”
25 Release, at p. 4, ¶ 7. [emphasis added]. The Release recites the text of Civil Code 1542 and
26 states that “the parties hereto expressly acknowledge and waive any and all rights and benefits
27 conferred upon them by the provisions of Section 1542...” *Ibid.* Moreover, nowhere in the
28

1 FAC do Plaintiffs allege that the release of unknown claims is contrary to Plaintiffs' intent or
2 understanding. *See* FAC, 168:19-25. Accordingly, the Release is effective as to unknown and
3 unsuspected claims.

4 **C. The 22nd and 23rd Claims for Breach of Fiduciary Duty Should Be Dismissed**
5 **Since, as a Matter of Law, a Bank Does Not Owe a Fiduciary Duty to its**
6 **Depositors.**

7 "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a
8 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the
9 breach." *Stanley v. Richmond*, 35 Cal. App.4th 1070, 1086 (1995); *Gutierrez v. Girardi* (2011)
10 194 Cal. App. 4th 925, 932. Here, Plaintiffs' 22nd Claim fails because the Cornerstone
11 Defendants owed no fiduciary duty to Plaintiffs as depositors.

12 The gravamen of the 22nd Claim is that the RICO Defendants diverted funds deposited
13 at Cornerstone to their own use and that the Cornerstone Defendants had a fiduciary duty to
14 Plaintiffs as depositors to intervene and stop the alleged conversion of tribal funds. Similarly,
15 Plaintiffs' 23rd Claim is premised on the theory that the Cornerstone Defendants had a fiduciary
16 duty to make inquiry and to investigate the propriety of the RICO Defendants' transactions
17 from 2006 forward with respect to the Tribe's money at Cornerstone Bank and they failed to
18 hinder or prevent the RICO Defendants' use of the Tribe's accounts at Cornerstone Bank.

19 The allegation that there was a fiduciary relationship between Plaintiffs and the
20 Cornerstone Defendants is contrary to law. "[T]he relationship between a bank and its depositor
21 arising out of a general deposit is that of a debtor and creditor." *Morse v. Crocker National*
22 *Bank*, 142 Cal. App.3d 228, 232 (1983). As there is no fiduciary relationship between a debtor
23 and creditor (*Price v. Wells Fargo Bank*, 213 Cal. App.3d 465, 476 (1989)), there is no
24 fiduciary relationship between a bank and its depositor. *Lawrence v. Bank of America*, 163 Cal.
25 App.3d 431, 437 (1985) ["the relationship between a bank and its depositor is that of
26 debtor-creditor, and is not a fiduciary one"]; *Copesky v. Superior Court*, 229 Cal. App.3d 678,
27 694 (1991) [banks are not fiduciaries for their depositors and the bank-depositor relationship is
28 not a "special relationship"]. Moreover, the contractual relationship between a bank and its

1 depositors “does not involve any implied duty ‘to supervise account activity’ or ‘to inquire into
2 the purpose for which the funds are being used.’” *Chazen v. Centennial Bank*, 61 Cal. App. 4th
3 532, 537 (1998)(*Chazen*). Nor is a bank required to supervise a depositor's use of its own
4 funds. *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, 742 (2010).

5 Since Plaintiffs cannot as a matter of law establish that the Cornerstone Defendants
6 owed a fiduciary duty to Plaintiffs as depositors, dismissal of the 22nd Claim and the 23rd Claim
7 for failure to state a claim upon which relief can be granted is warranted.

8 **D. The 24th Claim for Common Law Negligence Should Be Dismissed.**

9 **1. The Payments Described in the FAC Are Presumptively Authorized.**

10 The FAC alleges that the RICO Ringleaders had signing authority over the Tribe's
11 accounts. *See, e.g.*, FAC 123:17-19, 125:21-22, 50:10-12, 124:23-26, 7:20-21, 15:14-16,
12 19:14-18 and 19:14-18. Because of this authority, the Cornerstone Defendants could, as a
13 matter of law, properly assume that the transaction in which the RICO Ringleaders engaged
14 with respect to the Tribal accounts at the Bank were for a purposes authorized by Plaintiffs and
15 within the scope of the authority conferred upon the RICO Ringleaders.
16
17

18 California Financial Code section 1451 provides:

19 When the depositor of a commercial or savings account has authorized
20 any person to make withdrawals from the account, the bank, in the
21 absence of written notice otherwise, may assume that any check, receipt,
22 or order of withdrawal drawn by such person in the authorized form or
23 manner, including checks drawn to his personal order and withdrawal
orders payable to him personally, was drawn for a purpose authorized by
the depositor and within the scope of the authority conferred upon such
person.

24 Moreover, California Financial Code section 1450(a) provides, in pertinent part:

25 Notice to any bank of an adverse claim (the person making the adverse
26 claim being hereafter called "adverse claimant") to a deposit standing on
27 its books to the credit of or to personal property held for the account of
28 any person shall be disregarded, and the bank, notwithstanding the
notice, shall honor the checks, notes, or other instruments requiring
payment of money by or for the account of the person to whose credit the

1 account stands and on demand *shall* deliver that property to, or on the
2 order of, the person for whose account the property is held, without any
liability on the part of the bank. [Emphasis added]

3 The foregoing provisions authorize a bank to honor withdrawals from an account on the
4 signatures authorized by the signature card so long as the checks drawn on the account are
5 signed in conformity with the signature card. *Blackmon v. Hale*, 1 Cal. 3d 548, 556 (1970).
6 Consequently, a bank is justified in presuming that checks drawn to the order of an agent of the
7 depositor were authorized by the depositor. "Regardless of whatever suspicion might have
8 lurked in the mind of the teller as to the destination of the proceeds, no duty of inquiry would
9 have been cast on the bank." *Boston Ins. Co. v. Wells Fargo Bank*, 80 Cal. App. 2d 59, 66
10 (1947). In addition, considerations of confidentiality militate against imposing on banks a duty
11 to monitor accounts for wrongdoing. *Chicago Title Insurance Co. v. Superior Court*, 174 Cal.
12 App. 3d 1142, 1159 (1985).

13 Thus, a bank is permitted by California Financial Code section § 1451 to honor, without
14 liability, withdrawals from accounts by authorized persons who draw on the account in an
15 authorized manner, and is required by California Financial Code section § 1450 to disregard
16 notices of adverse claims to the account, including notices conveyed by circumstantial
17 evidence or documents in the bank's possession, unless the claims are made through an
18 appropriate affidavit or court order. *Chazen, supra*, 61 Cal App. 4th at 540. In addition,
19 California Financial Code section § 1451 allows a bank to presume that the depositor
20 authorized checks which are drawn by a corporate officer authorized to make withdrawals from
21 the account, even when the officer draws the funds to his personal order. *Id.* at 538.
22 Regardless of whatever suspicion might have lurked in the mind of the teller as to the
23 destination of the proceeds, no duty of inquiry would have been cast on the bank. *Ibid.*

24 The FAC alleges no facts sufficient to rebut the presumption imposed by California
25 Financial Code section 1451 that the withdrawals by the RICO Defendants discussed in the
26 FAC were for purposes authorized by the depositor and within the scope of the authority
27 conferred by Plaintiffs. At best, the allegations may support a view that the withdrawals should
28

1 have raised suspicion in the minds of the employees of the Bank. However, suspicions are
2 insufficient to impose liability contrary to the code provision set forth above, inasmuch as
3 suspicions do not impose on the bank a duty of inquiry. *Boston Ins. Co. v. Wells Fargo Bank &*
4 *Union Trust Co.*, 80 Cal. App. 2d 59, 66 (1947).

5 **2. The Cornerstone Defendants Are Not Liable for Common Law**
6 **Negligence Because the Payments Alleged in the FAC Were Properly**
7 **Payable According to Commercial Code Section 4401(a), Which**
8 **Has Displaced Common Law Negligence with Regard to a Drawee's**
9 **Liability for Charges to a Drawer's Account.**

10 “A bank may charge against the account of a customer an item that is properly payable
11 from that account even though the charge creates an overdraft. An item is properly payable if it
12 is authorized by the customer and is in accordance with any agreement between the customer
13 and bank.” California Commercial Code §4401(a). Where the provisions of California
14 Commercial Code §4401(a) are applicable, said section precludes recovery under a common
15 law negligence theory. *Joffe v. United California Bank*, 141 Cal. App. 3d 541, 557-558
16 (1983)(*Joffe*).

17 As has been discussed above, the contractual relationship between a bank and its
18 depositors does not involve a duty to supervise account activity, to inquire into the purpose for
19 which funds are being used, or to supervise a depositor's use of its own funds. See, *supra*, p.
20 15:1-5. Accordingly, any claim for negligence against the Cornerstone Defendants must fall
21 within Section 4401(a), i.e., that the subject transactions were not authorized by the customer
22 or were not in accordance with an agreement between the customer and the bank.

23 Where an item is properly payable, the payor bank (Cornerstone in this case) comes
24 within the protection of Section 4401(a), formerly Section 4401(1). *Joffe, supra*, 141 Cal. App.
25 3d. at 557-558. If an item is not properly payable, a claimant may recover under Section
26 4401(a). *Id.*, at 558. “The principles of [Section 4401] preclude recovery under a negligence
27 theory in this situation.” *Id.*, at 557. “The principles of tort law are . . . displaced by the
28 particular provisions of the [Commercial] Code in this instance.” *Id.*, at 558.

1 In *Joffe*, plaintiffs purchased a cashier's check from their savings and loan association.
2 The check was drawn on the savings association's account at United California Bank ("UCB")
3 and made payable to "Continental Finance Systems – Wells Fargo Trust Account." However,
4 the check was deposited in Continental's account at Bank of America ("BofA") with a stamped
5 endorsement "Pay to the order of Bank of America . . . For Deposit Only Continental Financial
6 Systems [account number]." UCB paid the check on BofA's endorsement notwithstanding that
7 the check was made payable to Continental's Wells Fargo account.

8 Among other claims, the *Joffe* plaintiffs sued UCB for negligence. The *Joffe* court held
9 that plaintiff's recovery on its claim against UCB, if any, was based on Commercial Code
10 Section 4401(1) (now Section 4401(a)) and not under common law negligence. *Id.*, at 557. A
11 claim under Commercial Code section 4401(a), is only available if the payment at issue was
12 either (1) not authorized by the customer or (2) in breach of an agreement between the
13 customer and the bank. *Id.*, at 557-558.

14 Accordingly, any liability for failure to use reasonable care with respect to the
15 Cornerstone Defendants' payments from Tribal accounts must be brought pursuant to
16 Commercial Code section 4401(a) and not under the common law.

17
18 **E. The 25th Claim for Statutory Negligence Pursuant to California
Commercial Code § 3405(b) Should Be Dismissed.**

19 California Commercial Code section 3405(b) provides:

20 For the purpose of determining the rights and liabilities of a person who,
21 in good faith, pays an instrument or takes it for value or for collection, if
22 an employer entrusted an employee with responsibility with respect to
23 the instrument and the employee or a person acting in concert with the
24 employee makes a fraudulent indorsement of the instrument, the
25 indorsement is effective as the indorsement of the person to whom the
26 instrument is payable if it is made in the name of that person. If the
27 person paying the instrument or taking it for value or for collection fails
28 to exercise ordinary care in paying or taking the instrument and that
failure contributes to loss resulting from the fraud, the person bearing the
loss may recover from the person failing to exercise ordinary care to the
extent the failure to exercise ordinary care contributed to the loss.

1 California Commercial Code section 3405(a)(2) defines "fraudulent indorsement" to
2 mean " (A) in the case of an instrument payable to the employer, a forged indorsement
3 purporting to be that of the employer, or (B) in the case of an instrument with respect to which
4 the employer is the issuer, a forged indorsement purporting to be that of the person identified as
5 payee." Nowhere in the FAC do Plaintiffs allege that any of transaction which they allege to
6 have been made by the RICO Defendants through Cornerstone Bank contained a forged
7 indorsement; indeed, they affirmatively and repeatedly allege that the RICO Ringleaders were
8 authorized to act with respect to the Tribal accounts. Accordingly, California Commercial
9 Code section 3405(b) is inapplicable and the 25th Claim must be dismissed.

10 **V. CONCLUSION**

11 In 2014, Plaintiffs executed the Amended and Restated Defense and Indemnity
12 Agreement, releasing the Cornerstone Defendants from liability for "any and all claims,
13 demands, controversies, actions, causes of action, obligations, liability, costs, expenses,
14 attorneys' fees, defenses and damages of any character whatsoever, nature or kind, in law or in
15 equity, that they or any member of the Band" might have against the Cornerstone Defendants.
16 Said Release bars all claims set forth against Cornerstone Defendants in the FAC.

17 Assuming *arguendo* that the entire action cannot be dismissed based on the Release at
18 this stage of the litigation, Plaintiffs' claims for breach of fiduciary duty (the 22nd and 23rd
19 Claims), for common law negligence (the 24th Claim), and for statutory negligence pursuant to
20 California Commercial Code section 3405(b) (the 25th Claim) should be dismissed pursuant to
21 FRCP Rule 12(b)(6), inasmuch as each claim, for the reasons set forth herein, fails to state a
22 claim upon which relief can be granted.

23 Dated: May 15, 2015

Respectfully submitted,
KRAFT OPICH, LLP

24
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