William A. Munoz - 191649
(wmunoz@mpbf.com)
Robert W. Lucas - 143920
(rlucas@mpbf.com)
MURPHY, PEARSON, BRADLEY & FEENEY
520 Capitol Mall, Suite 250
Sacramento, CA 95814
Telephone: (916) 565-0300
Facsimile: (916) 565-1636

Attorneys for Defendant
ASSOCIATED PENSION CONSULTANTS, INC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PASKENTA BAND OF NOMLAKI INDIANS; PASKENTA ENTERPRISES CORPORATION,

Plaintiff,

v.

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

Defendants.

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

Nominal Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF DEFENDANT ASSOCIATED PENSION CONSULTANT, INC'S MOTION TO DISMISS FIRST AMENDED COMPLAINT [FRCP 12(b)(6)] AND TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT [FRCP 12(f)]

Date: July 27, 2015
Time: 9:00 a.m.
Ctrm.: 10

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I. INTRODUCTION

Defendant Associated Pension Consultants, Inc. ("APC") has been caught in the cross-fire between warring factions of Plaintiff Paskenta Band of Nomlaki Indians ("the Tribe"). Basically, the Tribe's leadership changed in 2014, and the new leadership claims the old leadership, which the Tribe refers to in the First Amended Complaint ("FAC") as the "RICO Ringleaders" embezzled money from the Tribe, which the current leadership wants restored. While working with the then duly appointed old leadership, APC assisted in setting up two pension plans for the Tribe: (1) A Defined Benefit Plan, and (2) A 401(k) Profit Sharing Plan. Now, in spite of conducting this routine, arms-length business activity for the Tribe, the Tribe now contends that somehow APC illegally aided and abetted the old leadership team in it embezzlement of the Tribe's funds.

In this motion, APC seeks dismissal of the FAC against it on multiple grounds. First, Plaintiff Paskenta Enterprises Corporation has failed to set forth any claims against APC. Second, Plaintiffs fail to establish that APC caused them any damage. Third, Plaintiffs fail to establish a claim for breach of fiduciary duty by APC. Fourth, Plaintiffs fail to establish a claim for aiding and abetting against APC. Fifth, Plaintiffs' claims are barred by the statute of limitations. Finally, Plaintiffs have failed to establish their punitive damage claims against APC, and they should either be stricken under Rule 12(f) or dismissed under Rule 12(b)(6).

II. STATEMENT OF FACTS

The federal government recognized the Tribe in 1994. FAC, ECF 30, ¶ 2. After federal recognition, the Tribe employed several individuals, including Defendants John Crosby, Ines Crosby, Leslie Lohse, Larry Lohse and Sherry Myers ("the individual Defendants') to manage the Tribe's business affairs. FAC, ECF 30, ¶¶ 3, 27, 28, 29, 30 & 35. The Tribe terminated the individual Defendants' employment in April 2014. FAC, ECF 30, ¶¶ 12, 27, 28, 29, 30 & 35.

APC, a third party retirement plan administrator, assisted the Tribe in setting up retirement plans. FAC, ECF 30, ¶¶ 49, 218. Participants in the plans included the individual Defendants. FAC, ECF 30, ¶ 221. Working with the Tribe's duly employed individual Defendants and elected officials, APC thereafter administered the retirement plans according to the Tribe's instructions, including terminating at the Tribe's instructions the Defined Pension Plan in 2009, and its 401(k) Profit Sharing

Plan in 2014. FAC, ECF 30, ¶¶ 222-227, 717. The Tribe now contends that the individual defendants received excessive retirement compensation under the retirement plans the Tribe's duly elected officials and employees authorized. FAC, ECF 30, ¶¶ 228-251.

III. DISCUSSION

A. Plaintiffs' First Amended Complaint Must Be Dismissed For Failure to State a Cause of Action Against APC Under Rule 12(b)(6)

1. Legal Standard

"A district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (*quoting Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plausibility does not equate to probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, *Twombly* and *Iqbal* establish that a party must demonstrate the plausibility, as opposed to conceivability, of its causes of action in the complaint. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) ("*Eclectic*"); *Nuveen Mun. Trust v. Withumsmith Brown, P.C.*, 692 F.3d 283, 303 (3d Cir. 2012). Accordingly, the pleading requirements are not met by a "complaint that contains conclusion or surmise and requires a court to decide whether events not pleaded could be imagined in a plaintiff's favor. The [Supreme] Court in [*Twombly* and *Iqbal*] wrote that judges may bypass implausible allegations and insist that complaints contain enough detail to allow courts to separate fantasy from claims worth litigating." *Levin v. Miller*, 763 F.3d 667, 671 (7th Cir. 2014). Consequently, a complaint that merely contains allegations consistent with a defendant's liability, stops short of the line between possibility and plausibility of entitlement to relief. *Eclectic*, 751 F.3d at 996 (citation omitted).

In order to establish plausibility, allegations in a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Eclectic*, 751 F.3d at 996 (internal quotation and citation omitted).

Therefore, establishing the plausibility of a complaint's allegations is a two-step process that is "context-specific" and "requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *Eclectic*, 751 F.3d at 995-96. First, a district court should "identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Then, a court should "assume the [ ] veracity" of "well pleaded factual allegations" and "determine whether they plausibly give rise to an entitlement to relief." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 678 (citation omitted). When considering plausibility, courts must also consider an "obvious alternative explanation" for the defendant's behavior. *Id.* at 682 (quoting *Twombly*, 550 U.S. at 567). Indeed, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678.

2. Plaintiff Paskenta Enterprises Corporation ("PEC") Cannot Maintain Any of Its Claims Against APC Because the FAC Is Devoid of Any Allegations that A Relationship Existed Between PEC and APC

Each of the FAC's allegations and claims against APC – the twenty-eighth and twenty-ninth claims for breach of fiduciary duty, thirtieth claim for negligence, thirty-first claim for aiding and abetting, and thirty-third claim for restitution – are premised on APC's acting as third party administrator of the Tribe's retirement plans, not PEC's. FAC, ECF 30, ¶¶ 49, 218, 221-251, 709-732, 751-754. The FAC specifically delineates in its allegations between "the Tribe" and "PEC", and specifically indicates that APC administered the Tribe, not PEC's retirement plans. FAC, ECF 30, ¶¶ 24, 25, 49, 214, 218. Consequently, the FAC lacks any allegation that any relationship existed between APC and PEC. Therefore, because the FAC is devoid of any allegations against APC involving PEC, the FAC must be dismissed as between PEC and APC.

3. Plaintiffs Fail to Establish that APC Caused Them Any Injury

Each of the FAC's allegations and claims against APC – the twenty-eighth and twenty-ninth claims for breach of fiduciary duty, thirtieth claim for negligence, thirty-first claim for aiding and abetting, and thirty-third claim for restitution – fail because Plaintiffs – either the Tribe or PEC – fail to establish that APC's acts caused them injury. "For a condition to be a cause of an injury, it must be the cause in fact of the injury." *Muffett v. Royster*, 147 Cal.App.3d 289, 307 (1983) abrogated on other grounds by *Cornette v. Department of Transp*., 26 Cal.4th 63 (2001). In other words, a tort becomes a legal cause of injury only when it is a substantial factor in producing the injury. *Soule v. General Motors Corp.*, 8 Cal.4th 548, 572-573, fn. 9, (1994). There must be substantial evidence of a causal connection between a defendant's acts or omissions and a plaintiffs' injuries." *Dixon v. City of Livermore*, 127 Cal.App.4th 32, 43 (2005). Stated differently, an actor's conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not committed a tortious act. *Mills v. U.S. Bank*, 166 Cal.App.4th 871, 889 (2008); *Viner v. Sweet*, 30 Cal.4th 1232, 1240 (2003).

The FAC establishes that no act or omission by APC could be the cause of their injury. The gravamen of Plaintiffs' injury is that third parties – namely the so-called Ringleader Defendants and RICO Defendants, which by definition do not include APC, "took control of the Tribe and PEC, and then used their control to steal and embezzle from the Tribe with impunity." FAC, ECF 30, ¶¶ 3, 27-36. Despite numerous claims that boil down to nothing more than unsubstantiated conjecture and conclusions devoid of factual underpinnings, the core of the FAC acknowledges that APC's role was limited setting up and administering the retirement plans on behalf of the Tribe. FAC, ECF 30, ¶¶ 40, 218. Indeed, Plaintiffs acknowledge that Defendant Garth Moore was responsible for the idea of retirement plans, not APC. FAC, ECF 30, ¶ 218. Simply because APC established and administered retirement plans that allowed others allegedly to benefit improperly from otherwise permissible plans does not establish that APC was the cause in fact of any of Plaintiffs' damages. Accordingly, each of Plaintiffs' claims against APC fail and should be dismissed.

a. APC Cannot Be Held Liable Due to the Superseding Cause Doctrine

Even if Plaintiff can establish that an act or omission of APC was a cause in fact of their injury,

Plaintiffs still cannot be held liable under the superseding cause doctrine. An intervening cause that breaks the chain of causation from the original act is itself regarded as the proximate cause of the injury, and relieves the original actor of liability. *Schrimscher v. Bryson*, 58 Cal.App.3d 660, 664 (1976). The general test of whether an independent intervening act that operates to produce an injury breaks the chain of causation is whether the act is foreseeable. An act is not foreseeable and thus is a superseding cause of the injury if the independent intervening act is highly unusual or extraordinary and not reasonably likely to happen. *Id*. If it is determined that the intervening cause of independent origin was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries. *Hoyem v. Manhattan Beach City Sch. Dist*., 22 Cal.3d 508, 521 (1978); *Martinez v. Vintage Petroleum*, 68 Cal.App.4th 695, 700 (1998). Furthermore, criminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior act which might otherwise be deemed a contributing cause. *Koepke v. Loo*, 18 Cal.App.4th 1444, 1449 (1993).

Here, based on the allegations of the FAC, the RICO Ringleaders and RICO Defendants engaged in numerous acts which create a superseding cause based on these individuals "taking control of the Tribe and PEC, and then used their control to steal and embezzle from the Tribe with impunity." FAC, ECF 30, ¶¶ 3, 27-36. Plaintiffs acknowledge that the RICO Ringleaders along with Defendant Meyers, not APC, allegedly diverted retirement compensation to themselves, and allegedly developed the scheme with Defendant Moore. FAC, ECF 30, ¶¶ 213-218. Each of these taken alone or as a whole are intervening acts of independent origin, and constitute criminal conduct on behalf of the alleged perpetrators. (*e.g*., theft and embezzlement). As such, these acts constitute a superseding cause which relieves APC of liability, if any. Thus, each of Plaintiffs' claims against APC fail and should be dismissed.

4. Plaintiffs' Twenty-Eighth And Twenty-Ninth Claims for Relief for Breach of Fiduciary Duty Must Be Dismissed Because Plaintiffs' Fail to Establish that APC Owed Plaintiffs a Fiduciary Duty

To state a claim for breach of fiduciary duty, Plaintiffs' must establish the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *Knox v. Dean*, 205 Cal.App.4th 417, 432 (2012). Here, the FAC fails to establish that APC entered into a fiduciary

relationship with Plaintiffs.

By definition, breach of fiduciary duty is a tort that may be committed by only a limited class of persons. *1-800 Contacts, Inc. v. Steinberg*, 107 Cal.App.4th 568, 592 (2003). To be charged with a fiduciary obligation, a party must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *Cleveland v. Johnson*, 209 Cal.App.4th 1315, 1338 (2012). The FAC fails to allege any facts to establish this requirement.

To establish a fiduciary relationship, Plaintiffs must establish that a relation exists between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. *Wolf v. Superior Court*, 107 Cal.App.4th 25, 29 (2003). Traditional examples in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. *Wolf*, 107 Cal.App.4th at 30.

Here, Plaintiffs simply stated that APC administered the Tribe's pension plans. FAC, ECF 30, ¶ 49. This, in and of itself, does not create a fiduciary relationship. While Plaintiffs infer that a contractual relationship exists between APC and the Tribe, nowhere in the FAC do Plaintiffs spell out the scope and nature of the relationship, either by attaching the written agreement between APC and the Tribe to the FAC as an exhibit or describing the scope of that agreement in the pleading itself. Rather, APC and the Court are left to conjecture as to the exact nature of the relationship between the Tribe and APC alleged by the Plaintiffs.

Plaintiffs likely will claim that by entering into some type of agreement with APC that the Tribe reposed trust and confidence in APC. However, the California Supreme Court, citing *Wolf*, noted that every contract requires one party to repose an element of trust and confidence in the other to perform because every contract calls for the highest degree of good faith and honest dealing between the parties. However, the ability to exploit a disparity of bargaining power between the parties does

not necessarily create a fiduciary relationship. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 389 (2008). Indeed, it is not at all unusual for a party to enter into a contract for the very purpose of obtaining the superior knowledge or expertise of the other party. Standing alone, though, that circumstance does not necessarily create fiduciary obligations, which generally come into play when one party's vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries. *Id.*

Additionally, the FAC does not establish a principal-agent relationship between the Tribe and APC. An agency relationship results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. As such, the principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control. Thus, the formation of an agency relationship is a bilateral matter requiring words or conduct by both principal and agent to create the relationship. *van't Rood v. Cnty. of Santa Clara*, 113 Cal. App. 4th 549, 571 (2003). The fact that parties had a preexisting relationship is not sufficient to make one party the agent for the other and control may not be inferred merely from the fact that one person's act benefits another. *Id.* at 572.

All that can be gleaned from the FAC is that APC agreed to perform some type of administrative functions regarding the Tribe's pension plans. Without anything more, such as the scope of the engagement required under any agreements between APC and the Tribe, the FAC fails to establish an agency relationship between APC and the Tribe. Thus, at best, the FAC establishes an independent contractor relationship between the Tribe and APC. See *White v. Uniroyal, Inc.*, 155 Cal.App.3d 1, 25 (1984), overruled on other grounds in *Soule*, 8 Cal.4th at 548 (when the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established); see also *Mark Tanner Constr. v. Hub Internat. Ins.* Servs., 224 Cal.App.4th 574, 585 (2014) ("[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured."); *Trane Co. v. Gilbert*, 267 Cal.App.2d 720, 726 (1968) (preparation of plans and specifications by an architect creates an independent contractor, not agency, relationship).

The FAC also fails to establish that APC acted in any type of trust relationship with the Tribe. A pension plan offered by an employer creates two relationships: (1) a contractual relationship

between the employer and the employee; and (2) a trust relationship between pensioner-beneficiaries and the trustees of pension funds who administer retirement benefits. *Lix v. Edwards*, 82 Cal.App.3d 573, 578, (1978); *Hannon Engineering, Inc. v. Reim*, 126 Cal.App.3d 415 (1981). The trustees must exercise their fiduciary duties in good faith. *Id.* Here, however, the FAC fails to elucidate the role APC actually played in the Tribe's retirement plans, and nowhere alleges that APC acted as trustee for the plans. Therefore, Plaintiffs' fail to establish that APC entered into a trust relationship with the Tribe or any other party with regard to the plans. Accordingly, Plaintiffs fail to establish under any theory that APC acted in a fiduciary capacity with regard to the Tribe. Consequently, the Court should dismiss the twenty-eighth and twenty-ninth claims for breach of fiduciary duty against APC.

5. Plaintiffs' Thirty-First Claim for Relief for Aiding & Abetting Must Be Dismissed Under Rule 12(b)(6)

a. Plaintiffs Cannot Maintain Their Aiding & Abetting Claim Under RICO

Plaintiffs' thirty-first claim for relief is ambiguous as to which specific claims of the alleged "RICO Defendants" that APC allegedly aided and abetted – i.e. whether Plaintiffs are limiting their claim to whether APC aided and abetted only the ninth claim for conversion and the thirteenth claim for breach of undivided loyalty or whether it encompasses all of Plaintiffs' claims against the RICO Defendants, including the claims alleged under RICO. FAC, ECF 30, ¶¶ 711-712. To the extent, however, that their aiding and abetting claim against APC extends to the RICO claims, that claim fails as a matter of law. In *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the Supreme Court addressed the question whether Section 10(b) of the Securities Exchange Act created a private cause of action for aiding and abetting where the language of the statute included no such language. The court held in the negative, observing that Congress knows how to explicitly provide for civil aiding and abetting liability when it intends to create it, and that nothing in the text of the statute suggested such an unstated intent. *Central Bank of Denver*, 511 U.S. at 182-185. Aiding and abetting liability is therefore limited to those statutes in which it is imposed. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1006 (9th Cir. 2006). The civil RICO statute, 18 U.S.C. section 1964, does not include civil aiding and abetting liability, and thus under the *Central Bank of Denver* analysis such claims are barred. *See, e.g., Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir.

1998); *Urenia v. Public Storage*, 2014 U.S. Dist. LEXIS 70647, 18-19 (C.D. Cal. May 22, 2014); *Pette v. Int'l Union of Operating Eng'rs*, 2013 U.S. Dist. LEXIS 146299, 16 (C.D. Cal. Oct. 9, 2013); *Armitage v. BDO Seidman, L.L.P.*, 2005 U.S. Dist. LEXIS 41624, 3-4 (C.D. Cal. July 28, 2005); *King v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 11317, 78-79, (D. Or. Mar. 8, 2005); *see also Salas v. Int'l Union of Operating Eng'rs*, 2015 U.S. Dist. LEXIS 20077, 19-20 (C.D. Cal. Feb. 18, 2015) (parties agreed no aiding and abetting liability exists under RICO).

b. Plaintiffs Cannot Maintain Their Aiding & Abetting Claim Under State Law

Under California law, liability may be imposed for aiding and abetting the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1475. "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." *Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519. Here, the FAC fails to allege facts establishing that APC has actual knowledge of an intentional wrong to be committed by the RICO Defendants.

"California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort." *Casey v. U.S. Nat. Bank Assn.*, 127 Cal.App.4th 1138, 1144 (2005); *accord Henry v. Lehman Commer. Paper, Inc. (In re First Alliance Mortg. Co.)*, 471 F.3d 977, 993 (9th Cir. 2006). A civil cause of action for aiding and abetting "necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff's object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong." *Howard v. Superior Court*, 2 Cal.App.4th 745, 749 (1992). Liability for aiding and abetting an intentional tort arises if the defendant

substantially assists or encourages another party to act, with the knowledge that the other party's conduct constitutes a breach of duty. *Casey*, 127 Cal.App.4th at 1144.

The pleadings here are similar to the pleadings in *Schulz v. Neovi Data Corp.*, 152 Cal.App.4th 86 (2007), where an Internet consumer failed to allege facts, as to two payment processing companies, sufficient to state a cause of action for aiding and abetting an illegal on-line lottery. There, the plaintiff pleaded only that "PayPal knew the site was an illegal lottery but agreed [the site] could use its payment system with the knowing intent to aid and abet [the site's] operation because it could be profitable for PayPal." *Id.* at 97. As to the other payment processing company, the complaint alleged only that it "'knew of [the site's] unlawful operations' 'but knowingly and intentionally aided and abetted the operation by setting up a system' for consumers to use its electronic check system, and, as a result, received a fee." *Id.* Based on these pleadings, the appellate court held that the plaintiff had failed to allege the requisite knowledge of the alleged illegal lottery or facts showing substantial assistance or encouragement. *Id.* In so holding, the court explained that the allegations were nothing more than "mere conclusions" that did not save the aiding and abetting causes of action. *Id.*

Here, Plaintiffs only allege conclusions without any supporting facts to support those conclusions. Particularly, the Plaintiffs only allege that APC "knew that the RICO Defendants were effecting these conversions and committing these breaches" without ever explaining how APC had this actual knowledge. FAC, ECF 30, ¶ 758. This is simply conclusory and insufficient to establish an aiding and abetting claim. Plaintiffs must must allege that APC actually knew of the specific primary wrong—the underlying tort—that APC intentionally aided. *Casey*, 127 Cal.App.4th at p. 1145; *see also Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 47 (1908) (aiding and abetting means participation in a specific primary wrong "with knowledge of the object to be attained".

In *Casey*, the plaintiff alleged the banks knew that certain bank customers (officers and fiduciaries of a corporate entity) were involved in "wrongful or illegal conduct," including dishonest activities such as laundering money and making excessive withdrawals in violation of fiduciary duties they owed to said corporate entity. *Casey*, at p. 1152. *Casey* held these allegations were insufficient to satisfy the actual knowledge requirement because they did not establish the bank's actual knowledge of the specific primary wrong that it allegedly participated in—namely, a misappropriation or theft of $36

million from the corporation. *Id.* at 1149, 1152-1153. The *Casey* plaintiff further alleged "each [bank] acted with knowledge of the primary wrongdoing and realized that its conduct would substantially assist the accomplishment of the wrongful conduct." *Id.* at p. 1153. *Casey* held that such allegation did not satisfy the actual knowledge pleading requirement: "This conclusory allegation fails to identify the primary wrong and is not otherwise supported by the rest of the complaint, which fails to allege the banks knew the DFJ Fiduciaries were misappropriating funds from DFJ." *Id.* Here, Plaintiffs fail to allege that APC had actual direct knowledge that the RICO Defendants were actually converting the Tribe's money, and that APC knowingly assisted them in converting this money. Consequently, Plaintiffs fail to state a claim for aiding and abetting against APC, and the Court should dismiss their claim.

6. Plainitiffs' Thirty-Third Claim for Restitution Must Be Dismissed Under Rule 12(b)(6) Because Restitution Is Not a Viable Claim for Relief

"No cause of action exists under California law for restitution." *Durell v. Sharp Healthcare*, 183 Cal.App.4th 1350, 1370 (2010); *In re IPhone Application Litigation*, 844 F.Supp.2d 1040, 1076 (N.D. Cal. 2012) ("California does not recognize a cause of action for restitution"). Instead, restitution is a remedy that can be awarded in various different scenarios. *Durell*, 183 Cal.App.4th at 1370; *Robinson v. HSBC Bank USA*, 732 F.Supp.2d 946, 987 (N.D. Cal. 2010) ("There is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy."). "For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for reason." *Durell*, 183 Cal.App.4th at 1370. "Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory." *Id.* Accordingly, Plaintiffs' claim fails because restitution is not an independent claim for relief; and, therefore, the Court should dismiss the claim.

7. Each of Plaintiffs Claims Against APC Is Barred by the Statute of Limitations

The statute of limitations for professional negligence is two years after the Plaintiffs discover or should have discovered loss or damage plus actual injury. Cal Civ. Proc. Code § 339(1); *International*

Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal.4th 606, 608–609, 613 (1995) (accountant malpractice). Thus, the statute of limitations for Plaintiffs' thirtieth claim for negligence is two years.

The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent. *American Master Lease LLC*, 225 Cal.App.4th at 1479. Here, Plaintiffs twenty-eighth and twenty-ninth claims for breach of fiduciary duty do not allege fraud. Therefore, the statute of limitations is four years. *Id.*; Cal. Civ. Proc. Code § 343.

Additionally, the statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort. *American Master Lease LLC*, 225 Cal. App. 4th at 1478-79 (aiding and abetting breach of fiduciary duty); *Vaca v. Wachovia Mortgage Corp.*, 198 Cal.App.4th 737, 743–744 & n. 4 (2011) (aiding and abetting fraud). Here, Plaintiffs' thirty-first claim for relief alleges aiding and abetting breach of fiduciary duty and conversion. Therefore, the claim is governed either by the three year statute for conversion or the four year statute for breach of fiduciary duty. Cal. Civ. Proc. Code § 338(c)(1); *see Taylor v. Forte Hotels International*, 235 Cal.App.3d 1119, 1126-1127 (1991); *American Master Lease LLC*, 225 Cal.App.4th at 1479; Cal. Civ. Proc. Code § 343.

Finally, to the extent that restitution can be considered a claim, it is synonymous with unjust enrichment. *Dinosaur Development, Inc. v. White*, 216 Cal.App.3d 1310, 1314 (1989). Unjust enrichment has been described as a quasi-contractual form of common count for money had and received to recover money paid by fraud or mistake. As such, it is governed by the three-year limitation period applicable to fraud actions. *First Nationwide Savings v. Perry*, 11 Cal.App.4th 1657, 1670 (1992). Thus, if the Court declines to dismiss Plaintiffs' thirty-third claim for restitution, that claim is governed by the three year fraud statute of limitations. Cal. Civ. Proc. Code § 338(d).

California courts have often stated the maxim that "[i]n ordinary tort and contract actions, the statute of limitations ... begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action ... does not toll the statute." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 187 (1971). This so-called "date-of-injury" accrual rule advances the fundamental policy underlying statutes of limitation: protecting "potential defendants by affording them an opportunity to gather evidence while facts are still fresh." *Davies v. Krasna,* 14 Cal.3d 502, 512 (1975). Thus, a cause of action accrues ***at the moment the party who owns it is***

entitled to bring and prosecute an action thereon. *April Enterprises, Inc v. KTTV*, 147 Cal.App.3d 805, 822-823 (1983) *citing Howe v. Pioneer Mfg. Co.*, 262 Cal.App.2d 330, 339-340 (1968).

Here, each of Plaintiffs' claims accrued in 2009 when the Tribe alleges that APC facilitated the liquidation of its pension plan. FAC, ECF 30, ¶ 717. At that time, Plaintiffs acknowledge they suffered actual damages through diversions of pension funds ending in 2008 to the individual defendant. FAC, ECF 30, ¶¶ 229, 234, 238, 245, 250. Thus, ***at the moment the party who owns it is entitled to bring and prosecute an action thereon.*** *April Enterprises*, 147 Cal.App.3d at 822-823. Plaintiffs' complaint was filed on March 10, 2015. Complaint, ECF 1. Thus, even assuming the alleged liquidation of the pension plan occurred on December 31, 2009, the complaint was filed more than four years after Plaintiffs were allegedly wronged and suffered injury. Accordingly, regardless of the theory of relief, Plaintiffs failed to timely file their complaint against APC and it should be dismissed.

Even if Plaintiffs can claim advantage of the discovery rule, *see, e.g. Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 221 (1991), the discovery rule is of no help to them. As indicated above all of the facts necessary to start the running of the statutes were available to the Plaintiffs by the end of 2009 to put them on notice of wrongdoing. Suspicion alone is enough to trigger the running of the limitations period. *Jolly v. Eli Lilly & Co.* 44 Cal.3d 1103, 1110 (1988). As the California Supreme Court in *Jolly* stated:

> "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. As we said in Sanchez and reiterated in Gutierrez, the limitations period begins once the plaintiff " ' "has notice or information of circumstances to put a reasonable person on inquiry...." ' " [Citations omitted.] A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, *it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.*

Id. (emphasis added).

Here, Plaintiffs knew facts going back to 2009. And suffered injury due to the alleged acts of APC in 2009. Consequently, the statute of limitations has run on each of Plaintiffs' claims against

APC and they should be dismissed.

B. Whether by Motion to Strike Under Rule 12(f) or by Motion to Dismiss Under Rule 12(b)(6), the Court Should Strike/Dismiss Plaintiffs Conclusory Punitive Damage Allegations Against APC

1. Plaintiffs' Punitive Damage Claims Against APC

Plaintiffs allege the following in support of their claim for punitive damages against APC:

> 720. Abettor Defendants Moore, Haness, and APC acted willfully, maliciously, and with fraud and oppression in taking such actions and making such omissions. FAC, ECF 30, ¶ 720.
>
> 727. Abettor Defendants Moore, Haness, and APC acted willfully, maliciously, and with fraud and oppression in taking such actions and making such omissions. FAC, ECF 30, ¶ 727.
>
> 732. Defendants Moore, Haness, and APC acted willfully, maliciously, and with fraud and oppression in taking such actions and making such omissions. FAC, ECF 30, ¶ 732.
>
> 741. Defendants Moore, Haness, and APC acted willfully, maliciously, and with fraud and oppression in taking such actions and making such omissions. FAC, ECF 30, ¶ 741.

Further, Plaintiffs allege in Paragraph 4 of the Demand for Judgment that the Court "Award Plaintiffs treble, multiple, punitive, and/or other exemplary damages, in an amount to be determined at trial." FAC, ECF 30, at 187:2-3.

2. The Method for Removing Punitive Damage Claims at the Pleading Stage is Not Entirely Clear

Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970 (9th Cir. 2010), a case involving a motion to strike a request for lost profits and consequential damages, has cast some doubt on the practice of using motions to strike for such purposes, and indicated that the proper method was to bring the motion as a motion to dismiss. Subsequent to *Whittlestone*, Judge Shubb of this Court noted, however, that a motion to strike was the proper mechanism because "under California law punitive damages are merely a remedy that may attach to a particular cause of action, not a separate cause of action in and of themselves. Given that one cannot state a 'claim' for punitive damages, it seems somewhat nonsensical, therefore, to think of dismissing a claim for punitive damages. *Garcia v. M-F Ath. Co.*, 2012 U.S. Dist. LEXIS 20411, 13-15 & n. 4, (E.D. Cal. Feb. 16, 2012). Likewise, Judge Ishii of this Court also held subsequent to *Whittlestone* – citing *Nurse v. United States*, 226 F.3d 996, 1004-05 (9th

Cir. 2000), a case affirming the striking of prayer for punitive damages and attorneys' fees – may be used to strike a prayer for relief where the damages sought are not recoverable as a matter of law. *I.R. v. City of Fresno*, 2012 U.S. Dist. LEXIS 126936, 5 (E.D. Cal. Sept. 5, 2012). Additionally, in *Susilo v. Wells Fargo Bank, N.A.*, 796 F.Supp.2d 1177, 1196 (C.D. Cal. 2011) the Central District indicated that a court may strike under Rule 12(f) a prayer for relief which is not available as a matter of law.

However, even if the Court may not strike punitive damage claims under Rule 12(f), the Court may convert the Rule 12(f) motion to a Rule 12(b)(6) motion to dismiss. *Kelley v. Corr. Corp. of Am.*, 750 F.Supp.2d 1132, 1138 (E.D. Cal. 2010). Thus, whether by way of a motion to strike under rule 12(f) or a motion to dismiss under Rule 12(b)(6), the Court can remove Plaintiffs' punitive damage allegations against Plaintiff.

3. *Twombly and Iqbal* Provide the Correct Standard for Assessing Plaintiffs' Punitive Damage Claims

APC acknowledges that federal rather than state standards govern the pleading requirements applicable to Plaintiffs' claims for punitive damages. See *Neveau v. Fresno*, 392 F.Supp.2d 1159, 1183-1184 (E.D. Cal. 2005). Nevertheless, *Twombly* and *Iqbal* provide the correct standard with which to analyze Plaintiffs' punitive damages claims. *Kelley*, 750 F.Supp.2d at 147. The *Kelley* court reasoned:

> First, the pleading standards set forth in *Twombly* and *Iqbal* more closely approximate standards that are well established in California law. As this court has observed concerning standards for award of punitive damages under California law:
>
> > "Allegations that the acts ... were 'arbitrary, capricious, fraudulent, wrongful and unlawful,' like other adjectival descriptions of such proceedings, constitute mere conclusions of law ..." *Faulkner v. California Toll Bridge Authority*, 40 Cal.2d 317, 329, 253 P.2d 659 (1953); see *Letho v. Underground Construction Co.*, 69 Cal. App. 3d 933, 944, 138 Cal. Rptr. 419 (1997) (facts and circumstances of fraud should be set out clearly, concisely, and with sufficient particularity to support punitive damages); *Smith v. Superior Court*, 10 Cal.App.4th 1033, 1042, 13 Cal.Rptr.2d 133 (1992) (punitive damages claim is insufficient in that it is "devoid of any factual assertions supporting a conclusion petitioners acted with oppression, fraud or malice."); *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977) ("conclusory characterization of defendant's conduct as intentional, willful and fraudulent

> is a patently insufficient statement of 'oppression, fraud, or malice, express or implied,' within the meaning of section 3294").
>
> *Endurance American Specialty Ins. Co. v. Lance*, 2010 U.S. Dist. LEXIS 100467, 2010 WL 3619476 (E.D. Cal. 2010) at *17. Second, and equally supportive of the applicability of the higher pleading standards, is the express policy that "[p]unitive damages are never awarded as a matter of right, are disfavored by the law, and should be granted with the greatest of caution and only in the clearest of cases." 2010 U.S. Dist. LEXIS 100467, [WL] at * 18 (quoting *Henderson v. Security Pacific Nat'l Bank*, 72 Cal.App.3d 764, 771, 140 Cal. Rptr. 388 (1977).

Kelley, 750 F.Supp.2d at 1147.

Accordingly, the Court should apply the pleading standards set forth in *Twombly* and *Iqbal* to Plaintiffs' claims for punitive damages under California law because it serves the salutary purpose of harmonizing standards applicable to state and federal proceedings while avoiding unnecessary pleading distinctions between consequential and punitive damages. *Id.*

4. Plaintiff's Allegations And Prayer for Punitive Damages Against Should Be Stricken/Dismissed From The Complaint

California law has imposed exceedingly specific and strict pleading requirements on allegations and prayers for exemplary or punitive damages. The mere allegation an intentional tort was committed is not sufficient to warrant an award of punitive damages. *Grieves v. Superior Court*, 157 Cal.App.3d 159, 166 (1984). In other words, the defendant must have committed a tort and have acted with malice, oppression or fraud. *Myers Building Indus. v. Interface Technology, Inc*., 13 Cal.App.4th 949, 961 (1993). A claim of negligence cannot support an award of punitive damages. *Jackson v. Johnson*, 5 Cal.App.4th 1350, 1354 (1992). Furthermore, a punitive damage claim cannot rest on grossly negligent or even reckless conduct. *Bell v. Sharp Cabrillo Hosp*., 212 Cal.App.3d 1034 (1989); *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co*. 185 Cal.App.3d 1149, 1155 (1986). Rather, in cases involving conduct performed without intent to harm, a finding of "malice" for punitive damages purposes requires proof by clear and convincing evidence that defendant's tortious wrong amounted to "despicable conduct" and that such despicable conduct was carried on with a "willful and conscious disregard" of the rights or safety of others. Cal. Civ. Code § 3294(c)(1). Likewise, "oppression" for purposes of a punitive damage award means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *Id.* § 3294(c)(2).

California Civil Code section 3294, though, makes no attempt to define "despicable conduct" within the context of punitive damages. However, "[u]sed in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.'" *College Hosp., Inc. v. Superior Court,* 8 Cal.4th 704, 725 (1994) (quoting Oxford English Dictionary (2nd ed. 1989)); *see American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton,* 96 Cal.App.4th 1017, 1050 (2002) ("despicable" suggests "the character of outrage frequently associated with crime.") Accordingly, the California Approved Civil Instructions define "despicable conduct" as "conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people." CACI 3940, 3941.

Additionally, "despicable conduct" by itself does not itself amount to "malice" or "oppression" for punitive damages purposes. The trier of fact must go on to find that the despicable conduct was carried on by the defendant with a willful and conscious disregard of the rights or safety of others. Cal. Civ. Code § 3294(c)(1) & (2); *see* CACI 3940, 3941. Thus, a plaintiff must show that the defendant both (1) was aware of the probable dangerous consequences of his or her conduct; and (2) willfully and deliberately failed to avoid those consequences. *Taylor v. Superior Court,* 24 Cal.3d 890, 895-896 (1979); *Mock v. Michigan Millers Mut. Ins. Co.,* 4 Cal.App.4th 306. 328-329 (1992); *Hoch v. Allied-Signal, Inc./Bendix Safety Restraints Division,* 24 Cal.App.4th 48, 61 (1994); see CACI 3940, 3941. Essentially, it must appear (by clear and convincing evidence) that defendant's conduct was so "wanton and willful" that injury to others was a virtual certainty. *Taylor,* 24 Cal.3d at pp. 895-896; *see also Weisman v. Blue Shield,* 163 Cal.App.3d 61 (1984). Indeed, California Supreme Court cases have emphasized that subjective awareness is essential. "There must be circumstances of ... such a *conscious and deliberate disregard of the interests of others that* ... [defendant's] *conduct may be called willful or wanton*." *Taylor,* 24 Cal.3d at pp. 894-895 (emphasis in original); see *Hasson v. Ford Motor Co.* 32 Cal.3d 388, 402 (1982).

Here, Plaintiffs' defective charging allegations are conclusory statements completely unsupported by facts that establish the requisite elements of malice, oppression or fraud. Paragraphs 720, 727, 732, and 741, do nothing more than make a cursory claim of that "APC acted willfully, maliciously, and with fraud and oppression in taking such actions and making such omissions." FAC,

ECF 30, ¶¶ 720, 727, 732, 741. Plaintiff's claims for punitive damages are unsupported by allegation of any facts to establish how APC acted willfully, maliciously, and with fraud and oppression. Accordingly, Plaintiffs' conclusory punitive damage claims fail to meet the standards of *Twombly* and *Iqbal*, and thus must be removed either by striking them under Rule 12(f) or dismissing them under Rule 12(b)(6).

IV. CONCLUSION

The Court should dismiss the FAC against APC on multiple grounds. First, Plaintiff Paskenta Enterprises Corporation has failed to set forth any claims against APC. Second, Plaintiffs fail to establish that APC caused them any damage. Third, Plaintiffs fail to establish a claim for breach of fiduciary duty by APC. Fourth, Plaintiffs fail to establish a claim for aiding and abetting against APC. Fifth, Plaintiffs' claims are barred by the statute of limitations. Finally, Plaintiffs have failed to establish their punitive damage claims against APC, and those claims and the prayer for punitive damages should either be stricken under Rule 12(f) or dismissed under Rule 12(b)(6).

Dated: May 15, 2015

MURPHY, PEARSON, BRADLEY & FEENEY

By /s/ Robert W. Lucas
Robert W. Lucas
Attorneys for Defendant
ASSOCIATED PENSION CONSULTANTS, INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that the above and foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system and was E-Mailed to all parties listed below on May 15, 2015, which will send notification of such filing to the following:

MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF DEFENDANT ASSOCIATED PENSION CONSULTANT, INC'S MOTION TO DISMISS FIRST AMENDED COMPLAINT [FRCP 12(b)(6)] AND TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT [FRCP 12(f)]

Stuart G. Gross Gross Law, P.C. The Embarcadero Pier 9, Suite 100 San Francisco, CA 94111 E-Mail: sgross@gross-law.com Email: dgoldberg@gross-law.com Email: kso@gross-law.com	Attorney For Plaintiffs
Joseph R. Saveri Andrew M. Purdy Joseph Saveri Law Firm, Inc. 505 Montgomery Street, Suite 625 San Francisco, CA 94111 Email: jsaveri@saverilawfirm.com Email: apurdy@saverilawfirm.com Email: krayhill@saverilawfirm.com Email: PLall@saverilawfirm.com	Attorney For Plaintiffs
John M. Murray Liberty Law, A.P.C. 2150 N. Main Street, Suite 10 Red Bluff, CA 96080 Email: john@libertylawapc.com Email: Sue@libertylawapc.com	Attorney For Defendants INES CROSBY, JOHN CROSBY, LESLIE LOHSE, LARRY LOHSE, TED PATA, JUAN PATA, CHRIS PATA, SHERRY MYERS
John M. Peebles Fredericks Peebles & Morgan LLP 2020 L Street, Suite 250 Sacramento, CA 95811 Email: jpeebles@ndnlaw.com	Attorney For Defendants INES CROSBY, JOHN CROSBY, LESLIE LOHSE, LARRY LHSE, TED PATA, JUAN PATA, CHRIS PATA, SHERRY MYERS, F
Michael T. Fogarty Mike Kuzmich Boutin Jones, Inc. 555 Capitol Mall, Suite 1500 Sacramento, CA 95814 Email: tfogarty@boutinjones.com	Attorney For Defendants QUICKEN LOANS, INC.

Email: MKuzmich@boutinjones.com
Email: TDoyle@boutinjones.com

Kevin M. Seibert
Becky Stockman
Downey, Brand, Seymour & Rohwer
3425 Brookside Road, Suite A
Stockton, CA 95219-1757
Email: kseibert@downeybrand.com
Email: bstockman@downeybrand.com
Email: ajohnson@downeybrand.com

Attorney For Defendants
HANESS & ASSOCIATES, LLC AND ROBERT M. HANESS

Natalie P. Vance
Nancy Vanderhorst
Klinedinst PC
801 K Street, Suite 2800
Sacramento CA 95814
Email:nvance@klinedinstlaw.com
Email: nvanderhorst@klinedinstlaw.com
Email: KBlake@klinedinstlaw.com

Attorney For Defendants
GARTH MOORE AND GARTH MOORE INSURANCE AND FINANCIAL SERVICES, INC.

Scott H. Jacobs
Casey Kurtis
Reed Smith LLP
355 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Email: shjacobs@reedsmith.com
Email: kcurtis@reedsmith.com
Email: cspoon@reedsmith.com

Attorney For Defendants
UMPQUA BANK AND UMPQUA HOLIDNGS CORPORATION

John H. McCardle
Kraft Opich LLP
7509 Madison Avenue, Suite 111
Citrus Heights, CA 95610
Email: jmccardle@kraftopich.com
Email: mopich@kraftopich.com

Attorney For Defendants
CORNERSTONE COMMUNITY BANK, CORNERSTONE COMMUNITY BANCORP AND JEFFREY FINCK

Mani Sheik
Sheik Law
1 Maritime Plaza, Suite 100
San Francisco, CA 94111
Email: mani@sheiklaw.us

Attorney For Defendants
CRP III WEST 141ST LLC, CASTELLAN MANAGING MEMBER LLC, CRP WEST 168TH STREET LLC, CRP SHERMAN AVENUE

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on May 15, 2015.

By /s/ Dyonna S. Bloxson
Dyonna S. Bloxson