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10 GARTH MOORE; GARTH MOORE
11 INSURANCE AND FINANCIAL
12 SERVICES, INC.

13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF CALIFORNIA**

15 PASKENTA BAND OF NOMLAKI
16 INDIANS; and PASKENTA
17 ENTERPRISES CORPORATION,

18 Plaintiffs,

19 v.

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

Defendants,

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

Nominal Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS GARTH MOORE AND
GARTH MOORE INSURANCE AND
FINANCIAL SERVICES, INC.'S MOTION
TO DISMISS**

[FED. R. CIV. P. 12(b)(6)]

**[Notice of Motion and Motion Filed
Concurrently Herewith]**

Date: July 27, 2015
Time: 9:00 a.m.
Courtroom: 10
Judge: Garland E. Burrell, Jr.
Magistrate Judge: Craig M. Kellison

Complaint Filed: March 10, 2015
Trial Date: None set

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1 Defendants, GARTH MOORE; GARTH MOORE INSURANCE AND
2 FINANCIAL SERVICES, INC. (collectively “Moore”) submit the following
3 Memorandum of Points and Authorities in support of their Motion to Dismiss the Thirty-
4 First Claim for Relief against Moore pursuant to Rule 12(b)(6). The subject dispute is an
5 inter-tribal dispute over wrongful acts of tribe members exceeding their authority.
6 Plaintiff’s allegations of Racketeer Influenced and Corrupt Organization Act (“RICO”)
7 violations do not provide a basis for federal question jurisdiction in the intra-tribal
8 dispute. The First Amended Complaint (“FAC”) (See USDC Docket #30 filed 4/17/15)
9 does not allege sufficient factual matter to state a claim of relief in the Thirty-First Claim
10 for Relief against Moore for Aiding and Abetting RICO Defendants’ Conversion and
11 Breaches of Fiduciary Duties because the claim is grounded in RICO.

12 **I.**

13 **INTRODUCTION**

14 This lawsuit involves claims of the Paskenta Band of Nomlaki Indian tribe (“The
15 Tribe”) that, starting in 1998, certain tribe member and non-member individuals and
16 entities illegally took control of tribal income and property, converted millions of dollars
17 of tribal monies to their own personal use and to the exclusion of other tribe members to
18 whom said monies and property rightfully belonged.

19 The FAC alleges a number of claims against various tribal defendants and non-
20 tribal defendants, including RICO violations, breaches of fiduciary duties, civil
21 conspiracy, and aiding and abetting various wrongful acts. The Thirty-First Claim for
22 Relief alleges Moore fraudulently, wilfully and maliciously assisted RICO Ringleaders
23 and RICO defendant, Sherry Myers in breaching their fiduciary duties and in effecting
24 conversions of tribal monies through the Tribal retirement plans.

25 The moving parties are Defendant, Garth Moore and his company, Garth Moore
26 Insurance and Financial Services, Inc. Moore served as a financial advisor to tribal
27 members, which Moore believed were authorized by the tribal council to take charge of
28 the tribe’s various financial/investment endeavors, including approval of retirement and

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1 pension benefits plans. Moore advised and assisted the tribe with investment decisions
2 regarding the Tribe’s defined pension plan and the Tribe’s 401(k) plan. Moore also
3 advised the Tribe regarding health insurance offerings. The latter are not the subject of
4 this lawsuit.

5 The FAC alleges that certain defendants dubbed “RICO Ringleaders” used their
6 control of the Tribe and its money to execute a scheme to defraud the Tribe. One of the
7 ways in which this goal was accomplished was by way of the defined benefits plan and
8 401(k) plan. The “Abettor Defendants”, including Moore, are alleged to have
9 substantially assisted the Ringleaders and RICO Defendants’ conversion and breaches of
10 fiduciary duties the latter owed the Tribe.

11 **II.**

12 **LEGAL STANDARD**

13 Federal Rule of Civil Procedure Rule 12(b)(6) authorizes a defendant to move,
14 before filing a responsive pleading, for dismissal of a plaintiff’s claim(s) if, plaintiff fails
15 to state a claim upon which relief can be granted. Fed. R. Civ. Proc. R. 12(b)(6).

16 **III.**

17 **RELEVANT FACTUAL ALLEGATIONS**

18 The FAC identifies four individual Tribe members as the “RICO Ringleaders”.
19 Together with the latter group of defendants, five other Tribe members are included in
20 the group of “RICO Defendants” who, beginning in 1994, allegedly wrongfully took
21 control of the Tribe and devised a scheme to steal and embezzle from the Tribe. (FAC ¶¶
22 2-3; 27-36) The RICO Defendants allegedly embezzled more than \$20 million of the
23 Tribe’s money through paying themselves with excessive retirement compensation and
24 non-retirement compensation, expensive vacations, private jet travel, sporting events,
25 luxury homes, custom sports cars, etc. (FAC ¶¶6-10; 37-55; 175-180)

26 One of the ways in which the RICO Defendants, in part with alleged assistance
27 they had from “Abettor Defendants”, accomplished their alleged embezzlement scheme
28 was through contributions to unauthorized retirement plans, including a defined benefit

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1 plan (tribal pension plan) and a 401(k) plan designed and administered by the Abettor
2 Defendants. (FAC ¶¶37-55; 213-220) The tribe pension plan and 401(k) were allegedly
3 inappropriately established, designed, funded, and administered. Among the problems
4 with the plans were the facts that (1) only the Ringleader Defendants and Sherry Myers
5 were allowed to participate in the plans; (2) the tribal pension plan was a short-term plan,
6 employed an extraordinarily high actuarial formula; (3) there were high investment gains
7 and losses in the plans. (FAC ¶¶213-226)

8 The FAC alleges Garth Moore served as a financial advisor to the Tribe and
9 assisted the RICO Ringleaders in setting up and administering the retirement plans.
10 (FAC ¶¶48) Moore and other Abettor defendants allegedly assisted the RICO defendants
11 in establishing, funding, and modifying the tribal plans in order to divert as much money
12 as possible to themselves without Tribal Council authorization. (FAC ¶222) Moore was
13 allegedly responsible for implementing the investment choices of the trustees of the
14 plans, Ringleaders John Crosby and Leslie Lohse. (FAC ¶225)

15 The Abettor defendants, including Moore, allegedly substantially assisted the
16 Ringleaders and RICO defendants in their conversion and breaches of fiduciary duties to
17 the Tribe, and as such, are allegedly liable for the harm caused to the Tribe by the theft
18 and breaches perpetrated by the RICO defendants, all in violation of RICO, and did so,
19 wilfully and maliciously. (FAC ¶¶733-741)

20 IV.

21 ARGUMENT

22 **1. Plaintiff's Claim for Relief Against Moore for Aiding and Abetting the**
23 **Conversion and Breaches of Fiduciary Duties of the RICO Defendants Fails.**

24 The court lacks jurisdiction over the tribe's RICO claims against the RICO
25 defendants because the dispute, at its essence, is an inter-tribal dispute over wrongful acts
26 of tribe members exceeding their authority contrary to tribal constitution.

27 Indian tribes retain elements of sovereign status, including the power to protect
28 tribal self-government and to control internal relations. "A tribe's right to define its own

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1 membership for tribal purposes has long been recognized as central to its existence as an
2 independent political community." *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. Minn.
3 1996), citing, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 32 (1978).

4 In *Smith v. Babbitt*, members and nonmembers of Shakopee Mdewakanton Sioux
5 sued both tribal and federal officials under the Indian Gaming Regulatory Act (IGRA),
6 Indian Civil Rights Act (ICRA), Indian Reorganization Act (IRA), RICO, and the tribal
7 constitution based upon their position that some ineligible persons were improperly
8 receiving payments, and other eligible persons were being denied payments to which they
9 were entitled. Despite alleging violations of RICO and other federal statutes, the court
10 determined that at its core, the conflict was an intra-tribal dispute over membership. In
11 dismissing the action as one being "properly left to tribal authorities," the court held that,
12 "[f]ederal court jurisdiction does not reach this matter simply because the plaintiffs
13 carefully worded their complaint." *Smith*, 100 F.3d at 559.

14 Similarly, *Miccosukee Tribe of Indians v. Cypress*, 975 F.Supp.2d 1298 (S.D. Fla
15 2013), involved RICO, conspiracy to commit RICO, theft, fraud, aiding and abetting
16 fraud, embezzlement, breach of fiduciary duty, and misrepresentation claims of the tribe
17 against several tribal members, as well as, non-tribal defendants who provided legal
18 counsel and financial advice to the tribe. The complaint alleged as members of the RICO
19 Enterprise, "associated with each other over the course of five years for the common
20 purpose of money laundering, mail fraud, and engaging in monetary transactions in
21 criminally derived property from the tribe, in order to obtain large sums of money and
22 additional benefits, including but not limited to continued employment and other
23 substantial financial benefits." The complaint alleged that RICO defendants hired a team
24 of people, based upon their profession and skills, to assist in embezzling millions of
25 dollars and concealing the embezzlement from the Miccosukee Tribe. RICO defendants
26 allegedly used these funds for personal expenses and activities, such as gambling,
27 investing in real estate, and purchasing luxury vehicles, jewelry, fine dining, and
28 luxurious vacations. Other defendants allegedly participated through concealment and

1 other assistance and benefited from the embezzlement scheme. Defendants were also
2 accused of managing the tribe's funds in a manner that allowed suspicious financial
3 transactions to occur without complying with banking regulations. There were also
4 allegations that the RICO defendants used abettor defendants to advise them regarding
5 investment of the proceeds.

6 The *Miccosukee* court followed the ruling of the Eighth Circuit Court of Appeals
7 finding in *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d
8 749 (8th Cir. 2003) that RICO did not provide a basis for federal question jurisdiction in
9 the intra-tribal dispute between tribal councils because the alleged misconduct of the
10 elected council could not be considered qualifying predicate violations under RICO.
11 *Miccosukee Tribe of Indians v. Cypres*, *supra*, at 1306-1307. The Miccosukee Tribe was
12 asking the Court to decide that the defendants unlawfully exceeded their authority as
13 officers and agents of the Miccosukee Tribe when they engaged in behavior the
14 Miccosukee Tribe contends were not in its interest. The suit was deemed internal to the
15 organization and dismissed for lack of subject matter jurisdiction.

16 The instant dispute is analogous to those in the cases above. Plaintiff Tribe claims
17 certain tribe members illegally took control of tribal income and property, converted
18 millions of dollars of tribal monies to their own personal use and to the exclusion of other
19 tribe members to whom said monies and property rightfully belonged. The Tribe claims
20 income, including casino income, that rightfully belonged to all tribal members was
21 largely converted, without authorization of the Tribal Council, to the benefit of a few
22 members, over a short period of time, and to the exclusion of other tribal members.

23 The FAC confirms the Tribe was recognized as a sovereign entity in 1994. (FAC
24 ¶¶2, 24) Tribal government, Council, and Constitution were in place since as early as
25 19938. (FAC ¶62, 75) The Tribal Constitution delineates the duties and functions of the
26 Council's treasurer with regard to receiving, preserving, and safeguarding the tribal
27 funds. (FAC ¶89)

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1 The nature of the alleged wrongful actions of the RICO Defendants that form the
2 basis of the FAC can only be characterized as an inter-tribal dispute over wrongful acts of
3 tribe members exceeding their authority contrary to tribal constitution. As such, and
4 consistent with the *Sac & Fox* and *Miccosukee* rulings, these allegations cannot form the
5 basis of RICO claims.

6 **2. The FAC Fails to State a RICO Claim Upon Which an Aiding and Abetting**
7 **the Conversion and Breaches of Fiduciary Duties Can be Based.**

8 Dismissal pursuant to Rule 12(b)(6) is proper where the complaint fails to allege
9 either a cognizable legal theory *or* sufficient facts to support a cognizable legal theory.
10 *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).
11 The court cannot accept as true unreasonable inferences, allegations that are merely
12 conclusory, unwarranted deductions of fact, or legal characterizations cast in the form of
13 factual allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 987 (9th Cir.
14 2001); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also*
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

16 The elements for RICO claim are: 1) conduct; 2) of an enterprise; 3) through a
17 pattern; 4) of racketeering activity; and 5) causing injury to the plaintiff's business or
18 property. *Grimmett v. Brown*, (9th Cir. 1996) 75 F.3d 506, 510; 18 USCS §1962.

19 Racketeering is defined as indictable criminal acts, including mail fraud. *United*
20 *Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.* (9th
21 Cir. 1988) 857 F.2d 356. In addition, an enterprise is proven if there are multiple acts
22 against multiple victims over a period of time from which an inference that the conduct is
23 unlikely to stop can be reached. *Id.*

24 In order to set forth a claim of RICO violation, plaintiff must establish a pattern of
25 racketeering activity, that the racketeering predicates are related, and that they amount to
26 a pose of a threat of continued racketeering activity. *H.J. Inc. v. Northwestern Bell* (1989)
27 492 U.S. 229, 239.

28 ///

1 In order to establish aiding and abetting liability plaintiff must show that all other
2 requirements of RICO are met and that the defendants aided and abetted in at least two
3 predicate acts. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356
4 (3rd. Cir. 1987).

5 If the court deems the dispute an inter-tribal dispute that is necessarily outside the
6 court's jurisdiction and the RICO claims fail, then the aiding and abetting of the RICO
7 necessarily cannot stand.

8 Assuming, despite the above rulings, the RICO-based claims alleged against the
9 RICO defendants are determined to come within this court's jurisdiction, the aiding and
10 abetting claims against Moore should nevertheless be dismissed.

11 In the recent case *Salas v. Int'l Union of Operating Eng'rs*, the court considered
12 motions to dismiss plaintiff's claims for RICO violations brought by groups of
13 defendants. The court granted the motions and refused to allow civil RICO claims
14 premised upon aiding and abetting of the underlying predicate acts. *Salas v. Int'l Union*
15 *of Operating Eng'rs*, 2015 U.S. Dist. LEXIS 20077, 19-21 (C.D. Cal., 2015) The court
16 looked at the holding in *Central Bank of Denver* where the Supreme Court addressed the
17 question whether Section 10(b) of the Securities Exchange Act created a private cause of
18 action for aiding and abetting where the language of the statute included no such
19 language. The court observed that "Congress knows how to explicitly provide for civil
20 aiding and abetting liability when it intends to create it, and that nothing in the text of the
21 statute suggested such an unstated intent." *Central Bank of Denver v. First Interstate*
22 *Bank of Denver* (1994) 511 U.S. 164, 182-185. In light of *Central Bank of Denver*,
23 plaintiffs in *Salas* did not allege civil liability for aiding and abetting a RICO violation.
24 Instead, Plaintiffs alleged that certain named Defendants were liable as principal RICO
25 violators because they aided and abetted underlying RICO predicate offenses. The court
26 would not allow this. "An exception allowing civil RICO claims to be premised upon the
27 aiding and abetting of underlying predicate acts would swallow *Central Bank of Denver's*
28 rule foreclosing implicit civil aiding and abetting liability." *Salas v. Int'l Union of*

1 *Operating Eng'rs*, at p. 21.

2 In this case, the tribe alleges Moore defendants have liability for aiding and
3 abetting other defendants who are allegedly guilty of racketeering activities, including
4 conversion and breaches of their fiduciary duties to the tribe. The FAC alleges Moore
5 and others substantially assisted the RICO defendants in effecting conversions of tribe
6 money, which conversion was inherently a breach of the RICO defendant's duties to the
7 tribe. This cause of action is nearly identical to the claims in *Salas* as it is based on the
8 RICO claims alleged against the RICO defendants. Applying the *Central Bank of Denver*
9 rule, consistent with the holdings of all but one court, ¹prohibits the aiding and abetting
10 claim against Moore.

11 In meet and confer with Plaintiff's counsel before filing this motion, Moore's
12 counsel has come to understand that Plaintiff's position is that the aiding and abetting
13 claim against Moore is not a RICO-based claim but rather a claim that Moore aided and
14 abetted the Ringleaders' conversion and breaches of fiduciary duties only. This,
15 however, does not change the analysis. The claims of conversion and breaches of
16 fiduciary duties against the Ringleaders are grounded in the RICO violation claims. The
17 allegations in support of the RICO Defendants' conversion and misdeeds include the
18 phrase "with substantial assistance from the Abettor Defendants". These allegations are
19 presumably set forth in support of the claim that the abettor defendants were part of the
20 "enterprise". The tribal defendants are identified as RICO Defendants and RICO
21 Ringleaders. The predicate offenses are the conversion and the breaches of fiduciary
22 duties.

23 Moreover, each claim for relief in the FAC, including the Ninth, Thirteenth, and
24 Fourteenth Claims for Relief (Conversion, Breach of Fiduciary Duty of Undivided
25 Loyalty, and Breach of Fiduciary Duty of Reasonable Care) incorporates all allegations
26

27 ¹ The *Salas* court disagreed with the only court that has accepted the argument that aiding and abetting a predicate
28 act could constitute racketeering activity (*In re Trilegiant Corp., Inc.* 11 F.Supp. 3d 132, 141 (D. Conn 2014)).
Salas v. Salas v. Int'l Union of Operating Eng'rs, 2015 U.S. Dist. LEXIS 20077, 22 (C.D. Cal., 2015)

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1 contained in the previous paragraphs. As such, the conversion and breach of fiduciary
2 duty claims, as well as the aiding and abetting claim alleged in the Thirty-First Claim for
3 Relief are based on precisely the same allegations as the RICO claims. (FAC ¶¶ 519,
4 544, 560, 733) *See Trachsel v. Buchholz*, 2009 U.S. Dist. Lexis 4219 (N.D. Cal 2009),
5 citing, *Bald Eagle Area School Dist. V. Keystone Fin'l Inc.*, 189 F.3d 321, 330 (3d. Cir.
6 1999); *Javitch v. First Montauk Fin. Corp.*, 279 F. Supp. 2d 931, 943 (N.D. Ohio 2003)
7 (plaintiff "cannot avoid the RICO bar by pleading mail fraud [and] wire fraud . . . as
8 predicate offences . . . if the conduct giving rise to those predicate offenses amounts to
9 securities fraud" (internal quotation marks omitted)).

10 The instant situation is analogous to the aforementioned mail securities cases.
11 Conversion and breaches of fiduciary duties are the predicate offenses that support
12 Plaintiff's RICO claims against the Ringleaders and other RICO Defendants. The alleged
13 pattern of racketeering activity that supports the RICO claims is also alleged to support
14 the conversion and breaches of fiduciary duty claims. The aiding and abetting of the
15 latter claims, therefore, necessarily includes the RICO claim, which is barred by *Salas v.*
16 *Int'l Union of Operating Eng'rs, supra.*

17 If the court finds the aiding and abetting claim against Moore to stand separate
18 from RICO, the claim should nevertheless be dismissed without prejudice for lack of
19 jurisdiction as discussed above. (See *Harrell v. 29th Century Ins. Co.*, 934 F.2d 203 (9th
20 Cir. 1991); *Hoffarth v. Diversified Lending Group, Inc.*, 2011 U.S. Dist. Lexis 97370
21 (C.D. Cal. 2011)[It is generally preferable for a district court to not exercise supplemental
22 jurisdiction over pendent state law claims once federal claims have been dismissed.]

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IV.

CONCLUSION

Based on the foregoing, Moore respectfully request the Court dismiss the Thirty-First Claim for Relief for Aiding and Abetting against the Moore Defendants, without leave to amend.

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DATED: May 15, 2015

By: /s/ Kristin N. Blake

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