# No. 17-15486

## In the United States Court of Appeals for the Ninth Circuit

Paskenta Band of Nomlaki Indians, et al.,
Plaintiffs and Appellants,

vs.

Umpqua Bank, et al.,
Defendants and Appellees.

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## ANSWERING BRIEF

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Appeal from a Judgment of Dismissal
U.S. District Court for the Eastern District of California
Case No. 2:15-cv-00538, The Honorable Morrison England

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants and Appellees Umpqua Bank and Umpqua Holdings Corporation state the following:

Umpqua Bank is a wholly owned subsidiary of Umpqua Holdings Corporation, a publicly traded corporation. No publicly traded corporation owns more than 10% of Umpqua Holdings Corporation's stock.

DATED: June 5, 2018

REED SMITH LLP

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# TABLE OF CONTENTS

Page

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

**Statutes**

**Rules**



**Other Authorities**

# I. INTRODUCTION

Plaintiffs and Appellants Paskenta Bank of Nomlaki Indians (the "Tribe") and Paskenta Enterprises Corporation (collectively, "Plaintiffs") sued Defendants and Appellees Umpqua Bank and Umpqua Holdings Corporation (collectively, "Umpqua") claiming that Umpqua should be held financially responsible for alleged embezzlement of funds by the Tribe's authorized signatories on its deposit accounts. Specifically, Plaintiffs alleged that liability should follow because Umpqua failed to affirmatively detect and stop the alleged misappropriation by these authorized signers. In keeping with controlling California law, however, the district court found that Umpqua had no such duty to police the activities of authorized signers. California law instead facilitates the efficient and expeditious handling of banking transactions and expressly provides that banks have a duty to honor authorized debits and not interject themselves into their customers' affairs.

These public policies are codified in California Financial Code §§ 1450 & 1451, which state that a bank: (i) must disregard adverse claims to funds on deposit and continue to honor debits unless the adverse claims is made in the proper legal form; and (ii) can assume that debits initiated by authorized signers are drawn for a proper purpose, even when made payable to the authorized signer, unless the bank receives written notice from the depositor that the signer's authority has been revoked.

Here, Umpqua recognized the Tribe's designation of its authorized signers on its accounts until the Tribe provided written notice their authority had been revoked, just as the parties' deposit agreement and controlling law required. On this record, therefore, the district court correctly rejected Plaintiffs' negligent oversight and "aiding and abetting" claims. This Court should affirm.

## II. JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because the case involves claims brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Plaintiffs' Excerpts of Record ("ER") at 1203. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because on March 10, 2017 Plaintiffs filed a timely appeal from the district court's February 21, 2017 judgment. *See* ER 1 (judgment entered in favor of Umpqua); ER at 63-67 (notice of appeal).

## III. COUNTER-STATEMENT OF ISSUES PRESENTED

This appeal presents two issues for the Court to decide:

1. Can Umpqua be liable for allegedly failing to detect and stop embezzlement by the tribal officials who were designated as authorized signatories on the Tribe's depository accounts?

2. Have Plaintiffs alleged sufficient facts to demonstrate that Umpqua had "actual knowledge" that the Tribe's authorized signers were embezzling funds?

For the reasons explained below, the answer to both questions is "no."

## IV. COUNTER-STATEMENT OF THE CASE

### A. The Tribe Maintained Deposit Accounts At Umpqua On Which It Designated Two Tribal Officials As Authorized Signers

Prior to 2005, the Tribe opened several deposit accounts with Umpqua. ER at 432. The accounts were governed by a deposit agreement pursuant to which the Tribe designated two senior tribal officials—Ines Crosby (the Tribal Administrator) and Leslie Lohse (the Tribal Treasurer and a member of the Tribe's tribal council)—as its authorized signers. ER at 348, 354-55, 388, 642, 644-52.

The deposit agreement obligated Umpqua to honor the Tribe's designation of Ms. Crosby and Ms. Lohse as the Tribe's authorized signers on its accounts until the Tribe's governing body advised Umpqua in writing of a change. ER at 647. Specifically, the deposit agreement stated:

> **Business, Organization and Association Accounts –** Earnings in the form of interest, dividends, or credits will be paid only on collected funds, unless otherwise

> provided by law or our policy. *We may require the governing body of the entity opening the account to give us a separate authorization telling us who is authorized to act on its behalf. We will honor the authorization until we actually receive written notice of a change from the governing body of the entity.*

ER at 647 (emphasis added).

Consistent with this contractual provision, Umpqua honored the Tribe's designation of Ms. Crosby and Ms. Lohse as its authorized signers until May 30, 2014, when it received written notice from an attorney for the Tribe that Ms. Crosby and Ms. Lohse were no longer authorized to transact business on the Tribe's behalf. ER at 432-40.

### B. Beginning In April 2014, An Internal Tribal Leadership Dispute Arose Between The Freeman And Lohse Factions That Was Not Resolved Until September 2014

Prior to April 2014, the Tribe was led by a tribal council recognized by the Bureau of Indian Affairs ("BIA") and its day-to-day operations were managed by four senior tribal officials—Ms. Crosby, Ms. Lohse, John Crosby (Ms. Crosby's son, who served as Economic Development Director), and Larry Lohse (Ms. Lohse's husband, who served as Environmental Director). ER at 358; Umpqua's Supplemental Excerpts of Record ("SER") at 538-39. The Crosbys and Lohses were members of the Pata family—who, along with the Freeman and Swearinger families, were the principal families making up the Tribe. SER at 537-38. The tribal council was comprised of Andrew Freeman, David Swearinger, Geraldine Freeman, Allen Swearinger, and Ms. Lohse. SER at 540.

A tribal leadership dispute developed during an April 12, 2014 meeting of the Tribe's general membership.[1] SER at 540. Without prior notice, Mr. Freeman declared that the Pata family did not satisfy the Tribe's constitutional criteria for membership. SER at 540. He then purported to replace three members of the tribal council, including Ms. Lohse, with individuals he selected. SER at 540-41. This new tribal council (the "Freeman Council") then held a special meeting on April 16 where it purported to discharge the Crosbys and Lohses from their leadership positions and to exclude them from tribal land. SER at 541. The Freeman Council also called a special meeting of the Tribe's general membership on May 10, where the Tribe's membership was asked to approve the actions taken on April 12 and replace the remaining member of pre-April 12 tribal council. SER at 541.

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[1] The background of the leadership dispute already has been briefed in two companion appeals—*Paskenta Band of Nomlaki Indians v. Cornerstone Community Bank*, Ninth Circuit Case No. 17-15484 and *Paskenta Band of Nomlaki Indians v. Crosby*, Ninth Circuit Case No. 17-15238. Umpqua summarizes only the aspect of that dispute relevant to this case.

Not surprisingly, the Crosbys and Lohses disputed the validity of these actions. SER at 541. They maintained that the existing tribal council (the "Lohse Council") continued to be the Tribe's lawfully constituted governing body. SER at 541. Consequently, after the April 12 meeting, two competing factions—one aligned with the Freeman Council and one aligned with the Lohse Council—claimed to be in charge of the Tribe's affairs. SER at 541. Each one likewise maintained that the other faction was operating illegally. SER at 541.

As the leadership dispute unfolded, both the BIA and National Indian Gaming Commission ("NIGC") wrote letters expressing concern about what had transpired. ER at 658-61. While the BIA noted that it did not generally get involved in tribal leadership disputes, it indicated it would recognize the Lohse Council as the Tribe's last validly constituted governing body until the leadership dispute was resolved pursuant to the Tribe's internal documents and process. ER at 660-61; SER at 541. For its part, the NIGC expressed its "concern" over Mr. Freeman's actions in purporting to dismiss four members of the tribal council and exclude them from tribal property. ER at 658-59. The NIGC noted that in light of Mr. Freeman's actions, it appeared as though "the tribal government recognized by the BIA [was] not in control of the Band's gaming operations[,]" which would mean the Tribe's casino was operating illegally. ER at 658-59.

Then, in June of 2014, the leadership dispute took a more confrontational turn. The Lohse Faction retained a tribal police force and attempted to lock down the Tribe's casino. SER at 542. An armed standoff between the two factions ensued. SER at 542-43. The California Department of Justice was forced to intervene and obtained an injunction against both sides. SER at 542-43. After that, the two factions reached a mediated settlement to hold an election for the disputed seats in September 2014 and to retain the law firm Wilmer Cutler Pickering Hale and Dorr LLP to investigate the Tribe's financial affairs. ER at 380; SER at 360-65, 543.

Just over two months later, in early September 2014, WilmerHale issued a fifty-four page report detailing the results of its investigation and offering a series of recommendations for the Tribe going forward. SER at 523-600. Among other things, the report concluded that the Crosbys and Lohses appeared to have paid themselves millions of dollars in unauthorized compensation and regularly made unauthorized withdrawals from the Tribe's accounts for personal use. SER at 526-30. Thereafter, the Freeman faction's candidates prevailed in the election and the Freeman Council assumed control of the Tribe's affairs. ER at 345, 380.

### C. Plaintiffs File This Lawsuit, Alleging Umpqua And Other Defendants Are Liable For "Aiding And Abetting" Embezzlement By The Lohse Faction

After the September 2014 election, Plaintiffs filed this lawsuit. SER at 665-835. Plaintiffs relied on WilmerHale's report and investigation as the predicate for their allegations and claims. SER at 675. They named as defendants: (i) the Crosbys and Lohses (who Plaintiffs have referred to as the "RICO Ringleaders"); (ii) five individuals previously affiliated with the Tribe who were allegedly aligned with the Crosbys and Lohses; and (iii) various third-parties (including Umpqua) who alleged "aided and abetted" the embezzlement. SER at 677-82.

In its first two iterations,[2] Plaintiffs' complaint alleged that during the time the Crosbys and Lohses were in charge, they abused their positions of power by embezzling millions of dollars from the Tribe and paying themselves grossly excessive salaries and benefits. ER at 1203-08; SER at 671-76. They further alleged that the third-parties against whom they had filed suit—including Associated Pension Consultants, Inc. ("APC"), Cornerstone Community Bank, Cornerstone Community Bancorp., and Jeffrey Finck (collectively, "Cornerstone"), Garth Moore Insurance and

[2] Plaintiffs filed their initial complaint on March 10, 2015 and, by stipulation of the parties, filed a first amended complaint on April 17, 2015 before any of the defendants had responded to their initial complaint. SER at 661-64.

Financial Services, Inc. and Garth Moore (collectively, "Garth Moore"), and Umpqua—should be held liable for "aiding and abetting" the embezzlement. ER at 1211-15; SER at 679-82.

With respect to Umpqua, Plaintiffs alleged that Umpqua knew or should have known something was wrong based on the frequency of cash withdrawals on the Tribe's accounts, the expensive clothes and jewelry worn by Ms. Crosby, and the reports about allegations of impropriety by tribal officials that had appeared in a local newspaper. ER at 1279-83, 1359-61; SER at 744-47, 817-24.

### D. The District Court Finds Umpqua Had No Legal Duty To Police The Tribe's Accounts And Dismisses Plaintiffs' Claims, While Granting Leave To Amend

Umpqua moved to dismiss Plaintiffs' lawsuit because it had no duty under California law to police activities on its deposit accounts and thus could not be held liable for allegedly failing to detect misappropriation by the Tribe's authorized account signers. SER at 636-56. Invoking California Financial Code § 1451 and the California Court of Appeal's decision in *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532 (1998), Umpqua argued that the Tribe's allegations that Umpqua "knew or should have known" the withdrawals were improper did not state a claim for relief. SER at 645-48. Rather, under controlling California law, the only way Umpqua could be liable was if it had "actual knowledge" of the embezzlement, which Plaintiffs had not plausibly alleged. SER at 651-54.

The other defendants filed their own motions to dismiss. ER at 1427-28. Notably, the Crosbys and Lohses argued that the district court lacked subject matter jurisdiction to consider Plaintiffs' claims because they implicated a non-justiciable tribal governance dispute between the Lohse and Freeman factions. SER at 630-35.

While the defendants' motions were pending, Plaintiffs sought a preliminary injunction freezing the Crosbys' and Lohses' finances. SER at 479-517. In support of their claims, they submitted a copy of the WilmerHale report and asked the district court to accept it as evidence that Plaintiffs were likely to prevail. SER at 484-85, 519-600.

The district court granted Umpqua's motion to dismiss, but denied the motion filed by the Crosbys and Lohses. ER at 39-62. It agreed with Umpqua that Plaintiffs' allegations were insufficient to state viable claims for relief because Umpqua had no duty to police activity on the Tribe's accounts. ER at 44-46, 48-49. However, it granted Plaintiffs leave to amend. ER at 46, 49. The court denied the Crosbys' and Lohses' motion because they had not demonstrated that Plaintiffs' claims were so intertwined with the leadership dispute as to deprive the court of jurisdiction. ER at 41-

43. The court also denied Plaintiffs' request for a preliminary injunction, finding that Plaintiffs had not made a showing that the Crosbys and Lohses were likely to dissipate their assets.[3] SER at 193-95.

### E. Plaintiffs Add Allegations About Umpqua's Purported Awareness Of The Leadership Dispute, The District Court Again Finds That Plaintiffs' Claims Are Legally Infirm And Provides Another Opportunity To Amend

Before filing their amended complaint, Plaintiffs asked for, and were given, the opportunity to depose Umpqua's employees. SER at 188-92. After that, Plaintiffs added various allegations to their second amended complaint relating to Umpqua's alleged knowledge of the leadership dispute. ER at 769-76. For example, Plaintiffs now alleged that in April 2014, Ms. Crosby informed an Umpqua branch manager that a competing tribal faction had attempted to exclude her from tribal land and terminate her position. ER at 769-70. They further alleged that after acquiring this information and reading newspaper reports about purported misconduct by tribal officials, Umpqua asked Ms. Crosby to provide documentation indicating she still was entitled to transact business on the Tribe's accounts. ER at 770-71. In response, Ms. Crosby brought to Umpqua documents from the BIA and

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[3] Plaintiffs appealed the denial of their motion for preliminary injunction and this Court remanded with directions that the district court make further factual findings. *Paskenta Band of Nomlaki Indians v. Crosby*, 672 F. App'x 762, 763-64 (9th Cir. 2017). On remand, the district court again denied the motion and Plaintiffs have appealed that ruling as well. ER at 1449-50.

NIGC addressing the authority issue. ER at 773; *see also* ER at 654, 658-61. The complaint then criticized Umpqua for relying on these materials, alleging that they were inadequate because they did not mention Ms. Crosby by name or explicitly discuss her authority to transact business on the Tribe's accounts. ER at 773-76.

Umpqua again moved to dismiss, initially noting that the district court already had rejected Plaintiffs' contention that it had a duty to police activities by authorized signers on the Tribe's accounts and thus that Plaintiffs' allegations with respect to the pre-April 2014 time period still were legally infirm. SER at 168-87. With respect to the new allegations related to the post-April leadership dispute, Umpqua argued that Plaintiffs' complaint did not plausibly suggest that Umpqua had "actual knowledge" of the alleged embezzlement particularly when Ms. Crosby had supplied information from the BIA and NIGC indicating that her faction remained in charge. SER at 178-80. The district court agreed with Umpqua and again granted its motion to dismiss, but nevertheless gave Plaintiffs another opportunity to amend. ER at 30-31, 34-35.

### F. Plaintiffs "Reorder" And "Reword" The Same Legally Infirm Allegations And The District Court Dismisses Umpqua And Enters Judgment In Its Favor

Plaintiffs' third amended complaint largely repeated the same allegations they made previously about the leadership dispute as support for their negligence and aiding and abetting claims. *Compare* ER at 769-76; *with* ER at 434-40. The district court therefore granted Umpqua's motion to dismiss, finding that Plaintiffs "provided no new allegations as to the Umpqua Defendants" and that Plaintiffs' "[m]ere reiteration of the same allegations, reordered and reworded" was insufficient to cure the legal deficiencies in their claims. ER at 14. Plaintiffs' appeal followed the entry of judgment in Umpqua's favor pursuant to Federal Rule of Civil Procedure 54(b).[4] ER at 1, 63-64.

## V. SUMMARY OF THE ARGUMENT

Plaintiffs' arguments on appeal track the arguments they made in the district court. They argue that Umpqua should be liable for allegedly failing to detect and stop the embezzlement by Ms. Crosby and Ms. Lohse (the Tribe's authorized signers on its accounts). As for their aiding and abetting claims, Plaintiffs maintain that Umpqua should be held liable for

[4] The district court also entered judgment in favor of APC, Cornerstone, and Garth Moore. ER at 1. Following entry of those judgments, the district court awarded APC, Cornerstone, Garth Moore, and Umpqua their costs as the prevailing party, awarded Cornerstone its attorney's fees, and denied Umpqua's request for an award of attorney's fees. ER at 1455. Plaintiffs have appealed from the judgments entered in favor of APC, Cornerstone, and Garth Moore and from the costs and fee award entered against them. Umpqua has cross-appealed the denial of its request for an award of attorney's fees. ER at 1452-55.

allegedly facilitating Ms. Crosby's and Ms. Lohse's theft of funds from the Tribe's accounts. None of this withstands scrutiny.

First, under California law, Umpqua cannot be held liable in tort or contract for allegedly failing to detect alleged embezzlement from the Tribe's accounts. On the contrary, as a matter of law, Umpqua had no duty to police the activity of the Tribe's authorized signers with respect to its deposit accounts. It instead was permitted to assume that transactions initiated by the Tribe's authorized signers were duly authorized and that held true until Umpqua received written notice from the Tribe to the contrary. This is consistent with the terms of Umpqua's deposit agreement, which made clear that Umpqua would honor transactions initiated by authorized signers until the Tribe notified it their authority had been revoked.

Second, as for Plaintiffs' aiding and abetting claims, Plaintiffs did not allege facts plausibly suggesting that Umpqua had "actual knowledge" funds were being embezzled. Plaintiffs' pleading at best alleged facts suggesting that by mid-April 2014 Umpqua became aware of a leadership dispute at the Tribe, where a competing faction was challenging the Crosbys and Lohses for authority. After learning this information, the complaint alleged that Umpqua asked Ms. Crosby to bring in documentation showing her continued authority to transact business on the Tribe's accounts. While Plaintiffs take issue with Umpqua's actions in asking Ms. Crosby to document her continued authority to transact business on the Tribe's accounts and its reliance on the BIA and NIGC letters Ms. Crosby supplied, their complaint did not plausibly suggest that Umpqua *actually knew* Ms. Crosby was *embezzling* funds. That failing is dispositive and Plaintiffs' aiding and abetting claims were properly dismissed as well.

## VI. STANDARDS OF REVIEW

This Court reviews "de novo the district court's judgment granting a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014). To meet Federal Rule of Civil Procedure 8's requirement of a short and plain statement of the claim showing that the pleader is entitled to relief, a complaint must contain "more than labels and conclusion." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "'Factual allegations must be enough to raise a right to relief above the speculative level[,]'" and "plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 557).

In ruling on a motion to dismiss, courts are permitted to "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). The "incorporation by reference doctrine" applies when "the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

## VII. ARGUMENT

### A. Plaintiffs' Negligence And Breach Of Contract Claims Are Legally Infirm And Were Properly Dismissed

In their opening brief, Plaintiffs argue that their third amended complaint alleged viable negligence and contract claims against Umpqua predicated on breach of the same alleged legal duty. Appellants' Opening Brief ("AOB") at 18-26. According to Plaintiffs, once Umpqua had "constructive knowledge" that the authorized signatories could be embezzling funds, it had a duty to investigate and put a stop to any withdrawals, notwithstanding the Tribe's designation of these individuals as its authorized signatories on its accounts. AOB at 19-20, 25-26. But no such duty exists under California law. What is more, Plaintiffs' argument is at odds with the terms of the Umpqua's deposit agreement, which stated that Umpqua would honor transactions initiated by the Tribe's authorized signers until the Tribe notified that their authority had been revoked.

### 1. Under Controlling California Law, Umpqua Had No Duty To Detect And Stop The Alleged Embezzlement

#### a. Banks Have No Duty To Police Activity By Authorized Signers On Deposit Accounts

Under California law, a bank generally has no duty to police activities on depositor accounts or the activities of its depositors. As a result, a bank cannot be held liable for allegedly failing to detect and stop illicit activity by authorized signatories on its depository accounts. It can instead assume that transactions undertaken by authorized signatories are duly authorized without any further duty of inquiry. These settled principles are codified in California Financial Code §§ 1450 & 1451 and decades of California case law.

Financial Code § 1450 thus states that banks *must disregard* adverse claims to depositor funds and honor customer debits notwithstanding an adverse claim unless the adverse claimant makes the claim in the form of an affidavit containing specific information or by way of a court order. To that end, in relevant part, § 1450 provides:

> Notice to any bank of an adverse claim (the person making the adverse claim being hereafter called "adverse claimant") to a deposit standing on its books to the credit of or to personal property held for the

> account of 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 account stands and on demand shall deliver that property to, or on the order of, the person for whose account the property is held, without any liability on the part of the bank; subject, however, to the exceptions provided in subdivisions (a) and (b):
>
> (a) If an adverse claimant delivers to the bank at the office at which the deposit is carried or at which the property is held an affidavit of the adverse claimant [containing specific information] . . ., the bank shall refuse payment of the deposit and shall refuse to deliver the property for a period of not more than three court days (including the day of delivery) from the date that the bank received the adverse claimant's affidavit, without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit.
>
> (b) If at any time, either before, after, or in the absence of the filing of an affidavit by the adverse claimant, the adverse claimant procures and serves upon the bank at the office at which the deposit is carried or at which the property is held a restraining order, injunction, or other appropriate order . . . the bank shall comply with the order or injunction . . . .

Cal. Fin. Code § 1450.

Financial Code § 1451, in turn, provides that banks may assume that any debit drawn on a deposit account initiated by an authorized signer, even one payable to the authorized signer personally, is for a valid purpose unless the bank receives written notice from the depositor otherwise. To that end, § 1451 states:

> When the depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by such person in the authorized form or 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.

Cal. Fin. Code § 1451.

These principles—requiring banks to honor debits and respect a depositor's designation of its authorized signers—have governed in California for nearly one hundred years. Originally enacted in 1925, § 16a of the California Bank Act contained substantially similar wording to the current Financial Code § 1451. *See Boston Ins. Co. v. Wells Fargo Bank & Union Trust Co.*, 80 Cal. App. 2d 59, 65 (1947) (discussing § 16a of the California Bank Act and quoting statutory text). Later, with the inception of the Financial Code in 1951, § 16a became Financial Code § 953, until it was renumbered as § 1451 in 2011. *See* Stats. 1951, c. 364, § 953. Similarly, what became Financial Code § 1450 in 2011 was originally enacted in 1931 and later renumbered as Financial Code § 952. *See* Stats. 1951, c. 364, §

952; *Desert Bermuda Props. v. Union Bank*, 265 Cal. App. 2d 146, 151-52 (1968) (discussing history of § 952).[5]

By the same token, courts applying these provisions have long held that banks cannot be liable for failing to detect alleged misappropriation by authorized account signatories. The Court of Appeal's decision in *Boston Insurance Co.* provides an early illustrative example. In that case, the Court of Appeal relied on the predecessor to § 1451 (§ 16a of the California Bank Act) in rejecting an argument that a bank could be liable because it was on "constructive notice" of alleged misappropriation by a depositor's authorized signers. *Boston Ins. Co.*, 80 Cal. App. 2d at 65-66. The plaintiff corporation had designated three of its employees as signers on its

[5] Other states have similar provisions that often are modeled on the Uniform Fiduciaries Act. *See*, *e.g.*, *Graulty v. Bank of Haw.*, 856 F.2d 78, 80-81 (9th Cir. 1988) (finding that a bank was not liable for a disbursement of funds under Hawaii's Uniform Fiduciaries Act); *Robinson Protective Alarm Co. v. Bolger & Picker*, 512 Pa. 116, 124 (1986) (holding that Pennsylvania's Uniform Fiduciaries Act protected a bank from liability for negligence related to a misappropriation of funds). Courts have long recognized the importance of enforcing such statutes because "[t]he transactions of banking in a great financial center are not to be clogged, or their pace slackened, by over-burdensome restrictions." *Empire Trust Co. v. Cahan*, 274 U.S. 473, 480 (1927) (citation omitted); *see also* Alvin C. Harrell, *Some Surprising New (and Old) Perspectives on Check-Kiting*, 57 Consumer Fin L.Q. 214, 218 (2003) (noting that limiting a bank's liability is "an essential element of the banking system's role as a low-cost financial intermediary" and observing that "an obligation to investigate every transaction (including some 50-70 billion checks per year) . . . would obviously impair that function").

commercial deposit account. *Id.* at 60. The employees then proceeded to abuse their authority by misappropriating funds on deposit and investing them into a business venture in which the plaintiff corporation had no interest. *Id.* at 60-61. The plaintiff corporation filed suit against the bank, claiming that the bank was on notice of the alleged misappropriation because the drafts at issue were made payable to one of the authorized signers personally. *Id.* at 61.

The Court of Appeal rejected that argument, relying on § 16a of the California Bank Act. *Id.* at 66. Under that provision, the bank was entitled to assume that the transactions undertaken by the duly authorized agents or officers of the corporation, even if personally drawn, were valid and that was true "[r]egardless of whatever suspicion might have lurked in the mind of the teller as to the destination of the proceeds . . . ." *Id.* The court also observed that this holding was consistent with the jurisprudential maxim that "'where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss.'" *Id.* at 68 (quoting *Nat'l Bank of San Mateo v. Whitney*, 181 Cal. 202, 205 (1919)). That burden fell on the plaintiff given it was the one that had entrusted the employees with signing authority. *Id.*

Forty years later, in *Desert Bermuda*, the Court of Appeal relied upon Financial Code §§ 952 & 953 (the immediate predecessors to §§ 1450 &

1451) in reaching a similar result in response to allegations of a failure to prevent misappropriation. *Desert Bermuda,* 265 Cal. App. 2d at 150. In that case, the plaintiff Desert Bermuda agreed to sell aircraft parts and sublease its space to non-party Serdon. *Id.* at 147. Serdon, in turn, agreed to deposit 85% of the proceeds of the sales into an account at defendant Union Bank to guarantee Serdon's payment of the purchase price and payments under the sublease. *Id.* at 147-48. Desert Bermuda subsequently learned, however, that Serdon's principals intended to disburse the deposit funds held for its benefit in violation of the parties' agreement. *Id.* at 148. It wrote Union Bank to notify it of Serdon's promise and describe its interest in the disputed funds. *Id.* Despite receiving the letter, Union Bank allowed Serdon's principals to access the disputed funds by voiding an earlier check for $23,500 and issuing a new check payable to themselves. *Id.* at 148-49. Desert Bermuda maintained that the bank should have prevented the disbursement based on its awareness of the terms of the Desert Bermuda-Serdon agreement. *Id.*

Relying on §§ 952 & 953, the Court of Appeal found that the bank could not be held liable for allowing disbursement of the funds. *Id.* at 149-51. As the court explained, § 952 directed the bank to ignore adverse claims to funds unless they were made in a specific form, while § 953 likewise made clear the bank was not required to inquire into the relationship between depositors and their authorized signers—including whether they were acting in the scope of their authority until it received written notice specifying that authority had been revoked. *Id.* at 150-51. Because Desert Bermuda's letter was not a legally effective notice of an adverse claim and because the bank had not received a written notice of lack of authority, there was no basis for Union Bank's alleged liability. *Id.*

Most recently, in *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532 (1998), the Court of Appeal rejected similar assertions attempting to hold a bank liable for failing to police its depositors or their deposit account. In that case, plaintiffs were purchasers of second mortgages that were being serviced by a mortgage loan broker. *Id.* at 536. They lost over a million dollars as a result of the mortgage broker's theft of mortgage payments that had been placed into trust accounts at the defendant bank to be held for plaintiffs' benefit. *Id.* Plaintiffs sued the bank for negligence, alleging the bank had "'actual or constructive notice of the [mortgage broker's] conversion of [their] funds based upon irregular activities . . . .'" *Id.* at 536, 540. The trial court sustained the bank's demurrer without leave to amend and the Court of Appeal affirmed. *Id.* at 538-41.

The *Chazen* court began its analysis "with the well-established principle, codified in Financial Code sections 952 and 953, that a bank has no duty to monitor trust accounts for breaches of fiduciary duty." *Id.* at 536-37.

Those provisions instead allow "bank[s] to presume that . . . checks . . . drawn by a corporate officer authorized to make withdrawals from the account" are valid, "even when the officer draws the funds to his personal order." *Id.* at 538. The court also noted that banks have a right to rely upon this presumption "'[r]egardless of whatever suspicion might have lurked in the mind of the teller as to the destination of the proceeds . . . .'" *Id.* (quoting *Boston Ins.*, 80 Cal. App. 2d at 66). Moreover, this presumptive reliance principle was based on sound policy concerns, encompassing both the accountholder's right to financial privacy and the need for financial transactions to be processed in an expeditious manner. *Id.* at 538-39. Banks are required to process an enormous number of transactions each day and would not be able to discharge their obligations to process transactions quickly and automatically if they had a legal duty to monitor account activity and intervene in suspicious activities. *Id.*

The *Chazen* court then turned to plaintiffs' allegation that the bank "knew or should have known" of the conversion because of the alleged irregular activities—including "'overdrafts of funds in fiduciary accounts, numerous telephone transfers of large amounts of funds from fiduciary accounts into general and personal accounts of the [mortgage broker], coupled with repeated overdrafts in personal and general accounts.'" *Id.* at 540. It recognized that "the inevitable result of these allegations would be to require banks to police fiduciary accounts so as to prevent breaches of fiduciary duty." *Id.* at 541. Because §§ 952 & 953 established that banks have no such legal duty and instead are obligated to honor valid withdrawals, the court rejected plaintiffs' claims as a matter of law. *Id.*

Taken together, the Financial Code provisions and case law implementing them make clear that banks are not liable for failing to detect alleged misappropriation by a depositor's authorized signers or for failing to police their depositors' activities. Banks instead are required to honor transactions initiated by authorized signatories until they receive written notice from the accountholder that their authorization to transact on the account has been revoked. Under this settled law, the negligence and contract claims Plaintiffs allege are foreclosed. Simply put, Plaintiffs are attempting to hold Umpqua liable for failing to act affirmatively to prevent alleged misappropriation by the Tribe's authorized signers where there is no written revocation of authority. *See* AOB at 20-21, 25-26; ER at 519-23. That is a non-starter, as the reasoning and holdings in *Boston Insurance Co.*, *Desert Bermuda*, and *Chazen* illustrate.

**b. The Tribe's Reliance On Dicta In *Blackmon v. Hale* To Alter Controlling California Law And Create A Duty To Police Deposit Accounts Must Be Rejected**

In their opening brief, Plaintiffs do not acknowledge the governing provisions in the Financial Code. *See* AOB at 18-26. And, while

Plaintiffs cite *Chazen* and acknowledge the principle that banks generally have "no duty to 'supervise account activity,'" the sum total of their argument as to why Umpqua can purportedly be liable under a negligence standard is a single sentence stating that a bank can be liable if it has "constructive knowledge of a third party's misappropriation[.]" AOB at 19. That proposition is, however, directly at odds with controlling law.

The only conceivably relevant authority Plaintiffs offer in support of this assertion is *Blackmon v. Hale*, 1 Cal. 3d 548, 556 (1970).[6] AOB at 19. But Plaintiffs' effort to derive a duty to investigate suspicious activity on deposit accounts from *Blackmon* misconstrues the case and erroneously expands its holding.

In *Blackmon*, the California Supreme Court affirmed a judgment entered in favor of a bank that allegedly had acted improperly by allowing its depositor to access client trust funds while possessing "constructive knowledge" the depositor intended to misappropriate the money. *Blackmon*, 1 Cal. 3d at 553-56. The depositor, an attorney, had deposited and

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6 The other authorities Plaintiffs cite in support of their "constructive knowledge" argument—such as *John B. v. Superior Court*, 38 Cal. 4th 1177 (2006) and *Hope v. Cal. Youth Auth.*, 134 Cal. App. 4th 577, 588-89 (2005)—do not discuss the scope of a bank's obligations. AOB at 19-20. They instead generally discuss what constitutes constructive knowledge in the negligence context.

subsequently withdrawn a cashier's check representing client trust funds from the attorney's client trust account. *Id.* at 554-55. The plaintiff claimed the bank should have known something was wrong because the check was deposited "in an account with a name different from that of the payee" on the check. *Id.* at 554-56. The bank had, however, acted in a manner permitted by the applicable provisions of the California Commercial Code. *Id.* at 555-56. The Supreme Court therefore rejected the argument that the bank could be held legally responsible for the alleged misappropriation. *Id.*

Here, while Plaintiffs purport to divine a duty to investigate whether misappropriation is occurring based on *Blackmon*, their argument goes well beyond what the Court actually considered and decided. *Blackmon*'s holding was limited to the propriety of the bank's actions with respect to how it handled the check drawn on the particular trust account. *Blackmon* thus cannot be read as broadly as Plaintiffs perceive. *See, e.g., Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964) ("an opinion is not authority for a proposition not therein considered"); *McGee v. Superior Court*, 176 Cal. App. 3d 221, 226 (1985) ("The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or its reasoning.").

Plaintiffs nevertheless point to dicta in *Blackmon* [AOB at 19], where the court indicated in passing that a "bank is not liable for the misappropriation of trust funds . . . unless the bank has knowledge, actual or constructive, of such misappropriation." *Blackmon*, 1 Cal. 3d at 556. But as the *Chazen* court explained, *Blackmon*'s passing observation is "dicta" that should not be stretched to create a duty that Plaintiffs advance:

> [T]he *Blackmon* dicta should not be interpreted in a manner that would undermine the judicial principles and statutory mandates, discussed above, which relieve banks of any duty to police fiduciary accounts. We regard the dicta as a prudent judicial qualification, recognizing that banks may in some extreme circumstances engage in wrongdoing affecting a fiduciary account that would merit the imposition of liability.

*Chazen*, 61 Cal. App. 4th at 539.

Plaintiffs not only stretch *Blackmon* beyond its holding, their misdirected effort runs even further off course when context is considered. *Blackmon* dealt with a bank's alleged liability in the context of misappropriation of funds on deposit in a trust account administered by a trustee. *Blackmon*, 1 Cal. 3d at 555-56. In that regard, the statement in *Blackmon* on which Plaintiffs rely concerned the extent to which a bank can be liable for "misappropriation of trust funds by the trustee." *Id.* And, the two cases *Blackmon* cited in noting that "constructive notice" might be sufficient to create liability—*Lynch v. Wells Fargo Bank & Union Trust Co.*, 114 Cal. App. 565 (1931) and *Southern Trust & Commerce Bank v. San Diego Sav. Bank*, 60 Cal. App. 215 (1922)—were both decided under since superseded versions of the relevant Financial Code provisions that treated trust accounts and commercial accounts differently. *See Blackmon*, 1 Cal. 3d at 556 (citing *Lynch* and *Southern Trust*).

As explained by the Court of Appeal in *Desert Bermuda*, under those now superseded versions of the Financial Code, cases had held that banks had a duty to police *trust accounts* even though no such duty existed with respect to commercial deposit accounts. *See Desert Bermuda*, 265 Cal. App. 2d at 151-52 (discussing revisions to California Financial Code § 952 that altered a bank's duty to police trust accounts and explaining how those amendments rendered the holdings of *Lynch* and *Southern Trust* obsolete). But even this changed when the Legislature amended the Financial Code and expanded the application of what is now California Financial Code § 1450 to trust and fiduciary accounts in order to "relieve[] banks from any general duty to police fiduciary accounts (a duty which a bank could not reasonably be expected to carry out effectively)." *Id.* Here, of course, no trust account is alleged to be involved and thus Plaintiffs' effort to extend *Blackmon*'s dicta would fail even under the prior case law dealing with the superseded versions of the relevant statues.

Finally, Plaintiffs' reliance on *Blackmon* to remake California law goes beyond this Court's role under *Erie* and conflicts with relevant public policy. There is no basis in relevant California statutory or case authority for divining a duty to investigate and stop alleged misappropriation by authorized account signatories on this record. The financial privacy and banking efficiency policy considerations identified in the California cases that reject such a duty likewise apply with equal force in this context. *See Chazen*, 61 Cal. App. 4th. at 538-39. It is not, therefore, within the role of this Court to chart a course California courts have not indicated they would take. *See Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) (it is not this Court's role to expand state law).

Indeed, as underscored by the arguments Plaintiffs themselves advance in *Paskenta Band of Nomlaki Indians v. Cornerstone Community Bank*, Ninth Circuit Case No. 17-15484, a failure to embrace the recognized legal and policy considerations supporting the lack of a duty of inquiry would have distinctly adverse real world consequences. In that case, Plaintiffs describe in detail how the Tribe would have faced "economic collapse" had Cornerstone preemptively frozen the Tribe's accounts and interpled the Tribe's funds when the Freeman and Lohse factions made competing claims about who was in charge of the Tribe's affairs. *See* Appellants' Opening Brief, Case No. 17-15484 ("Cornerstone AOB"), at 34-35. Avoiding the sort of "economic duress" that would follow a bank's premature freezing of a depositor's accounts is one of the considerations that led California courts to refuse to impose affirmative obligations on banks to police accounts or intervene in their depositor's affairs. *See Chazen*, 61 Cal. App. 4th at 538-39 (explaining the importance of promptly processing customer debits and how imposing a duty to police customer accounts or intervene in suspicious activities would prevent banks from making prompt payment).

In sum, Plaintiffs cannot ignore existing authority and elevate *Blackmon*'s dicta to support their contention that Umpqua owes an investigatory duty that California courts have refused to adopt. The district court's dismissal of their negligence and contract claims can be affirmed on this basis alone.

**2. The Terms Of The Parties' Deposit Agreement Are Also Dispositive Of Umpqua's Duty Of Care**

It is axiomatic that a breach of contract claim requires there to be an actual breach of the contract's terms. *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489-90 (2006). The same is true with a negligence claim predicated on an alleged failure to exercise reasonable care in performance with one's contractual obligations. This is because it is the terms of the contract that "gives rise to [the] duty of care which requires that services be performed in a competent and reasonable manner." *N. Am.*

*Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 775 (1997). Thus, the terms of the contract are significant because they define the scope of the duty to exercise reasonable care. *See id.*; *Eads v. Marks*, 39 Cal. 2d. 807, 811 (1952).

In this case, however, the terms of Umpqua's deposit agreement make clear that it was the Tribe's responsibility to notify Umpqua of changes to its authorized signers and that Umpqua would be obligated to honor debits initiated by authorized signers on the Tribe's accounts until it received written notice that their authority had been revoked. In relevant part, the deposit agreement states:

> **Business, Organization and Association Accounts –** Earnings in the form of interest, dividends, or credits will be paid only on collected funds, unless otherwise provided by law or our policy. We may require the governing body of the entity opening the account to give us a separate authorization telling us who is authorized to act on its behalf. We will honor the authorization until we actually receive written notice of a change from the governing body of the entity.

ER at 647.

The actual terms of Umpqua's deposit agreement are thus likewise dipositive of Plaintiffs' negligence and contract claims. Plaintiffs fault Umpqua for continuing to honor Ms. Crosby's authority to transact business on the accounts after allegedly learning of suspicious circumstances that they contend should have led Umpqua to question whether the transactions she was initiating were actually authorized. *See* AOB at 20-21, 25-26; ER at 519-23. But the Tribe cannot maintain a negligence or contract claim predicated on allegations that Umpqua should have done something other than what the parties' contract specifically required Umpqua to do. This is so because the terms in the parties' contract define the duty of reasonable care. *See McKell*, 142 Cal. App. 4th at 1489-90; *N. Am. Chem. Co.*, 59 Cal. App. 4th at 775. Thus, Umpqua's adherence to the terms of its deposit agreement is dispositive of Plaintiffs' negligence and contract claims.

## B. Plaintiffs' Aiding And Abetting Claims Are Legally Infirm And Were Properly Dismissed

Under California law, liability may be "imposed on one who aids and abets 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." *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005) (citations and internal quotation marks omitted).

Plaintiffs maintain that they adequately pled aiding and abetting claims under both theories. AOB at 26-28. They contend that the second theory does not require that a defendant have "actual knowledge" of the tortious conduct, only that the defendant's conduct amount to a breach of a duty owed to the plaintiff. AOB at 26-28. Therefore, as Plaintiffs would have it, the district court erred in requiring Plaintiffs to plead facts demonstrating that Umpqua had "actual knowledge" of the alleged misappropriation because Plaintiffs had adequately alleged that Umpqua breached its duty of care. AOB at 26-27. Plaintiffs also argue that even if they were required to plead actual knowledge, they did so. AOB at 28-29. They are wrong on all counts.

For starters, as the preceding analysis shows, Umpqua did not breach a duty of care and Plaintiffs' effort to invoke the second theory of aiding and abetting liability ends right there. *See* Section VII.A, *supra*. In addition, under California law, actual knowledge is required to hold a financial institution liable for "aiding and abetting" tortious conduct by processing customer transactions. And, Plaintiffs do not plead sufficient facts plausibly suggesting that Umpqua had the requisite actual knowledge in this case. The district court's dismissal of Plaintiffs' aiding and abetting claims should be affirmed for these reasons.

### 1. Umpqua Could Only Be Liable For "Aiding And Abetting" If It Had "Actual Knowledge" Of The Alleged Embezzlement

As this Court has noted, although California recognizes two theories underlying "aiding and abetting" liability, "both avenues require actual knowledge . . . ." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1039 (9th Cir. 2016). This is so because "aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct." *Casey*, 127 Cal. App. 4th at 1146 (quoting *Howard v. Superior Court*, 2 Cal. App. 4th 745, 748-49 (1992)) (alterations and internal quotation marks omitted). As such, it "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." *Id.*; *accord Gerard v. Ross*, 204 Cal. App. 3d 968, 983 (1998) ("A defendant can be held liable as a co-tortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort.").

Indeed, as the California Supreme Court explained over one hundred years ago, "[t]he 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." *Lomita Land Water Co. v. Robinson*, 154 Cal. 36, 47 (1908); *see also Sindell v. Abbot*

*Labs.*, 26 Cal. 3d 588, 604 (1980) (common purpose liability, which encompasses both conspiracy and aiding and abetting, covers "'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit'") (quoting Prosser, Law of Torts, § 46, at 292 (4th ed. 1971)).

The need for "actual knowledge" is especially critical where, as here, the aiding and abetting claim has been asserted against a financial institution whose only alleged malfeasance is processing transactions pursuant to an authorized signer's direction. Banks have a legal obligation to process customer transactions and are strictly liable for wrongfully dishonoring customer debits. *Chazen*, 61 Cal. App. 4th at 539. Therefore, absent actual knowledge of wrongdoing, a bank's execution of transactions for a customer does not constitute the "substantial assistance" required for aiding and abetting liability. *Casey*, 127 Cal. App. 4th at 1145.

As *Casey* explains: "Knowledge is the crucial element." *Id.* Knowledge is what transforms the "ordinary business transactions" a bank is required to process for its customers into "substantial assistance" for purposes of tortious aiding and abetting liability. *Id.*; *accord Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 745 (2010) ("a bank may be liable as an aider and abettor of a tort if the bank, in providing ordinary services, *actually knew* those transactions were assisting the customer in committing a specific tort") (emphasis added, citation and internal quotation marks omitted). So it should be here as well.

Although Plaintiffs dispute whether actual knowledge is required to establish aiding and abetting liability, they offer little in the way of substantive analysis to support their view. AOB at 26-28 & n.5. In a footnote, they argue that *ESG*'s assertion that any theory of aiding and abetting requires actual knowledge is "dicta" and that the only case that *ESG* cited in support its assertion is *Casey*—which Plaintiffs say did not address whether actual knowledge is required to establish "aiding and abetting" liability under the second theory stated above. AOB at 27 & n.5. None of this squarely confronts the reasoning in the relevant cases; nor is it true.

In so far as financial institutions are concerned, *Casey* squarely addressed the actual knowledge requirement and concluded that the *only* way a bank's processing of customer transactions can be considered "substantial assistance" is if the bank had *actual knowledge* of the alleged misappropriation. *Casey*, 127 Cal. App. at 1145. As noted, the *Casey* court made clear that "[k]nowledge is the crucial element" that is required to transform a bank's processing of customer transactions into "substantial assistance." *Id.* at 1145. That holding was reaffirmed by the Court of Appeal in *Das*. *Das*, 186 Cal. App. 4th at 727 ("a bank may be liable as an aider and abettor of a tort if the bank, in providing ordinary services, *actually knew* those transactions were assisting the customer in committing a specific tort") (emphasis added, citation and internal quotation marks omitted).

As the reasoning and holdings in these cases reveal, rejection of an actual knowledge requirement would again require this Court to abandon its deference under *Erie*. *See Kremen*, 325 F.3d at 1038. *Casey, Das*, and the related authorities requiring actual knowledge, represent California law and these cases provide no hint that actual knowledge would not be required here. *See Kremen*, 325 F.3d at 1038. As for Plaintiffs' call to dispense with *EFG*'s reliance on *Casey*, that runs headlong into this Court's "law-of-the-circuit rule." *See Biggs v. Sec'y of Cal. Dep't of Corr. & Rehab.*, 717 F.3d 678, 689 (9th Cir. 2013) (explaining law-of-the-circuit doctrine); *In re Brace*, 566 B.R. 13, 19 & n.8 (9th Cir. B.A.P. 2017) (courts are supposed to follow Ninth Circuit precedent on state law under the law-of-the-circuit doctrine unless there is intervening state case law).

In sum, the law is clear. Plaintiffs were required to plead facts demonstrating "actual knowledge" in order to maintain an aiding and abetting claim against Umpqua.

### 2. Plaintiffs Failed To Allege Facts That Plausibly Suggest Umpqua Had "Actual Knowledge" Of The Alleged Embezzlement

The "actual knowledge" standard is met when the defendant has direct personal knowledge of the specific intentional tort being committed. *See Casey*, 127 Cal. App. 4th at 1146 ("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") (citation, alterations, and internal quotation marks omitted); Black's Law Dictionary, *Actual Knowledge* (10th ed. 2014), (actual knowledge is "[d]irect and clear knowledge, as distinguished from constructive knowledge"). Although actual knowledge sometimes can be inferred from circumstantial evidence, that is true only when the cited evidence shows that the defendant "must have known," not merely "should have known." *Donchin v. Guerror*, 34 Cal. App. 4th 1832, 1839 (1995) (citing *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 514 & n.4 (1975)).

In this case, the tortious conduct that Plaintiffs claim Umpqua "aided and abetted" is the embezzlement of funds by the Tribe's authorized signers on its accounts—Ms. Crosby and Ms. Lohse. ER at 523-24; AOB 28-29. The facts alleged in the third amended complaint do not, however, plausibly suggest that Umpqua had the requisite "actual knowledge"—i.e., that Umpqua's employees were personally aware—that Ms. Crosby and Ms.

Lohse were embezzling money from the Tribe. *See Casey*, 127 Cal. App. 4th at 1146. As noted, it is not enough that Plaintiffs allege facts that might create an inference that Umpqua's employees "should have known" something had gone wrong. *See Donchin*, 34 Cal. App. 4th at 1839. To meet the applicable standard, the complaint's factual allegations must plausibly suggest that Umpqua's employees "must have known" that unlawful embezzlement was taking place. *Id.*

*Casey* again is illustrative. There, the trustee of a bankrupt corporation sued the bank defendants for aiding and abetting alleged embezzlement by the former officers and directors of the bankrupt corporation. *Casey*, 127 Cal. App. 4th at 1141-42. The trustee alleged that the bank defendants knew "something fishy" was going on with accounts opened by former officers and directors of the bankrupt corporation and that the banks had allowed them to open these accounts in the names of fraudulent entities despite knowing these entities were not legitimate businesses. *Id.* at 1149. The trustee also alleged that the banks knew that the former officers and directors were withdrawing money from these accounts with the use of forged checks and checks that exceeded written limits, and, most suspiciously, that they were carrying large, unreported amounts of cash out of the bank in unmarked duffel bags. *Id.*

The *Casey* court was not persuaded. *Id.* at 1149-53. It held that "the banks' alleged knowledge of the [former officers' and directors'] suspicious account activities—even money laundering—*without more*, d[id] not give rise to tort liability for the banks." *Id.* at 1151 (emphasis in original). Emphasizing the need to "strict[ly] appl[y] the pleading requirement for the knowledge element of an aiding and abetting claim" given that banks lack any generalized duty to police customer accounts, the court explained that the identified allegations were insufficient because they did not plausibly suggest that the banks had *actual knowledge* that money was being stolen. *Id.* at 1151-52.

Significantly, while *Casey* was a California case applying California's notice pleading standard, Plaintiffs were required to adhere to Federal Rule of Civil Procedure 8's more rigorous "plausibility" requirement as laid out by the Supreme Court in *Twombly* and *Ibqal*. *See Eclectic Properties*, 751 F.3d at 995 (citing *Twombly*, 550 U.S. at 557 and *Iqbal*, 556 U.S. at 678). Under this standard it is not enough that a complaint's allegations be "consistent with a defendant's liability"; rather, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Id.* at 996-97.

In their opening brief, Plaintiffs argue that their third amended complaint alleges three things that plausibly suggest that Umpqua had actual knowledge of the alleged embezzlement. AOB at 28-29. In particular, Plaintiffs argue that by May 1, 2014, Umpqua's employees were aware that: (1) Ms. Crosby had for several years made large cash withdrawals from the Tribe's accounts and written checks payable either to herself or family members; (2) the local newspaper had reported about allegations of misappropriation by tribal officials; and (3) Ms. Crosby had been ousted from her position at the Tribe and banned from tribal property. AOB at 28-29. Plaintiffs' allegations, however, do not measure up. None of the allegations in the complaint can be equated to a plausible suggestion that Umpqua "must have known" that Ms. Crosby was acting unlawfully and embezzling from the Tribe.

First of all, the account withdrawals do not imply any irregularity. On the contrary, because Ms. Crosby was duly authorized by the Tribe to transact business on its accounts, the withdrawals are presumptively proper under California law. *See* Cal. Fin. Code § 1451; *Chazen*, 61 Cal. App. 4th at 537. It is equally significant that Ms. Crosby had been an authorized signer for *years* and had consistently transacted business in the same manner, yet no one at the Tribe had ever raised any concerns about her activity on the accounts. *See* ER at 441-43. As for the newspaper articles, awareness of unproven allegations in the media cannot be equated with the reader having actual knowledge that the allegations are true.

With respect to the contention that Umpqua's employees knew that Ms. Crosby has been ousted from her position and banned from tribal land, that does not supply the requisite actual knowledge, or even a basis to infer it, because that is not what the third amended complaint alleges. To be sure, the third amended complaint does allege that Ms. Crosby told Umpqua's employees about an ongoing leadership dispute and actions taken by a competing faction vying for control (including purporting to oust Ms. Crosby from her position and exclude her from tribal land). ER at 434. But the third amended complaint also makes clear that Ms. Crosby disputed the validity of those actions and maintained that she was the Tribe's lawful representative. ER at 434-36. To that end, it alleges that when Umpqua asked her to do so, Ms. Crosby brought in documentation to establish her continued authority. ER at 435-36. None of this implies that Umpqua's employees actually knew Ms. Crosby was stealing funds. If anything, these allegations plausibly suggests that the opposite was true. But there is more.

Plaintiffs' third amended complaint is based in large part on the WilmerHale report submitted in support of Plaintiffs' motion for preliminary injunction, which Plaintiffs expressly incorporated into their opposition to

Umpqua's motion to dismiss.[7] ER at 346; SER at 24. The report explains that the leadership dispute began during an April 12, 2014 meeting of the Tribe's general membership when Mr. Freeman unilaterally declared that the Pata family did not meet the Tribe's criteria for membership. SER at 540-41. It then goes on to detail how Mr. Freeman purported to replace the four members of the Lohse Council to form the Freeman Council and how both the Lohse and Freeman Councils claimed to be the Tribe's legitimate governing body until the September 2014 elections for the disputed seats were held. SER at 540-41. This is the same story Plaintiffs have told this Court in one of the companion appeals to this case. *See* Cornerstone AOB at 11-18 (explaining background of the leadership dispute). For the timeframe that is relevant to the third amended complaint, therefore, the report confirms that there was no basis to favor one faction over the other, much less to declare that Umpqua must have known that Ms. Crosby was acting unlawfully and embezzling funds.

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[7] Even if Plaintiffs had not expressly incorporated this material into their opposition to Umpqua's motion to dismiss, it would still be relevant to evaluating whether the district court's ruling dismissing Plaintiffs' claims against Umpqua was prejudicial. *See Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (error dismissing claims against two defendants rendered harmless because summary judgment evidence demonstrated they had no role in underlying dispute); Federal Rule of Civil Procedure 61 (harmless error).

Finally, the two letters Umpqua affixed to its motion to dismiss containing the materials Ms. Crosby brought into Umpqua when they asked her to verify her authority to transact business on the Tribe's account tell the same story. ER at 658-61. The BIA's letter stated it does not get involved in tribal governance disputes, but confirmed that as of April 15, 2014 the BIA's records reflected that the Lohse Council was the Tribe's governing body. ER at 660-61. The NIGC letter was addressed to Mr. Freeman (the head of the Freeman Council) and stated that the NIGC expressed concern with the legality of Mr. Freeman's actions in purporting to exclude the Lohse Council from tribal land and expressed concerned with whether the casino was now being operated illegally. ER at 658-59. These letters, which are also referenced in Plaintiffs' complaint [ER at 435-36, 654], further negate any plausible suggestion that Umpqua's employees must have known Ms. Crosby was stealing funds from tribal accounts.

Simply put, there is no way to get from the allegations in the third amended complaint, and the contents of the documents it incorporates, a plausible suggestion Umpqua's employees must have known Ms. Crosby was stealing. All the third amended complaint alleges is that Umpqua knew about a leadership dispute. But, at the time, the Tribe had not even resolved who was in charge of its affairs and there is no basis to infer that Umpqua's employees knew something the Tribe did not. Apart from that, there most certainly is no basis to leap from the tangled web of the leadership dispute to actual knowledge on the part of Umpqua's employees that an authorized account signatory—Ms. Crosby—was embezzling tribal funds. Plaintiffs' aiding and abetting claims accordingly were properly dismissed as well.

## VIII. CONCLUSION

For the reasons stated above, this Court should affirm the district court's dismissal of Plaintiffs' claims against Umpqua.

DATED: June 5, 2018

REED SMITH LLP

s/ Kasey J. Curtis
Kasey J. Curtis
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Umpqua Holdings Corporation

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants and Appellees Umpqua Bank and Umpqua Holdings Corporation state that they are aware of the following related cases:

- *Paskenta Band of Nomlaki Indians v. Crosby*, Ninth Circuit Case No. 17-15238;
- *Paskenta Band of Nomlaki Indians v. Associated Pension Consultants*, Ninth Circuit Case No. 17-15483;
- *Paskenta Band of Nomlaki Indians v. Cornerstone Community Bank*, Ninth Circuit Case No. 17-15484;
- *Paskenta Band of Nomlaki Indians v. Garth Moore Insurance and Financial Services, Inc.*, Ninth Circuit Case No. 17-15485; and
- *Paskenta Band of Nomlaki Indians v. Cornerstone Community Bank*, Ninth Circuit Case No. 17-16633.

DATED: June 5, 2018 REED SMITH LLP

s/ Kasey J. Curtis
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**CERTIFICATE OF COMPLIANCE**

1. This Answering Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point CG Times.

DATED: June 5, 2018

REED SMITH LLP

s/ Kasey J. Curtis

Kasey J. Curtis
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Appellees Umpqua Bank and
Umpqua Holdings Corporation

9th Circuit Case Number(*s*) 17-15486

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system

on *(date)* 06/05/2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Signature *(use "s/" format)* s/ Kasey J. Curtis

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system

on *(date)* .

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature *(use "s/" format)*