Case No. 17-15483

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paskenta Band of Nomlaki Indians, et al.,

Plaintiffs and Appellants,

v.

Associated Pension Consultants, Inc.

Defendant and Appellee.

On Appeal from the United States District Court
Eastern District of California,
Case No. 2:15-CV-00538-MCE-CMK
The Honorable Morrison C. England, Jr.

DEFENDANT/APPELLEE ASSOCIATED PENSION CONSULTANTS, INC. ANSWERING BRIEF

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Associated Pension Consultants, Inc. states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

Associated Pension Consultants ("APC") prepared and provided non-discretionary ministerial services for several retirement plans for Plaintiff Paskenta Band of Nomlaki Indians ("PNBI") over 10 years pursuant to a written services agreements with PNBI. All retirement plans prepared by APC were approved by PNBI's Tribal Council, including the two allegedly "unusual" and "unorthodox," but admittedly legal plans that are the subject of the instant lawsuit — a defined benefit plan and 401(k) profit sharing plan. PNBI's agents, Director of Business Development John Crosby ("Crosby") and Tribal Council Treasurer Leslie Lohse ("Lohse") were the designated plan trustees for the subject plans.

APC prepared the plan documents for the defined benefit plan in 2004. Those plan documents, not APC, determined eligibility under the plan. All PNBI employees, except collective bargaining employees, nonresident aliens, and reclassified employees, were eligible to participate. Based upon the yearly census information for employee participants provided by Crosby, yearly contributions were calculated and the plan funded accordingly. Thereafter, APC would prepare forms 5500 for the Internal Revenue Service based upon the information provided by trustee Crosby consistent with the written services agreement with PNBI. Given that PNBI was responsible for funding any losses to the defined benefit plan for any given period, trustee Crosby exercised his discretion to terminate the defined benefit plan as this country was in the worst recession in history. Following trustee Crosby's instructions, APC prepared the necessary paperwork to terminate the defined benefit plan in 2008.

Thereafter, at the direction and approval of PNBI, APC prepared a 401k profit sharing plan. Again, the plan documents determined eligibility, which were identical to the requirements for the prior defined benefit plan. Crosby and Lohse were the plan trustees until July 1, 2014 when they were removed by the Plan Administrator PNBI. Although PNBI contends that APC delayed removing Crosby and Lohse as trustees allowing the RICO Ringleaders (John Crosby, Ines Crosby, Leslie Lohse, and Larry Lohse) to cash out their 401k plans, the change in trustees was done in accordance with the plan documents requiring 30 days' notice and other ministerial tasks to be performed before removal was effective — a fact fatally missing from any of PNBI's complaints.

Significantly, the plan documents provided an exception to the 30-day notice requirement that stated the trustee could be removed immediately "where the Employer [PNBI] reasonably determines a shorter notice period or immediate removal is necessary to protect Plan assets." 2-ER-0000176, § 8.08(B); *see also* 3-ER-000342, § 7.10. However, notably missing from any of plaintiffs' complaint are facts that would suggest PNBI proceeded to invoke this exception.[1] In fact, the allegations unequivocally demonstrate that PNBI did not. As alleged in the Third Amended Complaint ("TAC"), after apparently catching wind of the RICO Ringleaders alleged embezzlement in May 2014, PNBI was so concerned that the RICO Ringleaders could liquidate their 401k plans (which was their right under the plan documents) that it never bothered to contact APC to inquire about the plans or to provide APC with any information by which PNBI could immediately remove trustees Crosby and Lohse "to protect plan assets." Rather, PNBI's "new" Tribal Council leaders sent the request to remove trustees Crosby and Lohse to co-defendant Garth Moore. It was Moore, not PNBI, who forwarded the request to APC who immediately began the process to effectuate the change in trustees pursuant to the terms of the plan documents.

Plaintiffs hopelessly contend, based on nothing more than rank speculation, innuendo and legal conclusions, that APC's employee Greg Lynn had "actual knowledge" that the RICO Ringleaders intended on using the subject plans to fraudulently enrich themselves citing to (and mischaracterizing) various e-mails; yet the actual content of those e-mails belie any such argument and do not plausibly

[1] There are no allegations that John Crosby liquidated his 401(k) plan through Paskenta Enterprises Corporation ("PEC") Tribe-Owned Business "E" or that APC assisted him in doing so. *See* 5-ER-000752-754, 761, 764-766, ¶¶ 261, 264, 317-323.

allege any facts to support an aiding and abetting claim against APC, much less claims for negligence or breach of fiduciary duty.

Neither PNBI nor PEC could articulate facts in the four complaints filed to date to plausibly state claims against APC as required under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("*Iqbal*") and *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") without resorting to rank speculation and innuendo. As noted by the district court in its ruling on APC's motion to dismiss the TAC, when PNBI and PEC attempted to elaborate on the "facts" purportedly supporting their claims against APC, they were "internally inconsistent" and mischaracterized the documents referenced (but not attached) to the TAC. The plan documents and written services agreement with APC demonstrate that: (1) APC's conduct comported with the scope of the written services agreement with PNBI; (2) APC did not provide any investment advice regarding the plans and did not exercise any discretionary authority regarding the management or administration of the plans necessary to implicate a fiduciary relationship regarding the plans; and (3) that Crosby and Lohse were removed as trustees in accordance with the plan documents.

Consequently, the district court granted APC's motion to dismiss the TAC pursuant to Federal Rule of Civil Procedure 12(b)(6) with prejudice and entered judgment in favor of APC pursuant to Federal Rule of Civil Procedure 41(b).

The district court did not err in granting APC's motion to dismiss the TAC with prejudice and thus, the judgment should be affirmed in its entirety.

JURISDICTIONAL STATEMENT

APC agrees with the jurisdictional statement set forth by Appellants PBNI and PEC that the district court had jurisdiction over APC under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. *See* Appellants Opening Brief ("AOB") at 6. APC does agree with PNBI and PEC's jurisdictional statement as it relates to this Court's jurisdiction under 28 U.S.C. § 1291. *Ibid.*

STATEMENT OF ISSUES PRESENTED

1. Whether the facts alleged in any of PNBI and PEC's complaints set forth facts plausibly alleging that APC had actual knowledge that the RICO Ringleaders were breaching any fiduciary duty to PNBI and/or PEC sufficient to state a claim for aiding and abetting the RICO Ringleaders breach of fiduciary duty as required by *Iqbal* and *Twombly*.

2. Whether the facts alleged in any of PNBI and PEC's complaints set forth facts plausibly alleging a claim for common law negligence against APC as required by *Iqbal* and *Twombly*.

3. Whether PNBI and PEC have alleged any facts plausibly alleging a confidential relationship sufficient to give rise to a claim for breach of fiduciary against APC as required by *Iqbal* and *Twombly*.

4. Whether PNBI and/or PEC have alleged any facts that any managing agent as defined under the California Supreme Court's decision in *White v. Ultramar*, 21 Cal.4th 563 (1999) acted with malice, oppression or fraud as required to state a claim for punitive damages under California Civil Code section 3294.

5. Whether PNBI and /or PEC have alleged any facts plausibly alleging that APC's alleged conduct was a substantial factor in causing their harm.

6. Whether the RICO Ringleaders' conduct was superseding intervening cause of PNBI and/or PEC's damages to break the causal link as to any alleged wrongful conduct by APC.

Despite four attempts to allege facts plausibly demonstrating an entitlement to relief, PNBI and PEC have wholly failed to do so and the district court's orders granting APC's motions to dismiss should be affirmed.

STATEMENT OF FACTS

The federal government recognized PNBI in 1994. 5-ER-000688, ¶ 2. After federal recognition, PNBI employed several individuals, including Defendants John Crosby, Ines Crosby, Larry Lohse ("RICO Ringleaders") and Sherry Myers to manage the Tribe's business affairs. 5-ER-000688, 708-709, ¶ 3, 84, 87. Leslie Lohse was the Tribal Council Treasurer.[2] 5-ER-000694, ¶ 30. PNBI terminated

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[2] Leslie Lohse is also considered to be one of the RICO Ringleaders. 5-ER-000688, ¶ 3.

these Defendants' employment and otherwise removed them from their positions with PNBI on April 12, 2014. 5-ER-000691, 694, ¶¶ 12, 28-31.

A. PNBI Authorizes Creation of Defined Benefit and 401(k) Plans

On December 31, 2004, PNBI Tribal Council passed a resolution authorizing the adoption of the Defined Benefit Plan signed by then-Tribal Chairman Everett Freeman, who is now deceased. 5-ER-000743, 819 ¶¶ 228, 499; 3-ER-000273; 10-ER-001667, ¶ 13. PNBI and PEC now contend that "APC [and Moore] were aware of this requirement for Tribal Council authorization and were aware that no such authorizations were received." 5-ER-000747, ¶ 244. They further allege in the same conclusory fashion that the "purported signatures of Tribal Council Chairman Everett Freeman…vary so widely that no reasonable person could concluded they were signed by the same person." 5-ER-000747, ¶ 243.

However, absent from every complaint so far are any facts alleging: (1) how it was that APC was aware of such forgery having had no prior experience or dealings with PNBI; and (2) how APC knew that Tribal authorization had not, in fact, been received to establish the plans. 5-ER-000747, ¶¶ 243, 244. The reason these facts are missing from each of PNBI and PEC's four complaints is because they simply do not exist.

B. PNBI Retains APC to Prepare the Defined Benefit and 401(k) Plans

Acting through Director of Economic Development John Crosby and Tribal Council Treasurer Leslie Lohse, PNBI contracted with APC to design, structure and administer both a defined benefit pension plan and a 401(k) plan pursuant to a written Service Agreement.[3] 5-ER-000699, 747, 748, 750, ¶¶ 50, 244, 252-253; 3-ER-000275-278. Once the plans were prepared, APC provided "technical, data management and recordkeeping services" for the plans. 3-ER-000275. The scope of the agreement referenced in, but not attached to, the TAC states in relevant part:

> ***The Plan Administrator, as defined in the Plan document, is a named fiduciary of the Plan and is responsible for directing Plan policies, interpretations and procedures.*** The Plan Administrator is responsible for the preparation of reporting documents as required by law, with the Internal Revenue Service ("IRS"), Department of Labor ("DOL"), and Pension Benefit Guaranty Corporation ("PBGC"). ***It is understood by both parties that APC is not the Plan Administrator. APC shall have no authority or control regarding Plan assets or any discretionary authority regarding the management or administration of the Plan.*** APC shall prepare documentation and reports for review by the Plan Administrator which may be used by the Plan Administrator to file with the IRS, DOL, or PBGC. ***APC shall not be required to review or audit information supplied by the Plan Administrator. The Plan Administrator shall bear sole responsibility of verifying the accuracy of all such information.*** Documents and forms are submitted to the Plan Administrator solely to assist the Plan Administrator, attorneys and accountants.

[3] PNBI and PEC do not dispute the validity of this agreement given that the "new" Tribal Council members and trustees executed the identical agreement with APC with the same scope of services on January 15, 2015. 3-ER-000521-525.

3-ER-000275. (Emphasis added.)

The Service Agreement goes on to further limit APC's scope of the services to PNBI as follows:

> Employer and Trustee understand and agree that APC ***does not*** perform the following services:
>
> • Provide discretionary authority, control, or assume responsibility of the investment or disposition of Plan assets, or the management or administration of the Plan.
>
> • Provide investment advice or investment management services.
>
> • Value plan assets but relies on the values as provided by the Trustee.
>
> • Act as a Plan "fiduciary" as the term in used under federal law.
>
> APC is retained to provide only the administration support services specifically described above. The legal capacity of APC is that of an agent of the Plan Administrator. The Plan Administrator delegates to APC certain ministerial nondiscretionary administrative services as set forth in this Service Agreement. APC is not being delegated any discretionary authority in the administration of the Plan.

3-ER-000276. (Emphasis added.)

Pursuant to the terms of this Service Agreement, APC provided PNBI with plan documents to set up both plans. 5-ER-000699, 743-744. Significantly, PNBI acted as the plan sponsor and administrator for both plans. 3-ER-000285, 289, 298-299 ¶¶ 1.5, 1.26; 2.2; 2.4; 3-ER-000351, 353; 3-ER-000454-455; 5-ER-000874, ¶ 789. Crosby and Lohse acted as the plans' trustees and administered the plans on behalf of PNBI. 5-ER-000747, 756-758, 839, ¶¶ 244, 276-282, 287, 289, 571; 3-

ER-000351-353; 3-ER-000431, 454-455. This is significant because throughout the various complaints, PNBI and PEC continually allege that APC "worked only with the RICO Ringleaders — specifically John Crosby and Leslie Lohse — to assist in the creation and modification of the Tribal 401(k)." 5-ER-000750, ¶ 253. It makes sense that APC would work with Crosby and Lohse because they were the designated trustees from whom APC took direction regarding the subject plans consistent with the plan documents. *See*, *e.g.*, 5-ER-000297-300, 336-340, 353.

Acting in their capacity as trustees of the retirement plans, Crosby and Lohse reported to APC the list of eligible employees participating in the plans (census information). 5-ER-000000761, 763-764, ¶¶ 301, 310, 313-315, 317; 3-ER-000457-494. Contrary to PNBI's allegations, all PNBI employees were eligible, except certain exempted employees that PNBI does not dispute. *Compare* 5-ER-000744, 761, ¶¶ 229-230, 301 *with* 3-ER-000288, 300-301, ¶¶ 1.22, 3.1-3.7; 3-ER-000353-355, and 3-ER-000384, 435-436; 2-ER-000098-99. Additionally, while PNBI and PEC contend that the census information provided by Crosby was false, APC was under no obligation to verify the information provided. 3-ER-000276.

APC thereafter administered the retirement plans according to trustees Crosby and Lohse's instructions, including terminating the Defined Benefit Plan in 2008 at PNBI's instruction. 5-ER-000769, ¶ 334. PNBI now contends that the so-called RICO Ringleaders and Myers received excessive retirement compensation under the retirement plans that PNBI's duly elected officials and employees authorized and administered. 5-ER-000747-752, ¶¶ 243-261. Indeed, while PNBI takes issue with the plan provisions allowing for immediate vesting and lump sum distributions, it readily acknowledges that such provisions are permissible. 5-ER-000769, ¶ 334.

C. PNBI and PEC Turn Their Focus on APC's Greg Lynn in an Unsuccessful Attempt to Assert a Plausible Claim Against APC

In the TAC, PNBI and PEC focus on APC's employee Greg Lynn and what he purportedly did and knew. Although they added a number of paragraphs attempting to show that Mr. Lynn had a crystal ball and could read the minds of the RICO Ringleaders, the allegations, at best, amount to nothing more than rank speculation and, at worst, outright misrepresentations insufficient to meet the *Twombly/Iqbal* standard.

Fanciful allegations regarding Mr. Lynn's involvement demonstrate the complete absence of any factual support for their claims. For instance, they allege:

> 271. In fact, the RICO Ringleaders took the extraordinary step of withdrawing the money in cash, and thus incurring significant tax penalties, so as to avoid efforts by the Tribe to track and locate the funds. The liquidations were accomplished in late June and early July of 2014. This is well after it was common knowledge, especially in the Corning-Chico-Redding area, that the RICO Ringleaders were accused of embezzling millions of dollars from the Tribe and had been removed from their positions.
>
> 272. In full knowledge of these facts, APC's Lynn, with the active participation and assistance of Garth Moore, allowed the RICO Ringleaders to make these withdrawals without requesting and receiving authorization from the

> Tribe and actively assisted RICO Ringleader John Crosby — who, as known by Mr. Lynn at the time, had not held any position with the Tribe since April — to affect the liquidation for himself and the other RICO Ringleaders.

5-ER-000685, ¶¶ 271, 272.

Not only does PNBI fail to allege any facts demonstrating that Lynn knew these "facts", PNBI readily admits in the TAC that it knew the RICO Ringleaders had opened Post Office boxes to divert Tribe-related mail and set up new accounts at Umpqua Bank to funnel the allegedly embezzled monies. *See* 5-ER-000780, ¶ 370. Yet, PNBI did not alert APC to this fact or provide any information to APC to suggest there was a problem in order to expedite removing Crosby and Lohse as plan trustees as evidenced by the fact that PNBI sent the request to change trustees to Garth Moore, not APC. 5-ER-000758, ¶ 289; 2-ER-0000226-227. Furthermore, the fact that the RICO Ringleaders were removed from their positions on April 12, 2014 has no bearing on Crosby's duties as trustee of the 401(k) plan and ability to liquidate the plan because acting as trustee did not require that he hold a position with PNBI or PEC. 3-ER-000336-343, ¶¶ 7.1-7.12; 5-ER-000823, ¶ 509.

Undeterred by these fictional allegations, PNBI goes on to allege, "They [Lynn and Garth Moore] also knew that the Tribe was not yet aware of the size of the RICO Ringleaders' and Sherry Myers' Tribal 401(k) accounts and were likely to object to and prevent the distribution of the monies those accounts to the RICO Ringleaders and Ms. Myers if John Crosby was to be replaced as a trustee of the

Tribal 401(k) prior to the distribution of the funds in the accounts." 5-ER-000685, ¶ 273. PNBI then references emails dated June 30, 2014 and July 1, 2014 between Shelby Campiz of Garth Moore and Mr. Lynn to jump to the illogical and purely speculative conclusion that Mr. Lynn knew that Andrew Alejandre would not approve the distribution. 5-ER-000756-758, ¶¶ 274-283; 2-ER-0000199-200. Yet, again, PNBI failed to allege that Ambrosia Rico, the presumptive Tribal Secretary did, in fact, execute the paperwork necessary to liquidate at least one of the RICO defendants — Sherry Myers - 401(k) plan in August 2014 without question despite the fact that "it was common knowledge, especially in the Corning-Chico-Redding area, that the RICO Ringleaders were accused of embezzling millions of dollars from the Tribe and had been removed from their positions." 2-ER-0000203; 3-ER-000536-540; 5-ER-000685, ¶ 271. In fact, notwithstanding this "common knowledge", Mr. Alejandre was prepared to approve the rollover/distribution requests for all RICO Ringleaders as late as June 30, 2014. 2-ER-000199.

Moreover, the suggestion that PNBI or PEC were not aware of the amount of money in the plan is belied by the fact that the information was publicly available to them. The plan documents were readily available from the Department of Labor, as well as the Form 5500s filed by APC with the IRS for the plans since 2005, that would have provided PNBI and PEC with the amounts contained in the plans before the RICO Ringleaders decided to liquidate their accounts. *See* https://www.dol.gov/ebsa/publications/how_to_obtain_docs.html. There are no facts alleged that PNBI or PEC exercised any modicum of diligence in this regard.

The allegations are replete with bold statements of what Mr. Lynn purportedly knew, but wholly fail to allege facts how it was that Mr. Lynn knew certain facts, such as the RICO defendants' intentions to allegedly rob PNBI of millions of dollars. Other allegations are simply absurd. *See*, *e.g.*, 5-ER-000685, ¶¶ 282-290.

What is abundantly clear from the documents referenced to and relied upon (but not attached) by PNBI in the TAC is that the plans at issue were admittedly lawful and never challenged or disqualified by the IRS. Further, APC conducted itself consistent with the terms and conditions of the Service Agreement it entered into with PNBI at the behest of the trustees overseeing the plans. Despite their best efforts on four, different occasions, PNBI and PEC have failed to allege anything but rank speculation to suggest any wrongful conduct by APC, or to link APC with any alleged wrongful conduct they attribute to the RICO Ringleaders, sufficient to plausibly state any claims against APC. Consequently, the district court's ruling granting APC's motion to dismiss should be affirmed.

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). In ruling on a motion to dismiss, the Court may look beyond the four corners of the complaint to documents for which the Court can take judicial notice, as well as documents referenced in, but not attached to, the Complaint without converting the motion to dismiss into a motion for summary judgment. *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Knievel*, *supra*, 393 F.3d at 1076-1077 (holding that the "incorporation by reference" doctrine allows the Court to look beyond the pleadings on a 12(b)(6) motion without converting it into a motion for summary judgment.)

The court presumes factual allegations of the complaint to be true and draws all reasonable inferences in favor of plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Rather, Plaintiffs must plead facts that allow a court to reasonably infer that defendant APC is liable for the alleged misconduct; the mere possibility that APC's conduct was unlawful is not enough. *Iqbal*, *supra*, 556 U.S. at 677. Conclusory allegations and unwarranted inferences are also insufficient. *Twombly*, *supra*, 550 U.S. at 555. Furthermore, allegations that simply recite the elements of a claim are not assumed to be true. *Iqbal*, 556 U.S. at 681. Thus, a court is not required to "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 659 F.3d 1061, 1064 (9th Cir. 2011).

Moreover, the District Court's decision may be affirmed on any ground supported by the record, even if not relied upon by the District Court. *Campbell v. Washington Dept. of Soc. & Health Servs.*, 671 F.3d 837, 842 n.4 (9th Cir. 2011). PNBI and PEC have wholly failed to meet their burden and the order granting APC's motion to dismiss the TAC and subsequent judgment on the same should be affirmed.

LEGAL ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT PNBI AND PEC FAILED TO STATE A CLAIM AGAINST APC FOR AIDING AND ABETTING RICO RINGLEADERS BREACH OF FIDUCIARY DUTY

Under California law, liability may be imposed for aiding and abetting the commission of an intentional tort only if the person: (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act; or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.App.4th 1451, 1475 (2d Dist. 2014). "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained. [Citation.]" *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal.App.4th 1138, 1146 (1st Dist. 2005). A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." *Upasani v. State Farm General Ins. Co.*, 227 Cal.App.4th 509, 519 (4th Dist. 2014). However, the alleged failure to act, without more, is insufficient as a matter of law to state a claim for aiding and abetting the commission of a tort. *Fiol v. Doellstedt*, 50 Cal.App.4th 1318, 1326 (2d Dist. 1996) ["Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting."]

"California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort." *Casey*, *supra*, 127 Cal.App.4th at 1144; *accord Henry v. Lehman Commer. Paper, Inc.* (*In re First Alliance Mortg. Co.*), 471 F.3d 977, 993 (9th Cir. 2006). A civil cause of action for aiding and abetting "necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff's object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong." *Howard v. Superior Court*, 2 Cal.App.4th 745, 749 (2d Dist. 1992). Thus, liability for aiding and abetting an intentional tort arises if the defendant substantially assists or encourages another party to act, with the knowledge that the other party's conduct constitutes a breach of duty. *Casey*, *supra*, 127 Cal.App.4th at 1144. The key element patently absent here is actual, not constructive, knowledge of the alleged wrongful conduct.

In *Casey*, plaintiff alleged the defendant banks knew that certain officers and fiduciaries of a corporate entity were involved in "wrongful or illegal conduct," including money laundering and making excessive withdrawals in violation of fiduciary duties they owed to said corporate entity. *Casey*, *supra*, 127 Cal.App.4th at 1152. The *Casey* court held these allegations were insufficient because they did not establish the bank's actual knowledge of the misappropriation or theft of $36 million from the corporation. *Id.* at 1149, 1152-1153. The *Casey* plaintiff further alleged, like PNBI and PEC allege here, that "each [bank] acted with knowledge of the primary wrongdoing and realized that its conduct would substantially assist the accomplishment of the wrongful conduct." *Id.* at p. 1153. However, the *Casey* Court disagreed holding, "[t]his conclusory allegation fails to identify the primary wrong and is not otherwise supported by the rest of the complaint, which fails to allege the banks knew the DFJ Fiduciaries were misappropriating funds from DFJ." *Ibid.*

Similarly, in *Schulz v. Neovi Data Corp.*, 152 Cal.App.4th 86 (4th Dist. 2007), the court affirmed an order sustaining defendants' demurrers to the aiding and abetting claim without leave to amend. In *Schulz*, the plaintiff pleaded only that "PayPal knew the site was an illegal lottery but agreed [the site] could use its payment system with the knowing intent to aid and abet [the site's] operation because it could be profitable for PayPal." *Id.* at 97. As to the other payment processing company, the complaint alleged only that it "'knew of [the site's] unlawful operations' 'but knowingly and intentionally aided and abetted the operation by setting up a system' for consumers to use its electronic check system, and, as a result, received a fee." *Ibid*. Based on these pleadings, the Court held that plaintiff had failed to allege the requisite actual knowledge of the alleged illegal lottery or facts showing substantial assistance or encouragement because the allegations were nothing more than "mere conclusions." *Ibid.*

Here, PNBI and PEC allege similar conclusions as did plaintiff in *Neovi* and *Casey* without any supporting facts. Particularly, they allege that the RICO Ringleaders and Defendant Myers relied upon APC to establish the retirement plans, and that based upon the RICO Ringleaders and Defendant Myers' actions, APC *should have known* of the "unlawful and disloyal aims in putting the retirement plans in effect." 5-ER-000685, ¶¶ 809-810 (emphasis added.) However, "should have known" is not actual knowledge required for an aiding and abetting claim and thus fails as a matter of law.

There are no facts in any of Plaintiffs' complaints, or that can be pled, plausibly alleging that APC had actual knowledge that the RICO Ringleaders and Defendants were breaching their fiduciary duties to PNBI or PEC and knowingly assisted them in doing so. Significantly, PNBI and PEC ignore the fact that APC was under no obligation to verify information provided to it by the plan sponsor (PNBI), administrator (PNBI) or trustees (Crosby and Lohse) or to inquire into the purposes of setting up the plans. 3-ER-000276; 5-ER-000839, 874, ¶¶ 571,789. Nor was it under any obligation to monitor the plan for any prohibited transactions as defined by the Internal Revenue Service and ERISA. 3-ER-000277. PNBI and PEC's attempt to get around the actual knowledge requirement by using overtly constructed conclusions to give the appearance that APC *should have had* actual knowledge without actually stating that APC did, in fact, have actual knowledge is fatal to their claim.

Furthermore, PNBI and PEC assert that "it was common knowledge, especially in the Corning-Chico-Redding area, that the RICO Ringleaders were accused of embezzling millions of dollars from the Tribe and had been removed from their positions." 3-ER-000536-540; 5-ER-000685, ¶ 271. Consequently, they allege that APC *should have known* of the RICO Ringleaders scheme and should have prevented them from liquidating the 401(k) plan by immediately changing the trustees upon request. *See* 5-ER-000755-758, ¶¶ 270-290. However, the plan documents required 30-days' notice before removing a trustee except "where the Employer [PNBI] reasonably determines a shorter notice period or immediate removal is necessary to protect Plan assets." 2-ER-0000176, § 8.08(B); *see also* 3-ER-000342, § 7.10.

PNBI readily admits that it knew in May 2014 that "RICO Defendant Sherry Myers was diverting Tribal mail to Post Office Boxes that she maintained" and that "RICO Ringleaders had opened the Umpqua accounts in the Tribe's name" clearly suggesting something was amiss. 5-ER-000780, ¶ 370. In fact, PNBI and PEC spend 9 pages and 36 paragraphs of the TAC detailing what they knew as early as May 1, 2014 regarding the RICO Ringleaders alleged embezzlement. 5-ER-000778-787, ¶¶ 362-398. Yet, despite this knowledge that something was amiss, notably missing from any of plaintiffs' complaints are any facts that PNBI or PEC provided APC with any information to suggest that "immediate removal was necessary to protect Plan assets." 2-ER-0000176, § 8.08(B); *see also* 3-ER-000342, § 7.10.

Quite to the contrary, the allegations demonstrate there was no such immediacy because PNBI's "new" Tribal Council leaders sent the request to change Crosby and Lohse as trustees to co-defendant Garth Moore, not APC. 5-ER-000758, ¶ 289; 2-ER-0000226-227. It was Moore, not PNBI, who forwarded the request to APC who immediately began the process to effectuate the change of trustee pursuant to the terms of the plan documents. *Ibid.* If PNBI was so concerned about dissipation of plan assets, as they now allege, it would have contacted APC directly and provided APC with all pertinent information advising APC that immediate removal was necessary. It did not. 2-ER-0000226-227. In fact, the "new" Tribal Council was fine with signing the rollover requests for the RICO Defendants to liquidate their accounts as late as July 1, 2014. 2-ER-0000199.

When all four complaints are viewed in their entirety, coupled with documents referred to in the complaint and those for which this Court can take judicial notice, PNBI and PEC's conclusory allegations of what APC "should have known" versus what APC actually knew cannot withstand scrutiny because the complaints fail to establish that APC participated in a specific primary wrong "with knowledge of the object to be attained." *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 47 (1908). The district court's order granting APC's motion to dismiss was proper and should be affirmed in its entirety.

II. THE DISTRICT COURT PROPERLY FOUND THAT PNBI AND PEC HAVE FAILED TO PLAUSIBLY ALLEGE A COMMON LAW NEGLIGENCE CLAIM AGAINST APC

To establish a professional negligence claim, PNBI and PEC must allege: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." *Budd v. Nixen*, 6 Cal.3d 195, 200 (1971).

A. PNBI and PEC Have Failed to Plausibly Alleged Any Facts That APC Breached Any Duty Owed to Them As APC Performed Consistent with the Terms of the Written Services Agreement

A professional's duty of care will arise from a contract to perform professional services. *See Gagne v. Bertran*, 43 Cal.2d 481, 490 (1954). Thus, the scope of a professional's duty is defined by the contract or undertaking. *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 406 (1992). In other words, a professional has the duty to exercise care in performing those particular services or functions the professional has agreed or undertaken to perform. *See, e.g.*, *Heyer v. Flaig*, 70 Cal.2d 223, 228-229 (1969), *disapproved on other grounds*, *Laird v. Blacker*, 2 Cal.4th 606, 617 (1992). Consequently, the professional's duty does not extend to services for which there is no agreement or undertaking or which are not within the agreement or undertaking. *See Kane, Kane & Kritzer, Inc. v. Altagen*, 107 Cal.App.3d 36, 39-42 (2d Dist. 1980) (attorney requested only to send demand letter had no duty to take action to avoid the running of the statute of limitations); *Brandlin v. Belcher*, 67 Cal.App.3d 997, 1001 (2d Dist. 1977) (in absence of specific undertaking or agreement to amend trust agreement, neither attorney's previous representation of client nor knowledge of client's alleged desire for amendment created duty to take action to effect amendment); *Oakes v. McCarthy Co.*, 267 Cal.App.2d 231, 247-249 (2d Dist. 1968) (soils engineer's liability for negligent filling and compacting of residential lot dependent upon undertaking to supervise and inspect work); *Costa v.*

Regents of Univ. of Cal., 116 Cal.App.2d 445, 460-461 (1st Dist. 1953) (hospital undertaking to provide outpatient services had no duty to hospitalize patient).

In the TAC, PNBI alleged that it contracted with APC to design, structure and administer both a defined benefit pension plan and a 401(k) plan. 5-ER-000685, ¶¶ 50, 228, 252. This agreement is the fundamental premise upon which any duty can be imposed upon APC and thus essential to PNBI's claims. *Knievel, supra*, 393 F.3d at 1076. The Service Agreement sets forth the scope of APC's services and, thus any duty owed to PNBI. 3-ER-000274-278. In this regard, the Agreement states:

> Employer does hereby retain APC to provide certain technical, data management and record keeping services including production of documents and reports to the Employer's qualified retirement plan . . . [¶] It is understood by both parties that APC is not the Plan Administrator. APC shall have no authority or control regarding Plan assets or any discretionary authority regarding the management or administration of the Plan. APC shall prepare documentation and reports for review by the Plan Administrator…The Plan Administrator shall bear the sole responsibility of verifying the accuracy of all such information . . . ."

3-ER-000275.

APC provided PNBI with plan documents to set up both the defined pension plan and the 401(k) plan. 5-ER-000685, ¶¶ 228, 253. Both plans covered all of PNBI's employees, except for certain excluded employees not relevant here. 5-ER-000685 ¶¶ 227-230, 301, 310, 313-315, 317-322; *see also* 3-ER-000288, 353, 435-436; 2-ER-000098-99.

Preliminarily, PNBI and PEC allege that Tribal Council authorizations signed by Tribal Chairman Everett Freemen creating, and then terminating, the defined benefit plan were forged and APC knew it. 5-ER-000747, 758-761, ¶ 243, 292-300. However, the suggestion that APC knew or should have known that Tribal Chairman Everett Freeman's signature on the resolution terminating the defined benefit plan in 2008 was forged or that the ability to obtain the resolution on short notice presupposes APC: (1) had sufficient interaction with Everett Freeman and exemplars of Everett Freeman's handwriting to discern any potential discrepancies in his signatures over the years as he advanced in age; and (2) had any understanding of the Tribal Council process necessary to pass a resolution. Not only is the TAC devoid of any such facts plausibly establishing these points, but such knowledge would be outside the scope of the express obligations that APC agreed to undertake in entering into the service agreement in the first instance. 5-ER-000685, ¶¶ 292-297.

Moreover, PNBI and PEC acknowledge that the IRS scrutinizes and will disqualify improperly set up plans, but provide no allegations that the IRS did so in this instance. *See* 5-ER-000685, ¶ 301-308, 312, 318-322. In this regard, they contend that the defined benefit plan was not a bona fide plan because it was terminated only a few years after creation. 5-ER-000769-770, ¶¶ 334-335. However, there are no facts alleged in any complaint that APC knew from inception that the RICO Ringleaders intended the defined benefit plan to be a short-term investment vehicle. More important, there are no facts alleged that the IRS has challenged or disqualified the plan as not being a bona fide plan.

PNBI and PEC also contend that the census information provided by Crosby to APC for each of the plan years identifying five employees was false and APC knew it. 5-ER-000762-764, ¶¶ 306-315. However, there are no facts demonstrating that "APC knew it." Further, APC was under no obligation to verify this information as expressly stated in the written services agreement. 3-ER-000456-494. Nor was it required to ensure that the plan administrator and sponsor (i.e., PNBI) provided notice to all eligible employees. *Ibid.* Thus, the plans set up and administered by APC were designed for inclusivity, not exclusivity, and there are no allegations that APC undertook any action itself to limit participation in the plans.

PNBI readily admits that it was both the pension and 401(k) plan sponsor and administrator. 5-ER-000874, ¶ 789. PNBI, through the plan trustees Crosby and Lohse, could limit participation in the plans if it chose to do so, not APC. 5-ER-000744, 753 ¶¶ 229-230, 264. Specifically, trustee Crosby reported to APC the list of eligible employees to APC each year. 5-ER-000764, ¶ 315; 3-ER-000456-494. APC did not determine eligibility or participation as it had no discretionary authority to do so. 3-ER-000276. Regardless, the only employees excluded from participating were collective bargaining employees, nonresident aliens, and reclassified employees. *See, e.g.*, 3-ER-000384. Thus, all other employees were eligible.

By their own admission, PNBI and PEC acknowledge that APC properly set up the retirement plans, and that the IRS has not challenged or disqualify the plan. Additionally, PNBI, not APC, was responsible for limiting participation. There are no facts alleged, nor can there be, demonstrating that APC breached any duty owed to PNBI or PEC in the performance of its nondiscretionary ministerial tasks regarding the subject plans sufficient to plausibly state a claim for negligence against APC and the district court's order granting APC's motions to dismiss the negligence claim should be affirmed.

III. THE DISTRICT COURT PROPERLY HELD THAT PNBI AND PEC FAILED TO PLAUSIBLY ALLEGE A BREACH OF FIDUCIARY DUTY CLAIM AGAINST APC

In the First Amended Complaint ("FAC"), PNBI and PEC asserted a claim for breach of fiduciary duty against APC contending "the Tribe's retirement plan service providers, were duty bound to act with utmost good faith in the best interest of the Tribe."[4] 11-ER-001975, ¶ 722. They went on to allege, "[t]his required . . . that APC conduct [its] activities with same care as that with which other reasonably competent providers of administrative, investment and/or actuarial services to sponsors of tax-

[4] Apparently recognizing the futility of this claim, the breach of fiduciary duty claim does not appear in the Second or Third Amended Complaints.

qualified retirement plans would provide such services." *Id.* at ¶ 723. These allegations are nothing more than legal conclusions, which, at best, allege a professional, as opposed to a fiduciary duty.

Professional negligence and fiduciary duty are separate and distinct claims. *Barbara A. v. John G.*, 145 Cal.App.3d 369, 382-383 (1st Dist. 1983); *cf. Budd v. Nixen*, 6 Cal.3d 195, 200 (1971). Beyond mere allegations of professional negligence, a claim for breach of fiduciary duty requires some further violation of the obligation of trust, confidence, and/or loyalty to the client. *See, e.g.*, 2 Mallen & Smith, *Legal Malpractice* (2017) § 15.3, pp. 660-661 ("[F]iduciary breach allegations that constitute negligence, which do not implicate a duty of confidentiality or loyalty, and are merely duplicative of a negligence cause of action, do not support a cause of action for fiduciary breach").

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

By definition, breach of fiduciary duty is a tort that may be committed by only a limited class of persons. *1-800 Contacts, Inc. v. Steinberg*, 107 Cal.App.4th 568, 592 (2003). To be charged with a fiduciary obligation, a party must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *Cleveland v. Johnson*, 209 Cal.App.4th 1315, 1338 (2d Dist. 2012). There are no such facts here.

PNBI and PEC must allege facts demonstrating that a relation exists between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. *Wolf v. Superior Court*, 107 Cal.App.4th 25, 29 (2d Dist. 2003).

While the California Supreme Court has noted that every contract requires one party to repose an element of trust and confidence in the other to perform because every contract calls for the highest degree of good faith and honest dealing between the parties, the ability to exploit a disparity of bargaining power between the parties does not necessarily create a fiduciary relationship. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal.4th 375, 389 (2008).

In an effort to establish a fiduciary relationship, PNBI and PEC have alleged APC "served as the third-party administrator for the Tribe's retirement and defined benefits plans." 11-ER-001807, ¶ 49. They further contend, in a conclusory fashion, that APC "assisted that RICO Ringleaders in making investment choices with the funds invested in the plans;" yet it was defendant Moore who was "responsible for implementing the investment choices of the trustees of the plans, RICO Ringleaders John Crosby and Leslie Lohse." 11-ER-001858, ¶ 225. However, these allegations are in direct contravention with the written services agreement between APC and PNBI which expressly states:

> APC shall not be obligated to and shall not provide any advice regarding the investment of Plan assets. Specifically, but without limitations, APC shall not be obligated to render advice regarding the allocation of Plan assets (to any particular investment or type of investment) or the procedural prudence employed by the plan or its agents in investing Plan assets.

3-ER-000276.

Nor did APC agree to perform "discretionary authority, control, or assume responsibility of the investment or disposition of Plan assets, or the management or administration of the Plan." 3-ER-000276. Further, APC did not agree to "provide investment advice or investment management services" or "[a]ct as the Plan fiduciary." *Ibid.*

Even assuming for the moment that the plans at issue were subject to ERISA (which they are not)[5], APC would not qualify as a fiduciary because it did not exercise any discretionary authority or discretionary control regarding the management of the plans or exercise any control over the management of plan assets.

[5] The plans at issue are governmental plans expressly exempt from ERISA. *See* 29 U.S.C. §§ 1002(32), 1003(b)(1).

29 U.S.C. § 1002(21)(A); 3-ER-000276. Nor did APC provide advice to PNBI or PEC on a regular basis that served as the primary basis for investment decisions regarding plan assets. 29 U.S. C. § 1002(21)(A)(ii); 3-ER-000276. In fact, the plan documents and written service agreement belie any such allegation. 3-ER-000275-276; 285, 3-ER-000289, ¶¶ 1.26, 1.29; 3-ER-000351, 353; 3-ER-000454-455.

For example, the defined benefit plan defines a "named fiduciary" and the fiduciary's responsibilities in relevant part as follows:

> The "named Fiduciaries" of this Plan are: (1) the Employer; (2) the Administrator; (3) the Trustees (if the Trustee has discretionary authority as elected in the Adoption Agreement or as otherwise agreed upon by the Employer and the Trustee), and (4) any Investment Manager appointed thereunder. The named Fiduciaries shall have only those specific powers, duties, responsibilities, and obligations as are specifically given them under the Plan, including, but not limited to, any agreement allocating or delegating their responsibilities, the terms of which are incorporated herein by reference…

3-ER-000348-349, § 10.14.

In this case, PNBI was the employer and administrator; Crosby and Lohse were the trustees, and Garth Moore was the investment manager. 3-ER-000285, 289, §§ 1.5, 1.26; 3-ER-000351, 353, 454-455; 5-ER-000753, 762, 874, ¶ 263, 306, 307, 789. APC, on the other hand, did not occupy any fiduciary role with the plans.

In *Brown v. California Pension Administrators and Consultants, Inc.*, 45 Cal.App.4th 333 (2d Dist. 1996), plaintiff investors sought to hold the trustee and plan administrator liable for negligence and breach of fiduciary duty for failing to alert them to the fact that the borrower of plan funds had defaulted in loan payments. The trial court sustained defendants' demurrer to the breach of fiduciary duty claim without leave to amend and granted defendants' motion for summary judgment on the negligence claim finding no duty owed.

In affirming the judgment, the Court reviewed the plan documents, including the adoption agreement, noting that while these documents may have imposed a duty to perform ministerial functions as plan administrators and trustees with due care (which was not at issue), they did not have any duty regarding investment choice or advising them about the risk of any investments. Thus, there was no obligation to advise the investors about the defaulted payments. *Brown*, *supra*, 45 Cal.App.4th at 345-348.

In the present case, PNBI and PEC have alleged that APC administered the Tribe's pension plans. 11-ER-001791, ¶ 49. This, in and of itself, does not create a fiduciary relationship and is not only inconsistent with the written services agreement that expressly limits APC's duties, but also internally inconsistent with their own allegations that allege defendant Garth Moore was responsible for advice concerning investment of plan assets. 5-ER-000753, ¶ 263. In fact, the services agreement with APC expressly excludes any discretionary authority or control regarding plan assets and management or administration of the plan. 3-ER-000275-276.

All that can be gleaned from the FAC is that APC agreed to perform some type of administrative functions regarding PNBI's pension plans. Without anything more, the FAC failed to establish a fiduciary relationship between APC and PNBI or PEC. Thus, at best, the FAC established an independent contractor relationship between PNBI and APC. *See White v. Uniroyal, Inc.*, 155 Cal.App.3d 1, 25 (1st Dist. 1984), *overruled on other grounds in Soule v. General Motors Corp.,* 8 Cal.4th 548 (1994) (when the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established); *see also Mark Tanner Constr. v. Hub Internat. Ins. Servs.*, 224 Cal.App.4th 574, 585 (3d Dist. 2014) ("[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured."); *Trane Co. v. Gilbert*, 267 Cal.App.2d 720, 726 (2d Dist. 1968) (preparation of plans and specifications by an architect creates an independent contractor, not agency, relationship).

The FAC also failed to establish that APC acted in any type of trust relationship with PNBI. A pension plan offered by an employer creates two relationships: (1) a contractual relationship between the employer and the employee; and (2) a trust relationship between pensioner-beneficiaries and the trustees of pension funds who administer retirement benefits. *Lix v. Edwards*, 82 Cal.App.3d 573, 578 (2d Dist. 1978); *Hannon Engineering, Inc. v. Reim*, 126 Cal.App.3d 415

(2d Dist. 1981). The trustees must exercise their fiduciary duties in good faith. *Hannon*, *supra*, 126 Cal.App.3d at 427.

Here, however, the FAC failed to elucidate the role APC actually played in PNBI's retirement plans, and nowhere alleges that APC acted as trustee for the plans. Therefore, Plaintiffs' failed to establish that they entered into a trust relationship with APC with regard to the subject plans. Accordingly, Plaintiffs fail to establish under any theory that APC acted in a fiduciary capacity with regard them. Consequently, the district court did not err in dismissing the breach of fiduciary duty claim asserted in the First Amended Complaint without leave to amend and the ruling should be affirmed.

IV. THE DISTRICT COURT PROPERLY DISMISSED THE CLAIM FOR PUNITVE DAMAGES AGAINST APC

Under California law, in order to assert a claim for punitive damages against a corporate defendant, plaintiffs must allege that APC had "advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice [ ] on the part of an officer, director, or managing agent of the corporation." Cal. Civ. Code § 3294(b); *White v. Ultramar*, 21 Cal.4th 563, 575-576 (1999). "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." *College Hospital v. Superior Court*, 8 Cal.4th 704, 726 (1994); *Virtanen v. O'Connell*, 140 Cal.App.4th 688, 715 (4th Dist. 2006).

Ratification generally applies when "the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." *Virtanen*, *supra*, 140 Cal.App.4th at 726. In other words, there must be allegation above and beyond simply alleging the mere commission of a tort to plausibly state a claim for punitive damages against APC. Alleging that APC breached a fiduciary duty is insufficient. *See Scott v. Phoenix Schools, Inc.*, 175 Cal.App.4th 702, 715-716 (3d Dist. 2009); *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton LLP*, 96 Cal.App.4th 1017, 1051 (2d Dist. 2002); *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*, 185 Cal.App.3d 1149, 1154-1155 (1st Dist. 1986).

Furthermore, a "managing agent" is limited to employees who exercise substantial independent authority and judgment in their decision making, so that their decisions ultimately determine corporate policy. *White*, *supra*, 21 Cal.4th at 575-576. "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." *Id*. at pp. 576.

In *Virtanen*, attorney O'Connell, a shareholder with the law firm of Parker Milliken represented the buyer in a purchase and sale agreement. O'Connell and the firm agreed to act as the escrow agent for the transaction thereby implicating fiduciary duties to both parties to the transaction. The seller Virtanen rescinded the transaction and provided notice to O'Connell. However, O'Connell proceeded to close the transaction and transfer the stock certificates to the holding agent. Virtanen then sued O'Connell and the firm for breach of fiduciary duty seeking punitive damages. The jury deadlocked on the punitive damages issue and the trial court denied plaintiff's motion for retrial on the issue of punitive damages.

On appeal, the Court affirmed the trial court's ruling respect to the punitive damages issue as it related to the law firm. Although O'Connell was an agent for the firm and the undisputed testimony was that O'Connell and the firm represented both parties in the subject transaction, the Court found that punitive damages against the firm were not warranted because there was no evidence that the firm had advance notice or knowledge of O'Connell's unfitness, or that the firm itself committed fraud or acted with malice or oppression. *Virtanen*, *supra*, 140 Cal.App.4th at 724.

In the present matter, PNBI and PEC have alleged APC acted with malice, oppression and fraud in the context of their common law negligence and aiding and abetting breach of fiduciary duty claims. 5-ER-000876, 879, ¶¶ 795, 813. On the former, there can be no punitive damages as a matter of law for simple negligence. Cal. Civ. Code § 3294(a); *see also In re Northern District of California Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982) "(Punitive damages standards can range from gross negligence to reckless disregard to various levels of willfulness and wantonness.")

Regarding the latter, as set forth above, PNBI and PEC have failed to allege any facts to support an aiding and abetting claim against APC. More important, they have not alleged any facts that a managing agent of APC acted with malice, oppression or fraud. Rather, they simply point to APC employee Greg Lynn's conduct but allege no facts that he is a principal, officer, director or shareholder of APC, much less that he "exercise[d] substantial independent authority and judgment in [his] decision making, so that [his] decisions ultimately determined corporate [APC] policy" as required by *White*. Rather, PNBI and PEC simply allege that Lynn was an APC employee, with no facts suggesting that APC officers, directors or managing agents had any knowledge of the alleged conduct, much less ratified it, which is insufficient as a matter of law. *See*, *e.g.*, 5-ER-000753-754, ¶¶ 262-266.

PNBI and PEC have not alleged any facts in four complaints to support a claim for punitive damages against APC under any theory or that any managing agent of APC acted with malice, oppression or fraud sufficient to support a claim for punitive damages against APC. Thus, the district court's ruling dismissing this claim was proper and should be affirmed.

V. THE DISTRCT COURT PROPERLY GRANTED APC'S MOTION TO DISMISS AS CAUSATION IS LACKING

The district court granted APC's motion to dismiss the TAC on the grounds that the facts did not plausibly state claims for aiding and abetting a breach of fiduciary duty due to a lack of actual knowledge and the common law negligence claim due to a lack of breach. However, lack of causation is an independent basis with which to affirm the district court's decision to dismiss the TAC regarding both claims.

A. There are No Facts Plausibly Stated Alleging Causation

A tort becomes a legal cause of injury only when it is a substantial factor in producing the injury. *Soule v. General Motors Corp.*, 8 Cal.4th 548, 572-573, fn. 9, (1994). There must be a causal connection between a defendant's acts or omissions and a plaintiffs' injuries." *Dixon v. City of Livermore*, 127 Cal.App.4th 32, 43 (1st Dist. 2005). Stated differently, an actor's conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not committed a tortious act. *Viner v. Sweet*, 30 Cal.4th 1232, 1240 (2003); *Mills v. U.S. Bank*, 166 Cal.App.4th 871, 889 (4th Dist. 2008).

There are no facts plausibly alleged in the TAC demonstrating that any act or omission by APC caused PNBI or PEC's injuries. As noted above, the retirement plans at issue covered all of PNBI's employees, with three noted exceptions not relevant here. 3-ER-000353, 384. Additionally, PNBI, not APC, was the retirement plans' sponsor and administrator, and PNBI, through its then authorized agents, Crosby and Lohse, directed the activities of the Plan. 3-ER-000275-278, 285, 289, 297-300, 351, 353, 384, 454-455; 5-ER-000874, ¶ 789. Moreover, PNBI acknowledges that the IRS scrutinizes and will disqualify improperly set up plans, but provides no allegation that the IRS did so in this instance. 5-ER-000761-766, ¶¶ 301-308, 312, 318-322. In this regard, PEC suggests that APC set up a 401(k) plan for Tribe-Owned Business "E" so that Crosby could put ("steal" in plaintiffs' words) more money than he was permitted to do under IRS regulations. 5-ER-000764-766, ¶¶ 317-322. However, there are no allegations stating that that the IRS disqualified, or otherwise challenged, the plan as a result.

Thus, by their own admissions, PNBI and PEC acknowledge that APC properly set up the retirement plans and that the plans as structured violated no laws. The fact that others employed by PNBI or PEC may have had undisclosed intentions to improperly benefit from otherwise permissible plans does not establish that APC was the cause in fact of any of PNBI's or PEC's damages. Thus, PNBI and PEC's negligence claim fails as a matter of law and the district court's ruling dismissing this claim should be affirmed.

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

As another independent basis to affirm the district court's order dismissing the TAC, PNBI and PEC's negligence and breach of fiduciary duty claims fail because the RICO Ringleaders' conduct was a superseding, intervening cause. An intervening cause that breaks the chain of causation from the original act is itself regarded as the proximate cause of the injury, and relieves the original actor of liability. *Schrimscher v. Bryson*, 58 Cal.App.3d 660 (2d Dist. 1976). The general test of whether an independent intervening act that operates to produce an injury breaks the chain of causation is whether the act is foreseeable. *Id.* at 664. An act is not foreseeable and thus is a superseding cause of the injury if the independent intervening act is highly unusual or extraordinary and not reasonably likely to happen. *Ibid*. If it is determined that the intervening cause of independent origin was not foreseeable and that the results that it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries. *Hoyem v. Manhattan Beach City Sch. Dist*., 22 Cal.3d 508, 521 (1978); *Martinez v. Vintage Petroleum*, 68 Cal.App.4th 695, 700 (2d Dist. 1998). Furthermore, criminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior act which might otherwise be deemed a contributing cause. *Koepke v. Loo*, 18 Cal.App.4th 1444, 1449 (4th Dist. 1993).

In the present matter, PNBI and PEC readily admit in the TAC that the RICO Ringleaders, none of whom are employed or otherwise engaged by APC, went to great lengths to conduct the alleged illegal enterprise by employing a pattern of racketeering and other wrongful means to exert full control over PNBI and its ventures, including rigging elections, controlling information, hiding tribal documents including the Tribal Constitution, failing to keep financial records, bribery, and quashing opposition through economic pressure. *See, e.g.* 5-ER-000700-725, ¶¶ 54-157.

Additionally, PNBI admits that the RICO Defendants engaged in a concerted effort to hide their scheme to defraud by misleading PNBI as to its finances, fabricating employment agreements, conducting cyber-attacks, and physical intimidation. *See, e.g.* 5-ER-000816-828, ¶¶ 489-539. When this broad ranging illegal activity is coupled with the fact that APC properly set up the subject retirement plans to include all employees and performed only ministerial, non-discretionary tasks at the direction of the plan sponsors (PNBI), administrators (PNBI), and trustees (Crosby and Lohse), PNBI and PEC cannot escape the fact that the RICO Ringleaders' criminal conduct was unforeseeable. There are no plausible allegations to the contrary and thus, this criminal conduct is a superseding cause relieving APC of all liability.

Accordingly, the district court's ruling dismissing the common law negligence claim against APC with prejudice should be affirmed.

CONCLUSION

PNBI and PEC have woefully failed to assert facts to support any theory of liability against APC in four attempts. Legal conclusions, speculation, innuendo, misleading and false characterizations are insufficient as a matter of law under *Iqbal* and *Twombly* to plausibly state any claims for relief against APC. The district court correctly dismissed the claims against APC with prejudice and the judgment in favor of APC should be affirmed in its entirety.

DATED: January 3, 2018

MURPHY, PEARSON, BRADLEY & FEENEY

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STATEMENT OF RELATED CASES

The following related cases are currently pending in this Court and have been designated as companion cases for hearing and decision before the same panel:

- *Paskenta Band of Nomlaki Indians, et al. v. Crosby, et al.*, Case No. 17-15238;
- *Paskenta Band of Nomlaki Indians, et al. v. Umpqua Bank, et al.*, Case No. 17-15486;
- *Paskenta Band of Nomlaki Indians, et al. v. Garth Moore Insurance, et al.*, Case No. 17-15485;
- *Paskenta Band of Nomlaki Indians, et al. v. Cornerstone Community Bank, et al.*, Case No. 17-15484;
- *Paskenta Band of Nomlaki Indians, et al. v. Cornerstone Community Bank, et al.*, Case No. 17-16633; and
- *Paskenta Band of Nomlaki Indians, et al. v. Umpqua Bank, et al.*, Case No. 17-16673

CERTIFICATE OF COMPLIANCE

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Signature *_/s/ William A. Munoz_*
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Date January 3, 2018

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CERTIFICATE OF SERVICE

I certify that on January 3, 2018, I filed this Answering Brief electronically with the Clerk of the United States Court of Appeals for the Ninth Circuit. The Court's ECF system will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ William A. Munoz
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