2017 WL 5152201 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

PASKENTA BAND OF NOMLAKI INDIANS, et al., Plaintiffs-Appellants,

v.

ASSOCIATED PENSION CONSULTANTS, INC., Defendants-Appellees.

No. 17-15483.
November 3, 2017.

Appeal of the Judgment of the United States District Court for the Eastern District of California

Appellants' Opening Brief

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***I CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants state that none of them have a parent corporation and that no publicly-held companies hold 10 percent or more of any Plaintiffs-Appellants' stock.

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*1 *INTRODUCTION* [1]

The Paskenta Band of Nomlaki Indians (the "Tribe) was a victim of a 12-year embezzlement scheme by a small group of high-level employees, Ines Crosby, John Crosby, Leslie Lohse, and Larry Lohse (the "RICO Ringleaders"), and others they brought into the fold, including Sherry Myers ("Myers"), a lower-level employee. All profited handsomely and the Ringleaders, in particular, became very wealthy. After they terminated the RICO Ringleaders and Myers, the Tribe realized that something was amiss, and began investigating, with the help of law firm WilmerHale, exactly what the Ringleaders and Myers had done and how they had done it. Today, three of the Ringleaders are being criminally prosecuted in the Eastern District of California on numerous charges of fraud and embezzlement.

One of the ways in which the Ringleaders transferred vast sums of the Tribe's money to themselves was through retirement plans. On behalf of the Tribe, they engaged Defendants-Appellees Associated Pension Consultants, Inc. ("APC"), and Garth Moore and his firm, Garth Moore Insurance and Financial Services, Inc. (collectively, "Moore"), to design, implement, and administer a pension plan and a 401(k) plan and provide ongoing advice about their operation. In the ordinary course, such retirement-planning services would be regarded as ***2** benign. But here, the facts and circumstances give rise to a plausible inference that APC and Moore knew the Ringleaders and Myers's objective was to use the retirement plans as a subterfuge to steal from the Tribe, or at the very least to enrich themselves at the Tribe's expense, and they helped them do it.

Perhaps most egregious was a defined-benefit pension plan that APC and Moore devised and administered. Curiously, the Ringleaders and Myers were the only participants in this plan, even though the Tribe had other employees. In addition, no competent retirement-planning professional would create a pension plan with the features that the APC and Moore-designed plan had if it was a legitimate retirement-savings vehicle, especially when its sponsor was a governmental entity. Indeed, the plan's structure deviated so profoundly from conventional pension plans as to practically announce it was a sham. It was modeled on plans that help small businesses significantly reduce their tax liability, a strange blueprint to use for a sovereign Tribal government. What's more, it required the Tribe to make enormous annual contributions to each Ringleader (often in the hundreds of thousands of dollars a year), provided that the plan's benefits would vest immediately rather than after the Ringleaders completed a certain number of years of employment, and allowed the Ringleaders to cash out the money when they left their jobs and/or in the event the plan was terminated. All of these terms were well outside the norm for conventional pension plans. ***3** Further, despite federal regulations that require such pension plans to be permanent, and that cast serious suspicion on their legitimacy if they are terminated for any reason other than business necessity, APC and Moore helped the Ringleaders shut down and distribute the plan's assets after just three-and-a-half years, and despite the lack of any business exigency. In that short period of time, the Ringleaders and Myers accrued nearly *$4 million* in benefits, including an astonishing $1.5 million that was funneled to Ines Crosby alone. The Ringleaders lacked the requisite knowledge and expertise about retirement plans to accomplish this on their own. They needed help from APC and Moore and they got it.

On top of that, the Tribe has pleaded facts showing that APC and Moore worked with John Crosby, the 401(k) plan trustee, to liquidate that plan for the benefit of the Ringleaders and Myers, even *after* the Ringleaders and Myers had been terminated from their positions with the Tribe, *after* it had become public knowledge that they were under scrutiny for having embezzled from the Tribe, and *after* the Tribe had communicated, in no uncertain terms, that it wanted Crosby removed as plan trustee. Rather than adhere to the wishes of their client--the Tribe--to remove Crosby as expeditiously as possible, APC and Moore unreasonably delayed, and instead helped him liquidate the plan assets, thus transferring yet more Tribal money to him and his fraudster colleagues. In a contemporaneous email, the APC employee who worked extensively with the ***4** Ringleaders on the Tribal retirement plans told a Moore employee that they should "take care of John's [Crosby] stuff" *before* he was replaced as trustee. These facts support the reasonable inference that APC and Moore knew that the Ringleaders and Myers were benefiting improperly from the retirement plans, and APC and Moore helped them enrich themselves to the detriment of the Tribe.

Based on these and related facts, the Tribe pleaded detailed allegations against APC and Moore, seeking to hold them liable for negligence, breach of fiduciary duty, aiding-and-abetting liability, restitution, and for punitive damages. The district court, however, dismissed all of the Tribe's claims on the theory that its allegations are insufficient to give rise to a plausible inference that APC and Moore had actual knowledge of the Ringleaders' wrongdoing. In so holding, the district court erroneously gave short-shrift to the Tribe's factual allegations. It also failed to adequately consider whether, even if APC and Moore did not *actually know* that the Ringleaders were improperly lining their own pockets with the Tribe's money, they nonetheless *should have known* given their expertise. This speaks directly to the Tribe's negligence claim. In addition, in reviewing the aiding-and-abetting claim, the district court failed to consider whether APC and Moore knew that the Ringleaders were violating their fiduciary duties to the Tribe by using the retirement plans as vehicles to transfer extraordinary sums of the ***5** Tribe's money to their accounts, even if APC and Moore did not specifically know that the Ringleaders were engaged in a long-running embezzlement scheme.

Contrary to the district court's conclusion, the operative complaint is brimming with facts that strongly suggest that APC and Moore did, in fact, know, at the very least, that the Ringleaders were enriching themselves at the Tribe's expense in breach of their fiduciary duties to the Tribe, and provided essential aid and support to the Ringleaders. The design of the pension plan was so anomalous that APC and Moore could not have failed to understand that the Ringleaders' true purpose was to use it not as a genuine retirement-savings plan, but as a ruse to siphon millions of dollars out of the Tribe. Likewise, the priority treatment that APC and Moore gave to Ringleader Crosby's desire to terminate the 401(k) plan and pocket its assets in the face of the Tribe's desire to replace him as trustee, and in the face of public allegations of wrongdoing by him and his Ringleader cohort, further supports the inference that APC and Moore knew what was going on and contributed to the scheme.

Thus, the Tribe's well-pleaded factual allegations are sufficient for a reasonable jury to conclude either that APC and Moore knew full well that the Ringleaders were embezzling from the Tribe, or that, at a minimum, APC and Moore *should have known* what was happening and were in breach of their duties of care to the Tribe if they did not.

***6** For all of these reasons, the district court's dismissal of the Tribe's claims against APC and Moore should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1362 because the Tribe is a federally recognized Indian tribe, as well as federal-question jurisdiction under 28 U.S.C. § 1331, because the Tribe asserted claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment disposing of all of the Tribe's claims against APC and Moore on February 21, 2017. 1-ER-00001. The Tribe filed a timely notice of appeal on March 10, 2017. 2-ER-000063.

QUESTIONS PRESENTED

Where the Tribe has pleaded numerous detailed facts supporting the reasonable inference that APC and Moore knew that the Ringleaders and Myers were using the Tribal retirement plans to enrich themselves at the Tribe's expense--including the completely anomalous way APC and Moore designed the pension plan; their assistance in prematurely terminating that plan; and their refusal to assist the Tribe in expeditiously removing Ringleader Crosby as trustee of the 401(k) plan, while at the same time working with him, in his trustee capacity, to liquidate the 401(k) plan assets--did the district court err when it dismissed the ***7** Tribe's claims against APC and Moore for negligence, breach of fiduciary duty, aiding-and-abetting liability, and restitution, and its prayer for punitive damages?

STATEMENT OF THE CASE

A. Over a Dozen Years, the Tribe's Former Leadership Embezzled the Tribe's Money and Used It to Fund Their Lavish Lifestyles.

The Paskenta Band of Nomlaki Indians is a federally recognized Indian tribe that occupies 2,000 acres outside of Corning, California. 5-ER-000703-705 [¶¶ 68, 70]. The Tribe owns and operates several businesses, including the Rolling Hills Casino, which has been indispensable to improving Tribal members' standard of living. 5-ER-000705 [¶¶ 70-72].

Beginning around 1998, four members of a single family effectively took over the Tribe's government administration and its businesses. 5-ER-000700-701 [¶ 55]. These individuals, including Ines Crosby; her son, John Crosby; Ines's sister, Leslie Lohse; and Leslie's husband, Larry Lohse (collectively, the “RICO Ringleaders”), inveigled their way into various employment positions with the Tribe and its businesses and crucially, installed Leslie Lohse on the Tribe's governing council, as its Treasurer, and John Crosby as its Economic Director. 5-ER-000694-695 [¶¶ 28-35], 000707-709 [¶¶ 77-89]. In this way, the RICO Ringleaders were able to take control of the Tribe's finances and bank accounts. XXXXXXXXXXXXXXX [¶ 91]. In the 12-year period between 2002 and 2014, when the ***8** Ringleaders were finally ousted from the Tribe, they treated the Tribe's money as their personal assets. They rewarded themselves with hefty salaries, bought luxury homes, cars, and vacations, and otherwise paid their bills and expenses out of the Tribe's coffers. 5-ER-000723 [¶ 148]; 000727-728 [¶ 164]; 000731-733 [¶¶ 177-179]; 000733 [¶ 185]; 000743 [¶ 227]; 000790-792 [¶ 404]; 000801-802 [¶ 445]; 000803-806 [¶¶ 452, 454]; 000807 [¶ 461]; 000809 [¶ 467]; 000810 [¶ 471]; 000813 [¶¶ 479-480]. All the while, the Ringleaders concealed their fraud from the Tribe, even going so far as to bribe and threaten those Tribal members who questioned their activities. And when necessary to maintain the scheme, they brought others into it, including RICO Defendant, Sherry Myers, who worked as a secretary at the Tribe's offices and worked closely with the RICO Ringleaders. 5-ER-000695 [¶ 36]; 000700-701 [¶¶ 55-56]; 000713-716 [¶¶ 107-110, 113-115]; 000724-725 [¶¶151-157].

B. The RICO Ringleaders Engaged Defendants Moore and APC to Establish Retirement Plans Through Which They Wrongfully Funneled Millions More of the Tribe's Money Into Their Personal Accounts.

One of the ways that the Ringleaders converted the Tribe's assets to their own use was by arranging for the establishment of retirement plans that exclusively benefited them and RICO Defendant Myers, and enabled them to lay ***9** claim to over $4.4 million in Tribal money, much of it in a short amount of time.[2] 5-ER-000743 [¶ 227]. To help them set up these plans, the Ringleaders turned to Defendant Garth Moore and his firm, Defendant Garth Moore Insurance and Financial Services, Inc. (collectively, “Moore”), who served as outside financial advisors to the Tribe. 5-ER-000699, 000774-775 [¶¶ 49, 350]. The Ringleaders also engaged Defendant Associated Pension Consultants, Inc. (“APC”) in this endeavor, and worked extensively with senior APC consultant Greg Lynn. 5-ER-000699, 000774-775 [¶¶ 50, 350].

Moore and APC's Lynn were experienced retirement professionals who worked together to establish and manage the plans and carry out the Ringleaders' objectives relating to them. 5-ER-000745-747 [¶¶ 265, 267]. Moore originated the idea of setting up the retirement plans and provided advice relating to them, while APC structured how they operated. 5-ER-000753 [¶ 263]. For this work, Moore and APC were generously compensated out of the Tribe's money. 5-ER-000755 [¶269]. Moore also received a benefit in the form of the Tribe's sponsorship of his son's race car. 5-ER-000755 [¶¶ 269].

***10** There were three different plans that the Ringleaders used to fraudulently enrich themselves, and RICO Defendant Myers, at the Tribe's expense. The first was a defined pension plan (the “pension plan”), in effect from December 31, 2004, through July 15, 2008. 5-ER-000743 [¶ 228]. The second was a 401(k) plan (the “401(k) plan”), in effect from approximately 2005, until July 2014. 5-ER-000743 [¶ 228]. The third was a 401(k) plan for Tribe-owned business “E” (the “Business E plan”), through which John Crosby wrongfully diverted money to himself. 5-ER-000743 [¶ 228].

Under Tribal law, the Tribe's governing Council was required to approve the establishment and termination of any Tribal retirement plans, but the plans were never presented to or authorized by the Council, nor did the Council sign off on the considerable sum of Tribal money transferred to the Ringleaders and Myers through the plans. 5-ER-000744; 000747-748; 000750 [¶¶ 231, 243-244, 252-253]. Indeed, as described below, the signature of the Tribe's Chairman was forged on key documents that terminated the pension plan and immediately vested the plan's millions of dollars in the Ringleaders and Myers. 5-ER-000759-760 [¶¶ 295-297].

Importantly, the only beneficiaries of the pension plan and the 401(k) plan were the Ringleaders and Myers. 5-ER-000744 [¶ 229]. The Ringleaders falsely represented that they were the only employees of the Tribe, when in fact, Ringleader Leslie Lohse's colleagues on the Tribal Council were also employees, ***11** but they were excluded from the plans. 5-ER-000761 [¶¶ 301]. Lohse's only position with the Tribe was as Treasurer on its governing Council, so if she was eligible to participate in the pension plan and 401(k) plan, then the other four members of the Council (its Chairperson, Vice-Chairperson, Secretary, and Member-at-Large) also should have been eligible participants. 5-ER-000704; 000762; 000763-764 [¶¶ 68(c), 306, 311]. Based on their prior work with the Tribe, APC and Moore knew that the other members of the governing Council were also employees. 5-ER-000762; 000764 [¶¶ 306, 312, 314-315].

C. The Pension Plan Contained a Number of Highly Unorthodox Features.

The pension plan designed and implemented by APC and Moore was in effect for just three-and-a-half years, from December 30, 2004, through July 15, 2008, and had a number of unorthodox features that one would not expect of a legitimate retirement-savings vehicle. [3] 5-ER-000766-774 [¶¶ 324-325, 328-329, 334-336, 340-348].

First, APC and Moore modeled the pension plan on defined-benefit plans used by small business owner-employees who are trying to minimize their tax liability. 5-ER-000766-767 [¶¶ 324-325]. The point of such structures is to enable ***12** small businesses to deposit a large chunk of their profits into a pension plan, and thereby reduce their tax burden. 5-ER-000766-767 [¶¶ 324-325]. But APC and Moore knew that the Tribe was not a small business, but rather a *sovereign government*, and they likewise knew that the RICO Ringleaders and Myers were not owners-employees of a small business, but rather employees (and in Leslie Lohse's case, an elected official) of a sovereign government. 5-ER-000766-767 [¶¶324-325].

Second, defined-benefit pension plans are supposed to be permanent. 5-ER-000769-772 [¶¶ 335, 340]. Indeed, applicable federal regulations provide that a short shelf life for such plans--as was true of the plan devised by APC and Moore--is evidence that they were not bona fide retirement programs in the first place. 5-ER-000769-770 [¶ 335]. Although federal law allows for early termination on account of “business necessity,” APC and Moore knew that the Tribe was not suffering from a diminution in its revenue or any kind of financial exigencies. 5-ER-000770 [¶ 336]. Indeed, as a sovereign, the Tribe was not at risk of “going out of business.” 5-ER-000770 [¶ 336].

Third, contrary to convention, APC and Moore established the pension plan so that its benefits vested immediately--i.e., as soon as the Tribe made contributions--instead of after each beneficiary had completed a certain number of years of employment with the Tribe. 5-ER-000772 [¶¶ 341-342].

***13** Fourth, defined-benefit plans are typically funded over the course of an employee's working career and then paid out in monthly annuity payments during the employee's retirement years. 5-ER-000774 [¶ 348]. But the plan put in place by APC and Moore deviated markedly from this norm. The plan's governing documents called for immediate lump-sum distributions in the event that the Ringleaders and/or Myers left their jobs with the Tribe, as well as lump-sum distributions immediately upon the plan's termination. 5-ER-000773-774 [¶ 347]. Such lump-sum distributions are disfavored because they are burdensome for plan sponsors (in this case, the Tribe) in that they require the sponsor to pay out a large sum of money all at once, rather than over time. 5-ER-000774 [¶348].

Next, APC and Moore used an unusual actuarial formula for calculating the Tribe's contributions to the plan that required those contributions to be enormous. 5-ER-000767-768 [¶¶ 328-329]. While such a formula may be acceptable in certain situations involving small business owner-employee pension plans, the Tribe is a sovereign government, not a small business. 5-ER-000768 [¶ 330]. Here, the actuarial formula employed by APC and Moore meant that the Tribe was shelling out hundreds of thousands of dollars annually for Ringleaders Ines Crosby, Larry Lohse, and Leslie Lohse *individually*. 5-ER-000748-749 [¶¶ 246-248]. Indeed, the pension plan was highly beneficial to one participant in particular: Ines Crosby. More than $1.5 million of Tribal money was funneled into ***14** the pension plan exclusively for her, including over $560,000 in 2008 alone. 5-ER-000748; 000773 [¶¶ 246, 344-345]. Thus, the pension plan was structured to be remarkably effective at transferring a considerable amount of the Tribe's money to the Ringleaders and RICO Defendant Myers in a short amount of time. The amounts that each of these individuals received from the plan's inception on December 30, 2004 through its termination in 2008 are set forth below:

	Ines Crosby	**Larry Lohse**	**Leslie Lohse**	**John Crosby**	**Sherry Myers**
2004	$258,037	$103,081	$103,081	$49,983	$29,299
2005	$298,525	$98,236	$98,236	$46,604	$27,369
2006	$170,600	$101,437	$101,437	$50,062	$31,000
2007	$246,918	$128,207	$128,207	$63,168	$35,696
2008	$560,923	$386,433	$370,961	$257,791	$111,710
Total	$1,535,003	$817,394	$801,922	$467,608	$235,074

5-ER-000748-749 [¶¶ 246-251]. [4] Although the pension plan was terminated just six months into 2008 (on July 15, 2008), the contributions the Tribe made for each participant in that year jumped substantially over the contributions for each participant in the prior year.

***15 D. The Circumstances Surrounding the Termination of the Pension Plan Indicated That the RICO Ringleaders Were Defrauding the Tribe.**

On May 12, 2008, APC's Lynn provided Ringleader John Crosby with a set of documents to terminate the pension plan. 5-ER-000759 [¶ 293]. These included a Tribal resolution to be signed by then Tribal Chairman, Everett Freeman, confirming that a meeting of the Tribe's members was held at which a quorum resolved to: (1) terminate the pension plan effective July 15, 2008; (2) fully vest the account balances of all the plan participants, i.e., the RICO Ringleaders and Myers; and (3) amend the plan to instruct the trustee to actually distribute the account balances to each participant. 5-ER-000759 [¶¶ 293-294]. The resolution meant that the Tribe was agreeing to immediately hand over nearly $4 million to the Ringleaders and Myers. 5-ER-000759 [¶¶ 292-293].

Lynn instructed Crosby to return executed copies of the resolutions to him by May 15, 2008, i.e., just three days after he gave them to Crosby. 5-ER-000759 [¶ 294]; 2-ER-000196-197, [¶ 6]; 000255. Lynn knew, or should have known, that the signed resolutions returned to him were not genuine. 5-ER-000759-760 [¶ 296]. The resolution purportedly signed by Tribal Chairman Everett Freeman confirming that the Tribe had voted to terminate the pension plan, was dated May 6, 2008, and said that the meeting of the full Tribe at which the resolution was adopted had occurred that same day, May 6. 5-ER-000759-760 [¶ 296]; 2-

ER-000197 [¶ 7]; ***16** 000257. But APC's Lynn had not given the termination documents to Crosby until May 12, six days *after* the Tribe had supposedly convened to approve them and Chairman Freeman had signed them. 5-ER-000759-760 [¶ 296]; 2-ER-000257. In addition, Chairman Freeman's purported signature did not resemble other documents he had allegedly signed that were given to Lynn. 5-ER-000759-760 [¶296]; Compare 2-ER-000257; with 3-ER-000273. In one document, he spells his first name, "Everett," with two "t's," but in the May 6, 2008 resolution terminating the pension plan, he appears to use just one "t."

E. APC and Moore Established a 401(k) Plan for Tribe-Owned Business "E" and Manipulated John Crosby's Compensation to Maximize the Contributions He Would Receive.

In 2013, APC and Moore were responsible for setting up a 401(k) plan for Tribe-owned business "E." 5-ER-000764 [¶ 317]. Even though this business had more than 40 employees, the only beneficiaries of the plan were Ringleader John Crosby and two others. 5-ER-000765 [¶ 318]. Moreover, APC and Moore manipulated the figures they used for Crosby's compensation in order to ensure that he received the maximum contributions possible. 5-ER-000765-766 [¶¶ 319-322]. In a 2013 email, APC's Lynn explained to Greg Moore that Crosby would get $46,500 in benefits under the plan for that year, and that the "only unknown" was "how much compensation" Crosby would need to pay himself to make this ***17** happen. 2-ER-000000268. In this way, Crosby was able to walk away with $42,000 of the Tribe's money through this investment vehicle.

F. APC and Moore Followed Through on Ringleader John Crosby's Instructions to Liquidate the Ringleaders' 401(k) Plans and Distribute the Plan Assets to Them, *After* Crosby Had Been Terminated by the Tribe and *After* the Tribe Had Sought to Replace Crosby as the Trustee of the Plan.

The Ringleaders and Myers were terminated from their positions with the Tribe on April 16, 2014. 5-ER-000688 [¶ 2]; 2-ER-000205; 000210; 000215; 000220. Not long thereafter, the Tribe discovered evidence of embezzlement by the Ringleaders, and accusations that the Ringleaders had been stealing from the Tribe for over a decade were soon a matter of public knowledge. 5-ER-000755 [¶¶270-271].

Around this time, APC and Moore were informed of the Tribe's intent to take control of the 401(k) plan as part of its effort to account for its financial resources and ascertain the nature and extent of the Ringleaders' embezzlement. 5-ER-000755-756 [¶ 273]. To that end, on May 1, 2014, the Tribe provided Garth Moore with a form executed by Andrew Freeman, the Tribe's Chairman for many years, removing John Crosby and Leslie Lohse as trustees of the 401(k) plan, and replacing them with new governing Council members Ambrosia Rico and Andrew Alejandre. 5-ER-000758 [¶ 289]; 2-ER-000227. Shelby Campiz, an employee of Garth Moore, sent this form to American Funds, the entity that held the 401(k) ***18** plan assets, no later than May 6, 2014, and informed APC's Lynn about it that same day. 2-ER-000226.

Thus, as of May 1, 2014, John Crosby was no longer employed by the Tribe, and the Tribe had communicated directly to Moore (who communicated to APC) that it wanted Crosby removed as trustee of the 401(k) plan. Nonetheless, Crosby remained. As late as June 27, and June 30, 2014, he signed paperwork to liquidate the 401(k) funds for each of the four Ringleaders. 2-ER-000209; 000214; 000219; 000224. Email correspondence on June 30, 2014 between Garth Moore employee Shelby Campiz and APC's Lynn shows that APC and Moore were aware of the need to replace Crosby as trustee, consistent with the Tribe's instructions, but that they were treating July 1, 2014 as the effective date of the change. Further, APC's Lynn explained that, *"[w]e want to take care of John' [sic] [Crosby] stuff before we change trustees...."* 5-ER-000756 [¶ 282]; 2-ER-000199. The email exchanges between Moore employee Campiz and APC's Lynn read as follows:

Hi Gregg,

I believe you talked to John Crosby about him rolling over his 401k as well as Ines.[5] Garth wanted me to check with you, Andrew Alejandre should be trustee now of the 401k. Do you know if that is the way it is showing?

5-ER-000756 [¶¶ 276-277]; 2-ER-000200.

Lynn responded:

***19** John Crosby is listed as trustee until tomorrow the effective date of the amendment change.

5-ER-000756[¶ 279]; 2-ER-000200.

Campiz emailed Lynn the next day, July 1, to confirm that the company that held the 401(k) plan "was aware" that Crosby remained the trustee until that day. Lynn responded, "Do not know. We want to take care of John' [sic] [Crosby] stuff before we change trustees at American Funds [i.e., the company that held the 401(k) plan assets]." 5-ER-000756 [¶ 282]; 2-ER-000199.

Thus, APC and Moore gave priority to John Crosby's wishes, and actively sought to ensure that the Ringleaders' 401(k) funds were liquidated *before* Crosby was removed as trustee. APC and Moore processed the liquidation paperwork by sending it to American Funds on July 2, 2014, the day after Crosby indisputably had been terminated as trustee. 2-ER-000228-239.

Nine months later, the Tribe's new governing Council, as part of its effort at accounting, asked Campiz who had signed the paperwork liquidating and distributing the 401(k) plan assets to the Ringleaders and Myers. 5-ER-000757 [¶¶ 286-287]. Campiz emailed APC's Lynn about the Tribe's inquiry and its request for copies of the liquidation paperwork and asked him to contact her before she responded. 2-ER-000202. Campiz knew that someone would have to explain to the Tribe that even though it had instructed, as early as May 1, 2014, that Crosby be removed as trustee and replaced by new governing Council members Andrew ***20** Alejandre and Ambrosia Rico, that change did not actually occur for two more months. With the assistance of APC and Moore, the long-since unemployed Crosby was therefore able to slip in the liquidation paperwork on June 30, 2014, on the eve of his termination as trustee, allowing for several more hundred thousand dollars of Tribal government money to flow into the Ringleaders' bank accounts.

G. Procedural History.

The Tribe filed this action on March 10, 2015. Its First Amended Complaint, filed on April 17, 2015, asserted four claims against APC and Moore, including for: (1) breach of fiduciary duty, (2) aiding and abetting the RICO Defendants' conversion and fiduciary breaches, (3) common law negligence, and (4) restitution, and sought punitive damages. 5-ER-001973, 001975, 001976, 001982. APC moved to dismiss and the district court granted its motion with leave to re-plead on August 14, 2015. 1-ER-000039.

The Tribe filed a Second Amended Complaint on September 25, 2015, in which it reasserted all of the same claims, except for its breach-of-fiduciary-duty claim, and again requested punitive damages. 7-ER-001113. APC moved to dismiss and the district court granted its motion with leave to re-plead, but dismissed the Tribe's restitution claim with prejudice. 1-ER-000024.

On May 20, 2016, the Tribe filed its Third Amended Complaint. It again alleged its negligence and aiding-and-abetting claims and requested punitive ***21** damages. 5-ER-000685. This time, however, the district court dismissed the Tribe's claims with prejudice on October 19, 2016, and entered final judgment in favor of APC and Moore on February 21, 2017.

SUMMARY OF ARGUMENT

The district court erred when it dismissed the Tribe's claims against APC and Moore. Those claims are supported by numerous detailed factual allegations from which a jury could reasonably infer that APC and Moore knew that the Ringleaders and Myers were, at a minimum, improperly exploiting the Tribe for their own gain, and that APC and Moore contributed to the Ringleaders' wrongdoing. A reasonable jury also could conclude that if APC and Moore *did not know*, they were in breach of their own duties of care to the Tribe because any competent retirement-planning professional would have understood that the Ringleaders' transfer of enormous sums of Tribal money to themselves was far from a legitimate "retirement" savings strategy, even if retirement plans were the guise through which those transfers occurred.

The Tribe's complaint goes into great detail concerning, among other things, the nature of the retirement plans at issue; APC and Moore's conduct in structuring and administering them; the highly unusual parameters of the pension plan and its improper early termination; APC and Moore's manipulation of data to ensure that the Ringleaders could obtain the largest amount of Tribal contributions possible; ***22** and APC and Moore's efforts to protect the interests of the Ringleaders at the expense of the Tribe. Had the district court taken the Tribe's well-pleaded allegations as true, and drawn the plausible inferences that naturally flow from those allegations, it would have upheld each of the Tribe's claims.

ARGUMENT

A. Legal Standards.

To withstand a motion to dismiss, a plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556. When evaluating a Rule 12(b)(6) motion, a court must accept as true all allegations of material facts in the complaint and construe all reasonable inferences in the light most favorable to the plaintiff. *Escobedo v. Applebee's*, 787 F.3d 1226, 1229, n.3 (9th Cir. 2015). This Court reviews the district court's grant of a motion to dismiss de novo. *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848 (9th Cir. 2016).

B. The Tribe Has Pleaded Sufficient Facts to Support Its Negligence Claim.

Under California law, the elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence, and ***23** diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. *See e.g., Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 821 (2011); *Hahn v. Mirda*, 147 Cal.App.4th 740, 746-47 (2007).

The Tribe has alleged sufficient facts to satisfy each of these elements.

First, the Tribe has alleged that APC and Moore were experienced retirement professionals who it engaged to design and implement the pension plan and the 401(k) plan, and provide advice to the Tribe concerning how they should operate. 5-ER-000699; 000753; 000754; 000774-775 [¶¶ 49-50, 263, 265, 267, 350]. The Tribe has also alleged that the Ringleaders and Myers lacked retirement-planning expertise and were reliant on APC and Moore's skill and judgment in these matters. 5-ER-000774-775 [¶ 350]. APC and Moore therefore had a duty to exercise reasonable care in designing lawful retirement plans and to refrain from structuring them in a way that facilitated and advanced the Ringleaders' and Myers' fraud. 5-ER-000754-755; [¶¶ 266, 268]; *see* *Flowers v. Torrance Mem. Hosp. Med. Ctr.*, 8 Cal.4th 992, 997-98 (1994) (explaining that the standard of "reasonable care" for professionals takes account of "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing....").

***24** The Tribe has alleged that APC and Moore breached this duty because they knew, or should have known, that the Ringleaders and Myers were deliberately using the retirement plans not as legitimate savings and investment vehicles, but to take advantage of the Tribe by siphoning off millions of dollars of the Tribe's money while it wasn't looking. The following facts support this reasonable inference:

• The exclusive participants in the pension plan and the 401(k) plan were the Ringleaders and Myers, but based on their work with the Tribe, APC and Moore knew or should have known that, if Tribal Council Treasurer Leslie Lohse was an employee, the other members of the governing Council were employees too and that they could not be lawfully excluded from the plans. 5-ER-000764 [¶¶ 312, 314-315].

• The pension plan was so inappropriately designed that it necessarily raises a plausible inference that APC and Moore knew that its true purpose was to enable the Ringleaders and Myers to enrich themselves at the Tribe's expense. As an initial matter, it was modeled on a tax-deferral plan used by small business owner-employees, which is a situation completely removed from that of a sovereign government, like the Tribe. In addition, recall that the pension plan was set up as a defined-benefit plan, but its central parameters-- including its short lifespan (three-and-a-half years), the immediate vesting of contributions in the Ringleaders and Myers, the lump sum distribution of plan assets upon a participant's separation from employment and/or the termination of the plan, and the extraordinary amount of money, in just a few years, that the Tribe was compelled to contribute for each Ringleader and Myers--all run entirely against the grain of how defined-benefit plans are supposed to work. 5-ER-000766-774 [¶¶ 324-325, 328-329, 334-336, 340-348]. Further, APC and Moore facilitated the pension plan's termination after it had been in existence for just a few short years, even though there was no business necessity justifying shutting it down. This contravened federal regulations stating that abandoning such plans for any reason other than business necessity is evidence that they were not bona fide. Put simply, these facts show that a legitimate pension for setting aside retirement ***25** savings would never be structured as APC and Moore structured the plan here. That raises a plausible inference that APC and Moore knew, or should have known, that the Ringleaders and Myers were improperly exploiting the Tribe.

• Likewise, the suspicious circumstances surrounding the termination of the pension plan suggest that APC and Moore knew, or should have known, of the Ringleaders' fraud or at least that the Ringleaders were enriching themselves at the Tribe's expense. APC's Lynn gave Ringleader John Crosby the necessary termination paperwork for the Tribe's approval on May 12, 2014. 5-ER-000759 [¶ 293]. When that paperwork was returned to him, however, it indicated that the Tribe had purportedly approved the plan's termination at a meeting that took place on May 6, *six days before* Lynn even gave it to Crosby. 5-ER-000759-760 [¶ 296]; 2-ER-000257. Further, the signature of then-Tribal Chairman Everett Freeman on the resolution terminating the pension plan differed from other documents bearing his signature that APC and Moore received, thus suggesting it had been forged. 5-ER-000759-760 [¶ 296]; 2-ER-000257; 3-ER-000273.

• John Crosby accrued over $40,000 in benefits through Tribe-owned business "E" thanks to APC and Moore's manipulation of the data needed to calculate the contribution amount. In particular, APC and Moore worked backward by setting the contribution level, and then figured out how much Crosby would have to pay himself to receive that level of benefits.

• Within just a couple of weeks of having terminated the Ringleaders and Myers from their positions, the Tribe conveyed to APC and Moore, in writing, its instruction to terminate John Crosby as trustee of the 401(k) plan. 5-ER-000758 [¶ 289]. Yet APC and Moore did not act on that request for two months, and in an email, two months later, to a Moore employee, APC's

Lynn specifically said that they first needed to take care of Crosby's request to liquidate the entire 401(k) before they acted on the Tribe's two-month-old instruction that he be replaced as trustee. 5-ER-000756 [¶ 282]; 2-ER-000199.

All of these facts give rise to the plausible inference that APC and Moore were aware, or should have been aware, of the Ringleaders' scheme to use the ***26** retirement plans to line their own pockets with millions of dollars of Tribal money. Indeed, the pension plan in particular opened a floodgate from the Tribe's coffers directly into those of the Ringleaders and Myers. Between the end of 2004, and the middle of 2008, Ines Crosby amassed over $1.5 million in pension-plan benefits, while Larry and Leslie Lohse took in over $800,000 each (altogether, the Ringleaders and Myers accrued over $3.8 million in Tribal money through the pension plan). 5-ER-000748-749 [¶¶ 246-251]. That amounted to an extraordinary transfer of wealth from the Tribal government to just five of its employees in a short period of time. Thus, the Tribe has pleaded numerous facts alleging that APC and Moore breached their duty of care to the Tribe by designing and administering a pension plan that they knew was a sham.

With respect to the causation element of the Tribe's negligence claim, the Tribe has pleaded that if APC and Moore had not designed and implemented the pension plan the way they did, the Ringleaders and Moore could not have used it to further their scheme. 5-ER-000753 [¶ 263]. Likewise, had APC and Moore honored the Tribe's request by promptly arranging for the removal of John Crosby as trustee of the 401(k) plan, the Ringleaders and Myers might not have been able to liquidate the 401(k) assets, thereby continuing to steal from the Tribe even months after they had been terminated from their employment.

***27** Finally, APC and Moore's conduct damaged the Tribe by causing it to lose millions of dollars that the Ringleaders and Myers improperly took for themselves.

The district court deemed the Tribe's allegations insufficient to support a reasonable inference that APC and Moore breached any duty of care to the Tribe. The court reasoned that the Tribe's allegations did not support the inference that APC and Moore knew, or should have known, that the Ringleaders and Myers were engaged in a fraudulent scheme against the Tribe. 1-ER-000015-18.

As an initial matter, the court rejected the Tribe's detailed allegations concerning the highly unusual way the pension plan was structured and why no credible pension plan would take such a form. 1-ER-000015. The court treated these facts as immaterial on the grounds that "John Crosby and Leslie Lohse had apparent authority to create, modify, and terminate the Tribal Retirement Plans." 1-ER-000015. But even if the Ringleaders' positions with the Tribe gave them the authority to engage financial-planning experts to set up Tribal retirement plans, that does not mean that APC and Moore can be immunized from liability for crafting a peculiar pension plan with terms almost laughably favorable to the Ringleaders and equally unfavorable to the Tribe, and that was wholly inappropriate for a governmental entity. APC and Moore had a duty to employ their professional judgment, not simply carry out the bidding of Ringleaders Crosby and Lohse.

***28** The district court was obligated to take the Tribe's well-pleaded allegations as true. The court therefore should have accepted the Tribe's factual assertions concerning the atypical nature of the pension plan and how its very atypicality meant that APC and Moore knew, or should have known, that the Ringleaders used the pension plan to unjustly enrich themselves. Whether the pension plan was as unconventional as the Tribe alleges and whether it would have alerted any competent retirement-planning professional to the likelihood of fraud is a question for the trier of fact based on evidence, including expert testimony.

In the same vein, the district court should have credited the Tribe's allegations concerning how APC and Moore ensured that John Crosby was able to receive tens of thousands in Tribal money through the business "E" 401(k) as a result of APC and Moore's manipulation of his compensation. APC and Moore's fiddling with Crosby's compensation to get him as much of a 401(k) benefit as possible gives rise to the inference that they knew Crosby was taking advantage of the Tribe to enrich himself.

Next, the district court discounted the Tribe's allegations concerning the two-month delay between the Tribe's May 1, 2014 request to remove John Crosby as trustee of the 401(k) plan, and his actual removal on July 1, reasoning that the Tribe's allegations do not give rise to the inference that there was any delay at all, let alone that APC and Moore caused it for any nefarious purpose. 1-ER-000015- ***29** 18. In this regard, the district court treated APC and Moore's version of the facts as true, not the Tribe's as it should have done.

In support of its motion to dismiss, APC submitted a document it claims governed the 401(k) plan and that contained a provision requiring an employer to give 30 days' written notice to a plan trustee of his or her removal, "except where the Employer reasonably determines a shorter notice period or *immediate* removal is necessary to protect Plan assets." 2-ER-000176 [emphasis added]. On the basis of this document, the district court held that the Tribe had "misconstrued the process of removing a plan trustee," and that the 30-day notice period eliminated any inference that APC and Moore had delayed effectuating Crosby's termination in order to assist him in liquidating the plan's assets. [6] 1-ER-000017.

***30** But contrary to the district court's conclusion, the plan document does not render implausible the inference that APC and Moore's handling of the change-of-trustee issue suggests that they knew about the Ringleaders' wrongdoing and breached their duty not to aid them. [7] The Tribe has pleaded that APC and Moore knew that the Ringleaders and Myers had been terminated from their employment with the Tribe and that they were under a public cloud of suspicion for stealing from the Tribe. 5-ER-000688; 000755 [¶¶ 2, 270-271]. And based on the Tribe's May 1, 2014 form directing the removal of John Crosby and Leslie Lohse as 401(k) plan trustees, APC and Moore knew that the Tribe wanted Crosby and Lohse's status as trustees terminated. 5-ER-000755-756; 000758 [¶¶ 273, 289]; 2-ER-000226-227. The Tribe has also pleaded that it was entirely dependent on APC and Moore's expertise for advice concerning the management of its retirement plans. Under these circumstances, had APC and Moore been acting as competent professionals, they would have taken steps to remove Crosby and Lohse as quickly as possible. They did not. And they cannot now seek to excuse that behavior by pointing to a 30-day notice period that was completely waivable *by the Tribe* if it reasonably determined that "a shorter notice period or immediate removal [was] necessary to protect Plan assets." Thus, even considering the notice period, the ***31** Tribe's factual allegations still raise a plausible inference that APC's and Moore's inaction in removing Crosby as trustee constituted a breach of duty to the Tribe.

The district court also faulted the Tribe for being "inconsistent" in its pleading allegations. 1-ER-000017. The district court reasoned that the Tribe asserted that the formal approval of the governing Council was necessary to modify the retirement plans, but did not plead that the governing Council likewise approved the change in trustees, and instead suggested that the May 1, 2014 form executed by the Tribal Chairman was sufficient to accomplish this purpose. The import of the May 1 form is that it plainly shows that the Tribe wanted to change trustees and that it had communicated this intent to Moore, who then conveyed it to APC. 2-ER-000226-227. The urgency with which the Tribe wanted this action taken is evident from the fact that the Tribe did not merely phone or email APC and Moore about it, but actually completed and executed the necessary American Funds form (i.e., the entity that held the 401(k) assets) to accomplish it. 2-ER-000227. At that point, APC and Moore should have taken steps to assist the Tribe in removing Crosby and Lohse as expeditiously as possible, but they did not. Worse still, APC's Lynn made clear in a contemporaneous email--which the district court overlooked--that their objective was to liquidate the Ringleaders' 401(k) plans and distribute the assets to them before Crosby was relieved as trustee. 5-ER-000756 [¶ 282]; 2-ER-000199. That email, along with APC and ***32** Moore's intentional dithering in the face of the Tribe's clearly expressed desire to remove Crosby and Lohse, gives rise to a plausible inference that APC and Moore were knowingly assisting the Ringleaders' fraud. [8]

Finally, the district court pointed to a portion of the July 1, 2014 email chain between Moore employee Campiz and Lynn, in which Campiz says that the new trustees would sign Crosby's "rollover request," as negating any inference that APC and Moore intentionally delayed Crosby's removal as trustee. 1-ER-000017-18; 2-ER-000199. But even if Campiz's email meant that the Tribe would have signed off on the liquidation of the Ringleaders' 401(k) plan, [9] that does not mean that APC and Moore did not know about the Ringleaders' scheme and were not trying to assist them in escaping with the 401(k) funds. The focus here is on APC and Moore's knowledge and behavior, not on whether the Tribe--at the outset of ***33** its investigation into what the Ringleaders had been doing with the Tribe's money--would have signed off on Crosby's liquidation request. Both things can be true: APC and Moore knew, or should have known, that the Ringleaders were exploiting the Tribe in violation of the Ringleaders' duties to the Tribe, and the Tribe, still in the dark about the nature and extent of the Ringleaders' wrongdoing, might have been willing to liquidate the 401(k).

In sum, taking the Tribe's factual allegations as true, they amply support each of the elements of the Tribe's negligence claim.

C. The Tribe Has Pleaded Sufficient Facts to Support Its Aiding-and-Abetting Claim.

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." *Saunders v. Superior Court*, 27 Cal.App.4th 832, 846 (1994); *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.App.4th 1451, 1476-77 (2014).

The Ringleaders and Myers lacked the requisite experience to pull off an embezzlement scheme that used purportedly genuine retirement plans as the ***34** vehicles for their theft; APC and Moore's participation thus made all the difference. APC and Moore's contribution constituted a breach of their fiduciary duties (see below) and their duty to exercise reasonable care in designing and administering the Tribe's retirement plans. Further, the Tribe has pleaded that APC and Moore were familiar with the concept of fiduciary duties and knew that the Ringleaders, as senior employees of the Tribe, owed the Tribe a duty of loyalty, which included the duty not to enrich themselves at the Tribe's expense. 5-ER-000754 [¶¶ 265, 267].

The district summarily dismissed the Tribe's aiding-and-abetting claim for the *same* reasons it rejected the Tribe's negligence claim, namely, that the Tribe failed to adequately plead that APC and Moore had actual knowledge that the Ringleaders and Myers were stealing. 1-ER-000020-21. But for all the reasons described above, the Tribe *did* sufficiently plead that APC and Moore knew that the Ringleaders and Myers were embezzling from their employer. To satisfy its burden as to the aiding-and-abetting claim, however, the Tribe did not even need to be this specific. Rather, it simply needed to plead facts giving rise to the inference that APC and Moore *knew that the Ringleaders and Myers were breaching their duties to the Tribe* and substantially assisted them in doing so. *See* *Saunders v. Superior Court*, 27 Cal.App.4th at 846 (explaining that aiding-and-abetting ***35** liability attaches when one "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act").

The Tribe satisfied this "breach-of-duty" burden through its factual assertions concerning how the Ringleaders and Myers rewarded themselves--and only themselves--with outrageous amounts of retirement compensation through a purported retirement plan whose terms were absurdly (and certainly unconventionally) favorable to them. The Tribe has pleaded that no retirement-planning professional would structure the pension plan as APC and Moore did, and go along with its early termination, if the true objective was to establish a legitimate vehicle for Tribal employees to obtain retirement savings. Thus, the only plausible inference is that APC and Moore knew that the Ringleaders' actual purpose--in violation of the Ringleaders' duties to their employer--was to use the retirement plans as a mechanism for taking millions of dollars out of the Tribe in a short amount of time, and that APC and Moore substantially contributed their expert know-how to this project. And if APC and Moore did not know this, despite their years of retirement-planning experience and their long working relationship with the Tribe (Moore's especially), then they were in breach of their own duties to the Tribe and can, and should, be held liable on that basis.

Further, the Tribe's allegations concerning APC and Moore's focus on taking care of the Ringleaders' interest in liquidating the 401(k) plan *before* ***36** Crosby was removed as a trustee only heighten the inference that APC and Moore knew that the Ringleaders and Myers were scheming against the Tribe. As described above, there was simply no plausible reason for them to delay terminating Crosby for *two months* and the email correspondence between APC's Lynn and Moore's Campiz strongly suggests that they were protecting the Ringleaders' interests--“We want to take care of John' [sic] stuff before we change trustees”--and then grew uneasy (or at least Campiz did) when the Tribe's new governing Council began asking questions months later about who had signed off on the Ringleaders' liquidation of the 401(k).

For all of these reasons, the Tribe has pleaded sufficient facts to support its claim for aiding-and-abetting liability and the district court's judgment should be reversed.

D. The Tribe Has Pleaded Sufficient Facts to Support Its Breach-of-Fiduciary-Duty Claim.

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 483 (1998); *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1183 (2004). “A fiduciary or confidential relationship may arise whenever confidence is reposed by persons in the integrity and good faith of ***37** another.” *City of Atascadero*, 68 Cal.App.4th at 483. If the alleged fiduciary “voluntarily accepts or assumes that confidence, he or she may not act so as to take advantage of the others' interest without their knowledge or consent.” *Id.*; *see also* *Brown v. Wells Fargo Bank, NA*, 168 Cal.App.4th 938, 960 (2008) (explaining that “ ‘[f]iduciary’ and ‘confidential’ relationships are relationships existing between parties to a transaction wherein one party is duty bound to act with the utmost good faith for the benefit of the other....”).

The district court dismissed the Tribe's fiduciary-duty claim against APC in its order granting APC's motion to dismiss the First Amended Complaint. [10] The court did not set forth any reasoning but simply concluded that the Tribe's allegations were “insufficient to plausibly allege APC owed a fiduciary duty to Plaintiffs.” 1-ER-000054.

The district court was wrong. The Tribe has alleged numerous detailed allegations showing that it had a relationship of confidence and trust with APC and Moore such that they had power and influence over the Tribe that they were obligated not to exploit. *Freeney v. Bank of Am. Corp.* No. CV-15-02376, 2015 U.S. Dist. LEXIS 189247, *110 (C.D.Cal. Nov. 19, 2015) (explaining that the ***38** “essential elements” of a fiduciary relationship are “ ‘(1) the vulnerability of one party to the other, which (2) results in the empowerment of the stronger party by the weaker, which (3) empowerment has been solicited or accepted by the stronger party, and (4) prevents the weaker party from effectively protecting itself.’ ”) (quoting *Persson v. Smart Inventions, Inc.*, 125 Cal.App.4th 1141, 1161 (2005)). For instance, the Tribe has pleaded that APC and Moore were experienced financial-planning experts who the Tribe engaged to devise and implement its retirement plans and provide advice and consulting services. 5-ER-000699; 000753; 000774-775 [¶¶ 49-50, 263, 350]. The Tribe has alleged that the Ringleaders and RICO Defendant Myers did not possess the relevant skill and judgment to structure and manage the plans and that they therefore relied on the superior skill of APC and Moore.

The Tribe has further pleaded facts demonstrating that it was APC and Moore who figured out how to structure the retirement plans, including the highly unconventional pension plan; APC and Moore that prepared paperwork and proposed resolutions for the Tribe to adopt concerning the plans' formation, modification, and termination; and APC and Moore who performed regular work to ensure that the Ringleaders and Myers could maximize their ill-gotten retirement savings, even if that meant manipulating compensation and other data that drove ***39** the plans' contribution formula. 5-ER-000762-763; 000766-767; 000775-776 [¶¶ 306, 309, 324-338, 352-353].

All of these facts are sufficient to allege that APC and Moore occupied a position of power and trust over the Tribe and that they were obligated to exercise that authority in a way that did not harm the Tribe. The Tribe has thus sufficiently alleged that as its financial and retirement-planning advisors, APC and Moore were fiduciaries who may be held liable for their breach of trust. *See e.g.,* *Negrete v. Fidelity and Guar. Life Ins. Co.*, 444 F.Supp.2d 998, 1004 (C.D. Cal. 2006) (holding that a fiduciary relationship existed between financial advisors/estate planners and their clients).

E. The Tribe's Restitution Claim Against Moore Should Be ReInstated.

The Tribe pleaded a claim for restitution against Moore, alleging that it received benefits at the expense of the Tribe that it would be unjust for Moore to retain. [11] 7-ER-001309 [SAC ¶¶ 770-773]; 5-ER-000880 [¶¶ 823-826].

Restitution is synonymous with unjust enrichment under California law and comes into play when a defendant has been "unjustly conferred a benefit through mistake, fraud, coercion, or request." ***40** *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (internal quotation marks and citation omitted); *Chapman v. Skype Inc.*, 220 Cal.App.4th 217, 233-34 (2013).

The district court dismissed the Tribe's restitution claim against Moore on the grounds that the Tribe failed to adequately plead that Moore knowingly assisted the Ringleaders' wrongdoing and that therefore Moore had not received any benefits it should be compelled to disgorge. 1-ER-000021-22. But because the district court's order as to the Tribe's negligence, aiding-and-abetting, and fiduciary-duty claims should be reversed--given that the Tribe has adequately pleaded facts giving rise to a plausible inference that Moore did indeed know that the Ringleaders were defrauding the Tribe or, at a minimum, knew that the Ringleaders were breaching their duties to the Tribe, and Moore substantially assisted that endeavor--the district court's dismissal of the restitution claim should also be reversed.

F. The Trial Court Erred by Dismissing the Tribe's Prayer for Punitive Damages.

Under California Civil Code section 3294, a plaintiff may recover punitive damages where the defendant acts with oppression, fraud, or malice. Cal. Civ. Code § 3294(a). "[A] plaintiff must show that the defendant both (1) was aware of the probable dangerous consequences of his or her conduct; and (2) willfully and ***41** deliberately failed to avoid those consequences." *Taylor v. Superior Court*, 24 Cal.3d 890, 895-96 (1979).

The Tribe's allegations are more than sufficient to invoke their right to recover punitive damages. The Tribe has pleaded that APC's Lynn and individual defendant Garth Moore were experienced retirement professionals. 5-ER-000754 [¶¶ 265, 267]. They were familiar with their fiduciary responsibilities and knew that designing and administering the pension plan the way they did was both contrary to how such pension plans are supposed to work, and capable of functioning as a clever ruse through which the Ringleaders and RICO Defendant Myers could (and did) siphon an enormous amount of money out of the Tribe. 5-ER-000743-775 [¶¶ 227-353]. And when APC and Moore were enlisted to terminate the pension plan after the Ringleaders and Myers had accumulated nearly $4 million in just three-and-a-half years, they could have had no doubt about what the true purpose of the pension plan was. In the same vein, the Tribe has pleaded sufficient facts showing that when APC and Moore made it a priority to facilitate the Ringleaders' liquidation of the 401(k) plan assets, they were aware that their actions could harm the Tribe. Afterall, by that point APC and Moore knew that the Ringleaders were no longer employed with the Tribe, were under scrutiny for embezzling from the Tribe, and that the Tribe wanted John Crosby and Leslie Lohse removed as 401(k) plan trustees. Thus, the Tribe has pleaded sufficient ***42** allegations triggering a plausible inference that APC and Moore were aware of the dangerous consequences their conduct carried, but deliberately failed to forestall those consequences. The Tribe's request for punitive-damages relief should therefore be restored.

CONCLUSION

For all the reasons described above, the Tribe respectfully requests that the Court reverse the dismissal of its claims, and its request for punitive damages, against APC and Moore.

Dated: November 3, 2017

GROSS & KLEIN LLP

By: */s/ Stuart G. Gross*

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43** ***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: (1) *Paskenta Band of Nomlaki Indians, et al. v. Crosby, et al.*, Case No. 17-15238; (2) *Paskenta Band of Nomlaki Indians, et al. v. Umpqua Bank, et al.*, Case No. 17-15486; (3) *Paskenta Band of Nomlaki Indians, et al. v. Garth Moore Insurance, et al.*, Case No. 17-15485; (4) *Paskenta Band of Nomlaki Indians, et al. v. Cornerstone Community Bank, et al.*, Case No. 17-15484; (5) *Paskenta Band of Nomlaki Indians, et al. v. Cornerstone Community Bank, et al.*, Case No. 17-16633; and (6) *Paskenta Band of Nomlaki Indians, et al. v. Umpqua Bank, et al.*, Case No. 17-16673.

Footnotes

1 Given the overlapping facts and law, this brief and the opening brief filed in the related appeal of *Paskenta Band of Nomlaki Indians, et al. v. Garth Moore Insurance and Financial Services, Inc., et al.*, Case No. 17-15485, are identical in all respects except for the procedural history and the standard of review.

2 Between 2004 and 2013, Ringleader Ines Crosby received the most Tribal money in retirement compensation at $1.7 million. 5-ER-000744 [¶ 232]. During the same period, Leslie and Larry Lohse each received at least $1 million in retirement compensation; John Crosby received at least $650,000; and Myers received at least $290,000. 5-ER-000745-747 [¶¶ 234, 236, 239, 242].

3 Although the pension plan was in effect for just three-and-a-half years, the Ringleaders and Myers received five years of retirement compensation through it, including for 2004 (even though the plan was established on December 31 of that year), and 2008 (even though the plan was terminated halfway through that year), and for the three years in between.

4 The pension fund is the vehicle through which the Ringleaders and Myers obtained most of their wrongfully procured retirement benefits. By comparison, they embezzled less money from the Tribe through the 401(k) plan, including $206,900 each for Ines Crosby, Larry Lohse, and Leslie Lohse; $180,679 for John Crosby; and $54,481 for Sherry Myers. 5-ER-000750-752 [¶¶ 255-260]. Likewise, the 401(k) APC and Moore set up for Tribe-owned business “E” yielded $42,000 in benefits for John Crosby. 5-ER-000764 [¶ 317].

5 Campiz was mistaken about Crosby's intentions. He did not seek to “roll-over” the 401(k) plan assets, but instead liquidated them.

6 APC also submitted a letter from its own Greg Lynn to Tribal Chairman Andrew Freeman, dated May 26, 2014, in which Lynn provided Freeman with the paperwork necessary to terminate John Crosby and Leslie Lohse as trustees, along with a draft Tribal resolution to accomplish this. 2-ER-000082. The district court correctly declined to rely on Lynn's May 26 letter because it sets up a factual dispute that cannot be resolved on the pleadings. 1-ER-000016. But even if that were not the case, the May 26 letter supports, rather than undermines, the Tribe's claims because it shows that even after learning no later than May 6, that the Tribe wanted Crosby and Lohse gone as trustees, APC waited nearly *three weeks* to send basic paperwork to effectuate the Tribe's goal. And what's more, Lynn's letter shows that he did not bother to tell the Tribe that it could, in fact, consistent with the plan governing documents, terminate Crosby and Lohse immediately, without waiting 30 days. Thus, the letter supports the inference that APC's Lynn affirmatively took actions to ensure that John Crosby would remain trustee of the 401(k) plan until the end of June 2014, so that Crosby could control the liquidation of his and the other Ringleaders' accounts, without interference by the Tribe.

7 And of course, the Tribe's burden at the pleading stage is not to negate every possible innocent explanation for APC and Moore's conduct, but to allege facts giving rise to the plausible inference that APC and Moore engaged in wrongdoing that entitles the Tribe to relief.

8 The subsequent email communications between Lynn and Campiz some nine months later in which Campiz was apparently concerned when the Tribe began asking questions about who signed off on the liquidation of the 401(k) plan also suggest that APC and Moore knew what was going on and were concerned regarding the manner in which the Tribe would react when it found out what had occurred. 5-ER-000757 [¶¶ 286-287]; 2-ER-000202.

9 Of course, neither Campiz nor anyone else with knowledge of this email have yet been deposed, nor have any related emails or other communications yet been produced. Whether Campiz's email actually had the meaning that the district court ascribed to it, or whether it was in reference to the liquidation form of Myers, which the Tribe did sign off on some weeks later, or whether Campiz was simply mistaken, or her email was a subterfuge, are all open questions. Campiz was just an employee of Moore, and not necessarily privy to Moore's knowledge of the Ringleaders' scheme. These are issues still to be explored and ultimately for a jury to resolve.

10 The Tribe did not replead the claim in its subsequent complaints because its allegations in the First Amended Complaint were sufficient. If this Court reinstates the claim, as it should, then it should also re-instate it as to Defendant Moore (the Tribe did not re-assert the claim against either APC or Moore in its Second and Third Amended Complaints, and thus it was not a subject of Moore's motion for judgment on the pleadings).

11 The Tribe pleaded a restitution claim against APC as well but does not challenge the dismissal of that claim on appeal.

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