2018 WL 1121847 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

PASKENTA BAND OF NOMLAKI INDIANS, et al., Plaintiffs-Appellants,
v.
UMPQUA BANK, et al., Defendants-Appellees.

No. 17-15486.
February 21, 2018.

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

Appellants' Opening Brief

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1** ***INTRODUCTION

The former, corrupt leadership of Plaintiff-Appellant Paskenta Band of Nomlaki Indians (the "Tribe") embezzled millions of dollars from it over the course of a decade, which they used to lead lives of luxury. One of the ways this group - the "RICO Ringleaders" - carried out their scheme was by setting up a checking and money market account in the name of the Tribe at Defendant Umpqua Bank (collectively with Defendant-Appellee Umpqua Holdings, "Umpqua" [1]) and then regularly using the checking account to pay their personal expenses and write checks to themselves and their family members. Ringleader Ines Crosby withdrew thousands of dollars in cash from the Tribe's checking account so frequently that she was well known to the Bank's personnel, who would set aside for her actual piles of large denomination bills from the Tribe's accounts.

The Tribe brought suit against Umpqua on the grounds that the Bank learned that the RICO Ringleaders, and especially Ringleader Ines Crosby, were misappropriating the Tribe's money, but Umpqua not only failed to deny Ines access to the Tribe's accounts, but actually helped her to essentially drain them in May 2014.

The district court dismissed all three of the Tribe's claims (negligence, breach of contract, and aiding and abetting), at the pleading stage, concluding that ***2** the Tribe had not alleged sufficient facts demonstrating a plausible entitlement to relief. In particular, the court held that the Tribe's allegations did not give rise to a credible inference that Umpqua knew about the Ringleaders' embezzlement, or that Umpqua breached any duties it separately owed to the Tribe.

The district court's judgment should be reversed. Accepting the Tribe's numerous and detailed factual allegations as true, those allegations show that Umpqua's negligent and otherwise wrongful conduct enabled the Ringleaders to make off with Tribal money that should have been out of reach.

As an initial matter, the operative complaint plausibly alleges that by May 1, 2014, Umpqua knew what Ines Crosby had been up to. Besides having years-worth of account activity showing the Ringleader credit-card bills and other personal expenses the Tribe's money had been used for, by May 1, 2014, Umpqua also knew that Ines had been ousted from her as Tribal Administrator and barred from returning to the Tribe's offices or entering its lands. It likewise knew that she and her fellow Ringleaders (all of whom were her family members) had been publicly accused of embezzlement by the Tribe.

At this point, Umpqua did not completely bury its head in the sand. Instead, aware of the fact that Ines might no longer be authorized to access the Tribe's accounts - a fair inference when she had been banned from the Tribe - Umpqua temporarily froze the Tribe's account and asked Ines to provide verification of her ***3** continuing right to use it, making no effort to contact anyone else. Ines responded by giving the Bank two letters from two different U.S. government agencies (the Bureau of Indian Affairs and the National Indian Gaming Commission), neither of which were addressed to Umpqua and neither of which were even remotely responsive to its request. No reasonable person could conclude, after reviewing the documents, that they came anywhere close to confirming Ines still had the Tribe's consent to conduct transactions in its Umpqua accounts.

But the manager of the branch where Ines regularly came to make her cash withdrawals was eager to keep Ines happy because she believed that would ensure that Umpqua would continue to get the Tribe's business. The branch manager therefore accepted Ines's irrelevant documents as (non-existent) proof of her authority, and urged the Bank's fraud department to do the same, which it did. The Bank lifted the freeze on the accounts and Ines immediately swooped in to substantially clean them out, all with the branch manager's assistance.

Given these facts, the district court subjected the Tribe to an overly stringent, if not impossible, pleading burden when it deemed the Tribe's allegations insufficient. The well-pleaded facts give rise to the plausible inference that Umpqua knew, by May 1, 2014, of the embezzlement scheme, that it breached its duties to the Tribe by, among other things, failing to undertake a reasonable investigation into Ines's authority to access the Tribe's account, and substantially ***4** contributed to the Ringleaders' fraud by facilitating Ines's transactions that effectively looted the Tribe's remaining account assets.

Accordingly, the district court's judgment in favor of Umpqua 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 the Tribe's claims against Umpqua on February 21, 2017. 1-ER-000001. The Tribe filed a timely notice of appeal on March 10, 2017. 2-ER-000063.

QUESTIONS PRESENTED

1. Negligence: Under California law, a bank may be liable to a depositor where it fails to act with reasonable care in connection with transactions in the depositor's account. The Tribe has pleaded facts showing that no later than May 1, 2014, Umpqua knew - either actually or constructively - that Ines Crosby had engaged in an embezzlement scheme to the Tribe's detriment. The Tribe has also pleaded that

***5** Umpqua failed to reasonably investigate whether Ines still had the Tribe's consent to access its bank accounts despite knowing that she had been removed from her position as Tribal Administrator, locked out of the Tribal Office, banned from Tribal lands, and accused of embezzlement from the Tribe. Given these allegations, has the Tribe made out a plausible claim of negligence against Umpqua for allowing Ines to clean out the Tribe's account despite what it knew of her estrangement from the Tribe, the public accusations against her, and its own failure to confirm her status as an authorized user of the account?

2. Breach of Contract: California law specifies that the relationship between a bank and its depositors is governed by the contract between the parties, which is typically memorialized by the signature card the depositor signs. A duty to exercise reasonable care in connection with account transactions is implied in every such contract. Where the Tribe has alleged that Umpqua enabled Ines Crosby to continue accessing the Tribe's account without taking appropriate steps to confirm her authority to do so, has the Tribe plausibly pleaded a breach-of-contract claim?

3. Aiding and Abetting: To allege that a defendant aided and abetted someone else's wrongdoing, a plaintiff may plead either that the defendant actually knew what the primary wrongdoer was up to and substantially assisted the primary wrongdoer, or that the defendant substantially assisted the primary wrongdoer and the defendant's own conduct constituted a breach of duty to the plaintiff. Where ***6** the Tribe has pleaded facts giving rise to the plausible inference that Umpqua actually knew, no later than May 1, 2014, that Ines Crosby had embezzled from the Tribe; where it has likewise pleaded facts showing that Umpqua's response to these circumstances amounted to a breach of its own, independent duties to the Tribe; and where the Tribe has pleaded that Umpqua actively assisted Ines in largely emptying the Tribe's accounts after May 1, 2014, has the Tribe adequately pleaded a claim for aiding-and-abetting liability?

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. 3-ER-000357-359 [¶¶ 68, 70]. Beginning around 1998, four members of a single family effectively took over the Tribe's government administration and its businesses. 3-ER-000354-355 [¶ 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. 3-ER-000348-349 [¶¶ 28-35], 000361-362 ***7** [¶¶79, 82]. Ines Crosby held the title of "Tribal Administrator," and her son, John Crosby, was the Tribe's Economic Director. 3-ER-000348 [¶¶ 28-29].

Despite what their titles suggest, the RICO Ringleaders were mostly empty suits who did not actually do much real work, and who were often unsuccessful at what they did bother to do. 3-ER-000385-388 [¶¶180-183, 186-187], 000390-391 [¶¶ 196, 200-201]. Nonetheless, the Ringleaders' posts endowed them with power and influence, and most importantly, the ability to steal from the Tribe's bank accounts. XXXXXXXXXXXXXXX [¶ 91]. In the 12-year period between 2002 and 2014, when the 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, otherwise paid their bills and expenses, and even took large lump sums in cash for walking-around money, all out of the Tribe's bank accounts. XXXXXXXXXXX [¶ 148], 000381-382 [¶ 164], 000385 [¶177-179], 000387 [¶ 185], 000397 [¶ 227], 000444 [¶ 404], 000455-461 [¶¶ 445, 452, 454, 461], 000463-464 [¶¶ 467, 471], 467 [¶¶ 479-480]. The Ringleaders concealed their fraud from the Tribe, even going so far as to bribe and threaten those Tribal members who questioned their activities, 3-ER-000371-373 [¶¶ 121, 123-124], 000378-379 [¶¶ 151-157], but did not hide it from the employees of Umpqua and other banks at which the Tribe's money was deposited. 3-ER-000432-433 [¶¶ 364-368]. Indeed, Ines Crosby so regularly walked into the same ***8** small Umpqua branch in Orland, California, and withdrew thousands of dollars in cash from the Tribe's bank account that when she did not show up, as expected, the Bank's employees set aside thousands of dollars in what they referred to as simply "large" (i.e. $50 and $100 denominiation bills) for when she did show up. 3-ER-000433 [¶ 366].

In April 2014, the Tribe toppled the Ringleaders and forced them out of the Tribe altogether. On April 12, it replaced Leslie Lohse and two members of the Tribe's governing council with new members. 2-ER-000342 [¶ 2], 000348 [¶¶ 28-31]; 2-ER-000069 [¶ 2], 000128 [¶ 3], 000149 [¶ 2], 000154 [¶ 3], 000181 [¶ 2]. Two days later, the new council passed a resolution terminating any signature authority the deposed members of the old council, as well as the RICO Ringleaders, had on any bank accounts associated with the Tribe or its businesses. 2-ER-000069 [¶ 3], 000149 [¶ 3], 000240-241. The Tribe, further, changed the locks on the Tribe's office in Orland and issued an order barring the RICO Ringleaders from Tribal property. 3-ER-000434 [¶ 372]. And once the Tribe began to uncover evidence of the Ringleaders' embezzlement, it widely publicized these findings in the local press. 4-ER-000664-669.

B. The Ringleaders Use the Tribe's "On the Side" Umpqua Account to Enrich Themselves.

In approximately 2005, the RICO Ringleaders opened a checking and money market account on behalf of the Tribe at Umpqua Bank. 3-ER-000432 [¶¶ 362, ***9** 365], 000434 [¶ 370]. John Crosby described these accounts to investigators as "on the side," and indeed, the Tribe did not know that they even existed until May 2014, after it had ousted the Ringleaders and replaced the Tribe's previous governing council. 3-ER-000432 [¶ 432], 000434 [¶ 370].

Between 2005 and 2014, the Ringleaders used the Umpqua accounts as their personal piggybank, embezzling more than $6.4 million of the Tribe's money. 3-ER-000432 [¶ 362]. For example, they spent over $2 million in making payments on their personal credit cards, wrote over $2 million in checks to themselves and their family members, and spent over $100,000 on fitness clubs. 3-ER-000432 [¶ 364].

Ringleader Ines Crosby frequently stopped in to the Bank's Orland branch to withdraw money, typically in the thousands of dollars. 3-ER-000432-433 [¶¶ 365-366], 000441 [¶ 399]. Ines was well known to the Bank's tellers and managerial staff. 3-ER-000432-433 [¶¶ 365-366]. As noted above, they knew her preference for receiving cash in $50 and $100 bills, and when she did not arrive when they expected her, they set aside piles of the bills so her cash would be ready when she got there. 3-ER-000433 [¶ 366], 000441 [¶ 399]. Ines admitted to investigators that she regularly withdrew money from the Tribe's Umpqua account and used it for her personal expenses. 3-ER-000432 [¶ 363].

***10** The Bank's many years of dealing with Ines should have caused it to suspect that she was wrongfully lining her own pockets with the Tribe's money. The regular withdrawals of thousands of dollars in cash were suspicious by themselves, as were the payments to the Ringleaders' credit cards, and other non-Tribal or business expenses. On top of that, Ines sought to avoid governmental scrutiny by keeping her withdrawals just below the amount ($10,000) that required the Bank to file Currency Transaction Reports ("CTRs") with the IRS. 3-ER-000440 [¶ 395]. Despite these indicia of fraud, Umpqua did nothing to investigate.

C. Umpqua Learns About Ines Crosby's Expulsion From the Tribe, and About Public Allegations That the Tribe's Former Leadership - of Which Ines Was a Part - Had Engaged in an Embezzlement Scheme, But Umpqua Fails to Properly Investigate Ines's Authority to Access the Tribe's Account and Helps Her to Empty It of Its Remaining Assets.

As noted above, the Ringleaders were ousted from the Tribe and her position as Tribal Administrator on April 12, 2014, and the Tribe passed a resolution two days later terminating their signature authority on any Tribe bank accounts. XXXXXXXXXXX [¶ 2], 000128 [¶ 3], 000149 [¶ 2], 000154 [¶ 3], 000181 [¶ 2], 000240-241. On April 17, 2014, Ines told the manager of Umpqua's Orland branch, Shirley Schrumpf, that she had been locked out of the Tribe's offices and barred from coming onto Tribal land. 3-ER-000434 [¶ 372]. Despite learning that Ines was estranged from the Tribe, Schrumpf did nothing to verify that Ines was still authorized to access the Tribe's bank account. XXXXXXXXXX [¶ 373]. In fact, ***11** Schrumpf did the opposite by facilitating Ines's withdrawal of $10,000 from the Tribe's checking account. 3-ER-000434 [¶ 372].

By May 1, 2014, articles began appearing in the local press reporting on allegations that the Tribe's former leadership had embezzled from it. 3-ER-000435 [¶ 374]. Umpqua's fraud-protection unit sent the articles to branch manager Schrumpf, and instructed her to "obtain new documentation on who [the Tribe's] current officers are and who can sign on the account." 3-ER-000435 [¶¶ 374-375]; 4-ER-000599. In response, Schrumpf did not contact the Bank's client, i.e., the Tribe. Instead, the only person she contacted was Ines Crosby, someone who Schrumpf knew had been removed from her position with the Tribe, and who was part of the former leadership team that had been publicly accused of stealing millions of dollars of the Tribe's money. 3-ER-000435-437 [¶¶ 375, 379-380, 382].[2] Ines told Schrumpf "it was no problem" and said she would bring documents to the Bank that day in response to Schrumpf's inquiry. 3-ER-000435 [¶ 375]. Schrumpf told another Bank employee that, "Ines was great and thanked me ...." 3-ER-000435 [¶ 376].

***12** The two documents Ines gave Schrumpf did not come from the Tribe and did not address Schrumpf's request: They did not identify the current officers of the Tribe or confirm who had signing authority on the Umpqua account. 3-ER-000435-436 [¶ 377]. Indeed, the documents did not even mention Ines Crosby. 4-ER-000658-661.

The first document was a letter from the federal Bureau of Indian Affairs ("BIA"), dated April 15, 2014, and addressed to the City of Orland Police Department and Cornerstone Community Bank, another bank that held the Tribe's money. 4-ER-000660. The letter explained that the BIA "does not get involved in internal tribal disputes." 4-ER-000660-661. It also attached a document, dated January 12, 2011 (more than three years earlier), which the BIA described as the most recent information in its possession identifying the members of the Tribe's governing council. 4-ER-000660-661. That record listed the names of the five members of the former council, which naturally did not include Ines Crosby, since she was an employee of the Tribe, not an elected representative of the Tribe. 4-ER-000661. The BIA letter thus did not provide any information about the governing council's current composition, but only its composition as the BIA had been apprised of it three years earlier. And the letter was entirely silent as to who had signing authority over the Tribe's Umpqua account, which is not something the ***13** BIA would be expected to know anyway, or Ines Crosby's status with the Tribe more generally.

The second document was a letter from the National Indian Gaming Commission ("NIGC"), dated April 21, 2014, and addressed to the Tribe's Chairman, Andrew Freeman. 4-ER-000658-659. The purpose of the letter was to acknowledge its understanding that the former Tribal council had recently been replaced, and to express concern as to whether the Tribe's Casino gaming operations were still properly under the Tribe's control. 4-ER-000658-659. Just like the BIA letter, the NIGC letter did not purport to identify the Tribe's current officers or employees, or those persons entitled to access the Tribe's Umpqua account (and again, this latter piece of information is not something the NIGC would be expected to know). 3-ER-000520 [¶ 736]; 4-ER-000658-659.

The Bank imposed a temporary restriction on the Tribe's account on May 1, 2014, while it verified Ines's authority. 3-ER-000433-434 [¶ 369], 000436 [¶ 381] 000521 [¶ 740]. Branch manager Schrumpf regarded the BIA and NIGC documents as conclusively establishing Ines's authority to continue to withdraw money and otherwise make transactions in the account, but she sent them to Umpqua's Operations Resource Desk "just to be safe." [3] 3-ER-000436. On May 5, ***14** 2014, Schrumpf followed up with the Operations Resource Desk to find out if she could restore Ines's access. 3-ER-000436. Schrumpf also asked whether she could process checks Ines had written before Schrumpf learned of the embezzlement allegations. 3-ER-000433-434 [¶ 369], 000436 [¶ 381]. The Bank granted Schrumpf's request, and Schrumpf called Ines to give her the good news. 3-ER-000437 [¶¶ 383-384].

That same day, May 5, 2014, Ines went to the Orland branch and conducted a series of transactions, with Schrumpf's assistance, that resulted in the withdrawal of nearly all of the Tribe's remaining money on deposit with the Bank. 3-ER-000437-438 [¶ 386]. In effect, the Tribe's balance went from $415,000 to $15,000. 3-ER-000437-438 [¶ 386]. Ines obtained a cashier's check of $59,839, and she transferred $250,000 from the Tribe's money market account to its checking account to cover a $300,000 check she had written on May 3, 2014. 3-ER-000437-438 [¶ 386].

Thereafter, the Bank's employees were instructed to ignore any allegations concerning embezzlement from the Tribe, and to even avoid reading any of the ongoing newspaper reports. 3-ER-000438-438 [¶¶ 388, 390]; 4-ER-000602-603.

On May 9, 2014, Schrumpf sent flowers to Ines and John Crosby, and invited them to lunch. 3-ER-000438-439 [¶ 389]; 4-ER-000597-598. She reported back to her supervisor that the two could not make lunch because they were still ***15** locked out of their office, but that Ines had assured her that, "Umpqua Bank Orland was going to get their business when this is all resolved and then we can come welcome them back into their office!" 3-ER-000438-439 [¶ 389]. Her supervisor responded, "This is fantastic!" 3-ER-000438-439 [¶ 389]. Schrumpf was eager to stay in the Crosbys' good graces because the amount of her bonus was directly tied to the amount of money on deposit at the Bank. 3-ER-000433 [¶ 367]. The size of the Tribe's account made it one of the Orland branch's bigger clients. 3-ER-000433 [¶ 367].

It was only on May 30, 2014, when Umpqua received a cease-and-desist letter from the Tribe's counsel, that it finally froze the Tribe's account. 3-ER-000439 [¶ 391]. At that late date, not much could be done: Virtually all of the Tribe's funds had already been drained by the Ringleaders. 3-ER-000439 [¶ 391].

Although the Tribe's accounts were depleted by the end of May 2014, Schrumpf's deference to Ines paid off because a few months later, on July 8, Ines and John Crosby deposited nearly a half million dollars in a new Umpqua account in their names, the source of which was the Tribe. 3-ER-000434 [¶ 371], 000439 [¶ 392].

D. Procedural History.

The Tribe filed this action on March 10, 2015. Its First Amended Complaint, filed on April 17, 2015, asserted three claims for relief, including (1) common law ***16** negligence, (2) statutory negligence, (3) and aiding-and-abetting liability. 8-ER-001355-1362, 001364-1365. Umpqua moved to dismiss and the district court granted its motion with leave to re-plead on August 14, 2015. 1-ER-000039-62

The Tribe filed a Second Amended Complaint on September 25, 2015, in which it reasserted its common law negligence and aiding-and-abetting claims, and also asserted breach-of-contract and restitution claims. 5-ER-000847-855. Umpqua 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-000037.

On May 20, 2016, the Tribe filed its Third Amended Complaint. It again alleged claims for negligence, breach of contract, and aiding-and-abetting liability. 3-ER-000519-526. This time, however, the district court dismissed all of the Tribe's claims with prejudice on October 19, 2016, and entered final judgment in favor of Umpqua on February 21, 2017. 1-ER-000007-000023; 1-ER-000001.

SUMMARY OF ARGUMENT

The district court failed to give deference to the reasonable inferences that are readily apparent when accepting the Tribe's detailed factual allegations as true. Those facts plausibly allege that Umpqua knew, at least by May 1, 2014, that Ines Crosby and her fellow Ringleaders had engaged in embezzlement. The Tribe has also plausibly alleged that when Umpqua undertook an investigation to verify that Ines was still authorized to access the Tribe's accounts, it breached its duties to the ***17** Tribe by failing to undertake the kind of reasonable investigation it was obligated to undertake - especially in light of what it knew about Ines's expulsion from the Tribe and the latter's charge that she and the other Ringleaders had stolen from it. Finally, the Tribe has alleged that Umpqua substantially assisted the Ringleaders' embezzlement by helping Ines loot the Tribe's remaining assets in the account in May 2014, after it was aware of all these troubling facts.

At the pleading stage, these allegations and the logical inferences that flow from them are more than sufficient to raise the Tribe's entitlement to relief over the threshold of the conceivable, and into the realm of the plausible. Because Umpqua did not exercise the reasonable care that the law imposes upon banks in connection with depository accounts, it may be held liable. The district court's conclusion to the contrary should be reversed.

*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 ten percent or more of a party's stock.

*17 *ARGUMENT*

A. Standard of Review.

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). This Court must accept the factual allegations in the complaint as true and construe all reasonable inferences in the light most favorable to the Tribe. Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017). "If there are two alternative explanations, one advanced by defendant and the other ***18** advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." Starr v. Baca, 652 F.3d

1202, 1216 (9th Cir. 2011). Further, "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." Twombly, 550 U.S. at 556. 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 Adequately Pleaded Its Negligence Claim.

To plead a claim for negligence under California law, a party must allege: (1) a duty to exercise due care, (2) breach of that duty, (3) causation, and (4) damages. Badame v. JP Morgan Chase Bank, N.A., No. CV-13-05425, 2014 U.S. Dist. LEXIS 22164, *18 (C.D. Cal. Feb. 13, 2014) (citing Paz v. Cal., 22 Cal.4th 550, 559 (2000)).

In the court below, Umpqua argued that the Tribe had failed to adequately plead facts plausibly alleging that it breached any duties owed to the Tribe. The district court agreed, but its conclusion is based on flawed and logically untenable reasoning. According to the district court, even if Umpqua knew that Ines and the other Ringleaders were suspected of embezzling from the Tribe, that does not give rise to a plausible inference that Umpqua breached its duty of care to the Tribe when it allowed Ines to continue to access the account. 1-ER-000014; 1-ER- ***19** 000030-31. The district court's ruling unfairly subjects the Tribe to an impossible pleading burden and one that is not supported by the law or the detailed facts the Tribe has alleged.

Generally speaking, a bank has no duty to "supervise account activity," or to "inquire into the purpose for which [account] funds are being used." Chazen v. Centennial Bank, 61 Cal.App.4th 532, 537 (1998). While a bank's duties to its customers are limited, they are far from non-existent. Simi Mgmt. Corp. v. Bank of Am., N.A., 930 F. Supp.2d 1082, 1100-01 (N.D. Cal. 2013). A bank's relationship with its customers is governed by contract, "which is ordinarily memorialized by a signature card that the depositor signs upon opening the account." Das v. Bank of Am., N.A., 186 Cal.App.4th 727, 741 (2010) (internal quotation marks and citation omitted). This contract gives rise to an implied duty to "act with reasonable care in its transactions with its depositors." Casey v. U.S. Bank Nat. Assn., 127 Cal.App.4th 1138, 1150 (2005); Chazen, 61 Cal.App.4th at 543. Thus, a bank may be held liable for negligence for misconduct in connection with an account. Das, 186 Cal.App.4th at 741; Ghalchi v. United States Bank, N.A., No. 14-6619, 2017 U.S. Dist. LEXIS 56428, *8 (C.D. Cal. Jan. 10, 2017). In fact, if a bank has actual or constructive knowledge of a third party's misappropriation, it is subject to liability for that misappropriation. Blackmon v. Hale, 1 Cal.3d 548, 556 (1970); see also John B. v. Superior Court, 38 Cal.4th 1177, 1190-91 (2006) (defining ***20** "constructive knowledge" as "knowledge that one using reasonable care or diligence should have, and therefore is attributed by law to a given person") (internal quotation marks and citation omitted).

Taking the allegations in the complaint as true, it is more than plausible that by May 1, 2014, Umpqua knew, or should have known, that Ines had been unlawfully using the Tribe's money to enrich herself. See e.g., Hope v. Cal. Youth Auth., 134 Cal.App.4th 577, 588-89 (2005) (noting that "knew or should have known" is a negligence standard). By that point, Umpqua knew that Ines had been regularly withdrawing large sums of cash for years, and that the account had been used to pay the Ringleaders' personal expenses. 3-ER-000432-433 [¶¶ 362, 364-366]. It also knew that Ines had been locked out of the Tribe's office and forbidden from stepping foot on Tribal property. 3-ER-000434 [¶ 372]. And it knew that the former leaders of the Tribe, which included Ines as a senior employee, had been publicly accused of stealing millions of dollars from the Tribe. 3-ER-000435 [¶ 374]. Branch manager Schrumpf and other Bank employees had read one or more newspaper reports describing the Tribe's ouster of the Ringleaders and its investigation into their misconduct, which included referring the matter to local law enforcement. 3-ER-000435 [¶¶ 374-375]; 4-ER-000665-667; 4-ER-000567, 000588. These facts collectively support the reasonable inference that Umpqua knew that Ines and the Ringleaders had misappropriated the Tribe's funds. Indeed, ***21** the Bank was concerned enough by these troubling circumstances that its fraud unit temporarily froze the Tribe's account and directed Schrumpf to obtain paperwork from the Tribe confirming the identities of its current officers, as well as the identities of those persons with signing authority over the account. 3-ER-000433-434 [¶ 369], 000436 [¶ 381], 000521 [¶ 740]; 4-ER-000656.

The district court appears to have ignored the significance of this fact, which shows that by May 1, 2014, Umpqua itself determined that it had a duty to investigate to be sure that Ines had the Tribe's permission to engage in account transactions. Umpqua was right to do so because the existing circumstances made it entirely foreseeable that the Tribe would be harmed if unauthorized persons were allowed to loot its assets. See Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal.3d 671, 694-95 (1978) ("It is settled ... that the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk ...."); see also Lerner v. Fleet Bank, N.A., 459 F.3d 273, 288 (2d Cir. 2006) ("Facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated will trigger such a duty of inquiry on the part of the depositary bank, and the bank's failure to conduct a reasonable inquiry when the obligation arises will result in the bank being charged with such knowledge as inquiry would have disclosed.") (internal quotation marks and citation omitted).

***22** The problem, however, is that the well-pleaded facts give rise to the plausible inference that the investigation fell woefully short and was conducted with half-hearted interest at best. The only person Umpqua contacted to verify Ines's authority was Ines herself, and this at a time when the Bank knew - because Ines told Schrumpf - that she had been expelled from the Tribe, locked out of the Tribal Office, and was precluded from entering Tribal property. 3-ER-000435-437 [¶¶ 375, 379-380, 382]. The complaint gives rise to the plausible inference that had the Bank acted reasonably and with due regard for its duties to the Tribe, it would not have confined its inquiry merely to Ines, someone who was admittedly on the outs with the Tribe and under a public cloud of suspicion. 3-ER-000437-438 [¶¶ 382, 387], 000519-520 [¶¶ 732, 735]; 4-ER-000580. Given the detailed facts alleged in the complaint, a non-negligent investigation certainly required more than that.

Further, even if posing its inquiry exclusively to Ines were somehow reasonable (and it was not), the Tribe has pleaded facts showing that the documents she furnished to Umpqua were not responsive to Umpqua's request. All she gave them were the letters from the BIA and NIGC - agencies of the U.S. government - that were addressed to others and had nothing to do with the Tribe's bank accounts; the BIA and NIGC simply acknowledged their awareness of reports that the Tribe's governing council had recently undergone a change. 3-ER-000435- ***23** 436 [¶ 377]; 4-ER-000658-662. Neither letter expressed the opinion that those changes were illegitimate, and more to the point, neither letter so much as mentioned any of the Tribe's bank accounts, let alone the Umpqua account, nor did they have anything to say about who was authorized to access the Tribe's accounts. [4] 4-ER-000658-662. That's not even the kind of information that the U.S. government would be expected to have about a sovereign Indian tribe. The documents, moreover, did not even contain a single mention of Ines Crosby. 4-ER-000658-661.

In short, when it ended its investigation on May 5, 2014, after reviewing the BIA and NIGC letters, Umpqua had no more reason to think that Ines Crosby was an authorized user of the Tribe's accounts, than it had on May 1, 2014, when it began its investigation. Umpqua nonetheless fully restored Ines's access, and she quickly took advantage of the situation by draining most of the remaining assets in the Tribe's accounts, with the direct and active assistance of Umpqua employees. 3-ER-000436-438 [¶¶ 378, 381, 383-384, 386].

Umpqua had an obligation to take reasonable steps to ascertain Ines's right to direct what happened to the Tribe's money once it decided (correctly) that the revelations about malfeasance involving Ines and her cohort demanded such an ***24** inquiry. The Tribe has pleaded ample facts plausibly suggesting that Umpqua failed in this regard, at least in part because it was principally motivated by a desire to keep longtime and lucrative customers Ines and John Crosby happy. 3-ER-000433 [¶ 367], 000438-439 [¶ 389]. Further, the Tribe's allegations lead to the plausible inference that had Umpqua undertaken a reasonable investigation, it would have learned that the new Tribal governing council had terminated Ines's employment and explicitly revoked her signing authority over all Tribal bank accounts. XXXXXXXXXXX [¶ 3], 000149 [¶ 3], 000240-241. Having failed to perform the investigation that a prudent bank would have performed, the law charges Umpqua with the knowledge it would have obtained had it undertaken a proper investigation, namely, that the Tribe disputed Ines Crosby's right to control its assets. Lerner, 459 F.3d at 288 (explaining that a "bank's failure to conduct a reasonable inquiry when the obligation arises will result in the bank being charged with such knowledge as inquiry would have disclosed") (internal quotation marks and citation omitted).

For these reasons, the district court erred when it held that the Tribe's allegations were insufficient to plead a negligence claim against Umpqua.

C. The Tribe Has Adequately Pleaded Its Breach-of-Contract Claim.

To plead a breach-of-contract claim under California law, a plaintiff must allege facts addressing each of the following elements: (1) the existence of a ***25** contract between the plaintiff and defendant; (2) the plaintiff's performance of the contract or excuse for non-performance; (3) the defendant's breach of the contract; and (4) damages caused by the breach. U.S. Bank N.A. v. Wayman, No. 13-CV-02203, 2015 U.S. Dist. LEXIS 133755, *16-17 (S.D. Cal. Sept. 30, 2015).

As noted above, the relationship between a bank and its customers is contractual in nature. Das, 186 Cal.App.4th at 741. The district court concluded that the Tribe had failed to sufficiently plead its breach-of-contract claim for the same reasons its negligence claim purportedly fell short, namely, that the Tribe's alleged facts were inadequate to give rise to the plausible inference that Umpqua had breached any duty it owed the Tribe. 1-ER-000021. For the reasons described above, however, that conclusion is legally insupportable.

The Tribe has alleged sufficient facts to make it more than plausible that by May 1, 2014, Umpqua had actual or constructive knowledge of Ines's embezzlement of Tribal money on deposit with the Bank (see discussion above). 3-ER-000432-435 [¶¶ 362-364, 365-366, 372, 374-375] 000440-442 [¶¶ 395, 399]. And on top of this, Umpqua failed to conduct a reasonable investigation to ascertain whether Ines still had the Tribe's permission to direct account transactions. 3-ER-000435-437 [¶¶ 374-375, 377, 379-380, 382]; 4-ER-000658-662. At a minimum then, Umpqua breached its contract with the Tribe when, despite what it knew as of May 1, 2014 concerning Ines's ouster from the Tribe ***26** and the public charges of embezzlement leveled at her and the other Ringleaders, and despite its lack of diligence in determining Ines's status with respect to the Tribe's account, it nonetheless restored her ability to do what she pleased with the Tribe's money. The Tribe was quickly damaged by Umpqua's carelessness when Ines, with the assistance of Umpqua employees, immediately - on the same day the temporary freeze of the account was removed - substantially emptied the accounts of their assets. 3-ER-000433 [¶ 369], 000436-438 [¶¶ 381, 383-384, 386].

D. The Tribe Has Adequately Pleaded Its Aiding-and-Abetting Claim.

There are two ways to plead an aiding-and-abetting claim. First, a plaintiff may allege facts making it plausible that the defendant knew that a third party's conduct constituted a breach of duty to the plaintiff, and substantially assisted or encouraged the third party's actions. Bradshaw v. SLM Corp.652 F. App'x 593, 594 (9th Cir. 2016); Casey v. U.S. Bank Nat. Assn., 127 Cal.App.4th 1138, 1144 (2005). Alternatively, the plaintiff may plead that the defendant gave substantial assistance to the third party in accomplishing a tortious result and the defendant's own conduct, separately considered, constituted a breach of duty to the plaintiff. Bradshaw, 652 F. App'x at 594; Casey, 127 Cal.App.4th at 1144. An aiding-and-abetting claim pleaded under the first approach must allege that the defendant actually knew of the primary wrongdoer's specific misconduct. In re First Alliance Mortg. Co., 471 F.3d 977, 993 (9th Cir. 2006); ***27** Lorenz v. East West Bancorp, Inc., No. 15-CV-06336, 2016 U.S. Dist. LEXIS 5492, *20-21 (C.D. Cal. Jan. 14, 2016). Actual knowledge need not be pleaded directly, however, and may be adequately alleged through the reasonable inferences that may be drawn from the facts. Neilson v. Union Bank of Cal., N.A., 290 F. Supp.2d 1101, 1120-21 (C.D. Cal. 2003). Under the second approach, actual knowledge is not a required pleading element. [5] Seaman v. Sedgwick, LLP, No. 11-664, 2012 U.S. Dist. LEXIS 9917, *20 (C.D. Cal. Jan. 26, 2012).

***28** The district court dismissed the Tribe's aiding-and-abetting claim on the grounds that it had failed to adequately allege that Umpqua actually knew of the Ringleaders' embezzlement (as required by the first approach), or that Umpqua breached any duties it owed the Tribe (as required by the second approach). 1-ER-000019-20. The district court erred. The Tribe has satisfied both tests for pleading aiding-and-abetting liability by alleging numerous facts raising its right to relief well above the speculative level. Twombly, 550 U.S. at 555.

First, the facts adequately allege that Umpqua knew that Ines Crosby had been stealing from the Tribe. By May 1, 2014, Umpqua had several years of history with Ines, during which she had made regular, large cash withdrawals, to say nothing of the credit card bills and checks to themselves and family members that the Ringleaders paid out of the Umpqua account. 3-ER-000432 [¶¶ 362, 364]. In addition, the Bank knew by May 1, that Ines had been removed from the Tribe and banned from its property. 3-ER-000434 [¶ 372]. It also knew that the Tribe's new leadership had accused the former leadership, which included Ines as a senior employee, of embezzling over $1 million, and the Tribe had brought its findings to local law enforcement agents. 3-ER-000435 [¶¶ 374-375]; 4-ER-000665667. These allegations give rise to the plausible inference that Umpqua knew no later than May 1 that Ines had breached her duties to the Tribe by stealing from it, and that when it allowed her to drain the ***29** Tribe's account on May 5, it substantially assisted her embezzlement. See Lorenz, 2016 U.S. Dist. LEXIS 5492, at *22 (holding that the plaintiffs adequately alleged actual knowledge for aiding-and-abetting purposes when they pleaded that the bank had determined that an entity was operating a fraudulent scheme but continued to approve transfers of the plaintiffs' money out of the entity's account until all the money was gone).

Moreover, even if the Court were to hold that the Tribe has not hurdled the first test for pleading aiding-and-abetting liability, it has certainly hurdled the second test, which does not require actual knowledge allegations. The Tribe's facts are sufficient to withstand a motion to dismiss under this test because the Tribe has alleged, contrary to the district court's conclusion, that Umpqua separately breached its duties to the Tribe when it facilitated Ines's emptying out of the account on May 5, after the Bank's own deeply flawed investigation failed to confirm that Ines still possessed the authority to access the Tribe's money despite being removed from the Tribe and accused of theft. By substantially assisting Ines's embezzlement in this way, irrespective of whether it knew what she was up to, Umpqua breached its own duties to the Tribe. See Casey, 127 Cal.App.4th at 1144 (explaining that a defendant may be liable where it "gives substantial assistance to the other in accomplishing a tortious result and the [defendant's] own conduct, separately considered, constitutes a breach of duty to the [plaintiff]"). Umpqua was negligent in its handling of the account and breached its contractual ***30** duty not to give unauthorized persons access to the Tribe's funds. Accordingly, the Tribe's aiding-and-abetting allegations cross the line from the merely conceivable to the plausible. Twombly, 550 U.S. at 570.

CONCLUSION

For all of the reasons described above, the Tribe respectfully requests that the Court reverse the judgment in favor of Umpqua, and remand to the district court so the Tribe may litigate its negligence, breach of contract, and aiding-and-abetting claims.

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Footnotes

1 Umpqua Holdings conducts substantially all of its operations through Umpqua Bank, its wholly owned subsidiary. Both are organized under Oregon law.

2 At her deposition, Schrumpf testified that as of May 1, 2014, she was aware of allegations that Ines had embezzled from the Tribe, owing to the newspaper reports. 3-ER-000519 [¶ 731]; 4-ER-000567, 000638. A May 1, 2014 article in the Red Bluff Daily News reported that the Tribe's new leadership had met with local law enforcement to discuss its (i.e., the Tribe's) finding based on its initial investigation that the removed members had embezzled over $1 million. 4-ER-000665.

3 When the BIA and NIGC letters were put in front of her at her deposition, Schrumpf admitted that they did not say that Ines Crosby was an authorized user of the Tribe's Umpqua account. 4-ER-000609.

4 The letters also did not respond to Umpqua's request for documentation identifying the members of the Tribe's current governing council. The BIA letter only identified the council members set forth in the Tribe's last communication to the BIA on the subject, and that was from January 12, 2011, three years earlier.

5 In ESG Capital Partners, LP v. Stratos, 828 F.3d 1023, 1039 (9th Cir. 2016), this Court stated that "both avenues [for pleading aiding-and-abetting liability] require actual knowledge," but did not cite any authority for that proposition. Moreover, the Court's statement was dicta because it had already concluded that the plaintiff had adequately alleged the defendant's actual knowledge, and the Court therefore did not have to consider the pleading standard under the second approach. Finally, Casey, the California case that sets forth the two approaches, does not, on its face, include actual knowledge as a requirement of the second approach. Casey says that liability may be imposed on an aider and abettor if it "[1] knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or [2] 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." 127 Cal.App.4th at 1144 (emphasis added). What the aider and abettor "knows" is plainly not an element of the second approach. See Seaman, 2012 U.S. Dist. LEXIS 9917, at *20 ("Although knowledge is one means of proving aiding and abetting liability, it is not required for [the] second method set forth in Casey.") Finally, imputing an actual knowledge requirement into the second pleading approach would make that approach obsolete for all practical purposes. No one would attempt to satisfy it because it would mean that for both approaches, a plaintiff would have to plead actual knowledge and substantial assistance, but for the second approach a plaintiff would have the added burden of pleading that the defendant's conduct also constituted a breach of duty. The second approach would no longer be an alternative to the first, but the same test with an added requirement.

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