No. 17-15486

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paskenta Band of Nomlaki Indians, et al.,

Plaintiffs-Appellants,

v.

Umpqua Bank, et al.,

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The gist of Umpqua's argument on appeal is that "there's nothing to see here." Umpqua says that it was free to assume that all of Ines Crosby's transactions in the Tribe's bank accounts were legitimate because she was an authorized signatory on the accounts. But Umpqua is responding to an argument that the Tribe isn't making on appeal.

The district court erred in dismissing the Tribe's negligence, breach-of-contract, and aiding-and-abetting claims because the Tribe has alleged in detail that Umpqua breached its duty of care to the Tribe. In particular, by May 1, 2014, Umpqua was aware of alarming facts, including that Ines had been ousted from the Tribe and that the Tribe had accused her and her fellow Ringleaders of embezzlement. As a result, Umpqua took it upon itself to investigate whether Ines maintained the authority to continue doing as she pleased with the Tribe's money, but it failed to conduct that investigation in a reasonable manner. Umpqua correctly determined that it had a duty to investigate—it suspended Ines's access to the accounts—but then it undertook an investigation so minimal and ineffectual as to be almost laughable. Indeed, given the cozy relationship between the Bank's branch manager and Ines, it's not unreasonable to wonder whether the whole thing was intentionally rigged in Ines's favor. In any event, based on its wholly deficient inquiry, Umpqua quickly restored Ines's access and she immediately emptied the Tribe's accounts of money totaling approximately $400,000.

The Tribe's allegations are sufficient to state claims for negligence and breach of contract, at least as to Umpqua's wrongful conduct beginning on May 1, 2014. Had Umpqua not breached its duty of care to the Tribe by taking reasonable steps to confirm Ines's authority over the accounts, Ines would not have made off with hundreds of thousands of dollars of the Tribe's money.

The Tribe's allegations also state a claim for aiding-and-abetting liability because the Tribe has adequately alleged that Umpqua breached its duties to the Tribe as described above, and that it gave Ines substantial assistance in stealing from the Tribe when it restored her access to the account and facilitated her withdrawals.

Umpqua argues that the Tribe must allege that it actually knew about Ines's embezzlement to plead a plausible aiding-and-abetting claim. But the case law Umpqua cites does not support that proposition. What's more, inserting an "actual knowledge" requirement into the second prong of the aiding-and-abetting test—the prong under which the Tribe has always proceeded—would render that prong meaningless. Plaintiffs would never rely on it because they would have to satisfy the same two elements of the first prong, in addition to a third element not called for by the first prong. Moreover, even if this Court were to require facts concerning actual knowledge, the Tribe has pleaded them. The facts concerning Umpqua's incompetent investigation are enough to raise a plausible inference that the Bank knew that Ines was lining her own pockets with the Tribe's money but that it decided its interests were better aligned with Ines, than with its true client, the Tribe.

For these reasons, and as more fully described below, the Tribe respectfully requests that the Court reverse the judgment dismissing its negligence, breach-of-contract, and aiding-and-abetting claims.

ARGUMENT

A. The Tribe's Negligence and Breach-of-Contract Claims Are Adequately Alleged and Should Be Reinstated.

1. Even Umpqua Recognized That Its Duty of Care to the Tribe Required It to Investigate Ines's Right to Control the Tribe's Accounts.

Umpqua does not, nor could it, dispute that it owed a duty of care to the Tribe as its depositor. *Chazen v. Centennial Bank*, 61 Cal.App.4th 532, 543 (1998) (stating that, "It is well established that a bank has 'a duty to act with reasonable care in its transactions with its depositors'" and that this duty "is an implied term in the contract between the bank and its depositor") (quoting *Bullis v. Security Pac. Nat. Bank*, 21 Cal.3d 801, 808 (1978)). Umpqua contends, however, that its duty of care did not include the obligation to monitor activity in the Tribe's accounts for signs of fraud by Ines or the other Ringleaders. As long as Ines remained an authorized signatory on the account, says Umpqua, it was required to honor her payment instructions.

Umpqua's argument misses the point because in this appeal the Tribe is not seeking relief based on any failure to "police" transactions in the Tribe's accounts. The Tribe has alleged specific facts showing that by May 1, 2014, Umpqua *knew* Ines's right to access the accounts was in serious doubt. In fact, Umpqua was sufficiently concerned that it immediately froze the account and launched an investigation into whether Ines remained an authorized user. 3-ER-000433-434 [¶ 369], 000436 [¶ 381], 000521 [¶ 740]. Thus, it's not as though the complaint merely asserts that by May 1, 2014, Umpqua's duty of care required it to investigate. Rather, the complaint pleads facts showing that Umpqua arrived at this very conclusion itself, i.e., that its duty of care required Umpqua to investigate. And Umpqua was correct to do so. By May 1, 2014, Umpqua knew that Ines had been: (1) expelled from the Tribe, (2) fired from her job with the Tribe, (3) barred from entering Tribal land, and (4) publicly accused (along with other members of her family) of embezzling from the Tribe. 3-ER-000434-435 [¶¶ 372, 374]. If a bank's well-established duty of care to its depositors means anything, it must mean that when confronted with such extraordinary information about an employee signatory to the employer's bank accounts, the bank must take reasonable steps to verify that the employee remains an authorized signatory.

2. Umpqua's Duty of Care to the Tribe Required That Its Investigation Into Ines's Authority Be Competently Performed.

Umpqua's decision to suspend transactions in the Tribe's accounts while it investigated Ines's status was correct and had it undertaken that investigation in a responsible way, we might not be here. But it did not. The facts pleaded by the Tribe show that Umpqua's investigation was grossly negligent, at best, and, at worst, a sham.

For starters, Umpqua's branch manager, Shirley Schrumpf, knew as of April 17, 2014 that Ines had been removed from the Tribe because Ines told her as much. 2-ER-000069 [¶ 2], 000128 [¶ 3], 000149 [¶ 2], 000154 [¶ 3], 000181 [¶ 2], 000240-241; 3-ER-000434 [¶ 372]. But Schrumpf did nothing. 3-ER-000434-435 [¶ 373]. It was not until May 1, after reports of embezzlement by Ines and the Ringleaders appeared in the local press that the Bank's fraud department directed Schrumpf to obtain documentation showing the Tribe's current leadership and verifying that Ines still possessed authority over the accounts. 3-ER-000435 [¶ 374]. In response, Schrumpf didn't contact *the Tribe* with this request. She instead contacted only Ines. 3-ER-000434-437 [¶¶ 375, 379-380, 382]. No reasonable investigation would have been confined to asking the person whose account authority was in doubt—and who was no longer employed and who had been publicly accused of embezzlement—to substantiate her authority. It makes no sense to limit the scope of such an investigation to the subject of the investigation;

and certainly a reasonable juror could reach the conclusion based on evidence supporting these allegations that Umpqua was negligent in doing so.

Moreover, no reasonable person would have construed the documents that Ines gave to Umpqua as adequate proof of her continuing authority over the accounts. Neither of the two documents even came from the Tribe. One was a letter from the Bureau of Indian Affairs stating that its most recent information about the composition of the Tribe's governing council was three years old, dating to 2011. 4-ER-000660-661. The second letter was from the National Indian Gaming Commission expressing concern as to whether the Tribe's casino operations were still under its control given that the Commission understood that the Tribe's governing council had recently changed. 4-ER-000658-659. Neither of these documents, either directly or inferentially, addressed: (1) Ines's status with the Tribe, (2) the Tribe's Umpqua accounts, or (3) Ines's right to carry out transactions in those accounts. No reasonable person would have deemed these documents as sufficient proof of Ines's account authority, and a reasonable juror could easily reach that conclusion based on the evidence supporting these allegations.

Thus, the Tribe has stated claims for relief because it has alleged that Umpqua "affirmatively engaged in risk-creating conduct." *Sun 'n Sand, Inc. v. United California Bank*, 21 Cal.3d 671, 693 (1978). It was entirely foreseeable that if Umpqua failed to take reasonable steps to confirm Ines's authority, the Tribe would be harmed through the loss of its assets, and indeed, that's exactly what happened. *Id.* at 695 (explaining that the most important consideration in determining whether a duty of care exists is the foreseeability of the harm to the plaintiff). After doing nothing more than taking Ines's word for it and crediting her irrelevant "proof," Umpqua restored her access to the Tribe's accounts. 3-ER-000433-434 [¶ 369], 000436 [¶ 381], 000437 [¶¶ 383-384]. On the very same day, Ines promptly directed transactions that almost completely drained all of the Tribe's remaining assets at the Bank, driving its balance down from $415,000 to $15,000. 3-ER-000437-438 [¶ 386].

None of this should have happened. Had Umpqua undertaken a minimally competent investigation, it would have contacted the Tribe and learned that it had a new governing council that had passed a resolution terminating Ines's signature authority, and that of the other Ringleaders, on all of the Tribe's bank accounts. That information should have prompted Umpqua to refrain from restoring Ines's access, which in turn would have at least preserved the approximately $415,000 remaining in the Tribe's accounts as of May 1, 2014.[1] Because Umpqua was armed

[1] Indeed, had Umpqua done what it should have by contacting the *Tribe* to ascertain Ines's status, the Tribe certainly would have forwarded to the Bank the April 14, 2014 resolution of the new governing council terminating the Ringleaders' signature authority on all tribal bank accounts. That, in turn, would have satisfied the "written notice" requirement in the parties' deposit agreement for

with sufficient facts that would have caused "a reasonably prudent person" to suspect that the Tribe's money was being stolen, it had a duty to investigate. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 288 (2d Cir. 2006). And, irrespective of whether it had any duty to investigate in the first place (it did), once it engaged in that investigation, it had a duty to conduct it in a reasonable manner. *Hayes v. Richfield Oil Corp*., 38 Cal. 2d 375, 384 (1952); *see also Hardin v. PDX, Inc*., 227 Cal. App. 4th 159, 168 (2014).

Thus, not only does Umpqua's "failure to conduct a reasonable inquiry" mean that it must be "charged with such knowledge as inquiry would have disclosed," *Lerner*, 459 F.3d at 288, a reasonable juror could easily find based on evidence supporting the Tribe's allegations that—whether or not Umpqua is charged with such knowledge—it is liable to the Tribe for the careless manner in which it conducted that investigation. The Tribe should be given an opportunity to present such evidence to a jury, and the district court's order dismissing its claims against Umpqua—and foreclosing the Tribe from that opportunity—reversed.

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changing account signatories. 4-ER-000647 ("We will honor the authorization until we actually receive written notice of a change from the governing body of the entity.").

3. <u>The Proposition Upon Which Umpqua Relies That Banks Have No Obligation to "Police" Accounts for Signs of Wrongdoing Is Irrelevant to the Tribe's Claim Here.</u>

The cases that Umpqua relies upon are inapposite. The allegations of the complaint strongly suggest that Umpqua put its head in the sand with respect to the Ringleaders' numerous payments out of the Tribe's accounts to themselves, their credit cards, and other personal expenses. Yet, the Tribe is not seeking to hold Umpqua liable for failing to "police" the Ringleaders' conduct and notify the Tribe of their scheme. That makes this case distinguishable from *Boston Ins. Co. v. Wells Fargo Bank & Union Trust Co.*, 80 Cal.App.2d 59 (1947) (holding that a bank could not be liable for misappropriation by plaintiff's employee who was an authorized signatory on plaintiff's account). Further, the Tribe was Umpqua's actual *depositor*, not a third-party beneficiary of an account in the name of others, which makes both *Chazen v. Centennial Bank*, 61 Cal.App.4th 532 (1998), and *Desert Bermuda Props. v. Union Bank*, 265 Cal.App.2d 146 (1968), inapposite.

Umpqua also criticizes the Tribe's cite to *Blackmon v. Hale*, 1 Cal.3d 548 (1970), in which the California Supreme Court said that a bank cannot be held liable for misappropriation of trust funds unless it "has knowledge, actual or constructive, of such misappropriation." Umpqua says that this is *dicta*, not entitled to any deference, but in *Chazen* (which Umpqua cites approvingly), the court explained that the *Blackmon* passage serves "as a prudent judicial qualification, recognizing that banks may in some extreme circumstances engage in wrongdoing affecting a fiduciary account that would merit the imposition of liability." This is one of those "extreme circumstances." It's not every day that an employee of a depositor comes to the bank acknowledging that she's lost her job and been barred from her employer's offices, but says she still has the right to access the money in her employer's bank accounts. Nor is it every day that the bank's branch manager, in reaction, bends over backwards to facilitate that employee's continued access to the account, rather than seek guidance from the employer—the actual depositor and the bank's customer—the Tribe.

Umpqua does not address these facts in its Answering Brief. It does not explain why, as a matter of law, the Tribe's negligence and breach-of-contract claims should be dismissed despite Umpqua's own determination by May 1, 2014, that it had a duty to "police" the Tribe's account by freezing it until Ines's purported authority could be verified. Nor does Umpqua explain why the Tribe's claims should be dismissed given its well-pleaded allegations that Umpqua breached its duties to the Tribe by failing to properly investigate Ines's authority and unreasonably deciding to restore her access, which resulted in losses of over $400,000 to the Tribe.

For all the reasons described above, the Tribe has alleged more than enough facts to make its entitlement to relief plausible. The district court's judgment dismissing the negligence and breach-of-contract claims should be reversed.

B. **The Tribe's Aiding-and-Abetting Claim Is Adequately Alleged and Should Be Reinstated.**

1. **Contrary to Umpqua's Argument, Only One of the Two Prong's of the Aiding-and-Abetting Test Requires Proof That the Aider and Abettor Actually Knew of the Primary Tortfeasor's Wrongful Purpose.**

There are two ways to plead aiding-and-abetting liability. A plaintiff may plead either that the alleged aider and abettor: "(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 the third person." *Casey v. U.S. Bank Nat. Assn.*, 127 Cal.App.4th 1138, 1144 (2005). Both approaches require a showing that the aider and abettor helped the primary tortfeasor ("substantial assistance or encouragement"), but on its face, only the first approach requires evidence that the aider and abettor *knew* that what the primary tortfeasor was doing was wrongful. The second approach does not say anything about the aider and abettor's knowledge.

Nonetheless, Umpqua insists that both avenues to establishing aider-and-abettor liability call for proof that the alleged aider and abettor knew that the primary tortfeasor was engaged in wrongdoing. In addition to not being what the words of the test actually say, Umpqua's contention is not supported by the case law, and its interpretation of the second prong would set the bar so high—

considerably higher than the first prong—that it would be rendered obsolete because no plaintiffs would ever bother trying to satisfy it.

Umpqua points to this Court's decision in *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1039 (9th Cir. 2016), in which this Court stated that "both avenues require actual knowledge." Umpqua says that this Court is bound by that holding under the law-of-the-Circuit doctrine. The problem, however, is that Umpqua refuses to confront the fact that the *ESG* comment can be fairly read only as *dicta*.

ESG was a complex fraud case involving numerous claims in which the Court disposed of the state-law aiding-and-abetting claim in a single, brief paragraph. The Court cited *Casey* for the governing test but mangled that test by truncating *Casey*'s actual language. This Court stated: "To allege aiding and abetting, a plaintiff must show that the defendant knowingly: (1) substantially assisted or encouraged another to breach a duty, or (2) substantially assisted another's tort through an independently tortious act."[2] *Id.* at 1039. The Court went on to say that "both avenues require actual knowledge," but it did not cite any authority, even *Casey*, for that proposition. Moreover, the Court concluded based

[2] As noted above, what *Casey* actually says is that a plaintiff may plead either that the alleged aider and abettor: "(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 the third person." *Casey*, 127 Cal.App.4th at 1144.

on its analysis of an earlier claim that the plaintiff had adequately pleaded knowledge. Thus, the question of whether knowledge is a required element of both prongs of the test was not at issue in *ESG* and its unsupported assertion that both "require actual knowledge" was therefore *dicta*. This Court is not obligated to follow *dicta*.

Umpqua also argues that despite the way *Casey* frames the test—with the knowledge element part of only the first prong—it too supports the notion that actual knowledge is indispensable to both prongs. But that is not persuasive because *Casey* expressly explains that the plaintiff "attempts to assert the banks' liability under the first prong of the common law test." 127 Cal.App.4th at 1144. Because Casey proceeded under only the first prong, there was never any question that it would have to plead actual knowledge. There is thus no basis for imputing *Casey*'s discussion of the knowledge element to the second prong, a prong that was not at issue in *Casey*.

Besides failing to take account of these aspects of *ESG* and *Casey*, Umpqua refuses to confront the logical implication of its insistence that the knowledge element is incorporated into both prongs of the aiding-and-abetting test. If true, then the two prongs are vastly unequal in their demands, with the first being much easier to satisfy. Under Umpqua's theory, prong one requires a showing of: (1) actual knowledge, and (2) "substantial assistance or encouragement." Prong two, on the other hand, requires a showing of: (1) actual knowledge, (2) "substantial assistance" (there is no mention of "encouragement" in prong two, a presumably lower hurdle than "substantial assistance"), *and* (3) proof that the aider and abettor's own conduct "constitutes a breach of duty to the third person." No one would even attempt to satisfy the second prong, since doing so would require them to satisfy the two elements of the first prong (actual knowledge and substantial assistance), plus the additional element of the second prong (independent breach of duty). The much more reasonable interpretation is that while actual knowledge is an element of prong one, prong two substitutes that element for a showing that the aider and abettor's conduct amounts to an independent breach of duty to the plaintiff. *Accord, e.g., Seaman v. Sedgwick, LLP,* No. 11-664, 2012 WL 254046, 2012 U.S. Dist. LEXIS 9917, at *19-20 (C.D. Cal. Jan. 26, 2012).

As described in the Opening Brief and above, the Tribe has adequately pleaded that Umpqua violated its duty of care to the Tribe. Because the Tribe has also pleaded that Umpqua substantially assisted the Ringleaders by facilitating Ines's withdrawal of hundreds of thousands of dollars from the Tribe's accounts, it has alleged sufficient facts to plead its aiding-and-abetting claim under the second prong.

2. <u>Even Assuming That Both Prongs of the Aiding-and-Abetting Test Entail an Actual Knowledge Element, the Tribe Has Pleaded Sufficient Facts to Satisfy This Requirement.</u>

Even assuming that "actual knowledge" is an element of *both* prongs of the aiding-and-abetting test, the Tribe has pleaded enough facts to survive dismissal. In short a reasonable juror could conclude that the Bank's branch manager had actual knowledge, by May 1, 2014, that Ines Crosby was stealing from the Tribe and assisted her in doing so.

As described above, by May 1, 2014, Umpqua was armed with considerable probative information about Ines—her expulsion from the Tribe, loss of her job, and exclusion from Tribal lands—that prompted it to suspend the Tribe's accounts while it sought to confirm that Ines still had the right to access them. But the Bank's investigation was so incompetent as to give rise to a plausible inference that its employee and agent, Orland branch manager Shirley Schrumpf, knew what Ines was actually up to and decided to help her because she was a lucrative customer to have, both for the Bank and Ms. Schrumpf by extension.[3] As described above, no prudent person confronted with what Umpqua knew would have questioned *only* Ines, the ousted employee and alleged embezzler, and no prudent person would have accepted the documents she provided as substantiating her authority. But that's exactly what Umpqua did. Its actions appear to have been

[3] The amount of Schrumpf's bonus was tied directly to the amount of money on deposit at the Bank. 3-ER-000433 [¶ 367].

calculated to restore Ines's access as quickly as possible. The Tribe's allegations concerning the grossly deficient nature of Umpqua's investigation and the eagerness of branch manager Schrumpf to have Ines's access restored, all support the plausible inference that Umpqua knew that Ines no longer had the Tribe's permission to direct the use of its funds (and that Ines was therefore stealing them), but that the Bank deemed it more beneficial to its interests to keep Ines happy than to honor its duties to its actual client, the Tribe.

At this early stage of the proceedings, these facts are sufficient to satisfy any "actual knowledge" requirement that the Tribe might be held to and allow it to gather further evidence supporting these allegations and present it to a jury.

CONCLUSION

For all the reasons set forth above, and in the Opening Brief, the Tribe respectfully requests that this Court reverse the judgment in favor of Umpqua on its negligence, breach-of-contract, and aiding-and-abetting claims.

Dated: July 12, 2018

GROSS & KLEIN LLP

By: /s/ *Stuart G. Gross*
Stuart G. Gross

Counsel for Appellants

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Signature of Attorney or Unrepresented Litigant: s/ Stuart G. Gross

Date: Jul 12, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on July 12, 2018, I filed this Reply Brief electronically with the Clerk of the United States Court of Appeals for the Ninth Circuit. The Court's ECF system will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ *Stuart G. Gross*
Stuart G. Gross