No. 17-15483

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paskenta Band of Nomlaki Indians, et al.,

Plaintiffs-Appellants,

v.

Associated Pension Consultants, Inc.

Defendant-Appellee.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Much like the answering brief of its co-defendant, Garth Moore, APC's answering brief unduly focuses on what it purportedly *did not do*, as if this somehow negates the plausible inferences to be drawn from the detailed facts the Tribe has pleaded about what APC *did do*.

For example, APC insists that it did not manage the highly unorthodox Tribal "pension plan," or act as the plan trustee, but it pointedly ignores the fact that it *devised* the plan and did so in a way that practically invited the Ringleaders to use it not as a genuine retirement-savings device, but as a vehicle for fraudulently rewarding themselves at the Tribe's expense. When APC does focus on the irregular features of the "pension plan" that mark it as a sham, APC bizarrely claims that the Tribe admits that the pension plan was "properly set up." No fair reading of the Complaint or the Tribe's Opening Brief supports that far-fetched assertion. Indeed, many, and perhaps most, of the Tribe's allegations against APC center on the atypical way that it chose to structure the pension plan, and the obvious inference flowing from those allegations that no reasonable retirement-planning professional would have structured an Indian tribe's pension plan as APC did. The allegations are sufficient to infer that the Tribe is entitled to recover against APC because the latter was at least negligent, and more likely *knew* that the Tribe was using the pension plan as a subterfuge, especially given the enormous sums of money the Ringleaders transferred to themselves through the plan in a short amount of time.

APC fares no better when it seeks to undermine the Tribe's allegations concerning its dilatory behavior in terminating Ringleaders Crosby and Lohse as trustees of the Tribal 401(k) plan. APC attacks these allegations principally on the ground that the Tribe did not act with sufficient urgency in communicating its desire to have Crosby and Lohse removed, and that there is evidence that the Tribe would have signed off on the Ringleaders' request to liquidate the 401(k) accounts despite its suspicious about the Ringleaders' conduct. Neither argument is sufficient to dispel the plausible inference that APC bears liability for maintaining Crosby and Lohse as trustees for months after the Tribe unequivocally instructed that they be removed. Contrary to APC's argument, the Tribe did act "urgently" on this matter: Less than three weeks after the Ringleaders were ousted and the new leadership came to power, the latter directed Crosby and Lohse's removal. Likewise, even if the Tribe would have signed off on the Ringleaders' liquidation of the 401(k) plan (an inference that is far from conclusively established at this early, pleading stage of the case), that does nothing to undercut the plausible inference that APC was trying to keep the Tribe out of the matter altogether, either out of negligence or because it was actively aiding the Ringleaders.

As described in more detail below, APC fails to convincingly rebut the Tribe's arguments that the numerous facts it has pleaded plausibly allege that APC can, and should, be held liable.

ARGUMENT

APC works hard to minimize its role as a retirement-planning adviser to the Tribe. It points to the written services agreement that it entered into with the Tribe, arguing that this contract shows it had no control over the money in the Tribe's retirement plans, and no right to manage those plans. (APC Br. at 8-9.) APC says that it simply took direction from plan trustees John Crosby and Leslie Lohse and that its participation was limited to performing "certain ministerial nondiscretionary administrative services." (APC Br. at 9-10.) APC thus asks the Court to ignore the allegations in the Complaint and, instead, believe that its role was so marginal that it could not have known, and had no obligation to know, that the Ringleaders and Myers were using the retirement plans to enrich themselves at the Tribe's expense. For the reasons described below, APC's argument is unconvincing.

A. APC Created the So-Called "Pension Plan" and the Way APC Structured That Plan Was So Outside the Norm as to Give Rise to the Plausible Inference That APC Knew, or Should Have Known, That the Plan Was a Subterfuge.

At the center of the Tribe's allegations against APC is are its design and implementation of the anomalous "pension plan." 5-ER-000766 [¶¶ 324-350].[1] This plan was the primary retirement vehicle that the Ringleaders and Myers used to transfer extraordinary amounts of Tribal money to themselves—more than $3.8 million in just three-and-a-half years. 5-ER-000748-749 [¶¶ 246-251].

APC concedes that it was responsible for establishing the pension plan. (APC Br. at 9 .)[2] The Tribe has pleaded detailed facts explaining that the "pension plan" was no such thing, but was in fact a ruse to facilitate the Ringleaders' and Myers embezzlement. As explained in the Opening Brief, the Complaint alleges that no legitimate pension plan for a sovereign-government Indian tribe would contain all of the features that this "pension plan" contained, including: (1) a requirement that the Tribe make extremely large annual contributions to the Ringleaders (5-ER-000767-769 [¶¶ 329-333]); (2) a short shelf life of just three-and-a-half years (5-ER-000769-771 [¶¶ 334-338]; (3) *immediate* vesting of benefits (5-ER-000772-773 [¶¶ 341-346]); and (4) *immediate* lump-sum distributions upon the Ringleaders' separation from employment (5-ER-000773-

[1] References to the Excerpts of Record ("ER") herein are to the ER filed in *Paskenta Band of Nomlaki Indians, et al. v. Garth Moore Insurance and Financial Services, Inc., et al*., No. 17-15485.

[2] Also, the Tribe has alleged, and APC does not dispute, that the actuary APC worked with has reported that APC designed the pension plan. 5-ER-000753 [¶ 263]. Likewise, Garth Moore stated in his FINRA broker report that APC came up with "the plan setup and recommended the funding." 5-ER-000753 [¶ 263].

775 [¶¶ 347-350]). Given these highly irregular parameters—ones that APC put in place—the Complaint alleges that "APC's Lynn and Garth Moore knew that the structure and patterns of operation of the Tribal Pension . . . indicated and effected . . . embezzlement from an Indian tribe." 5-ER-000767 [¶ 326].

Thus, no matter what APC's role was *after* the pension plan was in operation, APC was responsible for designing and implementing it.[3] APC was not compelled to structure the pension plan the way it did—indeed, the Tribe pleads that no reasonable retirement-planning professional would have done so—and it cannot evade liability by arguing that it largely sat on the sidelines and just did what trustees Crosby and Lohse told it to do after it had devised the plan.[4] At that point, substantial damage had already been done: It was the very way that APC had formulated the plan that allowed the Ringleaders and Myers to wantonly steal from the Tribe without being detected.

The Tribe's allegations relating to the anomalous structure of the pension plan are certainly sufficient to raise a plausible inference that APC knew, or should

[3] The Tribe does not concede that APC's post-creation and implementation role was as merely a kind of paper pusher, as APC contends. Indeed, the Tribe pleads that APC was heavily involved in the termination and liquidation of the pension plan. 5-ER-000758-761 [¶¶291-300].

[4] APC does not argue that it simply followed the directives of the Ringleaders in setting up the pension plan in the first place. The Ringleaders had no background or expertise in this area that would have allowed them to establish the pension plan (5-ER-000774-775 [¶ 350]) and, as described below, APC was not free to abandon its professional judgment and do whatever the Ringleaders told it to with respect to the set-up.

have known, what the Ringleaders were really doing with its handiwork.[5] The Tribe is entitled to prove its case through discovery and expert testimony concerning how a legitimate pension plan for a sovereign Indian tribe would have been devised, how this "pension plan" deviated from that model, and how this plan bespeaks at least negligence, if not a deliberate choice to devise a sham plan knowing it was being used as a mechanism of fraud.

B. APC's Contention That It Did Nothing Wrong in Connection With the Pension Plan Is Belied by the Well-Pleaded Allegations of the Complaint.

APC devotes little attention to explaining why the Tribe's allegations concerning the pension-plan design are insufficient to plausibly infer that APC's conduct was wrongful and that the Tribe is entitled to relief. And what APC does say is unconvincing.

First, it claims that "while [the Tribe] takes issue with the plan provisions allowing for immediate vesting and lump sum distributions, it readily acknowledges that such provisions are permissible." (APC Br. at 11 [citing 5-ER-000769 [¶ 334]].) That is not the case, and APC's cite to the Complaint does not

[5] The Tribe need not prove that APC *actually knew* that the Ringleaders were embezzling from the Tribe to prevail on its negligence, breach-of-fiduciary-duty, and aiding-and-abetting claims. All it needs to establish is that APC *should have known* that the Ringleaders were involved in misconduct. *See e.g., Hope v. Cal. Youth Auth.*, 134 Cal. App.4th 577, 588-89 (2005) (negligence); *Jorgensen v. Beach 'N' Bay Realty, Inc.*, 125 Cal. App.3d 155, 162 (1981) (breach of fiduciary duty); *Saunders v. Superior Court*, 27 Cal. App.4th 832, 846 1994) (aiding and abetting).

support its contention.[6] The Tribe nowhere alleges that immediate vesting and lump-sum distributions are permissible, but instead alleges that both are *inconsistent* with legitimate pension plans, and particularly so where, as here, the pension is being set up for the benefit, and by, certain employees of a government, as opposed to the owner-employees of a small business.

With respect to lump-sum distributions, the Tribe alleges that pension plans are structured to pay out a monthly annuity over employees' retirement years until death and that therefore "the payment of large lump sums is burdensome to a plan that is intended to be a long-term program [as pension plans by definition are supposed to be], because the cash flow is difficult to predict and sustain when lump sums are included." 5-ER-000774 [¶ 348]. Likewise, with respect to the immediate vesting provision, the Tribe has pleaded that this too was completely inconsistent with a legitimate pension plan in that "[w]hen a defined benefit plan is set up for a bona fide purpose, the benefits that an employee-beneficiary accrues generally do not vest, i.e., become, in effect, his or her property, until some length of service

[6] Paragraph 334 of the Complaint, which APC cites, says that a short shelf life is not unusual for pension plans established for owner-employees of small businesses as a means for those owner-employees to withdraw profits from the business on a tax-deferred basis. 5-ER-000769. Here, however, the Tribe is not a small business and the Ringleaders and Myers were not owners-employees of it. The (questionable) permissibility of a short life-span for a pension plan in *particular contexts*, excluding that here, is thus not applicable. Rather, the inappropriateness of a short life-span for a pension plan *here* adds to the inference that the pension plan was set up and used by the Ringleaders as a means to embezzle money from the Tribe.

requirement has been met." 5-ER-000772 [¶ 342]. Further, the Tribe alleges that legitimate pension plans do not allow for immediate vesting because doing so does not incentivize employees to remain with the employer and also imposes a significant and immediate cash drain on the contributing employer. 5-ER-000773 [¶ 346]. APC's contention that the Tribe does not dispute the immediate-vesting and lump-sum-distribution provisions is thus squarely contradicted by the actual allegations of the Complaint. The propriety of these provisions is a question for the trier of fact.

Next, APC says that the Tribe has not pleaded any facts showing that it knew from the time it devised the pension plan that it would be a "short-term investment vehicle." (APC Br. at 25-26.) Even if that is true (and the Complaint raises reasonable inferences to the contrary), the other bizarre provisions chosen by APC—the extremely large annual contributions required by the Tribe, the immediate vesting of benefits, and the immediate right to a lump-sum distribution upon separation from employment—were by themselves sufficient to raise an inference that APC knew, or should have known, of the plan's true purpose.

What's more, the Tribe has indeed pleaded facts raising at least an inference that APC knew the plan was not intended to be a long-term one—even though IRS regulations make clear that pension plans are supposed to be long-term—even if it did not know the *exact date* that it would terminate. For example, the Tribe has pleaded that APC used an actuarial formula that required the Tribe to make extraordinarily high annual contributions to the Ringleaders and Myers' pension plans. Pension plans ordinarily set the target monthly retirement benefits at about *equal to an employee's average after-tax monthly income for the last five years of employment*. 5-ER-000767 [¶ 328]. But APC set the target monthly retirement benefit at *245 percent of the highest average pre-tax income* of each of the Ringleaders and Myers *over the prior three years*. 5-ER-000767-768 [¶ 329]. Setting the target monthly benefit that high forced the Tribe to allocate hundreds of thousands of dollars each year to the four Ringleaders and Myers, including over $560,000 to Ines Crosby in just one year. 5-ER-000748-749 [¶¶ 246-251].)

This should have indicated to APC that the Ringleaders did not intend to maintain the pension plan for long. Further, the Complaint specifically alleges that the Ringleaders did not know how to set up the pension and, instead, relied on APC to do so. 5-ER-000774 [¶ 350]. Thus, if, as APC repeatedly claims, it was merely following the orders of the Ringleaders in setting up the pension, a reasonable inference is that they told APC's Lynn that they wanted the pension set up in a manner that would result in a large amount of Tribal money being deposited in the pension for their benefit even if the pension was terminated after only a few years, and in response Lynn suggested and implemented the formula that was used to accomplish this purpose.

Further, the reported compensation for each Ringleader, except Larry Lohse, more than doubled between 2004 and 2006, and Lohse's increased by approximately 65 percent. 5-ER-000769, 771-772 [¶¶ 333, 340]. In fact, all the Ringleaders' compensation substantially jumped during the years the pension plan was in effect.[7] 5-ER-000731, 733, 735-737 [¶¶ 178, 185, 194, 198]. This too indicated to APC that the Ringleaders' goal was to maximize the amount of money they could funnel into the faux pension plan in as short an amount of time as possible, and that they had no intention of maintaining the pension plan beyond what was necessary to do this.

Finally, although APC concedes that it designed the pension plan, it disputes that it had any role with respect to administering and managing the plan. As described above, APC's design of the plan is sufficient to raise a plausible inference that it knew, or should have known, that the plan was a subterfuge. Thus, even if the Court credits APC's assertion that it was largely a bystander after creating the plan with no obligation to do anything other than carry out the trustees' instructions, and no duty to question those instructions, APC is still subject to liability. But this Court should not credit APC's contention because it is

[7] For example, in 2004, the first year the pension plan was in effect, Leslie Lohse's compensation was $165,209, but by 2008, the last year of the plan, her compensation had risen to $384,000. 5-ER-000736-737 [¶ 198]. Likewise, Ines Crosby's compensation went from $169,000 in 2004, to $440,000 in 2006. 5-ER-000733 [¶ 185].

belied by the well-pleaded allegations of the Complaint. The Tribe has alleged that APC worked closely with Moore, the Tribe's long-time financial adviser, to administer the Tribe's retirement plans and to communicate with the Ringleaders about those plans and how to use them. 5-ER-000699, 747-748, 750, 753, 755-758, 760, 763-769 [¶¶ 49, 244, 253, 263, 272, 275-282, 285-289, 300, 309, 317-318, 322, 329, 332]. This includes, in particular, working with John Crosby to amend the plan documents to terminate it after only three and a half years in existence and simultaneously cause all of the Tribal money transferred into the pension to immediately vest for each Ringleader—i.e. become their legal property, out of reach of the Tribe—upon such termination. 5-ER-000758-761; 000769-771; 000772-773 [¶¶ 291-300; 334-38; 341-43].

APC's claim that it was Moore that was primarily responsible for advising the Tribe about how to invest the funds in the pension plan is inapposite. The Tribe is not seeking to hold APC responsible for giving the Ringleaders poor advice about how to invest the money they stole from the Tribe, but rather for giving the Ringleaders good advice on how to accomplish such theft.

Moreover, the allegations in the Complaint make clear that APC and Moore worked so closely together to assist the Ringleaders in using retirement vehicles as means to steal from the Tribe that their conduct cannot be precisely disentangled and this Court is obligated to accept those allegations as true at the pleading stage.

See e.g., Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (explaining that the Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party"). APC's efforts, therefore, to evade liability by pointing fingers at Moore fails.

C. APC Fails to Rebut the Plausible Inference That Its Unreasonably Dilatory Conduct in Terminating Crosby and Lohse as Trustees of the 401(k) Plan Shows That It Was at Least Negligent, if Not Knowingly Assisting the Ringleaders in Accomplishing Fraud.

The Tribe's allegations concerning the inappropriate and suspicious design of the "pension plan" are sufficient by themselves to uphold all of its claims against APC. In addition, however, the Tribe has pleaded that APC, in coordination with Moore, failed to timely remove John Crosby and Leslie Lohse as trustees of the Tribal 401(k) plan. Recall that on May 1, 2014, the Tribe unambiguously instructed Moore to terminate Crosby and Lohse as trustees and it sent Moore a signed form to accomplish this purpose, which was forwarded to APC. 2-ER-000226; 5-ER-000758 [¶ 289]. Two months later, on June 30, 2014, Moore employee Shelby Campiz emailed APC's Greg Lynn, noting that another member of the Tribe should now be the trustee of the 401(k) and asking Lynn whether he knew "if that is the way it is showing?" 2-ER-000200; 5-ER-000756 [¶¶ 276-277]. Lynn responded that Crosby would remain as trustee until the next day, July 1, and later on explained that, "We want to take care of John['s] stuff before we change trustees . . . ." 2-ER-000200; 5-ER-000756 [¶ 279].

As described in the opening brief, these facts raise a plausible inference that APC and its employee Lynn failed to process the Tribe's unambiguous request to remove Crosby as trustee of the 401(k) plan as a result of negligence, or worse, because they were conspiring with Moore to protect the Ringleaders at the expense of the Tribe. While the 401(k) plan governing document established a 30-day notice period for removing trustees, that notice period could be waived if the employer determined that a shorter notice period or immediate removal was required. APC acknowledges this and does not dispute that it never told the Tribe that it could waive the notice period. Instead, APC blames the Tribe for the delay, arguing that if the removal of Crosby and Lohse as trustees was truly an urgent matter, the Tribe would have sent its request directly to APC, rather than to Moore first, who then sent it to APC. (APC Br. at 21-22.)

This argument is not well taken. There is no dispute that the Tribe sent the form signed by its Tribal Chairman removing Crosby and Lohse as trustees on May 1, 2014 to Moore, and that Moore sent that same form to American Funds (the entity that held the plan assets), no later than May 6, 2014, and informed APC about it that *same day* (i.e., May 6). 2-ER-000226-227. Moore was the Tribe's longtime financial adviser and it worked closely with APC. 5-ER-000699, 753, 760, 762 [¶¶ 49, 263, 298, 306]. APC does not point to anything, including a plan governing document, that required the Tribe to contact APC about this matter. Common sense suggests that what the Tribe did was perfectly normal and understandable: It contacted its financial advisor, who then contacted APC. The fact that Moore was the Tribe's point of contact on this issue does not in any way diminish the plausibility of the inference that APC was at least negligent, if not deliberately aiding the Ringleaders, in its dilatory handling of the Tribe's instruction to remove Crosby and Lohse as trustees.

APC further contends that the Tribe's suspicions about the Ringleaders were sufficiently grave by May 1, 2014, that it should have been more clear about the need to urgently remove Crosby and Lohse as trustees.[8] (APC Br. at 21.) The Tribe does not dispute that as of May 1, 2014, it had come to suspect the Ringleaders of embezzlement. That's exactly why it instructed Moore to remove Crosby and Lohse by that very date. And the urgency with which the Tribe wanted this accomplished is reflected in the fact that it did not just ask Moore to do whatever was necessary to take care of it, but the Tribe's Chairman took the additional step

[8] In support, APC points to allegations in the Complaint that it claims document everything the Tribe knew as of May 1, 2014, about the Ringleaders' wrongdoing. (APC Br. 21 [citing 5-ER-000778-787 [¶¶ 362-398]]. As described above, the Tribe does not dispute that by that date it suspected the Ringleaders of fraud, but the Complaint paragraphs cited by APC deal with the Tribe's allegations against APC's co-defendant, Umpqua Bank, and are not a laundry list of everything the Tribe knew as of May 1.

of actually executing the form created by American Funds to effect the change in trustees and sending that executed form to Moore.[9] 2-ER-000227. The Ringleaders were not ousted from the Tribe and the new leadership did not take over until April 12, 2014. 5-ER-000823 [¶ 509]. Despite everything else they had to do, the new leadership took less than three weeks to communicate its unambiguous instruction to have Crosby and Lohse terminated as trustees. That's not the antithesis of acting with urgency. It's the definition of action with urgency.

If something more was required in order for this instruction to be conveyed with even greater dispatch, that was something that APC, as the retirement service professional and fiduciary to the Tribe, had a duty to make the Tribe aware of. To now claim that it was, in fact, the *Tribe* that was negligent for not ferreting out the requirement that it do something more to gain immediate compliance with its wishes is nothing but a disingenuous attempt to shift blame to the victim.

Finally, APC seeks to undermine the import of the change-of-trustee allegations by arguing that the delay in terminating Crosby and Lohse was immaterial because the Tribe's new leadership was prepared to sign off on Crosby's request to roll-over or liquidate his 401(k) account. (APC Br. at 13.) In

[9] The Tribe's new leadership almost certainly had to consult with Moore to find out what it needed to do to bring about the change in trustees (and it almost certainly did not dig up the American Funds form on its own). This suggests that the Tribe had conveyed to Moore its intent to terminate Crosby and Lohse as trustees even *before* its May 1 transmittal of the executed American Funds form, once again showing that the Tribe acted with urgency.

support, APC points to a July 1, 2014 email from Moore employee Shelby Campiz to APC's Lynn in which she says that the Tribe's "Andrew Alejandre would sign the rollover request." 2-ER-199. But as explained in the Opening Brief, to date there has been no discovery concerning the meaning of this email, including no depositions or production of related communications and documents; and Plaintiffs are entitled to the reasonable inference that the Tribe's representative was indicating to Campiz that the Tribe would sign a rollover request not for the Ringleaders' accounts, but rather that of Myers, which, in fact, occurred some weeks later. 3-ER-00540. Indeed, though APC glosses over this distinction, nowhere in the Complaint is it alleged that the Tribe had any knowledge of Myers' involvement in the Ringleaders' scheme during this period, just that it had begun to uncover evidence of embezzlement by the Ringleaders.

Moreover, even if one grants APC the (dubious) inference, to which it is not entitled on a motion to dismiss, that Campiz's email means that the Tribe would have cooperated in the Ringleaders' efforts to liquidate their 401(k) funds, that does not undercut the plausible inference that APC was at least negligent in sitting on the change-of-trustee paperwork for so long, if not the inference that it was knowingly attempting to assist Crosby in the breach of his duties to the Tribe. Indeed, even if the Tribe surprisingly expressed a willingness, on July 1, 2014, to sign off on Crosby's liquidation of his account, the Ringleaders, aided and abetted by APC and Moore, had good cause to think that the Tribe *would not* cooperate. APC and Moore's unreasonable delay in removing Crosby and Lohse was thus quite the convenient safeguard for the Ringleaders, as it ensured that the Tribe would not have be involved in the liquidation at all. The allegations in the Complaint are more than sufficient to plausibly infer that APC's delay in removing Crosby and Lohse as trustees was at least negligent, if not knowingly carried out to protect the interests of the Ringleaders at the expense of the Tribe.

D. The Negligence Claim Is Sufficiently Alleged.

APC argues that the Tribe has not alleged any facts that APC breached any duties owed to the Tribe and that it performed consistent with the written Services Agreement. APC is wrong.

APC concedes that it designed the pension plan. (APC Br. at 8.) It therefore had a duty "to use such skill, prudence, and diligence" as other members of the retirement-planning profession would exercise in creating such a plan. *See e.g., Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811 (2011); *Hahn v. Mirda*, 147 Cal.App.4th 740, 746-47 (2007). But the Tribe alleges that APC breached that duty by concocting a pension plan that was wildly inappropriate for one benefiting a small group of tribal government employees and that contained a number of features that a legitimate pension plan a for tribal government would never contain. The inference raised by these allegations is that APC should have known that the

Ringleaders did not intend to use the pension plan as a true retirement-savings vehicle, but as a ruse to transfer millions of dollars of the Tribe's money to themselves.[10] And that inference is further strengthened and corroborated by the allegations that, only three years after setting it up, APC accepted obviously backdated paperwork from the Ringleaders to terminate the pension and immediately transfer to their ownership the millions of dollars of Tribal money that they accumulated in the pension.

Importantly, to establish professional negligence, the Tribe is not required to plead facts showing that APC actually knew what the Ringleaders were doing—although the Tribe's allegations are sufficient to give rise to this plausible inference—but only that APC should have known that the way it structured and administered the Tribe's pension plan was a tailor-made formula for facilitating fraud. *See e.g., Coll. Hosp. Inc. v. Superior Court*, 8 Cal.4th 704, 710 (1994); *Hope*, 134 Cal. App.4th at 588-89 (noting that "knew or should have known" is a negligence standard).

In the same vein, APC had a duty to carry out the Tribe's instructions with respect to timely removing Crosby and Lohse as trustees of the 401(k) plan. APC

[10] APC contends that, "By their own admission, PNBI and PEC [i.e., the Tribe] acknowledge that APC properly set up the retirement plans . . . ." (APC Br. at 27.) APC does not cite anything in the record for this claim, nor can it. As described above, the Complaint is replete with allegations pleading that APC breached its duty to "properly set up" the pension plan. Indeed, these allegations are at the heart of the Tribe's claims against APC.

breached that duty by unreasonably delaying terminating these two Ringleaders. At a time when the Ringleaders had been terminated from their positions with the Tribe and publicly accused of embezzlement, APC should have known that failing to act promptly in removing Crosby and Lohse could cause unnecessary losses to the Tribe. 5-ER-000781 [¶ 374]. And it should have known that the Tribe's new leadership would not likely be aware of any extra hoops necessary to immediately accomplish that result. 5-ER-000691 [¶ 12].

APC never comes to grips with *all* of the Tribe's detailed allegations concerning its design and administration of the pension plan, in particular, and how no reasonable retirement planning professional would have structured the plan the way APC did. APC instead focuses narrowly on certain of the Tribe's allegations, or the absence of allegations, to argue that it did nothing wrong.

For example, APC argues that the Tribe has not alleged that the IRS disapproved of any of the retirement plans. (APC Br. at 25.) This is immaterial.[11] An adverse IRS finding is not a prerequisite to finding APC negligent (or to a finding against it on any of the Tribe's other claims), and APC does not, and cannot, contend otherwise.

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[11] To be clear, the Tribe has no information suggesting that the IRS ever scrutinized, investigated, or ever reviewed at all, any of the retirement plans, and APC does not suggest that the IRS did so. Therefore, the fact that the Tribe did not plead that the IRS faulted the plans in any way is doubly meaningless. An adverse IRS finding is not an element of any of the Tribe's claims, and the Tribe simply has no information—one way or the other—concerning IRS oversight of the plans.

APC also contends that it had no obligation to verify any of the information that Crosby and Lohse gave it concerning the plans, such as the information concerning the number of employees who were eligible to participate. (APC Br. at 10, 26.) Even if true, and the Tribe does not concede that it is, APC unmistakably had a duty to use the professional skill that others with its expertise would have used to design lawful and legitimate retirement plans. The Tribe has pleaded that APC breached that obligation by designing a pension plan that deviated markedly from what a true pension plan—particularly one for the government of an Indian tribe—would look like. APC was not free to abandon its professional judgment and blindly do whatever the Ringleaders wanted it to do. Rather, it was required to exercise the skill and care that other professionals in the field would have exercised in designing the pension plan. The allegations of the Complaint plausibly allege that APC breached that duty.

Finally, APC says that there are no facts suggesting that it knew that Tribal Chairman Freeman signature on the paperwork terminating the pension plan was forged. (APC Br. at 25.) APC is wrong. The Tribe has pleaded that the signature did not resemble the Chairman's signature on other Tribal documents that APC had received, and that the resolution terminating the pension plan was dated *six days before* APC had even given the termination paperwork to the Tribe. But even if this Court deemed the facts concerning this issue and the census information insufficient, there are still ample other facts pleaded in the Complaint concerning the design of the pension plan, by itself, to raise a plausible inference that the Tribe is entitled to recover against APC.

For these reasons, there is no merit to APC's challenge to the Tribe's negligence claim.

E. <u>The Aiding-and-Abetting Claim Is Sufficiently Alleged.</u>

APC claims that the Tribe's aiding-and-abetting claim falls short because it does not adequately allege that APC actually knew the Ringleaders and Myers were using the retirement plans to embezzle from the Tribe. As described above, however, the Tribe has plausibly pleaded that the aberrant design of the pension plan alone necessarily meant that APC knew the Ringleaders' true purpose was to enrich themselves at the Tribe's expense. The plan's parameters were inconsistent with a legitimate retirement-savings vehicle for employees of a Tribal government and as an experienced retirement professional, APC would have known as much. But that did not stop APC from partnering with Moore to help the Ringleaders use those plans to nefarious ends. What is *implausible* is not that APC knew that the Ringleaders were breaching their own duties to the Tribe, but that it knew nothing. To sustain that doubtful proposition on these facts requires rejecting the truth—which this Court is barred from doing—of each of the Tribe's numerous allegations detailing how and why the elaborately mis-constructed "pension" plan was a transparent ruse, and would have been recognized as such by a retirement professional like APC.

Furthermore, because the Tribe has adequately alleged that APC, in taking actions to assist the Ringleaders' scheme, violated duties of care, loyalty, and good faith it owed to the Tribe, the validity of the Tribe's aiding-and-abetting claims do not solely depend on the plausibility of its allegations of actual knowledge. As discussed above, even if APC did not know that it was assisting the Ringleaders fleece the Tribe, it certainly should have known that was the case and it was a violation of APC's duty of care to have, nonetheless, provided such assistance. This is sufficient to support a claim for aiding and abetting, irrespective of the question of actual knowledge. *See e.g., Saunders*, 27 Cal. App.4th at 846 (explaining that a party may be held liable for aiding and abetting where it gives substantial assistance to another in accomplishing a tortious result and the party's own conduct, separately considered, constitutes a breach of duty to the third person).

F. The Fiduciary-Duty Claim Is Sufficiently Alleged.

APC argues that it cannot be liable for breach of fiduciary duty because it had no fiduciary relationship with the Tribe. That is non-sensical. APC undertook the job of applying its superior expertise to creating the Tribal pension plan and 401(k) plan on behalf of an unsophisticated party, i.e., the Tribe. *See Beery v. State*

Bar, 43 Cal.3d 802 (1987) (stating that "the essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party"). The Tribe necessarily reposed confidence in APC in carrying out this work and APC was thus duty-bound "to act with the utmost good faith for the benefit of" the Tribe. *See People ex rel. Harris v. Rizzo*, 214 Cal. App.4th 921, 950 (2013). Thus, even if APC did not administer the plans or act as trustee, it assumed the role of fiduciary when it agreed to devise the plans.

APC cites *Brown v. California Pension Administrators and Consultants*, 45 Cal. App.4th 333 (1996), in support of its contention that it did not have a fiduciary relationship with the Tribe. *Brown* is inapposite, however, because there was no allegation there that the defendants were engaged to create retirement plans specifically for the plaintiffs. Here, in contrast, the Tribe engaged APC to design and implement a pension plan and a 401(k) specifically for its use.

The Tribe's allegations are sufficient to raise an inference that APC occupied a fiduciary role when it agreed to devise the Tribe's retirement plans. Moreover, under the law of this Circuit, the existence of a fiduciary relationship is a question of fact for the jury, and therefore the Tribe's fiduciary-duty claim cannot be dismissed at the pleading stage based on this question. *See e.g.,* *Goodworth Holdings, Inc. v. Suh*, 99 F. App'x 806, 808 (2004) ("The existence of [a fiduciary relationship] is a question of fact, to be resolved by examining the facts and circumstances of a particular case."); *Bear Stearns & Co. v. Daisy Sys. Corp. (In re Daisy Sys. Corp.)*, 97 F.3d 1171, 1996 (9th Cir. 1996) (same).

G. **The Tribe Has Sufficiently Alleged That APC's Conduct Caused Its Losses.**

APC unpersuasively argues that the Tribe has not pleaded sufficient facts alleging that APC's wrongdoing was a "substantial factor" in causing the Tribe's losses. (APC Br. at 38-39.) That argument misses the mark.

First, whether APC's conduct satisfies the substantial-factor test is a question of fact for summary judgment or trial, not the pleadings. *See, e.g., Koepke v. Loo*, 18 Cal. App.4th 1444, 1449-50 (1993) (explaining that proximate cause is "a jury question" which cannot be decided as a matter of law by the trial court "unless *from the facts* only one reasonable conclusion could be drawn") (italics added); *Bettencourt v. Hennessy Indus., Inc.*, 205 Cal. App.4th 1103, 122-25 (2012) (same). Indeed, all of the cases APC cites concerning the substantial-factor test were decided at *summary judgment* (*Mills v. U.S. Bank*, 166 Cal. App.4th 871 (2008)), or *post-trial* (*Soule v. General Motors Corp.*, 8 Cal.4th 548 (1994); *Dixon v. City of Livermore*, 127 Cal. App.4th 32 (2005); *Viner v. Sweet*, 30 Cal.4th 1232 (2003)).

In addition, the California Supreme Court's decision in *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 969 (1997), makes it clear that the substantial-factor test is intended to be *plaintiff*-friendly, and that courts should reject arguments like APC's that place "[u]ndue emphasis" on the term "substantial," or seek to "misuse[]" the test by arguing that a defendant cannot be held liable just because others may be liable as well. *See also Bettencourt*, 205 Cal. App.4th at 1123-24 ("That the conduct of other entities may also have contributed to plaintiffs' injuries would not preclude a finding that [the defendant's] product was a substantial factor in causing those injuries."); *see also Major v. R.J. Reynolds Tobacco Co*., 14 Cal. App. 5th 1179, 1196, (2017) ("'A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. . . . It does not have to be the only cause of the harm.'") (quoting CACI No. 430).

Taking the allegations of the Complaint as a whole, the Tribe has pleaded that the Ringleaders lacked the knowledge and experience to design and use retirement plans as embezzlement devices. They were dependent on APC, which obliged them by designing and implementing the plans. Combined with what APC knew, or should have known, about what the Ringleaders were really up to, its contributions to the Tribe's losses far surpassed the "infinitesimal" or "theoretical." *Rutherford*, 16 Cal.4th at 969 ("This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor.").

APC also argues that the Ringleaders' criminal conduct was a superseding cause of the Tribe's losses that relieves APC of any liability. (APC Br. at 40-41.) The problem with this argument is that criminal conduct is not treated as a superseding cause of loss "where the risk created by the breach of the duty is that the plaintiff is exposed to danger from criminal conduct." *Vasquez v. Residential Invs., Inc.*, 118 Cal. App.4th 269, 289-90 (2004). That is precisely the situation here. APC used its professional expertise to facilitate the Ringleaders' and Myers' embezzlement (through, among other things, its design of the pension plan), thereby exposing the Tribe to criminal conduct.

H. The Punitive-Damages Prayer Is Proper.

APC challenges the Tribe's punitive-damages request on the grounds that the Tribe must show that APC's employee, Greg Lynn, was an officer, director, or managing agent of the corporation. (APC Br. at 34.) APC's argument is unavailing. It does not point to any authority (nor has the Tribe found any such authority) requiring plaintiffs seeking punitive damages to *plead* detailed facts concerning the precise positions and extent of authority of those corporate employees with whom they have worked. It would be premature to require the Tribe to show at this early, pleading stage in the litigation—before depositions and related discovery—that either Lynn, or other APC employees who advised the Tribe, occupied the position of an officer, director, or managing agent within APC. Indeed, the cases APC relies upon in support of this proposition were decided only *after* an evidentiary record had been established at trial. *See White v. Ultramar*, 21 Cal.4th 563, 575-76 (1999); *Virtanen v. O'Connell*, 140 Cal. App.4th 688, 715 (2006).[12] Thus, the Tribe has satisfied its pleading burden by alleging facts that APC was aware "of the probable dangerous consequences" of its conduct, and "willfully and deliberately failed to avoid those consequences." *Taylor v. Superior Court*, 24 Cal.3d 890, 895-96 (1979).

CONCLUSION

For all the reasons set forth above, and in the Opening Brief, the Tribe respectfully requests that the Court reverse the dismissal of its claims and its request for punitive damages.

Dated: January 24, 2018

GROSS & KLEIN LLP

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

Counsel for Appellants

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[12] APC also cites *College Hospital v. Superior Court*, 8 Cal.4th 704, 726 (1994), which was decided at the pleading stage, but that case had to do with the punitive-damages provision embodied in Code of Civil Procedure section 425.13(a), which is a specialized provision limiting punitive damages against healthcare providers.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15483

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Signature of Attorney or Unrepresented Litigant	s/ Stuart G. Gross	Date	Jan 24, 2018

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

CERTIFICATE OF SERVICE

I certify that on January 24, 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*
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