Scott H. Jacobs (SBN 81980)
Email: shjacobs@reedsmith.com
Kasey J. Curtis (SBN 268173)
Email: kcurtis@reedsmith.com
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Telephone: +1 213 457 8000
Facsimile: +1 213 457 8080

Attorneys for UMPQUA BANK and UMPQUA HOLDINGS CORPORATION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PASKENTA BAND OF NOMLAKI INDIANS; and PASKENTA ENTERPRISES CORPORATION,

Plaintiffs,

vs.

INES CROSBY; JOHN CROSBY; LESLIE LOHSE; LARRY LOHSE; TED PATA; JUAN PATA; CHRIS PATA; SHERRY MYERS; FRANK JAMES; UMPQUA BANK; UMPQUA HOLDINGS CORPORATION; CORNERSTONE COMMUNITY BANK; CORNERSTONE COMMUNITY BANCORP; JEFFERY FINCK; GARTH MOORE; GARTH MOORE INSURANCE AND FINANCIAL SERVICES, INC.; ASSOCIATED PENSION CONSULTANTS, INS.,; HANESS & ASSOCIATES, LLC; ROBERT M. HANESS; THE PATRIOT GOLD & SILVER EXCHANGE, INC.; and NORMAN R. RYAN,

Defendants,

QUICKEN LOANS, INC.,

Nominal Defendant.

CASE NO.: 2:15-cv-00538-GEB-CMK

DEFENDANTS UMPQUA BANK AND UMPQUA HOLDINGS CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Fed. Rule Civ. Proc. 12(b)(6)]

The Honorable Garland E. Burrell, Jr.

DATE: July 27, 2015
TIME: 9:00 a.m.
LOCATION: Courtroom 10

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 27, 2015 at 9:00 a.m. in Courtroom 10 of the United States District Court, Eastern District of California, Sacramento Division, Defendants Umpqua Bank and Umpqua Holdings Corporation (collectively, "Umpqua") will, and hereby do, move to dismiss the First Amended Complaint ("FAC") filed in this action by Plaintiffs Paskenta Band of Nomlaki Indians and Paskenta Enterprises Corporation (collectively, "Plaintiffs") on April 17, 2015, and each claim for relief asserted therein against Umpqua (i.e., the eighteenth, nineteenth, twentieth, twenty-first and thirty-third claims for relief). This motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. It is based on this notice of motion, the accompanying memorandum of points and authorities, the operative complaint and pleadings on file with the Court in this matter, all matters which this Court may properly judicial notice, and any other evidence or oral argument as the Court may consider in connection with this motion.

DATED: May 15, 2015

REED SMITH LLP

By: */s/ Scott H. Jacobs*
Scott H. Jacobs
Kasey J. Curtis
Attorneys for Defendants UMPQUA BANK and UMPQUA HOLDINGS CORPORATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

Although Plaintiffs'[1] First Amended Complaint ("FAC") consumes 187 pages, and contains 763 paragraphs of allegations covering a broad range of topics, this case, at least as to Defendants Umpqua Bank and Umpqua Holdings Corporation (collectively, "Umpqua"), is quite simple and the essential facts are not disputed. Those facts are: (1) the Tribe had bank accounts at Umpqua (the "Umpqua Accounts"); (2) Defendants Ines Crosby and Leslie Lohse were authorized signatories on the Umpqua Accounts; and (3) all of the transactions alleged in the FAC were performed by either Ines Crosby ("Ms. Crosby") or Leslie Lohse ("Ms. Lohse"), on behalf of the Tribe, while they were authorized signatories on the Umpqua Accounts. Because Umpqua was acting as directed by the authorized representatives of its depositor, the Tribe cannot complain, and it does not complain, about what Umpqua did. Instead, the Tribe complains about what Umpqua did not do. Having failed to police the activities of its authorized representatives, the Tribe belatedly seeks to shift that responsibility to Umpqua, and complains that Umpqua failed to investigate the propriety of the transactions of its depositor, and failed to stop the Tribe's authorized representatives from accessing funds in the Umpqua Accounts. The Tribe contends that, by failing to supervise the activity on the Umpqua Accounts, Umpqua breached a duty to care. The breach of that purported duty is the premise of the Tribe's negligence-based claims.

However, under the governing principles of banking law, there is no such duty. The law applicable here is based on sound public policy which recognizes the need for a system that provides quick and efficient banking services, especially with respect to commercial depositors. That system could not function effectively if banks were required to investigate transactions and then intervene in what might appear to be suspicious activities. This policy is also based on the fact that depositors are in a far better position to avoid losses by exercising care in choosing employees, supervising their employees, and adopting measures designed to detect when their employees have over-stepped their authority. It is axiomatic that any negligence-based claims must be predicated upon a legally

[1] As used herein, "Plaintiffs" shall mean Plaintiffs Paskenta Band of Nomlaki Indians and Paskenta Enterprises Corporation, collectively. As used herein, the "Tribe" shall mean only Plaintiff Paskenta Band of Nomlaki Indians.

cognizable duty. Here, as a matter of law, no such duty exists. For that reason, Plaintiffs' negligence-based claims[2] must be dismissed.

Plaintiffs also contend that Umpqua "knew or should have known" that Ms. Crosby, her son (John Crosby), Ms. Lohse, and her husband (Larry Lohse) (collectively, the "Crosby Defendants") were misappropriating the Tribe's money and, on that basis, contend that Umpqua aided and abetted the Crosby Defendants in their breach of fiduciary duty and conversion.[3] These claims fail for two reasons: (1) allegations of constructive knowledge (i.e., that Umpqua "should have known") are insufficient to support a claim of aiding and abetting—actual knowledge must be pleaded and proved; and (2) the FAC does not sufficiently plead actual knowledge.

Plaintiffs also assert claims for breach of contract and restitution.[4] But those claims fail as well because Plaintiffs have not alleged any facts to establish the essential elements of either of the claims.

II. FACTUAL BACKGROUND[5]

From approximately 1998 until their removal from power in April 2014, the Crosby Defendants held "all political and financial power within the Tribe" and they used that power to assume "authority and control over revenue and other moneys" that the Tribe had on deposit in various accounts including the Umpqua Accounts. **[**FAC, ¶¶ 61, 89, 93, 96, 437(c)]. Specifically, in 1996, Ms. Crosby became the Tribal Administrator. [FAC, ¶ 84]. As Tribal Administrator, Ms. Crosby had "signing authority over certain Tribal bank accounts, including accounts at . . . Umpqua Bank." [FAC, ¶ 437(c)]. In 1998, Ms. Lohse was elected as the Tribe's Treasurer. [FAC, ¶ 89]. As the Tribe's Treasurer, Ms. Lohse had "access to ***all*** Tribal bank accounts," as well as the books and records of those accounts. [FAC, ¶ 89 (emphasis added)]. In late 2000, Mr. Crosby was hired as the Tribe's Economic Development Director. [FAC, ¶ 91]. As Economic Development Director, Mr.

---

[2] Plaintiffs' negligence-based claims are the Eighteenth and Nineteenth Claims for Relief, for Common Law Negligence and Statutory Negligence, respectively.

[3] *See* FAC, Twenty-First Claim for Relief.

[4] *See* FAC, Twentieth and Thirty-Third Claims for Relief.

[5] For the purpose of this motion only, Umpqua accepts the allegations of the FAC as true.

Crosby had "unfettered and unchecked access to the Tribe's various bank accounts on which he was made a signee." [FAC, ¶¶ 91, 93]. In late 2000, Mr. Lohse was hired as the Tribe's Environmental Director. [FAC, ¶ 94]. As the Environmental Director, Mr. Lohse was "given check writing authority . . . over certain Tribal accounts." [FAC, ¶¶ 94, 96].

After attaining their positions within the Tribe, the Crosby Defendants then abused their authority by misappropriating Tribal money. [*See, e.g.*, FAC, ¶ 98 ("Over the next thirteen years, the [Crosby Defendants] would use these positions and the power it gave them over the Tribe's money to enormously enrich themselves"); FAC, ¶ 196 ("The position of Tribal Administrator gave [Ms. Crosby] signing authority over the Tribe's bank accounts . . . . This authority was, in essence, the keys to the kingdom, allowing the [Crosby Defendants] to direct millions of dollars of Tribal money for their own benefit.")]. With regard to the Umpqua Accounts, Ms. Crosby (who was, at the time of all transactions, an authorized signer on the Umpqua Accounts) withdrew large sums of cash that she subsequently converted [FAC, ¶¶ 283-84, 312]; wrote checks payable to her friends and family [FAC, ¶ 285]; and used funds on deposit to pay her credit card bills and to purchase a new car [FAC, ¶¶ 347, 335]. The Tribe contends that it did not "authorize" these transactions. [FAC, ¶ 281]. But that is a legal conclusion that this Court need not accept as true. Indeed, in this case the specific facts alleged by Plaintiffs, which establish that Ms. Crosby and Ms. Lohse were authorized signers on the Umpqua Accounts, compel a contrary conclusion.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Navarrow v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) when the complaint lacks a cognizable legal theory, or when it presents a cognizable legal theory yet fails to plead essential facts to support that theory. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The purpose of a Rule 12(b)(6) motion is "to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993).

While all material allegations must be taken as true, "conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). Indeed, the Supreme Court has confirmed the requirement that pleadings must contain more than labels and unsupported conclusions, and emphasized that conclusory allegations are not entitled to be assumed true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-52 (2009). A court is not required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). When it would be futile to amend the complaint's deficiencies, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

IV. LEGAL ARGUMENT

A. Plaintiffs' Eighteenth Claim For Relief For Common Law Negligence Should Be Dismissed

1. Umpqua Had No Duty To Supervise The Activity On The Tribe's Accounts

It is axiomatic that an essential element of a common law negligence claim is the existence of a cognizable legal duty. Here, Plaintiffs contend that Umpqua had a duty to monitor the Umpqua Accounts so it could detect what might be suspicious transactions. But, it is well-settled that a bank has no such duty. *See Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, 741-42 (2010). As courts have explained, the "relationship of bank and depositor is founded on contract, which is ordinarily memorialized by a signature card that the depositor signs upon opening the account. This contractual relationship does not involve any implied duty to supervise account activity or to inquire into the purpose for which the funds are being used." *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 537 (1998) (citations and internal quotation marks omitted).

The applicable statutory authority is consistent, and in fact augments the case law by adding specific protections for banks. California Commercial Code ("Commercial Code") Section 4401 provides:

> A bank may charge against the account of a customer an item that is properly payable from that account. . . . An item is properly payable if it

> is authorized by the customer and is in accordance with any agreement between the customer and bank.

California Financial Code ("Financial Code") Section 1451 provides:

> When the depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by such person in the authorized form or manner, including checks drawn to his personal order and withdrawal orders payable to him personally, was drawn for a purpose authorized by the depositor and within the scope of the authority conferred upon such person.

Commercial Code Section 4401 and Financial Code Section 1451, taken together, authorize banks to charge an account for any transaction initiated by an authorized signer, and allow banks to presume that withdrawals made by authorized signers are for a proper purpose, even when they are payable to the authorized signer personally. *See Desert Bermuda Properties v. Union Bank*, 265 Cal. App. 2d 146, 151 (1968) (When the Legislature enacted Section 1451 (formerly Section 953), "it relieved banks from any general duty to police . . . accounts (a duty which a bank could not reasonably be expected to carry out effectively).").

Courts applying these principles have held that a bank has no liability for failing to detect and stop an authorized signer's misappropriation of the depositor's funds. For example, in *Chazen*, the plaintiffs, who were purchasers of second mortgages which were being serviced by a mortgage loan broker, lost over a million dollars as a result of the broker's conversion of mortgage payments that had been placed into trust accounts at the bank. *Id.* at 535-36. The plaintiffs sued the bank in negligence, alleging the bank had "actual or constructive notice of the [mortgage broker's] conversion of [their] funds based upon irregular activities." *Id.* at 540. The trial court sustained the bank's demurrer without leave to amend. *Id.* at 536.

The Court of Appeal agreed that the plaintiffs' claims were not viable and affirmed the decision of the trial court. *Id.* at 538-41. It began by recognizing that Financial Code Section 1451 (formerly Section 953) "allows a bank to presume that . . . checks . . . drawn by a corporate officer authorized to make withdrawals from the account" are valid, "even when the officer draws the funds to his personal order." *Id.* at 538. The Court of Appeal also noted that the presumption created by

the statute exists "[r]egardless of whatever suspicion might have lurked in the mind of the teller as to the destination of the proceeds . . . ." *Id.*, quoting *Desert Bermuda Properties v. Union Bank*, 265 Cal. App. 2d 146, 150 (1968). The Court of Appeal then turned to plaintiffs' allegation that the bank "knew and should have known" of the conversion because of the alleged irregular activities—including "overdrafts of funds in fiduciary accounts, numerous telephone transfers of large amounts of funds from fiduciary accounts into general and personal accounts of the [mortgage broker], coupled with repeated overdrafts in personal and general accounts." *Id.* at 540 (alternations and internal quotation marks omitted). The Court of Appeal recognized that "the inevitable result of these allegations would be to require banks to police fiduciary accounts so as to prevent breach of fiduciary duty. Under governing principles of banking law, the bank has no such duty." *Id.* at 541. In fact, the Court of Appeal held that, based on Financial Code Section 1451, the bank was obligated to honor the withdrawals from the account. *Id.*

Here, as in *Chazen*, Plaintiffs' common law negligence claim is precluded. The gravamen of Plaintiffs' claim is that Umpqua failed to discover the Crosby Defendants' alleged misappropriation of Tribal funds. Specifically, Plaintiffs allege that Umpqua:

- ***failed*** "to make any inquiry or investigation into the propriety of the [Crosby Defendants'] transactions via-a-vis the Tribe's money at Umpqua Bank, despite numerous warning signs it is required to recognize;" [FAC, ¶ 586];
- ***failed*** "to prevent its employees from knowingly assisting [Ms.] Crosby in her conversion of Tribe money deposited at the bank;" [FAC, ¶ 586];
- ***failed*** "to stop the [Crosby Defendants'] use of the Tribe's accounts at Umpqua Bank to further their scheme, including without limitation by freezing or closing the accounts and/or limit . . . [Ms.] Crosby's ability to withdraw funds from those accounts;" [FAC, ¶ 586]; and
- ***failed*** "to investigate or inquire into the propriety of numerous large cash withdrawals by the [Crosby Defendants] from the Tribe's accounts at Umpqua Bank, totaling millions of dollars, and large payments for the [Crosby Defendants'] personal benefit, further totaling millions of dollars, that the [Crosby Defendants] caused to be made from the Tribe's accounts at Umpqua Bank." [FAC, ¶ 587].

Together, Commercial Code Section 4401 and Financial Code Section 1451, as well as the cases applying them, make clear that banks have no duty to police their depositor's accounts, even

fiduciary or trust accounts, and for that reason there can be no liability imposed on a bank for failing to do so. It is undisputed that the Crosby Defendants were in control of the Tribe's finances and were the authorized signers on the Tribe's bank accounts. As a matter of law, Umpqua had no duty to police the activity on the Umpqua Accounts. Rather, under governing principles of banking law, it was obligated to honor the withdrawals made by the authorized signers.

2. The Bank Secrecy Act Does Not Create A Duty Upon Which Plaintiffs Can Base A Claim For Negligence

The Bank Secrecy Act (the "Act") is a law enforcement tool and only a law enforcement tool. It was enacted to "require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. The Act, and its implementing regulations, "impose duties upon financial institutions to keep certain records, obtain particular information, file reports, and establish an effective anti-money laundering compliance program." *United States v. Caro*, 454 Fed. App'x 817, 823 (11th Cir. 2012). For instance, the Act requires that banks file Currency Transaction Reports ("CTRs") with the Financial Crimes Enforcement Network ("FinCEN") whenever they handle transactions involving more than $10,000 in currency. *See* 31 U.S.C. § 5313; 31 C.F.R. § 1010.311. The Act also requires banks to report certain suspicious activity to FinCEN by filing Suspicious Activity Reports ("SARs"). *See* 31 U.S.C. § 5318(g)(1); 31 C.F.R. § 1020.320.

The Act's reporting obligations "were designed to provide a sweeping law enforcement tool for locating, *inter alia*, large transfers, in currency, or the proceeds of unlawful transaction . . . ." *See Karen Kane, Inc. v. Bank of America*, 67 Cal. App. 4th 1192, 1203 (1998) (citation and internal quotation marks omitted); *see also Martinez-Colon v. Santander Nat'l Bank*, 4 F. Supp. 2d 53, 57 (D. Puerto Rico 1998) ("Congress' purpose in enacting the [Bank Secrecy Act] was to ensure that certain business records assist government agencies in conducting criminal, tax, or regulatory investigations."). Because the Act is a law enforcement tool, any duties it imposes are duties owed to the federal government, not to customers. *See Wiand v. Wells Fargo Bank, N.A.*, -- F. Supp. 3d --,

2015 WL 518826, *5 (M.D. Fla. Feb. 9, 2015) ("To the extent federal banking statutes such as the Bank Secrecy Act impose duties on banks, those duties extend to the United States, not a bank's customers."). And, while the Act "provide[s] for civil and criminal penalties, [it] do[es] not create a private right of action." *Taylor & Co. v. Bank of America Corp.*, 2014 WL 3557672, *3 (W.D.N.C. June 5, 2014); *El Camino Resources, Ltd v. Huntington Nat. Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) (It is "well settled that the anti-money-laundering obligations of banks, as established by the Bank Secrecy Act, obligate banks to report certain customer activity to the government but do not create a private cause of action.");

It is not surprising, then, that courts have uniformly rejected the notion that a plaintiff can use the Act to support a negligence claim. *See SFS Check, LLC v. First Bank of Delaware*, 990 F. Supp. 2d 762, 775 (E.D. Mich. 2013) (because the Act does not allow for a private right of action, "under any theory of negligence predicated on Bank Secrecy Act compliance, monitoring, or implementation—whether pleaded as a failure to exercise due care, a failure to exercise due diligence, a failure to supervise employees, respondeat superior, or gross negligence—the law does not provide a basis for imposing a duty of care"); *In re Agape Litig*, 681 F. Supp. 2d 352, 360 (S.D.N.Y. 2010) ("because the Bank Secrecy Act does not create a private right of action, the Court can perceive no sound reason to recognize a duty of care that is predicated upon the statute's monitoring requirements"); *Wiand*, 2015 WL 518826, *4 (the Act cannot be used as a predicate for a negligence claim); *Taylor & Co*, 2014 WL 3557672, at *3 (same). This result is virtually mandated by the fact that the Act prohibits disclosure of certain information, such as whether a bank has, or has not, filed an SAR on a particular account [*see* 31 U.S.C. § 5318(g)(2)(A)(i)], and provides for criminal penalties for violations of the Act [*see* 31 U.S.C. § 5322 (criminal penalties include a fine of up to $250,000 or imprisonment for up to five years, or both)]. A negligence claim against a bank rooted in the duties imposed by the Act would lead to an absurd (and constitutionally questionable) result—a claim in which a plaintiff cannot obtain the evidence necessary to prove its case,[6] and a

[6] Plaintiffs recite the requirements of the Act applicable to Umpqua. [*See* FAC, ¶¶ 39-41]. But those paragraphs contain nothing more than a statement of the law. Of course, because of the potential criminal penalties, Plaintiffs do not allege, and will never be able to allege, that Umpqua did or did not comply with the Act or the applicable regulations.

defendant cannot offer evidence to defend itself, lest both be subject to criminal penalties.

B. Plaintiffs' Nineteenth Claim For Relief For Negligence Under Commercial Code Section 3405(d) Should Be Dismissed

Plaintiffs allege that, "to the extent . . . [Section] 3405 is applicable to some or all of the improper transactions made by the [Crosby Defendants] in connection with the Tribe's accounts at Umpqua," Umpqua violated Section "3405(b) by failing to exercise reasonable care required thereunder." [FAC, ¶ 606]. But, the FAC makes clear that Commercial Code Section 3405(b) is not applicable here.

Commercial Code Section 3405 is entitled "Employer's Responsibility for Fraudulent Indorsement by Employee." In relevant part, it provides that when a bank paying an instrument that bears an employee's fraudulent indorsement "fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss." Cal. Com. Code § 3405(b). A "fraudulent indorsement" means: "(A) in the case of an instrument payable to the employer, a ***forged indorsement*** purported to be that of the employer, or (B) in the case of an instrument with respect to which the employer is the issuer, a ***forged indorsement*** purported to be that of the person identified as payee." Cal. Com. Code § 3405(a)(2) (emphasis added).

There are no facts alleged in the FAC that suggest that any transaction on the Umpqua Accounts involved "fraudulent indorsements." Rather, the FAC makes clear that when Ms. Crosby and Ms. Lohse engaged in the transactions, they were authorized to do so. [*See* FAC, ¶¶ 89, 437(c)]. Because Commercial Code Section 3405(b) is inapplicable, Plaintiffs' statutory negligence claim should be dismissed.

C. Plaintiffs' Twenty-First Claim For Relief For Aiding And Abetting Fails Because Plaintiffs Have Not Alleged Facts Which Establish That Umpqua Had Actual Knowledge Of The Misappropriation

1. Liability For Aiding And Abetting Cannot Be Imposed Unless The Defendant Has Actual Knowledge That The Other's Conduct Constitutes A Breach Of A Duty

The law in California is that liability for aiding and abetting may be imposed only if the defendant: "(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *Casey v. U.S. Bank National Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005), quoting *Saunders v. Superior Court*, 27 Cal. App. 4th 832 (1994).[7] To state a claim for aiding and abetting under California law, a plaintiff must allege sufficient facts to suggest that the defendant had "actual knowledge of the specific primary wrong the defendant substantially assisted." *Simi Management Corp. v. Bank of America, N.A.*, 930 F.Supp.2d 1082, 1098-99 (N.D. Cal. 2013); *In re First Alliance Mortg. Co.*, 471 F.3d 977, 993 (9th Cir. 2006), citing *Casey*, 127 Cal. App. 4th at 1146. Constructive knowledge is insufficient. *See Casey*, 127 Cal. App. 4th at 1146.

Accordingly, in analyzing whether a plaintiff's aiding and abetting allegations are sufficient, it is imperative to first identify the specific breach for which the plaintiff seeks to hold the defendant liable. *See In re Sharp Intern. Corp.*, 281 B.R. 506, 514 (Bankr. E.D.N.Y. 2002). The court must then evaluate the specific allegations to ascertain whether they are sufficient to establish that the defendant had the required knowledge—keeping in mind the fact that whether a defendant had a "vague suspicion of wrongdoing" or knew of "[w]rongful or illegal conduct" is legally irrelevant. *In re First Alliance Mortg. Co.*, 471 F.3d at 993 n. 4 (citation and internal quotation marks omitted); *In re Syntax-Brillian Corp.*, 573 Fed. App'x 154, 164 (3rd Cir. 2014) ("California courts have

[7] As demonstrated in Section IV.A., *infra*, as a matter of law Umpqua owed no independent duty to the Tribe. Therefore, to state a claim for aiding and abetting, Plaintiffs must allege facts sufficient to establish that Umpqua actually "knew" that the Crosby Defendants were breaching their fiduciary duties to the Tribe.

concluded that banks may presume that depositors have authorized transactions undertaken by corporate officers, and that regardless of whatever suspicion might have lurked in the mind of the teller as to the destination of the proceeds, no duty of inquiry is cast on the bank.")

2. Plaintiffs Have Failed To Allege Sufficient Facts To Establish That Umpqua Had Actual Knowledge Of The Alleged Conversion And/Or Breaches Of Fiduciary Duties By The Crosby Defendants

Plaintiffs contend that Umpqua aided and abetted the Crosby Defendants in their conversion of the Tribe's money and in the breach of their fiduciary duties to the Tribe. The relevant question, therefore, is whether Plaintiffs have alleged sufficient ***facts*** to establish that Umpqua had actual knowledge that the Crosby Defendants were breaching their fiduciary duties to the Tribe.

To begin, conclusory allegations about what Umpqua "knew" must be disregarded. Stripped of these allegations, what remain in the FAC are allegations that: (1) Ms. Crosby, an authorized signer on the Umpqua Accounts, regularly made in person withdrawals of large sums of money from the same Umpqua branch in Orland, California [FAC, ¶¶ 589-90]; (2) because Orland is a small community, the Umpqua employees who dealt with Ms. Crosby must have been aware that Ms. Crosby lived an "extravagant and luxurious life style" [FAC, ¶ 590]; (3) tellers continued to allow Ms. Crosby to make cash withdrawals after it was reported in the local press that she had been suspended from the Tribe and was "suspected" of misappropriating funds [FAC, ¶ 594]; and (4) Ms. Crosby used the Tribe's money to pay credit card bills and to purchase a new car [FAC, ¶ 599].

These allegations are insufficient to establish that Umpqua had actual knowledge that the transactions in question involved conversion of the Tribe's money or breaches of the Crosby Defendants' fiduciary duties to the Tribe. *See Casey*, 127 Cal. App. 4th at 1153 (the allegation that "each [defendant] acted with knowledge of the primary wrongdoing and realized that its conduct would substantially assist the accomplishment of the wrongful conduct" does not satisfy the actual knowledge pleading requirement). At best, the fact that Ms. Crosby withdrew significant sums of money and purportedly used that money to pay credit card bills and purchase a car *may* have caused some suspicion of wrongdoing. However, courts have repeatedly held that suspicion and surmise are

not the same as actual knowledge. *See Sharp*, 281 B.R. at 515; *Casey*, 127 Cal. App. 4th at 1146 (the allegation that the Banks knew the DFJ Fiduciaries "were making unauthorized cash withdrawals from [the Banks' accounts] in breach of their fiduciary duties to the Estate and were actually involved in a criminal or dishonest and wrongful enterprise and were, at the very least, laundering money" were insufficient to suggest that the banks had actual knowledge of the misappropriation.); *see also* Cal. Com. Code § 3307 (b)(3).

Here, there are no facts from which it may be inferred that Umpqua had actual knowledge. Even if the frequency and nature of the withdrawals created some suspicion on the part of individual employees, that does not establish the actual knowledge that the law requires before liability for aiding and abetting may be imposed. Moreover, Plaintiffs' repeated use of the phrase "should have known," and the allegations that describe what Umpqua "failed" to do, are inconsistent with the notion that Umpqua had the requisite actual knowledge. [*See, e.g.*, FAC ¶ 586 (alleging Umpqua failed to make "any inquiry or investigation into the propriety of the . . . transactions"), ¶ 589 (alleging Umpqua was "on inquiry notice"), ¶ 593 (same), ¶¶ 594-95 (same), 597-98 (same), 598-600 (same)].

Plaintiffs' allegations here pale in comparison to what the banks in *Casey* allegedly "knew." In *Casey*, the plaintiff alleged that the bank defendants knew "something fishy" was going on with accounts opened by DFJ Fiduciaries and that the banks had allowed the DFJ Fiduciaries to open these accounts in the names of fraudulent entities despite knowing these entities were not legitimate businesses. *Casey*, 127 Cal. App. 4th at 1149. The plaintiff also alleged that the banks knew that the DFJ Fiduciaries were withdrawing money from these accounts with the use of forged checks and checks that exceeded written limits, and, most suspiciously, that the DFJ Fiduciaries were carrying large, unreported amounts of cash out of the bank in unmarked duffel bags. *Id.* The Court was not persuaded. It held that "the banks' alleged knowledge of the DFJ Fiduciaries' suspicious account activities—even money laundering—*without more*, does not give rise to tort liability for the banks." *Casey*, 127 Cal. App. 4th at 1146 (emphasis in original).

Here, Plaintiffs focus on the purpose for which withdrawals were made (e.g., to fund an

extravagant lifestyle and pay credit cards bills). But Plaintiffs ignore the fact that Ms. Crosby and Ms. Lohse were authorized signers on the Umpqua Accounts. Because they were authorized signers, absent written notice to the contrary, Umpqua was entitled to presume that there was a legitimate purpose for each transaction. *See Chazen*, 61 Cal. App. 4th at 537; Cal. Fin. Code § 1451.

D. Plaintiffs' Twentieth Claim For Relief For Breach Of Contract Fails Because It Is Inadequately Pled And Because Umpqua Had No Duty To Police The Activity In The Umpqua Accounts

Plaintiffs allege that Umpqua breached an unidentified contract by failing to exercise reasonable care in connection with its handling of the Umpqua Accounts. [FAC, ¶¶ 614-15]. This claim fails for two reasons. First, it is inadequately pled. Fundamentally, to state a breach of contract claim the plaintiff "must plead the contract, his performance of the contract or excuse for nonperformance, [the defendant's] breach and the resulting damage." *Otworth v. Southern Pac. Transportation Co.*, 166 Cal. App. 3d 452, 458 (1985). "Further, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct." *Id.* "If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." *Id.* The FAC contains no such allegations. Although the FAC alleges the existence of a contract, it does not state whether the contract is written, oral or implied. The FAC also fails to allege ***any*** of the material terms of the contract.

Second, this claim fails because it is predicated on the same duty as Plaintiffs' negligence claim—i.e., the duty to use reasonable care. As discussed above in Section IV.A, *supra*, that claim fails because Umpqua had no duty to police the activity on Plaintiffs' accounts. Pursuant to Commercial Code Section 4401 and Financial Code Section 1451, Umpqua was permitted, and in fact obligated, to pay the transactions in question. Whether couched as a negligence claim or a contract claim, the result is the same.

E. Plaintiffs' Thirty-Third Claim For Relief For Restitution Fails Because Restitution Is Not A Claim For Relief And Because Plaintiffs Have Failed To Allege Any Basis For Awarding Restitution Against Umpqua

To support their claim for restitution, Plaintiffs allege only a legal conclusion, i.e., that "Defendants" have "received benefits at the expense of the Tribe" and that it "would be unjust for the Defendants to retain these benefits." [*See* FAC, ¶¶ 752-53].

"There is no cause of action in California for [restitution]." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010); *In re IPhone Application Litigation*, 844 F. Supp. 2d 1040, 1076 (N.D. Cal. 2012) ("California does not recognize a cause of action for restitution"). Instead, restitution is a remedy that can be awarded in various different scenarios. *Durell*, 183 Cal. App. 4th at 1370; *Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 946, 987 (N.D. Cal. 2010) ("There is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy."). "For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." *Durell*, 183 Cal. App. 4th at 1370. "Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory." *Id.*

Here, Plaintiffs' claim fails because restitution is not an independent claim for relief and because Plaintiffs have not pled facts which would entitle them to such a remedy.

V. CONCLUSION

Plaintiffs' claims are fundamentally at odds with the legal principles that govern our modern banking system. Should banks make decisions based on subjective criteria, such as the "extravagant" lifestyles of its customers, or what is reported in the media? Should the standard for banking decisions vary based on the size of the community in which a particular branch is located? Cleary, the answer to these questions is no. But that is the inevitable consequence of the allegations that Plaintiffs make here. The Tribe entrusted certain individuals with the proverbial "keys to the

kingdom" and now fault Umpqua for failing to exercise the supervision that was, undeniably, the responsibility of the Tribe. The modern banking system could not function effectively if banks were required to investigate transactions, or if banks could be subjected to claims based on surmise, speculation, or what a plaintiff contends the bank "should have known." For all of the foregoing reasons, Umpqua respectfully submits that all claims for relief that are directed at Umpqua should be dismissed without leave to amend.

DATED: May 15, 2015

REED SMITH LLP

By: */s/ Scott H. Jacobs*
Scott H. Jacobs
Kasey J. Curtis
Attorneys for Defendants UMPQUA BANK and UMPQUA HOLDINGS CORPORATION

PASKENTA BAND OF NOMLAKI INDIANS, et al. v. INES CROSBY . . . UMPQUA BANK; UMPQUA HOLDINGS CORPORATION, et Al.
USDC - Eastern District – Sacramento Division - Case No.: 2:15-cv-00538-GEB-DMK

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On May 15, 2015, I served the following document(s) by the method indicated below:

- **DEFENDANTS UMPQUA BANK AND UMPQUA HOLDINGS CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

☒	by CM/ECF electronic delivery. In accordance with the registered case participants and in accordance with the procedures set forth at the Court's website www.ecf.cacd.uscourts.gov
☐	by transmitting via facsimile on this date from fax number +1 213 457 8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Ca1.R.Ct 2.306.
☐	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. (See attached Service List) I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
☐	by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.
☐	by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.
☒	by transmitting via email to the parties at the email addresses listed below:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on May 15, 2015 at Los Angeles, California.

CANDICE A. SPOON

SERVICE LIST

SERVICE VIA CM/ECF	
Andrew Michael Purdy, Esq. JOSEPH SAVERI LAW FIRM 505 Montgomery Street, Suite 625 San Francisco, CA 94111 Telephone: 415.500.6800 Facsimile: 415.500.9940 Email: apurdy@saverilawfirm.com	***Attorney for Plaintiffs PASKENTA BAND OF NOMLAKI INDIANS; AND PASKENTA ENTERPRISES CORPORATION***
Daniel Canfield Goldberg, Esq. Stuart G. Gross, Esq. GROSS LAW, P.C. The Embarcadero Pier 9, Suite 100 San Francisco, CA 94111 Telephone: 415.671.4628 Facsimile: 415.480.6688 Email: dgoldberg@gross-law.com sgross@gross-law.com	***Attorney for Plaintiffs PASKENTA BAND OF NOMLAKI INDIANS; AND PASKENTA ENTERPRISES CORPORATION***
Mani Sheik, Esq. SHEIK LAW One Maritime Plaza, Suite 1000 San Francisco, CA 94111 Telephone: 415.205.8490 Facsimile: Email: mani@sheiklaw.us	***Attorney for Defendant CRP 111 WEST 141ST LLC, CASTELLAN MANAGING MEMBER LLC, CRP WEST 168TH STREET LLC, CRP SHERMAN AVENUE LLC***
SERVICE VIA E-MAIL	
Tod Fogarty Mike Kuzmich Boutin Jones, Inc. 555 Capitol Mall, Suite 1500 Sacramento, CA 95814 Telephone: 916.321.4444 Email: tfogarty@boutinjones.com Email: mkuzmich@boutinjones.com	***Attorneys for Defendant QUICKEN LOANS, INC.***
Kevin M. Siebert Downey Brand 621 Capitol Mall, 18th Floor Sacramento, CA 95814 Telephone: 916.444.1000 direct Email: kseibert@downeybrand.com	***Attorneys for Defendants HANESS & ASSOCIATES, LLC, and ROBERT M. HANESS***

William Munoz Murphy, Pearson, Bradley, & Feeney 520 Capitol Mall, Suite 250 Sacramento, CA 95814 Telephone: 916.565.0300 Email: wmunoz@mpbf.com	***Attorneys for Defendant ASSOCIATED PENSION CONSULTANTS, INC.***
Natalie P. Vance Klinedinst Attorneys 801 K Street, Ste. 2800 Sacramento CA 95814 Telephone: 916.444.7573 Email: nvance@klinedinstlaw.com	***Attorneys for Defendants GARTH MOORE, and GARTH MOORE INSURANCE AND FINANCIAL SERVICES, INC***
John McCardle Marty Opich Kraft Opich, LLP 7509 Madison Avenue, Suite 111 Citrus Heights, CA 95610 Telephone: 916.880.3040 Email: jmccardle@kraftopich.com Email: mopich@kraftopich.com	***Attorneys for Defendants CORNERSTONE COMMUNITY BANK, CORNERSTONE COMMUNITY BANCORP, and JEFFREY FINCK***
John M. Murray (232419) Liberty Law, A.P.C. 2150 N. Main Street, STE 10 Red Bluff, CA 96080 Telephone: 530-529-4329 Email: john@libertylawapc.com	***Attorneys For Defendants INES CROSBY, JOHN CROSBY, LESLIE LOHSE, LARRY LOHSE, TED PATA, JUAN PATA; CHRIS PATA, SHERRY MYERS, FRANK JAMES, THE PATRIOT GOLD AND SILVER EXCHANGE, INC. and NORMAN R. RYAN***