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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP; and FRANCISCO AGUILAR, MILO BARLEY, GLORIA COSTA, GEORGE DECORSE, SALLY DECORSE, et al., on behalf of themselves and all those similarly situated,

Plaintiffs,

v.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally-recognized Indian tribe; ROBERT ROSETTE; ROSETTE & ASSOCIATES, PC; ROSETTE, LLP; RICHARD ARMSTRONG; KEENY ESCALANTI, SR.; MARK WILLIAM WHITE II, a/k/a WILLIE WHITE; and DOES 1 THROUGH 10,

Defendants.

Case No. 17-CV-01436 GPC MDD

REDACTED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ROSETTE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

[Notice of Motion, Request for Judicial Notice, Rogers Declaration, and Cienfuegos Declaration Filed Concurrently]

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: June 8, 2018
Time: 1:30 p.m.

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I. Introduction

Robert Rosette and his firm, Rosette, LLP, are industry-leading practitioners in the area of tribal law. They have represented dozens of Indian tribes across the country in a variety of contexts, including petitioning branches of federal and state government to further the rights of their clients. One of those clients, the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan"), retained Rosette, LLP in 2017 for help negotiating disputed gaming rights with California's executive branch and resolving the State's threats of litigation. In so doing, Quechan terminated its prior counsel, Williams & Cochrane LLP, a firm founded by two former Rosette, LLP associates. Quechan's exercise of its absolute right to switch counsel gives rise to this lawsuit, which has become more outlandish with each amendment.

As a Plaintiff, Williams & Cochrane LLP spins a far-fetched and frivolous tale in its 121-page First Amended Complaint ("FAC"), which seeks to tarnish a competitor, punish a former client, and secure a multimillion-dollar windfall to which it is not remotely entitled. Quechan's decision to change lawyers was both proper and unremarkable. Clients do it all the time, especially after their organization, like Quechan's, undergoes a leadership change. Plaintiff, however, is not content to pursue contractual remedies to resolve its fee dispute with Quechan. Rather, Williams & Cochrane seeks to hold Mr. Rosette, his firm, its corporate parent, and the firm's of-counsel attorney, Richard Armstrong (collectively, the "Rosette Defendants") liable for two separate RICO violations—and to recoup, indeed treble, the unconscionable $6 million contingency fee that Plaintiff demands for its ineffective representation of Quechan. It seeks similar damages for accurate biographical descriptions of Mr. Rosette's work and a press release about Quechan's compact. And as counsel to newly joined plaintiffs (the "Individual Plaintiffs"), Williams & Cochrane improperly seeks to use an intra-tribal dispute over recent recall elections to bring a patently meritless claim for "negligence / breach of fiduciary duty," i.e. malpractice.

The FAC is riddled with defects that no amendment can cure. As an initial matter, multiple claims against the Rosette Defendants are barred by the long-established *Noerr-Pennington* doctrine, which protects petitioning activities directed at all three branches of government, *see Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929–30 (9th Cir. 2006), as well as "conduct incidental" to petitioning activity. *Id.* at 934–35. Quechan's negotiations with California's government are squarely protected conduct, as are the Tribe's communications regarding those efforts and the Rosette Defendants' actions supporting them, both of which are "incidental" to petitioning activity. In addition to *Noerr-Pennington*'s insurmountable bar, Williams & Cochrane has not stated a claim under either RICO or the Lanham Act, nor have the Individual Plaintiffs stated a claim for malpractice.[1] All claims against the Rosette Defendants should be dismissed with prejudice.

II. Summary of Allegations

While Plaintiffs' sprawling FAC refers to various dealings between Williams & Cochrane and the Rosette Defendants, the crux of its causes of action pertains to two tribes' disputes with California about rights and obligations under the federal Indian Gaming Regulatory Act (the "IGRA," 25 U.S.C. § 2701 et seq.): (i) *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, No. 09-01955 CAB MDD (S.D. Cal. 2016) (the "Pauma Litigation"), and (ii) Quechan's 2016–2017 tribal-state compact negotiations with California and resolution of California's claims that Quechan failed to make required revenue-sharing payments under an earlier compact (the "Quechan Compact").[2]

[1] Moreover, California's anti-SLAPP statute requires that the malpractice claim against the Rosette Defendants be struck. *See* the Rosette Defendants' concurrently filed Special Motion to Strike.

[2] The Rosette Defendants will not stoop to addressing here the wholly irrelevant and factually erroneous allegations included in Section II.A of the FAC. Those *ad hominem* attacks on Mr. Rosette have no bearing on the claims at issue and are merely part of Plaintiff's malicious effort to use court filings to support its negative marketing and campaign to harm the Rosette Defendants.

Pauma Litigation. Cheryl Williams and Kevin Cochrane started representing tribes when they were hired by Rosette & Associates, PC (later known as Rosette LLP). (FAC ¶¶ 42, 138.) At the direction of their employer, Mr. Rosette, Ms. Williams and Mr. Cochrane filed on Pauma's behalf a complaint against the State of California seeking rescission of the 2004 Pauma gaming compact. (*Id.* ¶ 41.) Mr. Rosette, the founding partner of Rosette, LLP, was Pauma's lead attorney and he was listed at the top of the pleading (Ex. 1 to Rogers Decl.), and he was the primary strategist behind the complaint, formulating the plan for litigating against the State. (*Id.*) Associates at his firm worked on a day-to-day basis executing the strategy that Mr. Rosette devised. (*Id.*) Rosette, LLP soon filed a motion for preliminary injunction, again with Mr. Rosette listed as the lead attorney. (Ex. 2 to Rogers Decl.) The firm also filed an opposition to a stay request on appeal, again listing Mr. Rosette as the lead attorney. (Ex. 4 to Rogers Decl.)

The preliminary injunction motion was an unprecedented success, allowing Pauma to begin immediately making lower monthly revenue-sharing payments to California, saving it millions of dollars over the life of its compact. (Ex. 3 to Rogers Decl.) Plaintiff alleges that Mr. Rosette began to "champion" this result on his firm's website, listing among his accomplishments that he "successfully litigated a case saving [Pauma] over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger." (FAC ¶ 66.) According to Plaintiffs, this statement appeared as early as 2014. (Ex. 6 to FAC.)

While the preliminary injunction was being appealed, Ms. Williams and Mr. Cochrane left Rosette, LLP to form their own firm. (Compl. ¶ 46.) One month later, they convinced Pauma to change representation (*id.* ¶ 50), and took over the Pauma Litigation from Rosette, LLP. With the road to success already paved by the strategy memorialized in the complaint and preliminary injunction, Williams & Cochrane secured in 2016 a restitutionary judgment for Pauma for $36.3 million,

awarded for past overpayments. (*Id.* ¶ 67.) According to the State of California's website, however, Pauma still has not been able to obtain a new gaming compact.[3]

Quechan Compact. Quechan had its own gaming rights dispute with California arising from a 2007 Amended Compact [redacted] In 2016, Williams & Cochrane persuaded Quechan to sign an extraordinary contingency-fee agreement covering potential litigation against California and possible renegotiation of the Tribe's gaming compact with the State. [redacted] (*Id.* ¶¶ 73–74.) [redacted] (*Id.* ¶ 75; *see also id.* ¶ 78.)

The retention agreement recognized that Quechan could "discharge" Williams & Cochrane "at any time," entitling the firm only to a "reasonable fee for the legal services . . . ." (Docket No. 5-3 at 6.) But Ms. Williams, a veteran of Milberg Weiss LLP (*id.* ¶ 138), negotiated a hybrid fee arrangement with Quechan entitling Williams & Cochrane to receive $50,000 every month irrespective of the firm's actual time spent, as well as 15% of any "net recovery" of past *overpayments* made under the 2007 Amended Compact. (*Id.* ¶¶ 78–84; *see also* Docket No. 5-3 at 1–2.) The FAC does not allege that the Rosette Defendants had any involvement in these negotiations or dealings.

After its retention, Williams & Cochrane prepared a "notice of dispute for the

[3] *See* California Gambling Control Commission, *Ratified Tribal-State Gaming Compacts (New and Amended)*, http://www.cgcc.ca.gov/?pageID=compacts (listing Pauma's most recent compact as amended in 2004 and noting that "the Tribe is subject to the 1999 Compact for purposes of payment obligations.") (last visited April 6, 2018).

Office of the Governor" and began negotiations with the State in October 2016. (FAC ¶¶ 87–88.) Williams & Cochrane held only two negotiation sessions with the State before a change in Quechan's leadership in December 2016 supposedly stalled progress. (*Id.* ¶¶ 89, 94–98.) Williams & Cochrane continued to charge Quechan $50,000 a month, every month, whether or not the firm did any work. [redacted] (*Id.* ¶¶ 98–98.) [redacted] (*Id.* ¶ 100.)

Frustrated by the pace and cost, Quechan's new leadership voted to change lawyers in June 2017, retaining Mr. Rosette and his firm to take over the matter, with the goal being a global resolution of the compact negotiations [redacted] (*E.g.*, *id.* ¶ 114 (Williams & Cochrane "had already been 'grossly overcompensated' given its failure to 'produce better-than boilerplate terms'" in the negotiations.).) Rosette, LLP ultimately negotiated a full resolution of Quechan's legal disputes with the State.

This Lawsuit. Before the new Quechan Compact with California was even executed, Williams & Cochrane brought a lawsuit against Defendants—Quechan, two of its elected leaders, and the Rosette Defendants—for a multitude of claims stemming from Quechan's retention of Rosette, LLP and termination of Williams & Cochrane. (Docket No. 5.) The Rosette and Quechan Defendants each filed an anti-SLAPP motion and a motion to dismiss. (Docket Nos. 29–32.) Rather than defend their pleading, Williams & Cochrane filed the FAC, adding the Individual Plaintiffs, 28 tribe members who purport to represent a putative class asserting a single malpractice claim against the Rosette Defendants, despite the fact that the Rosette Defendants have only ever represented Quechan, their co-Defendant. (FAC ¶¶ 7, 13, 298– 303.) The new plaintiffs do not allege that they were clients of

Rosette, LLP. According to Williams & Cochrane, the primary motivation behind the amendment was to avoid Defendants' anti-SLAPP lawsuits by "reclassify[ing]" its "state-law contract claims . . . as a federal claim under" RICO. (Docket No. 43 at 7; *see also id*. at 17 (FAC "simply shifted many of the objectionable claims over from state law to federal law").)

III. Argument

The Complaint contains five claims (numbers four through eight) against some or all of the Rosette Defendants. Each claim suffers from multiple, independently fatal defects that compel dismissal with prejudice. Although at this stage the Court must accept factual allegations as true, a pleading like the FAC "that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations and citations omitted). Indeed, the Court must ignore allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth," and determine whether the remaining allegations allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged" and "plausibly give rise to an entitlement to relief." *Id.* at 678–79; *see generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Nor may it accept allegations that fail to "exclude a plausible and innocuous alternative explanation" for defendants' conduct. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998 (9th Cir. 2014). And those claims that hinge on fraud—RICO and Lanham Act violations included—must also comply with the heightened pleading standards set forth in Rule 9. *See, e.g., Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065–66 (9th Cir. 2004) (RICO); *Nutrition Distribution, LLC v. New Health Ventures, LLC*, 2017 WL 2547307, at *4 (S.D. Cal. June 13, 2017) (Lanham Act).

A. The Sixth, Seventh, and Eighth Claims for Relief Are Barred by the *Noerr-Pennington* Doctrine

The sixth, seventh, and eighth claims for relief against the Rosette

Defendants are based on the Rosette Defendants' communications with Quechan about its petitioning conduct vis-à-vis the executive branch of the State of California and its efforts to avoid what Williams & Cochrane characterizes as a "high" likelihood of litigation with the State. The First Amendment protects Quechan's right "to petition the government for a redress of grievances," U.S. CONST. amend. I, including petitioning directed at any branch of government, whether at the federal or state level. *See Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929–30 (9th Cir. 2006). To give effect to this important right, the Supreme Court developed what has come to be known as the *Noerr-Pennington* doctrine,[4] which immunizes "those who petition any department of the government for redress . . . from statutory liability for their petitioning conduct." *Id.* at 929. *Noerr-Pennington* applies to alleged statutory liability and state-law tort claims alike. *See Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).

Just as the right to petition is sacrosanct, the right to give and receive legal advice in connection with petitioning is protected in order "to preserve the breathing space required for the effective exercise of the rights [the Petition Clause] protects." *Sosa*, 437 F.3d at 933–34. This protected conduct includes, for example, "conduct incidental" to petitioning activing, including by attorneys for the petitioner. *Columbia Pictures Indus., Inc. v. Prof. Real Estate Investors, Inc.*, 944 F.2d 1525, 1528–29 (9th Cir. 1991) (holding that the decision to accept or reject a settlement offer is protected). And, while the First Amendment petition right belongs to the client-party in the first instance, "their employees, law firms and lawyers . . . get to benefit as well." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005). Otherwise, the right to petition would be chilled because those who seek to engage with the government would be burdened in their

[4] *See E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139–40, 143–44 (1961); *accord United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965).

efforts to seek representation. *Cf. Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991) (protection "necessary to avoid 'a chilling effect on the exercise of this fundamental First Amendment right.'").

As is clear on Plaintiffs' own account of the facts, liability cannot be imposed on the Rosette Defendants consistent with the Constitution: Quechan was petitioning the executive branch of the State of California, in the express statutory context of the federal IGRA, *and* according to the FAC Quechan faced substantial threats of litigation, [redacted] (*See, e.g.*. FAC ¶¶ 74–75, 100.)[5] Plaintiffs allege that Mr. Rosette counseled Quechan about its gaming compact and dispute with California regarding overdue revenue sharing payments, and then communicated with the State regarding those subjects. Plaintiffs' RICO and "malpractice" claims are premised on those alleged communications, including:

- Meeting with Quechan to discuss negotiations with the State of Arizona over gaming compacts (*id.* ¶¶ 190–191);
- Advising Quechan in connection with its California compact negotiations and dispute with California (*id.* ¶¶ 193–198; 200–201);
- Assuming responsibility for compact negotiations with California (*id.* ¶¶ 299);
- Advising Quechan in connection with terminating Williams & Cochrane (*id.* ¶¶ 56, 288(h)-(k)); and
- Requesting Williams & Cochrane's working file on the California dispute after Rosette was retained (*id.* ¶¶ 288 (l)-(m)).

[5] The same is true of the Rosette Defendants' communications with Pauma throughout the Pauma Litigation, as well as their communications with the State, as Plaintiff concedes the Pauma Tribe had authorized. (*See* FAC ¶ 177 (acknowledging that Pauma's Chairman signed a letter acknowledging Mr. Rosette's authority to engage in outreach concerning settlement).) However, for the reasons discussed below, these alleged predicate acts in 2011 are time-barred.

These activities, undertaken in furtherance of Quechan's petitioning rights, go to the heart of the First Amendment and are protected by *Noerr-Pennington*.

Quechan's Compact Negotiations Are Petitioning Activity. There is no doubt that Quechan was engaged in protected petitioning conduct. As Plaintiffs allege, compact negotiations for the State are carried out by the California Attorney General's Office on behalf of the Office of the Governor and results are announced in press releases by the Governor himself. (*Id.* ¶¶ 4–6.) Compacts must also be ratified by the California legislature. (*Id.* ¶ 198.) *Noerr-Pennington* protects these efforts, and any "activity in the form of lobbying or advocacy before any branch of either federal or state government." *See, e.g.*, *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998). This includes efforts to influence the official decisions of executive and legislative bodies. *Id.* ("[L]obbying effort designed to influence a state administrative agency's decision . . . is within the ambit of the doctrine."). Moreover, Quechan faced threatened litigation, and conduct and communications in advance of contemplated litigation are protected by the Petition Clause and the *Noerr-Pennington* doctrine, even if no case is ultimately filed. *See, e.g.*, *Sosa*, 437 F.3d at 942, 930–32 & n.6 (*Noerr-Pennington* doctrine barred claims based on pre-litigation demand letters). And "[t]he Ninth Circuit has applied the doctrine to protect petitioning activity as well as activity incidental to and in anticipation of petitioning activity." *Cal. Pharmacy Mgmt., LLC v. Redwood & Cas. Ins. Co.*, 2009 WL 3514571, at *3 (C.D. Cal. Oct. 26, 2009).

The Rosette Defendants' Conduct Is Incidental to Quechan's Protected Activity and Cannot Give Rise to Liability. It is "the law of this circuit . . . that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity." *Sosa*, 437 F.3d at 935. "The immunity provided under the doctrine extends to . . . activities preliminary to the formal filing of litigation, communications between private parties sufficiently related to

petitioning activity; and even pre-litigation information." *Macy's Inc. v. Initiative Legal Grp.*, 2015 WL 12655379, at *1 (C.D. Cal. May 12, 2015) (quotations and citations omitted). Consistent with these principles, the Ninth Circuit has held that attorneys' advice to and conduct on behalf of clients engaged in petitioning activity is immune from liability to third parties. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645–46 (9th Cir. 2009) (where petitioning conduct is protected, "it follows" that attorneys' conduct incidental to petitioning is also protected). Here, because the challenged communications—which all concern Quechan's compact negotiations, dispute with California, and representation and strategy in both—are incidental to Quechan's protected petitioning activity, they too are protected by the *Noerr-Pennington* doctrine.

For similar reasons, and as more fully explained in the Rosette Defendants' Special Motion to Strike, the Rosette Defendants' communications with Quechan and the State in connection with the compact negotiations are also protected by California Civil Code section 47, and cannot form the basis of liability. *See* Cal. Civ. Code § 47(b); *Olsen v. Harbison*, 191 Cal. App. 4th 325, 333 (2010) (section 47(b) "immunizes defendants from virtually any tort liability (including claims for fraud)" based on protected communications). And to the extent that the Individual Plaintiffs seek to pursue their claim based on any legal advice that the Rosette Defendants gave to Quechan, that advice is privileged and cannot be used to prove a third party's case. *See, e.g.*, *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451, 458 (2001) (a "plaintiff may not prosecute a lawsuit if in doing so client confidences would be disclosed.").

B. Williams & Cochrane's RICO Claims Against the Rosette Defendants Are Frivolous and Not Plausible or Adequately Pled

Williams & Cochrane's RICO claims have no place in this dispute. As the firm admits, its RICO claims are nothing more than repackaged state-law claims for interference with contract, all of which seek to vindicate a single supposed "injury:"

the firm's termination by Quechan and replacement with Rosette, LLP. (Docket No. 43 at 7, 17.) But "Congress enacted RICO 'to combat organized crime, not to provide a federal cause of action and treble damages' for personal injuries." *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002) (quotations and citations omitted). And because it is often a vehicle for abuse, courts should "strive to flush out frivolous RICO allegations at an early stage of the litigation." *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 827 (9th Cir. 2003), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007). Williams & Cochrane's claims here fall precisely into that category.

To support a RICO claim, a plaintiff must establish that defendants participated in: "(1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt." *Eclectic Props.*, 751 F.3d at 997. "In addition, the conduct must be (5) the proximate cause of harm to the victim." *Id.* That harm must be a concrete injury to business or property. *Avalos v. Baca*, 596 F.3d 583, 594 (9th Cir. 2010) (describing RICO standing requirements.) Bare recitals of these elements are insufficient to survive a motion to dismiss, and when defendants "otherwise act as routine participants in American commerce, a significant level of factual specificity is required to allow a court to infer reasonably that such conduct is plausibly part of a fraudulent scheme." *Eclectic Props.*, 751 F.3d at 997–98. Williams & Cochrane alleges (1) a RICO claim against the Rosette Defendants; and (2) a separate claim for conspiracy to violate RICO against the Rosette Defendants and the individual Quechan Defendants. The required factual specificity is not alleged with respect to any element of either claim, and while ostensibly based on "mail and wire fraud," the FAC fails to plead with particularity a single instance of any such fraud.

a. The RICO Claim Fails Because the FAC Does Not Allege a Cognizable RICO Enterprise

The FAC falls far short of alleging that the Rosette Defendants constitute a

RICO enterprise, rather than simply a law firm run by Mr. Rosette. "To show the existence of an enterprise . . . plaintiffs must plead that the enterprise has (A) a common purpose, (B) a structure or organization, and (C) longevity necessary to accomplish the purpose." *Eclectic Props.*, 751 F.3d at 997. An enterprise must also consist of at least two distinct entities—a defendant and an enterprise—not one entity referred to by two different names. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). "[A] single individual or entity cannot be both the RICO enterprise and an individual RICO defendant." *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992). The FAC fails to allege the existence of a RICO enterprise because it does not sufficiently allege an association-in-fact by distinct entities. *See Boyle v. United States*, 556 U.S. 938, 944 (2009) (RICO enterprise "includes any union or group of individuals associated in fact . . . for a common purpose of engaging in a course of conduct.") (quotations and citations omitted). While the FAC identifies the "enterprise" as the Rosette Defendants, it fails to identify how the actions of the corporate entities, which can act only through the person directing them, are distinct from Mr. Rosette himself.

According to the FAC, Mr. Rosette "is the President and Director of Rosette & Associates, PC, which is in turn a general partner of a parent entity named Rosette, LLP." (FAC ¶ 15.) Mr. Armstrong, the other member of the supposed "enterprise," is alleged to be "a senior of counsel with Rosette, LLP who has been with the firm since before 2009." (*Id.* at ¶ 18.)[6] There are no distinct allegations of wrongdoing against Rosette & Associates, PC or Rosette, LLP. Naming these

[6] The only factual allegations against Mr. Armstrong are that he (1) requested the Quechan Compact file from Williams & Cochrane after Rosette, LLP was retained (*id.* ¶¶ 120) and (2) corresponded with the State's lead negotiator on behalf of Pauma while the Pauma Litigation was pending. (*Id.* ¶¶ 169–171) Naming Mr. Armstrong as a defendant based on these paper-thin allegations is exactly the type of RICO abuse that courts have stood vigilant against. *Cf. Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027–28 (8th Cir. 2008) ("The requirements of § 1962(c) must be established as to each individual defendant.").

parties separately does not create a RICO enterprise: "[t]he requirement of distinctness cannot be evaded by alleging that a corporation has violated the statute by conducting an enterprise that consists of itself plus all or some of its officers or employees." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013); *see also In re Toyota Motor Corp. Unintended Acceleration Mktg., etc. Litig.*, 826 F. Supp. 2d 1180, 1202–03 (C.D. Cal. 2011) (company-defendant and its agents, employees, and directors do not constitute an enterprise). A contrary reading of the statute "would encompass every fraud case against a corporation." *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997). "The courts have excluded this far-fetched possibility by holding that an employer and its employees cannot constitute a RICO enterprise." *Id.*

And because the FAC fails to describe with any detail the alleged "enterprise's" organization, or include allegations of wrongdoing against anyone other than Mr. Rosette, it fails to allege "that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163 (quotations and citations omitted, emphasis in original); *see also River City Mkts.*, 960 F.2d at 1461 ("[A]n individual cannot associate or conspire with himself."). The FAC therefore fails to allege the existence of a RICO enterprise, let alone allege one with particularity.

b. The RICO Claim Also Fails Because There Is No Pattern of Racketeering Activity

The sixth claim for relief also fails to plead with particularity a pattern of racketeering activity. A "pattern" requires "at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5). Racketeering activity, in turn, is defined as a violation of an enumerated statute, including mail and wire fraud under 18 U.S.C. sections 1341 and 1343. *Id.* § 1961(1). Williams & Cochrane's RICO claim is based on supposed predicate acts of alleged mail and wire fraud, all of which are barred by *Noerr-Pennington*, as discussed above. But even if they were not barred, the

conduct identified by the FAC does not amount to fraud. The elements of mail and wire fraud are: (1) the existence of a scheme to defraud; (2) the use of wire, radio, television, or mail to further the scheme; and (3) a specific intent to defraud. *See United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013) (wire fraud); *Eclectic Props.*, 751 F.3d at 997 (mail fraud). Rule 9(b)'s heightened pleading standard requires plaintiffs to "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Although Williams & Cochrane has cast its net wide in search of alleged predicate acts, they fall into just three categories, none of which constitute fraud (*See* FAC ¶ 288): (1) communications with and on behalf of Pauma, in connection with the Pauma Litigation (*id.* ¶ 288 (a), (b), (d), (e), (f)); (2) communications with and on behalf of Quechan, in connection with Quechan's disputes with California (*id.* ¶ 288(g), (h), (i), (j), (k), (l), (m)); and (3) communications with another attorney specializing in tribal law, Michelle La Pena, allegedly about Ms. Williams and Mr. Cochrane (*id.* ¶ 288 (c)). All of the statements identified in the first and third categories are alleged to have occurred in 2010 and 2011, meaning they are time-barred under the applicable four-year statute of limitations, which runs from the discovery of a plaintiff's injury. *See Rotella v. Wood*, 528 U.S. 549, 558 (2000) (rejecting "any accrual rule softened by a pattern discovery feature"). The most recent of these allegations—that Mr. Rosette and his associates communicated with the state negotiator (as authorized by Pauma but without Williams & Cochrane's knowledge) during the Pauma Litigation—dates to August 2011, and Ms. Williams complained of it herself at the time. (*See* Ex. 5 to Rogers Decl. at 91.) The remaining alleged acts all occurred earlier. As a result, all of the supposed predicate acts from 2011 or earlier are barred by the statute of limitations.

Second, while Williams & Cochrane may not like the content of the alleged statements or their consequences, only one is actually alleged to have contained a

misrepresentation: "telling the tribe and/or certain putative Quechan Councilmembers that Robert Rosette was responsible for litigating the Pauma suit upon which the tribe's dispute with the State of California was in part based." (FAC ¶ 288(g).) Plaintiff does not allege when or to whom the statement was made, or what words were used. But even if those allegations were present, Plaintiff cannot overcome the fact that this supposed statement is actually true. As judicially noticeable documents and Williams & Cochrane's own allegations demonstrate, Mr. Rosette *was* responsible for litigating a major victory for Pauma, in the form of the preliminary injunction allowing it to pay lower remittances to the State and his litigation strategy set the course for the entire case. (*See* FAC ¶ 41, 45, Exs. 1–4 to Rogers Decl.) Even if the statement was false (which it is not), one act does not constitute a pattern under RICO; nor can a single act be attributable to two defendants without detailed allegations concerning their involvement. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 914 (C.D. Cal. 2012) (requiring plaintiff to "properly identify two acts of racketeering activity" by each defendant). Plaintiff also fails to indicate which, if any, of the acts identified occurred through mail or over wires.

Finally, Williams & Cochrane does not allege facts giving rise to an inference that any Rosette Defendant had a specific intent to defraud. Nor does Williams & Cochrane allege facts that "exclude [the] plausible and innocuous alternative explanation" for the Rosette Defendants' actions—that they were advising clients and potential clients in the course of operating a law firm. *Eclectic Props.*, 751 F.3d at 998, 1000. "[W]hen faced with two possible explanations [for defendants' conduct], only one of which can be true and . . . results in liability, [plaintiff] cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation." *Id.* at 996 (quotations and citations omitted). The facts alleged in the FAC are far more consistent with ordinary law firm operations in a close-knit community than they

are with a seven-year conspiracy to engage in racketeering.

c. The RICO Claim Also Fails to Allege Concrete Injury and Proximate Causation

Plaintiff's RICO claim also must be dismissed because Williams & Cochrane fails to allege that any injury to its business or property "was 'by reason of' the RICO violation, which requires the plaintiff to establish proximate causation." *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008). Here, its only purported loss was the contingency fee it supposedly missed out on because Quechan terminated its representation. "When a Court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). There are no facts in the FAC either demonstrating Williams & Cochrane's entitlement to the fee or showing that its loss was attributable to a RICO violation. Williams & Cochrane's agreement with Quechan included an absolute right to terminate the firm at will, meaning that it had no legitimate expectation to ongoing payments. (FAC ¶ 113.) To the extent that Williams & Cochrane feels it is owed more under its contract, it can pursue that contractual claim. That contractual claim is what Williams & Cochrane bargained for and that right remains intact. There is no RICO conspiracy when an attorney advises a potential client that his or her services will provide better and more cost-effective means to achieve the client's goals. To the contrary, this is speech that the First Amendment's Petition Clause protects.

d. The RICO Conspiracy Claim Fails To Allege Either an Agreement or a Substantive RICO Violation

In addition to the sixth claim for relief, Williams & Cochrane alleges that the Rosette Defendants, along with Defendants Escalanti and White, should be held liable for engaging in a *separate conspiracy* to violate RICO under 18 U.S.C. § 1962(d), allegedly because they agreed to participate in "an enterprise aimed at

creating a sham online payday lending business at the tribe in an environment that will avoid detection by" Quechan. (FAC ¶ 293.) Putting aside the sheer volume of speculative assertions, utter lack of properly pleaded facts, and outright falsehoods in this section of the FAC, Williams & Cochrane have no standing to pursue a claim based on hypothetical injuries to someone else (the Tribe), and the FAC makes no effort to tie its dubious allegations to Williams & Cochrane, the only party asserting the claim. Not only must Williams & Cochrane allege a concrete injury to its business or property to maintain a RICO conspiracy claim (*see* 18 U.S.C. § 1964(c)), that injury must be caused by "an act . . . . that is independently wrongful under RICO." *Beck v. Prupis*, 529 U.S. 494, 505–07 (2000). Plaintiff alleges neither, simply repeating that it is owed over $6 million dollars in "contract damages" for a contingency fee it hoped to collect from Quechan. (FAC ¶ 296.)

The conspiracy claim fails to allege all other requirements elements, too. To state a claim for a violation of section 1962(d), Williams & Cochrane must "allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Again, Williams & Cochrane alleges neither. Nor are there details explaining the structure or operations of the "enterprise" allegedly formed by Defendants, and there is no pattern or practice of racketeering activity alleged. As with the other RICO claim, the so-called predicate acts include only the use of mail and wires, but no fraud. And more fundamentally, Williams & Cochrane's RICO conspiracy claim rests on the faulty premise that online lending is *per se* unlawful.[7] There are no plausible allegations that Mr. Rosette has advised Quechan in connection with any unlawful

[7] *See, e.g.*, *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 108 (2d Cir. 2014) (tribes have "established internet-based lending companies in the hopes of reaching consumers who had difficulty obtaining credit at favorable rates but who would never venture to a remote reservation.").

conduct. Thus, the FAC "stops short of the line between possibility and plausibility of entitlement to relief" as it alleges fails to exclude innocuous explanations for the challenged conduct. *Iqbal*, 556 U.S. at 678

C. Williams & Cochrane's Lanham Act Claims Fail as a Matter of Law Because the Challenged Statements Are Not False and Did Not Cause Any Alleged Harm

Williams & Cochrane cannot hold Mr. Rosette, Rosette & Associates, PC, and Rosette, LLP liable under the Lanham Act for a statement in Mr. Rosette's biography about his involvement in the Pauma Litigation and a press release announcing the Quechan Compact. Here again, Williams & Cochrane seeks "contract damages and injuries totaling at least $6,209,916.10"—the value of the alleged contingency fee it seeks to recoup from Quechan through its other claims. (*See* FAC ¶ 274.) Williams & Cochrane's view of the Lanham Act would upend the statute's reach and render actionable standard practices across the legal industry, where lawyers regularly include biographies referencing attorneys' involvement in complex cases that required contributions from many different attorneys over time. The Lanham Act does not appear to have been applied in this context, in any jurisdiction, and applying it here would significantly expand the Act's reach, calling into question nearly every statement about past work by any attorney who functioned as part of a team or who assumed representation from another firm. Each claim fails for multiple other reasons as well.

The Challenged Statements Are Not Actionable. To state a claim for false or misleading advertising under the Lanham Act, Plaintiff must allege with particularity under Rule 9(b):[8] (1) a false or misleading statement of fact in a commercial advertisement about product or services; that (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; that

[8] *See, e.g.*, *Nutrition Distribution, LLC*, 2017 WL 2547307, at *2 (collecting authorities).

(3) the deception is material (likely to influence the purchasing decision); that (4) the defendant caused its false statement to enter interstate commerce; and that (5) the plaintiff has been or is likely to be injured as a result of the false statement. *See Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012).

Williams & Cochrane first takes issue with a specific statement in Mr. Rosette's biography—calling it "literally false"—but the FAC does not plausibly allege any falsity or sufficiently plead its materiality or resulting injury. Williams & Cochrane alleges that Mr. Rosette and the Rosette entities advertised to the general public that "Mr. Rosette . . . successfully litigated a case saving [Pauma] over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger." (FAC ¶¶ 66, 147–149, 274). Williams & Cochrane then speculates that Mr. Rosette "presumably" told or wrote the same fact to Quechan President Keeny Escalanti and Councilmember William White because the Tribe hired Rosette, LLP to replace the firm. (*Id.* ¶¶ 4, 149, 192.) On the basis of these allegations alone, Plaintiff seeks $18,629,748.30—treble damages for the "lost" contingency fee from Quechan—and disgorgement of "direct profits." (*See* Prayer for Relief at 119, ¶ 3.)

"A handful of statements to customers does not trigger protection . . . ." under the Lanham Act. *Walker & Zanger, Inc. v. Paragon Indus., Inc*., 549 F. Supp. 2d 1168, 1182 (N.D. Cal. 2007) (quotations and citations omitted). But even if it did, Plaintiff's desire to minimize Mr. Rosette's role in the Pauma Litigation is not a basis for a Lanham Act claim. The statement about Mr. Rosette's work on the Pauma Litigation is *not* false. Plaintiff admits that Mr. Rosette's firm represented Pauma (FAC ¶ 42) and filed on Pauma's behalf a complaint and a motion for preliminary injunction against the State of California seeking rescission of its 2004 Compact. (*Id.* ¶ 41.) Both documents list Mr. Rosette as Pauma's lead attorney, and Mr. Rosette has testified under oath—as alleged in Plaintiff's own FAC—that he directed the strategy that resulted in Pauma's successful motion for preliminary

injunction. (*Id.* ¶ 43.) This is the victory Mr. Rosette's biography champions, and the FAC does not plausibly allege otherwise.

It does not matter that associates employed and supervised by Mr. Rosette drafted key briefs, made court appearances, and contributed to the success of the Pauma Litigation. This does not change the fact that he was the lead partner in the litigation when the key victories were achieved. Lead partners are ultimately responsible for the success or failure of litigation, even though clients and courts understand that associates and other law firm and client personnel often play important roles. Nothing about Mr. Rosette's statement denied the role of Ms. Williams or Mr. Cochrane.[9]

Nor does the challenged statement take credit for subsequent developments in the Pauma Litigation after Williams & Cochrane took over. For example, Mr. Rosette makes no reference to the $36.3 million award of restitution for past overpayments, litigated by Plaintiff, even though that judgment was made possible only by the strategic direction provided by Mr. Rosette at the outset. In fact, the statement challenged in the FAC was made by Rosette & Associates in Mr. Rosette's biography as early as 2011, several years *before* the district court determined Pauma was entitled to restitution for past overpayments. (*See* Ex. 1 to Cienfuegos Decl.; *see also* FAC Ex. 7, dated August 25, 2014.) Thus, the only reasonable interpretation of the statement's reference to savings is those attributable to the preliminary injunction alone.[10]

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[9] That Mr. Rosette was unable to attend the hearing on the preliminary injunction is unremarkable and does not detract from his tactical and directional contributions.

[10] Moreover, given how long the challenged statement has been included in Mr. Rosette's biography, a presumption of laches applies. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002) ("[I]f the claim is filed after the analogous limitations period has expired, the presumption is that laches is a bar to suit."); *see also Baby Trend, Inc. v. Playtex Prods., LLC*, 2013 WL 4039451, at *5 (C.D. Cal. Aug. 7, 2013) (applying laches to grant motion to dismiss Lanham

As for the fifth claim for relief, Williams & Cochrane asserts that a press release posted on Rosette, LLP's website announcing the conclusion of the Quechan Compact, which makes no reference to Mr. Rosette's involvement or his representation of the Tribe, is a misleading advertisement. (Ex. 40.) Williams & Cochrane claims that the press release is "misleading if not a literally false representation of fact," because its mere existence, coupled with the inclusion of Mr. Rosette's contact information, "implies that Robert Rosette is responsible for negotiating the Quechan compact." (FAC ¶¶ 277–278.) It strains credulity to suggest such a website's announcement of news, in conjunction with an attorney's contact information, suggests responsibility for the development. Regardless, there is nothing false or misleading about the statement. Mr. Rosette *did* represent Quechan, as Williams & Cochrane acknowledges (*id*. ¶¶ 116, 120, 204), and Mr. Rosette *was* responsible for concluding compact negotiations with the State. (*Id*. ¶¶ 6, 204.) Those facts are the *sine qua non* of Plaintiff's case. Thus, the Court may determine as a matter of law that the press release was neither false nor misleading. *See, e.g.*, *Nat'l Lighting Co. v. Bridge Metal Indus., LLC*, 601 F. Supp. 2d 556, 565 (S.D.N.Y. 2009) (granting motion to dismiss based on lack of falsity or misleading content).

At most, Plaintiff wants to quibble about the relative contributions of the lawyers on each matter. But, consumers are well aware that many members of a team contribute to efforts involving litigation. *See Gensler v. Strabala*, 764 F.3d 735, 738 (7th Cir. 2014) (clients "who pay millions for substantial projects . . . know full well that it takes [a] team to design and execute the plans.") "They also know that teams have leaders." *Id.* Courts cannot and should not use the Lanham Act to dissect cases or transactions to adjudicate which lawyers made significant

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Act claim, where it was clear on the face of the complaint that the claim was filed more than a year and a half after the applicable period expired).

contributions and which were unremarkable non-factors. Doing so would invade the attorney-client relationship, calling on clients and others to opine on the relative contributions of the various lawyers. It is not the purpose of the Lanham Act or the role of federal courts to promote "an unending roundelay of litigation, an evil far worse than an occasional unfair result." *See Rodriguez v. Panayiotou*, 314 F.3d 979, 989 (9th Cir. 2002) (quoting *Silberg v. Anderson*, 50 Cal. 3d 205, 214 (1990)). And, even if Williams & Cochrane could produce evidence from former clients, adversaries or judges to prove some degree of puffery in the challenged statements, it would not be actionable given Mr. Rosette's undisputed role in both matters. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (puffery may be determined as a matter of law and is not actionable under Lanham Act). The challenged statements imply no facts beyond Mr. Rosette's leadership of the Pauma case in its early stages and his development of successful case theories.

Williams & Cochrane Was Not Injured By Either Statement. To state a claim under the Lanham Act for false advertising, Williams & Cochrane must go beyond traditional Article III standing principles. As one court in this District recently explained:

> First, a plaintiff must demonstrate . . . an injury to a commercial interest in reputation or sales. Second, a plaintiff must demonstrate that its injuries are proximately caused by violation of the Lanham Act. Specifically, a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising.

Plan P2 Promotions, LLC v. Wright Bros., Inc., 2017 WL 1838943, at *5 (S.D. Cal. May 8, 2017) (quotations and citations omitted). In connection with the Quechan press release, Williams & Cochrane has identified no injury at all. And the only specific "injury" that Williams & Cochrane identifies in connection with the Pauma Litigation statement again focuses on the firm's termination by Quechan. But the

FAC offers no allegations consistent with Rule 9(b) that anyone from Quechan received or reviewed a commercial advertisement from Mr. Rosette or his firm containing any statement about the Pauma Litigation. (*See, e.g.*, FAC ¶¶ 4, 149, 192.) There is no nexus, then, between the challenged statement and Quechan's act of firing Williams & Cochrane and refusing its demands for a $6 million contingency fee. In fact, the FAC's allegations undermine any suggestion that such a nexus could exist: according to the FAC, Williams & Cochrane was hired by Quechan in the first place because the Tribe saw contemporaneous news articles about Plaintiff's role in obtaining restitution for Pauma. (*Id.* ¶ 68.) Since the Tribe knew about Plaintiff's later-in-time victories in the Pauma Litigation, it is not plausible to suggest that the Tribe could be misled or lured away by Mr. Rosette's claim of responsibility for prior aspects of the same case, and the FAC offers no explanation. Stepping back, the only plausible reading of the FAC is that Williams & Cochrane was fired by Quechan's new leadership because of: Quechan's absolute right to change counsel, Williams & Cochrane's cost and performance, and the structure of the fee agreement that Williams & Cochrane prepared.

D. The Individual Plaintiffs Cannot Assert a Malpractice Claim Against the Rosette Defendants Because No Attorney-Client Relationship Exists

The Individual Plaintiffs' malpractice claim is barred by the *Noerr-Pennington* and the litigation privilege, *supra* Section III.A, and it also fails as a matter of law because there is no attorney-client relationship between the Individual Plaintiffs and the Rosette Defendants. To maintain a claim for professional negligence (or malpractice), a plaintiff must allege a duty, breach, proximate cause, and actual damages. *See Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 693 (2009) (listing elements). The Individual Plaintiffs, two dozen members of the Quechan Tribe, are not the Rosette Defendants' clients, and the Rosette Defendants owe them no duty. The FAC does not allege otherwise. In fact, Rosette, LLP's Attorney Services Contract with Quechan, executed in connection with the

California compact dispute, affirmatively states that the firm represents only the Tribe, not its individual members:

> [T]he Tribe should be aware that *the Firm's representation is with the Tribe and not with its individual members*, officers, executives, shareholders, directors, partners, or persons in similar positions, or with its agencies, parent, subsidiaries, or other affiliates. In those cases, *the Firm's professional responsibilities are owed only to that entity, alone* . . . .

(*See* Ex. 2 to Cienfeugos Decl. at Section 2, emphasis added.)[11] Rosette, LLP's duties were therefore to the Tribe itself, not the individual members, and "[a]bsent duty there can be no breach and no negligence." *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1267 (1990); *see also Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 529 (2004) ("[A]n attorney will normally be held liable for malpractice only to the client with whom the attorney stands in privity of contract, and not to third parties."). Moreover, Quechan's Constitution provides that only the Tribal Council has authority "[t]o present and prosecute any claims or demands of the Quechan Tribe" and "[t]o employ legal counsel for the protection and advancement of the rights of the Tribe and its members." (*See* Ex. 6 to Rogers Decl. at Art. IV, Section 1(b) and (d).) The Individual Plaintiffs therefore lack standing.

The Individual Plaintiffs also fail to identify any specific action or inaction by Mr. Rosette or his colleagues that allegedly fell below professional standards, instead referring vaguely to particular aspects of the final Quechan Compact that they believe would have been negotiated differently by Williams & Cochrane and citing this very litigation as evidence of that same breach. (*See* FAC ¶ 299.) In support of their claim of an adverse outcome, they implausibly assert that allegedly overdue revenue sharing payments, [redacted]

[11] This approach is consistent with American Bar Association's Model Rules of Professional Conduct, Rule 1.13. *See* ABA Rule 1.13, Comment 9 (stating that a lawyer's duty to an "organization acting through its duly authorized constituents" applies to attorneys retained to represent governmental organizations).

[redacted] only became a factor in the compact negotiations once Mr. Rosette took over. (*Id.* ¶ 205.) According to the Individual Plaintiffs, this was because the "Office of the Governor changed its negotiation position following the firm switch." (*Id.* ¶ 204.) In other words, the challenged result flowed from a decision by the State, according to the Plaintiffs, and not any action or inaction by Mr. Rosette. And the fact that Mr. Rosette ultimately negotiated a Compact that resolved *all* outstanding disputes with the State does not mean the Compact was objectionable, even though those disputes could have been addressed in other ways, like through litigation. Attorneys are "granted latitude in choosing among legitimate but competing considerations, and [are] not liable for an informed tactical choice within the range of reasonable competence." *Barner v. Leeds*, 24 Cal. 4th 676, 690 (2000).

The Individual Plaintiffs' allegations are therefore insufficient to maintain a malpractice claim, even if an attorney-client relationship existed, as they do nothing to demonstrate that the Rosette Defendants' counsel "was so legally deficient when it was given that [they] may be found to have failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Martorana*, 175 Cal. App. 4th at 693. Nor do they meet the requisite "but for" causation test in the malpractice context. *Viner v. Sweet*, 30 Cal. 4th 1232, 1244 (2003) (attorney's error or omission must be legal cause of asserted damages). The malpractice claim should therefore be dismissed with prejudice.

IV. Conclusion

For the foregoing reasons, the Rosette Defendants respectfully request that the claims for relief against them in Plaintiffs' FAC be dismissed.

Dated: April 6, 2018

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