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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

REPLY IN SUPPORT OF ROSETTE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

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

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The FAC attacks protected petitioning activity, impermissibly distorts a simple fee dispute into separate RICO claims, asserts Lanham Act claims challenging truthful marketing common in the profession, and attempts to have individual Tribal members assert claims that they have no standing to bring. The Opposition spends nearly a page reciting a lax pleading standard under Rule 8, but never engages with the heightened pleading standard that governs Williams & Cochrane's ("W&C") fraud-based RICO claims and Lanham Act claims.[1] It argues that the RICO claims are adequately pled, but never explains why the predicate acts identified in the FAC amount to mail or wire fraud. It mentions payday lending no fewer than 14 times in an effort to inflame an intra-tribal governance dispute, but fails to point to any factual allegation plausibly demonstrating that Mr. Rosette has ever discussed, let alone established, a payday lending operation with Quechan. Instead, the FAC mischaracterizes operations at other tribes and makes false assumptions about Rosette, LLP's connections and legal advice to other tribal clients. And the Opposition declines to address the fact that the Individual Plaintiffs have no authority to usurp the Tribe's right as a sovereign government to prosecute any claims that might exist under the Tribe's own engagement agreement. These dispositive legal issues warrant dismissal of all claims against the Rosette Defendants. That dismissal should be with prejudice because Plaintiffs have had two opportunities to amend their pleading, and the FAC continues to contain fatal defects that cannot be cured.

I. Argument

A. *Noerr-Pennington* Protects the Petitioning Activity Challenged in Plaintiffs' Sixth, Seventh, and Eighth Claims for Relief

The Rosette Defendants' Motion to Dismiss cites extensive authority demonstrating that the RICO and malpractice claims are premised on petitioning activity. (Mot. at 7, 9–10.) These claims seek to impose liability based on the

[1] Terms defined in the Motion are used in this Reply unless otherwise stated. Internal quotations and citations are omitted unless otherwise stated.

Rosette Defendants' meeting with Quechan to discuss compact negotiations with state governments (FAC ¶¶ 190–191); advice to Quechan in connection with its California compact negotiations and payment dispute (*id.* ¶¶ 193–198; 200–201); assumption of responsibility for compact negotiations with California (*id.* ¶¶ 299); advice to Quechan in connection with terminating W&C (*id.* ¶¶ 56, 288(h)–(k)); and request for W&C's working file after Rosette, LLP was retained (*id*. ¶¶ 288 (l)–(m)). *Noerr-Pennington* protects these pre-litigation efforts and "lobbying or advocacy before" branches of "federal or state government." *See, e.g.*, *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998).

In opposition, W&C urges a legal standard that would deny Indian tribes the constitutional protections afforded to others. The Opposition argues that the First Amendment right to petition does not apply to tribes or their leaders, arguing that the doctrine only "protects petitioning activity addressed to a 'political or superior sovereign [.]'" (Opp. at 4.) Since Indian tribes are sovereigns, the reasoning goes, they do not get the protection of *Noerr-Pennington.* The sole authority for this dramatic limitation is a dictionary definition of "petition." The phrase pulled from the dictionary—"political or superior sovereign"—does not appear in any case or statute cited by W&C, however. And the Opposition fails to acknowledge that *Noerr-Pennington* has been applied to Indian tribes engaged in petitioning activity. *See, e.g.*, *Oneida Tribe of Indians of Wisconsin v. Harms*, 2005 WL 2758038, at *3 (E.D. Wis. Oct. 24, 2005) (Oneida Tribe was "exercising rights that are protected by the *Noerr–Pennington* doctrine" in sending demand letters, filing an administrative complaint, and filing lawsuit).

Moreover, IGRA, 25 U.S.C. § 2701 et seq., requires states to negotiate with tribes about gaming rights and authorizes federal courts to adjudicate non-compliance. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1022, 1027 (9th Cir. 2010). The negotiations are compelled and controlled by federal law, which is why compact negotiations under

IGRA are distinct from negotiations between "independent sovereign entities." *Id.* at 1030 ("In IGRA, Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities."). W&C's position also contradicts the Ninth Circuit's application of *Noerr-Pennington* to governmental entities when "petitioning or lobbying of another governmental entity." *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000). W&C's approach would undercut tribes' ability to negotiate and litigate state compacts and lobby state and local governments by exposing tribes and their advisors to collateral tort litigation. There is no justification for discriminating against tribes in the manner advocated by W&C.

W&C's fallback arguments fare no better. Negotiations with state executives under IGRA are not merely business discussions: "IGRA negotiations are . . . distinguishable from regular contract negotiations." *Rincon,* 602 F.3d at 1030. Those negotiations are petitioning activity seeking more favorable treatment from another government entity also regulated by IGRA. Nor has W&C alleged consistent with *Iqbal* and its progeny that Quechan's petitioning and pre-litigation activity, and the Rosette Defendants' communications supporting it, fall into *Noerr-Pennington*'s "sham" exception. "Sham petitioning is private action that is not genuinely aimed at procuring favorable government action." *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp*., 235 F. Supp. 3d 1132, 1155 (E.D. Cal. 2017). "The sham exception applies when a defendant uses government processes, as opposed to the outcome of those processes, as a mechanism to injure plaintiffs." *Id.* There can be no doubt that Quechan's interactions with California's executive branch, which were initiated by W&C and then taken over by the Rosette Defendants, were communications directed at securing a favorable outcome for the Tribe through official channels. (*See, e.g.*, FAC ¶ 200.) Because W&C has not alleged plausibly that petitioning rights were "exercised . . . with no expectation of obtaining legitimate government action[,]" the "sham" exception to *Noerr-*

Pennington does not apply. *Comm. to Protect our Agric. Water*, 235 F. Supp. 3d at 1158 (analyzing petitioning before a non-quasi-judicial executive body).

B. W&C's RICO Claims Fail for Multiple, Independent Reasons

The Opposition confirms that the RICO claims must be dismissed. W&C seems to allege that each of the Rosette Defendants conducts the affairs of *two different RICO enterprises* made up of all of the Rosette Defendants (and occasionally the two individual Quechan defendants), associating together to put W&C out of business and establish payday lending businesses on tribal lands. (Opp. at 8; FAC ¶¶ 285 290.) But the FAC does not allege facts to support the elements required by RICO. There is a simple reason why: This is not the type of dispute that RICO governs.

W&C's partners started their careers working for Mr. Rosette, and both law firms represent Indian tribes in the Western United States. There is bound to be some overlap between clients and matters. That one or two clients terminated W&C and hired Rosette, LLP, or vice versa, is not suggestive of racketeering or criminal activity. It is a fact inherent in the private practice of law where clients enjoy the absolute right to change counsel. Whether some tribes seek to develop their economies through online lending, which is not illegal, has nothing to do with W&C or its alleged injuries.[2]

As for Quechan, the FAC does not include any plausible allegations that Rosette Defendants have discussed or helped establish an online payday lending business at the Tribe or on its lands. Instead, W&C's payday lending narrative is a red herring designed to attack W&C's competitor and foster distrust and political

[2] None of this is impacted by the content of W&C's motion seeking permission to file a "First Supplemental Complaint." (Docket No. 71.) The Rosette Defendants will respond to that motion on the schedule set by the Court, but as detailed in Rosette, LLP's Notice of Inadvertent Disclosure (Docket No. 81), the sharing of the unredacted FAC was inadvertent. How information related to specifics of Quechan's negotiations with the State would harm W&C in any event is unclear given that the public versions of W&C's pleadings promote those matters.

unrest at Quechan, and the only plausible reading of the properly pled facts in the FAC is that Mr. Rosette and the Rosette Defendants are simply operating a law firm and representing clients in the same practice area as W&C. *See, e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("When faced with two possible explanations . . . plaintiffs cannot offer allegations that are merely consistent with their favored explanation . . . . Something more is needed.").

Despite the inflammatory language and personal attacks, the Opposition ignores the key grounds for dismissal. For example, the predicate acts identified in the FAC are not pled with the requisite detail under Rule 9(b), which "requires that the pleader 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 Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989); (*see* Mot. at 14.) The Opposition also ignores that there are no allegations of the "enterprise's" structure or organization (*id*. at 17), that only one "predicate act" is alleged to have contained a misrepresentation, and that none are specifically alleged to have occurred through the mail or over wires. (*Id.* at 14.) "[W]here a plaintiff simply fails to address a particular claim in its opposition to a motion to dismiss that claim, courts generally dismiss it with prejudice." *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014). W&C's sixth claim for relief should be dismissed on this basis alone.

W&C was also required to allege the existence of "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). "A plaintiff may name all members of an associated-in-fact enterprise as individual RICO persons, but must establish that those individual members are separate and distinct from the enterprise they collectively form." *See Moran v. Bromma*, 675 F. App'x 641, 645 (9th Cir. 2017). The question therefore is not whether Mr. Rosette can be a RICO person while Rosette, LLP can be a RICO enterprise. The question is "whether the associated in fact enterprise . . . is a being

different from, not the same as or part of, the person whose behavior [RICO] was designed to prohibit." *Moran*, 675 F. App'x at 645. Since the FAC includes no allegations defining the enterprise beyond its individual defendant-constituents, all of whom are related through Rosette, LLP, and provides no explanation of how the "enterprise's" efforts differ from the efforts of Rosette, LLP generally, the allegations are insufficient. *See Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) ("To be sure, if the 'enterprise' consisted only of [a corporate entity] and its employees, the pleading would fail for lack of distinctiveness."); *see also In re: Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *12 (S.D.N.Y. July 15, 2016) (same).

And rather than showing that W&C has suffered "concrete financial loss" and demonstrating "a causal connection between the alleged RICO conduct and the asserted injury," *Sasser v. Amen*, 2001 WL 764953, at *9 (N.D. Cal. July 2, 2001), *aff'd*, 57 F. App'x 307 (9th Cir. 2003), the Opposition argues that RICO's causation standard should be a flexible one, citing alleged injuries flowing from time-barred predicate acts. (Opp. at 12.) But W&C cannot recover damages for injuries sustained as a result of alleged acts more than four years ago. (Mot. at 14.) That rule is not diminished by the undisputed proposition that time-barred predicate acts may be considered in showing the existence of a RICO "conspiracy" (which W&C has not shown). *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996) (despite separate accrual, "damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.").

As for any conduct alleged to have occurred within the last four years, it all relates to the Rosette Defendants' retention by and representation of Quechan. The Motion establishes why the Rosette Defendants' communications with Quechan are protected by the *Noerr-Pennington* doctrine, meaning they cannot form the basis of liability. (Mot. at 6–10.) But even if they were not protected, the Opposition still does not explain how the Rosette Defendants caused W&C to miss out on a fee it

was not entitled to recover under its contract, why W&C expected continuing work from Quechan when its agreement provided the right to terminate at any time and there was already a change in leadership at Quechan, how the Rosette Defendants are responsible for Quechan's payments to W&C, or how any of these consequences flowed from the operations of a RICO enterprise.

Finally, W&C's seventh claim for relief against the individual Quechan Defendants and the Rosette Defendants for a separate RICO conspiracy is not addressed in the Opposition save for a single sentence repeating the FAC's allegations. (*Compare* Mot. at 16–17 *with* Opp. at 9.) W&C's failure to acknowledge the Rosette Defendants' arguments concerning this claim is fatal. *Moore*, 73 F. Supp. 3d at 1205.

C. W&C's Lanham Act Claims Must Be Dismissed

The Opposition offers no legal authority to support W&C's argument that the common practice of attorneys' referencing their involvement in complex cases litigated by teams is actionable under the Lanham Act. W&C does not refute that Mr. Rosette's firm represented Pauma, or that Mr. Rosette was listed as the lead attorney on Pauma's complaint and motion for preliminary injunction. (Mot. at 19.) Nor has W&C disputed that the district court's order granting the motion immediately allowed Pauma to make lower monthly revenue-sharing payments to California, saving it millions of dollars over the life of the compact. (Mot. at 3.) Instead, to make their linguistic argument for a false or misleading statement, W&C re-writes Mr. Rosette's biography, inserting "personally" between "Mr. Rosette" and "litigated," and adding "entire" before the word "case." (Opp. at 14–15.) Those words do not exist in the challenged statement; the statement *actually* made is both true and a description one might find on any attorney's biography.

Recognizing that its false advertising theory under the Lanham Act fails, W&C requests that the Court weigh the relative contributions of a team of lawyers in order to analyze this as "reverse palming off" claim. (Opp. at 16.) This would

invade attorney work product and attorney-client privilege by requiring judicial fact-finding on and characterizations of the relative roles and contributions of various lawyers in an earlier case or transaction, which could only be based on evidence adduced from clients, lawyers, and perhaps even jurors. (Mot. at 21.) W&C's legal theory is also barred by the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003), holding that "reverse palming off" only applies to "the producer of [] tangible goods that are offered for sale, not to the author of any idea, concept, or communication embodied in those goods." *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 219 F. Supp. 3d 984, 993 (N.D. Cal. 2017); *see also Grady v. Scholastic Inc.*, 2013 WL 12131721, at *5 (C.D. Cal. Jan. 31, 2013) ("Supreme Court and Ninth Circuit authority indicates that [a] 'failure to provide appropriate credit' claim is not cognizable under the Lanham Act."). "Reverse palming off" is not an applicable theory where, as here, "[d]efendants are accused only of failing to identify someone who contributed not goods, but ideas or communications (or, for that matter, 'services')." *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1184 (C.D. Cal. 2003).

W&C also fails to provide any support for its allegation that the challenged statement caused any injury. There are no credible allegations to show that the challenged statement (which had existed for years) suddenly caused W&C to be fired. The only plausible inference is that the change in counsel resulted from a combination of political dynamics within the Tribe, the windfall contingent fee that W&C was angling to demand, and the new Tribal Council's genuine dissatisfaction with W&C's approach. (Mot. at 22–23.)

Finally, W&C has not explained how the Rosette, LLP press release concerning the 2017 Quechan Compact, which makes no mention of Mr. Rosette's role in negotiating it, "falsely touts that he is solely responsible for the Quechan compact." (Opp. at 16.) Instead, W&C asks the Court to glean this meaning from the "whole of the words and images," without pointing to any words or images,

other than Mr. Rosette's contact information. (*See id.*) W&C has therefore failed to "identify *any* false statement, much less explain why it is misleading." *Seoul Laser Dieboard Sys. Co. v. Serviform, S.r.l.*, 957 F. Supp. 2d 1189, 1200 (S.D. Cal. 2013) (applying Rule 9(b) and granting motion to dismiss). And, as both parties agree, Mr. Rosette was responsible for concluding Quechan's compact negotiations. (FAC ¶ 204.) Both Lanham Act claims should be dismissed with prejudice.

D. The Individual Plaintiffs Lack Standing to Pursue a Malpractice Claim and Also Do Not Allege a Sufficient Claim

As detailed in the Rosette Defendants' concurrently filed Reply in Support of their anti-SLAPP Motion, the Individual Plaintiffs lack standing to bring a malpractice claim against Quechan's lawyers. "[A]n attorney's duty depends on the existence of an attorney-client relationship." *Thayer v. Kabateck Brown Kellner LLP*, 207 Cal. App. 4th 141, 160 (2012). The Individual Plaintiffs are not the Rosette Defendants' clients; the applicable Attorney Services Contract, which is judicially noticeable, specifically provides that "the Firm's representation is with the Tribe and not with its individual members . . . the Firm's professional responsibilities are owed only to that entity, alone." (*See* Docket No. 54-2, Ex. 2 to Cienfuegos Decl. at Section 2.)

Nor are the Individual Plaintiffs third-party beneficiaries. (Opp. at 19.) "[F]or one to succeed as a third party beneficiary, the contract must be expressly for the benefit of a third party." *Thayer*, 207 Cal. App. 4th at 160. The Rosette Defendants' Attorney Services Contract with Quechan is not for the Individual Plaintiffs' express benefit; it rejects any professional obligations to individual Tribe members. "The fact that third parties are . . . benefited, or damaged, by the attorney's performance does not give rise to a duty by the attorney to such third parties, and hence cannot be the basis for a cause of action by the third parties for the attorney's negligence." *See Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1268 (1990).

The few cases that the Individual Plaintiffs rely on to argue otherwise are outside of the attorney-client context or involve third parties with *direct* interests in the representation, such as beneficiaries of a will. Unlike here, direct interests by non-clients arise only when "legal advice was foreseeably transmitted to or relied upon by [the nonclients] or . . . [the nonclients] were intended beneficiaries of a transaction to which the advice pertained." *Fox v. Pollack*, 181 Cal. App. 3d 954, 961 (1986) (finding no duty to non-clients). There is simply no direct interest where the individual members of an organization or association hope to attain some financial advantage from a transaction negotiated on behalf of the organization writ large. *See Goldberg*, 217 Cal. App. 3d at 1268 ("Responsible representation of a city, county or other governmental unit will improve the lot of its citizens and employees . . . In these cases the third parties are incidental beneficiaries."); *Aragon v. Pappy, Kaplon, Vogel & Phillips*, 214 Cal. App. 3d 451, 464 (1989) (union member "only an indirect beneficiary of the negotiated, enforced agreement" entered into on behalf of union).

The Opposition also fails to address what specific action or inaction the Individual Plaintiffs claim was negligent, why it "was so legally deficient . . . that [defendants] may be found to have failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise," *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 693 (2009), and how it caused them any injury. As a result, the FAC fails to state a claim for malpractice.

II. Conclusion

For the foregoing reasons, the Rosette Defendants respectfully request that the Court dismiss with prejudice the claims against them in the FAC.

Dated: May 18, 2018

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