Cheryl A. Williams (Cal. Bar No. 193532)
Kevin M. Cochrane (Cal. Bar No. 255266)
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
125 S. Highway 101
Solana Beach, California 92075
Telephone: (619) 793-4809

Attorneys for Plaintiffs
WILLIAMS & COCHRANE, LLP, *et al*.

IN THE UNITED STATES DISTRICT COURT

FOR THE 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*;

(All 27 Individuals Listed in ¶ 12)

Plaintiff,

vs.

ROSETTE & ASSOCIATES, PC; **ROSETTE, LLP**; **RICHARD ARMSTRONG**; **QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION**, *a federally-recognized Indian tribe*; **ROBERT ROSETTE**; **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

WILLIAMS & COCHRANE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Date: August 24, 2018
Time: 1:30 p.m.
Dept.: 2D
Judge: The Hon. Gonzalo Curiel

INTRODUCTION

Williams & Cochrane ("Firm") hereby files this motion for leave to file the Third Amended Complaint that is attached hereto as Exhibit A – a pleading that simply adds a claim for intentional interference with contract/prospective economic advantage against the responsible parties based upon the allegations that are already on the docket as part of the Second Amended Complaint ("SAC"). *See* Dkt. No. 100.

Federal Rule of Civil Procedure 15(a)(2) ("Rule 15(a)(2)") governs amendments to a pleading other than the first one that may be done as a "matter of course" within 21 days of service of the pleading or the responsive filing. For these "other" amendments, a party may amend its pleading by obtaining leave of court, which "the district court should freely give… when justice so requires." *Silva v. Di Vittorio,* 658 F.3d 1090, 1105 (9th Cir. 2011) (citing Fed. R. Civ. P. 15(a)(2)). The "freely given" language within Rule 15(a)(2) has led the United States Court of Appeals for the Ninth Circuit to conclude that the rule should be interpreted and applied with "extreme liberality." *See, e.g., Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1051 (9th Cir. 2003); *see In re Korean Airlines Co.,* 642 F.3d 685, 701 (9th Cir. 2011) (indicating that Rule 15(a)'s "mandate is to be heeded," and that "[i]n the absence of any apparent or declared reason … the leave sought should, as the rule requires, be 'freely given.'" (quoting *Forman v. Davis,* 371 U.S. 178, 182 (1962))). This language also means that the non-movant bears the burden of demonstrating why leave to amend should not be granted. *See Horton v. Calvary Portfolio Servs., LLC,* 301 F.R.D. 547, 549 (S.D. Cal. 2014).

When making the decision on whether to grant or deny leave to amend, a district judge will typically consider four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of the amendment. *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir. 1994). The factors are not weighted equally, and by far the single most important factor in the analysis is whether prejudice would result to the non-movant as a consequence of the amendment. *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.,* 668 F.2d 1014, 1053 (9th Cir. 1981). "Absent prejudice, or a strong showing of any of the

remaining factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *C.F. v. Capistrano Unified Sch. Dist.,* 654 F.3d 975, 985 (9th Cir. 2011) (quoting *Eminence Capital,* 316 F.3d at 1051). So long as it adheres to the aforementioned rules, the district court may use its sound discretion to determine whether to grant a motion for leave to amend a pleading. With that said, the soundness of this discretion turns on not only the four factors mentioned above, but also the strong federal policy favoring the disposition of cases on the merits. *See DCD Programs Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir. 1987).

As the existing allegations in the Second Amended Complaint explain, Robert Rosette and his longtime friends at the firm WilmerHale have gone out of their way to undo the sealing orders issued by the Court in this case. First, they enlisted the aid of the Office of the Governor's Senior Advisor for Tribal Negotiations Joginder Dhillon to submit a declaration that attached and publicly disclosed *all* of Williams & Cochrane's compact-negotiation work product for Quechan that had previously been filed under seal. *See* Dkt. Nos. 50-4, 52-3. Any questions about the real motive behind this declaration should disappear after considering that Mr. Dhillon disclosed compact negotiation materials that he previously asserted were confidential, *only* disclosed Williams & Cochrane's work product (not Mr. Rosette's nor the State's), and made *no* attempt to redact any of the sensitive information contained therein that this Court found worthy of protection. *See, e.g.,* Dkt. No. 9; *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 16-01713, Dkt. No. 31-2, p. 63 (S.D. Cal. July 14, 2017). Possibly feeling emboldened by this fast one, Mr. Rosette and company then upped the ante by obtaining a copy of the unredacted materials that Cheryl Williams transmitted to opposing counsel by e-mail in connection with the filing of the First Amended Complaint (including said complaint), and then e-mailing the documents to at least *two* persons affiliated with Williams & Cochrane's client the Pauma Band of Mission Indians – one of them being a tribal member who happens to be not only a friend of Robert Rosette but a relative of Keeny Escalanti, Sr. *See* Dkt. No. 100, ¶¶ 172-73. It should go without saying that these

materials – and whatever yet-to-be discovered commentary the responsible parties provided along with them – spread like wildlife and were received and read by numerous tribal members and employees in just a matter of days. *See id.* at ¶ 173. Further, there is simply no question whether the un-redacted materials were the ones disclosed because the attorneys with Williams & Cochrane verified firsthand that the First Amended Complaint being spread around was the very same one that Ms. Williams e-mailed to opposing counsel in connection with the filing of the document – all the way down to its unique filename and meta-data. *See id.*

The attorneys for Williams & Cochrane tried to call this Court's attention to these disclosures in connection with the proposed First Supplemental Complaint, hoping that shedding light on a quickly devolving situation would get Mr. Rosette and his colleagues at WilmerHale to stand down. *See* Dkt. No. 71-1. However, all the filing did was produce the exact *opposite* result, with Mr. Rosette and WilmerHale upping the ante even more by shifting their focus from disseminating sealed filings to disseminating misinformation in connection with strategically improper filings. As to that, on June 21, 2018, WilmerHale filed a premature answer to a defunct complaint containing a myriad of cross-claims alleging that the attorneys of Williams & Cochrane violated their ethical duties in connection with their representation of Quechan. See Dkt. No. 94, pp. 16-20. Seeing a defendant answer *early* in federal litigation is practically unheard of for obvious reasons (as a Westlaw or Lexis Nexis case search proves), and the bizarreness of the situation led the attorneys with Williams & Cochrane to try and strike the responsive pleading before it was ultimately mooted by the filing of the Second Amended Complaint. *See* Dkt. No. 95-1. However, the actual reason for filing the premature Answer came to light in the weeks since, with Robert Rosette and company carrying out a plan to disseminate the Answer around Pauma along with a message that the *allegations* contained therein are *verifiable proof* that Williams & Cochrane violated its ethical duties while representing Quechan. *See* Dkt. No. 100, ¶ 174. Using at least the same tribal member who was responsible for previously disseminating the sealed pleading materials around Pauma, Robert Rosette

was successful in tainting Williams & Cochrane's contractual relationship with the tribe, as it has set up an imminent special meeting to discuss the employment status of the firm. *See id.* at ¶ 175. Considering that Williams & Cochrane is responsible for securing for Pauma the largest monetary judgment ever awarded in the now thirty-year history of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., less than two years ago, it is patently obvious that the interference by Robert Rosette and company will have enduring, irreparable effects upon the firm's relationship with this particular tribe whether there is an immediate termination or simply a painful and premature parting of ways. *See id.* at ¶ 176.

Thus, the last five months of litigation are replete with instances of Robert Rosette and WilmerHale engaging in nonstop extracurriculars in the Court's shadow, deliberately targeting a third-party client of Williams & Cochrane that neither legitimately represents. Given this, none of the amendment factors under Rule 15(a)(2) weigh against permitting Williams & Cochrane to amend its operative complaint to seek recourse for the various intentional interferences in this case. Bad faith is lacking because Williams & Cochrane gave the opposing parties the benefit of *every* doubt and only sought to amend after their actions resulted in concrete damage to an outside contractual relationship. Similarly, undue delay and the most important criterion of prejudice are nonexistent because the opposing parties are responsible for the recent harms, and Williams & Cochrane made this motion as soon as possible after realizing it suffered actual damages. Finally, as to futility, the federal courts generally "defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed" (*see Netbulla, LLC v. Distinct Corp.,* 212 F.R.D. 534, 539 (N.D. Cal. 2003)), and this Court should follow the same approach here.

CONCLUSION

For the foregoing reasons, Williams & Cochrane respectfully requests that the Court grant the motion for leave and permit the filing of a Third Amended Complaint that

is substantively identical to the one attached hereto as Exhibit A.[1]

RESPECTFULLY SUBMITTED this 23rd day of July, 2018

WILLIAMS & COCHRANE, LLP, *et al*.

By: */s/ Kevin M. Cochrane*

Cheryl A. Williams
Kevin M. Cochrane
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
125 S. Highway 101
Solana Beach, California 92075
Telephone: (619) 793-4809

[1] The redacted portions within Exhibit A (the proposed Third Amended Complaint) are identical to those within the lodged Second Amended Complaint that is the subject of Plaintiffs' pending motion to seal. *See* Dkt. No. 101.