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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' SPECIAL MOTION TO STRIKE PLAINTIFFS' SIXTH CLAIM FOR RELIEF PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

[Notice of Motion and Request for Judicial Notice Filed Concurrently]

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: October 12, 2018
Time: 1:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

Treatises

I. Introduction

Last summer, while negotiating with the State of California to resolve claims relating to a gaming compact, the new leadership of the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or the "Tribe") made a choice available to anyone facing potential litigation: it changed attorneys. Acting through its duly-elected Tribal Council, Quechan terminated Plaintiff Williams & Cochrane LLP ("W&C") and retained Defendant Rosette, LLP pursuant to Tribal law. Indignant that its former client had exercised its fundamental "right 'to sever the professional relationship [with its attorney] at any time and for any reason,'" *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 4 Cal. 5th 467, 477 (2018) (citation omitted), W&C filed suit against the Rosette Defendants and the Quechan Defendants, asserting a battery of claims that included interference with contract and prospective business advantage.[1] After the Rosette Defendants filed an anti-SLAPP motion demonstrating that W&C was legally barred from pursuing state-law claims based on the Tribe's protected decision to retain new counsel (Docket No. 31), W&C adopted a different approach: fomenting divisions within Quechan to influence the outcome of an upcoming election and recruiting individual tribal members (the "Individual Plaintiffs") to assert a putative class claim for professional negligence based on the Tribe's decision to change counsel.

The Rosette Defendants have never represented the Individual Plaintiffs—and, indeed, do not have an attorney-client relationship with individual members of the tribes Rosette, LLP represents. The Second Amended Complaint ("SAC") does not allege otherwise, and Rosette, LLP's Attorney Services Contract with Quechan explicitly disclaims any client relationship with or professional responsibilities to individual members of the Tribe. (*See* Docket No. 54-2, Ex. 2.) Ignoring these

[1] "Rosette Defendants" refers to Robert Rosette; Rosette & Associates, PC; Rosette, LLP; and another member of the Rosette firm, Richard Armstrong. "Quechan Defendants" refers to the remaining defendants.

facts, the SAC alleges that the Rosette Defendants are still somehow liable to the Individual Plaintiffs because Mr. Rosette "interfere[d]" with W&C's representation of the Tribe by assuming the representation himself, supposedly hindering the negotiations simply because W&C was no longer involved. (SAC ¶¶ 111–114.) Citing no particular act or omission by Mr. Rosette or his associates, the SAC, like the First Amended Complaint ("FAC"), claims that the mere fact of a change in counsel affected negotiations so dramatically that the gaming compact Quechan eventually signed was less favorable than earlier drafts. (*Id.*) The Court already rejected this theory as a basis for malpractice liability when it ruled on the Rosette Defendants' motion to dismiss the FAC. (Docket No. 89 at 36–37 ("[T]he differences between Quechan's final compact and W&C's draft are not stark enough to draw a reasonable inference of negligence by the Rosette Defendants.").) Plaintiffs repeated the claim in their SAC anyway. (*See* SAC ¶¶ 234–239.)

The gravamen of the Individual Plaintiffs' "negligence/breach of fiduciary duty" claim, like W&C's tortious interference claims before it, is Quechan's decision to replace W&C with Rosette, LLP, and thus, the claim is still subject to California's anti-SLAPP statute. Specifically, the claim seeks to undermine "the fundamental right of a client to choose and change his legal representation" and to impose liability for communications in the course of that representation. *Taheri Law Grp. v. Evans*, 160 Cal. App. 4th 482, 492 (2008). Courts have made clear that whenever protected conduct gives rise to the cause of action, the anti-SLAPP statute applies and no amount of artful pleading or tactical selection of claims can avoid the statute's application. *See, e.g.*, *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (looking beyond form of claim to challenged activity). A claim "arises from" protected activity when "the defendant's act underlying the plaintiff's cause of action . . . *itself*" is "an act in furtherance of the right of petition or free speech." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002). And as both state and federal courts have recognized repeatedly, the conduct underlying the Individual Plaintiffs'

state-law claim—retention of new counsel and subsequent legal representation in advance of litigation and in the course of official proceedings and petitioning activity—is protected against third-party tort liability under California's anti-SLAPP statute.[2]

The Individual Plaintiffs also cannot prevail on the merits of their professional negligence claim because they are neither clients nor intended third-party beneficiaries under the Attorney Services Contract between the Rosette Defendants and Quechan. In the context of the earlier Rule 12 motion, the Court concluded that the Individual Plaintiffs could allege standing to pursue a professional negligence claim. (Docket No. 89 at 35–36.) The Rosette Defendants respectfully submit that the Individual Plaintiffs cannot carry their burden to demonstrate that they have "a reasonable probability of prevailing" on their claim, *Graham-Sult v. Clainos*, 756 F.3d 724, 735 (9th Cir. 2014) (quotation and citation omitted), because California law does not permit a third-party beneficiary claim where the contract expressly disavows such a relationship. *See Pegasus Satellite Television, Inc. v. DirecTV, Inc.*, 318 F. Supp. 2d 968, 977 (C.D. Cal. 2004) ("[T]he Court has not found any authority that would allow it to abrogate an express no third-party beneficiary provision"). Moreover, courts and commentators regularly recognize the deleterious effects of allowing any citizen who disagrees with a governmental action to assert a breach of duty by the government's attorney simply because the engagement might impact the "public interest." *See Roberts v. City of*

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[2] *See, e.g.*, *Grant & Eisenhofer, P.A. v. Brown*, 2017 WL 6343506, at *1 (C.D. Cal. Dec. 6, 2017); *Gribow v. Burns*, 2010 WL 4018646, at *7 (Cal. Ct. App. Oct. 14, 2010); *Quintilone v. Low*, 2012 WL 420122, at *6 (Cal. Ct. App. Feb. 9, 2012); *Maki v. Yanny*, 2012 WL 4077571, at *5 (Cal. Ct. App. Sept. 18, 2012); *San Diego Fire Victims Lawyers v. Cmty. Assistance Recovery, Inc.*, 2013 WL 2303690, at *5 (Cal. Ct. App. May 23, 2013); *Tamman v. Nixon Peabody LLP*, 2014 WL 4827784, at *3 (Cal. Ct. App. Sept. 30, 2014); *Becerra v. Jones, Bell, Abbott, Fleming & Fitzgerald LLP*, 2015 WL 881588, at *3 (Cal. Ct. App. Feb. 27, 2015); *Taheri*, 160 Cal. App. 4th at 492.

Palmdale, 5 Cal. 4th 363, 380 n.5 (1993) (citizen-plaintiff "cite[d] no relevant authority for the proposition that each member of the entire public is the client of the city attorney, and we have found none."); *see also, e.g.*, Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawye*r, 5 GEO. J. LEGAL ETHICS 291, 298 (1991) ("[D]efining the government lawyer's client as the public interest would fail to provide any real guidance in regulating lawyers' conduct . . . [since] conceptions of the 'public interest' vary significantly from one person to the next").

The professional negligence claim will also fail on its merits in light of the strong protections afforded by California's litigation privilege and the *Noerr-Pennington* doctrine. Nor will the Individual Plaintiffs be able to show that any act by the Rosette Defendants fell below the applicable standards of care. Under section 425.16, the sixth claim for relief should therefore be struck.

II. Relevant Allegations and Facts

According to the SAC, Quechan's dispute with the State of California centered on its 2007 Amended Compact. [redacted] (SAC ¶¶ 55–57.) [redacted] having a "high likelihood of spiraling into federal litigation." (*Id.* ¶¶ 57–61, 82, 85.) W&C represented Quechan in this dispute from October 2016 until June 2017, when the Tribe terminated W&C and retained Rosette, LLP.[3] (*See, e.g.*, *id.* ¶ 95.)

[3] Under Quechan's December 18, 1936, Constitution and By-Laws, the Tribal Council "represent[s] the Quechan Tribe in all affairs" and has the power to "negotiate with Federal, State, and local governments on behalf of the Tribe";

Rosette, LLP represented Quechan through the execution and approval of its 2017 Compact. (*See, e.g.*, *id.* ¶ 109.) But even before the 2017 Compact was executed, W&C brought this action against the Rosette Defendants for providing Quechan with legal representation once the Tribe decided to exercise its right to replace its lawyers.

The Court has already dismissed the Individual Plaintiffs' malpractice claim once. (Docket No. 89 at 36–37.) Yet the SAC, like the FAC, includes over two dozen Individual Plaintiffs, purportedly seeking damages on behalf of a class for "negligence/breach of fiduciary duty," all because Mr. Rosette allegedly "interfere[d]" with the ongoing negotiations by accepting the representation and engaging in negotiations with the State once Quechan retained him to do so. (SAC ¶¶ 114, 238.) The Individual Plaintiffs continue to claim that the mere fact of Rosette, LLP's retention caused the State to take a new position in the negotiations (*see, e.g., id.* ¶ 82), despite the Court's rejection of this theory of liability. (Docket No. 89 at 36–37.) The Individual Plaintiffs even cite this lawsuit—instituted by the Tribe's prior counsel and putative class counsel in this case, W&C—as an adverse consequence of Mr. Rosette's representation of Quechan. (SAC ¶¶ 186, 238.)

III. Argument

California's statute prohibiting strategic lawsuits against public participation "establishes a procedure to expose and dismiss meritless and harassing claims that seek to chill the exercise of petitioning or free speech rights in connection with a public issue." *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 648 (9th Cir. 2009) (citing *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005)). The anti-SLAPP statute defines "act[s] in furtherance of a person's right of petition or free speech . . . in connection with a public issue" to include "any written or oral

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"present and prosecute any claims or demands of the Quechan Tribe"; and to "employ legal counsel for the protection and advancement of the rights of the Tribe . . . . " (*See* Ex. 27 to SAC at Art. I; Art. III, Section 6(a), (b), and (d).)

statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16(e)(2). It also protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e)(4).

Anti-SLAPP motions, which are available to defendants facing state-law claims in federal courts, proceed in two steps. *See Graham-Sult*, 756 F.3d at 735. First, the court assesses whether a "plaintiff's causes of action 'arise[] from an act in furtherance of the defendant's rights of petition or free speech.'" *Id.* (quoting *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010)). If this showing is made, the burden shifts to the plaintiff to demonstrate "that it has a reasonable probability of prevailing in its claims". *Id.* (quotation and citation omitted). If the plaintiff fails to show a reasonable probability of prevailing on the merits, the cause of action must be struck. *See Gov. Gray Davis Comm. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449, 456 (2002). Here, the Individual Plaintiffs' claim arises from protected activity, and they cannot show a reasonable probability of prevailing on the merits.

A. The Individual Plaintiffs' State-Law Claim Triggers the Anti-SLAPP Statute's Protection Because It Arises from Protected Conduct

The Individual Plaintiffs' state-law claim arises from protected activity because the conduct underlying their claim falls squarely within the ambit of the anti-SLAPP statute:

- Quechan's termination of W&C;
- Quechan's retention of the Rosette Defendants; and
- Quechan's (or its attorneys') communications involving the resolution of potential litigation, official proceedings, and executive actions with the State.

It is beyond dispute that California's anti-SLAPP statute broadly protects lawyers' communications with clients and potential clients, inside and outside of litigation, against claims by third parties, including malpractice claims. *See, e.g.*, *Mindys Cosmetics*, 611 F.3d at 600. Because the Rosette Defendants' retention by, and communications with and on behalf of, the Tribe concern at least three independent provisions of the anti-SLAPP statute—a negotiation with the California executive branch, a pending official proceeding, and a threat of litigation under section 425.16(e)(2)—those communications are protected.[4] And because the Individual Plaintiffs' claim for professional negligence is premised on those protected activities, their claim is subject to the anti-SLAPP statute.

1. The Anti-SLAPP Statute Protects Attorneys' Communications Related to Client Representation, Threatened Litigation, and Official Proceedings

The Individual Plaintiffs' malpractice claim is based solely on Quechan's retention of Rosette, LLP and the bare fact that Rosette, LLP negotiated on Quechan's behalf with the State. (*See* SAC ¶ 238.) Specifically, the Individual Plaintiffs allege (incorrectly) that because Rosette, LLP was retained and W&C was fired, the State "claw[ed] back on agreed-upon concessions at the last minute as a result of the firm switch." (SAC ¶ 5; *see also id.* ¶ 111.) But whether the Individual Plaintiffs seek to base their state-law claim on the Rosette Defendants' retention by or communications with Quechan, or their communications with the State on behalf of Quechan, the anti-SLAPP statute protects those communications.

Solicitation of and advice to clients, even where a representation is new or displaces existing counsel, is protected conduct under California's anti-SLAPP statute. The seminal case on the subject, *Taheri*, 160 Cal. App. 4th 482, demonstrates the bedrock principle. There, the Taheri Law Group sued attorney

[4] It also constitutes protected activity pursuant to section 425.16(e)(4), "conduct. . . in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(4).

Neil C. Evans, alleging that Evans tortiously interfered with Taheri's contract and prospective economic advantage with its client, Alexander Sorokurs, by soliciting and assuming his legal representation. *Id.* at 485. The *Taheri* court found Evans's conduct to be easily within the anti-SLAPP statute's protection and subject to the litigation privilege, barring any claims by Taheri against Evans for his conduct in either soliciting or advising Sorokurs as a client. *Id.* at 486. Any other conclusion "would conflict with the client's fundamental right of access to the courts, which necessarily includes the right to be represented by the attorney of his or her choice." *Id.* at 490.

A multitude of subsequent cases in federal and state court have applied *Taheri*'s reasoning to conclude that an attorney's direct solicitation of a client and that attorney's subsequent legal advice are *per se* protected conduct against third-party tort claims:

- In *Grant & Eisenhofer, P.A. v. Brown*, 2017 WL 6343506 (C.D. Cal. Dec. 6, 2017), the Honorable Philip S. Gutierrez reiterated the principle that "[u]nder the plain language of section 425.16 . . . as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are *per se* protected as petitioning activity by the anti–SLAPP statute." *Id.* at *4 (quotation and citation omitted).
- In *Gribow v. Burns*, 2010 WL 4018646, at *6–7 (Cal. Ct. App. Oct. 14, 2010), the California Court of Appeal affirmed the grant of an anti-SLAPP motion concerning claims based on a lawyer's solicitation of a former partner's clients, finding these communications absolutely protected and concluding that the plaintiff had no probability of prevailing on the merits in light of the applicable litigation privilege. *Id.* at *8, 11.
- In *Quintilone v. Low*, 2012 WL 420122, at *6 (Cal. Ct. App. Feb. 9, 2012), the California Court of Appeal explained that "ample authority" protected

an attorney's communications "advising a prospective client on pending litigation," even where that advice "included recommending [another lawyer's] discharge and related actions." *Id.* (quotation and citation omitted).

- Similarly, the court in *Maki v. Yanny*, 2012 WL 4077571, at *5 (Cal. Ct. App. Sept. 18, 2012), explained that "*Taheri* stands for the not-so-surprising proposition that a second lawyer's advice to a client, even when that client is already represented by another attorney concerning pending or prospective litigation, is protected activity subject to a special motion to strike under section 425.16." *Id.* at *4.
- And the court in *San Diego Fire Victims Lawyers v. Cmty. Assistance Recovery, Inc.*, 2013 WL 2303690, at *5 (Cal. Ct. App. May 23, 2013), affirmed the striking of unfair business practices claims, holding that "a complaint alleging improper solicitation of another attorney's client in a pending litigation by promising a more favorable outcome in the litigation is subject to the protections of the anti-SLAPP . . . ."

The Rosette Defendants' communications with both Quechan and the State are protected because they relate to threatened litigation. The federal Indian Gaming Regulatory Act ("IGRA") requires states to negotiate with tribes about gaming rights in good faith and authorizes federal courts to police non-compliance. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026–30 (9th Cir. 2010) (distinguishing compact negotiations from "voluntary" commercial contract negotiations). "If a court finds that a state has failed to negotiate in good faith, IGRA empowers the court to order additional negotiations and, if necessary, to order the parties into mediation in which a compact will be imposed." *Id.* Given the structure of these compulsory negotiations, the specter of litigation looms large. Here, litigation was not just in the background of the negotiations; there was "a high likelihood of spiraling into

federal litigation." (SAC ¶ 61.) Under the anti-SLAPP statute, communications related to threatened litigation are protected, even if no complaint has been filed. *See, e.g.*, *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) (anti-SLAPP statute applies to "communications preparatory to or in anticipation of the bringing of an action or other official proceeding"); *see also Maki*, 2012 WL 4077571, at *3 ("[p]relitigation communications are covered as well, if litigation is contemplated in good faith and under serious consideration") (quotation and citation omitted); *Taheri*, 160 Cal. App. 4th at 489 (noting that dispute over client stealing arose after global settlement was reached in previously pending litigation).

The communications underlying the Individual Plaintiffs' claim are also protected because they relate to Quechan's engagement in official negotiations with California's executive branch pursuant to IGRA. As the SAC alleges, compact negotiations are carried out by the California Attorney General's Office on behalf of the Governor and announced in press releases by the Governor himself. (SAC ¶¶ 4–5.) As a result, compact negotiations constitute communications "made in connection with an issue under consideration or review by a[n] . . . executive . . . body[.]" Cal. Civ. Proc. Code § 425.16(e)(2). Compact negotiations also qualify as "official proceedings" because they are "government-sponsored and provided for by statute," i.e., IGRA. *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1049 (1997) (finding state audits to be "official proceedings"); *see also Mindys Cosmetics*, 611 F.3d at 596 (distinguishing "official' proceedings, which are protected," from "mere 'ministerial' business communications, which are not"). Thus, under California's anti-SLAPP statute, Quechan was engaged in an official proceeding authorized by law *and* communicating about an issue under consideration by the executive branch—negotiations that the State was required to carry out under federal law. Quechan's conversations and correspondence with the Rosette Defendants, and the Rosette Defendants' conversations and correspondence

with the State, are therefore protected and cannot give rise to liability claims under state law.

2. California's Anti-SLAPP Statute Protects the Rosette Defendants' Communications, Regardless of How the Individual Plaintiffs Label Their Claim

As the history of this case shows, the Individual Plaintiffs' claim is pretext, engineered by W&C to avoid the anti-SLAPP statute. In response to anti-SLAPP motions addressed to its original complaint, W&C recruited the Individual Plaintiffs and repackaged W&C's prior tort claims as a claim for attorney malpractice. (*See* Docket No. 43 at 18 ("[T]he claim these tribal members seek to file ties back to general allegations in the original complaint").) The title of a plaintiff's claim, however, does not determine whether the anti-SLAPP statute applies. The statute applies whenever "the cause of action is *based on* the defendant's protected free speech or petitioning activity." *Navellier*, 29 Cal. 4th at 89 (emphasis in original). Courts look to "the *principal thrust or gravamen* of the plaintiff's cause of action." *Martinez v. Metabolife Int'l, Inc*., 113 Cal. App. 4th 181, 188 (2003) (emphasis in original). Thus, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but . . . the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier*, 29 Cal. 4th at 92.[5] Here, the Individual Plaintiffs seek to hold the Rosette Defendants liable for representing Quechan and negotiating with the State, not for any particular action or inaction that violated a professional duty or fell below any standard of professional

[5] *See also Flores v. Emerich & Fike*, 416 F. Supp. 2d 885, 897 (E.D. Cal. 2006) ("The trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike."); *Braun*, 52 Cal. App. 4th at 1043 ("A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)").

care.

The Ninth Circuit squarely addressed this situation when it held in *Mindys Cosmetics* that California's anti-SLAPP statute applies to malpractice claims asserted by non-clients. *Mindys Cosmetics*, 611 F.3d at 594. In that case, the plaintiffs asserted both malpractice and breach-of-fiduciary-duty claims against their opponent's attorney based on his filing of a trademark application. *Id.* at 596. In response to the defendant-attorney's anti-SLAPP motion, the plaintiffs argued that malpractice claims fall outside the anti-SLAPP statute's operation. *Id.* at 597. The Ninth Circuit disagreed, holding that "there is no categorical exclusion of claims of attorney malpractice from the anti-SLAPP statute." *Id*. at 598. Analyzing the first prong of the anti-SLAPP statute and finding it satisfied, the court reasoned that "[n]othing in the statute itself categorically excludes any particular type of action from its operation" and found that the challenged conduct—filing a trademark application in the name of other defendants—was protected activity under section 425.16. *Id.* (citation omitted).[6] The challenged conduct was "activity that the anti-SLAPP statute paradigmatically protects: one cannot sue his opponent's attorney for petitioning actions taken on that opponent's behalf." *Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 2011 WL 13101417, at *3 (C.D. Cal. Oct. 24, 2011); *accord PrediWave*, 179 Cal. App. 4th at 1222 (explaining that third-party malpractice claims seeking to impose liability on protected conduct are

[6] The Ninth Circuit's holding in *Mindys Cosmetics* that there is no exemption from the anti-SLAPP statute for malpractice claims is binding here. *See United States v. Vasquez-Cruz*, 692 F.3d 1001, 1006 (9th Cir. 2012) ("[A] published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so.") (quotation and citation omitted). Although California's intermediate appellate courts have not spoken with one voice on the subject, the weight of state authority also recognizes that malpractice claims are not categorically exempt from the anti-SLAPP motions when brought by non-clients. *PrediWave v. Simson Thacher & Bartlett LLP*, 179 Cal. App. 4th 12042, 1222 (2009); *but see Sprengel v. Zbylut*, 241 Cal. App. 4th 140 (2015).

subject to anti-SLAPP).

Like the plaintiffs in *Mindys Cosmetics*, the Individual Plaintiffs do not allege that they are the Rosette Defendants' clients. (*See infra* Section III.B.1.) That the Individual Plaintiffs claim to be beneficiaries of Rosette, LLP's Attorney Services Contract with Quechan is irrelevant to the anti-SLAPP statute's first prong. *Mindys Cosmetics* forecloses any argument to the contrary, and the majority of California courts also agree that when a "third party su[es] an attorney for petitioning activity, which clearly could have a chilling effect," the anti-SLAPP statute applies. *Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532, 1540 (2006) (distinguishing malpractice claims by current or former clients based on quality of services rendered or violation of professional duties). "It has been stated that acts by attorneys when they have not represented the plaintiff are subject to the anti-SLAPP statute." *Chodos v. Cole*, 210 Cal. App. 4th 692, 704 (2012); *accord Dolinger v. Murphy*, 2015 WL 5168667, at *4 (Cal. Ct. App. Sept. 3, 2015) ("Thus, when a plaintiff sues someone else's lawyer for litigation-related conduct, the anti-SLAPP statute applies if the gravamen of the plaintiff's claim is that litigation."); *Loanvest I, LLC v. Utrecht*, 235 Cal. App. 4th 496, 504 (2015) ("[A] claim for injuries suffered by adversaries or other nonclients resulting from an attorney's acts in the course of litigation is based on protected activity and within the scope of the anti-SLAPP statute").[7]

[7] While the Individual Plaintiffs might seek to rely on *Sprengel* for the proposition that client relationships cannot be determined on the first step of anti-SLAPP analysis, that case is inconsistent with *Mindys Cosmetics*, which is controlling, and the reasoning in *PrediWave, Chodos*, *Thayer*, *Peregrine*, and their progeny. *Sprengel* is also distinguishable because it was brought by a plaintiff asserting she was a former client. 241 Cal. App. 4th at 148 ("Sprengel had 'allege[d] the existence of an attorney-client relationship between her and [defendants]'") (alterations in original). Here, the Individual Plaintiffs do not allege that they had an attorney-client relationship with the Rosette Defendants at any time. *See also Integrated Investigations, Inc. v. O'Donnell*, 2011 WL 4929421, at *11 (Cal. Ct. App. Oct. 18, 2011) ("The fact that plaintiffs allege that [the attorney], in

B. The Individual Plaintiffs Cannot Prevail on the Merits

Under the anti-SLAPP statute's second prong, the Individual Plaintiffs must not only come forward with admissible evidence to make a *prima facie* showing for their claim (which they cannot do); they must overcome applicable defenses and privileges. *See, e.g.*, *Kashian v. Harriman*, 98 Cal. App. 4th 892, 926–27 (2002) (finding failure to show reasonable probability of success on the merits based on defensive privileges). As an initial matter, the Individual Plaintiffs' claim fails because they are neither the Rosette Defendants' clients nor the intended beneficiaries of the Attorney Services Contract. Nor will the Individual Plaintiffs be able to show that any act or omission by the Rosette Defendants constituted a breach of professional obligations. Additionally, for the same reasons that the Rosette Defendants' communications with Quechan and the State are protected by California's anti-SLAPP statute, those communications fall within the absolute privilege against liability afforded to communications about official proceedings and potential litigation. *See* Cal. Civ. Code § 47(b). These communications are similarly protected by the U.S. Constitution and the *Noerr Pennington* doctrine and cannot serve as a basis for liability. *See Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934–35 (9th Cir. 2006) (*Noerr-Pennington* protects "conduct incidental" to petitioning activity). Accordingly, Plaintiffs' sixth claim for relief is properly struck.

1. The Individual Plaintiffs' Claim Fails Because They Are Neither the Rosette Defendants' Clients Nor Intended Third-Party Beneficiaries of the Attorney Services Contract

The Individual Plaintiffs cannot prevail on the merits of their claim because they cannot demonstrate with admissible evidence a *prima facie* showing of its

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representing the County, also violated duties owed to them, does not take their complaint outside the ambit of section 425.16. Their characterization of [the attorney's] actions as professional negligence does not alter the fact that those actions were taken as part of her representation of the County."). Styling their claim as one for "negligence/breach of fiduciary duty" related to professional obligations (or "malpractice") does not change the anti-SLAPP analysis.

necessary elements. To maintain a claim for professional negligence (or malpractice), a plaintiff must demonstrate: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 693 (2009) (quotation and citation omitted).

The Individual Plaintiffs do not have an attorney-client relationship with the Rosette Defendants and cannot show that they are owed a duty under California law. Rosette, LLP's Attorney Services Contract with Quechan, executed in connection with the California compact dispute, affirmatively limits the Rosette Defendants' representation to the Tribe, as an entity, and excludes any other individuals:

> [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*, and no conflict of interest will be asserted by the Tribe because we represent persons with respect to interests that are adverse to individual persons or business organizations who have a relationship with the tribe. Of course, Firm can also represent individual members, officers, directors, shareholders, partners, and other persons related to the Tribe in matters that do not conflict with the interests of the Tribe, but any such representation will be the subject of a separate engagement letter.

(*See* Docket No. 54-4, Ex. 2 at Section 2, emphasis added.) As the Court previously observed, "[t]his document makes clear that the Rosette Defendants did not represent the Tribe's individual members." (Docket No. 89 at 35.)

Nor can the Individual Plaintiffs establish any duty by the Rosette Defendants. "The traditional rule in California, as in other jurisdictions, was an attorney could be held liable only to his or her client with respect to actions based

on professional negligence." *Chang v. Lederman*, 172 Cal. App. 4th 67, 76 (2009). Limited exceptions to the traditional rule developed over time, primarily in the context of wills and trust, where a direct, identifiable beneficiary is involved. As this Court previously recognized, liability to third parties not in privity with a defendant is assessed by weighing: (1) the extent to which a transaction was intended to affect the third party; (2) foreseeability of harm; (3) degree of certainty of injury; (4) nexus between the defendants' conduct and the plaintiff's injury; and (5) the policy of preventing future harm. (Docket No. 89 at 35, citing *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).) The assessment of these factors is unique in the attorney-client context because of the ethical implications of providing third parties with standing to second guess and regulate someone else's attorney. Critically, the California Supreme Court has been particularly concerned about extending liability that will place an undue burden on the profession or otherwise risk interfering with an attorney's performance of his or her ethical duties. *See Lucas*, 364 P.2d at 688; *see also Goodman v. Kennedy*, 18 Cal. 3d 335, 342 (1976) (attorney's duty to non-clients depends on "a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances").

An attorney cannot be liable to a third party where, as here, the contract's unequivocal terms explicitly disavow any obligations to third parties. *See Balsam v. Tucows Inc.*, 627 F.3d 1158, 1161–63 (9th Cir. 2010) (applying California law to hold that where the contract includes an explicit denial of third party rights, and no specific provision to "benefit a third person appears from the terms of the contract," a claim to third-party beneficiary status must fail); *Pegasus Satellite Television*, 318 F. Supp. 2d at 977 (same).[8] This rule follows from the requirement that third-party

[8] The Individual Plaintiffs also are neither "creditor beneficiaries" nor "donee beneficiaries," the only two categories of third-party beneficiaries under California law. *See Unite Here Local 30 v. Dep't of Parks & Recreation*, 194 Cal. App. 4th 1200, 1215 (2011) ("In California, as elsewhere, third party beneficiaries are categorized as either creditor beneficiaries or donee beneficiaries.").

liability can exist only where a "third party is the intended beneficiary of the attorney's services, or the foreseeability of harm to the third party as a consequence of professional negligence is not outweighed by other policy considerations." *St. Paul Title Co. v. Meier*, 181 Cal. App. 3d 948, 951 (1986). To determine whether a contract was made to benefit a third party, courts ask "whether an intent to benefit a third person appears from the terms of the contract." *Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 891 (2006). "Intent is to be inferred, if possible, solely from the language of the written contract." *The H.N. & Frances C. Berger Found. v. Perez*, 218 Cal. App. 4th 37, 44 (2013). Even if it is evident that a transaction "could incidentally benefit the claimant," there is no duty absent express intention by *both* Quechan and Rosette, LLP that the Individual Plaintiffs were "*the* [intended] beneficiar[ies] of legal services" that Rosette, LLP "was to render." *Zenith Ins. Co. v. O'Connor*, 148 Cal. App. 4th 998, 1008 (2007) (quotation and citation omitted).

Applying these rules, courts routinely deny citizens' claims to third-party beneficiary status relative to government contracts in the absence of express contract terms conferring that status. "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Lake Almanor Assocs. L.P. v. Huffman-Broadway Grp., Inc.*, 178 Cal. App. 4th 1194, 1201 (2009); *see also Martinez v. Socoma Companies*, 11 Cal. 3d 394, 401 (1974) (while a government may endow rights upon third parties "by including provisions in its contracts which expressly confer on a specified class of third persons a direct right to benefits, or damages in lieu of benefits, against the [contracting party]," in the absence of express intent, third-party beneficiary status will not be inferred). Simply put, there is 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 as a whole. *See, e.g.*, *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 union's behalf).

These binding judicial decisions are well grounded in sound public policy considerations. "Responsible representation of a city, county or other governmental unit will improve the lot of its citizens and employees," but the benefits the citizens recoup are only incidental. *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1268 (1990). "[A]n incidental benefit does not suffice to impose a duty upon the attorney." *Id.* at 1268–69.

Weighing the burdens on the profession and on attorneys' ethical obligations also militates against extending a duty here. The Rosette Defendants were engaged by the Tribe, a sovereign entity. Their duties and obligations run to that entity. To extend the Rosette Defendants' professional obligations to each individual member, in the face a contract that specifically precludes doing so, would be a vast and unprecedented expansion of an attorney's duty under California law and would present insurmountable ethical obligations for any attorney representing a governmental entity. The conflict and confidentiality implications alone are staggering, as any dispute between an elected government's objectives and those of a segment of its constituents would create a conflict of interest if the attorney owed duties to all. This case underscores that point: some Quechan members favor W&C and its litigation-oriented approach to negotiations with the State, while other Quechan members embraced a different approach. If Quechan's counsel were to owe each faction its own duty of loyalty—one that could be separately enforced by individual members—the Tribe would never be able to retain counsel for controversial matters, and counsel would constantly face lawsuits by individuals who believed the Tribal Council was proceeding down the wrong course.

This is precisely why California's State Bar explains that "an attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials . . . [t]hus, no conflict for the

governmental attorney is created by a disagreement between a government entity and its constituents, or between constituents of the entity." Cal. State Bar Form. Opn. No. 2001-156, *available at* http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2001-156.htm (last visited Aug. 2, 2018).[9] It is also why courts have been circumspect about expanding attorneys' professional duties beyond the parties in privity; exceptions to the privity rule are extraordinarily narrow, and they should not be extended here. *See, e.g.*, *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 109 Cal. App. 4th 1287, 1301 (2003) ("Threat of . . . liability [to non-clients] would tend to discourage lawyers from following client instructions adversely affecting third persons." (quoting Rest. 3d Law Governing Lawyers, § 51, comment f)).

For the foregoing reasons, the Individual Plaintiffs cannot show that they have a probability of succeeding on the duty element of their claim. Without a duty, no liability can attach. *Goldberg*, 217 Cal. App. 3d at 1267; *see also Thayer v. Kabateck Brown Kellner LLP,* 207 Cal. App. 4th 141, 159 (2012) (non-client did not show probability of prevailing on the merits based on conduct by attorney).

2. The Individual Plaintiffs Also Cannot Succeed on the Merits Because They Cannot Identify an Act or Omission that Violated Standards of Professional Conduct

Plaintiffs also fail to identify a breach of any duty, instead referring vaguely to aspects of the final Quechan Compact that they believe W&C would have negotiated differently and citing this very litigation as evidence of damages. (*See* SAC ¶ 238.) As the Court has already found, the Individual Plaintiffs' allegations are insufficient to maintain a malpractice claim, even if an attorney-client or intended third-party beneficiary relationship existed. (Docket No. 89 at 37–38.) This is because the allegations do nothing to demonstrate that the counsel provided

[9] *See also* American Bar Association Model Rules Prof. Conduct, Rule 1.13, Comment 9, (requiring that lawyers representing governmental organizations act on behalf of "the organization acting through its duly authorized constituents.").

to Quechan "was so legally deficient when it was given that [their lawyers] 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.

The Court previously found that "[t]he FAC does not point to any conduct by the Rosette Defendants suggesting their representation fell below the appropriate standard of care." (Docket No. 89 at 36.) The same is true of the SAC. According to W&C, "the only material difference . . . lies in what the State took away" (*id.* ¶ 111), and, again according to W&C, the State changed its position "simply because it was suddenly facing off with" a different firm. (*Id.*; *see also id.* ¶ 5 (alleging that Mr. Rosette "was abused by a State negotiator" who supposedly gave up undocumented concessions "as a result of the firm switch"). The SAC also refers to a "total repudiation" of W&C's Attorney-Client Fee Agreement with Quechan, citing the fees Quechan has incurred in this lawsuit as evidence of malpractice and referring to a purported desire to "abuse the finances of the [T]ribe." (SAC ¶ 238.) However, the Individual Plaintiffs fail to identify any specific action or inaction by Mr. Rosette or his colleagues that allegedly fell below professional standards.

3. The Rosette Defendants' Communications with Quechan and the State Are Immune from Liability Under Civil Code Section 47(b) and the *Noerr-Pennington* Doctrine

Separately, California Civil Code section 47(b) immunizes all communications made in a "(1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law." Cal. Civ. Code § 47(b). This privilege is so broad that it "immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution." *Olsen v. Harbison*, 191 Cal. App. 4th 325, 333 (2010). To give effect to its intended scope, the privilege applies to any communication with "some connection or logical relation" to the action or official proceeding that forms the basis for the privilege. *Action Apartment Ass'n, Inc. v. City of Santa Monica*,

41 Cal. 4th 1232, 1241 (2007). "Moreover, any doubt as to whether the privilege applies is resolved in favor of applying it." *Morales v. Coop. of Am. Physicians, Inc., Mut. Prot. Tr.*, 180 F.3d 1060, 1062 (9th Cir. 1999). Lawyers' communications directly soliciting clients are also absolutely privileged under section 47(b) when third parties seek to impose tort liability, *Rubin v. Green*, 4 Cal. 4th 1187, 1194–96 (1993), as are their communications following retention. *Gribow*, 2010 WL 4018646, at *11.

For the same reason that the Individual Plaintiffs' claim arises from protected communications—those between Quechan and the Rosette Defendants, and the Rosette Defendants and the State, that by their very nature concerned Quechan's legal representation, the disputed California negotiations, and potential litigation—the challenged communications are protected by California's litigation privilege. And where, as here, litigants seek to build tort claims on protected client solicitations, advice to clients, and communications in the course of representing those clients, those claims are destined to fail and are appropriately struck under the anti-SLAPP statute. *See, e.g.*, *Grant & Eisenhofer*, 2017 WL 6343506, at *6–7 (plaintiff had no likelihood of prevailing under second prong of anti-SLAPP analysis due to litigation privilege); *Gribow*, 2010 WL 4018646, at *4, 11 (same); *Quintilone*, 2012 WL 420122, at *7 (same). Because the Individual Plaintiffs' state-law claim is necessarily based on communications between lawyers (the Rosette Defendants) and their client (Quechan), and between lawyers (the Rosette Defendants) and parties in an adverse posture (the State), "the litigation privilege applies." *Grant & Eisenhofer*, 2017 WL 6343506, at *6.

Additionally, to the extent that the Individual Plaintiffs seek to pursue their claim based on any advice that the Rosette Defendants gave to Quechan in connection with its rights and obligations under W&C's Attorney-Client Fee Agreement or the California compact dispute, that advice is privileged and cannot be used to prove Plaintiffs' case. *See, e.g.*, *Solin v. O'Melveny & Myers, LLP*, 89

Cal. App. 4th 451, 458 (2001) ("[U]nless a statutory provision removes the protection afforded by the attorney-client privilege to confidential communications between attorney and client, an attorney plaintiff may not prosecute a lawsuit if in doing so client confidences would be disclosed.").

The communications are also protected under the "official proceedings" element of section 47 because official proceedings have been found to occur when communications are with a government branch "acting in an official capacity." *See Slaughter v. Friedman*, 32 Cal. 3d 149, 155–56 (1982). The "official proceedings" privilege extends to "communications in preparation of an official proceeding." *1901 First St. Owner, LLC v. Tustin Unified Sch. Dist.*, 2017 WL 5185147, at *6 (Cal. Ct. App. Nov. 9, 2017); *see also Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 360 (2004) ("We have explained that the absolute privilege established by section 47(b) serves the important public policy of assuring free access to the courts and other official proceedings."). Thus, because the Rosette Defendants' communications with Quechan and the State are subject to an absolute privilege and cannot give rise to liability under California law, the Individual Plaintiffs cannot prevail on their state-law claim.

The Individual Plaintiffs also cannot prevail on the merits of their claim because it is barred by the *Noerr-Pennington* doctrine. "Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa*, 437 F.3d at 929. Like section 47, it protects "conduct incidental" to a lawsuit or executive proceeding, *id.* at 934–35, but it also protects efforts that seek to influence official decisions of the executive and legislative branches. *See, e.g.*, *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998) (*Noerr-Pennington* protects any "activity in the form of lobbying or advocacy before any branch of either federal or state government."). While the First Amendment petition right belongs to the client-party originally, "their employees, law firms and lawyers, as

their agents in that litigation, get to benefit as well." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005).

Negotiating with the executive branch to secure more favorable treatment and avoid litigation is quintessential conduct in furtherance of petitioning activities. *See, e.g.*, *Kottle*, 146 F.3d at 1059 (discussing lobbying of state administrative agencies); *Sosa*, 437 F.3d at 936 ("Restricting such prelitigation conduct when the same demands asserted in a petition to the court [are] protected would render the entire litigation process more onerous, imposing a substantial burden on a party's ability to seek redress from the courts."). Plaintiffs allege that Mr. Rosette communicated with Quechan about a fully ripened compact dispute with the State of California and litigation strategy, and then communicated with the State about that dispute. Those communications "must be protected to afford breathing space to the right of petition guaranteed by the First Amendment." *Sosa*, 437 F.3d at 933. Consequently, under binding Ninth Circuit case law, no liability can attach without running afoul of the Constitution.

4. Plaintiffs Cannot Use the Federal Courts to Usurp the Tribe's Authority or Assume the Tribe's Legal Rights

Finally, the Individual Plaintiffs' state-law claim is an improper attempt to usurp Quechan's sovereignty by asking this Court to wrest control of tribal affairs from Quechan's Tribal Council. Although the Individual Plaintiffs label themselves the "General Councilmembers" to create the appearance of authority within the Tribe, under the Tribe's Constitution, the entity responsible for retaining counsel, codifying counsel's retention, and defending the Tribe's rights is the duly-elected Tribal Council. (*See* Ex. 27 to SAC at Art. I; Art. III, Section 6(b) and (d).) The Individual Plaintiffs do not allege that they are members of the Tribal Council. In fact, they acknowledge that they are not. (SAC ¶ 235.) They do not allege that

they are acting on behalf of the Tribal Council, the Tribe's governing body.[10] Rather, they believe that the Tribal Council, the authority vested with governance power by the Tribe's Constitution and recognized by federal and state governments, is composed of "rogue officials" who have been recalled but "have refused to step down." (SAC ¶¶ 6, 236(e).)[11]

This is exactly the type of dispute that this Court cannot adjudicate. "Tribal election disputes . . . are key facets of internal tribal governance and are governed by tribal constitutions, statutes, or regulations." *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010). "Such questions of tribal law are 'beyond the purview of the federal agencies and the federal courts.'" *Anderson v. Duran*, 70 F. Supp. 3d 1143, 1151 (N.D. Cal. 2014) (citation omitted).[12] And this Court is without jurisdiction to vest the Individual Plaintiffs with any authority to act on behalf of the Tribe. "Internal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act . . . . A district court thus generally lacks

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[10] According to Plaintiffs' own submissions, at least one of the Individual Plaintiffs is responsible for recent, unsuccessful attempts to unseat the Quechan government through a recall election. (*See* Ex. 30 to SAC, Docket No. 100-30 (explaining that Plaintiff Sally DeCorse filed multiple sets of recall petitions).)

[11] As Exhibit 30 to the SAC explains, in order to recall members of a Tribal Council, Quechan's Constitution requires a voter turnout threshold that was not met. (*Id.*; *see also* Ex. 27 to SAC, Docket No. 100-27, at Art. VI, Section 3 & Art. VII, Section 4.) The vote, which members of the Individual Plaintiff group initiated, was therefore ineffective.

[12] *See also Boe v. Fort Belknap Indian Cmty. of Fort Belknap Reservation*, 642 F.2d 276, 279 (9th Cir. 1981) (claims based on interference with tribal elections "simply are not cognizable in the federal courts"); *U.S. Bancorp v. Ike*, 171 F. Supp. 2d 1122, 1125 (D. Nev. 2001) ("Deciding a question involving a tribal election dispute is solely a matter of tribal law, and we do not have jurisdiction to address this question.") (collecting authorities).

jurisdiction to resolve matters of internal tribal governance." *See, e.g.*, *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1137 (E.D. Cal. 2015) (quotation and citation omitted). Thus, this is not the proper forum to address the Individual Plaintiffs' dissatisfaction with the recall election outcome.

IV. Conclusion

For the foregoing reasons, the Rosette Defendants respectfully request that the Court strike the sixth claim for relief. If struck, the Rosette Defendants will seek attorneys' fees and costs, as provided under California law, in a separate motion. *See* Cal. Civ. Proc. Code § 425.16(c)(1); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001) ("[A]n attorney fee award should ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee.").

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