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Attorneys for Defendants Quechan Tribe of the Fort Yuma Indian Reservation, Keeny Escalanti, Sr., and Mark William White II

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)

Plaintiffs,

v.

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

Defendants.

REDACTED

CASE NO.: 17-cv-01436-GPC-MDD

MEMORANDUM IN SUPPORT OF QUECHAN DEFENDANTS' MOTION TO DISMISS

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

On June 7, 2018, the Court granted in part and denied in part the motions to dismiss W&C's third complaint in the case. Dkt. No. 89 ("June 7 Order"). Now, in its fourth complaint, W&C continues to attack elected Quechan tribal officials and tries to transform internal Quechan tribal government actions into predicate acts for federal RICO claims. W&C's allegations remain baseless, and its legal theories are fatally flawed. Accordingly, the Quechan Tribe, President Escalanti, and Councilman White (together, the "Quechan Defendants") move to dismiss two claims in the Second Amended Complaint ("SAC").

First, in its June 7 Order, the Court ruled that W&C's breach of the implied covenant of good faith and fair dealing claim was not duplicative of the viable portion of W&C's breach of contract claim. June 7 Order at 18. The Court did not otherwise address the merits of the claim. The Tribe explains here why the breach of the implied covenant of good faith and fair dealing claim is barred and should be dismissed. Namely, not only does W&C's breach of the implied covenant claim contradict the plain terms of the Fee Agreement between W&C and the Tribe, but California law allows clients to terminate their attorneys at any time for any reason and prohibits breach of the implied covenant claims based on at-will agreements. Because the Fee Agreement was an at-will legal services agreement, W&C's claim is barred.

Second, as part of the June 7 Order, the Court dismissed, with leave to amend, W&C's RICO conspiracy claim against President Escalanti and Councilman White because W&C failed to allege an underlying RICO violation or that the defendants "agreed to commit or participate[] in wire or mail fraud." June 7 Order at 33. The Court further instructed W&C that any amended RICO conspiracy claim "must be clear as to how this alleged abuse of power affected, or will affect, W&C itself." *Id.*, at 34 n.2.

W&C has not cured any of these fatal deficiencies in its RICO conspiracy claim. As a threshold matter, W&C fails to allege a viable RICO claim. Even after the benefit of amendment, W&C fails to properly allege an enterprise, racketeering activity, or financial benefit to President Escalanti or Councilman White. W&C also does not, and cannot, explain how the purported RICO conspiracy activity could harm ***W&C***—the plaintiff asserting the claim—as is required by RICO. To the contrary, W&C tacitly concedes that if anyone could have standing to assert a RICO claim based on the SAC's allegations (false and legally flawed as they may be), it would be a Tribe member, not W&C. SAC at 73, n. 33. And last, W&C does nothing to address its inability to allege a conspiracy among the defendants to violate RICO. There is no factual basis to allege RICO or a conspiracy to violate RICO, and the claim must be dismissed with prejudice.

From the beginning, the Quechan Defendants have maintained that, as to them, this case should be a straightforward contract dispute between W&C and the Tribe about whether W&C is entitled to a "reasonable" fee under Section 11 of the W&C-Tribe Fee Agreement. Accordingly, although it disputes that W&C is entitled to an additional fee, the Tribe did not move to dismiss that claim and indeed has filed an Answer to it. W&C's continued efforts to blow this dispute wildly out of proportion with alternative contract theories, concocted RICO conspiracy claims, and personal attacks against individuals premised on internal Tribal matters should be rejected by the Court.[1]

[1] One business day after filing the SAC, W&C moved for leave to file its fifth complaint in the case, captioned as its Third Amended Complaint ("TAC"). The only substantive difference between the proposed TAC and the SAC is the addition of an intentional interference with contract/prospective economic advantage claim against the Rosette Defendants and the undersigned counsel for the Quechan Defendants. The Tribe will respond to that motion, and the frivolous claims asserted in the proposed TAC, on August 7.

SUMMARY OF RELEVANT ALLEGATIONS AGAINST QUECHAN DEFENDANTS

Despite the Court's warning that a further amended complaint "shall be short and plain" (Order at 2 n.1), W&C filed an eighty-page SAC on July 20, 2018. The SAC still mostly describes an apparent grudge W&C's two partners have with Rosette, dating back many years to when they worked for Rosette as associates at Rosette & Associates. SAC ¶¶ 26-29. Those allegations still have nothing to do with any of the Quechan Defendants. W&C's allegations against the Quechan Defendants in the SAC are more limited than they were in the FAC. Indeed, W&C amended the order of the defendants on the caption page so that the Rosette Defendants are now listed before the Quechan Defendants.

W&C's remaining breach of contract and breach of the implied covenant of good faith and fair dealing ("implied covenant") allegations are essentially intact from the FAC. The SAC does not, nor could it, change the terms of the Fee Agreement between W&C and the Tribe (SAC Ex. 2) to provide an adequate basis for a breach of implied covenant claim. Section 5 of the Fee Agreement continues to govern whether W&C was entitled to its contingency fee, and as the Court held in its June 7 Order, it was not. June 7 Order at 14-16. Section 11 of the Fee Agreement allows the Tribe to terminate W&C "at any time." SAC Ex. 2 at 4.

To try to salvage its RICO conspiracy claims against President Escalanti and Councilman White, in addition to W&C's now-abbreviated allegations of a payday lending scheme (*see id.* ¶¶ 178-81), W&C alleges a series of independent tribal government actions and decisions, and asserts that they are predicate acts in support of W&C's RICO conspiracy claim. *Id.* ¶ 231. W&C did not add any allegations regarding harm it suffered as a result of the purported RICO conspiracy—as it was instructed to do. Instead, W&C added a footnote purportedly "reserv[ing] the right to amend" again and bring the claim on behalf of Tribe members in the event W&C cannot bring the claim. *Id.* at 73, n. 33.

ARGUMENT

To survive a motion to dismiss, plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Accordingly, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* W&C has failed to allege facts sufficient to form the basis of a breach of the implied covenant claim or RICO conspiracy claim. Accordingly, the claims must be dismissed pursuant to FRCP 8 and 12.

I. W&C'S BREACH OF IMPLIED COVENANT CLAIM FAILS AS A MATTER OF LAW

W&C's breach of the implied covenant claim is based on the Tribe's termination of W&C, which was, according to W&C, designed to avoid paying the contingency fee under Section 5 of the Fee Agreement. *See* SAC ¶¶ 204-209. To state a claim for breach of the implied covenant, however, "plaintiffs must plead facts showing bad faith and demonstrating 'a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence, but rather by a conscious and deliberate act.'" *Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1300 (C.D. Cal. 2015); *see also Redlands Country Club Inc. v. Cont'l Cas. Co.*, No. CV10-1905 GAF (DTBx), 2011 WL 13224843, at *2 (C.D. Cal. Jan. 28, 2011).

Even crediting W&C's allegations, the Tribe's termination of W&C was not "bad faith" conduct: The Tribe exercised its specifically-enumerated termination right under Section 11 of the Fee Agreement because it had a less expensive option for completing the work. *See* SAC ¶ 185. W&C was not entitled to the contingency fee under Section 5 of the Fee Agreement at the time it was terminated. *See* June 7

Order at 14-17. Allowing W&C's breach of the implied covenant claim to go forward would be inconsistent with the both the plain terms of the Fee Agreement, which permit the Tribe to terminate W&C "at any time" (*see* SAC Ex.2 at Section 11), and California law, which provides for a client's 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*, 2018 WL 1146649, Slip Op. at *5 (Cal. Mar. 5, 2018); *see also Fracasse v. Brent*, 6 Cal. 3d 784, 790 (1972) ("[A] client should have both the power and the right at any time to discharge his attorney with or without cause.").

Consistent with a client's right to replace its attorney for any reason at any time, even the protective regime of California employment law allows employers to terminate employees without violating the implied covenant: "[A]n action cannot lie for breach of the implied covenant of good faith, when an employee may be terminated 'at will.'" *Hoy v. Sears, Roebuck & Co.*, 861 F. Supp. 881, 888 (N.D. Cal. 1994); *see also Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 350-51 (2000); *Alstad v. Office Depot*, No. C-94-1400 DLJ, 1995 WL 84452, at *7 (N.D. Cal. Feb. 7, 1995).

Here, Section 11 of the Fee Agreement ***allows the Tribe to terminate W&C at will.*** Fee Agreement § 11 ("Client may discharge Firm at any time."). Accordingly, the same reasoning that bars breach of the implied covenant claims in at-will employment cases should apply here to bar W&C's breach of the implied covenant claim. *See e.g. Hoy*, 861 F. Supp. at 888; *Fracasse*, 6 Cal. 3d at 790. Because the Fee Agreement was an at-will legal services contract, W&C's breach of implied covenant claim fails as a matter of law and should be dismissed with prejudice.

II. W&C'S RICO CONSPIRACY CLAIM FAILS AS A MATTER OF LAW

W&C asserts a claim for conspiracy to violate RICO against President Escalanti and Councilman White. That claim must be dismissed again because W&C fails to allege the requisite elements of a RICO claim, and because W&C does not adequately allege a conspiracy. *See Howard v. Am. Online, Inc.*, 208 F.3d 741,

751 (9th Cir. 2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO."); *Turner v. Cook*, 362 F.3d 1219, 1231 n. 17 (9th Cir. 2004) (finding that RICO conspiracy claim fails because appellants failed to allege the requisite elements of a RICO claim). President Escalanti and Councilman White hereby join in the sections of the Rosette Defendants' memorandum in support of its motion to dismiss that explain why W&C's RICO claim must fail.

A. W&C Fails to Allege a RICO Claim

To state a RICO claim under § 1962(c), a plaintiff must allege: (i) conduct (ii) of an enterprise (ii) through a pattern (iv) of racketeering activity, and (v) injury in the plaintiffs' business or property by the conduct constituting the violation. *Comm. to Protect Our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1172 (E.D. Cal. 2017) (citing *Sedima, S.P.R.L. v. Imrex Co.*, Inc., 473 U.S. 479, 496 (1985)). In granting the Rosette Defendants' Motion to Dismiss W&C's RICO claim, the Court agreed that the FAC failed to allege a sufficient racketeering activity, and as a result, did not even address the remaining arguments on the deficiencies in W&C's RICO claim. June 7 Order at 26.

W&C alleges that President Escalanti, Councilman White, and the Rosette Defendants, "are associated in fact and have either conspired to participate in or conduct an enterprise aimed at fraudulently abusing the finances of the tribe in pursuit of a sham online payday lending business or for some other elicit end" by engaging in two or more acts of mail or wire fraud as predicate acts. SAC ¶ 230. But after the benefit of amendment, W&C still fails to properly allege an enterprise, racketeering activity, or injury to its business or property. Moreover, W&C's mail and wire fraud allegations are not pled with particularity as required by Rule 9. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557–58 (9th Cir. 2010) (finding that

failure to identify specific mailings or misrepresentations does not satisfy Rule 9's pleading requirements).

1. W&C fails to allege a RICO enterprise.

W&C fails to allege an association-in-fact enterprise. To do so, plaintiffs must plead a common purpose, a structure or organization, and longevity necessary to accomplish the purpose. *See Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). W&C does not and cannot plead these elements.

First, W&C asserts that the RICO enterprise was aimed at creating a "sham online payday lending business or for some other elicit end," but alleges only a list of independent tribal government actions without attributing them to any Defendants[2] and without explaining how the Defendants associated together to create an online payday lending business or "other elicit end." SAC ¶¶ 230, 231. This is insufficient. *See Doan v. Singh*, 617 F. App'x 684, 686 (9th Cir. 2015) ("Plaintiffs have not sufficiently pleaded the existence of an enterprise because the complaint does not allege how Defendants associated together for a common purpose.").

Second, W&C fails to allege an organizational structure—formal or informal—among the Named Defendants, or how each Defendant coordinated their activities as a continuing unit. W&C merely states that "each of the abovenamed defendants has engaged in at least two predicate acts of mail or wire fraud . . . over the last ten years," and then lists a series of tribal government decisions without specifying which Defendants participated in the events. *See* SAC ¶ 231. This is, again, insufficient to allege a RICO enterprise. *See Comm. to Protect Our Agric. Water*, 235 F. Supp. 3d at 1175-76 (finding that conclusory allegations involving "isolated incidents each involving some but not all of the named defendants" were insufficient to establish the structure of the alleged enterprise).

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[2] W&C alleges in paragraphs 195, 197, and 198 that President Escalanti issued Tribal correspondence. W&C does not allege that President Escalanti wrote these letters in his personal capacity, nor could it given the nature of the alleged letters.

W&C provides no description of the structure of the purported payday lending RICO enterprise or "other elicit end," nor can it. Such plans were never discussed with Rosette,[3] and indeed, W&C acknowledges that a Quechan payday lending business never existed. *See* SAC ¶ 179 (listing alleged Rosette-related payday lending businesses). The most W&C can do is make the conclusory allegation that "Rosette and Quechan-related defendants are individuals and business entities that are associated in fact and have either conspired to participate in or conduct an enterprise aimed at fraudulently abusing the finances of the tribe in pursuit of a sham online payday lending business or for some other elicit end." *See* SAC ¶ 230. That is a legal conclusion; not a factual allegation that describes the structure of a cognizable RICO enterprise.

Third, W&C does not plead that any fraudulent or illegal conduct by the purported enterprise—a deficiency the Court found was a "vital flaw" in W&C's FAC. Order at 33. To the extent that W&C contends that President Escalanti and Councilman White's purported agreement to pursue "a sham online payday lending business" is a substantive violation of RICO, W&C still does not allege how the payday lending scheme itself is fraudulent or constitutes mail or wire fraud. SAC ¶ 230. W&C alleges that Mr. Rosette admits that the ventures are not legitimate tribal business but are legitimate private businesses. *See* SAC ¶ 190. But this still does not show that payday lending is fraudulent. Further, W&C still relies on complaints by the Consumer Financial Protection Bureau, but, as the Court noted, this does "not suggest that such litigation has resulted in findings or judgements suggesting the schemes are fraudulent." *See* SAC ¶ 191; Order at 33. Nor does W&C allege that the online payday lending businesses that Defendants are purportedly "in pursuit of" are the same as these prior payday lending businesses. Like the FAC, "the

[3] The Quechan Defendants reserve all rights to pursue any and all appropriate sanctions and claims for relief for having to defend against these patently false allegations.

'objective' of the agreement described in [Count Five] was not one to violate RICO's substantive provisions." Order at 33.

W&C now also alleges in the SAC that the Tribe's distribution of per capita payments ceased. *See* SAC ¶ 231. But this is not fraudulent either. As discussed below, the Tribal Council is not required to distribute per capita payments, but rather has discretion to distribute per capita payments based on its judgment of the Tribe's financial ability to do so. Declaration of Vice President Virgil S. Smith[4] ("Smith Decl."), Ex. 1 at 3-4. And if there is a grievance regarding the propriety of per capita distributions, it must be resolved in Quechan Tribal Court. *See* Smith Decl Ex. 2 at 10-11.

Moreover, W&C's purported fraud allegations are vague and violate Rule 9. W&C does not allege how funds were misused other than implying that abuse occurred because the Tribe (within its proper discretion) stopped making per capita payments. Nor does W&C describe how President Escalanti and Councilman White participated in misappropriating tribal funds. W&C cryptically claims that there was "some other elicit end" or "personal enrichment," but fails to disclose ***any*** specific fact regarding what the "elicit end" or "personal enrichment" was, or who was benefitting from it. Indeed, the Court specifically commented in footnote 4 of its June 7 order that W&C needed to coherently explain the alleged financial benefit to the RICO defendants from the RICO scheme. But W&C has failed to even attempt to do so.

2. W&C fails to allege predicate acts.

W&C alleges that the RICO predicate acts are wire and mail fraud. SAC ¶ 231. The elements of wire or mail fraud are: "(1) formation of a scheme or artifice to defraud; (2) use of the United States mails or wires, or causing such a use, in

[4] The Declaration of Vice President Virgil S. Smith is attached to Quechan Defendants' Request for Judicial Notice filed concurrently with this motion.

furtherance of the scheme; and (3) specific intent to deceive or defraud." *Cnty. of Marin v. Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1038 (N.D. Cal. 2011) (citing *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010)). Racketeering activity based on mail or wire fraud must be pled with particularity under Rule 9. *See Sanford*, 625 F.3d at 557–58. Despite amendment, W&C has failed to allege predicate acts that amount to wire or mail fraud.

a. The alleged predicate acts are either lawful Tribal government acts, or events outside of the Tribal Council's control.

W&C has alleged as predicate acts a number of independent actions and decisions made by the Tribal Council and other government entities. W&C has not specifically tied any of the alleged predicate acts independently to President Escalanti or Councilman White. Each predicate act describes conduct that is incident to the Tribal Council or other entity's normal course of business.

Predicate acts (a-e) alleged in SAC paragraph 231 are premised on W&C's assertion that the Tribal Revenue Allocation Plan "explains that 40% of the revenues that the casinos sends [sic] to the tribe each month shall go to the general membership in the form of per capita payments." SAC ¶ 196. But that is just not true. According to Section VI.C. of the Tribe's Revenue Allocation Plan, as approved by the United States Department of the Interior, per capita payments to eligible tribal members may be made annually or upon such other schedule as ***the Tribal Council may determine***. Smith Decl., Ex. 1 at 3. Further, The Tribal Council has the right to provide for ***no per capita payment at all*** depending on the proceeds available for distribution after, of course, the Tribe satisfies its operational and debt obligations. *See* Smith Decl., Ex. 1 at 3.

Likewise, under the Tribe's Constitution, the Tribal Council's purported refusal to "turn over any financial information or audit reports" (*see* ¶ 231(f)) is also based on a mischaracterization of the Tribal Council's obligations. The Tribe's Constitution does not require the Council to "turn over" records through the mail or

wires. *See* Tribe's Constitution, SAC Ex. 27 at 670. Rather, the Constitution provides that any member of the Quechan Tribe shall have full and free access to all records of the Council during business hours. There is no allegation that the Tribal Council—let alone President Escalanti or Councilman White—failed to do that; and even if they did, that would not be a predicate act of mail or wire fraud.

Moreover, the Tribal Council, President Escalanti and Councilmember White are not responsible for deciding [redacted] Smith Decl., Ex. 4 at 37. Accordingly, this is an exclusively internal Quechan matter and not the proper basis of a U.S. District Court litigation. *See Jeffredo v. Macarro*, 599 F.3d 913, 921 (9th Cir. 2010) (finding that the court lacks jurisdiction for appellant's claim for eviction because appellants "have not exhausted their claims for exclusion

from the reservation or denial of access to it as established in the [Pechanga Tribe's] Exclusion and Eviction Regulations").

Last, W&C has not alleged in the SAC that the Tribal Council generally—or President Escalanti and Councilmember White specifically—[redacted] *See* SAC ¶ 231. (They do not.) There is absolutely no information beyond the conclusory assertion regarding this purported act. [redacted] How did this act involve the mail or wires? None of this information is alleged. [redacted]

As with its FAC, W&C has failed in the SAC to establish why these predicate acts suggests any fraudulent activity. June 7 Order at 33. Therefore, these governmental acts cannot form the basis of a RICO conspiracy. *See Comm. to Protect Our Agric. Water*, 235 F. Supp. 3d at 1179–80 (determining that plaintiff's claims of mail or wire fraud failed where the FAC did not explain how defendants' communications involved a misrepresentation or "how any innocuous communications were an essential part of a scheme to defraud").

b. The alleged predicate acts fall squarely within a sovereign nation's inherent authority and the Tribe's Constitution.

Assuming for argument's sake that the Tribal Council did undertake the actions alleged as the RICO conspiracy predicate acts (*see* SAC ¶ 231), the alleged predicate acts are within the Tribe's inherent authority as a sovereign nation and cannot be the basis of a RICO claim. A tribe has the inherent authority to "determine tribal membership" and "to regulate domestic relations among members." *McDonald v. Means*, 309 F.3d 530, 542 (9th Cir. 2002) (quoting *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)). The Tribe's Constitution is

consistent with these principles and codifies the Tribal Council's authority and obligation to make the types of decisions that W&C seeks to label as RICO predicate acts. *See* SAC Ex. 27 at 670. The notion that these official governmental actions by a sovereign tribal nation could constitute RICO predicate acts is directly contrary to the Tribe's inherent and constitutional authority.

Moreover, the alleged predicate acts cannot be the basis of a federal claim here because they are matters that are specifically subject to the Tribe's own Tribal Court system and therefore not for this Court to decide in this case. See *Jeffredo*, 599 F.3d at 921 (holding that a party must exhaust Tribal remedies before pursuing relief in federal court). For example, W&C cannot base its RICO conspiracy claim on a dispute about the Tribe's per capita payments because any grievance regarding per capita payments must be resolved in the Quechan Tribal Court, as acknowledged by the Department of Interior and provided for in the RAP. *See* Smith Decl. Exs. 1 at 3-4, 2 at 10. Therefore, putting aside for the moment that W&C has no standing to assert a claim based on a per capita dispute anyway, as discussed *infra* at 16-17, it would still have to raise its complaint regarding per capita payments in the Quechan Tribal Court, not here.

[redacted] like the Tribal Council, has the same inherent authority to perform tribal affairs; its actions cannot constitute RICO predicate acts. *See E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001) (finding that a tribal housing authority "functions as an arm of the tribal government and in a governmental role" and "occupies a role quintessentially related to self-governance").

In order to protect the Tribe's sovereignty and self-governance, these lawful governance decisions cannot be the subject of a U.S. District Court lawsuit. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071

(2014) ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.'") (internal citations omitted).

c. The alleged predicate acts are not pled with specificity.

In its June 7 Order (at 33), the Court noted that "Plaintiffs' assertion that some of the relevant defendants took 'additional steps' towards the scheme does not identify any particular conduct." W&C, however, continues to use the same boilerplate pleading here by alleging vaguely that the "aforementioned predicate acts and others evidence a year-long conspiracy by the named defendants to take the necessary actions to use the public funds of the tribe for their own personally [sic] enrichment." SAC ¶ 232.

W&C must allege the "specific intent to deceive or defraud" and W&C does no such thing. *Sanford,* 625 F.3d at 557. There are no allegations about how funds were transferred and how the Defendants were personally enriched. Nor is it clear how the Defendants participated in this scheme. W&C offers no explanation of the actions that President Escalanti or Councilman White actually performed (aside from President Escalanti's sending of letters on behalf of the Tribal Council), or of the specific roles President Escalanti or Councilman White played in the purported actions by the Tribal Council. The SAC does not allege how or if they voted on the alleged Tribal Council decisions. The SAC does not explain how these decisions were made, or President Escalanti and Councilman White's role in the decision-making process. There is therefore no basis from which the Court can reasonably infer what President Escalanti or Councilman White's roles in the alleged conspiracy were.

Accordingly, the allegations are implausible and impermissibly vague under Rule 8, and come nowhere close to satisfying the particularity requirements of Rule 9. *See Rich v. Shrader*, No. 09-CV-0652-MMA (WMc), 2010 WL 3717373, at *11

(S.D. Cal. Sept. 17, 2010) ("'Rule 9(b) does not allow a complaint merely to lump multiple defendants together but requires plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'") (quoting *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991)); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (finding that plaintiffs had failed to allege mail fraud with particularity under Rule 9(b) because they "[did] not attribute specific conduct to individual defendants"). W&C's RICO claim therefore fails.

d. The alleged predicate acts are unrelated.

Finally, the predicate acts fail because they are unrelated. To constitute a pattern of racketeering activity the predicate acts must be "related," which means that they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are ***not isolated events***." *See Howard v. Am. Online*, Inc., 208 F.3d 741, 749 (9th Cir. 2000) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)) (emphasis added). "Merely having the same participants is insufficient to establish relatedness." *Id.*

Here, W&C include a series of unrelated and isolated events that cannot qualify as predicate acts. Although W&C alleges that "[t]he aforementioned predicate acts and others evidence a year-long conspiracy by the named defendants to take the necessary actions to use the public funds of the tribe for their own personally [sic] enrichment rather than the tribe generally," three predicate acts appear to be isolated events related to different individuals—a beneficiary removing funds from trust account, [redacted] *See* SAC ¶¶ 231(e), (g)-(h), 232. W&C merely argues that some of these individuals "tried to shine a light on some of the problems swirling within the tribe." *See* SAC ¶ 200. However, under Rule 9—and even under basic Rule 8 pleading requirements—"problems swirling within the tribe" is insufficient to connect these

acts to W&C's claims that defendants were using the Tribe's funds for their own personal enrichment.

The other alleged predicate acts involve standard communications with the Tribe, the Arizona Department of Gaming, and with the National Indian Gaming Commission. *See* SAC ¶¶ 231(a)-(d), (f), ¶ 232. These acts have no nexus to W&C allegations that defendants were using the Tribe's funds for their own personal enrichment. This laundry list of isolated events does not constitute predicate acts and "a pattern of racketeering."

3. W&C Does Not Allege Harm To Its Business Or Property

To plead a RICO claim, the alleged RICO activity must cause actual harm to the business or property of the RICO plaintiff. 18 U.S.C. § 1962(c); *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1146-47 (9th Cir. 2008) ("RICO provides a private right of action for '[a]ny person injured in his business or property' by a RICO violation.") (citing 18 U.S.C. § 1964(c)); *see also Walker v. Gates*, No. CV 01-10904 GAF (PJWx), 2002 U.S. Dist. LEXIS 27443, at *23 (C.D. Cal. May 22, 2002). These injuries must be tangible and concrete. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008).

A plaintiff has standing to bring a RICO claim only if "he has been injured in his business or property by the conduct constituting the violation." *Osgood v. Main Streat Mktg., LLC*, No. 16CV2415-GPC(BGS), 2017 WL 131829, at *8 (S.D. Cal. Jan. 13, 2017) (Hon. Gonzalo P. Curiel) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, Inc., 473 U.S. 479, 496 (1985)). To recover, a plaintiff "must show proof of concrete financial loss" and demonstrate that the "racketeering activity proximately caused the loss." *Id.* (quoting *Guerrero v. Gates*, 442 F.3d 697, 707 (9th Cir. 2006)).

Consistent with this authority, the Court made it clear that "[i]f Plaintiffs choose to amend their complaint, they must be clear as to how this alleged abuse of power affected, or will affect, W&C itself." June 7 Order at 33-4, n.4. W&C has not

done so. It does not include any allegation or any plausible inference that purported discussions about a potential payday lending business between any of the Quechan Defendants and Rosette caused any harm to W&C. And W&C does not include any allegation or any plausible inference that actions taken by the Tribal Council or other tribal governmental agencies caused any harm to W&C. W&C does not even attempt to connect the alleged "enterprise aimed at fraudulently abusing the finances of the tribe" to any actions taken against W&C. W&C merely asserts that the alleged conspiracy to violate RICO has "cause[d] William & Cochrane to suffer ***contract*** damages and injuries totaling at least $6,345,399.97." SAC ¶ 233 (emphasis added). This is conclusory, fails to explain how the "enterprise aimed at fraudulently abusing the finances of the tribe" in any way affects W&C, and is a concession that W&C is merely seeking damages consistent with its breach of contract theory.

Indeed, all but admitting that the RICO conspiracy claim is not its claim to bring, W&C notes in the SAC that it "reserves the right to amend this claim to bring it on behalf of some or all of the names Quechan General Councilmembers, who are hesitant to name themselves." SAC at 73 n.33. As such, W&C does not, and cannot, have standing to bring this claim and fails to allege the required RICO elements. *See Osgood*, 2017 WL 131829, at *8 (dismissing a RICO claim for lack of standing where the allegations of injury "are conclusory" and "fail to provide sufficient facts to support an alleged injury caused by the alleged illegal conduct"); *Gherini v. Lagomarsino*, 258 F. App'x 81, 83–84 (9th Cir. 2007) (finding that "district court lacks jurisdiction over [plaintiff's] RICO claim" because plaintiff "never had a property interest" in the property at issue and "alleged no injury to his own business or property").

* * *

For these reasons and those explained in the Rosette Defendants' motion to dismiss the SAC, W&C has not pled a RICO claim. As a result, the Court must again dismiss W&C's RICO conspiracy claim. *Howard*, 208 F.3d at 751 ("[T]he failure to

allege substantive violations precludes their claim that there was a conspiracy to violate RICO,"); *Kennar v. Kelly*, No. 10CV2105-AJB WVG, 2011 WL 2116997, at *7 (S.D. Cal. May 27, 2011), *aff'd sub nom. Kenner v. Kelly*, 529 F. App'x 870 (9th Cir. 2013) (dismissing the RICO conspiracy claim because plaintiffs failed to state an underlying RICO claim).

B. W&C Does Not Allege A Conspiracy

Not only does W&C fail to allege a RICO claim, but W&C also does not allege a conspiracy to violate RICO. As the Court observed, a RICO conspiracy can be proven in two ways: "Plaintiffs 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*, 208 F.3d at 751 (9th Cir. 2000); June 7 Order at 31.

W&C again fails to sufficiently allege—under Rule 9, which applies here, or even under Rule 8—that President Escalanti or Councilman White agreed to violate the substantive provisions of RICO or agreed to commit, or participated in, a violation of two predicate offenses. W&C still merely alleges in conclusory labels that defendants "either conspired to participate in or conduct an enterprise aimed at fraudulently abusing the finances of the tribe in pursuit of a sham online payday lending business or for some other elicit end." *See* SAC ¶ 230; *see also Carpenter v. Thrifty Auto Sales*, No. EDCV09-02233 DMG (DTBx), 2010 WL 11595928, at *5 (C.D. Cal. July 30, 2010) (citing *Wasco Products v. Southwell Technologies*, 435 F. 3d 989, 991 (9th Cir. 2006), *cert. denied*, 549 U.S. 817, 127 S.Ct. 83 (2006)) ("When the object of a conspiracy is fraudulent, a pleading must meet the heightened standard under Federal Rule of Civil Procedure 9(b)."); *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557–58 (9th Cir. 2010) (finding that failure to identify specific mailings or misrepresentations does not satisfy Rule 9's pleading requirements).

This is plainly insufficient. In the Ninth Circuit, a defendant may be held liable for conspiracy to violate RICO only if he "'knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise.'" *Natomas Gardens Inv. Grp., LLC v. Sinadinos*, 710 F. Supp. 2d 1008, 1020 (E.D. Cal. 2010) (quoting U.S. v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004)). Additionally, the defendant must be "aware of the essential nature and scope of the enterprise and intend[ ] to participate in it." *Id.* Completely lacking from the SAC is any semblance of the who, what, when, and where required to satisfy Rule 9.

W&C fails to provide specific facts about President Escalanti's and Councilman White's alleged agreement and plan to stop the per capita payments in order to pursue a payday lending service, "some other elicit end," or "personal enrichment." There are no plausible allegations that lead to an inference that either man knowingly joined a RICO scheme with the Rosette Defendants. Because W&C has again failed to allege an agreement it therefore fails to allege a RICO conspiracy. *Avalos v. Baca*, 596 F.3d 583, 593 (9th Cir. 2010) (affirming dismissal of RICO conspiracy claims where plaintiff did not present evidence of a "conspiracy" or "agreement" among defendants); *Alves v. Players Edge, Inc*., No. 05CV1654WQH(CAB), 2007 WL 6004919, at *12-13 (S.D. Cal. Aug. 8, 2007) (holding that a RICO conspiracy claim fails where plaintiffs did not sufficiently allege an agreement between defendants to further the enterprise and noting that "mere association" with an enterprise does not constitute a RICO conspiracy); *De Los Angeles Gomez v. Bank of Am., N.A*., 642 F. App'x 670, 676 (9th Cir. 2016) (finding that although plaintiffs pled that the defendants were involved and had general knowledge of the enterprise, the allegations were insufficient to show that defendants knew of the scheme or its scope, or that they agreed and intended to participate in it); *Natomas Gardens Inv. Grp*., LLC, 710 F. Supp. 2d at 1020-21 (dismissing plaintiff's RICO conspiracy claim where plaintiff failed to show how defendant was aware of

the essential nature and scope of alleged RICO enterprise or that defendants intended to participate in it).

Accordingly, W&C's RICO conspiracy claim must be dismissed.

CONCLUSION

W&C's breach of implied covenant claim is barred as a matter of law, and its RICO conspiracy claim against President Escalanti and Councilman White remains baseless. W&C has had sufficient opportunity to allege claims against the Quechan Defendants. But outside of the narrow fee dispute under the Fee Agreement's Discharge and Withdrawal clause (Section II), it cannot do so. The Court should therefore grant this motion, with prejudice.

Dated: August 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail address denoted on the electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 3, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima