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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.

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

OPPOSITION TO WILLIAMS & COCHRANE'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

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

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INTRODUCTION

In another effort to throw what should be a straightforward fee dispute off course, Williams & Cochrane ("W&C") has now moved for leave to file a Third Amended Complaint ("Proposed TAC")—just one business day after filing its Second Amended Complaint. In the Proposed TAC, W&C seeks to add an intentional interference claim, similar to one it abandoned previously, against several existing defendants and two new defendants—the counsel representing the Quechan Tribe of the Fort Yuma Indian Reservation ("Tribe") and two Tribal officials (together "Quechan Defendants") in this matter. The motion should be denied because the Quechan Defendants will be prejudiced, the proposed amendment is designed to gain an improper procedural advantage, and the proposed new claim is barred as a matter of law.

First, W&C's proposed intentional interference claim is barred by the litigation privilege under Cal. Civ. Code § 47(b) because the proposed claim is premised on court filings in this litigation, including the Tribe's Answer.

Second, W&C's proposed amendment would substantially prejudice the Quechan Defendants by seeking to create an "advocate witness" issue for the Quechan Defendants and their counsel. This would put the Quechan Defendants in a difficult, if not untenable, position. The TAC would also unnecessarily increase the Quechan Defendants' expenses and further delay the litigation by instituting another round of motion practice on yet another amended complaint.

Third, W&C's filing constitutes a bad faith attempt to gain a tactical advantage. W&C has already filed four previous complaints—the first two of which asserted intentional interference claims. W&C now seeks to add back an intentional interference claim in a new proposed TAC filed only one business day after it filed its Second Amended Complaint.

And, finally, W&C does not—and cannot—plead facts sufficient to allege the elements of its proposed claims for intentional interference with contract or with

prospective economic advantage against the Quechan Defendants' counsel. W&C fails, for example, to allege that the Quechan Defendants' counsel in this litigation—WilmerHale generally, or Mr. Casamassima specifically—(1) knew of the terms, duration, or type of W&C's contract with the Pauma tribe; (2) intended to induce the Pauma tribe to breach any contract; (3) caused the actual breach or disruption of any contract; (5) committed an independent wrong in the course of purportedly interfering with any contract; or (5) caused W&C to suffer damages as a result of the alleged interference. In addition, any fee agreement between Pauma and W&C would necessarily be an at-will contract, which cannot be the subject of an intentional interference claim. The proposed amendment would therefore be futile.

W&C's motion for leave to file the Proposed TAC should be denied.

SUMMARY OF PROPOSED NEW CLAIM

W&C's Proposed TAC seeks to bring a claim labeled "Intentional Interference with Contract/Prospective Economic Advantage" against Rob Rosette, his law firm, another attorney employed by Mr. Rosette's law firm ("Rosette Defendants"), and two completely new parties—Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), the law firm representing the Quechan Defendants in this lawsuit,[1] and the Quechan Defendants' lead counsel of record, Chris Casamassima ("Proposed New Defendants"). As best the Quechan Defendants can discern from this proposed new claim, W&C is attempting to allege interference with the W&C-Tribe Fee Agreement by the Rosette Defendants, and interference with the W&C-Pauma relationship by the Rosette Defendants and the Proposed New Defendants. Proposed TAC ¶¶ 245-46.

Neither Mr. Casamassima nor any other attorney at WilmerHale is mentioned

[1] "WilmerHale, LLP," named as a defendant in the caption of the TAC, is not a legal entity. Wilmer Cutler Pickering Hale and Dorr LLP, the Tribe's counsel in this lawsuit, is often referred to, and refers to itself, with the shorthand moniker "WilmerHale."

by name in the proposed new interference claim, and there are no allegations of any specific wrongful actions by any individual WilmerHale attorney. *Id.* ¶ 246. Rather, W&C's new allegations focus on WilmerHale's representation of the Quechan Defendants. W&C contends that "the attorneys with WilmerHale . . . have been targeting one of [W&C]'s clients for five months" by working with the Rosette Defendants to "undo the sealing orders in this case"; "disseminating the pleading materials [W&C] filed under seal"; and relaying the Tribe's "premature Answer" to individuals in the Pauma tribe "with the message" that the Counterclaims asserted by the Tribe in its Answer constituted proof of W&C's unethical conduct. *Id.* As discussed below, these allegations cannot form the basis of a claim against the Proposed New Defendants.

ARGUMENT

"After a party has amended once as a matter of course, it may only amend further after obtaining leave of the court, or by consent of the adverse party." *Swearingen v. Healthy Beverage LLC*, 2017 WL 1650552, at *5 (N.D. Cal. May 2, 2017) (denying amendment for futility where allegations were impossible). Such amendments are governed by Fed. R. Civ. P. 15.

A motion for leave to amend depends on the following factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Of these factors, undue prejudice to the opposing party carries the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.* 316 F.3d 1048, 1051-52 (9th Cir. 2003). Even where prejudice is absent, courts should deny leave to amend upon a "strong showing" of any of the other factors. *Fundingsland v. OMH Healthsedge Holdings, Inc.*, 2018 WL 3472357, at *9 (S.D. Cal. July 18, 2018) (denying leave to amend based on weight of relevant factors). Here, the proposed amendments are prejudicial, futile, in bad faith, and would constitute W&C's ***fifth*** complaint. The Court should deny W&C's motion.

I. W&C'S PROPOSED INTENTIONAL INTERFERENCE CLAIM IS BARRED BY THE LITIGATION PRIVILEGE AND PUBLIC POLICY

California Civil Code § 47(b) protects communications made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law[.]" *See also Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). This includes filings in a legal action. *See Roots Ready Made Garments v. Gap, Inc.*, 2008 WL 239254, at *6 (N.D. Cal. Jan. 28, 2008) (dismissing intentional interference claims based on court filing as barred by litigation privilege); *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1249 (2007) ("[T]he filing of a legal action [is] by its very nature [ ] a communicative act . . . We contemplate no communication that is more clearly protected by the litigation privilege than the filing of a legal action."). The litigation privilege grants "absolute immunity" from "all torts other than malicious prosecution . . . ." *Johnson v. Liberty Mut. Ins.*, 2013 WL 415585, at *5 (N.D. Cal. Jan. 31, 2013).

The principal purpose of the privilege "is to afford litigants and witnesses [ ] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *GeneThera, Inc. v. Troy & Gould Prof'l Corp.*, 171 Cal. App. 4th 901, 909 (2009). And the privilege "promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests." *Id.* ("The privilege is absolute, not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions . . .") (internal quotation marks omitted). Following these principles, California courts have held that attorneys may not sue opposing counsel for communications made as officers of the court during the course of litigation. *Pollock v. Superior Court*, 229 Cal. App. 3d 26, 29-30 (1991); *see also Rusheen v. Cohen*, 37 Cal. 4th 1048, 1063, 128 P.3d 713, 722 (2006)) ("The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without

fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation.") (citing *Silberg,* 50 Cal. 3d at 213-14).

Pollock is an analogous illustration of the rule. In that case, plaintiff-attorney sued opposing counsel for breach of contract and fraud, alleging that sanctions had been imposed on him as a result of the opposing counsel's failure to advise the court of a settlement and take a hearing off calendar. 229 Cal. App. 3d at 26. The appellate court directed the superior court to sustain the demurrer, finding that "the public policy of this state is not served by permitting attorneys to sue one another for omissions or representations made as officers of the court during the course of litigation." *Id.* at 29. And further, the court held that such an action represented an "intolerable" effort to "end-run and abuse the judicial system" and could lead to a "geometric proliferation of litigation" if allowed to proceed. *Id.* at 30. *Pollock* is in line with authority in other jurisdictions that have condemned the tactic of one side suing the other's counsel. *See, e.g.*, *American Family Mut. Ins. Co. v. Zavala*, 302 F. Supp. 2d 1108, 1120 (D. Ariz. 2003) ("It would be a dangerous precedent indeed to hold that lawyers must consider the interests of opposing parties when acting for their clients—that they may be held personally liable if their actions frustrate the opponents' interests."); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532 (N.D. Tex. 1996) (noting that "an attorney's knowledge that he may be sued . . . would favor tentative rather than zealous representation of the client, which is contrary to professional ideals and public expectations"); *Fla. v. Knapp King-Size Corp.*, 1992 WL 420893, at *3 (W.D. Mich. Oct. 19, 1992) ("Permitting a disgruntled litigant such as the plaintiff to sue the lawyer for the opposing side would allow a person to litigate the same issue in perpetuity . . . but this Court will not permit it.").

The reasoning in *Pollock* and the analogous authority applies directly here. W&C alleges that, in an effort to interfere with its contract with the Pauma tribe,

"attorneys with WilmerHale worked together with the Rosette Defendants to "undo the sealing orders in this case" by (1) filing the Declaration of the Office of the Governor's Senior Advisor for Tribal Negotiations Joginder Dhillon ("Dhillon Declaration") in connection with the Tribe's Motion to Dismiss the FAC; and (2) filing a "premature Answer" to the FAC. *See, e.g.*, Proposed TAC ¶¶ 174-76, 246. W&C's claims are therefore premised on court filings made by the Quechan Defendants' counsel—on behalf of the Quechan Defendants—in this action. Such claims are barred as a matter of law.

Under fundamental California law, the Dhillon Declaration and the Tribe's Answer and Counterclaims—filings made in defense of a legal action—are protected by the litigation privilege, which is "absolute." *Johnson*, 2013 WL 415585, at *5; *see also MDTV Med. News Now, Inc. v. Sax*, 2007 WL 174144, at *3 (S.D. Cal. Jan. 17, 2007) (holding communications made in connection with litigation do not fall outside privilege regardless of subjective intent of defendant); *Abraham v. Lancaster Cmty. Hosp.*, 217 Cal. App. 3d 796, 822 (1990) (holding litigation privilege is not affected by motive or purpose). The privilege extends to intentional interference claims. *Abraham*, 217 Cal. App. 3d at 822. W&C is accordingly barred from using these filings in this case to "end-run . . . the judicial system" and assert intentional interference claims. *Pollock*, 229 Cal. App. 3d at 30. W&C's proposed new claims are barred by the litigation privilege.

Declining to permit W&C to assert its new claim against the Quechan Defendants' counsel of record is all the more appropriate here given the availability of alternative remedies. *Pollock*, 229 Cal. App. 3d. at 30. To the extent that W&C is seeking to hinge this new claim on the vague and conclusory allegation that unnamed "WilmerHale attorneys" somehow knowingly violated a Court order by participating in the "disseminating" of sealed documents, it may pursue sanctions against the offending parties rather than a new tort claim against the Quechan Defendants'

counsel. *See* S.D. Cal. L.R. 83.1.[2]

II. W&C'S MOTION FOR LEAVE TO AMEND SHOULD BE DENIED BECAUSE IT IS PREJUDICIAL TO THE QUECHAN DEFENDANTS

The Ninth Circuit defines "prejudice" as "substantial prejudice or substantial negative effect." *Dorsett v. Sandoz, Inc.*, 2010 WL 1152276, at *1 (C.D. Cal. June 29, 2010). Prejudice results when amendment would unnecessarily increase costs or diminish the opposing party's ability to respond to the amended pleading. *San Diego Comic Convention v. Dan Farr Prods.*, 2017 WL 3269202, at *5 (S.D. Cal. Aug. 1, 2017) (denying motion for leave to amend, in part, because of the "dubious value of the proposed amendment and timing of the motion"). The proposed TAC would cause the Quechan Defendants significant prejudice.

W&C claims that it is "simply add[ing] a claim for intentional interference . . . against the responsible parties." This is misleading at best. The proposed amendment does not "simply" add a claim, it also adds new parties—specifically, the ***Quechan Defendants' counsel*** in this litigation. Dkt. 105-1. As a result, W&C's proposed amendments would substantially prejudice the Quechan Defendants by seeking to (1) manufacture an "advocate witness" issue for the Quechan Defendants and their counsel, and (2) burden the Quechan Defendants with the resulting inefficiencies and increased costs.

First, W&C's proposed amendments impermissibly seek to create an ethical issue for the Quechan Defendants and their counsel, which could lead to Mr. Casamassima having to withdraw from the case. Under California Rule of Professional Conduct 5-210, an attorney may not act as an advocate and a witness in

[2] In any event, the Pauma tribe is mentioned more than 100 times in the public version of the SAC and W&C bases claims on the Rosette Defendants' interactions with Pauma. *See* SAC ¶¶ 216-227. Pauma tribe members are potential witnesses and have "a substantial interest in the outcome of the pending litigation" pursuant to section 47(b). *See Costa v. Superior Court*, 157 Cal. App. 3d 673, 678 (1984); *Abraham v. Lancaster Community Hospital*, 217 Cal. App. 3d 796, 802 (1990).

the same proceeding. *See also Yousuf v. Robert A. Bothman, Inc.*, 2017 WL 5153695, at *2 (N.D. Cal. Nov. 7, 2017). This prohibition is aimed at eliminating "confusion" over an attorney's role, which "could ***prejudice one or more of the parties*** or call into question the impartiality of the judicial process itself." *Calouori v. One World Techs., Inc.*, 2012 WL 2004173, at *5 (C.D. Cal. June 4, 2012) (emphasis added). Rule 5-210 could bar Mr. Casamassima from representing the Quechan Defendants at trial, potentially even if the Quechan Defendants consented to his continued participation. *Id.* Forcing the Quechan Defendants to find new lead counsel would not only impose additional costs on the Quechan Defendants as substitute counsel became familiar with the case, but would interfere with the Quechan Defendants' fundamental right to retain counsel of their choice. *See Fracasse v. Brent*, 6 Cal. 3d 784, 790 (1972). Allowing W&C to manufacture this issue, and the resulting ramifications of the issue looming over the litigation, would constitute real and significant prejudice to the Quechan Defendants.

Second, a TAC would substantially prejudice the Quechan Defendants by needlessly extending the litigation and "unnecessarily increasing cost[s]" of the litigation to the Quechan Defendants. *San Diego Comic Convention*, 2017 WL 3269202, at *5. As noted in the Tribe's opposition to W&C's motion to strike the Tribe's Answer, Dkt. 98, a TAC, if permitted, would have the added inefficient effect of restarting the briefing process on the motion to dismiss and prolonging it through the fall (and increasing the associated costs). Indeed, the Quechan Defendants already had to incur additional burden in responding to this motion—at the same time they were preparing their motion to dismiss the Second Amended Complaint ("SAC"), which they filed just four days ago, on August 3. *See* Dkt. 115.

W&C's self-serving contention that its tactical gambit does not prejudice the Quechan Defendants should be taken for what it is. Dkt. 105-1 at 4. Accordingly, the Court should deny W&C's motion for leave to amend.

III. THE MOTION FOR LEAVE TO AMEND CONSTITUTES BAD FAITH AND WOULD RESULT IN W&C'S *FIFTH* COMPLAINT

Bad faith motive is a proper ground for denying leave to amend. *See Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987). Proposed amendments based on an attempt to gain a tactical advantage may reflect bad faith. *See, e.g.*, *San Diego Comic Convention*, 2017 WL 3269202, at *4 (denying leave to amend, in part, because the motion was a "tactical play that g[ave] an impression of bad faith"); *Hernandez v. DMSI Staffing, LLC*, 79 F. Supp. 3d 1054, 1060 (N.D. Cal. 2015) (denying leave to amend where plaintiff was using amendment as a tactic to "preview [the] defendant's motion to compel arbitration"), *aff'd*, 677 F. App'x 359 (9th Cir. 2017); *Sorosky*, 826 F.2d at 805 (denying leave to amend where plaintiff acted in bad faith and sought leave to add a new party to destroy diversity jurisdiction); *Acri v. International Ass'n of Machinist & Aerospace Workers*, 781 F.2d 1393, 1398-99 (9th Cir. 1986) (affirming denial of leave to amend where plaintiff moved, in bad faith, to avoid the possibility of an adverse ruling).

W&C argues here that bad faith is "lacking." Mem. at 4. But the proposed amendments themselves show that is not true. W&C's proposed amendments are a transparent attempt to gain an impermissible tactical advantage that would result in prejudice to the Quechan Defendants as discussed *supra—i.e.* by (1) seeking to create an ethical problem for the Quechan Defendants and their counsel; and (2) unnecessarily prolonging litigation and increasing costs to the Quechan Defendants. Further, as discussed *infra*, what is "lacking" here are any plausible allegations that any "WilmerHale attorneys" worked to "disseminate" materials to the Pauma tribe or otherwise interfered with W&C's relationship with Pauma.

Moreover, the Proposed TAC represents W&C's ***fifth*** complaint in this case. W&C filed its first complaint on July 17, 2017, (Dkt. 1), which was later struck by the Court, (Dkt. 3). On September 9, 2017, W&C filed its second complaint, which contained substantive revisions. Dkt. 5. Both of these complaints contained

intentional interference claims. *See* Dkts. 1, 5. After the defendants filed motions to dismiss and strike that complaint, W&C filed its third complaint, titled the First Amended Complaint ("FAC"), on March 2, 2018. Dkt. 39. The FAC abandoned the claims that were most likely to be struck under the Anti-SLAPP laws, ***including the intentional interference claims***. *Id.* The Quechan Defendants moved to dismiss the FAC. And, on June 7, 2018, the Court granted the Quechan Defendants' motion to dismiss in substantial part. Dkt. 89. W&C then filed its fourth complaint, titled the Second Amended Complaint ("SAC"), on July 20, 2018. The following business day, on July 23, W&C moved for leave to file the Proposed TAC. W&C's heavy-handed effort to derail the litigation with yet another amended complaint should not be allowed, particularly given that, if W&C is truly concerned with the violation of a Court Order, there are other more efficient and less burdensome remedies available. *See, e.g.*, S.D. Cal. L.R. 83.1.

IV. W&C'S MOTION FOR LEAVE TO AMEND SHOULD BE DENIED BECAUSE W&C FAILS TO PLEAD INTENTIONAL INTERFERENCE

The right to amend pleadings "does not extend to cases in which any amendment would be an exercise in futility[.]" *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1298 (9th Cir. 1998); *see also Johnson*, 356 F.3d at 1077 ("Futility alone can justify the denial of a motion to amend."). A proposed amendment is futile if no set of facts can be proved under the amendment that would "constitute a valid and sufficient claim or defense." *Derderian v. Southwestern & Pac. Specialty Fin., Inc.*, 2014 WL 6980525, at *3 (S.D. Cal. Dec. 8, 2014) (quoting *Miller v. Rykoff-Sexton, Inc*., 845 F.2d 209, 214 (9th Cir. 1988)). Accordingly, the test of whether an amendment is futile is "identical" to that for a motion to dismiss for failure to state a claim. *Id.*

W&C's proposed amendments are futile because they fail to state claims for intentional interference with contract or for intentional interference with prospective economic advantage. To state a claim for intentional interference with contract, a

plaintiff must allege: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004).

The elements of tortious interference with prospective economic advantage have two substantive differences: (1) rather than a valid contract, there must be at least "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff"; and (2) the defendant's interference must be "independently wrongful." *Id.* at 1152-53; *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153-54 (2003).

Here, W&C's proposed allegations do not point to facts sufficient to raise a plausible inference that Mr. Casamassima or any other unnamed "WilmerHale attorneys" intentionally interfered with W&C's relationship with the Pauma tribe. Even if W&C had a valid contract with the Pauma tribe, W&C fails to allege that (1) the Proposed New Defendants knew enough about such a contract or that the contract was not at-will; (2) the Proposed New Defendants intentionally acted to disrupt the contract; (3) there has been ***any*** "actual breach" or "disruption" of the purported contract; or (4) W&C has suffered any resultant damage.

A. W&C Fails To Sufficiently Allege The Proposed New Defendants' Knowledge of The Terms Of The Contract At Issue, Or That The Contract Is Not An At-Will Contract

As an initial matter, W&C fails to point to any facts indicating that the Proposed New Defendants knew the terms, duration, or even the type of contract W&C may have with the Pauma tribe. *See U.S. Colo, LLC v. CoreSite One Wilshire LLC*, 2014 WL 12689269, at *5 (C.D. Cal. July 31, 2014) (dismissing tortious interference claim where plaintiff failed to allege that defendant knew enough about the contracts at issue to "foresee that its actions would interfere" with them).

Knowledge is a required element of W&C's interference claim. In *Diehl v. Starbucks, Corp.*, 2013 WL 12108658, at *7-8 (S.D. Cal. Oct. 16, 2013), for example, a court dismissed intentional interference claims where the plaintiff made only conclusory allegations that the defendant knew of the contract and prospective business opportunities at issue. *See also Seoul Laser Dieboard Sys. Co. v. Serviform, S.r.l.*, 957 F. Supp. 2d 1189, 1201 (S.D. Cal. 2013) (same); *Trindade v. Reach Media Grp., LLC*, 2013 WL 3977034, at *15-16 (N.D. Cal. July 31, 2013) (dismissing intentional interference claims in which plaintiff failed to allege more than generalized knowledge by defendant of contract at issue).

Here, based on representations made by W&C in pleadings and briefs in this litigation, the Proposed New Defendants are generally aware that W&C represented the Pauma tribe in litigation with the State of California, and that it continues to represent the Pauma tribe in some capacity. But W&C does not allege that the Proposed New Defendants have knowledge of any specific contractual terms between W&C and the Pauma tribe, or that their contractual relationship extends into the future. W&C alleges no facts about its economic relationship with Pauma at all.

Moreover, in light of a client's right to terminate its lawyer at any time for any reason, any contract between W&C and Pauma is necessarily at-will. *See 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."). W&C implicitly concedes as much by acknowledging that it may be terminated soon. Proposed TAC ¶ 246. At a minimum, the most plausible inference from the allegations is that any W&C-Pauma agreement is at-will.

As a matter of law, a plaintiff cannot bring a claim for intentional interference with an at-will contract. *See Reeves*, 33 Cal. 4th at 1152; *Warwick v. University of the Pac.*, 2010 WL 2680817, at *10 (N.D. Cal. July 6, 2010) ("Under California law, a party who interferes with an at-will contract cannot be sued for interference with contract."); *see also* Dkt. 29-1 at 24-25 (explaining that under *Reeves* and *Warwick*, a

plaintiff cannot bring a claim for intentional interference with an at-will contract). W&C's claim for intentional interference with its contract with Pauma therefore cannot survive.

B. W&C Fails To Allege Facts That The Proposed New Defendants Engaged In Any Intentional Acts Designed to Disrupt W&C's Contractual Relationship with Pauma

To state an intentional interference claim, a plaintiff must plead that the defendant acted with the purpose of disrupting the contract at issue or be "substantially certain" that a breach would occur as a result of the purported interference. *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at *8-9 (N.D. Cal. Dec. 23, 2014) (citing *Reeves*, 33 Cal. 4th at 1148). *Celebrity Chefs Tour, LLC v. Macy's, Inc.*, 16 F. Supp. 3d 1141 (S.D. Cal. 2014) is instructive. In that case, the producer of a live television tour brought, *inter alia*, intentional interference claims against its sponsor, alleging that the sponsor interfered with the producer's contracts with third-party content providers. *Id.* The court dismissed the claims, holding that the producer failed to identify "what acts [the sponsor] purportedly undertook to induce third parties to breach their contracts with Plaintiffs, or why [the sponsor] rather than other forces, was the cause of said breach(es)." *Id.* at 1157; *see also Curley*, 2014 WL 7336462, at *8-9 (dismissing intentional interference claims where defendant's decision may have resulted from adherence to investor guidelines rather than an intentional act designed to induce breach).

Likewise, W&C fails to plausibly allege that its contractual relationship with the Pauma tribe was severed as a result of any actions by the Proposed New Defendants, as opposed to other factors. W&C's allegations offer no discernable—much less plausible—basis for W&C's allegations that the Proposed New Defendants "disseminat[ed]" any sealed documents or any "message" to Pauma. W&C generally alleges a "renewed campaign" by Rosette to sever W&C's relationship with the Pauma tribe by (1) "disseminating" a sealed document to the general manager of

Pauma's gaming facility; and (2) "disseminating" "all" the sealed documents in this case to an unnamed Pauma tribal member purportedly related to Quechan's President Escalanti. Proposed TAC ¶ 173-75. No WilmerHale attorney is identified in these allegations. *See id.*

Next, W&C claims that, after the sealed documents had allegedly been "disseminat[ed]" and after the Court issued its order on the motion to dismiss, Rosette worked with the Proposed New Defendants to "file a premature answer." *Id.* ¶¶ 176, 246. And, confusingly, citing paragraphs 174 and 175 in its Sixth Claim for Relief, W&C also alleges that both Rosette and unnamed "WilmerHale attorneys" "disseminat[ed]" sealed pleading materials to "two individuals" at the Pauma tribe prior to filing the Tribe's "premature" Answer.[3] *See id.* ¶ 246. As a result, the Quechan Defendants simply cannot discern any plausible facts establishing how unnamed "WilmerHale attorneys" "disseminat[ed]" sealed pleading materials when Rosette and the "WilmerHale attorneys" did not even purportedly begin "work[ing] together" until the filing of the so-called premature answer (which is alleged to have taken place after the purported "disseminat[ion]" of sealed materials).

Finally, W&C alleges that Rosette and the unidentified "WilmerHale attorneys" again "work[ed] together" to somehow "relay" the publicly-filed and procedurally proper Answer to the Pauma tribe with the "message" that W&C engaged in unethical behavior. *See id.* ¶¶ 176, 246. But to the extent that W&C asserts some "message" was delivered in connection with "relaying" the Answer (*see* TAC ¶ 246), the allegation is hopelessly vague and conclusory. It does not describe any role played by any WilmerHale attorney in connection with creating or "relaying" a message to Pauma—a tribe with which W&C does not even allege WilmerHale has a relationship.

Thus, W&C's intentional interference theory seems to be premised on the possibility that Pauma may terminate W&C after reading W&C's pleadings in this

[3] The allegations in the Tribe's Answer and Counterclaims cannot be the basis of a claim against the Proposed New Defendants. *See* supra, § I.

litigation, which were filed under seal ostensibly to protect the ***Tribe's*** confidentiality interests. W&C does not explain why its own client would want to terminate it after reading its filings here. But if true, it is apparently something that is in W&C's own filings—not any act by any of the Proposed New Defendants—that has apparently put W&C's relationship with Pauma in jeopardy.

W&C also does not allege facts showing that the Proposed New Defendants were "substantially certain" that a breach of W&C's contract with the Pauma tribe would occur. Instead, W&C conclusorily alleges only that "WilmerHale attorneys" worked with the Rosette Defendants to commit certain acts to purportedly induce the Pauma tribe to sever its relationship with W&C. *See, e.g.,* Proposed TAC ¶¶ 174-76, 246. But this is not enough. W&C must allege that the Proposed New Defendants: (1) acted with the purpose of interfering with the Pauma contract or (2) knew that interference was "substantially certain" to occur as a result of the actions described above. *See Curley*, 2014 WL 7336462, at *8-9. W&C alleges nothing of the sort.

In none of its allegations, conclusory as they are, does W&C identify any action taken by Mr. Casamassima. Indeed, the proposed TAC contains no allegations whatsoever, beyond preparing the filings in this litigation, of any action that Mr. Casamassima himself allegedly performed. His name is mentioned only insofar as he is identified as a potential defendant. Simply lumping him in generally as one of the "WilmerHale attorneys" in W&C's vague allegations is insufficient to involve him personally as a party in this case. *See, e.g.*, *Abed-Stephens v. First Fed. Bank of Cal.*, 2010 WL 1266833, at *2 (C.D. Cal. Mar. 30, 2010) (dismissing claims because plaintiffs "lump all of the defendants together throughout the entire SAC" and "simply state—in conclusory fashion—that Defendants have violated a particular statute"). Accordingly—putting aside all of the other reasons why W&C should not be permitted to include the Quechan Defendants' lead counsel, personally, as a defendant in this case—W&C simply has not satisfied its pleading burden under Rule 8 to include Mr. Casamassima as a defendant. Indeed, W&C cannot allege facts sufficient

to show that any "WilmerHale attorneys," intentionally acted to induce a breach or disruption of W&C's purported contractional relationship with the Pauma tribe. Its proposed intentional interference claim cannot proceed.

C. W&C Fails To Allege An Actual Breach Or Disruption Of Its Economic Relationship

A plaintiff must allege that the defendant's "alleged wrongful or unjustified conduct caused" a breach of contract or disruption of economic opportunity in order to state an intentional interference claim. *Celebrity Chefs Tour*, 16 F. Supp. 3d at 1157. Thus, courts routinely dismiss intentional interference claims in which a plaintiff fails to point to facts establishing that an actual breach or disruption of a contractual relationship or economic opportunity occurred. *See, e.g.*, *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008) (dismissing intentional interference with prospective economic advantage claim for failure to allege facts showing that the plaintiff lost a contract or a negotiation); *Seoul Laser Dieboard Sys.*, 957 F. Supp. 2d at 1201 (dismissing intentional interference claims for failure to plead specificity as to the disruption of the contract); *Martin v Walt Disney Internet Grp.*, 2010 WL 2634695, at *9-10 (S.D. Cal. June 30, 2010) (same).

W&C likewise fails to plead with any specificity that it lost a contract or economic opportunity. On the contrary, W&C alleges only that Pauma has "schedule[ed] an imminent meeting to discuss Williams & Cochrane's employment future with the tribe." Proposed TAC ¶ 246. This is neither an actual breach, nor a disruption. Indeed, W&C fails to allege: (1) that this "imminent" meeting took place ***and*** resulted in the Pauma tribe terminating its purported contract with W&C; or (2) that the Pauma tribe has otherwise ended its relationship with W&C. W&C's failure to allege an actual breach or disruption precludes its proposed claims.

D. W&C Does Not Allege That The Proposed New Defendants Committed An Independent Wrong

To state a claim for intentional interference with prospective economic advantage, W&C must allege that the purported interference was "wrongful by some legal measure apart from the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co.*, 29 Cal. 4th at 1159; *see also Epitech, Inc. v. Cooper Wiring Devices, Inc.*, 2013 WL 12095585, at *3 (S.D. Cal. Jan 8. 2013) ("To be 'wrongful,' the conduct must be 'independently actionable.'") (quoting *Korea Supply Co.*, 29 Cal. 4th at 1158-59).

W&C does not allege any independently wrongful acts by the Proposed New Defendants, or any "WilmerHale attorneys," in the Proposed TAC beyond conclusory allegations regarding the pleadings in this litigation, which are privileged under Cal. Civ. Code § 47(b). As best the Quechan Defendants can comprehend, W&C alleges that the "independently wrongful acts" are the same as the "intentional acts" purportedly taken by the Proposed New Defendants and the Rosette Defendants to interfere with W&C's relationship with Pauma, none of which is "independently actionable." *See supra* II.A.2.

E. W&C Fails To Allege Damage

W&C has not alleged that it suffered any damage or loss as a result of the Proposed New Defendants' purported intentional interference with the alleged Pauma contract. Nor could it, given that W&C cannot state facts sufficient to show that the Proposed New Defendants induced Pauma to sever its relationship with W&C. *See, e.g.*, *Roadrunner Transp. Servs. v. Tarwater*, 2010 WL 11483986, at *4 (C.D. Cal. Dec. 20, 2010) (dismissing intentional interference claim and stating that plaintiff's damages allegation was "conclusory at best" where plaintiff could not sufficiently allege intentional acts or an actual breach of the contract at issue).

All that W&C contends is that any interference by "Robert Rosette and company" will have "enduring, irreparable effects" on the purported contract with Pauma, such as a possible "immediate termination," or a "painful and premature parting of ways." Mem. at 4. As noted above, W&C alleges that the Pauma tribe has "scheduled an imminent meeting" to discuss W&C's employment. *See* Proposed TAC ¶ 246. This is not cognizable ***damage.*** W&C has not alleged, for example, that it has been terminated by the Pauma tribe or that it no longer has a contract with the Pauma tribe. These allegations are far too bare and conclusory to sustain a claim. W&C's motion should be denied.

CONCLUSION

With the instant motion, W&C seeks to divert the attention of the Defendants and the Court from the merits of the pending litigation by filing its fifth complaint in this case. The Proposed TAC seeks to add new parties, and has already prejudiced, and will continue to prejudice, the Quechan Defendants by forcing them to incur increased costs, by attempting to undermine their relationship with their chosen counsel, and by needlessly extending the litigation. Moreover, W&C has not stated—and cannot state—a claim for intentional interference. As a result, leave to amend to add the claim would be futile. For these reasons, the Quechan Defendants respectfully request that the Court deny W&C's motion for leave to file the Proposed TAC.

Dated: August 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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 7, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima