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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

ROSETTE DEFENDANTS' OPPOSITION TO 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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I. Introduction

Three days after filing the Second Amended Complaint ("SAC"), Williams & Cochrane ("W&C") filed a Motion for Leave to File Third Amended Complaint ("TAC"), seeking to add a claim for tortious interference with contract or prospective economic advantage. (*See* Docket Nos. 100, 105.) The proposed claim impermissibly seeks to base tort liability on communications made by the Rosette Defendants related to their representation of Quechan and their defense of this case. This includes, for example, communications to individuals and tribes specifically referenced in W&C's various complaints and two court filings in this litigation. As W&C implicitly conceded when it "amend[ed] around" the Rosette Defendant's first anti-SLAPP motion challenging similar claims (Docket No. 43 at 7), California's litigation privilege provides absolute immunity from tort liability and bars W&C's proposed claim. *See Silberg v. Anderson*, 50 Cal. 3d 205, 215 (1990) ("To effectuate its vital purposes, the litigation privilege is . . . absolute in nature"). The proposed amendment is therefore futile.

The timing of W&C's request is also prejudicial and raises questions about whether W&C had a good faith basis for bringing the Motion, rather than including the claim in its SAC. W&C included similar claims against the Rosette Defendants in its first unsealed complaint (Docket No. 5 at ¶¶ 250, 257), dropped them, and then on June 21, 2018, asked the Court to decide in advance whether it could pursue those claims in the SAC, all so that W&C could avoid expending "substantial resources when the opposing parties inevitably move to strike the new material." (Docket No. 93 at 6.) The Court declined W&C's request as "procedurally improper." (Docket No. 97 at 3.) W&C did not include a tortious interference claim in the SAC, where it surely would have faced an anti-SLAPP motion, even though the proposed claim is admittedly based on allegations that exist in the SAC. (Docket No. 105-1 at 2.) Instead, W&C staged its filings so that Defendants would need to respond first to the SAC, and then separately to the Motion. This

unnecessary motion practice is prejudicial and harassing. The Motion should be denied on this basis, too.

II. Argument

Motions for leave to amend pursuant to Federal Rule of Civil Procedure 15 are analyzed using five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 n.3 (9th Cir. 2009). The Court's discretion is "particularly broad where the plaintiff has previously amended." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (quotation and citation omitted). As the history of this case, the content of W&C's proposed amendment, and case law demonstrate, leave to file the TAC should be denied.

A. W&C's Proposed Claim Is Futile Because California's Litigation Privilege Precludes Liability for the Challenged Communications

The proposed claim for intentional interference with contract or prospective economic advantage is premised solely on communications related to litigation and official proceedings: (1) the Rosette Defendants' alleged solicitation of and communications with their client, Quechan; (2) two submissions to the Court in this case; and (3) communications about pleadings in this case with the subjects of those pleadings. (Docket No. 105-2 at ¶¶ 245–246.) California law precludes imposing tort liability for these communications, and "[l]eave to amend need not be given if a complaint, as amended, is subject to dismissal." *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

1. Section 47(b) Protects the Rosette Defendants' Communications with Quechan

California Civil Code section 47(b) immunizes from tort liability all communications made in furtherance of "any (1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law . . . ." Cal.

Civ. Code § 47(b). The privilege is extraordinarily broad and "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 of 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).

The Rosette Defendants' communications with Quechan occurred during an ongoing compact negotiation between Quechan and the State of California that W&C has repeatedly alleged "had a high likelihood of spiraling into federal litigation". (*E.g.*, SAC ¶ 61.) The existence of threatened litigation is sufficient to invoke section 47's protections. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) ("[C]ommunications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b)"). The Rosette Defendants' communications with Quechan 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).[1]

As Quechan's former attorneys, W&C cannot pursue an intentional

[1] The right to choose one's legal representative in the context of an official proceeding is no less important than in the context of litigation, and that is why section 47(b) applies with the same force and breadth to attorney communications made in connection with litigation. *See, e.g.*, *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").

interference claim against the Rosette Defendants for their communications related to taking over Quechan's representation or advising Quechan in connection with terminating W&C. (*See* Docket No. 31-1 (moving to strike W&C's previous intentional interference claims).) "[S]oliciting clients with respect to litigation is a communicative act within the scope of the litigation privilege." *Gribow v. Burns*, 2010 WL 4018646, at *11 (Cal. Ct. App. Oct. 14, 2010). As the California Supreme Court has explained, "[w]hether these acts amounted to wrongful attorney solicitation or not, they were communicative in their essential nature and therefore within the privilege of section 47(b)." *Rubin v. Green*, 4 Cal. 4th 1187, 1196 (1993); *accord Grant & Eisenhofer, P.A. v. Brown*, 2017 WL 6343506, at *6 n.3 (C.D. Cal. Dec. 6, 2017) ("the litigation privilege applies when prior counsel sues a client and her new lawyers").

Section 47(b) likewise protects advice to clients, regardless of motive or impact on other parties' contractual arrangements. *See, e.g.*, *Maki v. Yanny*, 2012 WL 4077571, at *7 (Cal. Ct. App. Sept. 18, 2012) ("The statements [the defendant attorney] is alleged to have made . . . unquestionably relate to anticipated or actual litigation. Accordingly, the privilege attaches to all such communications, even if made in a context that might give rise to an ethics violation.");[2] *Quintilone v. Low*, 2012 WL 420122, at *6–7 (Cal. Ct. App. Feb. 9, 2012) (litigation privilege applies to "advising a prospective client on pending litigation" even where that advice "included recommending [another lawyer's] discharge and related actions").

Once section 47(b) applies, it defeats all tort claims for intentional interference. *See, e.g.*, *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1142 (N.D. Cal. 2014) (dismissing intentional interference claims). As one

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[2] To be clear, the Rosette Defendant committed no ethics violations and Quechan was merely exercising its absolute right to get a second or third opinion and to change its counsel. The point here is that even communications that would constitute an ethics violation are immune from claims for tort liability by virtue of the section 47(b)'s absolute privilege.

court in the Central District of California explained, the reason for changing counsel is not relevant to the nature of the decision or the communications surrounding it: "[a]ny choice of counsel, regardless of the relative merits of the decision, the quality of the competing lawyers, or the level of self-interest involved, implicates a client's desire to seek appropriate representation." *Grant & Eisenhofer*, 2017 WL 6343506, at *6 (quotation and citation omitted). "A cornerstone of any client's rights is the ability to select counsel of her choosing." *Id.* at *7. Because the Rosette Defendants' alleged solicitation of and advice to Quechan is absolutely privileged, leave to file the TAC would be futile.

2. Court Filings in This Case Cannot Give Rise to Liability for Tortious Interference Under California Law

Nor can W&C build a tortious interference claim against the Rosette Defendants on allegations that a different defendant, Quechan, filed its Answer in this case, allegedly at the Rosette Defendants' urging, or that it filed "a declaration on behalf of the State's compact negotiator . . . that publicly discloses . . . confidential negotiation materials." (Docket No. 105-2 at ¶ 246.) "[T]he principal purpose of [the litigation 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." *Graham-Sult v. Clainos*, 756 F.3d 724, 747 (9th Cir. 2014) (affirming district court's order striking state-law claim based on court filings) (quotation and citation omitted). "[E]xternal threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice." *Silberg*, 50 Cal. 3d at 213 (quotation and citation omitted). In light of these considerations, pleadings and other court filings are absolutely privileged from civil liability under California law; "[e]ven the filing of improper or meritless pleadings, with an ulterior purpose, is privileged and does not constitute abuse of process." *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1319 (C.D.

Cal. 1992) (pleadings subject to section 47(b).)[3] Setting aside the fact that the proposed claim focuses on court filings by another party without suggesting how the Rosette Defendants were involved, those filings cannot form the basis of tort liability against *any party* under California law.

3. Sharing Pleadings with Individuals and Tribes Referenced in W&C's Allegations Is Also Subject to the Litigation Privilege

W&C also seeks to base its tortious interference claim on the alleged dissemination of: (1) a sealed version of the First Amended Complaint ("FAC") and (2) a copy of Quechan's Answer (Docket No. 94), along with a message that W&C "acted in an unethical manner." (Docket No. 105-2 at ¶ 246.) Both were allegedly sent to members or affiliates of the Pauma tribe. (*Id.*) These communications are also covered under section 47, and therefore cannot form the basis for tort liability, because they relate to the allegations in this litigation.

California's litigation privilege "is not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits." *Albertson v. Raboff*, 46 Cal. 2d 375, 381 (1956). Rather, "[i]f the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches." *Id.* All that is required is "some connection or logical relation to the action," *Silberg*, 50 Cal. 3d at 212; *see also Sacramento Brewing Co. v. Desmond, Miller &*

[3] The parties' filings are similarly protected by the *Noerr Pennington* doctrine and cannot serve as a basis for liability consistent with the Constitution. *See Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934–35 (9th Cir. 2006). The remedies for manifestly improper court filings in federal courts are found in Rule 11, 28 U.S.C. § 1927, and the Court's contempt authority, as well as post-litigation claims for malicious prosecution. *Cf. United States v. Pendergraft*, 297 F.3d 1198, 1206 (11th Cir. 2002) ("[L]itigants may be sanctioned for only the most frivolous of actions. These sanctions include tort actions for malicious prosecution and abuse of process, and in some cases recovery of attorney's fees, but even these remedies are heavily disfavored because they discourage the resort to courts"); *In re Trans Union Corp. Privacy Litig.*, 2009 WL 4799954, at *40 (N.D. Ill. Dec. 9, 2009) ("civil remedies (such as malicious prosecution or Rule 11 sanctions) are considered sufficient to police abuses").

1 *Desmond*, 75 Cal. App. 4th 1082, 1089 (1999) (litigation privilege "should be
2 denied only where [the communication] is so palpably irrelevant to the subject
3 matter of the action that no reasonable person can doubt its irrelevancy"). "Any
4 doubt as to whether such relationship or connection existed must be resolved in
5 favor of a finding of privilege." *Costa v. Superior Court*, 157 Cal. App. 3d 673,
6 678 (1984).

7 Pauma is mentioned more than 100 times in the public version of the SAC,
8 and W&C's pleadings specifically identify individuals connected to the tribe, either
9 by name (*see, e.g.*, FAC ¶ 184) or by detailed description, suggesting that those
10 individuals engaged in wrongdoing. (*See, e.g.*, SAC ¶ 170.) The Court's Order
11 dismissing the FAC discusses the Pauma allegations at length. (Docket No. 89 at
12 3–5.) Pauma and the individuals referenced in the pleadings therefore have "a
13 substantial interest in the outcome of the pending litigation" and come within the
14 protections of section 47(b). *Costa*, 157 Cal. App. 3d at 678. The California Court
15 of Appeal's analysis in *Abraham v. Lancaster Community Hospital* is instructive.
16 In *Abraham*, the plaintiff filed a lawsuit against its competitor alleging illegal,
17 anticompetitive conduct. 217 Cal. App. 3d 796, 802 (1990). The defendant,
18 Abraham, then filed a separate lawsuit against the original plaintiff, seeking
19 damages because the original plaintiff had "disseminated" the allegations against
20 Abraham in the locality and professional community. *Id.* at 805–06. The court
21 concluded that disseminating the allegations in the initial case to members of the
22 professional community was protected by California's litigation privilege because
23 that community had a "substantial interest" in the litigation. *Id.* at 823; *see also*
24 *Ingrid & Isabel*, 70 F. Supp. 3d at 1141 (non-party distributor and retailer had
25 substantial interest in intellectual property litigation such that privilege applied). If
26 anything, Pauma and individuals mentioned in the pleadings have a more direct
27 relationship than the professional community in *Abraham*. They are potentially
28 witnesses in this case so it cannot possibly be said that the communications W&C

seeks to challenge are "so palpably irrelevant to the subject matter of the action that no reasonable person can doubt its irrelevancy." *Sacramento Brewing Co.*, 75 Cal. App. 4th at 1089.

Moreover, "to exclude these alleged communications about a judicial proceeding from the scope of section 47 . . . would impose a chilling effect on the public's discussion of pending litigation." *Abraham*, 217 Cal. App. 3d at 823. The *Abraham* court pointed out that the underlying allegations are subject to the litigation privilege, and "'[i]t would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued . . . if he lets anyone know that he has brought it.'" *Id.* at 823–24 (quoting *Albertson*, 46 Cal. 2d at 380); *see also eCash Techs., Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1152 (C.D. Cal. 2001) ("[A] communication merely informing a third party of the pendency of this litigation must clearly fall within the privilege").

Here, given W&C's allegations about Pauma and the individuals referenced in the pleadings, both have a substantial interest in the outcome of this case. *See, e.g.*, *Sharper Image Corp. v. Target Corp.*, 425 F. Supp. 2d 1056, 1077–78 (N.D. Cal. 2006) (no formal party association required for privilege to attach); *Susan A. v. Cty. of Sonoma*, 2 Cal. App. 4th 88, 94 (1991) ("[S]ection 47(b) [applies to] publication to nonparties with a substantial interest in the proceeding"). In addition, the documents that W&C seeks to impose liability on the Rosette Defendants for sharing—the FAC and Quechan's Answer—are themselves subject to the privilege when filed with this Court.

W&C's allegations concerning the disclosure of a sealed version of the FAC does not change the character of that communication. As Rosette, LLP's Notice of Inadvertent Disclosure of Sealed Document and Remedial Measures explains, the firm is only aware of one inadvertent disclosure, which was unintentional and was rectified as soon as the disclosure was known. (Docket No. 81.) That disclosure was made to an individual whose name appeared in the FAC, in a paragraph that

1 was not sealed and was publicly available. (*See* Docket No. 81-1 at ¶ 4.) But, even
2 if improper or in violation of a Court order, the communication is still subject to the
3 litigation privilege. *See, e.g.*, *MMM Holdings, Inc. v. Reich*, 21 Cal. App. 5th 167,
4 181 (2018) (allegedly "improper" distribution of documents to third parties during
5 the pendency of *qui tam* action protected by litigation privilege).[4] A claim for
6 tortious interference is not the appropriate or a permissible remedy even if W&C
7 believes a party violated the Court's sealing orders intentionally.

8 In sum, W&C cannot state a claim for intentional interference because the
9 proposed claim is based on communications covered by the absolute immunity of
10 the litigation and official proceeding privilege codified in section 47. An
11 amendment that "seeks to add causes of action that would be subject to immediate
12 dismissal [ ] is [ ] futile." *Fremont Reorganizing Corp. v. Nat'l Union Fire Ins.*
13 *Co.*, 2012 WL 13015133, at *4 (C.D. Cal. Jan. 9, 2012). "This basis is sufficient to
14 support denial of leave to amend and the Court therefore does not address any other
15 arguments." *Id.*; *accord Dan Caputo Co. v. Russian River Cty. Sanitation Dist.*,
16 749 F.2d 571, 576 (9th Cir. 1984); *see also Ryan v. Zemanian*, 584 F. App'x 406,
17 407 (9th Cir. 2014) (affirming denial of leave to amend where proposed complaint
18 was subject to litigation privilege); *U.S. Commodity Futures Trading Comm'n v.*
19 *Crombie*, 2013 WL 3957506, at *27 (N.D. Cal. July 26, 2013) (denying leave to
20 amend where "allegations are not actionable due to the litigation privilege"). The
21 Motion should be denied on futility grounds alone.
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[4] Additionally, where, as here, the proposed amended complaint rests on the same facts as the SAC, "it would be futile to allow the [SAC] to be amended before ruling on the present motion to dismiss." *Blake v. Prof'l Coin Grading Serv.*, 898 F. Supp. 2d 365, 378 (D. Mass. 2012) ("The only effect would be to delay resolution"); (*see also* Docket No. 105-1 at 2 (conceding that the proposed claim is "based upon allegations that are already on the docket as part of the [SAC]").) The proposed TAC and the proposed tortious interference cause of action fail to state a claim for relief, and the Rosette Defendants reserve all rights to challenge the TAC if the Court permits its filing.

B. The Timing of the Motion and Proposed Claim Is Prejudicial

Granting leave to file the TAC will also result in prejudice, given the timing of the Motion. W&C has failed to explain why it did not include its proposed intentional interference claim in the SAC, which was filed just three calendar days—and only one court day—before W&C's Motion. (*See* Docket Nos. 100, 105.) The allegations concerning W&C's relationship with Quechan feature prominately in all of the pleadings in this case, and W&C was aware at the time the SAC was filed that Pauma had scheduled a "special meeting for July 26, 2018 to address Williams & Cochrane's employment status". (SAC ¶¶ 174–175.) Nothing changed over the weekend, between the filing of the SAC and the Motion, and that is reason enough to deny the Motion. *See Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) ("[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action"); *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) ("When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied").

By omitting the claim from the SAC and moving for leave to amend days later, W&C engineered a situation in which Defendants were required to respond to the SAC separately, incurring substantial expense that may be wasted if an amended complaint is filed. Delaying a motion for leave to amend for "the purpose of forcing a party to incur unnecessary expenses . . . demonstrate[s] bad faith." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

Because litigation expenses can be prejudice, the Court has discretion to "impose costs pursuant to Rule 15 as a condition of granting leave to amend in order to compensate the opposing party for additional costs incurred because the original pleading was faulty." *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66

F.3d 1500, 1514 (9th Cir. 1995).[5] The Rosette Defendants request that if the Court is inclined to grant W&C's Motion, that amendment be conditioned on the payment of fees and costs associated with preparing and filing motions challenging the SAC.

III. Conclusion

W&C's proposed amendment is a textbook example of a claim barred by section 47. If W&C had a good faith basis for asserting the claim, it should have been included in the SAC, but it was not omitted for tactical reasons that are prejudicial and costly to the Rosette Defendants. The Motion should be denied.

Dated: August 7, 2018

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[5] The Court also has inherent authority under 28 U.S.C. § 1927 to evaluate whether W&C's conduct has "multiplie[d] the proceedings . . . unreasonably and vexatiously" and may award "costs and fees 'reasonably incurred because of such conduct.'" *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 442 (9th Cir. 2017) (quoting 28 U.S.C. § 1927). Such an evaluation is appropriate here.