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

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

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**WILLIAMS & COCHRANE, LLP**; *and* **FRANCISCO AGUILAR**, **MILO BARLEY**, **GLORIA COSTA**, **GEORGE DECORSE**, **SALLY DECORSE**, *et al., on behalf of themselves and all those similarly situated*;

*(All 27 Individuals Listed in ¶ 12)*

Plaintiffs,

vs.

**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 100**;

Defendants.

Case No.: 17-CV-01436 GPC MDD

**PLAINTIFF WILLIAMS & COCHRANE'S CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

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

## INTRODUCTION

The primary objective of the defense of this litigation has been to try and punish Williams & Cochrane, LLP for filing suit by putting the firm out of business. Version 1.0 of this strategy involved the two opposing law firms filing synchronized special motions to strike under California law in the hopes of imposing hundreds of thousands of dollars of sanctions against Williams & Cochrane. Though in bad taste, this is something that the opposing parties *can* legally do. Yet, the decision by Williams & Cochrane to exercise its federal procedural right to amend around these special motions to strike engendered incredible animosity, a feeling that is evident in virtually every single subsequent court filing and one that has caused the opposing parties to take their strategy out of the courtroom and on to the reservations as they try and directly sever Williams & Cochrane's business relationships. *See* Dkt. No. 50-1, 10:4-5 ("In response, after considering those motions [to dismiss and strike], W&C chose to amend its complaint. Three times is enough."); Dkt. No. 53-1, 12:22-24 ("The Rosette and Quechan Defendants each filed an anti-SLAPP motion and a motion to dismiss… Rather than defend their pleadings, Williams & Cochrane filed the FAC… ."). This, of course, is something that the opponents *cannot* legally do.

As unexpected as this development was, what is even more unexpected is the manner in which the opposing parties have chosen to try and defend the pending motion for leave to file the proposed Third Amended Complaint, the pleading that raises the new intentional interference claim against the Rosette defendants and their longtime cohorts and co-counsel at WilmerHale. Though the Quechan defendants do not presently have a dog in this fight, WilmerHale artfully feigned that "the two Tribal officials in this matter" are named as defendants in the claim so it could oppose on behalf of the tribe and thereby bill the costs of the briefing to a client who has likely already paid the firm somewhere in the vicinity of $1 million. *See* Dkt. No. 120, 7:5-9. Yet, even the most cursory review of the proposed heading for the intentional interference claim shows that the Quechan defendants are *not* the target of this potential claim:

Prayer for Relief, *infra*.

**SEVENTH CLAIM FOR RELIEF**

78 Case No.: 17-CV-01436 GPC MDD

~~SECOND~~ THIRD AMENDED COMPLAINT



**[Intentional Interference with Contract/Prospective Economic Advantage]**

**[By Williams & Cochrane and Against Robert Rosette; Rick Armstrong; Rosette & Associates, PC; Rosette, LLP; Chris Casamassima; WilmerHale, LLP; and Does 1 through 100]**

242. Williams & Cochrane incorporates by reference the preceding general allegations as if set forth in full.

243. Intentional interference with contractual relationships has five elements and

*See* Dkt. No. 105-2, 81:27-82:6. As for the Rosette defendants, their entire defense is premised on the notion that an attorney is shielded from liability for *anything* he or she does if one can simply paint the conduct at issue as "advising" another party. Distributing false commercial advertisements is not actionable because it is simply an attorney "advising" a prospective client. *See* Dkt. No. 121, 9:13-28. Interactions with third parties receive the same protections as those with actual clients because the attorney is still giving "advice" no matter the nature of the relationship or the communications. *Id.* at 13:24-14:1. And most importantly for present purposes, disseminating sealed documents and material falsehoods regarding both the abilities of Williams & Cochrane and the particulars of the present lawsuit are simply part and parcel with an attorney doing its job. *Id.* at 14:8-10. Arguments like this stretch privilege laws passed their break points and create a state of affairs in which one attorney can learn the names within the book of business for its opposing counsel and then go to each one of the identified clients and make slanderous accusations about its adversary that have nothing to do with advancing the lawsuit in which the firms are engaged.

This final remark brings a crucial point to the forefront, which is that relevant privilege law only applies if a communication serves to advance the disposition of a lawsuit. In fact, while the thrust of the oppositions is based in the California litigation privilege at California Civil Code Section 47, the opposing parties seem to overlook this fact and start from the obdurate conclusion that the litigation privilege is "absolute." *See* Dkt. No. 121, 14:8-10. What this reply will show, though, is that this litigation privilege has a myriad of ignored exceptions that exempt everything from conduct, to communications with an attenuated connection to a lawsuit, to out-of-court statements, to breaches of confidences, to misrepresentations, to communications that are proscribed by statute or ethical rule. Quite simply, privilege law is not an impediment to the intentional interference claim and the opposing parties have failed to make even a minimal showing of *any* factor capable of persuading the Court to deviate from the liberal amendment policy of the Federal Rules of Civil Procedure and deny Williams & Cochrane leave to amend the operative complaint to address injuries that have resulted from the intentional acts of some of the Defendants and their longtime collaborators.

## ARGUMENT

### I. CALIFORNIA PRIVILEGE LAW DOES NOT PROTECT THE COURSE OF CONDUCT INVOLVING BREACHES OF CONFIDENCE AND MISREPRESENTATIONS THAT UNDERLIES THE INTENTIONAL INTERFERENCE WITH WILLIAMS & COCHRANE'S RELATIONSHIP WITH THE PAUMA TRIBE

The defense to the portion of the intentional interference claim dealing with the Pauma tribe starts with the conclusion that the litigation privilege *can* provide "absolute immunity" for "'all torts other than malicious prosecution.'" Dkt. No. 120, 10:13-15 (citing *Johnson v. Liberty Mut. Ins.,* 2013 WL 415585, *5 (N.D. Cal. Jan. 31, 2013)). This observation about what the privilege *can* do is not the test for what it *does* do for a given tort, though. The test for determining whether immunity attaches in the first place looks at whether a "publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." *Loomis v. Super-*

*ior Court,* 195 Cal. App. 3d 1026, 1029 (1st Dist. 1987). The party invoking the privilege bears the burden of proof, including showing how an allegation made against another party aimed to achieve the litigation's objects. *Silk v. Freedman,* 208 Cal. App. 4th 547, 555 (2d Dist. 2012). What this test shows, though, is there are at least five prerequisites for the litigation privilege to attach, if one includes the publication requirement, and any number of characteristics of the statement or conduct at issue can defeat the application of the privilege. A myriad of such disqualifying characteristics are present in the instant situation.

**a. Conduct**. As the "publication" requirement should make clear, the litigation privilege only attaches if the harmful event at issue is a communicative act rather than a course of conduct. *See Kupiec v. Am. Int'l Adjustment Co.,* 235 Cal. App. 3d 1326, 1331 (4th Dist. 1991). Here, part of the basis for the portion of the intentional interference claim concerning Williams & Cochrane's relationship with Pauma relates to the repeated dissemination of sealed materials in this case. That harm from those actions arises first and foremost from "the violation of privacy inherent in the [dissemination] itself" rather than the communication of any of the statements contained therein. *Id.*

**b. Privacy Breaches**. This point about conduct invading one's reasonable expectation of privacy being harmful leads into the second basis for the inapplicability of the litigation privilege, which is that the privilege does not protect one from disclosing information that is or should be protected by law. *See Cutter v. Brownbridge,* 183 Cal. App. 3d 836 (1st Dist. 1986); *see Mansell v. Otto,* 108 Cal. App. 4th 265, 271 (2d Dist. 2003) (explaining "the litigation privilege is inapplicable to the unauthorized reading of confidential [information]"). As an example, the litigation privilege does not immunize someone from violating an existing arrangement and thereby disclosing confidential information like trade secrets or other material that could "yield a competitive advantage" to an outside party. *Itt Telecom Prods. Corp. v. Dooley,* 214 Cal. App. 3d 207, 319 (6th Dist. 1989). In this case, Williams & Cochrane successfully moved to keep the compact negotiation materials under seal explicitly because those materials were attorney work product

that contained a significant amount of proprietary information derived from nearly a decade's worth of very specialized legal work. *See* Dkt. No. 9, 4:14-16 ("The Court follows the lead of other district courts in this circuit who have found that preventing disclosure of work-product is a compelling reason to restrict public access to court documents."). And yet, on *at least* the two occasions identified in the intentional interference claim, the Rosette defendants acting in concert with WilmerHale disseminated these materials to people in and outside of Pauma in the hopes of interfering with that relationship, amongst others. The briefing by WilmerHale is replete with comments that the firm or Quechan had the right to do this because it was the "***Tribe's***" privacy interest being protected by the sealing orders. *See, e.g.,* Dkt. No. 120, 20:25-21:2 ("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 litigation, which were filed under seal ostensibly to protect the ***Tribe's*** confidentiality interests."). Even if this statement were correct (it is not), the position WilmerHale has taken would eviscerate the ability of federal courts to seal information if even one party with some relation to the material decided that it could unilaterally determine what to do with the materials. Williams & Cochrane is not exactly advancing a very controversial position: obtain permission to disclose sealed documents in advance because forgiveness should not come by way of the litigation privilege or otherwise after the fact.

**c. Out-of-Court Statements**. The purpose of the litigation privilege is to protect the functionality of the judicial process, which means that statements that occur further from the proceedings are less deserving of protection. *Carpenter v. City of Los Angeles,* 230 Cal. App. 3d 923 (2d Dist. 1991). For example, a city government was unable to obtain the benefits of the privilege when a police officer made an out-of-court remark to a third party about the personal attributes of an alleged robber who was the subject of a pending robbery prosecution. *Id*. at 927. As explained by the California Court of Appeal, "the comments made by [the detective] were unrelated to the pending robbery prosecution and were not made in the course of a judicial proceeding to achieve the objects of

the robbery prosecution." *Id.* at 934. Here, regardless of how WilmerHale or the Rosette defendants want to spin the situation, Williams & Cochrane *knows* that the individuals and entities named in the proposed claim conspired to and did carry out a plan to transmit comments and materials about the supposed ethical failings if not outright dereliction of the attorneys for the Firm to one of its clients. These actions were done out of court and have no bearing on litigating let alone resolving this case – the relevant part of which concerns the attorney-client relationship between Williams & Cochrane and Quechan, *not* Pauma.

**d. Misrepresentations**. If out of court statements receive little protection, what does that say about out of court misrepresentations? In fact, a California Court of Appeal just recently dealt with this issue and explained that a party who makes a misrepresentation about a lawsuit is unlikely to receive the benefit of the litigation privilege, especially if the statement was not made "to achieve the objects of the litigation." *Greco v. Greco,* 2 Cal. App. 5th 810, 825-27 (3d Dist. 2016). Again, the statements at issue in the proposed intentional interference claim – at least the ones Williams & Cochrane know about to date – concern the named individuals disseminating falsehoods around a third-party tribe that the attorneys for the Firm had unquestionably committed unethical conduct when representing another tribe (in addition to just being outright unethical). This simply has no relevance to adjudicating in the first instance any issue of whether or not Williams & Cochrane failed to reasonably carry out some act during its representation of Quechan, if and when such issue is actually at play in the litigation. Thus, the litigation privilege argument that forms the heart of both opposition briefs contains at least four fatal defects.

## II. CALIFORNIA PRIVILEGE LAW DOES NOT PROTECT THE FALSE COMMERCIAL ADVERTISEMENTS THAT UNDERLIE THE INTENTIONAL INTERFERENCE WITH WILLIAMS & COCHRANE'S RELATIONSHIP WITH QUECHAN

As for the intentional interference at Quechan, the Rosette defendants' opposition brief suggests that an attorney can *never* be responsible for interfering with a competitor's contract because he or she is merely giving "advice to clients." Dkt. No. 121, 9:13-

15. In actuality, nothing about the current situation involves advice or petitioning or anything else that may be even remotely helpful to the legal rights of an actual or prospective client; rather it only concerns the act of engaging in false commercial advertisement in order to interfere with another's contract in a manner that is detrimental to the targeted client and the public at large. At the core, this dissemination of this advertisement is not only conduct, but conduct that likely implicates violations of California Rule of Professional Conduct 1-400 and the Lanham Act, 15 U.S.C. § 1051 *et seq*., which means that these ethical and statutory violations take precedence over the litigation privilege. *See Coretronic Corp. v. Cozen O'Connor,* 192 Cal. App. 4th 1381, 1391 (2d Dist. 2011) (explaining that illegal and unethical conduct are not protected); *Gaynor v. Bulen,* 19 Cal. App. 5th 864, 882 (4th Dist. 2018) (indicating that conduct that breaches statutory protections does not implicate petitioning activity). Thus, on the spectrum of behavior that goes from the protected on one end (*i.e.*, petitioning activity about a pending matter) to the non-protected on the other (*i.e*., malpractice by the attorney), this situation falls right in the latter camp because its concern is with limiting the negligent if not outright unlawful actions of an attorney that can pose a danger to an unsuspecting client, not restraining the petitioning rights of the client itself. *See Chodos v. Cole,* 210 Cal. App. 4th 692, 706 (2d Dist. 2012) (explaining that a breach of duty by an attorney does not implicate the right of petition).

## III. THIS COURT HAS ROUTINELY HELD THAT IT DOES NOT CONSIDER THE MERITS OF A PROPOSED CLAIM ON A MOTION FOR LEAVE, AND, EVEN IF IT DOES, THE EVER-EVOLVING STATE OF AFFAIRS PROVIDES WILLIAMS & COCHRANE WITH WHATEVER IT NEEDS TO CURE ANY DEFICIENCIES

Nearly one-half of the opposition brief filed by WilmerHale is devoted to arguing the perceived merits of the intentional interference claim, a rather deft strategic move given that WilmerHale knew Williams & Cochrane would only have three days in which to respond to all of that material. However, the general rule is that a court "will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Netbula v. Distinct Corp.,* 212

F.R.D. 534, 539 (N.D. Cal. 2003). A review of recent federal case law shows that this Court in particular has embraced this rule in recent years, applying it rather liberally in cases involving a contested motion for leave to amend the operative complaint. *See, e.g., TV Ears, Inc. v. SYK Group, LLC*, 2016 U.S. Dist. LEXIS 176083, *6 (S.D. Cal. 2016) ("Courts ordinarily do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend… ."); *Bona Fide Conglomerate, Inc. v. SourceAmerica,* 2016 U.S. Dist. LEXIS 723, *11 (S.D. Cal. 2016) ("At this point of the proceedings, it is not the Court's role to determine the validity of these claims."); *Siller v. Aloya,* 2015 U.S. Dist. LEXIS 5122, *7-*8 (S.D. Cal. 2015) ("Arguments concerning the sufficiency of the proposed pleadings, even if meritorious, are better left for briefing on a motion to dismiss." (citing, *e.g., U.S. Bank Nat'l Ass'n v. Friedrichs,* 2013 U.S. Dist. Lexis 177772 (S.D. Cal. 2013)); *accord, e.g., Michel v. U.S. Customs & Border Protection,* 2017 U.S. Dist. LEXIS 134439, *10 (S.D. Cal. 2017); *Kendrick v. City of San Diego,* 2017 U.S. Dist. LEXIS 96863, *18 (S.D. Cal. 2017); *Truijillo v. Ametek, Inc.,* 2017 U.S. Dist. LEXIS 95980, *14-*15 (S.D. Cal. 2017); *Koistra v. City of San Diego,* 2017 U.S. Dist. LEXIS 91795, *12 (S.D. Cal. 2017).

In this case, Williams & Cochrane gets the point: WilmerHale thinks that not a single element of the intentional interference claim has even been plausibly shown – there is no contract, no relationship, no disruption, no damages, no anything. But the allegations in the proposed Third Amended Complaint indicate otherwise. Not only that, but the allegations that support the intentional interference claim seem to grow by the day. For instance, take the following statement that just recently came to light, which is yet *another* communication that the Rosette defendants and WilmerHale either disseminated or caused to be disseminated around the Pauma tribe in the wake of filing the premature and defective Answer:

> WC was engaged by Quechan to resolve issues with the State of California regarding their gaming compact. WC made promises they could get the Quechan the outcome Pauma received. WC ended up being terminated by Quechan's Tribal Council and are now being sued for misrepresentation and

> failure to perform fiduciary duties, billing Quechan $50,000/month ($400,000 in total) and not delivering on their promises.

This paragraph is replete with gross inaccuracies, and yet it may be one of the more tame statements floating around Pauma regarding Williams & Cochrane's relationship with Quechan. Unfortunately, the Rosette defendants and WilmerHale are essentially camped out at Pauma, spewing misinformation around in the hopes of ruining Williams & Cochrane's relationship with the tribe. There are hundreds of tribal members, which means the falsities spread quickly and before Williams & Cochrane is able to stamp them out. The incessant and unrelenting pattern of misrepresenting both the character of Williams & Cochrane and the specifics about the litigation has given rise to the current state of affairs in which the Firm's relationship with the tribe has been disrupted and now hangs in the balance. Unfortunately, more evidence on the intentional interference will undoubtedly come to light over the coming weeks, which means that motion to dismiss briefing – and not this briefing on the motion for leave to amend – will afford the parties not only more time to put together arguments, but also a better opportunity to discuss the merits or demerits of an ever-evolving situation.

## IV. WILLIAMS & COCHRANE RAISED THE INTENTIONAL INTERFERENCE CLAIM IN THE MANNER THE COURT ORDERED AND AT THE EARLIEST PRACTICABLE DATE

Curiously, both oppositions take issue with the manner in which Williams & Cochrane sought amendment, with the Rosette defendants claiming that "W&C has failed to explain why it did not include its proposed intentional interference claim in the [Second Amended Complaint], which was filed just three calendar days – and only one court day – before W&C's Motion." Dkt. No. 121, 15:3-5. Lest the opposing parties forgot, Williams & Cochrane *did* seek to add the intentional interference claim directly to the Second Amended Complaint when it requested in the aftermath of the order on the first round of Rule 12 motions "that the Court explicitly grant leave to amend to use the existing and new allegations to state an interference with contract-type claim" in the next pleading. Dkt. No. 93, 5:18-24. Yet, the response from the Court was that Williams &

Cochrane could not just add the claim to the forthcoming Second Amended Complaint, but would instead have to offer it up as part of "a properly noticed motion [for leave]," as "[i]t would be unfair to Defendants for the Court to declare that Plaintiffs may pursue a hypothetical claim without allowing Defendants to offer any argument in response." Dkt. No. 97, 2:22-3:7. Thus, the fair process devised by the Court has simply created complaints of unfairness and claims that Williams & Cochrane should have done precisely what it originally requested. Even though this is likely a situation in which cries of prejudice would have arisen regardless of whether the motion for leave came about before, during, or after the latest round of motion to dismiss briefing, the key facts to remember are that Williams & Cochrane complied with the order of the Court and moved for leave to amend at the earliest possible juncture – a point at which the parties could have easily sought a stipulation to extend the time to respond to the Second Amended Complaint rather than going full bore on the briefing in the hopes that they would not have to address unseemly and all-too-true allegations. The complaints of extra work intentionally done to try to avoid discussing one's intentional misconduct is a self-inflicted injury, and one that does not suffice to establish prejudice for the amendment analysis. *Cf. Buchanan v. Garza,* 2014 U.S. Dist. LEXIS 56720, *7 (S.D. Cal. 2014) ("[T]he potential prejudice Plaintiff may suffer is his own fault."); *Leon v. FexdEx Ground Package Sys.,* 2016 U.S. Dist. LEXIS 38295, *23-*24 (D.N.M. 2016) (refusing to find prejudice where "any prejudice to the defendant was the defendant's own fault").

## CONCLUSION

For the foregoing reasons, Williams & Cochrane respectfully request that the Court grant the motion for leave to file the proposed Third Amended Complaint.

RESPECTFULLY SUBMITTED this 10th day of August, 2018

WILLIAMS & COCHRANE, LLP

By: */s/ Kevin M. Cochrane*
Cheryl A. Williams

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