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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,

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

PLAINTIFFS' OPPOSITION TO ROSETTE DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFFS' SIXTH CLAIM FOR RELIEF PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 (ECF No. 109)

Date: October 12, 2018
Time: 1:30 p.m.
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

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INTRODUCTION

Simply glancing at the table of contents for the renewed special motion to strike by the Rosette defendants is likely to elicit from even the most casual of observers following this case the Yogi Berra-ian exclamation of "its déjà vu all over again." The reason for this is that the Rosette defendants *already* pursued the two-prong argument in this motion to strike in its prior motions to dismiss and strike, which similarly argued that Rosette, LLP does not have any sort of attorney-client relationship with the general members of the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or "Tribe") and because of that each and every act done or statement made by the firm in representing the Tribe is somehow protected from the tribal members on the basis of one privilege or another. (ECF Nos. 52-1, 53-1)

The fact that the Court already addressed the predicate standing argument in connection with resolving the Rosette defendants' first motion to dismiss appears to be of no significance to the adverse party; what the Rosette defendants are looking for is a do over in the most simple and obstinate way possible – no reconsideration, no respect for the law of the case, no limited standard of review, no leave of court, no anything. One may wonder why the Rosette defendants are so dead set on casting aside virtually every rudiment of federal procedure by asking the Court to address these issues anew yet again. Of course, the answer to that inquiry lies in the very terms of the statute it is invoking, the State of California's anti-SLAPP law at Code of Civil Procedure Section 425.16. *See* Cal. Civ. Proc. Code § 425.16.

As another judge in the Southern District of California recently noted, "[t]he California legislature crafted this statute to remedy a specific problem, "[l]awsuits… deployed as a weapon barring rivals from meaningful access to judicial redress… [in which] parties prevailed by intimidating rivals instead of persuading judges and juries." *Puccio v. Love,* 2018 U.S. Dist. LEXIS 51597, *6 (S.D. Cal. 2018) (citing *Navellier v. Sletten,* 29 Cal. 4th 82, 96 (2002)). And yet, this statute has become a gross tool for abuse by domineering law firms like O'Melveny & Myers, promoting the very behavior that the statute

originally sought to deter. O'Melveny put this behavior on full display in connection with the first motion to dismiss, latching on to the provision in the statute that allows "a prevailing defendant… to recover his or her attorney's fees and costs" (*see* Cal. Civ. Proc. Code § 425.16(c)(1)), and using that as the basis for filing an overstuffed brief by overbilling attorneys for the purpose of trying to financially coerce Williams & Cochrane out of the courtroom before a judge or jury could address the merits of the claims. Now that the Court has given a first look at the complaint at issue and found that Williams & Cochrane presents a viable Lanham Act claim against the Rosette defendants, O'Melveny filed the *same* motion to strike but for a *different* reason – quite frankly, it hopes to delay the resolution of a claim with a potential treble damage remedy *and* impose an inordinate and unnecessary workload on its opposing counsel by taking advantage of the statute's interlocutory appeal right that follows a decision on the merits of a special motion to strike. *See* Cal. Civ. Proc. Code § 425.16(i).

At the present juncture, the questionable use of the special motion to strike that is currently on display does not accord in the least with the basic purpose of the Federal Rules of Civil Procedure ("Rule") as set forth in Rule 1, and is the *exact* sort of conduct that the California Courts of Appeal have chastised time and time again in recent years in the hopes of stemming the systemic misuse of this "special" motion. *See, e.g., Hewlett-Packard Corp. v. Oracle Corp.,* 239 Cal. App. 4th 1174 (6th Dist. 2015). When you get down to it, the *legal* arguments raised in the Rosette defendants' special motion to strike must have been raised at the outset of the case. The *factual* arguments must be continued until after the discovery process. And *all* of the arguments must have come before the Court via a different vehicle, whether that is a motion for reconsideration or motion for leave to file the document out of time. Whatever the case may be, the merits of the arguments underlying the Rosette defendants' special motion to strike have already been addressed by this Court, and they should not be addressed yet again so the proponent of the frivolous motion is rewarded with the right to file a frivolous interlocutory appeal.

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ARGUMENT

I. THE COURT SHOULD STRIKE OR OTHERWISE REFUSE TO CONSIDER THE SPECIAL MOTION TO STRIKE SINCE THE FILING DOES NOT COMPORT WITH ANY OF THE PROPER PROCEDURES

A. Court already Addressed Principal Argument

As mentioned at the outset, the argument the Court is now considering is the same as the one it previously considered when ruling on the Rosette defendants' first motion to dismiss. This prior motion raised the argument that "the individual plaintiffs cannot assert a malpractice claim against the Rosette defendants because no attorney-client relationship exists." (ECF No. 53-1, 30:17-32:22) To flesh out this argument, as the screenshot below shows in greater detail, this prior motion to dismiss went on to explain that "[t]he individual plaintiffs, two dozen members of the Quechan Tribe, are not Rosette Defendants' clients and the Rosette Defendants owe them no duty. The FAC does not allege otherwise. In fact, Rosette LLP's Attorney Services Contract with Quechan, executed in connection with the California compact dispute, affirmatively states that the firm represents only the Tribe, not its individual members."

D. The Individual Plaintiffs Cannot Assert a Malpractice Claim Against the Rosette Defendants Because No Attorney-Client Relationship Exists

The Individual Plaintiffs' malpractice claim is barred by the *Noerr-Pennington* and the litigation privilege, *supra* Section III.A, and it also fails as a matter of law because there is no attorney-client relationship between the Individual Plaintiffs and the Rosette Defendants. To maintain a claim for professional negligence (or malpractice), a plaintiff must allege a duty, breach, proximate cause, and actual damages. *See Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 693 (2009) (listing elements). The Individual Plaintiffs, two dozen members of the Quechan Tribe, are not the Rosette Defendants' clients, and the Rosette Defendants owe them no duty. The FAC does not allege otherwise. In fact, Rosette, LLP's Attorney Services Contract with Quechan, executed in connection with the

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> California compact dispute, affirmatively states that the firm represents only the Tribe, not its individual members:
>
> > [T]he Tribe should be aware that *the Firm's representation is with the Tribe and not with its individual members*, officers, executives, shareholders, directors, partners, or persons in similar positions, or with its agencies, parent, subsidiaries, or other affiliates. In those cases, *the Firm's professional responsibilities are owed only to that entity, alone* . . . .
>
> (*See* Ex. 2 to Cienfeugos Decl. at Section 2, emphasis added.)[11] Rosette, LLP's duties were therefore to the Tribe itself, not the individual members, and "[a]bsent duty there can be no breach and no negligence." *Goldberg v. Frye*, 217 Cal. App.

(ECF No. 53-1, 30:17-31:2) But this motion was not the only one to raise this argument. At the same time as it filed this motion to dismiss, the Rosette defendants also filed a special motion to strike that similarly raised the "no-client-relationship" argument and then contended that the absence of such a relationship means that *all* of Rosette, LLP's communications and actions in connection with the California compact negotiations are protected by some form of privilege. (ECF No. 52-1, p. 2)

This Court addressed the first-line standing argument in June 7, 2018 order on the initial round of responsive motions. (ECF No. 89) In fact, the Court did not mince any words that "the Rosette Defendants held a duty to protect the Quechan membership because it was foreseeable that any negligence by the Rosette Defendants would harm Quechan's membership." (ECF No. 89, 35:6-9) The order then went on to address the Rosette defendants' argument that the relationship was solely between Rosette, LLP and some ethereal Quechan entity, and not the individual tribal members, because the attorney services agreement says as much. (ECF No. 89, 35:10-14) To this, the Court stressed that the Rosette defendants were placing form over substance, as the benefit of the legal work actually ran to the general membership of the Tribe itself:

> The purpose of the transaction for which the Rosette Defendants were responsible – the compact negotiations with California – was to increase Quechan's wealth, which is distributed to its members in the form of per

> capita payments. (*See* FAC ¶ 236) As a result, Quechan's efforts in renegotiating its compact with California were motivated by, at least in substantial part, an intention to benefit its members. If the Rosette Defendants' malpractice resulted in higher costs and lower revenues to the Tribe, it is reasonably foreseeable that the members would be harmed in the form of lower per capita payments. Such loss to the members is both certain and closely connected: if the Tribe holds fewer funds, the distribution to members will be lower. Because Quechan is nothing if not a collection of its members, the principal purpose of Quechan retaining the Rosette Defendants to obtain a favorable outcome of the compact negotiations was to benefit the financial lives of Quechan's members.

(ECF No. 89, 36:3-14) With this holding that the Quechan tribal members have standing to sue the Rosette defendants for malpractice, the Court then went on to dismiss as moot the contemporaneous special motion to strike that contained all of the dependent arguments concerning the various privileges. (ECF No. 89, p. 1)

Fast forward three months and the parties have come full circle and are back at square one, with the Rosette defendants once again arguing in nearly identical fashion that the individual tribal members cannot pursue a malpractice action against Rosette, LLP and, as a result, any number of privileges apply to the statements and work done by this firm on behalf of the Tribe:

> **1. The Individual Plaintiffs' Claim Fails Because They Are Neither the Rosette Defendants' Clients Nor Intended Third-Party Beneficiaries of the Attorney Services Contract**
>
> The Individual Plaintiffs cannot prevail on the merits of their claim because they cannot demonstrate with admissible evidence a *prima facie* showing of its

(CONTINUED ON NEXT PAGE)

> necessary elements. To maintain a claim for professional negligence (or malpractice), a plaintiff must demonstrate: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 693 (2009) (quotation and citation omitted).
>
> The Individual Plaintiffs do not have an attorney-client relationship with the Rosette Defendants and cannot show that they are owed a duty under California law. Rosette, LLP's Attorney Services Contract with Quechan, executed in connection with the California compact dispute, affirmatively limits the Rosette Defendants' representation to the Tribe, as an entity, and excludes any other individuals:
>
> > [T]he Tribe should be aware that *the Firm's representation is with the Tribe and not with its individual members*, officers, executives, shareholders, directors, partners, or persons in similar positions, or with its agencies, parent, subsidiaries, or other affiliates. In those cases, *the Firm's professional responsibilities are owed only to that entity, alone*, and no conflict of interest will be asserted by the Tribe because we represent persons with respect to interests that are adverse to individual persons or business organizations who have a relationship with the tribe. Of course, Firm can also represent individual members, officers, directors, shareholders, partners, and other persons related to the Tribe in matters that do not conflict with the interests of the Tribe, but any such representation will be the subject of a separate engagement letter.
>
> (*See* Docket No. 54-4, Ex. 2 at Section 2, emphasis added.) As the Court previously

(ECF No. 109-1, 22:20-23:13) Though opposing counsel may have gone to great pains to rearrange the order of the constituent syntax, there is simply nothing new with this argument and nothing new for this Court to consider. As such, this Court should dismiss the pending special motion to strike as moot since it has already addressed the threshold issue in its June 7, 2018 order.

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B. No Motion for Reconsideration Filed

This reality that the Rosette defendants are trying to pass off its special motion to strike as new argument provides all the more reason for refusing to consider the motion. In general, a party who is on the receiving end of an adverse order has to file a motion for reconsideration to get a Court to revisit its decision (*see Cohen v. Trump,* 2015 U.S. Dist. LEXIS 147076, *4-*5 (S.D. Cal. 2015) (Curiel, J.) (citing *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)), just as Williams & Cochrane did after the Court mistakenly struck the First Amended Complaint for ostensibly being filed without leave of court under Rule 15(a)(2) when it was actually done as of right under Rule 15(a)(1). (ECF No. 48) To ensure the litigative process is fair and advancing towards a disposition on the merits, successfully persuading a court to reconsider a decision is extremely difficult, as "the[se] [motions] should not be granted absent highly unusual circumstances." *Cohen,* 2015 U.S. Dist. LEXIS 147076 at *5 (citing *Orange St. Partners v. Arnold,* 179 F.3d 656, 665 (9th Cir. 1999)).

The disfavor with which district judges view these motions means they have extra procedural requirements, like the one that requires the proposing attorney to submit an affidavit detailing certain information about the prior order and "what new and different facts and circumstances are claimed to exist which did not exist, or were not shown upon such prior application." *Id.* at *4-*5 (citing CivLR 7.1(i)(1)). They also have a heightened standard of review and should only be granted if "the district court (1) is presented with newly discovered evidence; (2) clear error or the initial decision was manifestly unjust; or (3) there is an intervening change in controlling law." *Id.* (citing *Sch. Dist. No. 1J,* 5 F.3d at 1263). Yet, the special motion to strike that is pending before this Court tries to do a complete end run around all of these requirements. It does not contain an affidavit laying out the fact that the principle argument was previously addressed and rejected by this Court. Moreover, the Rosette defendants seem to be seeking some sort of *de novo* review of the class standing issue in lieu of the highly deferential standard that normally applies on motions for reconsideration. The present situation thus involves two fundamental

problems: the Rosette defendants never moved for reconsideration of the June 7, 2018 order *and* the pending special motion to strike is procedurally and substantively defective in virtually every material regard as it tries to get a second bite at the apple of whether the individual tribal members have standing to sue Rosette, LLP for malpractice. As such, this Court should strike the special motion to strike for failing to adhere to required procedure.

C. Law of the Case Forecloses Consideration

Going hand in hand with the failure to move for reconsideration, the special motion to strike also fails to pay heed to the law of the case doctrine. "Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *United States v. Jingles,* 702 F.3d 494, 499-500 (9th Cir. 2012) (citing *Richardson v. United States,* 841 F.2d 993, 996 (9th Cir. 1988)). In keeping with the motion for reconsideration standard, this doctrine forecloses reexamination of an issue unless "there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice." *Jenkins v. County of Riverside,* 398 F.3d 1093, 1094 & n.2 (9th Cir. 2005) (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). With the pending motion turning upon the settled issue about the class' standing to pursue a malpractice claim against Rosette, LLP, this Court should dismiss as moot the special motion to strike.

D. Any Differences in Argument does not Excuse the Rosette Defendants for Filing this Motion outside the 60-Day Window without Seeking Leave of Court

The United States Court of Appeals for the Ninth Circuit has gone to great lengths to protect plaintiffs from the incompatible and inequitable aspects of California's anti-SLAPP law. For instance, the Ninth Circuit observed one of its district courts previously held that the statutory requirement that a "motion be filed within 60 days of the service of the complaint" could not be applied against a plaintiff who had yet to obtain the requisite

discovery to respond to the claims therein. *See Metabolife Int'l v. Wornick,* 264 F.3d 832, 846 (9th Cir. 2001) (citing *Rogers v. Home Shopping Network, Inc.* 57 F. Supp. 2d 973, 980 (C.D. Cal. 1999)). However, this discussion says nothing about *legal* claims that do not turn upon factual issues needing development, the sort that *should* be raised at the outset of a case given the disruptive interlocutory appeal provision of the statute. In fact, a California Court of Appeal recently addressed this issue when discussing the deluge of meritless anti-SLAPP motions that have flooded the State appellate courts as a result of these interlocutory appeals. *See Hewlett-Packard,* 239 Cal. App. 4th 1174.

Hewlett-Packard involved an action by the computer manufacturer alleging that Oracle "breached contractual and other duties by announcing that it would no longer make its software products compatible with certain HP hardware products." *Id.* at 1178. Long after the expiration of the sixty-day window set forth within the statute, Oracle filed a special motion to strike against Hewlett-Packard's "breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel" claims, contending the theory of damages turned in part upon some conduct protected by the California anti-SLAPP statute. *See id.* at 1183. In broaching the matter, the California Court of Appeal noted that, "[i]n a pattern that has become all too familiar to the appellate courts of this state,… the motion [to strike]… is utterly without merit." *Id.* at 1178. With that, the discussion then delved into how the anti-SLAPP statute has strayed from its principle purpose of holding accountable "contestants in the arena of public affairs [who] were using meritless litigation as a device to silence and punish their adversaries" and crept into "garden-variety civil disputes," like those raising "legal malpractice claims." *Id.* at 814 (citing, *e.g.*, *Kolar, v. Donahue, McIntosh & Hammerton,* 145 Cal. App. 4th 1532, 1535, 1539-40 (4th Dist. 2006)).

Of course, the reason for the "explosion" in these meritless special motions to strike is the fact that "the statute rewards the filer of an unsuccessful… motion with what one court has called a 'free time-out' from further litigation in the trial court." *Id.* at 1184 (citing *People ex rel. Lockyer v. Brar,* 115 Cal. App. 4th 1315, 1318 (4th Dist. 2004)).

However, the statutory counterbalance for this right that is ripe for abuse is the provision in subsection (f) that explains "[t]he special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." *Id.* at 1186 (citing Cal. Civ. Proc. Code § 425.16(f)). According to the court, "[t]his language might be readily understood to mean that a trial court *need not entertain*, but can instead *refuse to hear*, a motion filed outside the 60 days." *Id.* In fact, "some courts have suggested that this provision empowers a trial court to require advance leave before the defendant is permitted to file such a motion." *Id.* (citing, *e.g.*, *Platypus Wear, Inc. v. Goldberg,* 166 Cal. App. 4th 772, 775 (4th Dist. 2008); *Olsen v. Harbison,* 134 Cal. App. 4th 278, 286 (3d Dist. 2005)). While suggesting that a proponent may be able to pursue a belated special motion to strike if the motion is compatible with the "statute's actual mandate, or with the its purposes and policy" (*see id.* at 1188), the Court noted that "[a] late anti-SLAPP motion cannot fulfill the statutory purpose if it is not brought until after the parties have incurred substantial expense." *Id.* Put simply, "[i]t is therefore to be expected that every case will come to a point beyond which an anti-SLAPP motion simply cannot perform its intended function" (*see id.* at 1189), which the Court indicated had been found in other cases where "113 days elapsed between service of [the] complaint and [the] filing of the motion" and "where [the] motion [was] filed 278 days after service [of the complaint]." *Id.* (citing, *e.g.*, *Chitsazzadeh v. Kramer & Kramer,* 199 Cal. App. 4th 676, 680-81 (2d Dist. 2011); *Olsen,* 134 Cal. App. 4th at 282-83).

In this case, the action was originally filed on July 16, 2017 and the service of the complaint was effectuated on or about December 14, 2017. (*See, e.g.,* ECF No. 27, p. 3). What this means is that this latest special motion to strike by the Rosette defendants was filed 233 days after the service of the complaint and 384 days after the inception of this lawsuit, with counsel for Williams & Cochrane finding itself opposing this motion on days 268 and 419, respectively. If there is any doubt about whether this special motion that is designed to root out meritless claims at the outset of the lawsuit should be brought now, one only has to look at the amount of attorney's fees Quechan's litigation counsel

WilmerHale has accrued, a figure that totaled more than $1.2 million before the end of July 2018 and is likely half a million dollars higher now. (ECF No. 138-2) Many of the principal issues in the special motion to strike are *not* factual issues that the proponent *may* be justified in raising later in the case in order to protect a discovery-less plaintiff from undue prejudice. Rather, issues like whether the individual tribal members have standing to pursue a malpractice claim against Rosette, LLP are the sort of predominantly legal issues that *can* and *must* be brought at the outset of the lawsuit. There is simply no basis for the Rosette defendants pursuing this motion again, at this juncture, after the Court has already ruled on the principal issue, and before responsibly seeking leave of Court to file the motion.

The inevitable response from the Rosette defendants is that the filing of the Second Amended Complaint somehow restarted the sixty-day window for filing a special motion to strike. Yet, this argument that a defendant has an absolute right to file a special motion to strike an amended pleading "encourages [the sort of] gamesmanship that could defeat rather than advance th[e] purpose" of the statute to bring an end to certain lawsuits "early and without great cost to" the parties involved. *See Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism,* 6 Cal. App. 5th 1207, 1218 (4th Dist. 2016), *aff'd,* 4 Cal. 5th 637 (2018) (citing *Varian Med. Sys., Inc. v. Delfino,* 35 Cal. 4th 180, 192 (2005)). After all, "[a]n anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation *at the initiation of the lawsuit*." *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism,* 4 Cal. 5th 637, 645 (2018) (citing *San Diegans for Open Gov't v. Har Construction, Inc.,* 240 Cal. App. 4th 611, 625-26 (4th Dist. 2015)). Given this, the California Supreme Court has recently interpreted the anti-SLAPP statute as requiring a defendant, "subject to the trial court's discretion… to permit late filing,… [to] move to strike a cause of action within 60 days of service of *the earliest complaint that contains that cause of action*." *Id.* at 639-40, 645-46. Needless to say, this interpretation seems to comport with Rule 12, which explains that "a party that makes a motion

under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2).

Here, the malpractice cause of action was included within the First Amended Complaint that Williams & Cochrane filed on March 2, 2018. (ECF No. 39) The Rosette defendants moved to strike the malpractice claim on April 7, 2018 pursuant to an argument that largely turned upon whether the individual tribal members possess standing to pursue a malpractice claim against the firm in the first place. (ECF No. 52-1) The Court dealt with that issue in a manner unfavorable to the Rosette defendants while addressing an identical argument in their contemporaneously filed motion to dismiss. (ECF No. 53-1) Simply put, they have had their shot and they simply missed out on imposing massive sanctions and hijacking the proceedings in a "garden variety" case where the anti-SLAPP statute is clearly not supposed to apply; there is simply no reason to give the Rosette defendants a second opportunity to drop a litigative Atomic bomb when they have not even moved for leave to file what is a belated yet ironically outdated motion that opens with a rehashed legal argument that was meant for the outset of the proceedings, not now.

II. THE COURT SHOULD CONTINUE THE SPECIAL MOTION TO STRIKE UNTIL AFTER DISCOVERY AND THE ESTABLISHMENT OF A MUTUAL SUMMARY JUDGMENT PROCESS

The special motion to strike may start with certain legal arguments, but it ends with factual ones claiming that the individual tribal members are simply incapable of making out a case of legal malpractice against the Rosette defendants. The central theme of this argument is that the Second Amended Complaint only contains vague references "to aspects of the final Quechan Compact that [the individual tribal members] believe [Williams & Cochrane] would have negotiated differently," but "does not point to any conduct by the Rosette defendants suggesting their representation fell below the appropriate standard of care." (ECF 109-1, 27:19-28:7) Putting aside the recently-added allegations concerning Robert Rosette's admitted unpreparedness to take on the work or the timing

of the interference, the problem with the argument that the individual tribal members have not "point[ed] to any [specific] conduct" is that this *evidence* – unlike the remainder of the compact negotiation materials that Robert Rosette helped publicly disclose – is still shielded from view, supposedly protected by countless privileges that prevent the individual tribal members from seeing it, and only obtainable through discovery in this action – something the Court *has* to grant before addressing the special motion to strike under binding circuit precedent.

As to that, earlier this year the Ninth Circuit issued an opinion in *Planned Parenthood Federation of America v. Center for Medical Progress,* 890 F.3d 828 (9th Cir. 2018), in which it clarified the applicable standards of review for motions to strike under California's anti-SLAPP law. To bring the State statute into line with the Federal Rules of Civil Procedure, the Court used the traditional legal-versus-factual dichotomy and explained that a motion founded on "purely legal arguments" is analyzed under the Rule 8 and 12 standards while one raising a "factual challenge… must be treated as though it were a motion for summary judgment [under Rule 56] and discovery must be permitted." *Id.* at 833 (citing *Z.F. v. Ripon Unified Sch. Dist.,* 482 F. App'x 239, 240 (9th Cir. 2012)). This holding is yet one more attempt by the Ninth Circuit to coalesce the California anti-SLAPP statute with the Federal Rules of Civil Procedure, and continuing factual challenges until *after* the plaintiff has the necessary evidence to respond is but one example of that in the opinion of the court:

> Requiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without providing any of the procedural safeguards that have been firmly established by the Federal Rules of Civil Procedure. The result would effectively allow the state anti-SLAPP rules to usurp the federal rules. We could not properly allow such a result.

Id. at 834.

So, how does this play out the present situation? Well, you have Robert Rosette filing a declaration with this Court to admit that he was completely "[un]familiar with the

Quechan Tribe's legal issues in California, including Quechan's compact negotiations with California" just *eleven days* before he decided to interfere with said negotiations and take them off the path of being finished in just a matter of days. (ECF No. 31-2, ¶ 20) But, interfere he did, and he did so without associating with competent outside counsel or trying to work with Quechan's prior counsel to make sure the Tribe's interests were not harmed. Against the backdrop of brazenly reckless behavior, the record of evidence at this basic pleading stage shows both the final draft compact that the parties were set to execute in three days' time and the one they ultimately did – an agreement that suddenly required Quechan to pay back two million dollars and stripped away a number of other concessions like [redacted]. (ECF Nos. 100-19, 100-20) This is substantially more than some clients are capable of alleging when plausibly pleading a case of malpractice. *See, e.g., Charnay v. Cobert,* 145 Cal. App. 4th 175, 179 (2d Dist. 2006) (finding a plausible claim of malpractice where an attorney advised a client to defend a lawsuit that resulted in a "$600,000-plus judgment" rather than "settle[] the lawsuit for no more than the maximum of $25,000 amount recoverable in a limited civil action"). And yet, the response from the Rosette defendants is to taunt the individual tribal members for failing to cite *specific acts* of negligence from the very negotiation materials that the firm claims privilege law protects from disclosure to these curiously non-client clients. The Rosette defendants *may* ultimately be right that the individual tribal members cannot prevail on the merits of a malpractice claim,[1] but that is an issue this Court can only resolve *after* discovery and hopefully as part of a bilateral summary judgment process that is a little more fair than the present one-sided rigmarole that involves the recurrent fending-off of holistic and fact-based arguments.

III. THE ANTI-SLAPP SCHEME DOES NOT APPLY TO MALPRACTICE ACTIONS AND, EVEN IF IT DID, NONE OF THE CONDUCT AT ISSUE QUALIFIES AS SPEECH OR PETITIONING ACTIVITY

A. Anti-SLAPP Inapplicable to Malpractice Actions

[1] They're not.

The special motion to strike makes an art form out of contorting case law. Perhaps the best example of this is when the brief argues that the California anti-SLAPP statute does not apply to malpractice claims because the Ninth Circuit remarked "there is no categorical exclusion of claims of attorney malpractice from the anti-SLAPP statute." (ECF No. 109-1, 20:2-9 (citing *Mindys Cosmetics, Inc. v. Dakar,* 611 F.3d 590 (9th Cir. 2010)). What this statement means is that the *express text of the statute* does not specifically exempt malpractice actions from the anti-SLAPP regime. But, this has nothing to do with whether or not California courts have interpreted the statute as excluding these "garden-variety" kinds of claims. *See Hewlett-Packard,* 239 Cal. App. 4th at 1184 (citing *Kolar,* 145 Cal. App. 4th at 1532, 1535, 1539-40). As mentioned in Section I(D), *supra*, the Sixth District explained in its 2015 opinion in *Hewlett-Packard* that the anti-SLAPP statute does not apply to "garden-variety civil disputes" like "legal malpractice actions," and cited a 2006 opinion from the Fourth District for support. *Id.* In fact, the Fourth District just recently reiterated this same holding, stating that

> the courts have held a client's claims against his or her former attorney are not subject to the anti-SLAPP statute because the client is seeking recovery for the attorney's failure to competently represent the client's interests and/or the attorney's breach of loyalty owed to the client, and not to recover for injuries resulting from the attorney's petitioning activities, even if these activities were alleged to be wrongful and harmful to the client's interests.

Gaynor v. Bulen, 19 Cal. App. 5th 864, 880 (4th Dist. 2018); *see Chodos v. Cole,* 210 Cal. App. 4th 692, 702 (2d Dist. 2012) ("In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously.").

The *Gaynor* opinion from the Fourth District is noteworthy not only for its recent publication date, but also for the incredible survey of accordant appellate opinion it compiles from sister courts like the First, Second, and Fifth Districts. *Id.* at 880-81 (citing,

e.g., *Loanvest I, LLC v. Utrecht,* 235 Cal. App. 4th 496 (1st Dist. 2015); *Besnasra v. Mitchell Silberberg & Knupp,* 123 Cal. App. 4th 1179 (2d Dist. 2004); *Castleman v. Sagaser,* 216 Cal. App. 4th 481 (5th Dist. 2013)). In other words, just the two opinions in *Hewlett-Packard* and *Gaynor* alone show that five out of the six California Courts of Appeal exempt attorney malpractice claims from the anti-SLAPP statute, and the outlying Third District has reached the same conclusion in at least two unpublished opinions issued during the past ten years. *See, e.g., Perez v. Kouretes,* 2013 Cal. App. Unpub. LEXIS 6275, *11-*12 (3d Dist. 2013) ("As other courts have recognized, suits like plaintiffs' alleging legal malpractice and breaches of the duty of loyalty against former counsel are not subject to a special motion to strike."); *Matthews v. Mounier,* 2009 Cal. App. Unpub. LEXIS 888, *7 (2d Dist. 2009) ("Legal malpractice is not an activity protected under the anti-SLAPP statute."). Thus, the contention in the special motion to strike that "California's intermediate appellate courts have not spoken with one voice on th[is] subject" is flat out false, as the appellate courts have spoken, they have spoken uniformly, and they have all spoken as such *after* the Ninth Circuit issued its *Mindys Cosmetics* decision upon which the Rosette defendants place such incredible reliance.

B. No Petitioning Involved

Assuming *arguendo* that a malpractice action somehow comes under the ambit of the anti-SLAPP statute, the conduct at issue would still not trigger the statute because it is simply not petitioning in nature. Here, the Rosette defendants make much of the identity of the other party at the bargaining table to try and paint the matter as involving petitioning activity, but at least two federal court orders have deal with the issue of whether private negotiations with a federal or state government are petitioning in nature, and both have come down *against* such a holding. *See, e.g., LightSquared Inc. v. Deere & Co.,* 2015 U.S. Dist. LEXIS 14412, *62-*63 (S.D.N.Y. 2015) (indicating that "claims based upon" events in "private negotiations" with the government do not involve petitioning activity); *United States ex rel. Maranto v. Maxxam, Inc.,* 2009 U.S. Dist. LEXIS 14375, *18 (N.D. Cal. 2009) (explaining that a business deal with the United States for the

purchase of land did not constitute a petitioning activity). The fact of the matter is that the compact negotiations were simply one-on-one negotiations between two parties who had come to the table to work out the details of a rather significant business deal. The State of California was *not* a political superior who could use its discretion to resolve a grievance in the manner it saw fit, but a political equal who had a statutorily-mandated duty to negotiate in good faith with the tribe for the purpose of concluding an agreement. *See* 25 U.S.C. § 2710(d)(3)(A) (explaining that "[u]pon receiving [] a request [for a compact], the State shall negotiate with the Indian tribe in good faith to enter into such a compact"); S. Rep. No. 100-446, at 13 (1988) ("The Committee concludes that the compact process is a viable mechanism for settling various matters between *two equal sovereigns*."). The State, in other words, simply lacked the authority to impose its will on the other party – as is typically done by a governmental entity or official in the petitioning context – as all "the states are empowered to do is negotiate." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019, 1030-31 (9th Cir. 2010) ("But nothing in [the Indian Gaming Regulatory Act] can reasonably be construed as conferring on states the power to impose anything; all the state are empowered to do is negotiate.").

C. Only Protects Speech, not Conduct

Petitioning is as disconnected from the global negotiations as speech is from the actual *actions* under review. Anti-SLAPP motions have become such a scourge on civil dockets that the California courts have gone to great lengths in recent years to issue opinions that are like survey courses in the contours of the law in the hopes of curbing some of the misuse. One of the bigger pronouncements came out just last year when the California Supreme Court reemphasized that the anti-SLAPP motions are designed to protect certain forms of speech, *not* actions. *See Park v. Bd. of Trustees of CSU,* 2 Cal. 5th 1057, 1067 (2017); *See Heineke v. Santa Clara Univ.,* 2017 U.S. Dist. LEXIS 201163, *18-*19 (N.D. Cal. 2017) (citing examples in the anti-SLAPP context to differentiate between protected speech and non-protected actions). Here, the legal malpractice claim is not at all concerned with what Robert Rosette *said,* but rather what he *did*. Of course, one does

not have to take Williams & Cochrane's word for that; he or she can instead just rely on what the Rosette defendants argued in their special motion to strike. Therein, the substantive argument explains that the individual plaintiffs cannot succeed on the merits of their malpractice claim because they have failed to identify any deficient "conduct" by Mr. Rosette – or, stated differently, the "[i]ndividual Plaintiffs [have] fail[ed] to identify any specific *action* or *inaction* by Mr. Rosette or his colleagues that allegedly fell below professional standards." (ECF No. 109-1, 28:5-17). This lone admission goes to show the utter frivolity of the special motion to strike that is under review – the basis for the motion is that the malpractice claim in the complaint targeted speech but the motion itself admits that the only thing at issue is the defendant's conduct. This special motion to strike lacks even an ounce of credibility, and the Court should not reward the Rosette defendants for wasting everyone's time by addressing the motion on the merits.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court refuse to consider the merits of the special motion to strike on account of the failure to follow proper procedure, amongst the other reasons stated herein. Should the Court decide to address the merits, then the Plaintiffs alternatively request that the Court continue said motion until *after* the Plaintiffs obtain discovery from the Defendants and are able to file their own cross-motion for summary judgment on the malpractice claim.

RESPECTFULLY SUBMITTED this 7th day of September, 2018

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