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

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

(All 27 Individuals Listed in ¶ 12)

Plaintiffs,

v.

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

Defendants.

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

REPLY IN SUPPORT OF QUECHAN DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

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

Williams & Cochrane, LLP's ("W&C") Opposition is replete with mischaracterizations of the record and *ad hominem* attacks. What it fails to contain, however, are arguments that meaningfully address the merits of the Quechan Defendants' motion to dismiss. The motion should be granted with prejudice.

First, the motion is procedurally proper. It is directed at two claims: the RICO conspiracy claim against President Escalanti and Councilman White (the "Individual Defendants"), and the good faith and fair dealing claim against the Tribe. The Tribe is not named in the RICO conspiracy claim and the Individual Defendants are not named in the good faith and fair dealing claim. For the sake of judicial efficiency and orderly presentation of the arguments, the three Quechan defendants—the Tribe and the two Individual Defendants—filed a combined Memorandum.

While the Tribe filed an Answer to the First Amended Complaint and Counterclaims, the Individual Defendants did not. Accordingly, there is no ambiguity about the Individual Defendants' ability to file a 12(b)(6) motion. They can, and the RICO conspiracy claim should be dismissed with prejudice. W&C's procedural argument pertains only to the Tribe's motion to dismiss the good faith and fair dealing claim. But the Tribe's motion is proper, too. The SAC is a new complaint; the motion has not caused delay in the litigation, which is the concern behind Rule 12(g); and alternatively, the motion can be considered by the Court under Rule 12(c).

Second, W&C fails to reconcile its good faith and fair dealing claim with the terms of the Fee Agreement and a client's fundamental right to terminate its counsel at any time. Accordingly, the good faith and fair dealing claim must be dismissed.

Third, W&C fails to allege that the purported predicate acts fall outside the inherent tribal sovereignty of the Tribal Council; fails to point to ***any*** facts showing that President Escalanti and Councilman White intended to commit or engaged in any fraudulent activity or benefited from the alleged acts in any way; fails to identify any harm it suffered to its business or property; and fails to allege that President Escalanti

or Councilman White knowingly entered into any purported RICO conspiracy. The RICO conspiracy claim should be dismissed, with prejudice.

I. THE QUECHAN DEFENDANTS' MOTION IS PROCEDURALLY PROPER

As an initial matter, W&C's claim that the "Quechan defendants" and/or "WilmerHale" answered the First Amended Complaint is misleading. Opp'n at 2. The ***Tribe*** filed its Answer and Counterclaims on June 21, 2018. ECF No. 94. President Escalanti and Councilman White did not file an Answer or join the Tribe's Answer and Counterclaims. *See id.* Indeed, the Tribe is not even named as a defendant in the RICO conspiracy claim. Therefore, even if Rule 12(b) precluded the ***Tribe***'s motion to dismiss the good faith and fair dealing claim (which it does not, *see infra*), the Individual Defendants have not filed any "responsive pleading" that would preclude them from moving to dismiss the RICO conspiracy claim. W&C's procedural argument simply cannot apply to the Individual Defendants, and their motion to dismiss the RICO conspiracy claim is timely and proper.

Notwithstanding its Answer to the FAC, the Tribe also may move to dismiss W&C's good faith and fair dealing claim. The SAC supersedes the FAC and the Court is thus able to consider 12(b) motions on the SAC. *See, e.g.*, *In re Bofl Holding, Inc. Secs. Litig.*, 2017 WL 2257980, *2 (S.D. Cal. May 23, 2017) (Curiel, J.). Moreover, the Tribe moved to dismiss the good faith and fair dealing claim to identify the fatal flaws in the merits of the claim. It has not caused any delay by filing its motion, which is the concern of rule 12(g). *Kilopass Tech. Inc. v. Sidense Corp.*, 2010 WL 5141843, at *3 (N.D. Cal. Dec. 13, 2010) ("[Rule 12(g)] applies to situations in which a party files successive motions under Rule 12 ***for the sole purpose of delay***.") (internal quotations omitted) (emphasis added)). Here, the Individual Defendants moved to dismiss the RICO conspiracy claim, and the Rosette Defendants filed dispositive motions as well. The Tribe's short and straightforward argument regarding the good faith and fair dealing claim has not caused any delay

beyond the procedurally-proper briefing by other defendants.

Alternatively, even if the Court finds that the Tribe's motion falls outside of 12(b), courts routinely convert 12(b) motions into 12(c) motions, and the Court may do so here. *See* Opp'n at 4 ("a court . . . has the power to convert the motion into one for the judgement on the pleadings"); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (recognizing cases where courts held that if a 12(b)(6) motion is made after an answer, the court can treat the motion as one under Rule 12(c)); *see also Brooks v. Caswell*, 2016 WL 866303, *5 (D. Or. Mar. 2, 2016).

In its Opposition, W&C claims that a 12(b) motion cannot be converted to a 12(c) motion until "***after*** the pleadings are closed" and that, because it moved to dismiss the Tribe's Answer and Counterclaims, "this point is ***way*** off in the future." Opp'n at 4. But W&C's argument relies on its non-compliance with a Court order. W&C filed a Rule 12(f) motion in response to the Tribe's counterclaims in June. ECF No. 95. In denying that motion, the Court held that "[the Tribe's] counterclaims have been asserted and ***must be answered***. The Court will give W&C 14 days from the date this order is issued to file ***an answer*** to Quechan's counterclaims." ECF No. 135 at 12 (emphasis added). W&C has not filed an answer. Instead, violating the Court's clear direction, it filed a motion to dismiss the Tribe's counterclaims. ECF No. 138. Accordingly, the only reason "the pleadings are [not] closed" is because W&C is in violation of the Court's order to answer the Tribe's counterclaims. The Tribe therefore respectfully requests the Court to consider its argument regarding the good faith and fair dealing claim under 12(c) if it finds that that 12(b) is inapplicable.

II. W&C'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED

As explained in the Quechan Defendants' opening Memorandum, W&C does not attempt to explain the inconsistency of its good faith and fair dealing claim with the plain terms of its Fee Agreement with the Tribe, which provided for a potential alternative fee in the event W&C was terminated prior to being entitled to a

contingency fee, as occurred here. *See* SAC Ex. 2 at §11. There are no allegations of "bad faith" conduct in the SAC; the Tribe exercised its right to terminate W&C under Section 11 of the Fee Agreement and hire different counsel. W&C fails to explain how its good faith and fair dealing claim is consistent with a client's fundamental right to terminate its counsel at any time. *See* Mem. at 5.

Instead, W&C hinges its argument on *McCollum v. XCare.Net, Inc.*, 212 F. Supp. 2d 1142 (N.D. Cal. 2002). In *McCollum*, a plaintiff alleged that her former employer terminated her in bad faith to deny her a commission she was purportedly due under a compensation plan, which allowed the employer to reassign any accounts subject to its discretion. *Id.* at 1151. The plaintiff also claimed that she had been terminated by an email that provided her with a 30-day transition period. *Id* at 1144-45. The court denied summary judgment, finding that there were disputed questions of fact—including whether plaintiff was entitled to any commission under the circumstances of her termination, and whether defendant had exercised in bad faith its discretion to reassign plaintiff's contract. *Id.* at 1152.

McCollum is inapposite. As a threshold matter, it does not address an attorney-client relationship. Beyond that, the court's holding was based in part on the fact that the plaintiff may have been entitled to a commission despite her termination. *Id.*; *see also Pashman v. Aetna Insurance Co.,* 2014 WL 3571689, *12-14 (N.D. Cal. July 8, 2014) (distinguishing *McCollum* and holding that there was no breach where the plaintiff was not entitled to any commission).

Here, as the Court has already held, W&C is ***not*** "entitled" to the contingency fee under Section 5 of the Fee Agreement. ECF No. 89 at 15. The Tribe did not retain "discretionary power" akin to the reassignment provision of the plan in *McCollum*. Opp'n at 7-8. And, contrary to what W&C suggests, *McCollum* does not hold that the ability to terminate an employee at-will is itself an exercise of discretionary power. *See* 212 F. Supp. 2d at 1151-52. W&C does not even allege that there is any "discretionary" provision in the Fee Agreement anyway. W&C was

terminated by the Tribe on June 27, 2017 under Section 11 of the Fee Agreement, which allowed the Tribe to terminate W&C "at any time." SAC Ex. 2 at 4.

Accordingly, whether under Rule 12(b) or 12(c), the good faith and fair dealing claim fails as a matter of law and should be dismissed.

III. W&C DOES NOT PLEAD A RICO CONSPIRACY CLAIM

W&C has not—and cannot—salvage its RICO conspiracy claim. W&C has now twice failed to allege facts sufficient to state a plausible claim for conspiracy to violate RICO against President Escalanti and Councilman White. As before, W&C's conspiracy claim must fail where there is no underlying RICO violation. *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). And in any event, W&C fails to—and cannot—adequately plead a conspiracy. Its RICO conspiracy claim should therefore be dismissed with prejudice.

A. W&C Fails To Allege RICO Predicate Acts

In its Opposition, W&C states that the Court's "June 7, 2018 order…is pretty specific as to the information the Court wanted to see in the next amended pleading." Opp'n at 10. The Individual Defendants agree. But the Individual Defendants disagree that W&C has included facts sufficient to establish that they had the "specific intent to deceive or defraud" required to find a RICO violation. *See Cty. of Marin v. Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1038 (N.D. Cal. 2011) (citing *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010)).

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

In its opening Memorandum, the Individual Defendants argued that W&C alleged as predicate acts independent actions and decisions made by the Tribal Council and other entities, and that W&C has not specifically tied any of the alleged predicate acts to either of the Individual Defendants. Mem. at 10-12. W&C fails to rebut either of these arguments. W&C instead argues that the "Quechan Tribal Council"—not the Individual Defendants specifically—engaged in a "years-long

pattern of withholding per capita payments" and that purported misrepresentations about those distributions were made by the "Quechan Tribal Council." Opp'n at 14.

Neither the current Tribal Council nor the Individual Defendants plausibly could have been involved in a "years-long pattern" of withholding per capita payments. The current Tribal Council has been seated for just over a year (*see* SAC ¶ 79), and any withheld per capita distributions before that time would have been pursuant to the previous Tribal Council's direction. The Individual Defendants also do not have the ability to force the Tribal Council as a whole to take any of the actions alleged in the SAC, nor does W&C allege that they do. W&C cannot point to any facts connecting the purported predicate acts to the Individual Defendants. This failure is fatal to W&C's RICO conspiracy claim.

2. The alleged predicate acts are within the Tribal Council's inherent tribal sovereignty and are not properly before the Court

President Escalanti and Councilman White also argued in their opening Memorandum that the alleged government actions are within the Tribe's inherent sovereign authority. Mem. at 10-12. Accordingly, even assuming *arguendo* that the two Individual Defendants can be held liable for actions purportedly taken by the entire seven-member Tribal Council, and further assuming that the current Tribal Council performed the alleged predicate acts, the alleged acts are still well within the Tribe's inherent sovereign authority and not the proper subject of a district court lawsuit. *McDonald v. Means*, 309 F.3d 530, 542 (9th Cir. 2002) (tribes have inherent authority to "regulate domestic relations among members . . .").

W&C argues that the Individual Defendants cannot raise the inherent tribal sovereignty "issue" because it was "readily available" to them on the "first round of motion-to-dismiss briefing." Opp'n at 16-17. But it is well-established that a defendant may move to dismiss based on new matter in an amended complaint. *See Stamas v. County of Madera*, 2010 WL 289310, *4 (E.D. Cal. Jan. 15, 2010) (citing *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466, 120 S.Ct. 1579, 1584, 146 L.Ed.2d

530 (2000). Because W&C made considerable amendments to the RICO conspiracy claim, the Individual Defendants may properly base their arguments on the new allegations. *See, e.g.*, ECF No. 134-1 at ¶¶ 230, 231, 232 (redline).

W&C further claims that a federal court is able to "redress gross abuses of power" in the tribal context. Opp'n at 17. To do so, W&C leans heavily on *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202 (11th Cir. 2015). *Miccosukee* is not only readily distinguishable; it illustrates what is lacking from the SAC, and what W&C cannot allege. In that case, the second amended complaint specifically alleged, among other things, that a former tribal chairman charged millions of dollars of personal expenses to tribal credit cards, withdrew millions of dollars belonging to that tribe, bought luxury vehicles, and purposefully used a financial institution that would allow suspicious financial transactions to take place. *Miccosukee Tribe of Indians of Fla. v. Cypress*, 1:2012-CV-22439-MGC (Dkt. 75 at ¶¶ 27, 29, 32, 35) (S.D. Fla.). Moreover, the court rested its decision, in part, on a lack of tribal law setting forth the relevant authority of the chairman. *Id.*

These detailed fraud and embezzlement allegations bear no resemblance to W&C's allegations. Here, W&C does not allege any criminal activity whatsoever. In contrast to what appears to have been a case about out-and-out theft of tribal funds in *Miccosukee*, W&C's RICO allegations center on withheld per capita distributions, membership issues, and intra-tribal leadership issues, which are exactly the kind of "core issues of tribal sovereignty" included in the intra-tribal dispute doctrine. *See* Opp'n at 17; *see also* Tribal Constitution, SAC Ex. 27 at 670 (codifying the Tribal Council's authorities and obligations). Accordingly, these lawful intra-tribal decisions should not be the subject of a U.S. District Court lawsuit and the RICO conspiracy claim should be dismissed. Mem. at 13-14.

3. The alleged predicate acts are not pled with the required particularity

W&C fails to allege any facts supporting the inference that either President Escalanti or Councilman White misappropriated any of the Tribe's funds for their

own "personally [sic] enrichment." *See* SAC ¶ 232. To the contrary, and, again, far different from the allegations in *Miccosukee*, W&C admits that it ***"cannot explain 'how . . . Councilman White participated in misappropriating tribal funds'...."*** Opp'n at 16 (emphasis added). This admission is fatal to W&C's claim.

Consistent with its concession, W&C does not point to any facts showing whether or how President Escalanti or Councilman White diverted the Tribe's funds for their own personal use. Instead, W&C makes the conclusory statements that the Individual Defendants (1) used "public funds of the tribe for their own personally [sic] enrichment" and (2) "conspired to participate in or conduct an enterprise aimed at fraudulently abusing the finances of the tribe in pursuit of a sham online payday lending business or for some other elicit [sic] end." SAC ¶¶ 230, 232 (emphasis added). This is not nearly enough under Rule 9. W&C must allege facts, such as the time and place of the alleged wrongful conduct, and specific conduct of individual defendants. *See*, *e.g.*, *Sanford*, 625 F.3d at 557-58 (9th Cir. 2010) (predicate acts must be plead with particularity under Rule 9).

To sidestep its abject failure to allege the facts sufficient to establish that the Individual Defendants engaged in fraudulent activity, W&C claims that pleading standards for fraud "may be relaxed as to matters within the opposing party's knowledge" and that, essentially, the Individual Defendants know what they did. Opp'n at 15-16. But W&C cites no support for a "relaxed" pleading standard for these types of basic evidentiary facts, as opposed to, for example, intent; and regardless, "relaxed" does not mean erased. The Individual Defendants have no idea how they purportedly "misappropriated tribal funds." The SAC fails to provide even a cursory explanation, and therefore runs afoul of Rule 8, let alone Rule 9. W&C must plead facts sufficient to state that the Individual Defendants had the "specific intent to deceive or defraud." Its conclusory statement about vague "personally [sic] enrichment" is not enough to explain the alleged financial benefit to the Individual

Defendants from the alleged RICO conspiracy.[1]

Likewise, as the opening Memorandum makes clear, there are still no allegations that any purported payday lending activity is fraudulent or illegal or that any of the Quechan Defendants ever participated in payday lending. W&C does not oppose this argument. And W&C seemingly recognizes this fatal defect by removing nine paragraphs about the alleged payday lending from the FAC and shifting its focus to the purported Quechan tribal government actions as predicate acts. As before, W&C fails to identify any facts that would cure this "vital flaw" in its SAC.

B. W&C Fails To Allege Harm To Its Business Or Property

Contrary to the Court's order that W&C specifically identify how the purported abuse of power by the Individual Defendants "affected, or will affect, W&C itself," ECF No. 89 n.4, W&C argues that it need not be a "direct target" and that RICO damages are "a matter of perspective." Opp'n at 18-19. Consequently, W&C does not point to any facts showing that it suffered any "concrete" or "tangible" harm as required by RICO. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) ("[A] plaintiff asserting injury to property" must "allege 'concrete financial loss'" and "harm to a specific business or property interest") (citing *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (emphasis added).

W&C even concedes that it is not the "***most*** direct victim" of the purported RICO conspiracy. Opp'n at 19 (emphasis in original). And W&C further admits that if there were a RICO conspiracy (which there is not), any purported "concrete" harm would be suffered by ***Tribe members***—not W&C. Opp'n at 19-20. This does not comply with the Court's order to identify the specific harm suffered by W&C, nor

[1] Even the handful of inapposite cases W&C cites do not support its untenable position. *See, e.g.*, *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (denying leave to amend for failure to plead facts with particularity required by Rule 9(b)); see also *Apache Tribe of Okla. v. Brown*, 2013 U.S. Dist. LEXIS 114776, *21 (W.D. Okla. 2013) (denying request to conduct discovery to develop plausible claim).

does it show the harm to W&C's specific business or property required for RICO. As all of W&C's concessions show, it is not a proper plaintiff to bring this RICO conspiracy claim, nor could it be.

C. W&C Fails To Allege A RICO Conspiracy

In their opening memorandum, the Individual Defendants also argued that W&C did not allege any facts showing that President Escalanti and Councilman White were part of an association-in-fact RICO enterprise. Mem. at 19-20. In response, W&C makes only the conclusory statement in its Opposition that there was "a well-orchestrated and well-hidden systematic scheme." Opp'n at 14-15; *see also* SAC ¶ 230 (making the conclusory statement that "[t]he [] Rosette and Quechan-related defendants are individuals and business entities that are associated in fact…."). This is plainly insufficient. W&C has not pointed to any facts showing any conspiracy or agreement between the defendants—for example, how defendants associated together to create the purported payday lending business or some other vague "elicit" end, or how the defendants coordinated their activities as a continuing unit. *See, e.g.*, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Comm. to Protect Our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1175-76 (E.D. Cal. 2017); *Doan v. Singh*, 617 F. App'x 684, 686 (9th Cir. 2015). Without such facts, W&C cannot establish the association-in-fact enterprise required for a RICO conspiracy violation. Accordingly, the Court should dismiss the RICO conspiracy claim with prejudice.

* * *

W&C fails to state a good faith and fair dealing claim against the Tribe or a RICO conspiracy claim against the Individual Defendants. The Court should grant the instant motion without leave to amend.

Dated: September 14, 2018

Respectfully submitted,

/s/ Christopher T. Casamassima
Christopher T. Casamassima
Rebecca A. Girolamo

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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 September 14, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima