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Attorneys for Defendant and Counterclaimant Quechan Tribe of the Fort Yuma Indian Reservation, and "Reply Claim" Defendants 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

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND DISMISS REPLY CLAIM

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: TBD
Time: TBD

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INTRODUCTION

Williams & Cochrane's ("W&C") "Reply Claim" is procedurally and substantively flawed. It should be struck, or in the alternative, dismissed with prejudice.

Regarding the procedural issues, a claim in reply to a counterclaim has no basis in the Federal Rules. *See* Fed. R. Civ. P. 8, 12. And while Courts have allowed reply counterclaims in limited circumstances, there is no basis for allowing W&C's Reply Claim here. W&C's answer and Reply Claim were in response to a counterclaim by the Tribe. President Escalanti and Councilman White did not answer W&C's First Amended Complaint ("FAC")—which contained the Tribe's counterclaim—or assert any counterclaims against W&C. Thus, "Reply Claim" is a misnomer as to them.

In fact, President Escalanti and Councilman White were not even parties to the case when W&C filed its Reply claim. W&C's Third Amended Complaint ("TAC") does not assert claims against President Escalanti or Councilman White. To the contrary, W&C dropped both men from the RICO conspiracy claim it had unsuccessfully asserted in previous complaints. President Escalanti and Councilman White were therefore no longer parties to the case when W&C filed its Reply Claim. There is no authority to support bringing a "reply claim" against President Escalanti or Councilman White in this procedural posture.

Nor is there any permissible procedural basis for W&C's Reply Claim against any of the Reply Claim Defendants. The Reply Claim is based on alleged facts purportedly known to W&C long before W&C filed the TAC. When W&C filed this Reply Claim, it had already filed five complaints, (ECF Nos. 1, 5, 39, 100, 174), attempted to bring a supplemental claim, (ECF No. 71), and unsuccessfully moved the Court for leave to file a complaint while the Second Amended Complaint ("SAC") was pending, (ECF No. 105). And although the Reply Claim is a rehash of W&C's prior allegations, it is not based on the facts alleged by the Tribe in its

counterclaims, which are based on W&C's performance during its retention by the Tribe and W&C's subsequent refusal to provide the Tribe with its case file.

There is therefore nothing new that would justify a fresh "reply claim." Rather, this claim is stale. Indeed, W&C previously brought and then voluntarily dropped a tortious breach claim against the Tribe, President Escalanti, and Councilman White. W&C is merely attempting to bring a claim it could not add to the TAC, because doing so would have exceeded the leave granted by the Court to file the TAC. None of the cases allowing reply counterclaims contemplates anything like the situation here, and there is no reason to depart from the Federal Rules to allow W&C a sixth—or eighth, depending on how you count it—bite at the apple.

Substantively, the Reply Claim fares no better. As a threshold matter, the contract that W&C claims was tortiously breached was between the Tribe and W&C. Neither President Escalanti nor Councilman White were parties to it, and therefore could not have breached it—tortiously or otherwise. Beyond that, as explained below in the Memorandum, the claim is barred because of the Court's prior rulings, the litigation privilege and because of W&C's basic failure to plead facts that could give rise to a tortious breach claim. It is fundamentally an effort to transform W&C's already-pending breach of contract claim and breach of the covenant of good faith and fair dealing claims into a tort. "Tortifying" a breach of contract dispute is disfavored by California law and redundant here.

Much of this was discussed in the Tribe's previously-filed motions to dismiss and strike the FAC, in response to which W&C voluntarily "pulled" the claims and tried to "amend around" potential Anti-SLAPP sanctions. *See* ECF No. 73 at 25. Accordingly, as discussed here and in previous briefing, even if the Reply Claim is not struck, it should be dismissed with prejudice.

SUMMARY OF FACTUAL ALLEGATIONS

W&C's Reply Claim largely recycles a narrow subset of the allegations from its previous complaints. The Reply Claim acknowledges the existence of the Fee

Agreement between it and the Tribe, that it negotiated with the State over eight months in 2017, and describes the purported results of that negotiation—quoting from paragraph 208 in its TAC. *See* ECF No. 179 ("Reply Claim") ¶¶ 8-11. W&C then focuses on the alleged circumstances surrounding its termination, alleging that President Escalanti sent it a termination letter on June 27, which was dated June 26, 2017 ("June 26 letter"). *Id.* ¶ 12. W&C quotes from that letter, which reminded W&C of its confidentiality obligations and outlined the reasons for W&C's termination, including W&C's failure "to produce better-than-boilerplate terms," its acquiescence "to the State's demands," that the Tribe was "grossly overcompensat[ing]" W&C, and that W&C had not worked "anywhere near the amount of time and labor" that it should have. *Id.* ¶¶ 13-15. W&C's allegations continue on to describe the June 30, 2017 letter ("June 30 letter") sent by the Tribe to W&C requesting its case file back, and conclusorily assert that President Escalanti and Councilman White somehow "caused these letters to be sent" to W&C, the State, and unnamed "tribal members at, at least, one of the Firm's other tribal clients." *Id.* ¶¶ 20-23. These allegations are substantially similar to allegations in the TAC (*see, e.g.*, ECF No. 174 ¶¶ 3, 4, 201, 209, 216); the SAC (*see, e.g.*, ECF No. 100 ¶¶ 3, 4, 207, 214); the FAC (*see, e.g.*, ECF No. 39 ¶¶ 3, 4, 257, 264,); and the "Amended Complaint" W&C filed more than a year ago (*see, e.g.*, ECF No. 5 ¶¶ 3, 4, 210, 217, 221, 227).

The crux of W&C's Reply Claim, while largely duplicative of its two pending claims in the TAC against the Tribe, is that the Tribe's June 26 and June 30 termination and demand letters to W&C were somehow tortious, and that the alleged transmittal of those letters to unnamed persons at the Governor's office and to an unspecified tribal client of W&C was defamatory. Reply Claim ¶¶ 27-32.

ARGUMENT

I. LEGAL STANDARD

A court has discretion to order stricken "from a[ny] pleading a[ny] insufficient defense or any redundant, immaterial, impertinent, or scandalous" material. Fed. R. Civ. P. (12)(f). Immaterial matter "is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Cal. Dept. of Toxic Substances Control v. ALCO Pac., Inc.*, 217 F.Supp.2d 1028, 1032 (C.D. Cal. 2002) (internal citations and quotation marks omitted). Impertinent material "consists of statements that do not pertain, and are not necessary to the issues in question." *Id.* "'[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.'" *Zest IP Holdings, LLC v. Implant Direct Mfg., Inc.*, 2013 WL 5674834, at *2 (S.D. Cal. Oct. 16, 2013) (quoting *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983)) (Curiel, J.). And a district court has authority under Rule 12(f) to "strike a pleading, in whole or in part . . . if a motion is made before the moving party has filed a responsive pleading, unless the court strikes the pleading on its own initiative or no responsive pleading is permitted." *Id.* (internal citation and quotation marks omitted). Accordingly, a Rule 12(f) motion is also a proper vehicle to address improperly-filed pleadings. *See id.* at *6 (striking answer and counterclaim), *see also Nutrishare, Inc. v. Connecticut Gen. Life Ins. Co.*, 2014 WL 6669825, at *3 (E.D. Cal. Nov. 24, 2014) (granting motion to strike counterclaim in reply "as an improper pleading").

To survive a motion to dismiss, plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, courts "are not bound to accept as true a legal conclusion couched as a

factual allegation." *Id.* (internal citations and quotations omitted). W&C has failed to allege facts sufficient to form the basis of a tortious breach of contract claim. Accordingly, the Reply Claim must be dismissed pursuant to FRCP 8 and 12.

II. W&C'S COUNTERCLAIM IS PROCEDURALLY IMPROPER

A. The Court Should Strike W&C's Reply Claim Against President Escalanti and Councilman White

There is no such thing as a "Reply Claim" under the Rules. The analysis can begin and end there.

Going further, however, W&C's answer and Reply Claim responded to counterclaims filed by the Tribe. Neither President Escalanti nor Councilman White answered the FAC, which contained the Tribe's counterclaims; nor did President Escalanti or Councilman White assert any counterclaims against W&C. Because W&C did not allege claims against them in the TAC, neither were parties to the case when W&C filed its Reply Claim.

The only conceivable analog for W&C's Reply Claim is what some courts have called a "counterclaim in reply." *See, e.g., Mattel, Inc. v. MGA Entm't, Inc.*, 705 F.3d 1108, 1110 (9th Cir. 2013) (holding that, on remand, defendant's counterclaim in reply must be dismissed because it was not compulsory). Counterclaims are brought against "opposing part[ies]" under Rule 13. *See* Fed. R. Civ. P. 13 ("A pleading must state as a counterclaim any claim that…the pleader has against an ***opposing party***….) (emphasis added). Non-parties may be added as defendants only if a counterclaim is asserted against the opposing party and if they satisfy the joinder requirements under the Federal Rules. *See* 6 Wright & Miller, Fed. Prac. & Proc. § 1435 (3d ed. 2010) ("a counterclaim or crossclaim may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party"); *In Re Experian Info. Sols., Inc.*, 2017 WL 3574847, at *2 (D. Ariz. Aug. 17, 2017) (dismissing counterclaim against new parties where the counterclaim against existing party was improper).

Here, President Escalanti and Councilman White are not required parties under Rule 19 because the Court would still be able to "accord complete relief" to W&C without their presence in the case. W&C does not even make a specific request for relief as to President Escalanti and Councilman White. *See* ECF No. 179 at 8 (praying for relief generally and requesting money damages). Permissive joinder under Rule 20 is improper because, as discussed *infra*, W&C cannot plausibly assert any right to relief for tortious breach of the Fee Agreement against the Tribe. Thus, there is no basis to satisfy Rule 20's requirement that W&C assert a claim "against them jointly, severally, or in the alternative . . . ." *See*, e.g. *In re Experian*, 2017 WL 3574847 at *2.

Because the Reply Claim is defective, it is immaterial to the answer, and impertinent under Rule 12(f). The Court may therefore strike the Reply Claim or dismiss President Escalanti and Councilman White on these grounds alone.

B. The Court Should Strike W&C's Tortious Breach Of Contract Claim

Even if the Court construes the Reply Claim as a counterclaim in reply, and even if the Court finds that as a general matter, President Escalanti could be added to a counterclaim in reply alleging tortious interference, *W&C's* Reply Claim is still barred in its entirety. That is because counterclaims in reply are narrow exceptions to the Rules, only recognized by the Ninth Circuit in limited circumstances where such claims are compulsory. *See, e.g.*, *Mattel*, 705 F.3d at 1110; *Nutrishare, Inc. v. Connecticut Gen. Life Ins. Co.*, No. 2:13-CV-02378-JAM-AC, 2014 WL 6669825, at *3 (E.D. Cal. Nov. 24, 2014) (dismissing counterclaims in reply because they were not compulsory). And there is no authority allowing a party to bring a counterclaim in reply in circumstances resembling what exists here.

No authority stands for the proposition that a party should be able to bring a counterclaim in reply where it has been aware of the facts underlying the counterclaim since the time of the filing of the initial complaint and throughout

multiple subsequent amended complaints. To the contrary, the Ninth Circuit applies a "logical relationship" test that provides a counterclaim in reply is compulsory after the assertion of a counterclaim when the "same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests *activates additional legal rights otherwise dormant* in the defendant." *Mattel*, 705 F.3d at 1110 (emphasis added).

There is nothing in the Tribe's counterclaims that "activated additional legal rights" that were otherwise "dormant." *Id*. W&C's Reply Claim is a thinly veiled attempt to have its *eighth* bite at the apple. W&C has already filed its initial complaint, several amended complaints, and requested leave to file a supplemental complaint and an additional amended complaint, all of which pled the same facts as the Reply Claim. *See* ECF No. 174 ¶¶ 3, 4, 201, 209, 216; ECF No. 100 ¶¶ 3, 4, 207, 214; ECF No. 39 ¶¶ 3, 4, 257, 264; ECF No. 5 ¶¶ 3, 4, 210, 217, 221, 227. The Reply Claim relates to the termination of W&C and purported communications regarding that termination. Reply Claim ¶¶ 27-32.

The Tribe's counterclaim, by contrast, alleges claims based on W&C's poor performance under the Fee Agreement and failure to turn over the Tribe's case file. ECF No. 94 ¶¶ 56-102. As a result, before even assessing whether the Tribe's counterclaims awoke "dormant" rights, the Reply Claim cannot satisfy the threshold measure of being compulsory because it does not arise out of the same facts as the Tribe's counterclaim. *See* Mattel, 705 F.3f at 1110.

W&C alleges that the Reply Claim is "new" because the Tribe waived its sovereign immunity by filing the counterclaims. This is simply not true. First, *Guidiville Rancheria of Cal. v. United States*, 2015 U.S. Dist. LEXIS 109057 (N.D. Cal. Aug. 18, 2015), vacated in part on other grounds, 704 F. App'x 655 (9th Cir. 2017), relied on by W&C in the Reply Claim, is inapposite and limited to the facts of that case. *See id*. at *23. In *Guidiville Rancheria*, the tribe was a third-party beneficiary of an agreement between the City of Richmond and Upstream, and

attempted to invoke sovereign immunity to avoid paying attorney's fees, which were provided for in the parties' agreement. *Id*. at *14-15. The court there stated that the tribe's "mere participation in litigation d[id] not waive sovereign immunity for all counterclaims," but found that because the tribe brought a complaint seeking attorney's fees under the terms of the agreement, it had waived its sovereign immunity as to the reciprocal claim from the City for attorney's fees. *Id*. at *15. The Tribe's counterclaims are fundamentally different than those in *Guidiville Rancheria*—they were asserted in response to W&C's complaint that put the Fee Agreement at issue.[1]

Second, even if W&C believed there was a change in the Tribe's sovereign immunity, nothing in *Mattel* suggests that a plaintiff's belief about the merits of an affirmative defense would be a sufficient basis for a counterclaim in reply. Quite the contrary: "What matters is not the legal theory but the *facts*." *Id.* (emphasis in original). This is particularly true here given that W&C has already sued the Tribe, President Escalanti and Councilman White under numerous theories and taken the position that sovereign immunity did not apply.

Third, W&C prevailed on a sovereign immunity argument more than six months ago, on June 7, when the Court ruled that the Tribe waived its sovereign immunity as to claims regarding W&C's work for the Tribe under the terms of the Fee Agreement. ECF No. 89 at 16-17. Two weeks later, on June 21, 2018, the Tribe filed its counterclaims, which brought claims based on W&C's work for the Tribe. ECF No. 94. Since then, W&C has brought claims against the Tribe, President Escalanti and Councilman White in the SAC (ECF No. 100), and against the Tribe in

[1] The Tribe denies any waiver of sovereign immunity beyond what is contained in the Fee Agreement. Its Counterclaims did not expand the scope of that limited waiver. *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) ("Similarly, we consistently have held that a tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants in those actions.")

the TAC (ECF No. 174). Even before the Court ruled on motions to dismiss the SAC, W&C filed a motion for leave to file a Third Amended Complaint (ECF No. 105), demonstrating that W&C is aware of the proper procedure for attempting to assert new claims outside the Court's grant of leave to amend, even if it genuinely believed the Counterclaims constituted some sort of broader waiver of sovereign immunity.

Regardless, none of the Ninth Circuit cases permitting counterclaims in reply involve a plaintiff filing a third amended complaint while simultaneously seeking to assert a counterclaim in reply. And rightly so. W&C's Reply Claim is fundamentally an effort to circumvent this Court's Order on the motions to dismiss the SAC ("Court's Order"). The Court gave W&C leave to file a TAC *only* to amend the Fourth and Fifth Causes of Action. ECF No. 172 at 34. W&C knew that it could not plausibly allege a RICO conspiracy claim against President Escalanti and Councilman White—having failed twice already—and dropped the claim against them. Instead, W&C brought this Reply Claim. It is nothing more than a meritless attempt to make an end-run around the Court's Order dismissing the SAC—which is exactly the kind of "spurious issue" that Rule 12 seeks to avoid. *Cf. Zest Holdings*, 2013 WL 5674834, at *6.

The Reply Claim is procedurally improper. It is also immaterial to W&C's answer to the Tribe's counterclaims and contains impertinent accusations as to President Escalanti and Councilman White. Accordingly, it must be dismissed or stricken from the answer.

III. W&C'S TORTIOUS BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW

W&C's Reply Claim purports to state a claim for tortious breach of contract against the Tribe and against non-parties President Escalanti and Councilman White. That claim must be dismissed in its entirety because W&C fails to clear the high bar required to allege a tortious breach claim under California law. And the claim must

be dismissed against President Escalanti and Councilman White because W&C cannot plead the basic requirements of the claim against them.

A. W&C Cannot Allege A Tortious Breach Of Contract Against President Escalanti And Councilman White

It is fundamental California law that a breach of contract claim cannot be asserted against one who is not a party to the contract at issue. *See Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.*, 44 Cal. 4th 528, 536 (2008) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty")); Judicial Council of California Civil Jury Instruction 303—Essential Factual Elements ("To recover damages . . . for breach of contract, [a plaintiff] must prove all of the following [, including] [t]hat the [parties] entered a contract."). A breach is the unjustified failure to perform one's contractual obligations. *Boynton v. Reliance Standard Life Ins. Co.*, No. 14-CV-486-L(JMA), 2015 WL 11570935, at *2 (S.D. Cal. Jan. 29, 2015) ("A breach of contract, under California law, is the wrongful, i.e., unjustified or unexcused, failure to perform a contract.") (internal citation and quotation marks omitted); 1 Witkin, Summary of California Law, Contracts § 872. The Fee Agreement at issue was executed by W&C and the Tribe in September 2016. *See* ECF No. 174 ("TAC"), Ex. 2. Neither President Escalanti nor Councilman White were or are parties to the Fee Agreement. *See id.* Thus President Escalanti and Councilman White cannot have breached the Fee Agreement as a matter of law.

In fact, W&C already tried to plead a tortious breach of contract claim against the Tribe, President Escalanti, and Councilman White. ECF No. 29. It later dropped that claim in an admitted effort to plead around the Tribe's Anti-SLAPP motion. *See* ECF No. 73 at 25. W&C then twice failed to sweep President Escalanti and Councilman White into a RICO conspiracy claim. *See id.*; ECF No. 89, 172. As a result, W&C dropped the two from the recently-filed TAC. ECF No. 174. Now

W&C ignores black-letter law to assert this tortious breach of contract claim against them, who are both non-parties to the contract at issue.

President Escalanti nor Councilman White were not parties to the Fee Agreement. W&C therefore cannot—as a matter of law—bring a tortious breach of contract claim against them. The claim against them must be dismissed.

B. The June 26 and June 30, 2017 Letters Are Protected By The Litigation Privilege

W&C's tortious breach of contract Reply Claim is premised on two pre-litigation communications made in connection with this lawsuit—the claim is therefore barred by the litigation privilege. "A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim." *Digerati Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 888 (2011). The litigation privilege precludes liability arising from communications made in connection with any judicial proceeding. Cal. Civ. Code § 47(b). The privilege is not limited to statements made during a proceeding, but extends to steps taken prior to, or after, a proceeding. *See Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1241 (2007); *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006). It extends even further to communications with "some relation to a proceeding that is actually contemplated in good faith and under serious consideration by . . . a possible party to the proceeding." *Block v. Sacramento Clinical Labs, Inc.*, 131 Cal. App. 3d 386, 393 (1982) (internal citation and quotation marks omitted); *see Malin v. Singer*, 159 Cal. App. 4th 1283, 1301-02 (2013) (holding that demand letter was protected by litigation privilege). Indeed, the privilege has been "broadly applied to demand letters and other prelitigation communications. . . ." *Fleming v. Coverstone*, 2009 WL 764887, at *4 (S.D. Cal. Mar. 18, 2009) (citing *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 919 (2004)).

The purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts. *Finton Constr., Inc. v. Bidna Keys, APLC*, 238 Cal. App. 4th 200, 212 (2015); *see also Digerati*, 194 Cal. App. 4th at 889. The privilege is interpreted broadly and "immunizes defendants from virtually any tort liability . . . , [except] malicious prosecution." *Silberg v. Anderson*, 50 Cal.3d 205, 215-16 (1990). Further, the privilege is absolute and applies regardless of malice. *Malin*, 217 Cal. App. at 1300; *see also Digerati*, 194 Cal. App. 4th at 889.

W&C cannot show a probability of prevailing on its tortious breach of contract claim because it necessarily relies on prelitigation communications by the Tribe. W&C's allegations prove the point. For example, W&C claims that through the June 26 letter the Tribe: (1) terminated the firm; and (2) explained its reasons for the termination, including the Tribe's belief that the firm had overcharged the Tribe for the amount of work performed. Reply Claim ¶¶ 12-14.

The June 26 letter contains a factor by factor analysis of Section 11 of the Fee Agreement. *See* TAC Ex. 11. Indeed, the factors outlined in the June 26 letter are the relevant factors for W&C's remaining breach of contract claim under Section 11 of the Fee Agreement. See ECF No. 89 at 14-16. The June 26 letter then concludes that W&C was not entitled to any additional "reasonable fee," and demands that W&C release its case file. *See* TAC Ex. 11. The letter also demands that W&C adhere to its confidentiality obligations. *Id.* The Tribe sent a follow-up letter on June 30 to "tr[y] to obtain the [requested] compact materials" and the case file and stated if W&C again refused the request (as it had done previously), the Tribe would pursue litigation. Reply Claim ¶¶ 17-19. The allegations in the Reply Claim therefore establish that the Tribe's June 26 and June 30 letters are communications and demands made in connection with the termination of W&C and potential litigation.

The June 26 and June 30 letters are exactly the kind of prelitigation communications and demand letters protected by the litigation privilege. *See, e.g.*,

Fleming, 2009 WL 764887, at *4. As such, the tortious breach of contract claims premised on these letters is barred and must be dismissed.

C. W&C Fails To Allege A Tortious Breach Of Contract

W&C has not—and cannot—allege facts sufficient to state a tortious breach of contract claim. As a threshold matter, tortious breach claims, outside of bad-faith insurance denial, are disfavored. *Cervantez,*, 2007 WL 8076519, at *4 (recognizing that "tortious breach of contract" in California is limited to breaches of "substantial public polic[ies] which seek to protect the public") (internal quotations omitted). "The California Supreme Court has 'strongly suggested' that, in the absence of the violation of a duty arising under tort law independently of the breach of contract itself, lower courts should limit recovery in breach of contract actions to the insurance area." *Aqua Connect v. Code Rebel, LLC*, No. CV 11-05764 RSWL (MANx), 2013 WL 3820544, *4 (C.D. Cal. July 23, 2013) (dismissing a false promise claim where the "tort claim merely restates its breach of contract claim" and plaintiff did not allege independent tort or fraudulent inducement into contract); *see also Cervantez v. Celestica Corp.*, No. EDCV 07-729-VAP OPx, 2007 WL 8076519, at *4 (C.D. Cal. Oct. 5, 2007) ("California law does recognize a 'tortious breach of contract' though, when the action arises from the breach of a duty imposed by law to implement fundamental public policies, rather than on a breach of an express or implied promise in the contract itself.").

A contract breach "becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999). Outside of the insurance context, a tortious breach of contract may be found only when "(1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause

severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." *Id*. at 553-54 (quoting *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 105 (1995) (conc. and dis. opn. of Mosk, J.)).

Here, W&C's tortious breach of contract claim fails because (1) W&C fails to allege facts showing that the Tribe committed any common law torts in connection with any purported breach of the Fee Agreement; (2) W&C fails to allege that the means by which the Fee Agreement was purportedly breached were tortious; and (3) W&C fails to allege any facts showing that the Tribe purportedly breached the Fee Agreement in a manner it knew would cause "unmitigable harm."

1. W&C fails to state any common law tort claims

a) W&C fails to allege facts sufficient to plead civil extortion

W&C fails to allege any facts sufficient to establish civil extortion. California defines civil extortion as "the obtaining of property from another, with his consent … induced by a wrongful use of force or fear. . . ." *Malin*, 159 Cal. App. 4th at 1294; *TaiMed Biologics, Inc. v. Numoda Corp.*, 2011 WL 1630041, at *5 (N.D. Cal. Apr. 29, 2011); Pen. Code §§ 518, 519. Thus to state a claim of civil extortion, a claimant must demonstrate either that it had a pre-existing right to be free from the threatened harm or that the defendant had no right to seek payment for the service offered. *Levitt v. Yelp! Inc*., 765 F.3d 1123, 1133 (9th Cir. 2014) ("Any less stringent standard would transform a wide variety of legally acceptable business dealings into extortion.").

W&C does not allege the requisite elements of the civil extortion claim. W&C states, in conclusory language, that the Tribe "wrongfully and with no basis in fact retain[ed] monies that were lawfully due to [W&C] under the [] Fee Agreement and obtain[ed] work-product property through the use of threats to institute legal action. . . ." Reply Claim ¶ 28. This is plainly insufficient for at least three reasons.

First, the Tribe did not obtain property from W&C. To the contrary, the Tribe paid W&C the money owed under the Fee Agreement's monthly installments and W&C has refused to return the Tribe's case file.

Second, the animating principle behind extortion is that the plaintiff consented to giving property to the defendant but only because of the wrongful use of force or fear. *See Malin*, 159 Cal. App. 4th at 1294. As relevant here, W&C did not consent to anything. It refused to acknowledge its termination and kept communicating with the State after it was terminated (ECF No. 174 ¶ 99); it kept the Tribe's case file and continues to do so (*see* ECF No. 94 at 1-23; ECF No. 182 at 27-49); and filed the initial complaint in this case less than a month after receiving the June 26 letter to recover millions of dollars to which it is not entitled. ECF No. 1.

Third, the Tribe did not act "wrongfully" when it terminated W&C and requested the return of its case file. To the contrary, Section 11 of the Fee Agreement allows the Tribe to discharge W&C "***at any time***" and Section 12 provides that the Tribe, "at the end of the engagement," "may request the return of [its] case file." Accordingly, the June 26 and June 30 letters are "legally acceptable business dealing[s]" expressly contemplated by the parties in the Fee Agreement.

Under California law, it is fundamental that a client may change its legal counsel when it desires. *Taheri Law Grp. v. Evans*, 160 Cal. App. 4th 482, 492 (2008) (constitutionally protected exercise of free speech includes "the fundamental right of a client to choose and change his legal representation"); *Fracasse v. Brent*, 494 P.2d 9, 10 (Cal. 1972) (noting that there is a "strong policy, expressed both judicially and legislatively, in favor of the client's absolute right to discharge his attorney at any time"). And, as briefed previously to the Court (*see* ECF No. 94 at 13; ECF No. 182 at 39-40), California Rule of Professional Conduct 3-700(D)(1) requires an attorney whose employment was terminated to "promptly release to the client, at the request of the client, all the client papers and property."

Finally, as discussed *supra*, the June 26 and June 30 letters are communications made in good faith in the course of a judicial proceeding and in anticipation of litigation; thus, they cannot be the basis of a civil extortion claim. *See e.g., Fleming*, 2009 WL 764887, at *4 (holding that litigation privilege barred civil extortion claim based on demand letter); *Malin*, 217 Cal. App. 4th at 1302 (same). Accordingly, to the extent the tortious breach claim is based on civil extortion, it should be dismissed.

b) W&C Fails To Allege Facts Sufficient To Show Defamation

As with civil extortion, W&C's defamation allegations fall well short of meeting the elements required to state a claim. "[D]efamation involves (a) a publication that is (b) false, (c) defamatory, (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007). Ordinarily, the allegedly defamatory statement must be of fact, not opinion. *Gregory v. McDonnell Douglas Corp*. 17 Cal. 3d 596, 600 (1976); *Rudnick v. McMillan*, 25 Cal. App. 4th 1183, 1191 (1994).

Here, W&C alleges only that the Tribe purportedly committed defamation "by causing the [June 26 and June 30] letters—including the false statements therein that impugn the name, abilities, work ethic, and honesty of [W&C]—to be sent to multiple representatives for the Office of the Governor and at least one of the Firm's tribal clients. . . ." Reply Claim ¶ 29. These conclusory allegations fall well short of supplying a sufficient factual basis for any claim. W&C must do more than recite the elements of defamation.

W&C first fails to allege that the "false statements" contained in the two letters were facts rather than the Tribe's opinions. For example, W&C generally alleges, among other similar statements, that the June 26 letter stated that "it does not appear" that the firm dedicated enough resources the compact negotiations. *Id.* ¶ 13. That is the Tribe's subjective opinion—which is not actionable as defamation. *See, e.g., Taus*, 40 Cal. 4th at 720; *Rudnick*, 25 Cal. App. 4th at 1191. W&C similarly fails to

plausibly allege any facts showing that the Tribe's subjective opinion about its own interactions with W&C lowered W&C's esteem in the community or deterred people from associating with the firm. *See Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1047-48 (2008); Cal. Civ.C. § 45; *see also* Reply Claim ¶ 20 (alleging only that the Tribe wrote that it "ha[d] not witnessed" similar behavior from other firms it had worked with over the years).

Next, W&C only alleges vaguely that it "believes" the Tribe sent the two letters to members of the Office of the Governor and another tribe. *See* Reply Claim ¶¶ 21-23. But defamation requires that a false statement (which is not alleged here) be published to parties other than the subject of the statement. *Murphy v. Teamsters Union Local 542*, 2013 WL 3149482, at *11 (S.D. Cal. June 18, 2013) (citing *Cabesuela v. Browning–Ferris Industries of California, Inc.*, 68 Cal. App. 4th 101, 112 (1998)). W&C fails plead such facts. That W&C *believes* the statements at issue were communicated to the Office of the Governor and others is not enough to push the allegations from possible to plausible, as required by Rule 8.

And, finally, because the purported defamation is premised on the June 26 and June 30 letters, it too is precluded by the litigation privilege. *See, e.g., Knoell v. Petrovich*, 76 Cal. App. 4th 164, 169-70 (1999) (affirming trial court's holding that litigation privilege precluded defamation claim premised on demand letter). For these reasons, W&C fails to establish defamation—an intentional tort required to find a tortious breach of contract. The Court should therefore dismiss the claim.

c) W&C Fails To Allege Economic Duress

As an initial matter, economic duress is not an intentional tort. It is an equitable doctrine. *See Johnson v. Int'l Bus. Machines Corp.*, 891 F. Supp. 522, 528–29 (N.D. Cal. 1995) (citing *Rich & Whillock, Inc. v. Ashton Development, Inc.*, 157 Cal. App. 3d 1154 (1984)). The "underlying concern" of the doctrine is the enforcement of "minimal standards of business ethics" in the marketplace. *Rich*, 157 Cal. App. 3d at 1159. But "hard bargaining" and "efficient breaches" are

"acceptable, even desirable in our economic system." *Id.* at 1159. Accordingly, when a party pleads economic duress, that party must have had no "reasonable alternative" to the action it now seeks to avoid, which is an unfavorable contract. *Tarpy v. Cty. of San Diego*, 110 Cal. App. 4th 267, 277 (2003). To establish a claim for economic duress, a party must prove that: (i) the opposing party engaged in a sufficiently coercive wrongful act such that; (ii) a reasonably prudent person in the party's economic position would have had no reasonable alternative but to succumb to the opposing party's coercion; (iii) the opposing party knew of the party's economic vulnerability; and (iv) the opposing party's coercive wrongful act actually caused or induced the party to take the action. *See Johnson*, 891 F. Supp. at 528-29.

Here, W&C cannot show a tortious breach of contract based on the "intentional tort" of "economic duress" that allegedly accompanied the purported breach of contract. Because economic duress is not an intentional tort, any tortious breach claim based on it fails as a matter of law. But even if economic duress was considered an intentional tort for purposes of W&C's claim, W&C has not plead any facts sufficient to allege economic duress. Nor could it. W&C alleges only that the Tribe "wrongfully, and knowing its claim to be false, breach[ed] the [] Fee Agreement in such a manner . . . and opportunistic timing . . . that left W&C with no alternative but to turn over its work product and suffer the breach. . . ." Reply Claim ¶ 30. Parroting the elements of the economic duress doctrine is not enough. W&C must allege facts that could support a claim. It cannot. As far as the Tribe can tell, W&C argues that it turned over its work product as a result of economic duress based on the termination letter it received from the Tribe on June 26, 2017. This does not amount to economic duress for, at least, three reasons.

First, the purpose of the economic duress doctrine is to "vitiat[e] a coerced party's consent" to an unfavorable contract. *Tarpy*, 110 Cal. App. 4th at 277. But W&C's Reply Claim does not allege that the Tribe's June 26 and June 30 letters somehow coerced the firm into signing the Fee Agreement. That would be illogical.

Nor does W&C allege that the Fee Agreement was unfavorable. The doctrine is thus entirely inapposite here.

Second, the Tribe's termination of W&C was not wrongful—Section 11 of the Fee Agreement allows the Tribe to terminate W&C ***at any time.*** And W&C was ***required*** to turn over its work product not only pursuant to the Fee Agreement, but also pursuant to the California Rules of Professional Conduct. *See* ECF No. 174, Ex. 2 (Fee Agreement) § 12; CRPC 3-700(D)(1). No amount of artful pleading can change the express language in the Fee Agreement.

Third, W&C's allegation that it had "no alternative but to turn over its work product and suffer the breach" is disingenuous and belied by its own admission that W&C did ***not*** turn over any of its work product other than the draft compact that W&C claims it had already provided to the State anyway. *See* TAC ¶¶ 90, 103, 105.

For these reasons, W&C fails to establish that the Tribe "committed the intentional tort of economic duress" and its tortious breach of contract claim cannot survive.

2. W&C fails to allege that the means used to terminate W&C pursuant to the Fee Agreement were tortious

W&C alleges that "[a]long with committing a breach of contract," the Tribe intentionally engaged in "undue coercion" by threatening to "ruin the reputation" of W&C if it sought redress for the breach of the Fee Agreement from a court of law, and further threatening legal action to obtain W&C's work product. Reply Claim ¶ 31. This is conclusory and vague at best. It does not come close to satisfying Rule 8. There are no facts from which the Court can reasonably infer coercion.

"Coercion" is "the application to another of such force, either physical or moral, to constrain him to do against his will something he would not otherwise have done." *Ex parte Bell*, 19 Cal. 2d 488, 526 (1942). To the extent the Tribe even understands W&C's allegations, they are entirely devoid of facts alleging that the Tribe used any force at all to constrain W&C to do something it would not otherwise

have done, or that W&C did anything as a result of purported coercion. As discussed *supra*, W&C was ***obligated*** under the Fee Agreement and the California Rules of Professional Conduct to return its work product upon termination. W&C cannot now make a straight-face claim that it was somehow acting against its free will by providing work product (which it still has not provided in its entirety) that it was required to provide under the plain terms of the Fee Agreement and California law, and had already provided to the State. See TAC ¶¶ 90, 103, 105. Indeed, the June 26 and June 30 letters do not amount to a constraint of "such [physical or moral] force" against W&C—the letters merely requested W&C to act pursuant to its contractual obligations. Accordingly, W&C has failed to plead facts showing that the Tribe "intentionally engaged in undue coercion" and the tortious breach of contract claim must fail.

3. W&C fails to allege that the Tribe purportedly breached the Fee Agreement intending or knowing that such a breach would cause "unmitigable harm"

W&C's final grasp to allege tortious breach is based on the notion that a tortious breach of contract may be found when one party intentionally breaches the contract intending or knowing that such a breach will cause "severe, unmitigable harm" in the form of, among other things, substantial consequential damages. *Erlich v. Menezes*, 21 Cal. 4th at 553-54. This cannot apply to an alleged tortious breach of the Fee Agreement.

The Fee Agreement itself precludes W&C's argument that the Tribe's alleged breach was intended to cause unmitigable harm. The Fee Agreement's waiver of sovereign immunity allows claims for breach of Section 11 of the Fee Agreement—a claim the Tribe has never moved to dismiss. And Section 11 of the Fee Agreement outlines all the relevant factors that would allow W&C to receive an addition "reasonable fee" in the event of termination. This is what the Tribe addressed head-

on in the June 26 letter. That provision operates to afford W&C all damages to which it would be entitled under the Fee Agreement.

Like the other allegations before it, W&C fails to plead facts showing that the Tribe intended or knew that any alleged breach of contract would cause "unmitigable harm." Indeed, W&C does not even identify any such harm. W&C merely alleges that the Tribe "intentionally breached [the Fee Agreement] in a manner that they knew would likely cause 'substantial consequential damages' by causing the June 26, 2017 and June 30, 2017 letters to be sent to the Office of the Governor and at least one of the Firm's other tribal clients for the sole purpose of damaging the Firm's relationship with these entities." Reply Claim ¶ 32. But this is not enough. Rule 8 requires more than conclusory statements of law.

W&C never even attempts to describe its purported unmitigable harm, let alone plausibly explain the basis of any damages flowing from a purported breach of the Fee Agreement beyond what is outlined in Section 11. Moreover, W&C's own allegations cite language from the June 26 and June 30 letters that is inconsistent with the notion that the Tribe's "sole" purpose of terminating the Fee Agreement was to damage W&C in any way. *See, e.g., id.* ¶¶ 12, 13, 18. Indeed, W&C acknowledges a laundry list of reasons that the Tribe gave for terminating the parties' contractual relationship, including that the Tribe believed the firm had been overcompensated for its performance. *Id.* ¶ 13. Absent from these allegations are any facts showing how the Tribe intended or knew that any purported breach of the Fee Agreement would cause W&C "unmitigable" consequential damages.

W&C's last attempt to succeed on its tortious breach of contract claim fails—like the rest of its allegations—to establish any tortious conduct on the part of the Tribe that would support such a claim. The tortious breach claim should thus be dismissed.

4. W&C's Tortious Breach Reply Claim Is Duplicative Of Its Pending Claims, Which The Tribe Has Already Answered.

W&C's contract and breach of the covenant of good faith claims alleged in the TAC are based on the same facts and purported harm as this new Reply Claim. The Reply Claim is therefore duplicative of the two pending claims. California law and public policy counsel dismissal of tortious breach claims, which—like this one—largely restate pending claims. *See Aqua Connect*, 2013 WL 3820544, at *4 (dismissing "tort claim [that] merely restates its breach of contract claim"); *see also Cervantez*, 2007 WL 8076519, at *4 (holding that tortious breach claims arise out of duties "imposed by law to implement fundamental public policies, rather than on a breach of an express or implied promise in the contract itself."). Here, W&C's additional pending good faith and fair dealing claim only makes the reason for dismissing the Reply Claim all the more compelling.

CONCLUSION

W&C's tortious breach of contract claim is procedurally improper and substantively fails as a matter of law. W&C has had more than sufficient opportunity to allege claims against the Tribe, President Escalanti and Councilman White, and has alleged two claims in the TAC. California law and policy prohibit the Reply Claim from proceeding. The Court should therefore grant this motion, with prejudice.

Dated: December 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 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 December 31, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima