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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally-recognized Indian tribe; ROBERT ROSETTE; ROSETTE & ASSOCIATES, PC; ROSETTE, LLP; RICHARD ARMSTRONG; and DOES 1 THROUGH 100,

Defendants.

Case No. 17-CV-01436 GPC MSB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ROSETTE DEFENDANTS' MOTION TO DISMISS OR STRIKE PLAINTIFFS' FOURTH AND FIFTH CLAIMS FOR RELIEF PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 12(f)

[Notice of Motion Filed Concurrently]

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: March 22, 2019
Time: 1:30 p.m.

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STATUTES

I. Introduction[1]

After this Court twice dismissed W&C's RICO claims and twice provided substantial guidance about the allegations' deficiencies, Plaintiffs' Third Amended Complaint ("TAC") comes no closer to asserting a viable RICO claim. The reason is clear: despite multiple failed attempts, "[t]his dispute cannot be shoehorned into the [RICO] Act." *Walter v. Drayson*, 496 F. Supp. 2d 1162, 1164 (D. Haw. 2007), *aff'd*, 538 F.3d 1244 (9th Cir. 2008). Plaintiffs will no doubt claim to have tried, but their increasingly implausible and unsupported accusations "call[] into play the important principle that conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss." *Id.* at 1165 (dismissing RICO claims against attorneys).

As with the prior complaints, the TAC "is based entirely on delusional perceptions of persecution, unreasonable inferences drawn from those delusions, incoherent explanations of fact, or conclusory legal claims cast in the form of factual allegations." *Adams v. F.B.I.*, 2007 WL 627912, at *2 (N.D. Cal. Feb. 26, 2007). Allegations previously struck by the Court are reasserted. So-called predicate acts that the Court already rejected as insufficient are realleged without modification. And the RICO claims continue to focus on W&C's termination by Quechan, which the Court has specifically held cannot form a basis for relief. (*See* Docket No. 172 at 24.)

The amendments that Plaintiffs have made are, at best, legal conclusions masquerading as factual allegations simply to "parrot[] the language of this Court's order." *Quach v. Cross*, 2004 WL 2860346, at *3 (C.D. Cal. June 10, 2004), *aff'd*, 252 F. App'x 775 (9th Cir. 2007). In most cases, the amendments violate the Court's Orders, seek to challenge Quechan's tribal sovereignty, amplify the

[1] Unless otherwise noted, defined terms have the meanings identified in Docket No. 110, internal citations and quotations are omitted, and emphases are added.

personal attacks that permeate Plaintiffs' other pleadings, and confirm through their silence that no plaintiff has a cognizable RICO injury. These claims should be struck or dismissed with prejudice, and the Rosette Defendants respectfully request the Court consider appropriate remedies for W&C's violation of the Court's Orders.

II. Procedural History and the TAC's Amended Claims and Allegations

The Court is all too familiar with the procedural history of this case, which, during the year and a half since initiation, has generated more activity than many cases do in their lifetimes. This is W&C's fifth complaint. (Docket Nos. 1, 5, 39, 100, 174.) W&C also attempted to file a supplemental complaint (Docket Nos. 71, 91), unsuccessfully sought leave to file another pleading (Docket Nos. 105, 135), and asserted a "reply claim" in its Answer. (Docket No. 179). The crux of each complaint is the same: W&C wants to hold someone—anyone other than itself—liable for its termination by Quechan.

Taking aim at the Rosette Defendants, W&C began by asserting tortious interference, RICO, and Lanham Act claims. (Docket Nos. 5, 39, 105.) W&C later abandoned its efforts to assert a state-law claim, tried again, and was rebuffed by the Court based on the large body of case law precluding liability in light of California's litigation privilege. (Docket Nos. 5, 39, 105, 135.) W&C also enlisted individual tribal members (the "Individual Plaintiffs"), none of whom are on the Tribal Council and none of whom the Rosette Defendants have ever represented, to assert a putative class claim for professional negligence against the Rosette Defendants. (Docket No. 39, 100.) That effort failed, too. (Docket Nos. 89, 172.) The Court has allowed one portion of W&C's Lanham Act claim against a subset of the Rosette Defendants to survive,[2] but W&C has clung to the hope that it can seek treble damages with a civil RICO claim based on its far-fetched conspiracy

[2] The Rosette Defendants respectfully maintain that the Lanham Act claim against them fails, but recognize the Court has ruled on this question under Rule 12(b)(6).

theories. (Docket Nos. 89, 172.)

Most recently, the Court held that "amendment will prove futile" for predicate acts relating to W&C's termination of Quechan. (Docket No. 172 at 24.) The Court ultimately dismissed the RICO claim for lack of causation, and it dismissed the RICO conspiracy claim based on several defects. (*Id.* at 23–24, 26–27.) It warned that W&C would have just one more chance to amend each claim. (*Id.* at 24, 27.)

Despite the dismissals, Plaintiffs filed the TAC, again asserting inadequate theories of liability under RICO. Plaintiffs' amendments are reflected in an exhibit to the TAC (*see* Docket No. 174, Ex. 32 (redline filed under seal)). Relevant to this motion, the TAC converts what used to be a substantive RICO claim into one for "[c]onspiring to violate and/or violating" RICO (the fourth claim for relief) and now asserts a RICO conspiracy claim on behalf of the Individual Plaintiffs instead of W&C (the fifth claim for relief). The TAC also inserts conclusory and implausible allegations in a futile effort to remedy the deficiencies detailed by the Court. (*E.g.* TAC ¶ 124.) New allegations relate to the conduct of this litigation, (*e.g. id.* ¶ 228(p)), and introduce irrelevant and unsupported contentions that bear no relation to this case and cannot plausibly be construed as predicate RICO acts. (*E.g. id.* ¶¶ 228(a), (q) (2nd a), 229, 230.)

Also notable is what the TAC does not change. It does not remove "predicate acts" relating to W&C's termination by Quechan. (*See id.* ¶¶ 228(j)–(o), (2nd e)–(2nd h).) It does not remove or substantively amend multiple "predicate acts" that the Court already found to be insufficient as a matter of law. (*See id.* ¶¶ 228(j)–(o), (2nd e)–(2nd h).) It does not identify a concrete injury to W&C's business or property proximately caused by a RICO violation. And it does not delete the personal attacks this Court previously struck. (*Compare* SAC ¶¶ 115–21, *with* TAC ¶¶ 110–116; *compare* SAC ¶¶ 178–79, *with* TAC ¶¶ 188, 191; *compare* SAC ¶¶ 190–93, *with* TAC ¶¶ 189–190, 192–93.) In short, Plaintiffs' amendments

do not cure the deficiencies identified by the Court, and the persistent lack of particularized allegations demonstrates that Plaintiffs have no hope of asserting a sustainable RICO claim.

III. Argument

A. Plaintiffs' Amendments Exceed the Scope of the Court's Leave

In its last Order dismissing W&C's substantive RICO claim and RICO conspiracy claim as inadequately pleaded, the Court was clear about Plaintiffs' diminishing options: W&C would have only one more opportunity to supplement the Second Amended Complaint ("SAC") if it hoped to correct the deficiencies the Court identified. (Docket No. 172 at 24 ("Plaintiffs are placed on notice that in the event that they choose to amend ***this claim***, it will be the last opportunity to do so."); *see also id.* at 27.) Despite the limited scope of the Court's lenience, the TAC adds two entirely new RICO conspiracy claims: one on behalf of W&C and the other on behalf of a putative class of Quechan members. (TAC ¶¶ 224–240.) These claims should be struck or dismissed as procedurally improper.

The Court's leave was limited to curing the deficiencies in W&C's substantive RICO claim alleging the Rosette Defendants "attempt[ed] to interfere with W&C's business through misrepresenting that Rosette successfully litigated the Pauma case," (Docket No. 172 at 19) and W&C's RICO conspiracy claim alleging "Defendants conspired to use the Tribe's funds for their own personal enrichment." (*Id.* at 24–25.) Indeed, the Court clearly identified that the purpose of a new complaint would be for W&C "to amend the Fourth and Fifth Causes of Action." (*Id.* at 33–34.) But instead of amending those claims, the TAC adds new causes of action never before asserted: a RICO conspiracy claim alleging the Rosette Defendants generally sought to interfere with W&C's contracts by "spead[ing] fraudulent falsehoods," (*see, e.g.*, TAC ¶¶ 148, 226), many of which are unspecified, and a RICO conspiracy claim on behalf of the Individual Plaintiffs, none of whom have asserted a RICO claim in this case. (*Id.* ¶¶ 11, 233–240.)

"[W]here leave to amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken." *See DeLeon v. Wells Fargo Bank, N.A.*, 2010 WL 4285006, at *3 (N.D. Cal. Oct. 22, 2010) (dismissing new claims); *see also King v. Cty. of Los Angeles*, 2016 WL 893617, at *3–4 (C.D. Cal. Mar. 8, 2016) (dismissing new claims and newly added parties that "exceed[ed] the scope of the Court's order granting leave to amend the original complaint").[3] Courts routinely strike or dismiss claims like those added in the TAC. *See, e.g.*, *Espino v. Walgreen Co.*, 2016 WL 931098, at *3 (E.D. Cal. Mar. 11, 2016) ("[W]here a prior court order granted limited leave to amend, district courts in this circuit generally strike or dismiss new claims or parties contained in an amended complaint"); *Jameson Beach Prop. Owners Ass'n v. United States*, 2014 WL 4925253, at *4 (E.D. Cal. Sept. 29, 2014) (striking new claims); *see also Benton v. Baker Hughes*, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013) (same); *Raiser v. City of Los Angeles*, 2014 WL 794786, at *4 (C.D. Cal. Feb. 26, 2014) (same). Here, "[b]ecause the Court was specific about the purpose of the limited leave granted, [the] new claims are improperly before the Court and should be dismissed[.]" *Kouretas v. Nationstar Mortg. Holdings, Inc.*, 2015 WL 1751750, at *2 (E.D. Cal. Apr. 16, 2015).

B. The TAC Violates the Court's Prior Order and Adds Derogatory Allegations That Also Should Be Struck Under Rule 12(f)

The TAC realleges irrelevant *ad hominem* attacks that the Court previously struck under Federal Rule of Civil Procedure 12(f). In its last dismissal Order, this Court struck paragraphs 115–21, 178–79, and 190–93 of the SAC, ordering that "[i]f Plaintiffs do not seek leave to amend their complaint, Plaintiffs must refile their complaint omitting these allegations." (Docket No. 172 at 33.) Instead of

[3] The TAC also adds a new party, Individual Plaintiff Mona Hartt. (TAC ¶ 11.)

seeking—let alone obtaining—reconsideration or leave to amend, Plaintiffs ignored the Court's Order and reasserted the struck allegations in their TAC. (*Compare* SAC ¶¶ 115–21, *with* TAC ¶¶ 110–116; *compare* SAC ¶¶ 178–79, *with* TAC ¶¶ 188, 191; *compare* SAC ¶¶ 190–93, *with* TAC ¶¶ 189–190, 192–93.) Worse still, the TAC adds new inflammatory allegations of bigotry without a shred of support or any conceivable connection to any claim for relief in the TAC. W&C accuses Mr. Rosette and Mr. Armstrong of maligning Mr. Cochrane on the basis of sexual orientation—an unequivocally false, impermissibly derogatory, and entirely unsupported accusation that serves no purpose but to harm Mr. Rosette's and Mr. Armstrong's standing in the community. (*See* TAC ¶¶ 123, 228(a), 228(2nd a).) Calling these allegations "RICO predicates" has no basis in either fact or law; they "are indefensible and wholly inappropriate and have no place in filings in this court." *Pigford v. Veneman*, 215 F.R.D. 2, 4–5 (D.D.C. 2003) (striking accusations about a "racist attitude" that were "unsupported by facts or evidence, constitute a form of harassment, and [were] scandalous" within the meaning of Rule 12(f)).

The allegations previously struck by the Court had "no essential or important relationship to the claim[s] for relief" except to "cast a cruelly derogatory light on a party;" W&C's new character attacks warrant the same treatment. *SST Sterling Swiss Tr. 1987 AG v. New Line Cinema, Corp.*, 2005 WL 6141290, at *5 (C.D. Cal. Oct. 31, 2005). The Court should again strike paragraphs 110 to 116, 178 to 179, and 188 to 193 of the TAC as immaterial, impertinent, and improperly reasserted in violation of this Court's Order. It should also strike paragraphs 123, 228(a), and 228(2nd a) and consider imposing sanctions for "improperly includ[ing] allegations the court . . . previously struck under Rule 12(f)." *See Mireskandari v. Mail*, 2014 WL 12561581, at *9 (C.D. Cal. Aug. 4, 2014).

C. The TAC Still Fails to Identify Concrete Injuries Proximately Caused by Alleged RICO Violations

Fourth Claim for Relief. W&C's fourth claim is based largely on the same

allegations as the faulty SAC. Like its predecessors, this claim fails to adequately allege a RICO violation (conspiracy or otherwise) for multiple independent reasons, but the most glaring deficiencies are in W&C's attempt to plead statutory standing. "To have standing . . . a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was by reason of the RICO violation, which requires the plaintiff to establish proximate causation." *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008); *see also Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873 (9th Cir. 2010) ("To have standing under civil RICO, [the plaintiff] is required to show that the racketeering activity was both a but-for cause and a proximate cause of his injury."). A concrete, financial loss is necessary but not sufficient to allege statutory standing. *See Syngenta Seeds*, 519 F.3d at 975. The loss must also be "a harm to a specific business or property interest—a categorical inquiry typically determined by reference to state law." *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc).

As this Court held when dismissing W&C's previous RICO claim, W&C did not (and could not) allege that its termination by Quechan "was proximately caused by the Rosette Defendants' racketeering activity." (Docket No. 172 at 24.) The Court correctly explained, "Quechan could have terminated the agreement for any number of reasons unconnected to the asserted pattern of fraud." (*Id.* at 23.) In fact, the alleged wrongdoing and W&C's termination were so disconnected that the Court concluded "amendment will prove futile as to the predicate acts relating to Quechan's termination of the attorney-client agreement with W&C" and dismissed ***with prejudice*** any RICO claim based on that supposed injury. (*Id.* at 24.) W&C was therefore required to allege a concrete financial harm to its business and property unrelated to its termination by Quechan. The TAC entirely fails in this regard. W&C's only allegation of an "injury" in connection with its RICO claim is the flat assertion that it "suffer[ed] contract damages and injuries in an amount to be

proven at trial." (TAC ¶ 232.) What those damages are, W&C declines to specify. The TAC identifies no contracts or specific business relationships that W&C allegedly lost due to the statements in Mr. Rosette's biography about litigating the *Pauma* case or any other alleged misstatement. To survive a motion to dismiss, the complaint must allege facts showing that the RICO "violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006); *see also Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010) ("[T]he plaintiff is required to show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause as well.") (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). The TAC does not allege facts establishing the necessary direct connection.

The loss of a ***prospective*** relationship (TAC ¶¶ 228(a)–(b), (h)–(i), (2nd a)–(2nd b)) is too nebulous to constitute a concrete injury under RICO. As the Court has already explained, "[m]arket share is neither tangible or intangible property; its loss is far too amorphous a blow to support a claim of mail fraud." (Docket No. 172 at 20.) The Ninth Circuit has been crystal clear that even where a competitor seeks to "steal" clients or customers, "it cannot be said that these customers [are . . .] property." *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 406 (9th Cir. 1991) (affirming judgment in favor of defendants on RICO claim). Nor are fleeting references to impaired reputation sufficient. (*See* TAC ¶¶ 228(a), (2nd a).) W&C must show "some tangible financial loss" connected with harm to its business or property interests, and "allegations of injury to [] reputation or goodwill are personal injuries that are unconnected to a business or property interest recognized under state law . . . ." *Cobb v. JPMorgan Chase Bank, N.A.*, 2012 WL 5335309, at *4, *5 (N.D. Cal. Oct. 26, 2012) (dismissing RICO claims with prejudice), *aff'd sub nom.* 594 F. App'x 395 (9th Cir. 2015). As this Court recognized, "attorneys lose and gain clients for many reasons, such as dissatisfaction with current counsel or rapport, and 'it would require a complex

assessment to establish what portion' of the termination was the product of" alleged RICO violations. (Docket No. 172 at 24 (quoting *Anza*, 547 U.S. at 459).)

The TAC's litany of alleged "predicate acts" cannot satisfy the requirement to allege facts demonstrating that W&C suffered concrete harm to a business or property interest recognized under California law. Most of the predicate acts identified in the TAC still relate to W&C's termination by Quechan, which the Court held could not constitute an injury within the meaning of RICO. (*Id.* at 23–24.)[4] To the extent W&C seeks to recover for harm supposedly caused by alleged communications in 2010 between Mr. Rosette and Michelle La Pena (TAC ¶¶ 228(c)–(e))—which occurred well outside the four-year statute of limitations and therefore cannot form the basis for a damages claim, *see, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 558 (2000)—the Court has already held that "[n]othing supports the conclusion that La Pena terminated the of counsel relationship because of Robert Rosette claiming he was responsible for litigating the Pauma case" or making any other false statements. (Docket No. 172 at 23, n.3.)[5] Just as W&C's termination by Quechan could have resulted from any number of issues with the firm's performance, Ms. La Pena's decision not to establish a business relationship with W&C could have occurred for many different reasons, two of which (conflicts and trustworthiness) are contemplated by W&C's own allegations. (*See* TAC ¶ 149.)

W&C's allegations regarding Pauma fail for the same reasons. Although

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[4] W&C's agreement with Quechan included an absolute right to terminate the firm at will and provided specific remedies to W&C in the event of such termination. (*See* Docket No. 174-2.) Imposing treble damages for civil RICO liability based on a client's termination of its counsel would violate the client's absolute right to choose its own counsel.

[5] W&C is also not the direct "victim" of the supposedly false statements, which were allegedly made to others. To the extent the recipients of those statements feel that some fraud or other wrong has been committed against them, they "can be expected to vindicate the laws by pursuing their own claims." *Anza*, 547 U.S. at 460.

W&C vaguely refers to Pauma's decision "to significantly diminish the role of the firm" (*id.* ¶ 183), there is no plausible explanation for Pauma's dissatisfaction other than W&C's performance in the delivery of legal services.[6] And any implication that the allegations related to Pauma caused W&C's role to diminish is unavailing. The "predicate acts" involving Pauma are alleged to have occurred in 2011 (*id.* ¶¶ 228(f)–(g), (2nd c)–(2nd d)), and W&C asserts its role with the tribe was reduced ***seven years later*** in August 2018. (*Id.* ¶ 183.) The amount of time between the acts and the reduction of W&C's role only increases the "number of reasons unconnected to the asserted pattern of fraud" upon which Pauma made its decision. *Anza*, 547 U.S. at 458. Likewise, W&C's allegations concerning 2011 entreaties to the State on behalf of Pauma, which this Court already held cannot constitute predicate acts (Docket No. 172 at 16), are not linked to any asserted injury.[7] They are also barred by the statute of limitations, as W&C alleges no other cognizable injury within the past four years.

Fifth Claim for Relief. The TAC repackages W&C's previous RICO conspiracy claim as one now asserted on behalf of the Individual Plaintiffs (*see* TAC ¶¶ 233–240). This change exacerbates jurisdictional problems and does nothing to remedy the claim's defects, including the failure to identify a concrete

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[6] W&C has had a string of high-profile losses for Pauma recently, including at the Ninth Circuit, *see Pauma v. Nat'l Labor Relations Bd.*, 888 F.3d 1066 (9th Cir. 2018), and in this district, *Pauma v. Unite Here Int'l Union*, 2018 WL 4680029 (S.D. Cal. Sept. 28, 2018).

[7] Similarly, as to the alleged predicate acts relating to influencing testimony, obstructing justice, and witness tampering (TAC ¶¶ 228(p)–(q), (2nd i)–(2nd j), 229–230), "plaintiffs have not alleged that [Defendants'] course of conduct resulted in a concrete financial loss to plaintiffs." *Natomas Gardens Inv. Grp. LLC v. Sinadinos*, 2009 WL 1363382, at *21 (E.D. Cal. May 12, 2009). The TAC does not, for example, assert that the alleged "threats" caused Mr. Cochrane or Ms. Williams (who are not plaintiffs in this case) to "abandon [their] claims for a substantial period, during which time [they] incurred greater losses due to defendants' alleged fraudulent activities." *Id.* Rather, the TAC fails to point to any financial loss caused by these alleged predicate acts.

financial injury to business or property cognizable under state law and attributable to the allegedly wrongful conduct.

First, the Individual Plaintiffs' claim centers on intra-tribal affairs at Quechan over which this Court lacks jurisdiction. Nearly all the predicate acts alleged would require the Court to adjudicate questions of tribal law, including whether: (i) the Individual Plaintiffs were members of the Tribe who were owed per capita gaming revenues under the "Tribal Revenue Allocation Plan" (*id.* ¶ 238(c)); (ii) the Tribal Council had authority under Quechan's Constitution to discontinue those payments (*id.* ¶¶ 238(a)–(c)); (iii) individual membership benefits determinations were appropriate under tribal law (*id.* ¶ 238(h)); (iv) tribal elections complied with Quechan's Constitution (*id.* ¶¶ 238(n), (q)); (v) certain tribal officials acted appropriately and with authority on the Tribe's behalf (*id.* ¶¶ 238(a)–(c), (h), (o), (q)); and (vi) W&C was terminated and Rosette, LLP, was retained consistent with the Tribe's constitutional requirements and bylaws (*id.* ¶¶ 238(i)–(m)).

The Court does not have jurisdiction to adjudicate these issues because "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Accordingly, federal courts routinely hold that they lack jurisdiction to decide the issues raised in the TAC's fifth claim for relief: tribal election disputes "based on the alleged violation of tribal election procedures," *Wasson v. Pyramid Lake Paiute Tribe*, 782 F. Supp. 2d 1144, 1148 (D. Nev. 2011); disputes over "the Tribe's internal duties to its own members," *Wasson v. Pyramid Lake Paiute Tribe*, 2010 WL 4293349, at *5 (D. Nev. Oct. 20, 2010)[8]; tribal enrollment decisions, *see Santa Clara Pueblo*, 436 U.S. at 72 n.32;

[8] "Some such matters—but by no means an exhaustive list—include the inherent power to . . . regulate domestic relations among members, to prescribe rules of inheritance for members, and the power to punish tribal offenders." *Miccosukee Tribe of Indians of Fla. v. Cypress*, 975 F. Supp. 2d 1298, 1306 (S.D. Fla. 2013), *aff'd*, 814 F.3d 1202 (11th Cir. 2015).

tribal governance disputes, *see Montana v. United States*, 450 U.S. 544, 564 (1981), including whether an individual has authority to act on behalf of a tribe, *see Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010); and "disputes involving questions of interpretation of the tribal constitution," *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985). Courts have also repeatedly confirmed that disputes over the allocation or use of pro rata gaming revenue are within the exclusive jurisdiction of tribal courts. *See, e.g.*, *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) ("25 C.F.R. § 290.23 explicitly states that 'disputes arising from the allocation of net gaming revenue and the distribution of per capita payments' are to be resolved through 'a tribal court system, forum or administrative process.'").[9]

"To resolve these disputes, the Court would necessarily have to make rulings on tribal law that go beyond the scope of a district court's jurisdiction [and] Plaintiffs cannot eliminate this inherent issue just by bringing their challenge as a civil RICO action." *Rabang v. Kelly*, 328 F. Supp. 3d 1164, 1168 (W.D. Wash. 2018) (appeal filed); *Smith*, 100 F.3d at 559 ("Federal court jurisdiction does not reach this matter simply because the plaintiffs carefully worded their complaint."). Rather, tribal courts have jurisdiction over these disputes, which can be decided only under tribal law, and "[p]rinciples of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is

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[9] *See generally Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996) (claim that non-members participated in scheme to misallocate distribution of per capita gaming proceeds was internal tribal membership dispute); *Alvarado v. Table Mountain Rancheria*, 2005 WL 1806368, at *4 (N.D. Cal. July 28, 2005), *aff'd* 509 F.3d 1008 (9th Cir. 2007) ("Attempts to establish federal jurisdiction over tribal membership disputes by tying those disputes to congressional efforts to regulate tribal gaming have been routinely rejected by the courts"); *Montgomery v. Flandreau Santee Sioux Trib*e, 905 F. Supp. 740, 746 (D.S.D. 1995) (court lacked jurisdiction to adjudicate claims brought by individuals who claimed entitlement to receive per capita shares of tribal gaming revenues under tribal law and IGRA).

colorable[.]" *Watterson v. Fritcher*, 2018 WL 5880776, at *2 (E.D. Cal. Nov. 8, 2018).

Second, for each of these and the remaining "predicate acts," which involve governmental or regulatory certifications (TAC ¶¶ 238(d)–(g)) and communications concerning this lawsuit (*id.* ¶ 238(p)), the Individual Plaintiffs have not alleged that the acts proximately caused any financial injury to business or property cognizable under state law. Nowhere do the Individual Plaintiffs allege an individual entitlement to particular pro rata distributions, and under *Anza*, certifications to third parties, even if inaccurate, cannot be said to have proximately caused terminated pro rata distributions. *See generally Anza*, 547 U.S. at 451. The TAC also contains no explanation of how the Rosette Defendants' retention and representation of the Tribe caused the Individual Plaintiffs any concrete harm, and the Court's dismissal with prejudice of their professional negligence claim against the Rosette Defendants undermines any assertion of injury. Accordingly, like W&C, the Individual Plaintiffs lack statutory standing to pursue their claim.

D. The TAC Fails to Allege a Substantive RICO Violation or Conspiracy

Plaintiffs' amended allegations and revised legal theories not only fail to correct the many deficiencies identified by the Court, but also introduce new, separately fatal defects requiring dismissal. To state a RICO claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873 (9th Cir. 2010). Those claims that hinge on fraud—RICO violations included—must comply with the heightened pleading standards set forth in Rule 9. *See, e.g., Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065–66 (9th Cir. 2004) (Rule 9(b) applies to RICO claim).

Critically, "in cases alleging civil RICO violations, particular care is required to balance the liberality of the Civil Rules with the necessity of preventing abusive

or vexatious treatment of defendants." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Even under more liberal pleading standards, "the complaint must be anchored in a bed of facts, not allowed to float freely on a sea of bombast." *Quach*, 2004 WL 2860346, at *4. The TAC's RICO claims, based on conclusory assertions and bare speculation, do not state a claim upon which relief can be granted. Plaintiffs have failed to allege necessary elements of their RICO claims with the required factual specificity. The TAC fails to allege adequately any agreement to violate RICO and cobbles together alleged predicate acts this Court previously found insufficient with assertions devoid of factual support.

1. The Fourth Claim for Relief Fails to Allege Elements of a Substantive RICO Violation or a Conspiracy

Regardless of whether the TAC is trying to allege a substantive RICO claim, a RICO conspiracy claim, or both, the TAC fails to allege the required elements.

a. W&C Fails to Allege Sufficient Predicate Acts Constituting a Pattern of Racketeering

W&C's RICO claim is premised on 17 alleged predicate acts of mail or wire fraud by Mr. Rosette and Rosette & Associates, PC, and 10 alleged acts by Mr. Armstrong (which are largely duplicative of the other allegations). (TAC ¶ 228.)[10] W&C also alleges without a modicum of factual support that Mr. Rosette, Mr. Armstrong, and Rosette & Associates, PC, committed predicate acts of attempting to obstruct justice by: influencing Joginder Dhillon, the State's lead compact negotiator, to testify "in a partial manner"; influencing Ms. La Pena to destroy evidence and testify "in the desired manner"; and "endeavoring to influence [W&C]

[10] The TAC identifies no specific actions by Rosette & Associates, PC, and no allegations differentiate it from the enterprise alleged in the TAC. Thus, the Court's prior analysis regarding the distinctiveness of organizational defendants should apply with equal force to compel the dismissal of the RICO claims against Rosette & Associates, PC. (Docket No. 172 at 12.)

to not proceed with the present suit using threats of force." (*Id.* ¶ 229.) Finally, the TAC asserts Mr. Rosette committed two acts of tampering with a witness, claiming he told Ms. Williams and Mr. Cochrane that he was going to "hurt them" or "get them." (*Id.* ¶ 230.) These allegations fall into four categories: (i) statements about W&C; (ii) professional conduct on behalf of others; (iii) statements about the *Pauma* litigation; and (iv) post-filing conduct. Despite the number of allegations, W&C fails to allege predicate acts consistent with Rule 9(b).

Statements about W&C. The TAC asserts, based on "information and belief," that the Rosette Defendants made several false statements about Ms. Williams and Mr. Cochrane in order to interfere with their contractual relationships, existing and prospective. (*Id.* ¶¶ 123, 148, 228(a), (d)–(e), 228(2nd a).) As a threshold matter, the TAC does not allege facts demonstrating why the statements were supposedly false. For certain allegations, the TAC does not even indicate to whom the statements were made. (*Id.* ¶¶ 123, 228(a), 228(2nd a).) W&C offers no plausible factual support for its allegations that any of the Rosette Defendants told others that Ms. Williams and Mr. Cochrane had been terminated because of "abject incompetence," that Mr. Cochrane was a "deviant homosexual," that W&C represented a tribe near Shingle Springs Rancheria, or that W&C had been bragging that it was hired by Shingle Springs. (*Id.* ¶¶ 228(a)–(b), (d)–(e), 228(2nd a)–(2nd b).) Nor does it explain how these are acts of mail or wire fraud. What is more, these allegations lack the necessary particularized allegations required by Rule 9(b), offering only conclusory assertions that the statements occurred over the mail or wires. *See Desoto v. Condon*, 371 F. App'x 822, 824 (9th Cir. 2010) (affirming dismissal of RICO claim based on "mail and wire fraud allegations [that] are vague and conclusory, and fail to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation."). The TAC also does not explain how these statements furthered a scheme to defraud.

"[C]onclusory allegations such as these are insufficient to sustain a claim for

fraud, let alone a RICO claim, because courts need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences." *See Berman v. Knife River Corp.*, 2012 WL 12924973, at *7 (N.D. Cal. June 8, 2012). "To plead fraud as a predicate act of racketeering, Plaintiff must provide more than a jumble of accusations and suspicions . . . based on hindsight, unreasonable inferences, and labels of illegitimate motives." *Rich v. Shrader*, 2010 WL 3717373, at *12 (S.D. Cal. Sept. 17, 2010). But that is all the TAC offers.

While the Ninth Circuit has held that, "the general rule that allegations of fraud based on information and belief do not satisfy Rule 9(b) may be relaxed with respect to matters within the opposing party's knowledge . . . this exception does not nullify Rule 9(b); a plaintiff who makes allegations on information and belief must state the factual basis for the belief." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (affirming dismissal). Moreover, for this standard to apply, a plaintiff must "(1) specifically allege that the necessary information lies within the defendant's control; and (2) include a statement of the facts upon which plaintiff's information and belief is based." *State of Cal. ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 635 (N.D. Cal. 1997). W&C fails to identify what information is exclusively in the Rosette Defendants' possession, the basis for W&C's belief in the allegations despite its lack of evidence, or why W&C was unable to obtain the information from witnesses. Without more, W&C's allegations are insufficient under Rule 9(b).

Further, the TAC's allegations, also pleaded "on information and belief," that the Rosette Defendants "conspire[d] and commit[ted] to interfere with any and all future contracts secured by Cheryl Williams and Kevin Cochrane, including through the use of fraudulent means," (TAC ¶¶ 124, 228(b), (2nd b)), are archetypical "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). They are therefore not entitled to a presumption of truth. *Id.*

Professional Conduct on Behalf of Others. Many of the TAC's alleged predicate acts relate to the Rosette Defendants' professional conduct on behalf of Pauma and Quechan. (*See* TAC ¶¶ 228(f)–(g), (k)–(o), (2nd c)–(2nd h).) While W&C asserts that the conduct was wrongful because the "firm did not represent the tribe[s]" at various points (*see, e.g., id.* ¶ 228(f)), the TAC does not allege the Rosette Defendants misrepresented their role to the tribes or to anyone else.

For example, the TAC, like the SAC before it, asserts the Rosette Defendants committed predicate acts by helping Pauma attempt to settle its compact suit in 2011. (*Compare* TAC ¶¶ 228(f)–(g), 228(2nd c)–(2nd d), *with* SAC ¶¶ 225(b)–(c), 225(2nd a)–(2nd b).) As the Court concluded when evaluating the same allegations in the SAC, these assertions "do not reveal any false statements nor support a fraudulent interference with a contract scheme." (Docket No. 172 at 16.) Specifically, this Court reasoned that the acts "do not provide context for any properly alleged misrepresentation," given W&C's acknowledgement that Mr. Rosette stated: "Pauma 'had not hired him' and that Rosette 'was not engaged as legal counsel.'" (*Id.* (quoting SAC ¶ 159); TAC ¶ 157.) These assertions, therefore, "are not properly construed as predicate acts." (Docket No. 172 at 16.)

The TAC also alleges that the Rosette Defendants engaged in predicate acts of mail or wire fraud by helping Quechan obtain its draft compact and terminate its relationship with W&C. (TAC ¶¶ 228(k)–(n), (2nd e)–(2nd g).) W&C argues that this conduct was fraudulent because "Rosette, LLP did not officially represent Quechan" when these alleged acts occurred between June 26 and June 30, 2017. (*Id.*) This assertion is contradicted by W&C's own allegations and documents incorporated into the TAC. W&C itself alleges that Mr. Rosette met with Quechan on June 16, 2017, and discussed representing the Tribe at that meeting. (*Id.* ¶ 173.) Quechan's Attorney Services Contract was executed on June 23, 2017 (Docket No. 54-2, Ex. 2), and Quechan's formal resolution authorizing Rosette, LLP's retention was passed on June 26, 2017—all before the conduct described in the TAC

allegedly occurred. (*See* Docket No. 29-2, Ex. A.) While W&C alleges on information and belief that the resolution may have been "backdated," (TAC ¶¶ 173, 201, 228(o), (2nd h)), it offers no support or explanation for this assertion, which falls far short of the requirements of Rule 9(b). *See Stewart Title Guar. Co. v. 2485 Calle Del Oro*, LLC, 2018 WL 3222610, at *17 (S.D. Cal. June 19, 2018) (RICO predicates, including "allegedly forged signatures," "d[id] not allege the basis for the factual allegations asserted on information and belief"). That the State of California ***did*** negotiate with Mr. Rosette on Quechan's behalf belies any assertion to the contrary. (*E.g.*, TAC ¶¶ 106–109.)

These alleged acts on behalf of Pauma and Quechan are also protected petitioning activity under the *Noerr-Pennington* doctrine. *See Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929–30 (9th Cir. 2006). It is "the law of this circuit . . . that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr–Pennington* doctrine, so long as they are sufficiently related to petitioning activity." *Id.* at 935. "The immunity provided under the doctrine extends to conduct incidental to, and the breathing space necessary for, petitioning activities, *e.g.*, activities preliminary to the formal filing of litigation, communications between private parties sufficiently related to petitioning activity; and even pre-litigation information." *Macy's Inc. v. Initiative Legal Grp.*, 2015 WL 12655379, at *1 (C.D. Cal. May 12, 2015). Consistent with these principles, the Ninth Circuit has held that attorneys' advice to and conduct on behalf of parties engaged in petitioning activity is facially immune from liability under *Noerr-Pennington*. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645–46 (9th Cir. 2009) (if underlying petitioning conduct is protected, "it follows" that attorneys' conduct incidental to the petitioning is also protected); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185–86 (9th Cir. 2005) (*Noerr-Pennington* doctrine barred claims against law firms and attorneys predicated on alleged discovery misconduct, subornation of perjury, and witness intimidation).

Statements about the* Pauma *Litigation. W&C asserts that Mr. Rosette and Rosette & Associates, PC, have engaged in multiple predicate acts by issuing statements about Mr. Rosette's role in the *Pauma* litigation. (TAC ¶¶ 228(c), (h)–(j).) The TAC alleges, on information and belief, that Mr. Rosette stated in the body of an August 2010 email to Ms. La Pena that he "was responsible for litigating the Pauma case." (*Id.* ¶¶ 147, 228(c).) There would have been nothing deceitful or misleading about this statement at the time it was made. W&C itself concedes that Mr. Rosette's firm represented Pauma (*id.* ¶ 25) and filed on Pauma's behalf a complaint and a motion for preliminary injunction against the State of California seeking rescission of its 2004 compact. (*Id.* ¶¶ 25, 27.) Both documents list Mr. Rosette as Pauma's lead attorney, and Mr. Rosette has testified under oath—as alleged in Plaintiffs' own TAC—that he directed the strategy that resulted in Pauma's successful motion for preliminary injunction. (*Id.* ¶ 26.) As this Court reasoned, there is nothing misleading about "the statement that Rosette was involved with, or even 'litigated,' the Pauma case." (Docket No. 89 at 23–24.) This is particularly true of a statement made in August 2010, after Mr. Rosette's firm had represented Pauma for nine of the case's 11 months. (*See* TAC at ¶¶ 24–32.)

The TAC also asserts Mr. Rosette stated several times that he "successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California" and that this may serve as multiple predicate acts. (*Id.* ¶¶ 228(h)–(j).) One statement does not constitute a pattern under RICO, even when included in many distributions over mail and wires. *See Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989) ("[P]laintiffs are mistaken to emphasize the raw number of mail and wire fraud violations" where a single statement is concerned).

Post-Filing Conduct. The TAC alleges that the Rosette Defendants committed multiple predicate acts of wire or mail fraud, obstruction of justice, and

witness tampering throughout the course of this litigation. (TAC ¶¶ 228(p)–(q), 228(2nd i)–(2nd j), 229–230.) What is missing—apart from allegations to suggest that these accusations have any plausible basis in reality—is any explanation of how they relate to one another or to the alleged pattern of racketeering aimed at interfering with W&C's contracts. *See Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) ("A pattern of racketeering activity . . . requires proof that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity.").

For example, the TAC asserts the Rosette Defendants told Mr. Dhillon "that the attorneys of Williams & Cochrane had made a number of vicious personal attacks against [their] character[s]," so that Mr. Dhillon would testify in a partial manner. (*Id.* ¶¶ 228(p), (2nd i), 229.) The TAC fails to cite any misrepresentation or deceit involved in this statement. And these same allegations, asserted again as the TAC's obstruction of justice "predicate act," are unsupported by the facts or by plausible inferences from those facts. *See Cobb, N.A.*, 2012 WL 5335309, at *8 (analyzing an alleged obstruction of justice predicate act regarding a falsified court order, concluding an equally plausible inference is that the order was genuine and the judge determined the claims lacked merit). No attempt is made to connect the allegation to any injury or to any scheme to interfere with W&C's contracts. Likewise, the TAC's groundless allegation that the Rosette Defendants arranged for Ms. La Pena, who has yet to testify in this action, to "testify in the manner desired by Mr. Rosette . . . and further destroy any relevant files from her prior firm," (TAC ¶¶ 228(q), (2nd j), 229), falls far short of Rule 9(b)'s requirements, which mandate that W&C allege, at a minimum, the basis for its belief. W&C alleges nothing to support this claim.

Deficiencies also plague the TAC's "predicate acts" involving the unsubstantiated allegation that Mr. Rosette told Mr. Cochrane and Ms. Williams that he would "hurt them" or "get them." (*Id.* ¶¶ 229, 230.) Apart from the

absurdity of suggesting such an exchange occurred, there are no allegations indicating that the statement is related to this lawsuit, that Mr. Rosette acted "with the purpose of obstructing justice," *Fox v. HCA Holdings, Inc.*, 2015 WL 6744565, at *8 (N.D. Cal. Nov. 4, 2015), or that he acted "with intent to influence, delay or prevent the testimony of any person in any official proceeding." *Natomas Gardens*, 2009 WL 1363382, at *21 (quoting 18 U.S.C. § 1512). W&C has also failed to show that the words allegedly uttered were "material," having "the natural and probable effect of interfering with the due administration of justice." *Fox*, 2015 WL 6744565, at *8. Thus, the TAC's predicates for obstruction of justice and witness tampering, 18 U.S.C. §§ 1503(a), 1512, fail. (*See* TAC ¶¶ 180, 229, 230).

b. W&C Fails to Allege that Defendants Armstrong or Rosette & Associates, PC, Conducted the Affairs of an Enterprise

W&C's allegations against Mr. Armstrong and Rosette & Associates, PC, are insufficient to support a finding that they conducted the affairs of an enterprise under Ninth Circuit law or conspired to do so. In *Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir. 1993), the Ninth Circuit examined whether an attorney's provision of legal services satisfied the participation requirement, as clarified by the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). The Ninth Circuit concluded that the mere provision of legal services—including representing an enterprise in bankruptcy proceedings, and preparing "letters and a partnership agreement, in order to perpetuate the alleged fraudulent scheme"—did not meet the participation requirement, in part because the attorney did not direct the enterprise's affairs. *Allstate Ins. Co. v. Stone*, 2008 WL 802268, at *2 (D. Ariz. Mar. 24, 2008) (discussing *Baumer v. Pachl*, 8 F.3d at 1344–35).

Indeed, the Ninth Circuit has concluded, "even where an attorney held a position within the [enterprise-company], and used that position to promote the alleged . . . scheme, the *Reves* operation and management test was not satisfied because the attorney's position did not give him authority to direct the enterprise's

affairs. *Id.* (discussing *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 779 (9th Cir. 1996)). Rosette & Associate, PC, is not alleged to have taken any particular actions in furtherance of the alleged scheme, let alone directed the enterprise. *Cf. Walter*, 496 F. Supp. 2d at 1166 ("While *Living Designs* held that a law firm may be such a distinct entity for purposes of § 1962(c), that is so only if the law firm did something more than act in a professional capacity."). Mr. Armstrong, at most, is alleged to have provided routine legal services for Rosette, LLP, on behalf of its clients; he is not alleged to have participated in the operation or management of the firm. "Simply performing services for the enterprise does not rise to the level of direction, whether one is inside or outside." *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008).

c. W&C Fails to Allege a RICO Conspiracy

W&C's attempt to leverage these allegations into a RICO conspiracy claim also fails. First, the conspiracy claim misses the mark because the TAC fails to allege a substantive RICO violation based on the same conduct, for the reasons explained above. "Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO." *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000).

Separately, W&C fails to allege "an agreement that is a substantive violation of RICO or that the defendants agreed to commit . . . a violation of two predicate offenses." *Id.* To do so, "the pleadings must suggest the [defendants] were aware of the essential nature and scope of the enterprise and intended to participate in it." *De Los Angeles Gomez v. Bank of Am., N.A.*, 642 F. App'x 670, 676 (9th Cir. 2016). Here, the only allegations of an agreement W&C can muster "are conclusory allegations or a bare recital of the agreement requirement." *Smith v. Smith*, 2016 WL 4703834, at *6 (E.D. Tenn. Sept. 8, 2016).[11] "Such allegations,

[11] (*See, e.g.*, TAC ¶ 124.)

without any alleged factual support in the complaint, are insufficient to plausibly state a conspiracy." *Id.*; *see also Baumer*, 8 F.3d at 1347 ("Here, the bare allegations of the complaint provide no basis to infer assent to contribute to a common enterprise."); *Adams v. White*, 2011 WL 3875422, at *9 (E.D. Va. Aug. 31, 2011) ("generalized conclusory statements made upon information and belief, without any specific details of concerted action" insufficient to allege RICO conspiracy). Because the TAC fails to allege any facts indicating an agreement among any Rosette Defendants to violate RICO, and because the TAC's substantive RICO claim fails, W&C cannot maintain its conspiracy claim.

2. The Fifth Claim for Relief Fails to Allege a RICO Conspiracy

The fifth claim for relief, like its earlier iterations, focuses on events that allegedly took place on Quechan's tribal lands, with the assent of Quechan's government, allegedly affecting certain of Quechan's members. The Court previously dismissed the fifth claim for relief because W&C, which asserted the claim at the time, did not sufficiently allege (i) "an agreement amongst specific Defendants to commit these allegedly predicate acts"; (ii) involvement by the Rosette Defendants; (iii) false or misleading statements or use of the mail or wires for particular alleged predicate acts; or (iv) a concrete, cognizable injury to W&C. (*Id.* at 24–27.) The Individual Plaintiffs' amendments, which add conclusory allegations asserting without support that the Rosette Defendants assisted or directed the decisions of their client, Quechan, fail for the same reasons.

Once again, the TAC alleges the existence of a RICO conspiracy "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." (TAC ¶ 238.) But the TAC does not actually allege that an online lending operation has been established, and it does not allege any details about what is supposedly being done with the allegedly diverted money. The "objective" of the supposed conspiracy continues to be an

undefined form of financial abuse, the goal of which remains nameless. The TAC offers only vague charges of wrongdoing.

Like W&C's conspiracy claim, the fifth claim for relief does not allege with any level of particularity "an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Howard*, 208 F.3d at 751. There are no allegations of an agreement among the alleged co-conspirators, and there are no allegations from which one can infer that an agreement occurred. (*See, e.g.*, TAC ¶ 194.) Moreover, each alleged conspirator must "intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . ." *Salinas v. United States*, 522 U.S. 52, 65 (1997). Again, there are no allegations in the TAC evincing intent, including by Mr. Armstrong or Rosette & Associates, PC.

The TAC also fails to allege that the named Rosette Defendants each committed, or agreed to commit, two predicate acts. As explained above, most of the alleged predicate acts concern internal tribal affairs, and this Court lacks jurisdiction to adjudicate such matters. (*See* TAC ¶¶ 238(a)–(c), (h) (per capita distributions and member benefits); *id.* ¶¶ 238(n), (q) (tribal elections); *id.* ¶ 238(o) (tribal governance).) As to the other alleged acts, it is not clear how gaming certifications to other government bodies (*id.* ¶¶ 238(d)–(g)), W&C's termination and Rosette, LLP's representation of Quechan (*id.* ¶¶ 238(i)–(m)), or communications related or this lawsuit (*id.* ¶ 238(p)) caused any injury to individual Quechan members. Thus, none is actionable here.

Beyond adding boilerplate accusations that the Rosette Defendants "instruct[ed]," "assist[ed]," or "direct[ed]" the activities of Quechan's Tribal Council, or "author[ed]" various tribal communications, the underlying allegations remain largely unchanged, and do not plausibly indicate that the Rosette Defendants' involvement rose to the level of participating in an enterprise aimed at abusing the Tribe's finances. (*Id.* ¶ 238); *see, e.g.*, *Walter*, 538 F.3d at 1248

(lawyer who "allegedly wrote emails, gave advice, and took positions on behalf of her clients" did not conduct affairs of an enterprise). Equally, adding bare assertions that communications were false or occurred over the mail or wires, without any further explanation, are insufficient to salvage the RICO conspiracy claim under Rule 9(b). (*See, e.g.*, TAC ¶¶ 203–04, 238(p).)

What remains are the same disparate protestations about actions undertaken by the Tribe's duly authorized government that this Court has already found do not constitute mail and wire fraud. (*See* Docket No. 172 at 24–27.) As explained above, if the Individual Plaintiffs want to pursue these claims, they are required to do so in tribal court. *See Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 920–21 (9th Cir. 2008) (observing that exhaustion of tribal remedies is "mandatory" so long as there is a claim "over which tribal court jurisdiction is colorable").

IV. Conclusion

For the foregoing reasons, the Rosette Defendants respectfully request that the RICO claims against them in Plaintiffs' TAC be dismissed with prejudice, as the Court previously warned would occur.

Dated: January 7, 2019

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