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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP;

Plaintiff,

vs.

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

Defendants.

Case No.: 17-CV-01436 GPC MSB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIAMS & COCHRANE'S MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST QUECHAN TRIBE'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT AND COUNTERCLAIMS, PURSUANT TO FEDERAL RULE OF CIVIL PROCEUDRE 12(c) [ECF NO. 94]

Date: January 10, 2020
Time: 1:30 PM
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

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INTRODUCTION

With the relevant pleadings now closed, Williams & Cochrane, LLP ("Williams & Cochrane" or "Firm") hereby refiles, with only slight modifications, its Federal Rule of Civil Procedure ("Rules or "Rule") 12(b)(6) arguments that this Court declined to consider last year via a motion for judgment on the pleadings under Rule 12(c), and requests that the Court rule on the motion before the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or "Tribe") conducts any discovery on its pending counterclaims. *See* ECF No. 173. For purposes of background, this Court took the position in an ultimately-published order that a party can lose its fundamental right to file a Rule 12(b)(6) motion if it previously filed an unrelated motion that could be construed as falling under Rule 12 (*see* ECF No. 173, p. 13), thus enabling the pleading party to waltz into discovery armed with a bevy of likely-specious claims. In the case at hand, the Court declined to deviate from this rule on equitable grounds, finding that Williams & Cochrane's motion to dismiss failed to heed the requirement in Civil Local Rule 7.1(h) that "[b]riefs or memoranda in support of or in opposition to all motions noticed for the same motion date must not exceed a total of twenty-five (25) pages in length, per party [or group of parties], for all such motions without leave of the judge who will hear the motion." CivLR 7.1(h); *see* ECF No. 173, 14:3-5. Not only that, but the Court also noted that compliance with this rule had been spotty if not altogether absent, as "parties on *both* sides had previously failed to comply with this rule." See ECF No. 173, 14:5:6.

Williams & Cochrane respectfully takes issue with all three bases cited by the Court for declining to hear the legal arguments raised within its prior Rule 12(b)(6) motion. Hopefully, the responses to these three issues will help show why the Court *should* – on top of the *can* (and arguably *must*) provided by the Rules – hear the motion for judgment on the pleadings without delay. First, there is ample case law indicating that the bar on successive motions in Rule 12 does not apply to Rule 12(b)(6), and even if it does, a court should still hear any arguments raised therein – and sensibly narrow the issues – since the party can simply raise them once again – as here – before the start of discovery pursuant to a motion for judgment on the pleadings under Rule 12(c). *See* Legal Standard Section, *infra*. Second, the only motion noticed by Williams & Cochrane for that particular hearing date was its motion to dismiss containing the Rule 12(b)(6) arguments – a brief that totaled just twenty-five pages in length. *See* ECF No. 138-1. Perhaps this Court counted the accompanying request for judicial notice against this page limitation, but that request was just three-pages (3) long and the fairest approach to handling the matter would have been for the Court to simply ignore the request and then consider on its own volition whether to judicially notice any of the exhibits attached to the motion, as provided for under Federal Rule of Evidence 201. Third, Williams & Cochrane strongly objects to any intimation it's been a habitual offender of Civil Local Rule 7.1(h) in this case.

As way of illustration, consider the responsive motions filed by the parties to date. On the one hand, you have Williams & Cochrane, who filed one (1) four-and-a-quarter-page (4.25) motion to strike Quechan's Answer and Counterclaims that, for whatever reason, was filed after the Court had said it was granting the Firm leave to amend its operative complaint. *See, e.g.,* ECF No. 95-1. Then, roughly two months later, Williams & Cochrane filed one (1) twenty-five-page (25) consolidated motion that raised all the Rule 12(b) arguments, including those under Rule 12(b)(6). *See* ECF No. 138. Yet, on the other hand, you have the defendants from Quechan and Rosette who filed the following responsive motions for the same hearing date in connection with the original complaint:

Party	Motion	Page Length
Quechan	Motion to Dismiss	25
	Special Motion to Strike	13
Rosette	Motion to Dismiss	25
	Special Motion to Strike	17
	Request for Judicial Notice	3

See ECF Nos. 29-34. That is eighty-three (83) pages of briefing by just two (2) groups of defendants. Yet, this practice carried on, even after Williams & Cochrane filed an amended complaint to moot any potential SLAPP issues, as the defendants then filed:

Party	Motion	Page Length
Quechan	Motion to Dismiss	24

	Motion to Disqualify	9
Rosette	Motion to Dismiss	25
	Special Motion to Strike	24
	Request for Judicial Notice	4

See ECF Nos. 50-54. Thus, the total amount of responsive briefing for the First Amended Complaint actually *increased*, with the total going from eighty-three (83) pages to eighty-six (86) pages in turn. The number of briefing pages decreased somewhat in connection with the responsive motions to the Second Amended Complaint (as they should since these motions are only supposed to target new allegations and claims), but they were still well in excess of the limitation imposed by Civil Local Rule 7.1(h):

Party	**Motion**	**Page Length**
Quechan	Motion to Dismiss	20
	Request for Judicial Notice	4
Rosette	Motion to Dismiss	23
	Special Motion to Strike	25
	Request for Judicial Notice	2

See ECF Nos. 109-17. Thus, that is two (2) groups of defendants, three (3) rounds of responsive motions, and more than two-hundred and forty-three (243) pages of briefing.

What this hopefully shows is that the equities should not have weighed against Williams & Cochrane *then* on whether the Court would hear basic legal arguments attacking the sufficiency of counterclaims, just as they should not *now* as the parties are on the cusp of conducting discovery about those unchecked claims. Simply put, counsel for the opposing party needs to make its own case in the pleading stage (by satisfying the requisite legal standard) rather than just being waved through by the Court. This is especially important in this case since opposing counsel for Quechan has – to put it charitably – a rather checkered past in this District on discovery issues, as is evidenced by a spate of orders from the past year. *See, e.g., Stone Brewing Co., LLC v. MillerCoors Brewing Co.,* 2019 U.S. Dist. LEXIS 159224 (S.D. Cal. 2019) (order granting in part motion to compel and for sanctions for discovery violations against opposing counsel); *Stone Brewing Co., LLC v. Molson Coors Brewing Co.,* 2019 U.S. Dist. LEXIS 98157 (S.D. Cal. 2019) (order resolving discovery dispute against opposing counsel); *Stone Brewing Co., LLC v. Molson Coors Brewing Co.,* 2019 U.S. Dist. LEXIS 58616 (S.D. Cal. 2019) (order granting in part motion to compel against opposing counsel); *Park v. Webloyalty.com, Inc.,* 2018 U.S. Dist. LEXIS 73514 (S.D. Cal. 2018) (order largely resolving discovery dispute against opposing counsel); *see also TIBCO Software, Inc. v. Gain Capital Grp., LLC,* 2018 U.S. Dist. LEXIS 149434 (N.D. Cal. 2018) (order granting in part motion for protective order against opposing counsel). Obviously, discovery problems can arise, but responsive motions are supposed to narrow the claims and reduce the odds of that happening. To that end, Williams & Cochrane is repackaging its original, neglected arguments for this Court to consider as part of this motion for judgment on the pleadings.

The genesis of this case is Quechan hiring Williams & Cochrane on a largely contingency basis to obtain a replacement tribal/State gaming compact with the State of California, right as the Firm was receiving a significant amount of press for prevailing in a similar compact dispute for a different tribe. *See Pauma Band of Luiseno Mission Indians v. California,* 813 F.3d 1155 (9th Cir. 2015). Yet, as the Court noted earlier in this case, "[j]ust days before Quechan was set to sign a new compact with California, Quechan sent [Williams & Cochrane] a letter firing [the Firm] as its counsel… [and] indicat[ing] that it would not pay [Williams & Cochrane] *any* fee." (ECF No. 135, 2:28-3:2) The letter did not end there, though, as Quechan sought to deter any efforts by Williams & Cochrane to collect the fees to which it has a right by including a warning that states, "We strongly advise you against pressing your luck further out of concern for the reputation of your firm in Indian Country and in the State of California." (ECF No. 94-4, p. 3)

Shortly after the transmission of this letter, an associate attorney with the replacement firm of Rosette, LLP sent one of the partners of Williams & Cochrane, LLP an e-mail in order to obtain the final draft version of the compact Quechan was days away from executing with the State of California so the firm could simply carry out the final step of the process by getting the parties to sign on the dotted lines. *See* Williams Decl., Ex. 1. The body of this e-mail from the Rosette attorney to Cheryl Williams states:

> As you know, our firm has been retained to represent the Fort Yuma Quechan Indian Tribe in their compact negotiations with the State. *While there is a formal file request forthcoming*, it is imperative that we receive, immediately, the last compact, with any redlines, that was transmitted to the State during your negotiations. Please provide said compact as soon as possible. I am available to discuss any questions or concerns.

Id. Just days later, Ms. Williams heeded the instructions in the e-mail from replacement counsel and turned over the final draft of the compact and waited to receive the indicated "formal file request" so she could see what else, if anything, Quechan needed to simply get the State of California to sign the compact her firm had negotiated. Yet, this e-mail was the last Williams & Cochrane would hear from Rosette, LLP until it issued a press release some two months later to publicly announce that Quechan had executed its compact with the State of California. *See* Williams Decl., Ex. 2.

In all positive material respects, the executed compact is one and the same as Williams & Cochrane's final draft, from eliminating approximately $4,000,000 in annual revenue sharing on Quechan's preexisting machines, to increasing the machine cap from 1,100 to 1,600, to increasing the total number of permitted casinos from one to three. (ECF No. 220, ¶ 107) Remarkably, the press release issued by Rosette, LLP to announce the compact contains one glowing endorsement after the next by putative Quechan President Keeny Escalanti about the terms and effect of the agreement. *See* Williams Decl., Ex. 2. He was "grateful" to the State for making the agreement possible, "pleased" to move forward under the new agreement, and excited that "[t]he Tribe's savings under the new Compact will allow the Tribe to provide critical services to its Members" – even though he had cut off all financial assistance to the tribal members just months earlier. *Id.*

Putative Quechan President Escalanti was *so* grateful for the new compact that he even went on a traveling road show from Yuma, Arizona to Washington, D.C. so he could testify about the benefits of the agreement before the United States Senate Committee on Indian Affairs. *See* Williams Decl., Ex. 3.[1] This testimony that took place on the

[1] Exhibits 3 through 5 are governmental documents that the Court should hereby

morning of October 4, 2017 reiterates many of the buzzwords in the press release, as putative Quechan President Escalanti talks about how "grateful" and "pleased" the Tribe is with the new agreement, and how those involved worked "tirelessly" to bring it about:

> To alleviate the financial hardship that we experienced under the 2006 amendment, our Tribe recently negotiated a new Tribal-State Compact with Governor Edmund G. Brown ('2017 Compact'). Governor Brown's administration worked tirelessly to finalize our new compact, allowing the parties to reach an agreement in August 2017, in time for the California Legislature to ratify the compact before the end of this year's legislative session. The Tribe commends and is grateful for the hard work exhibited by Governor Brown and his administration. We are pleased with the terms of our new compact, as it allows for an expansion of gaming devices while offering up more favorable revenue-sharing provisions for the Tribe that will allow it to improve its financial status and augment services that we can provide its membership.

Unsurprisingly, during this time of recurrent public adulations about the benefits conferred by Williams & Cochrane's work, there was nary a peep from either Quechan or Rosette, LLP to Williams & Cochrane since they believed they had successfully bullied the Firm into walking away from its contract rights by threatening to ruin its reputation. Yet, this abject silence disappeared after the service of the complaint in this case, replaced with renewed attempts at retribution. As to that, the Department of the Interior formally approved Quechan's compact on December 15, 2017, and Williams & Cochrane began to serve the original complaint in this case contemporaneous therewith. *See* Williams Decl., Ex. 4. (ECF Nos. 22-28) The disclosure of the complaint sparked significant outrage amongst the tribal membership for the stunt putative Quechan President Escalanti and his cohorts pulled, so the Tribal Council tried to cover their backs by posting a notice on the door of the Tribal Administrative Building at approximately 4:30 p.m. on Friday, December 29, 2017 (*i.e.*, the day before the New Year's weekend) to announce the Tribe had been "frivolous[ly]" sued and the Tribal Council was exploring whether it had claims of its own that it could bring against Williams & Cochrane. *See* Williams Decl., Ex. 5.

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judicially notice. *See Astania v. Hain Celestial Group, Inc.,* 783 F.3d 753 (9th Cir. 2015).

This admission that a certain segment of the Tribal Council terminated Williams & Cochrane simply because it did not want to pay a specifically-requested fee under a long-negotiated contract did little to pacify the Quechan general membership, who set up two recall elections to remove the vast majority of the Tribal Council from office. *See* Williams Decl., Ex. 6. Ultimately, the general membership of Quechan voted to recall five of the seven officers, with each recalled Tribal Councilmember refusing to step down afterwards by claiming that the votes were invalid "because the total tall[ies] didn't meet a constitutional threshold." *See id.* Nevertheless, just three days after the second recall election on January 20, 2018, the lead attorney for WilmerHale sent a letter to the partners for Williams & Cochrane, presumably on behalf of recalled Councilmembers, that sought a litany of materials related to the now-concluded compact negotiations – materials ranging from "all time sheets or time records" to "all… computer records relating to services performed by Williams & Cochrane for the Quechan Tribe." (ECF No. 94-5, p. 2).

In other words, opposing counsel was trying to invent harm in order to level the playing field for a plainly duplicitous client. "Invent" is not only the key word in the foregoing sentence but also goes to show the problem with all the counterclaims filed by Quechan. This tribe that has received the benefits of a compact its leaders publicly lauded as being pleasing and eliciting feelings of extreme gratitude *without paying for it* simply has not suffered the sort of concrete injury that can serve as the basis for harm underlying any of the claims. Not only that, but should such an injury exist, at no point does the Answer explain how those injuries are attributable to Williams & Cochrane rather than Quechan's own troubles, whether it is the Tribe's infighting or inept business decisions that led to the complaint in this case. Lest anyone forget, the California Supreme Court specifically cautioned courts in the context of malpractice claims arising from "business transactions [actually] gone awry" to really look into the fact pattern at issue to make sure the "[c]lient… [is not] attempt[ing] to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of persons who were responsible for the underlying legal work." *Viner v. Sweet,* 30 Cal.4th 1232, 1241 (2003). Perhaps the most remarkable thing about the present situation is that this is *not* one involving a business transaction gone awry; Quechan actually got *more* than it bargained for, and is now simply trying to punish the firm responsible for attaining these results because it admittedly does not want to pay anything under the contract. The litany of Counterclaims are nothing more than crocodile tears, and should be dismissed with prejudice under Rule 12(c).

LEGAL STANDARD

Rule 12(g)(2) explains that, subject to certain exceptions, a "party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). However, as stated previously by a sister district judge, "[c]ourts have interpreted [this provision in] Rule 12(g) as allowing successive motions to dismiss for failure to state a claim, but not successive Rule 12(f) or 12(b)(2)-(5) motions." *Express Cos. v. Lifeguard Med. Solutions, LLC,* 2010 U.S. Dist. LEXIS 91381, *13 (S.D. Cal. 2010) (collecting cases). Even district courts who believe that this bar on successive motions applies to Rule 12(b)(6) have said that it just raises a "technical" problem and thus "decline to pass on this opportunity to narrow the issues," especially since such arguments can be raised again before the fact-development portion of the proceeding. *See Nat'l City Bank, N.A. v. Prime Lending, Inc.,* 2010 U.S. Dist. LEXIS 85888 (E.D. Wash. 2010). To wit, the express text of Rule 12 allows a party to re-raise failure-to-state-a-claim arguments via a motion for judgment on the pleadings "under Rule 12(c)." Fed. R. Civ. P. 12(h)(2)(B). In fact, this rule is so universally accepted and applied that a district court is supposed to convert a second and "untimely Rule 12(b)(6) as one seeking judgment on the pleadings under Rule 12(c)" if the circumstances permit. *Tolar v. Bradley Arant Boult Cummings LLP,* 2016 U.S. Dist. LEXIS 18098, *12-*13 (N.D. Ala. 2016) (citations omitted).

As for the standard for assessing a motion for judgment on the pleadings, it is unsurprisingly "the same as the standard for a Rule 12(b)(6) motion to dismiss." *Covert v. City of San Diego,* 2016 U.S. Dist. LEXIS 16934, *5 (S.D. Cal. 2014). Judgment on the pleadings is appropriate when, even if all the allegations in the complaint are true, the moving party is entitled to judgment as a matter of law. *Milne ex rel. Coyne v. Stephen Slessinger, Inc.,* 430 F.3d 1036, 1042 (9th Cir. 2005). Thus, the factual allegations in the pleading under attack must raise "more than a sheer possibility that [the movant] has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Rather, the pleading party must allege "enough facts to state a claim to relief that is plausible on its face." *Lowden v. T-Mobile USA, Inc.,* 378 F. App'x 693, 694 (9th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007) ("*Twombly*")). "Dismissal is appropriate if the complaint fails to state enough facts to raise a reasonable expectation that discovery will reveal evidence of the matter complained of, or if the complaint lacks a cognizable legal theory under which relief may be granted." *Angelfix Tech, LLC v. Nuvasive, Inc.,* 2014 U.S. Dist. LEXIS 5291, *4 (S.D. Cal. 2014) (citing *Twombly,* 550 U.S. at 556)).

ARGUMENT

I. COUNTERCLAIM ONE FOR BREACH OF FIDUCIARY DUTY IS BASED UPON NON-PARTICULAR AND/OR NONSENSICAL MISREPRESENTATIONS ABOUT A MATTER THAT TURNED OUT FOR QUECHAN'S EXTREME BENEFIT

A. Legally-Insufficient, Nonsensical Argument

The purpose of the pleading stage is to root out any claims that are not plausible on their face. *See Twombly,* 550 U.S. at 562. The first counterclaim in the Answer is one such claim. The allegations in Paragraph 61 therein explain that "[Williams & Cochrane] [erroneously] told the Tribe [in June 2017] that the Tribe would have a final signed compact by the end of June," and this was "a substantial factor in causing the Tribe to expend $50,000/month for eight months without receiving services from [Williams & Cochrane] consistent with its fiduciary obligations." (ECF No. 94, ¶¶ 61-62) In other words, a supposed future misrepresentation controlled the antecedent behavior of the other party. This argument is not just implausible; it flat out does not make any sense.

B. Failure to Satisfy the Heightened Pleading Standard

The first counterclaim is based upon what Quechan describes as "knowingly false representation" motivated by a desire to obtain additional fees – or, in other words: fraud.

(ECF No. 94, ¶¶ 60-61) Yet, the Federal Rules of Civil Procedure impose a heightened pleading standard for any claims that are grounded in either fraud or mistake. *See In re NationsMart Corp. Sec. Litig.,* 130 F.3d 309, 315 (8th Cir. 1997) (citing FED. R. CIV. P. 9(b)). This heightened pleading standard requires that "[a]verments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003). Despite this, the introduction of Paragraph 61 merely says that "in April 2017, [Williams & Cochrane] misrepresented its efforts and the State's position… to the newly-seated Tribal Council." (ECF No. 94, ¶ 61) This allegation is absolutely devoid of substance showing *what* Williams & Cochrane allegedly said and *how* that qualifies as a misrepresentation, making this claim deficient under *any* pleading standard and impossible for Williams & Cochrane to rebut with an intelligible response.

C. Lack of Causation

Causation is not only an element of Article III standing, but also an independent and "necessary element[ ] for a finding of malpractice liability as well as breach of fiduciary duty liability." *Vaxiion Therapeutics, Inc v. Foley & Lardner LLP,* 593 F. Supp. 2d 1153, 1164 (S.D. Cal. 2008) (citing *Osornio v. Weingarten,* 124 Cal. App. 4th 304, 319 (6th Dist. 2004)). The aforementioned nonsensical argument contained in Paragraphs 61 and 62 about alleged subsequent misrepresentations determining prior behavior also fails to show causation because the Answer earlier on admits that "the Tribal Council started to explore the possibility of hiring new counsel to replace [Williams & Cochrane]" in "late Spring 2017," ostensibly before the "misrepresentations" ever took place. (ECF No. 94, ¶¶ 39-40) The general allegations in the Answer, in other words, undercut the specific allegations in the first counterclaim, as Quechan admits it was looking to replace Williams & Cochrane before any supposed misrepresentations were made. Thus, assuming this is true, the delay in terminating Williams & Cochrane had nothing to do with misrepresentations by the firm and everything to do with finding an attorney foolish enough to try and interfere with complex and high-stakes negotiations during the waning days.

D. Non-Actionable Opinions as to Future Events, not Promises

An important legal distinction exists between an *opinion* and a statement of *fact*. A statement of opinion is one that offers the speaker's own views on a matter of judgment, and is generally non-actionable. *See, e.g., Graham v. Bank of Am., N.A.,* 226 Cal. App. 4th 594, 606-07 (4th Dist. 2014) (detailing how professional judgments by accountants, appraisers, and others are not actionable misrepresentations of fact). This is especially true if the opinion pertains to a future event rather than a past or present state of affairs. *See Cohen v. S & S Const. Co.,* 151 Cal. App. 3d 941, 946 (4th Dist. 1983) (explaining "predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud"). Here, the first counterclaim asserts that Williams & Cochrane made a "knowingly false representation" by telling the "Tribe that [it] would have a final signed compact by the end of June." (ECF No. 94, ¶¶ 60-61) Yet, this statement both concerns future events and implies what a third party would do – *i.e.*, that the State of California would sign the compact by a date certain. Regardless of how Quechan may feel, the law considers these statements to be mere expressions of profess-sional opinion, not actionable misrepresentations.

E. Contract Expressly Disclaims Promises

Not to mention, Quechan knew at the time these *alleged* misrepresentations were *allegedly* being made that Williams & Cochrane was not making promises or guarantees about any future events, such as the likely outcome of the matter. As to that, Section 16 of the Attorney-Client Fee Agreement expressly provides that

> [n]othing in this Agreement and nothing in Firm's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Firm makes no such promises or guarantees. Firm's comments about the outcome of the matter are expressions of opinion only, are neither promises nor guarantees, and will not be construed as promises or guarantees.

(ECF No. 220-2, § 16) Thus, the claim that Williams & Cochrane made misrepresentations is not only fatally flawed as a matter of law, but also foreclosed by the terms of the underlying contract that Quechan has gone to great lengths to ignore.

F. What Harm?

Along with causation, damages is a necessary element for a breach of fiduciary duty claim. *See Vaxiion,* 593 F. Supp. 2d at 1164. Here, Quechan contends that "[Williams & Cochrane's] motivation [in making the alleged misrepresentations] was to [string things out and] continue to receive $50,000/month in fees, and eventually, an additional contingency fee." (ECF No. 94, § 62). "Continue" is an odd word choice because Quechan *was not even paying the $50,000 monthly flat fee during the course of the representation*, electing instead to "send four paychecks to Williams & Cochrane to cover the base monthly fees for February 2017 to May 2017" right before repudiating the Attorney-Client Fee Agreement at the end of June 2017. (ECF No. 220, ¶ 93) When a primarily contingently-paid attorney is dealing with a client that fails to honor its contractual obligations and seems to spend most of its time fighting amongst itself, the only plausible inference from the allegations is that the attorney wanted to get the work done as quickly as possible so it could get paid and get out. Further, harm should not be able to arise from a legal perspective as a result of a client complying with financial obligations it specifically requested in the underlying contract after it has already received benefits far exceeding what it had bargained for at the outset of the representation. (ECF No. 220-12) The means to alleviate any perceived harm existed, and Quechan could have accomplished this by terminating the relationship in accordance with the terms of the Attorney-Client Fee Agreement rather than what it ultimately did.

II. Counterclaim Two for the Breach of the Implied Covenant of Good Faith and Fair Dealing does not Gel with either the Terms or Purposes of the Attorney-Client Fee Agreement

The second counterclaim is largely a rehash of the first one save for the fact that Quechan tries to suggest the conduct also violates an implied term of the Attorney-Client Fee Agreement. As has been oft-repeated now, "[g]ood faith performance… of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a (1981).

"The exact nature and scope of this duty is a factual inquiry and is based on the purposes of the Agreement, the express terms of the Agreement, and the reasonable expectations of both parties." *Daly v. United Healthcare Ins. Co.,* 2010 U.S. Dist. LEXIS 116048, *10 (N.D. Cal. 2010). "[L]ike all essential elements of a breach of contract cause of action," the facts constituting a breach of the implied covenant of good faith and fair dealing "must be pleaded with specificity." *Levy v. State Farm Mut. Auto Ins. Co.,* 150 Cal. App. 4th 1, 5 (4th Dist. 2007). With these principles in mind, the subsections below will refute each of the material allegations in the second counterclaim claiming an implied breach.

A. No Second-Guessing of Reasoned Professional Decisions

For a contract that vests one of the parties with discretion in its performance, the implied covenant requires that such discretion be exercised reasonably (rather than arbitrarily or capriciously), but "bad faith is not synonymous with erroneous judgment." *Oil Express Nat'l, Inc. v. Burgstone,* 958 F. Supp. 366, 369 (N.D. Ill. 1997). Thus, the inquiry is not one that "looks to results, but… [rather] the actual decision-making process to determine whether it was legitimate – *i.e.*, honest or within accepted commercial practices." *In re Sizzler Rests. Int'l,* 225 B.R. 466, 474 (Bankr. C.D. Cal. 1998) (citing *Svela v. Union Oil Co. of Cal.,* 807 F.2d 1494, 1501 (9th Cir. 1987)). Here, Paragraph 69 suggests that Williams & Cochrane breached the implied covenant because it "never tried resolving the underpayment issue." (ECF No. 94, ¶ 69). Yet, as admitted in its Answer, Quechan stopped making revenue sharing payments long before Williams & Cochrane ever entered the picture, and, nevertheless, the strategy the Firm implemented not only convinced the Office of the Governor to commence negotiations when it had no obligation to do so *but* to be in the midst of winding up said negotiations *without ever making a negotiation demand for repayment* at the time putative President Escalanti transmitted his termination letter. (ECF Nos. 94, ¶73; 220, ¶¶ 67-88) What this shows is that these outstanding revenue sharing payments only became an issue for the Office of the Governor *after* the firm switch when it realized it was facing off against an adversary that lacked the requisite savvy or skill (in negotiations, litigation, or otherwise) to keep its overreach in check. With that said, the relevant inquiry is still whether Williams & Cochrane's approach to the outstanding revenue sharing payments was reasonable, and quite simply, why would the Firm make a negotiation demand that was harmful to its client's interests when the Office of the Governor had not shown the backbone to raise the issue during the prior eight-plus months of negotiation?

The inevitable and illogical response from Quechan is that Williams & Cochrane *had* to raise the issue because the State's negotiator Joginder Dhillon made it clear earlier on in the negotiations that "neither the CGCC nor the Office of the Governor had the 'legal authority to excuse' the Tribe's payment obligations." (ECF No. 94, ¶ 31) Who then, pray tell, is able to settle contract disputes on behalf of the State of California if its chief executive lacks such power? Santa Clause? The Easter Bunny? In fact, Williams & Cochrane *knew* this statement was a ruse at the time it was made because the Firm engaged in a settlement process during the prior *Pauma* suit in which it executed settlement protocol with the State of California that specifically designated the Office of the Governor or one of its advisors as the representative for the State in any "discussions… directed toward… trying to effectuate a settlement, resolution, or other end" to this similar revenue sharing dispute. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955, ECF No. 192, ¶¶ 1-7 (S.D. Cal. Aug. 7, 2012). Of course, this whole protocol only came about because the very person who interfered with Williams & Cochrane's representation at Quechan also interfered in the Pauma suit and elicited an admission from Mr. Dhillon's predecessor that he had the power to settle a lawsuit that involved significant amounts of disputed revenue sharing. (ECF No. 220-1) As it turns out, Mr. Dhillon *did* in fact have the "legal authority to excuse" Quechan's payment obligations, as the State waived receipt of more than half of the revenue sharing monies the Tribe failed to pay over the course of the prior fourteen months when it executed the compact. (ECF No. 220-20, § 4.8) Thus, the only "second-guessing" that is appropriate should be on the part of a certain segment of the Quechan Tribal Council in examining its careless behaviors in wrapping up the negotiations for the Tribe.

B. The Length of the Representation is Contractually Awesome

Along with questioning Williams & Cochrane's decision-making processes, Quechan also claims that the Firm took too long to do the work, as it negotiated for "eight [whole] months… [and] deliberately structured [the process] to elongate the timeframe of its representation." (ECF No. 94, ¶ 69) Yet, this claim that eight months is unreasonably long for the completion of compact negotiations is directly undermined by the Attorney-Client Fee Agreement. Per Quechan's request, this agreement actually *rewarded* Williams & Cochrane if it somehow completed the project within twelve months of the filing of an at-the-time seemingly-forthcoming lawsuit:

> Firm's contingency fee will be calculated as follows if the representation matter is resolved through settlement or negotiations:
> (a) If the matter is resolved before the filing of a lawsuit or within 12 months thereof, Firm's contingency fee will be fifteen percent (15%) of the net recovery. …
> (d) The contingency fee rate above is higher than the formative rates for resolving the case through court action set forth in the ensuing subsections below based upon the Client's express request after consultation and stated need to resolve the situation in as effective and expeditious manner as possible.

(ECF No. 220-1, § 5) Even putting aside this contract language, the second counterclaim does not plead with specificity as to *why* eight months of complex and contested inter-governmental negotiations constitutes a breach of the implied covenant of good faith and fair dealing. For instance, the remarks by putative President Escalanti before the Senate Committee on Indian Affairs that are attached to the accompanying declaration indicate that Quechan was in compact negotiations with the State of Arizona for an undefined but potentially significant amount of time as of October 4, 2017, and the Tribe has *still* yet to execute the resultant compact. *See* Williams, Ex. 4. Not to mention, our noble adversary WilmerHale that dubs itself as being "uniquely positioned to counsel tribal governments on difficult…. legal questions" was seemingly involved in the ultimately unsuccessful on-again, off-again compact negotiations for the Enterprise Rancheria that spanned the time period of June 2000 to July 1, 2014. *See Estom Yumeka Tribe of Enter. Rancheria v.*

California, 163 F. Supp. 3d 769, 770 & 773-74 (E.D. Cal. 2016). Perhaps WilmerHale can explain to the Court why fourteen years of unsuccessful negotiations is reasonable while eight months of successful ones are not.

C. The Level of Productivity is Contractually Irrelevant

Finally, Quechan also claims that Williams & Cochrane "fail[ed] to perform under the Fee Agreement" for months on end while receiving "the $50,000/month flat fee." (ECF No. 94, ¶ 67) Again, the terms of the Attorney-Client Fee Agreement make it crystal clear that Quechan was paying this amount irrespective of the level of performance:

> Client agrees to pay a flat fee of $50,000 per month for Firm's service under this Agreement. This fee is fixed and does not depend on the amount of work performed or the results obtained.

(ECF No. 220-2, § 5) Yet, the period during the first quarter of 2017 in which Quechan laments the amount of work done by Williams & Cochrane coincides with the time in which the Tribe was all-consumed with infighting over election results, and the State showed little to no desire to negotiate further. (ECF No. 220, ¶¶ 75-77) By this point, Williams & Cochrane had already obtained for Quechan the first draft compact that reduced the Tribe's future revenue sharing load by more than $4,000,000 per year. (ECF No. 220-14) This is the same financial arrangement that putative President Escalanti recurrently touted time and time again after the execution of the compact, which makes Quechan's latest "failure to perform" argument all the more hard to swallow.

III. COUNTERCLAIM THREE FOR NEGLIGENCE RAISES A VAGUE ETHICAL VIOLATION THAT IS ILL-SUITED FOR THIS FORUM

The third counterclaim in the Answer is based upon the negligence of Williams & Cochrane in supposedly not providing "Quechan" materials from in its client file when requested. A negligence claim has four essential elements, "duty, breach of duty, proximate cause, and damage." *Chavez v. Carter,* 256 Cal. App. 2d 577, 579 (2d Dist. 1967). As the subsections below show, Quechan has not stated a legally-cognizable negligence claim for at least *four* separate reasons, including that the Tribe did not suffer any damages and, even if it did, Williams & Cochrane is not the proximate cause of those injuries.

A. Wrong Forum

The alleged violation of a rule of professional conduct "does not subject an attorney to civil liability in damages, [although] it may subject him or her to State Bar Disciplinary proceedings." *Aviel v. Sorgen*, 2001 Cal. App. Unpub. LEXIS 3644, *13-*14 (1st Dist. 2002) (citing *Wilhelm v. Pray, Price, Williams & Russell,* 186 Cal. App. 3d 1324, 1333 n.5 (2d Dist. 1986)). In line with this, when a party cites a discrete violation of the professional rules as the sole basis for a negligence claim, courts have understandably been loath to allow the party to pursue a damage claim, instead directing them to the administrative process set up by the State Bar. *See Wilhelm,* 186 Cal. App. 3d at 1333 (citing *Noble v. Sears, Roebuck & Co.,* 33 Cal. App. 3d 654, 658-59 (2d Dist. 1973)). Here, Paragraph 75 makes it clear that the negligence claim is based entirely on Williams & Cochrane supposedly not releasing "all of the Tribe's 'paper and property' upon termination of the attorney client relationship" under "California Rule of Professional Conduct 3-700(D)(1)" after Quechan repudiated the Attorney-Client Fee Agreement, threatened to ruin the reputation of the Firm, and nevertheless obtained the invaluable work product that its new attorney requested. (ECF No. 94, ¶ 75) Thus, any complaints about inadequate compliance with Rule 3-700(D)(1) are best addressed before the administrative body that oversees the professional rules, not this Court.

B. Claim is not Plausible

The crux of the third counterclaim is that Williams & Cochrane's alleged "refus[al] to transmit the Tribe's case file in violation of its duty to do so" caused "the Tribe [to] incur[] further legal expense to conclude the gaming compact negotiations." (ECF No. 94, ¶¶ 79, 81) One key omission from Quechan's portrayal of the factual background is the fact that an attorney for the replacement firm reached out to a partner for Williams & Cochrane and stated that it was "imperative" that she "immediately" receive the final version of the draft compact that the parties were just days away from executing, indicating in the process that a "formal file request" was forthcoming. *See* Williams Decl., Ex. 1. As it turned out, this forthcoming file request was *never* forthcoming, however, which conveyed to the attorneys with Williams & Cochrane that the replacement firm had what it needed to adeptly carry out the ministerial task of getting the Office of the Governor to sign an agreement that was all but complete.

The status of the negotiations also raises a question as to what exactly Quechan needed in addition to the final draft compact in order to finish the project. At a minimum, Quechan already had the opening draft compact, and the communications between Quechan and the State of California – including the demand letters from the CGCC – were all addressed to the Tribe as well. (ECF Nos. 220-15; 220-16; 220, ¶¶ 73, 79) This is an important consideration to keep in mind because the ethics opinions interpreting California Rule of Professional Conduct 3-700(D)(1) do not equate "all… papers and property" with "*all*… papers and property." Rather, the documents which a client may obtain upon an attorney's termination are the "significant" ones (*see* San Diego County Bar Association Ethics Opinion 2001-1), the definition of which "is not static… and will change depending on circumstances." Bar Association of San Francisco Ethics Opinion 1996-1. In fact, one would be remiss to think that all the draft compacts – the very materials the Office of the Governor's legal counsel at the Department of Justice even said should *not* be turned over (ECF No. 220, ¶ 99) – fall within this definition since the client only has a right to this sort of work-product if the failure to turn it over "would result in reasonably foreseeable prejudice to the client's rights." Bar Association of San Francisco Ethics Opinion 1990-1. Simply put, Williams & Cochrane gave Quechan *precisely* what it wanted despite the reputational threats and refusal to pay; the least the Tribe could do now is identify those materials it did not receive that would have actually aided its new attorney in finishing up the negotiations at a faster rate. As for the claims of continuing harm, virtually every material document related to the now-concluded compact negotiations was attached as an exhibit to the original complaint, which means WilmerHale should have everything it needs to defend against the breach of contract claims. (ECF Nos. 5-12-5-20)

C. Quechan is the Proximate Cause of its Harms

"In a litigation malpractice action, the [claimant] must establish that *but for* the alleged negligence of the… attorney, the [claimant] would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." *Viner,* 30 Cal. 4th at 1241. This but for test means that an "independent intervening act" – like a client's discussions with its "own [replacement] counsel" – can sever the line of causation and relieve an attorney of supposed negligence. *Wilhelm,* 186 Cal. App. 3d at 1333. Here, Paragraph 80 seems to concede that Quechan hired Rosette, LLP so this firm could simply swoop in at the last moment and have the parties sign the compact. (ECF No. 94, ¶ 80) Counterclaim three attributes the delay in the occurrence of this event to Quechan not possessing its client file. *Id.* However, Williams & Cochrane provided exactly what the new law firm requested, which means the cause of any supposed negligence – to the extent it is external to Quechan – rests on the shoulders of the firm that failed to send the indicated file request. *See* Williams Decl., Ex. 1. Plus, Quechan simply points at the two-month delay between the termination of Williams & Cochrane and the execution of the compact and says that is proof positive that the lack of a client file is to blame. However, with the Answer never detailing what Quechan was missing that it actually needed, the more reasonable inference from the allegations is that the two month delay resulted from a factor entirely unrelated to Williams & Cochrane – like Rosette, LLP having to get up to speed with a matter with which its principal was privately and admittedly unfamiliar just two weeks earlier or the State of California changing its bargaining position to take advantage of a less skilled, less prepared law firm. (ECF Nos. 52-2, ¶ 20; 220, ¶¶ 107-08)

D. What Damages?

The foregoing proximate-causation rule is a "safeguard against speculative and conjectural claims… [and] serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice." *Viner,* 30 Cal. 4th at 1241 (citing *Mattco Forge, Inc. v. Arthur Young & Co.,* 52 Cal. App. 4th 820, 832-34 (2d Dist. 1997)). To continue the discussion from the previous subsection, two months' worth of work by a replacement attorney to carry out the final step of a negotiated settlement is a perfectly reasonable outcome, particularly in light of the fact that the attorney – by his own *post hoc* admission – had no clue about the particulars of the negotiations shortly before taking on the work. (ECF No. 52-2, ¶ 20) Not to mention, Quechan seems to be of the mindset that the revenue sharing dispute was *not* settled by the time Williams & Cochrane was terminated (ECF No. 94, ¶ 69), which means Rosette, LLP could have spent the next two months finishing up that issue irrespective of *when* it got the client file (which it never requested) or *what* it obtained from it. Finally, from a financial perspective, Quechan simply was not harmed because it obtained the full benefit of the Attorney-Client Fee Agreement and actually spent less during the next two months with Rosette (at least superficially) than it withheld from Williams & Cochrane during its final month of work, the promise in the June 26, 2017 termination letter notwithstanding.

IV. COUNTERCLAIM FOUR FOR BREACH OF CONTRACT ALLEGES AN IMMATERIAL BREACH OF A CONTRACT THAT QUECHAN PREVIOUSLY REPUDIATED

A. Claim Foreclosed by Quechan's Prior Breach

One generally-accepted rule of contract law states that "it is a condition of each party's remaining duties to render performance to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." Restatement (Second) of Contracts § 237 & illus. 1 (1981) (citing example where a failure to pay by one relieves the other of "all remaining duties of performance under the exchange"); *see De Burgh v. De Burgh,* 39 Cal. 2d 858, 863 (1952). Here, the e-mail from the Rosette attorney requesting the "last compact" and indicating a "formal file request is forthcoming" was transmitted late in the evening of June 27, 2017, the day *after* putative President Escalanti seemingly mailed the notice of termination that explained "the Tribe will not pay any contingency fee or 'reasonable fee for the legal services provided in lieu' thereof." (ECF No. 220-4). This first-in-time communication that Quechan was repudiating the Attorney-Client Fee Agreement technically relieved Williams & Cochrane of any further compliance with the agreement. Thus, the alleged failure to transmit the client file *may* constitute a violation of professional duties, but it *cannot* legally constitute a breach of contract.

B. Claimed Breach is Immaterial

A material breach is one that "substantially defeats the contract's purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract." *Nijjar v. Mittal,* 2006 Cal. App. Unnpub. LEXIS 11741, *23-*24 (2d Dist. 2006) (citing 23 *Williston on Contracts* § 63:3, pp. 438-39 (4th ed. 2002)); *see Reading Int'l, Inc. v. Malulani Grp., Ltd.,* 2018 U.S. Dist. LEXIS 88583, *10-*11 & n.7 (D. Haw. 2018) (collecting cases). Circumstances are significant in determining whether a breach is material, and a court will often look "to the extent to which the injured party [was] deprived of the benefit which he reasonably expected." Restatement (Second) of Contracts § 241 (1981). To the extent that Quechan could reasonably expect *anything* after repudiating the Attorney-Client Fee Agreement and threatening to ruin the reputation of the Firm if it did not simply walk away from the contract, the Tribe received all that was reasonable when the Firm handed over its incalculably-valuable final draft of the compact, just as the replacement counsel requested. This single act ensured that Quechan could still obtain the benefit of the bargain despite its unwillingness to perform in a reciprocal manner. While Quechan is now feigning that it wanted more than it needed at the time, subsequent events prove that the supposed failure to deliver those materials was *not* a material event that defeated the contract's purpose.

C. Damages are Unforeseeable, Uncertain, and entirely Avoidable

Damages are not recoverable under a contract claim if they are unforeseeable (*see* Restatement (Second) of Contracts § 351 (1981)), uncertain (*see* Restatement (Second) of Contracts § 352 (1981)), or "could have been avoided [by the allegedly injured party] without undue risk, burden or humiliation." Restatement (Second) of Contracts § 350 (1981). Here, all three of these limitations apply. The damages are unforeseeable because Quechan waited till the very last moment to terminate Williams & Cochrane to ensure there were no unexpected contingencies; certainly no one could have reasonably predicted at the time that the mere possession of certain unidentified materials from the client file *other than* the final draft compact would have prevented the State of California from opening up negotiations and suddenly demanding that the Tribe make good on half of its past due payments. (ECF No. 220, ¶ 108) The damages are also uncertain because it is far more likely that the two months of last-minute negotiations had less to do with a supposedly-deficient client file than it did an overreaching State or a secretly-unprepared replacement firm. (ECF Nos. 52-2, ¶ 20; 220, ¶ 108) Finally, the damages were and are entirely avoidable because Quechan could have waited a few days until *after* signing the compact to repudiate the Attorney-Client Fee Agreement, or simply directed the replacement firm to finally send its abandoned file request in order to obtain the materials supposedly needed to finish out negotiations that should have already been finished.

V. Counterclaim Five for Unfair Competition is not Available to a Governmental Entity like Quechan, who would nevertheless be Barred from Relief by Equitable Doctrines like Unclean Hands and *In Pari Delicto*

A. No Standing to Sue

The California unfair competition law explains that "[a]ctions for relief pursuant to this chapter shall be prosecuted… by a *person* who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. As used in this jurisdictional section, the term "person" is defined to "mean and include persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons." Cal. Bus. & Prof. Code § 17201. However, governmental entities are *not* considered persons "within the meaning of the Unfair Practices Act." *Cal. Med. Ass'n v. Regents of Univ. of Cal.,* 79 Cal. App. 4th 542, 551 (2d Dist. 2000) (collecting cases). Here, the Answer makes it perfectly clear that "Tribe" means the federally-recognized "Quechan Tribe of the Ft. Yuma Indian Reservation" (ECF No. 94, p. 1 & ¶ 14), and *the Tribe* is the one that "has been injured in its business and property… [and] is accordingly" seeking "restitution or disgorgement" under the unfair competition claim. (ECF No. 94, ¶¶ 94-95) Whether or not it actually suffered injuries, Quechan simply does not have standing to pursue relief under California's unfair competition law.

B. Allegations are not Reasonably Particular

"A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of Cal., Inc.,* 14 Cal. App. 4th 612, 619 (2d Dist. 1993) (citing, *e.g*., 5 Witkin, *Cal. Procedure* § 728, p. 176 (3d ed. 1985)). Speaking in conclusory terms is insufficient to meet this standard, as it "do[es] not provide notice to [the opposing party] as to what claims [the claimant] [is] asserting." *Watson v. Bank of Am., N.A.,* 2016 U.S. Dist. LEXIS 85580, *16 (S.D. Cal. 2016) (Curiel, J.). Here, the few paragraphs in support of the fifth counterclaim are utterly devoid of the requisite substance, offering just *one* conclusory sentence stating Williams & Cochrane "committed acts of unfair competition" and failing to even identify whether the act of unfair competition being alleged is of the unfair, unlawful, or fraudulent variety. (ECF No. 94, ¶ 93) Allegations of unfair competition require significantly more detail before the defending party can reasonably be expected to provide an intelligible response.

C. Safe Harbor Applies

The California unfair competition law "forbids business practices that violate some other law," but is toothless if the "other law" does not proscribe the conduct in question. *See, e.g., Walker v. Countrywide Home Loans, Inc.,* 98 Cal. App. 4th 1158, 1175 (2d Dist. 2002); *see Ebner v. Fresh, Inc.,* 818 F.3d 799, 804 (9th Cir. 2016) (barring a claim challenging a lip balm manufacturer's net weight statement where the product complied with federal and state laws regarding the issue). Here, to the extent the unfair competition claim is premised upon an alleged violation of the California Rules of Professional Conduct, the preceding Section IV(B), *supra*, discusses both how Williams & Cochrane complied with the file request sent by Quechan's replacement law firm, and how the ethics opinions interpreting Rule 3-700(D)(1) only require a terminated attorney to turn over work product if it is "significant" and the failure to disclose it would "result in reasonably foreseeable prejudice to the client's rights." Bar Association of San Francisco Ethics Opinion 1990-1. The final draft compact is all Quechan's replacement attorney wanted so he could simply get the parties to sign the agreement; if he needed more, he should have sent the formal file request that turned out to be never forthcoming.

D. Requested Monetary Remedies are Unavailable

The remedies provided by the California unfair competition law are rather "limited," generally only extending to injunctive relief and restitution. *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1144 (2003) (citing *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.,* 20 Cal. 4th 163, 180 (1999)). Even then, in terms of restitution, a claimant can only "recover disgorgement of profits earned by [the defending party] *as a result of* their allegedly unfair practices." *Id.* (citing *Kraus v. Trinity Mgmt. Servs., Inc.,* 23 Cal. 4th 116 (2000)). Here, again, the basis of the unfair competition claim is presumably the "improper[] withhold[ing] [of] the Tribe's case file." (ECF No. 94, ¶ 94) Yet, all the monies Williams & Cochrane received from Quechan were "as a result" of the Firm performing under the Attorney-Client Fee Agreement; not a single dollar came via the Firm allegedly withholding certain materials in the client file after the conclusion of the representation. This point about timing really gets to the heart of the issue because the event that seemingly serves as the basis for the unfair competition claim occurred *after* the end of the representation and *long after* Quechan made its final payment to the Firm. Moreover, even if Quechan *could* obtain restitution in general, the law still dictates that it *cannot* in these circumstances because of the one-sided benefits the Tribe received under the Attorney-Client Fee Agreement. *Cf. In re Tobacco Cases II,* 240 Cal. App. 4th 779, 796 (4th Dist. 2015) ("A full refund is *unavailable* under the UCL when the product had value to consumers notwithstanding the alleged deceptive [act].").

E. Equity Bars Relief

An unfair competition claim under California law is subject to equitable defenses. *See Cortez v. Purolator Air Filtration Prods. Co.,* 23 Cal. 4th 163, 180-81 (2000). The permissible defenses include unclean hands and *in pari delicto* (*see Camp v. Jeffer, Mangels, Butler & Marmaro,* 35 Cal. App. 4th 620, 638 (2d Dist. 1995)), both of which close the courtroom doors to one tainted with "inequitableness or bad faith relative to the matter in which he seeks relief." *Id.*; *Scharrer v. Fundamental Admin. Servs., LLC,* 2013 U.S.

Dist. LEXIS 195600, *16 (M.D. Fla. 2013) (citing Black's Law Dictionary 794 (7th ed. 1999)). Here, the counterclaim at issue is presumably one for unfair competition for not fully turning over a client file, but this situation only arose because Quechan terminated the Firm at the last moment and then demanded the final compact so it could obtain the full benefits of the Attorney-Client Fee Agreement without satisfying any of its burdens. Thus, the inequity that spurred the situation also serves to block any backend remedy.

VI. COUNTERCLAIM SIX FOR RECOUPMENT/SETOFF IS NEITHER A COUNTERCLAIM NOR AVAILABLE TO ONE WHO HAS ENGAGED IN INEQUITABLE CONDUCT

Finally, the Answer contains a sixth counterclaim labelled "Recoupment/Setoff." (ECF No. 94, 22:22) Yet, the United States Court of Appeals for the Ninth Circuit has made it clear that "recoupment has been allowed by state courts… but it has always been recognized as a defense, not a claim." *City of St. Paul v. Evans,* 344 F.3d 1029 (9th Cir. 2003). The Federal Rules of Civil Procedure contain a process for re-designating a mis-labeled counterclaim as a defense if justice so requires (*see FDIC v. Jacobs,* 2014 U.S. Dist. LEXIS 6671, *6 (D. Nev. 2014) (citing FED. R. CIV. P. 8(c)(2)), but justice would be ill served by allowing Quechan to pursue a recoupment defense *at all*. The reason for this is an equitable remedy like recoupment "may not be invoked [*in any capacity*] to compensate someone who has engaged in inequitable conduct." *In re Straightline Invs.,* 525 F.3d 870, 882 (9th Cir. 2008). Here, Quechan seeks to reduce the very *real* and *concrete* damages caused by the total repudiation of the Attorney-Client Services Agreement by the completely *conjectural* damages from not receiving unspecified client file materials its new attorney never requested. If Quechan truly deserved the aid of an equity court, it would not have done *any* of the deplorable things discussed in the foregoing five sections – from repudiating a contract at the last moment to avoid payment to threatening to ruin the reputation of the injured party if it simply did not walk away from the situation.

CONCLUSION

For the foregoing reasons, Williams & Cochrane respectfully request that the Court enter judgment against Quechan on the counterclaims in the Answer with prejudice.

RESPECTFULLY SUBMITTED this 2nd day of October, 2019

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