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Quechan Tribe of the Fort Yuma Indian Reservation

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP,

Plaintiff,

v.

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.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*,

Counterclaim-Plaintiff,

v.

WILLIAMS & COCHRANE, LLP,

Counterclaim-Defendant.

Case No.: 17-cv-01436-GPC-MDD

THE QUECHAN TRIBE'S OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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

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INTRODUCTION

W&C's Motion is nearly-identical to its motion to dismiss that it filed over a year ago. The Court recognized then that "round after round of Rule 12 motions for claims and counterclaims is [not] an efficient use of the Court's resources." ECF No. 173 at 13-14. That is all the more true now. W&C's repackaged 12(c) Motion is just an attempted do-over for its prior failed motion to dismiss. The Motion should be summarily denied.

On its merits, the Motion still fails. The same arguments in the Tribe's Opposition to W&C's motion to dismiss apply here. *See* ECF No. 164. And the result is the same: The Tribe has adequately pled each of its counterclaims.

First, the Tribe has stated a claim for breach of fiduciary duty based on W&C's efforts to prolong its representation of the Tribe and maximize its fees.

Second, the Tribe has stated a claim for breach of the implied covenant of good faith and fair dealing, alleging that W&C acted in bad faith by dragging out gaming compact negotiations to increase its fees, and denying the Tribe efficient and competent legal representation it was entitled to under the Fee Agreement.

Third, the Tribe has stated a claim for negligence. It has sufficiently pled that W&C breached its duty of care by, among other things, failing to act with the requisite skill and diligence in its representation of the Tribe and failing to transmit the Tribe's "entire case file" upon request.

Fourth, the Tribe has sufficiently pled that W&C breached the Fee Agreement by refusing to transmit the Tribe's case file, which it was required to do under Section 12 of the Fee Agreement.

Fifth, the Tribe has sufficiently pled a claim under the UCL. For purposes of that statute, the Tribe is a "person" who has "lost money on property" as a result of W&C's unfair business practices.

And, finally, the Tribe has stated a claim for recoupment/setoff. If indeed, as W&C alleges, the June 21, 2017 draft compact was "materially better" than the compact signed by the Tribe in August 2017, the Tribe was prejudiced by W&C's refusal to transmit the Tribe's case file containing W&C's work.

For these reasons, if W&C's motion is considered on its merits, it must be dismissed in its entirety. Indeed, although discovery has only recently begun, one telling fact has been confirmed: W&C does not even have records of the time it purportedly spent working for the Tribe. *See* Ex. A to Declaration of Joshua A. Vittor. Discovery into the Tribe's Counterclaims should be allowed to continue.

SUMMARY OF ALLEGATIONS

The Tribe is a sovereign nation located along both sides of the lower Colorado River near Yuma, Arizona. CC ¶ 20. Its operations and the majority of the reservation land is located in California. *Id.* The Tribe's Constitution provides for a Tribal Council to act as the Tribe's governing body and represent the Tribe in "all affairs." *Id.* ¶ 21. Among the constitutionally-enumerated powers, the Tribal Council is responsible for (1) negotiating with Federal, State, and local governments on behalf of the Tribe and (2) employing legal counsel on behalf of the Tribe. *Id.* The Tribe has negotiated gaming compacts and related amendments with the State of California on several occasions, including in 1998, 2006, and 2017. *Id.* ¶ 22.

Williams & Cochrane's Representation of the Tribe

In late September 2016, the then-Tribal Council retained W&C to re-negotiate its existing obligations to the State under its 2006 Compact Amendment, which included an underpayment to the State of approximately $4 million. *Id.* ¶ 25. The parties' Fee Agreement provides that the Tribe would pay W&C a "Flat Fee" of $50,000/month for its "services," which included negotiations and potential litigation against the State. *Id.* ¶ 26, Ex. A §§ 2, 4. W&C also added a 15% "Contingency Fee" clause to the agreement based on amounts the Tribe was to be paid or credited by the State for any overpayments under the 2006 Compact Amendment with the

State. *Id.* § 5. If, however, the Tribe terminated W&C before it was entitled to the Contingency Fee, W&C could be entitled to what it labeled a "reasonable fee" using a multi-factor test. *Id.* § 11. Section 12 of the Fee Agreement provides that the Tribe "may request the return of [its] case file" at the end of the engagement. *Id*. § 12.

After an exchange of letters between the State and W&C in October 2016, the initial meeting to begin negotiations of the compact took place on November 9, 2016. CC ¶ 27. And on December 6, 2016, the State provided to W&C an initial discussion draft of a gaming compact for the Tribe. *Id*. ¶ 28. This draft contained terms similar to those contained in compacts that the State has entered into with other tribes and that the State was willing to offer any similarly-situated tribes seeking to negotiate a compact at that time. *Id.* It did not address the $4 million underpayment issue. *Id*.

Shortly thereafter, on December 14 and December 28, 2016, before providing any comments back to the State on the draft, Ms. Williams sent to then-President Jackson the draft compact proposal from the State along with memoranda summarizing provisions of the draft compact. *Id*. ¶ 29. W&C claimed that the "draft compact is as good as it can get form a financial perspective," and stated that aside from the revenue-sharing provisions, the "vast majority of the draft compact was boilerplate." *Id*.

On January 11, 2017, Ms. Williams sent to the State a letter requesting that, among other things, the State and the CGCC "refrain" from enforcing the Tribe's payment obligations under the 2006 Compact Amendment (i.e. the afore-mentioned underpayments). *Id*. ¶ 31. On January 18, Mr. Dhillon responded on behalf of the State that neither the CGCC nor the Office of the Governor had the "legal authority to excuse" the Tribe's payment obligations. *Id.*

The State's representatives met with Ms. Williams and Mr. Cochrane for further gaming compact negotiations on January 31, 2017. *Id.* ¶ 32. W&C had not provided a revised draft to the State in response to the State's December 6, 2016 initial discussion draft as of that date. *Id.*

The then-Tribal Council and W&C held a conference call on February 3, 2017 to discuss the January 31 meeting. *Id.* ¶ 33. In an email dated February 3, 2017, Ms. Williams claimed that W&C had the "legal" and "textual authority" to support the Tribe making reduced payments to the State under the 1999 compact terms. *Id*. This was misleading. Less than a month earlier, Mr. Dhillon had informed Ms. Williams that the State would not excuse such payments. *Id*. Mr. Dhillon had not changed his position. *Id*. Ms. Williams also wrote that the State agreed to increase the Tribe's machine cap by 100 machines, but that "[o]ther issues" would "take some time to iron out" and that W&C would "work hard" to "redline" the draft compact. W&C had not sent even one redline to the State at that time. *Id*.

In early April 2017, after the new Tribal Council had been seated, Ms. Williams sent a letter to it claiming vaguely that W&C had done its "best to buy time" to keep the December 6, 2016 draft compact offer "on the table." *Id*. ¶ 34. But it is not clear what work, if any, W&C performed during this time or how it "b[ought] time" for the Tribe. Rather, the Tribe is informed and believes W&C did very little or nothing, and that Ms. Williams's statement was essentially untrue. *Id*. Significantly, W&C also reported that negotiations with the State would continue and that the CGCC continued to seek payments due by the Tribe to the State under the 2006 Compact Amendment. *Id*.

Indeed, by April 2017, W&C had still not provided the State with revisions to the draft compact. *Id.* ¶ 35. Finally, on April 13, 2017—more than ***four months*** after receiving the initial draft compact from the State—Ms. Williams e-mailed Mr. Dhillon a revised draft compact. *Id*. W&C's April 13, 2017 draft was, however, nearly identical to the State's December 6, 2016 initial draft. *Id.*

After another period of little activity, on June 9, 2017, Kevin Cochrane, responding to an inquiry from the Tribe, stated that the compact would be ready to sign as of June 16, or within the following week. *Id.* ¶ 37. This was not true. The State was not ready to sign any draft of the compact in existence at that time. *Id.*

W&C sent the State a revised compact draft on June 21, 2017. *Id.* ¶ 38. Although W&C was representing to the Tribe at this time that it would have a final signed compact in June, at the time W&C was terminated on June 26, the Tribe had not even seen the latest draft. And, critically, this draft was still not final and the State was ***not*** prepared to sign it. See *id.* ¶¶ 9, 38. According to the State's lead negotiator, Joginder Dhillon (who is now a Superior Court judge in Sacramento), there were a litany of unresolved issues, including resolution of the amount the Tribe would have to pay the state for past underpayments under the current gaming compact, the identification of the land eligible for gaming pursuant to the compact, an agreed-upon payment mechanism, and an agreement on final language. *Id.* The reality—contrary to W&C's representations—was that the draft compact substantively was not far from the initial draft that the State provided at the beginning of the negotiations, and was not ready to be signed by anyone. *Id.* ¶¶ 4, 5, 38.

Concerns About W&C

In late Spring 2017, around the time that W&C provided its first comments on the compact to the State, the current Tribal Council reviewed the status of its compact negotiations, and W&C's work. *Id.* ¶ 39. Based on that review, it became clear to the Tribal Council that W&C was not diligently pursuing negotiations and was misrepresenting the limited results it had obtained. *Id.* W&C had also recommended retaining a lobbyist in Sacramento, for a substantial additional fee, to assist getting the compact approved. *Id.* Importantly, the underpayment issue continued to be unresolved. *Id.* Even so, W&C continued to charge the Tribe $50,000/month. *Id.* Based on its concerns, the current Tribal Council began to explore the idea of replacing W&C and had reached out to a Native American law firm in an initial effort to do so, but ultimately chose not to retain it. *Id.* ¶ 40.

Later, in June 2017, President Escalanti and Councilman White attended an Arizona Tribal Leaders' meeting. *Id.* ¶ 41. While at the meetings, a Tonto Apache tribe member contacted them about gaming issues affecting rural Arizona Tribes, and

suggested that they meet with Tonto Apache's attorney—Rob Rosette. *Id.* The next morning, President Escalanti and Councilman White met with Rob Rosette to discuss gaming issues in Arizona. *Id.* ¶ 42. After discussing those issues, President Escalanti asked Rob Rosette about his experience with compact negotiations in California, and ultimately, his availability and interest in working for the Tribe. *Id.* President Escalanti and Councilman White later relayed to the Tribal Council what happened at the meeting with Rob Rosette. *Id.*

Because the Tribal Council was dissatisfied with W&C's performance, it invited Rob Rosette to present to the Council about the possibility of Rosette LLP representing the Tribe in both Arizona and California compact negotiations. *Id.* ¶ 43. Following this presentation, the Tribal Council voted 6-0 to hire Rosette LLP. *Id.*; CC, Ex. C.

W&C's Termination

On June 26, 2017, with the Tribal Council's approval, President Escalanti sent W&C a letter terminating the firm's engagement. *Id.* ¶ 44. The letter included a request that W&C transmit the Tribe's entire case file to its new counsel and advised W&C that Rosette LLP ("Rosette") would be representing the Tribe going forward. *Id.* At that time, the Tribe had paid to W&C $400,000 in monthly fees in exchange for a limited number of draft compacts containing essentially boilerplate provisions that any similarly-situated tribe might have received following the *Rincon* litigation. *Id.* ¶ 45.

W&C had not sent the Tribe the most recent draft compact at that time. *Id.* ¶ 46. Over the next few days, the Tribal Council learned that W&C refused to give that draft to Rosette. *Id.* And W&C refused to give the Tribe or Rosette the Tribe's full case file—***as W&C is required to do*** under the plain language of the Fee Agreement (*see* § 12) and California Rule of Professional Conduct 3-700(D)(1) ("A member whose employment has terminated shall . . . promptly release to the client, at the request of the client, all the client papers and property."). *Id.* Accordingly, on June

30, 2017, with the Tribal Council's approval, President Escalanti sent a letter demanding that W&C provide the Tribe with its case file and the most recent draft compact. *See* CC, Ex. B. The letter further demanded that W&C cease and desist from communicating to anyone that they still represented the Tribe. *Id.*

W&C eventually sent Rosette the most recent draft of the gaming compact dated June 21, 2017 but refused (and continues to refuse) to send the Tribe or Rosette the Tribe's case file or any time records, despite specific requests to do so. *Id.* ¶ 47.

Rosette Concludes Negotiations with the State

Without the benefit of the Tribe's full case file, Rosette proceeded to conduct negotiations on behalf of the Tribe with the State starting on June 29, 2017. *Id.* ¶ 48. Less than a month later, Rosette submitted to the State the first of several draft compacts on behalf of the Tribe. *Id.* ¶ 49. Over the ensuing weeks, the parties discussed, among other things, the eligible gaming land and related map, the Revenue Sharing Trust Fund payment, the establishment of credits for non-gaming related capital investments, the establishment of programs to assist certain tribe members and to protect wildlife and habitat—and importantly, the Tribe's then-outstanding $4.2 million underpayment owed to the State under the 2006 Amendment. *Id.*

The parties resolved the underpayment issue in late August 2017, agreeing that, to satisfy the purported debt, the Tribe would pay the state just under half of the amount owed—about $2 million—over a period of six years. *Id.* ¶ 50. Beyond that, the State agreed that the Tribe could credit amounts spent by the Tribe on certain of the Tribe's nongaming related capital investments and programs to assist certain tribe members and to protect wildlife and habitat, in order to offset certain revenue sharing payments owed to the State. *Id.* ¶¶ 49, 52.

The parties exchanged further drafts during the latter half of August 2017, during which the State confirmed that President Escalanti had authority to execute a compact on behalf of the Tribe. *Id.* ¶ 51. President Escalanti signed the compact on

August 29, 2017 on behalf of the Tribe. *Id.* ¶ 52. Governor Brown signed on behalf of the State on August 31, 2017. *Id.*

LEGAL STANDARD

Rule 12(c) and Rule 12(b)(6) motions are reviewed under a "substantially identical" analysis. *See, e..g.*, *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (stating that Rule 12(c) and Rule 12(b)(6) motions are "functionally identical").

Under Rule 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). To determine whether a claim has been stated, the Court must accept as true all well-pled factual allegations and construe them in the light most favorable to the plaintiff. A complaint need not contain detailed factual allegations, but must only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

If a complaint is dismissed, leave to amend "shall be freely given when justice so requires . . . . " *See, e.g.*, *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). The Tribe's Counterclaims are well pled and satisfy Rule 8; but in the event the Court finds that any of the Tribe's allegations are lacking, the Tribe requests leave to amend.

ARGUMENT

I. THE FEDERAL RULES OF CIVIL PROCEDURE COUNSEL AGAINST GRANTING W&C'S MOTION

Rule 12, like all the Federal Rules, must "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." F.R.C.P. 1. Rule 12 should be interpreted to avoid "unnecessary and costly delays." *In re Apple iPhone Antitrust Litigation*, 846 F.3d at 318. As the Court has already recognized, "round after round of Rule 12 motions for claims and counterclaims is [not] an efficient use of the Court's resources." ECF No. 173 at 13-14. Even when there is no evidence that a motion was brought "in bad faith or with any intent to delay the proceedings," courts can use discretion to decline to hear Rule 12 motions on the merits to avoid setting "a dangerous precedent regarding the ability to continually hamstring [the opposing party] with wave after wave of motion to dismiss." *In re Packaged Seafood Products Antitrust Litigation*, 27 F. Supp. 3d 1167, 1174–75 (S.D. Cal. 2017).

W&C's nearly-identical motion to dismiss the Tribe's counterclaims was denied, pursuant to Rule 12(g), for failure to consolidate into one motion all available arguments under Rule 12. *See* ECF No. 173. The order denying the original motion to dismiss did not invite W&C to refile a virtually verbatim motion, almost a year later, under Rule 12(c). In the year since the original motion to dismiss was denied, the case has progressed: the Court has considered, and granted, two separate motions to dismiss (one each from the Tribe and the Rosette Defendants); the pleadings have closed; and fact discovery is underway. Most recently, the Court struck the Plaintiff's "original" motion for judgment for judgment on the pleadings (ECF No. 227) as moot. *See* ECF No. 244. Considering the present motion would be a significant step backwards, in contravention of Rule 1.

However, even if this Court chooses to decide W&C's Motion for Judgment on the Pleadings on the merits, it should be denied because the Tribe's Counterclaims

are adequately pled and satisfy Rule 8. W&C's Motion was substantively identical to its previous motion to dismiss. Accordingly, the arguments below are likewise substantively the same arguments the Tribe made in response to that motion. The Tribe believes the result should be the same now as it was then: W&C's Motion should be denied.

II. THE TRIBE HAS SUFFICIENTLY PLED A CLAIM FOR BREACH OF FIDUCIARY DUTY

The relationship between attorney and client is a fiduciary relation of the very highest character. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 189 (1971). To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate (1) the existence of a fiduciary relationship, (2) breach of that duty, and (3) damages. *See Charnay v. Cobert*, 145 Cal. App. 4th 170, 182 (2006). As an initial matter, the Tribe has unquestionably pled that W&C entered into a fiduciary relationship with the Tribe when the Tribe retained W&C as counsel. CC ¶ 57. W&C does not dispute this allegation. *See generally* Mem.

A. The Tribe Has Pled Facts Sufficient To Show W&C Breached Its Fiduciary Duty To The Tribe

The Tribe has also adequately pled that W&C breached its fiduciary duty. Specifically, the Tribe has alleged that "W&C knowingly acted against the Tribe's interests … by failing to perform under the Fee Agreement in exchange for the $50,000/month flat fee that it collected, and by dragging out negotiations to extend its representation and collect additional monthly fixed fee payments from the Tribe." CC ¶ 58. The underlying factual allegations are also replete with acts sufficient to show that W&C breached its fiduciary duty, which includes duties of loyalty and confidentiality. *See Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). For example, the Tribe alleges that W&C sat on the initial discussion draft compact that the State provided in December 2016 for over four months, sending back only very minor edits in April 2017, *see id.* ¶¶ 4, 35; that another month went by with only

one more exchange of drafts with the State, *id.* ¶¶ 4, 36; and that none of the limited drafts submitted by W&C ever addressed the Tribe's most significant concern—its more-than $4 million underpayment to the State—so that W&C could stretch out the life of its representation and receive its flat monthly fee. *Id.* ¶ 38. By themselves, these allegations are sufficient to show that W&C breached its duty under Rule 8.

And the Tribe further alleged that W&C made misrepresentations regarding its work for the Tribe. *Id.* at ¶¶ 2-3, 60-61. To the extent the specific allegations in paragraphs 2, 3, 5, 29, 33, 34, 37, and 61 about W&C's misrepresentations to the Tribe are subject to Rule 9, they have satisfied that standard—i.e. alleging the who, what, when, where, and how. Mem. at 10. For example, the Tribe alleges that on June 9 (when), Mr. Cochrane (who) emailed Mr. Montague (how and where), the CEO of the Tribe's casinos, to inform Mr. Montague that the compact would be ready to sign as of June 16 or within the following week (what)—which was not true. *Id.* ¶ 37. Further, the Tribe alleges that Ms. Williams sent a letter to the current Tribal Council in early April 2017 that W&C had "done its 'best to buy time' to keep the December 6, 2016 draft compact offer 'on the table,'" but that the Tribe believes this is essentially untrue. *Id.* ¶ 34. The Tribe also alleges that when it first met with Ms. Williams and Mr. Cochrane, it was promised a near certain multi-million-dollar recovery from the State. *Id.* ¶ 2.

B. W&C's Misrepresentations Are Actionable Statements

In its Motion for Judgment on the Pleadings, W&C ignores almost every allegation the Tribe made regarding the many acts constituting W&C's breach of fiduciary duty and ties its entire argument to the allegation that W&C erroneously told the Tribe in June 2017 that the Tribe would have a final signed compact by the end of June. *See* Mem. at 9-11. But, as described above, this is far from the only allegation underpinning the Tribe's breach of fiduciary duty claim; the thrust of the Tribe's claim is based on W&C's conduct.

Nevertheless, W&C argues that allegation is an opinion about a future event that is not an actionable misrepresentation. Mem. at 11. But the case that W&C cites to support this proposition also states "there are exceptions to this rule: . . . ***where the opinion is by a fiduciary or other trusted person*** . . ." *Cohen v. S & S Constr. Co.*, 151 Cal. App. 3d 941, 946 (1983) (emphasis added). The only other case W&C cites to support this argument, *Graham v. Bank of America., N.A.*, 226 Cal. App. 4th 594 (2014), is inapposite as it is a case involving the appraisal value of a property and does not fall within the exception identified above.

The exception to the rule is directly applicable here. The Tribe alleged that W&C was retained by the Tribe, and therefore W&C owed the Tribe "a fiduciary relation of the very highest character." *Neel*, 6 Cal. 3d at 189. W&C's misrepresentations about whether the Tribe would have a signed compact by the end of June are actionable because the misrepresentation was knowingly false and designed to avoid termination by the Tribe, which extended the length of W&C's representation and increased the amount of fees it charged the Tribe.

C. The Tribe Properly Alleged Harm

Finally, this Court has previously found that the Tribe has properly pled harm, in the context of holding that the Tribe had standing. Order, EFC No. 173 at 10–11 ("The Court finds that Quechan has sufficiently alleged an injury-in-fact" for Count I). The Tribe specifically alleged that it overpaid for W&C's incompetent and inefficient work on the Tribe's gaming compact negotiations at a cost of $50,000/month. CC ¶¶ 59-63. These allegations are sufficient to satisfy Rule 8.

W&C's arguments to the contrary are all improperly based on disputed facts rather than the sufficiency of the Tribe's allegations and should therefore be disregarded.

* * *

Accordingly, because the Tribe has properly pled a claim for breach of fiduciary duty, W&C's motion must be denied.

III. THE TRIBE HAS SUFFICIENTLY PLED A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In California, to state a claim for breach of the implied covenant a plaintiff "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Careau & Co. v. Security Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 399-400 (Ct. App. 1990).

W&C does not address whether the Tribe's claim lacks the requisite plausibility required under Rule 8. And, even if it had made such an effort, W&C would fail. The Tribe has alleged, for example, that: (1) the parties entered into the Fee Agreement for W&C to represent the Tribe in gaming compact negotiations, CC ¶¶ 1, 65; (2) W&C consciously and deliberately, and in bad faith, sought to "drag[] out negotiations in an effort to" "maximize its fees," *see id.* ¶¶ 11, 33-35, 67-70; (3) W&C's breach "deprived the Tribe from receiving the benefits of the Fee Agreement—i.e. [] efficient and competent representation…," *id.* ¶¶ 4, 67, 70; and (4) the Tribe was harmed by W&C's breach, *see id.* ¶¶ 67, 71. This is plainly sufficient under Rule 8.

W&C also argues that the Tribe's good faith and fair dealing claim fails because its "decision-making process … was legitimate." Mem. at 13. But this argument does not bear on the sufficiency of the Tribe's allegations and is based on inapposite case law. S*ee, e.g.*, *In re Sizzler Rests. Int'l*, 225 B.R. 466 (Bankr. C.D. Cal. 1998) (granting summary judgment where it was undisputed that franchisor exercised good cause in business decisions); *Oil Express Nat'l, Inc. v. Burgstone*, 958 F. Supp. 366 (N.D. Ill. 1997) (discussing good faith and fair dealing claim under Illinois law). W&C further argues the merits of whether eight months is an

unreasonably long time (or a "contractually awesome" time) to conclude gaming compact negotiations and whether it was required to do any work at all under the Fee Agreement. Mem. at 15-16.

Both of these arguments are based on issues of fact not appropriately considered on a 12(c) motion. *See, e.g.*, *Nguyen v. Radient Pharm. Corp.*, 2011 WL 5041959, at *7 (C.D. Cal. Oct. 20, 2011). They each depend on the extent to which W&C was fulfilling its obligation to act in good faith. If, for example, as alleged by the Tribe, W&C could have easily wrapped up negotiations in four months had it acted with the diligence required of a fiduciary, then it does not matter if the Fee Agreement allowed for payment in the event that W&C worked little or no time in a month. The Fee Agreement does ***not*** say that W&C was entitled to sit back and do no work for $50,000 a month when there was plenty of work it could and should have been doing, which is what the Tribe alleges here.

Accordingly, because the Tribe has stated a plausible claim for breach of the implied covenant of good faith and fair dealing, W&C's motion must be denied.

IV. THE TRIBE HAS STATED A CLAIM FOR NEGLIGENCE

To state a claim for professional negligence, a plaintiff must show: (a) a duty of an attorney to "use such skill, prudence and diligence as members of the profession commonly possess"; (2) a breach of that duty; (3) a causal connection between the breach and the resulting injury; and (4) damages. *Wolk v. Green*, 516 F. Supp. 2d 1121, 1129 (N.D. Cal. 2007). These elements, except for the question of the attorney's duty of care, are "generally factual" and should therefore not be challenged on a motion to dismiss. *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 319-20 (2004). The Tribe has sufficiently alleged each element and the Court should therefore deny W&C's motion.

A. The Tribe Has Sufficiently Pled The Existence Of A Duty

An attorney owes a duty of care to a client with whom the attorney stands in privity of contract. *See Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 529–30 (2004)

(citations omitted). The Tribe satisfies this element by alleging that the parties entered into the Fee Agreement for W&C to represent the Tribe in gaming compact negotiations with the State. CC ¶ 74.

B. The Tribe Has Sufficiently Pled That W&C Breached Its Duty

Breach of duty in a professional negligence situation is the failure of an attorney to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise. *See Osornio*, 124 Cal. App. 4th at 319.

W&C does not argue that the Tribe failed to plead facts sufficient to show that W&C breached its duty of care. Nor could it. Instead, W&C again improperly attacks the merits of the claim to argues that (1) a breach of the California Rules of Professional Conduct cannot be the "sole basis" for a negligence claim, and (2) it did not breach its duty because the Tribe's replacement firm never issued a "formal file request" for the Tribe's case file. Mem. at 17. But W&C either misstates or ignores the Tribe's allegations.

First, W&C's violation of Rule 3-700(D)(1) is only ***one*** of the ways—not the "sole basis"—in which it breached its duty. The Tribe has alleged a laundry list of ways sufficient to show W&C did not act with the requisite "skill, prudence, and diligence" that other attorneys possess. For example, the Tribe alleged that: W&C was not "diligently pursuing negotiations," CC ¶ 4; that W&C failed to provide a draft compact on behalf of the Tribe in response to the State's initial draft for over four months, *see id.* ¶¶ 4, 33, 35; and that W&C failed to address the Tribe's underpayment issue in the limited number of drafts it produced, *see, e.g.*, *id.* ¶ 38. The Tribe also specifically incorporated by reference paragraphs 1-72, which include allegations that W&C did not perform its obligations under the Fee Agreement in good faith or act in the Tribe's best interests. *See, e.g.*, *id.* ¶¶ 4, 33-35, 67-70. Allegations that an attorney breached "ethical duties of good faith and fidelity" are also actionable as negligence. *Schultz v. Harney*, 27 Cal. App. 4th 1611, 1621 (1994).

Second, W&C tries to hide the ball by claiming the Tribe's replacement firm did not later issue a "formal file request." Mem. at 17-18. To do so, W&C relies on a June 27, 2017 email from Rosette purportedly stating that a "formal file request" was forthcoming, which is attached to W&C's supporting declaration. ECF No. 235-2; Ex. 1. But this email is outside the pleadings and, at best, attempts to create a fact issue that is not appropriate for resolution at the pleadings stage. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a Court may consider "exhibits attached to the complaint," "matters properly subject to judicial notice," or documents necessarily relied on by the complaint whose authenticity no party questions.); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). W&C does not request that the document be judicially noticed (it cannot), or otherwise explain its basis for attempting to reference such a document in a 12(c) motion apart from a vague statement that the "text" of the email is "referenced" in—but not attached to—the FAC. Regardless, W&C's argument ignores the Tribe's allegations that W&C refused the Tribe's request for its "entire case file" in its June 26, 2017 letter terminating W&C. CC ¶¶ 76-77. And it ignores the allegations that W&C has refused additional subsequent requests from the Tribe, Rosette LLP, and the Tribe's current litigation counsel, WilmerHale. *Id.* ¶¶ 78–79.

Accordingly, the Tribe has pled facts sufficient to show that W&C breached its duty of care to the Tribe to support its negligence claim.

C. Proximate Cause/Causation

In negligence cases, "the crucial causation question is what would have happened if the defendant attorney had not been negligent." *Viner v. Sweet*, 30 Cal. 4th 1232, 1242 (2003). The plaintiff therefore "need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id.* at 1244.

The Tribe has, in fact, provided a "reasonable basis" to show "what would have happened if [W&C] had not been negligent." *Viner*, 30 Cal. 4th at 1242-43; *see also* CC ¶ 80. That is, ***but for*** W&C's failure to transmit the case file and failure to act in the best interest of the Tribe, the Tribe would not have incurred certain additional "legal fees" and "increased [] costs" to conclude the gaming compact negotiations. CC ¶¶ 80-81. The Tribe also alleged that it continues to be damaged in this action—as a result of W&C's continued refusals—from the "prejudice of not having the information that would be relevant to, and assist the Tribe in, preparing its defense…." *Id.* ¶ 82. These allegations, which must be construed in the light most favorable to the Tribe, are accordingly sufficient to show that it is "more likely than not" that W&C's conduct was a "cause in fact" of the extended negotiations and associated costs in concluding gaming compact negotiations, and continuing prejudice to the Tribe. *See Belinda K. v. Cty. of Alameda*, 2012 WL 1535232, at *20 (N.D. Cal. Apr. 30, 2012) (citing *Viner*, 30 Cal. 4th at 1242).

Again, to support this argument, W&C argues fact issues not appropriate for a motion to dismiss. *See Nguyen*, 2011 WL 5041959 at *7. It claims that, because it sent to Rosette and the Tribe the June 21, 2017 draft compact, it "provided exactly what [Rosette] requested," attributing the cause of any "supposed negligence" to Rosette. Mem. at 19. W&C claims that a "more reasonable inference" from the allegations is that Rosette had to "get up to speed with a matter" with which it was "unfamiliar." *Id.* But Rule 8 requires only that the Tribe plead factual content that allows a court to draw the "reasonable inference" that W&C is liable for the misconduct alleged. *See Iqbal*, 556 U.S. at 678. The Tribe has done so here.

D. The Tribe Has Sufficiently Pled Damages

The Tribe specifically alleged that it incurred "legal fees and increased [] costs" as a result of W&C's negligence and failure to transmit the Tribe's case file. CC ¶¶ 80-81; *see also* CC ¶ 45 (noting that the Tribe paid W&C $400,000 in monthly fees at the time of the termination). And the Tribe alleged that it has incurred

"further legal expenses" in an effort to obtain its case file and continues to be "damaged in this action because it is prejudiced in its defense" as a result of not having the "information that would be relevant to … preparing its defense." *Id.* ¶ 82. These allegations are plainly sufficient to satisfy Rule 8.

W&C's hodge-podge of arguments to the contrary must be disregarded given that they all improperly rest on fact issues rather than the sufficiency of the Tribe's allegations. The Tribe accordingly has satisfied the damages element of its negligence claim.

V. THE TRIBE HAS STATED A CLAIM FOR BREACH OF CONTRACT

The Tribe has pled facts sufficient to show, under Rule 8, that W&C is "liable for the misconduct alleged"—*i.e.* breaching the Fee Agreement. *See Iqbal*, 556 U.S. at 678. W&C's only response to these allegations is to, again, improperly argue a litany of fact issues—again, not appropriate on a motion to dismiss—to claim that the Tribe's request for its case file was somehow sent the day after the Tribe terminated W&C, and that, therefore, the Tribe had already "repudiated" the Fee Agreement; that W&C's admitted failure to return the case file to the Tribe was immaterial; and that the Tribe's damages are not recoverable because they are unforeseeable, uncertain, and avoidable. Mem. at 20-21. Not only are these arguments not properly before the Court, they fail as a matter of law.

W&C's argument that the Tribe somehow "repudiated" the Fee Agreement is without merit. As an initial matter, W&C conflates its termination with the idea that the Tribe repudiated the Fee Agreement. Repudiation of a contract occurs when a party announces an intention not to perform prior to the time due for performance. *See Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.*, 231 Cal. App. 4th 1131, 1150 (2014). That is not what happened here. The Fee Agreement expressly provided that the Tribe could terminate W&C "at any time." *See* FAC, Ex. 2. And pursuant to that contract, the Tribe terminated the Fee Agreement, and has now brought an action for damages against W&C—which it is permitted to do. *Id.*; *see*

also CC, Ex. A § 15. Moreover, W&C bases its argument on the same (impermissible) fact issues it raises in an effort to dismiss other claims. *See id.* But, the Tribe alleged that it requested its "entire case file" on June 26, 2017 in the letter terminating W&C—pursuant to sections 11 and 12 of the Fee Agreement.

W&C's remaining arguments likewise fail. W&C first argues that its breach was "immaterial." Mem. at 21. But, as with W&C's other arguments, the determination of whether a material breach has occurred is generally a question of fact (not appropriate on a Rule 12 motion). *See Aliya Medcare Finance, LLC v. Nickell*, 2015 WL 4163088, at *17 (C.D. Cal. July 8, 2015); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590 (2012). W&C next argues the merits of whether the Tribe's damages are recoverable, claiming that the Tribe's damages are unforeseeable, uncertain and avoidable. Mem. at 21-22. But this argument, too, fails to address the actual allegations in the Tribe's counterclaims. *See, e.g.*, CC ¶¶ 80-82. In sum, as pled, the Tribe's allegations are sufficient to establish that W&C breached the Fee Agreement and W&C's motion should therefore be denied.

VI. THE TRIBE HAS SUFFICIENTLY PLED A CLAIM UNDER THE UCL

The UCL "prohibits, and provides civil remedies for unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 320 (2011). This can "include anything that can properly be called a business practice and that at the same time is forbidden by law." *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1266 (1992) (internal quotation marks omitted).

A. The Tribe Has Standing Under the UCL

Any "person" who has suffered injury and lost money or property as a result of unfair competition may bring a claim under the UCL. *See* Cal. Bus. & Prof. Code § 17204. Section 17201 broadly defines "person" as "natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons." *Sonoma Falls Developer, LLC v. Dry Creek Rancheria Band of Pomo*

Indians, No. 3:01-cv-04125-VRW, ECF No. 40 at 8 (N.D. Cal. filed July 24, 2002). Although case law is sparse, at least one district court in the Ninth Circuit has held that "a tribe is 'an association [or] other organization of persons" and thus falls within Section 17201's "broad definition" of "person." *Id.* at 9 (citing *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F. 2d 1047, 1055 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985)). Available authority therefore supports the Tribe's standing to bring the UCL claim.

B. The Tribe Has Alleged Particularized Facts

The Tribe alleged that W&C "committed acts of unfair competition" by (1) violating Rule 3-700(D)(1), and (2) breaching its fiduciary duties to the Tribe. CC ¶ 93. The Tribe also incorporates the preceding allegations in the counterclaims. *Id.* ¶ 91. Those allegations include detailed underlying facts concerning the ways W&C breached fiduciary duties (*e.g.*, by dragging out gaming compact negotiations in order to maximize monthly fees), *id.* ¶¶ 58-61; and W&C's negligence and associated violation of the Rules of Professional Conduct, *id.* ¶¶ 73-82. And contrary to W&C's argument that "monetary remedies" are not available, Mem. at 24, the Tribe also properly alleged that it is entitled to injunctive relief and restitution related to the "lost money [and] property"—including, but not limited to, its case file and monthly fees paid to W&C for its inefficient and incompetent work—that it suffered as a result of W&C's unfair and unlawful business practice. *See Kwikset*, 51 Cal. 4th at 327 (holding that, at the pleading stage, general factual allegations of injury may suffice).

These allegations, which W&C largely ignores, go far beyond W&C's passing assertion that the Tribe "offer[ed] just ***one*** conclusory statement stating that [W&C] 'committed acts of unfair competition.'" Mem. at 23 (emphasis in original). The Tribe has accordingly stated facts sufficient to plead a claim under the UCL.

C. The Safe Harbor Does Not Apply

W&C argues that the Tribe's unfair competition claim fails because W&C is protected by a "safe harbor" exception solely because Rule 3-700(D) "does not proscribe the conduct in question." Mem. at 23. W&C's argument confuses the relevant test, and its argument fails. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 961 (9th Cir. 2016), is instructive. In *Ebner*, plaintiff-consumer brought, among other things, a UCL claim against a cosmetics manufacturer claiming that the manufacturer's labeling practices were deceptive. The court there held that the UCL safe harbor applied only where a plaintiff brings a claim that is "***affirmatively permitted*** by statute—the doctrine does not immunize from liability conduct that is not merely unlawful." *Id.* Here, of course, nothing permits W&C's conduct. Rule 3-700(D)(1) ***does*** "proscribe the conduct in question," and no other rule or law allows it. *See supra* III. W&C is therefore incorrect as a matter of law.

In any event, even if the "safe harbor" applied with respect to W&C's violation of Rule 3-700(D)(1) (which it does not), the Tribe's UCL claim is not limited to W&C's violation of Rule 3-700(D)(1). *See supra* V.B. The claim, as alleged, is also founded on W&C breach of its fiduciary duties and misrepresentations to the Tribe. *See, e.g.*, CC ¶¶ 56-63, 73-82, 91-95. Accordingly, W&C is not protected by the UCL's safe harbor provision and the Court should deny its motion.

D. W&C Cannot Assert Its Fact-Based Affirmative Defenses

As best the Tribe can comprehend, W&C also seeks to dismiss the UCL claim on the basis that it is subject to equitable defenses, such as unclean hands and *in pari delicto*. This is improper. As with the majority of W&C's motion, its argument is based on non-judicially noticeable facts outside of the Tribe's allegations. *See, e.g,* Mem. at 25 (arguing facts not alleged in the counterclaims regarding W&C termination). Even if W&C's fact issues could be considered, the facts underlying the circumstances of W&C's termination are in dispute. And affirmative defenses may not be raised by a Rule 12 motion where they depend on disputed issues of fact,

as is the case here. *See ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) ("If, from the allegations of the complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper"); *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). Accordingly, W&C's based on equitable defenses fail.

VII. THE TRIBE HAS STATED A CLAIM FOR RECOUPMENT/SETOFF

W&C argues that the Tribe cannot bring a claim for recoupment because it should instead be asserted only as an affirmative defense. Mem. at 25. This is incorrect. ***First,*** plaintiffs in district court in the Ninth Circuit have brought similar claims. *See James River Ins. Co. v. W.A. Rose Constr. Co.*, 2018 WL 3023408, at *1, 4, 8-9 (N.D. Cal. June 18, 2018); *Guidiville Rancheria of California v. United States*, 2015 WL 4934408, at *5 (N.D. Cal. Aug. 18, 2015), *vacated in part on other grounds*, 704 F. App'x 655 (9th Cir. 2017) (recognizing claims for recoupment). ***Second,*** the cases W&C relies upon to support this proposition are inapposite. In *City of St. Paul v. Evans*, 344 F.3d 1029, 1034 (9th Cir 2003), the court was reviewing a district court's decision on summary judgment regarding whether a time-barred defense could be raised as affirmative recovery. The court clearly explained that its discussion was focused on "the respective roles of the parties in the litigation as a whole." *Id.* at 1035. Noting that "[i]t is important that the party asserting the defense is not, simultaneously or in parallel litigation, seeking affirmative recovery on an identical claim." *Id*. That concern is not present here. The Tribe has not sought recovery for recoupment in any other manner, and the line of cases discussed in *City of St. Paul* does not apply.

The remainder of W&C's argument is rooted in the merits of the claim—*i.e.* whether the Tribe is entitled to recoupment. Once again, this fact-based inquiry is not a question that can be decided at this stage of pleadings. *See Nguyen*, 2011 WL 5041959, at *7. Accordingly, the Tribe has adequately plead a claim for recoupment.

CONCLUSION

W&C's motion for judgment on the pleadings should be denied. It is procedurally improper, and, in any event, each of the Tribe's counterclaims is well-pled, and is based on specific factual support. The Tribe therefore respectfully requests that the Court deny W&C's motion for judgment on the pleadings in its entirety. However, in the event that the Court grants the motion to dismiss as to any or all of the counterclaims, the Tribe requests leave to amend.

Dated: January 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 3, 2020 at Los Angeles, California.

/s/ Joshua A. Vittor
Joshua A. Vittor