HONORABLE BRIAN MCDONALD
Hearing Date: Friday, August 14, 2020
Hearing Time: 10:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GALANDA BROADMAN, PLLC, a Washington professional limited liability company, Plaintiff, v. KILPATRICK TOWNSEND & STOCKTON LLP, a foreign limited liability company; ROB ROY EDWARD STUART SMITH, an individual; and RACHEL SAIMONS, an individual, Defendants.	No. 19-2-16870-6 SEA **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION / RELIEF REQUESTED

Plaintiff Galanda Broadman, PLLC ("GB") opposes the Motion for Summary Judgment (the "Motion") filed by Defendants Kilpatrick Townsend & Stockton LLP ("KTS"), Rob Roy Edward Stuart Smith ("Smith"), and Rachel Saimons ("Saimons") (collectively, "Defendants").

Defendants' Motion presupposes that attorneys are immune from liability for intentional interference and unfair business practices if their misconduct occurred in the course of an attorney-client relationship. Neither Washington law nor the facts of this case support Defendants' position. Defendants displayed bad faith and dishonesty by undertaking and continuing a "special prosecutor" role for the Nisqually Indian Tribe (the "Tribe") with knowledge that the subjects of the investigation were adversaries and an adverse witness in ongoing litigation. During the "investigation," Defendants failed to complete the most basic task of questioning GB, despite falsely and unfairly painting GB's managing partner, Gabe Galanda, as complicit in a series of unethical acts. Defendants lacked neutrality and objectivity (which they admit to being essential when conducting an investigation), and they used their position to impugn GB to both the Tribe and the Washington State Bar Association. As attested by several Tribal Councilmembers, Defendants' actions directly led to the termination of GB's services agreement, which allowed Defendants to insert themselves as outside counsel for the Tribe. For the reasons discussed herein, the Court should deny summary judgment and allow this fact-intensive dispute to be resolved by the jury.[1]

Overview of Defendants' Misconduct

Since 2017, GB and Defendants have represented adverse parties in highly contentious civil RICO litigation (the "*Rabang* Action") involving the Nooksack Indian Tribe.

[1] Defendants accuse Mr. Galanda of filing this lawsuit out of spite for non-lawyers, like Smith, who represent Native American clients. Defendants offer no proof for this baseless accusation, which is fitting in light of their pattern of making unsubstantiated allegations that interfere with attorney-client relationships and impugn reputations.

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Defendants did, and still do, represent Raymond Dodge ("Dodge")—a defendant in the *Rabang* Action—whose membership in the National American Indian Court Judges Association (the "NAICJA") was terminated at the urging of Leona Colegrove ("Colegrove"), an NAICJA officer, and others. Dodge's expulsion from NAICJA has been a central issue in the *Rabang* Action such that Colegrove was an adverse witness for Defendants.

From May 2015 until May 2018, Colegrove served as the Legal Director for the Nisqually Indian Tribe, and she was supportive of the Tribe engaging GB as outside counsel beginning in June 2015.

In May 2018, Colegrove separated her employment from the Tribe and she received a severance payment that became a subject of scrutiny. On June 8, 2020, the Tribe posted a Request for Proposals for a special prosecutor to "[c]onduct a comprehensive investigation in to [sic] employee conduct and make legal recommendations to the Tribal Council based on findings." Upon being awarded the prosecutor role, Defendants learned that Colegrove was the target of the investigation and her alleged misconduct arose, in part, from having GB allegedly drafting a self-serving severance agreement. This created a clear conflict of interest: Defendants had a duty to the Tribe to be objective and neutral in their investigation, yet the subjects of their investigation were adversaries and an adverse witness in pending litigation.

Neither Smith nor Saimons contacted GB during their investigation, and Smith admits that he asked no questions of Colegrove about her severance agreement or whether GB was involved in its preparation. Nonetheless, Defendants delivered a scathing investigative report to the Tribal Council on November 13, 2018 that unnecessarily and unfairly smeared GB. On December 13, 2018, Smith and Saimons presented their findings at a Tribal Counsel executive session. Thereafter, on December 19, 2018, the Tribe filed a non-privileged bar complaint against Colegrove alleging, in part, that GB's "drafting of the severance agreement calls into question whose interest the agreement actually served." Smith admits drafting part of the bar complaint. Contrary to Smith's claims, GB played no role in preparing Colegrove's severance agreement—a fact Defendants would have uncovered had they contacted GB.

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As a direct result of Defendants' actions, the Tribe terminated its agreement with GB. According to Councilmember Willie Frank III, the Tribe fired GB based on information conveyed by Smith and Saimons, which was captured in the non-privileged bar complaint. Councilmember Brian McCloud also attested that information provided by Smith and Saimons led to the bar complaint and the termination of GB's services agreement. In addition, Councilmember Antonette "Maui" Squally attested that Defendants orchestrated the bar complaint that led to the firing of GB.

In sum, Defendants undertook their role as a neutral prosecutor despite a clear conflict of interest, and they used their position to generate false information that led to the termination of GB's contract. GB does not need to prove that Defendants intended to kill the services agreement between GB and the Tribe; GB only needs to prove that Defendants acted intentionally and with improper means. The record supports both findings.

Grounds for Denying Summary Judgment

Defendants challenge GB's claim for intentional interference based on an alleged lack of non-privileged evidence to substantiate what Smith and Saimons reported to the Tribal Council at the end of their investigation. This is a red herring. Defendants' interference is not limited to a single report; it involves the entire progression of events linking Defendants' response to the Request for Proposal to the ultimate termination of GB's Services Agreement. The evidence is clear that (a) Defendants applied for and undertook the special prosecution role despite clear conflicts of interest; (b) Defendants failed to communicate with GB or Colegrove about the severance agreement during their investigation; (c) Defendants delivered a report to the Tribal Council that at least three Councilmembers related as being an improper and unfair smear against GB; (d) Defendants drafted a non-privileged bar complaint against Colegrove that maligned GB for allegedly putting the interests of Colegrove over that of GB's client, the Tribe; and (e) these actions directly led to the termination of GB's services agreement. This evidence, even if deemed circumstantial, is more than sufficient to establish GB's claim for intentional interference and warrants a trial by jury.

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With regard to GB's claim for violation of the Consumer Protection Act ("CPA"), Defendants attack multiple elements of the claim, but the evidence and applicable law do not support the challenges. GB has established that Defendants engaged in unfair and deceptive practices that run afoul of the Rules of Professional Conduct, and that these actions are part of a pattern of Defendants interfering with the attorney-client relationships of Indian Tribes and their outside counsel. Defendants have engaged in similar misconduct in Washington, D.C., Wyoming, and Washington State, thus establishing a clear threat to the public interest. Finally, GB has demonstrated economic and non-economic injuries that are more than sufficient for carrying its burden of proof on summary judgment. In addition, these facts are tailor-made for CPA liability and summary judgment should be denied.

Finally, Defendants inaccurately claim this suit is a collateral attack on the Tribe's decision to terminate GB's contract, for which the Tribe has not waived its sovereign immunity. This argument is a gross distortion of applicable law. "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by [a non-sovereign party]. An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal." *Auto. United Trades Org. v. State,* 175 Wn.2d 214, 233, 285 P.3d 52 (2012). Here, Defendants cannot wield the Tribe's immunity as a shield to their own liability.

II. EVIDENCE RELIED UPON

This Opposition is supported by the Declarations of Charles P. Rullman ("Rullman Decl.") and Gabriel S. Galanda ("Galanda Decl."), as well as all exhibits attached thereto, and all documents on file in this action.

III. STATEMENT OF FACTS

A. GB Represented the Tribe From More than Three Years.

GB is an American Indian-owned boutique law firm specializing in tribal legal rights and Indian business interests. (Galanda Decl. ¶ 2.) Founded in 2010 by Gabe Galanda and Anthony Broadman, the firm currently employs approximately six attorneys. (*Id.*)

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On June 25, 2015, GB entered into a written Contract for Professional Services (the "Services Agreement") with the Nisqually Indian Tribe (the "Tribe"). (Galanda Decl., Ex. A.) GB and the Tribe renewed the Services Agreement on January 1, 2017 with a clause stating that it would automatically renew annually unless terminated in accordance with its terms. (*Id*., Ex. B.) Colegrove, the Tribe's Legal Director, oversaw the original and renewed Services Agreements. (*Id*. ¶ 4.)

Under the Services Agreement, GB provided general counsel and outside counsel legal services for the Tribe, which included, among other matters, the following public litigation matters:

- employment contract case by Fabio Apolito in Nisqually Tribal Court;
- recall election case brought by Brion Douglas in Nisqually Tribal Court;
- tort case brought by Dean Phillips in U.S. District Court for the W.D. of Washington;
- tort case brought by the Estate of Andrew Westling in U.S. District Court for the W.D. of Washington;
- tort case brought by Kevin Bell in U.S. District Court for the W.D. of Washington;
- tort case brought by Jean Ramos in Thurston County Superior Court;
- tort case brought by Janelle Duey in King County Superior Court; and
- Multi-District Litigation ("MDL") in the Northern District of Ohio brought by the Tribe against certain manufacturers and distributors of opioids ("the MDL Action").

(Galanda Decl. ¶ 5.)

GB's rates for tribal general counsel and outside counsel legal services range from $300 and $350 per hour. (Galanda Decl. ¶ 7.) Colegrove negotiated a discounted rate of $250 per hour with GB, which was never increased. (*Id*.; Ex. C.) For GB's insurance defense work for the Tribe, Colegrove and the Tribe's carrier negotiated a discounted $220 hourly rate. (*Id*.) In 2016 and 2017, GB earned an average of $120,918.87 in fees annually. (*Id*.)

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Regarding the MDL Action, the Tribe entered into a contingency fee Representation Agreement on March 1, 2018 with Robins Kaplan LLP and GB. (Galanda Decl. ¶ 8.) Under the Representation Agreement, GB would receive five percent (5%) of Robin Kaplan LLP's twenty percent (20%) gross recovery, if any. (*Id*.)

In the Brion Douglas matter referenced above, GB defended the Tribe against then-Tribal Council Vice Chairman Chris Olin's ("Olin") improper dissemination of confidential tribal information. (Galanda Decl. ¶ 9.[2]) Olin was a dissident member of the Tribal Council who was admonished in October, 2016, for repeatedly acting "without any authority of the Council" in manners that were "inappropriate and unlawful under the Nisqually Bylaws." (*Id*.; Ex. D.) As an attack on the Tribal Council majority and Colegrove, Olin falsely accused GB of representing the Tribe without proper approval. (*Id*.) In a non-privileged passage to a November 9, 2016 email to Olin and the Tribal Council, Gabe Galanda addressed these accusations:

> We at all times take direction from you, often times through the Director, to defend and protect the Tribe and its officials. As you know, we do not wait to react, knowing that your sovereignty and institutional integrity are too important for slow responses. We believe that all of the work we have performed on your behalf is preauthorized by you, through the Director. We take our ethics, and Tribal protocol, seriously. . . . Should we need to change our approach in any way, we will, as always, heed Council's direction. We remain grateful for the opportunity to serve Nisqually.

(*Id*., Ex. E.) Over the next two years, the Tribal Council never asked GB to change its approach and GB remained employed by the Council—until Defendants interfered. (*Id*. ¶ 9.)

B. KTS Undertook a Special Prosecution for the Tribe Despite a Clear Conflict of Interest.

In May 2018, Ms. Colegrove separated her employment from the Tribe. (Galanda Decl. ¶ 10.) GB continued to provide legal services under the Services Agreement for two successors to Ms. Colegrove, Maryanne Mohan and Heidi Peterson. (*Id*.) GB did not prepare or participate in the drafting of Ms. Colegrove's severance agreement. (*Id*.)

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[2] *See also* Exhibit 14 to Declaration of Leslie E. Barron (April 15, 2020).

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On June 6, 2018, the Tribe posted a Request for Proposal ("RFP") for a special prosecutor to "[c]onduct a comprehensive investigation in to [sic] employee conduct and make legal recommendations to the Tribal Council based on findings." (Galanda Decl. ¶ 11, Ex. F.) The RFP did not identify Colegrove as the subject of the investigation, but Smith testified to communicating with then-Legal Director Mohan about the engagement before Defendants submitted their proposal. (Rullman Decl., Ex. A at 68:22-69:14.) Moreover, the RFP made no mention of the special prosecutor being tasked with recovering a laptop from the unnamed employee, yet Defendants' proposal acknowledged the goal of trying to recover the computer. (*Id*.) The claim that Smith submitted Defendants' proposal without knowing that Colegrove was the target of the investigation is highly suspect. (*Id*.)

At that time Defendants responded to the RFP, GB was adverse to Defendants and its client, Raymond Dodge ("Dodge"), and Colegrove was an adverse witness. (Galanda Decl. ¶ 12.) Beginning in January of 2017, GB represented certain members of the Nooksack Indian Tribe in a federal lawsuit, *Margretty Rabang, et al. v. Robert Kelly, Jr., et al.*, Case No. 2:17-CV-00088-JCC (W.D. Wash.) (the "*Rabang* Action"), alleging that tribal officials had violated the federal Racketeer and Corrupt Organizations Act, 18 U.S.C. § 1964. (*Id*.) Dodge was, and continues to be, represented by Defendants. (*Id*.) The *Rabang* Action remains the subject of a pending appeal before the U.S. Court of Appeals for the Ninth Circuit. (*Id*.)

Part of the evidence pertaining to the RICO allegations against Dodge, in his personal capacity, was that the National American Indian Court Judges Association (the "NAICJA") had removed him from its membership. (Galanda Decl. ¶ 13, Exs. G and H.) Colegrove is a former NAICJA officer who, along with then NAICJA President Richard Blake, urged that Dodge be removed from its membership. (*Id*.) Defendants represented Dodge concerning his removal by NAICJA. (*Id*.) The interconnected *Rabang* Action and NAICJA removal proceedings were particularly contentious, including between Colegrove, NAICJA, and KTS; and between GB and KTS. (*Id*.)

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Despite these circumstances, Defendants failed to disclose these or any other conflicts of interest regarding Colegrove or GB to the Tribe. (*See* Exhibit N to Second Barron Decl., at 9 [KTS000093] ("There are no known conflicts of interest regarding Kilpatrick Townsend providing legal services to the Nisqually Indian Tribe."); *see also* Rullman Decl., Ex. A at 72:13-24.)

C. Defendants Completed The "Investigation" Without Communicating with GB or Colegrove.

From May to November of 2018, GB remained the Tribe's outside counsel, again, under the direction of Tribal Legal Directors Mohan and Peterson. (Galanda Decl. ¶ 10.) GB was, at all times, available to Defendants had they requested any information. (*Id*. ¶ 15.)

On November 13, 2018, Defendants purported to complete their investigation without interviewing GB. (Galanda Decl. ¶ 15.) As to On that date, Defendants issued a report to the Tribe containing their findings. (*Id*.; Rullman Decl., Ex. B at 48:25-49:7.) One month later, on December 13, 2018, Smith and Saimons made an oral presentation of their report to the Tribal Council. (*Id*.)

Within a week of delivering their findings to the Tribal Council, Smith participated in the drafting of a non-privileged bar complaint against Colegrove. (Rullman Decl., Ex. A at 104:5-20: "We were, yes. So the firm prepared that draft at the direction of the tribal council."; Galanda Decl. ¶ 20, Ex. J.) The thrust of the complaint, which is dated December 18, 2018, is that Colegrove manipulated the Tribal Council into paying a $22,000 severance that violated Tribal policies. (*Id*., Ex. J.) In footnote 3 of the complaint, Smith falsely claimed GB drafted Colegrove's severance agreement and failed to review the agreement with the Tribal Council. (*Id*.) Both statements are false, as Smith would have known had he conducted an investigation. (*Id*.)

D. The Tribal Council Prematurely Terminated GB's Services Agreement Based on the Misinformation Supplied by Defendants.

On December 12, 2018, GB received a letter dated December 7, 2018 from the Tribal Council terminating its Services Agreement with GB. (Galanda Decl. ¶ 16, Ex. I.) Before

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receiving the letter, Tribal Councilman Willie Frank III informed GB that the Services Agreement was likely to be terminated. (Galanda Decl. ¶¶ 17-18.) GB's Gabe Galanda had reached out to Mr. Frank to see if the Tribe would support a piece of state legislation Mr. Galanda had introduced before the Washington State legislation on behalf of Huy, a non-profit organization operated by GB that advocates for Indigenous prisoner religious freedoms. (*Id*.) Councilman Frank advised Mr. Galanda to not seek the Tribe's support for the legislation. (*Id*.) Mr. Frank volunteered that Smith had defamed Mr. Galanda and GB before the Tribal Council during an earlier meeting. (*Id*.) According to Councilman Frank, Smith told the Tribal Council that Colegrove had improperly "funneled" GB legal work and, in return, GB drafted a favorable severance agreement for Colegrove.[3] (*Id*.) According to Councilmember Frank, Smith stated that GB was "well compensated" as a result of some *quid pro quo* arrangement with Colegrove. (*Id*.) Councilman Frank volunteered to mail a copy of Defendants' Special Prosecution Report, which he did the following week.[4] (*Id*.)

Additional Tribal Council Members have attested that Defendants' investigation and report directly fueled the bar complaint and the termination of GB's Services Agreement. Antonette "Maui" Squally is a Tribal Councilmember and the current Vice Chairperson for the Tribal Council. (Galanda Decl. ¶ 26, Ex. M.) She served on the Tribal Council from 2013 to 2016 and again from May 2019 to the present. (*Id*.) She has stated under oath:

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[3] Defendants' smears of GB were as unnecessary as they were frivolous. Had Defendants bothered to inquire, they would have learned there were multiple instances where GB had the opportunity to perform work for the Tribe but recommended that the work be directed to other firms that were better equipped for the matter. (Galanda Decl. ¶ 21.) For example, in 2017, Colegrove asked GB who should help the Tribe as outside counsel in ongoing *U.S. v. Washington* sub-proceedings. (*Id*.) GB recommended Thomas Schlosser of Morriset Schlosser Jozwiak & Somerville, who, incidentally, were also adverse to GB in the Nooksack Indian Tribe matter that gave rise to the *Rabang* Action. (*Id*.) In addition, that same year, Colegrove inquired about engaging outside counsel for a complicated real estate workout transaction. (*Id*.) GB recommended Craig Jacobson of Hobbs Straus Dean & Walker, in Portland, Oregon, again recognizing there were other firms better suited for the work. (*Id*.)

[4] Notably, Defendants did not interview Mr. Frank but interviewed selected other Councilpersons, most notably Mr. Olin, during its special investigation. (Galanda Decl. ¶ 23; Rullman Decl., Ex B at 41:2-9: "I interviewed council member, Julie Palm, attorney-Tribal employee, or director, Shannon Blanksma. Council member Chris Olin. Those are the ones that are coming to mind. But there may – there may have been more.")

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> Soon after I was elected to serve as Tribal Council Vice Chairperson last May, I began to ask why the Tribe had no more Native American lawyers. When I was previously on the Tribal Council, the Tribe had Leona Colegrove as our in-house Tribal Attorney and Gabe Galanda as our general outside counsel.
>
> I learned last spring that Kilpatrick Townsend performed an investigation in 2018 as a special prosecutor for the Tribal Council. Kilpatrick Townsend's findings resulted in a bar complaint against Leona and termination of Gabe's firm as the Tribe's outside counsel.

(*Id*., Ex. M.) Brian McCloud is also a Tribal Councilmember and he has served in that position for the last 15 years. (*Id*. ¶ 24, Ex. L.) Mr. McCloud also observed the clear connection between Defendants' investigatory filings with the non-privileged bar complaint and the termination of GB's Services Agreement[5]:

> In late 2018, Kilpatrick Townsend served as a special prosecutor for the Tribal Council. I disagreed with that investigation process then and I disagree with it now. It resulted in two of the top Native American legal minds in our state, Leona Colegrove and Gabe Galanda, being harmed, and for no good reason. Leona was subject to a bar complaint and Gabe's firm was fired as the Tribe's outside counsel.

(*Id*., Ex. L.)

As a direct result of Defendants' false statements and deceptive practices, GB was forced to withdraw its representation of the Tribe in the *Bell* action pending in the U.S. District Court for the W.D. of Washington and the MDL Action in the N.D. of Ohio. (Galanda Decl. ¶ 19.) GB has not worked again with the Tribe. (*Id*.) Instead, the Tribe has hired Defendants as outside counsel, essentially replacing GB. (*Id*.; *see* also Ex. R to Second Barron Decl. [KTS000302–304, 307–310, 313–315]). As compared to GB's discounted flat fees of $220 to $250 per hour, Defendants charge the Tribe $508.50 and $382.50 per hour, respectively. (*Id*.) Defendants Smith and Saimons charged the Tribe "discounted" hourly rates of $486 and $360, respectively, for their special investigation work. (*Id*.)

E. KTS Has a Documented History of Interference in the Area of Indian Law.

GB is not the only law or professional services firm in Indian Country whose business relationships have been interfered with by Defendants.

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[5] Defendants also did not interview Mr. McCloud as part of their special investigation. (Galanda Decl. ¶ 24.)

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1. Poaching Clients From Sixkiller Consulting.

Joshua Clause ("Clause") is a Washington, D.C. lawyer-lobbyist for tribal governments across the nation and in Washington State, including the Nisqually Indian Tribe, Muckleshoot Tribe, Suquamish Tribe, and Kalispel Tribe. (Galanda Decl. ¶ 32.) Mr. Clause used to represent these Washington tribes while he was affiliated with Sixkiller Consulting, also of Washington, D.C. (*Id*., Ex. N.) In late 2017 or early 2018, Casey Sixkiller, the principal of Sixkiller Consulting, returned to Seattle to become the Chief Operating Officer for King County Executive Dow Constantine. (*Id*.) In light of Mr. Sixkiller's departure, Clause set up Clause Law, PLLC, and all of Sixkiller Consulting's tribal clients were slated to transition to his new firm. (*Id*.) Lawyers within KTS' Native American Practice Group convened a meeting to discuss "poaching" Sixkiller/Clause's tribal clients, as confirmed to Mr. Clause by a confidant within KTS who warned of the plan, albeit without any ability to stop it.[6] (*Id*.)

2. Interfering with Tribal Representation in Wyoming.

In July of 2019, KTS attorneys, including Native American Practice Group Chair, Keith Harper, filed suit in Wyoming against the Northern Arapaho Tribe's longtime lawyers, Baldwin Crocker & Rudd, P.C. ("BCR") (Galanda Decl. ¶¶ 33-34.) In a social media post preceding the filing, Harper claimed that BCR "refuses to return the documents belonging to an Indian Tribal client and then refusing to provide an accounting of funds the firm has held." (*Id*., Ex. O.) This claim, like the charges levied by Defendants against GB relating to the Nisqually Tribe, were precipitated by an "investigation" that resulted in the incumbent law firm being terminated as general outside counsel and being replaced by KTS. (*Id*., Ex. P.) In another similarity to this case, Mr. Harper made a presentation to the Northern Arapaho

[6] GB propounded seven discovery requests to Defendants seeking information regarding the "poaching" meeting, but Defendants objected that each request "appears to be an improper fishing expedition" and the information sought is "protected by the attorney-client, work product, or other applicable privilege." (Galanda Decl. ¶ 32.) There is no conceivable privilege that attaches to such an internal meeting regarding the possibility of "poaching" non-client tribes from another firm.

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Business Council, wherein he disparaged BCR. (*Id*., Ex. Q.) Notably, KTS' lawsuit against BCR was met with a Motion For Sanctions against KTS, which was granted on July 1, 2020. (*Id*., Exs. S and T.)

Separate and apart from KTS' failed attack on the BCR firm, KTS is also being sued for tortious interference arising from its efforts to unlawfully usurp control over the Northern Arapaho Tribe, its Northern Arapaho Business Council, and its federally-enabled gaming operations. (Galanda Decl., ¶ 35, Ex. U.)

3. Examples of Local Interference Practices Involving Defendants.

GB is not the first local law firm to grieve Defendants' unethical practices in Indian Country, particularly those of Smith. For example, on February 20, 2018, David Smith of Garvey Schubert & Barer ("GSB") (now of Summit Law Group) wrote to KTS' national Managing Partner to detail certain unethical practices attributed to Smith towards a joint client of GB and GSB, Carolyn Lubenau, the former Chairwoman of the Snoqualmie Indian Tribe. (Galanda Decl., ¶ 37; Ex. W.) In short, Smith had given legal advice to Ms. Lubenau that proved to be incorrect, but recused himself from the representation rather than acknowledge that his incorrect advice had exposed his client to legal liability. (*Id*.) Mr. Smith wrote: "If Mr. Smith had fully acknowledged the advice he gave to Ms. Frelinger on June 7, 2016, no charges would have been brought against either defendant. Instead, he told half-truths and failed to acknowledge that he specifically approved [a tribal resolution]. These actions were unethical and give rise to tort liability under tribal and Washington State law." (*Id*.)

In addition, in September of 2019, GB learned that Smith and Saimons would soon be replacing Tom Nedderman of Floyd Pflueger & Ringer PS as defense counsel for Mr. Dodge in *George Adams, et al., v. Raymond Dodge, et al.*, Case No. 19-2-01552-37 (Whatcom Super. Ct.). (Galanda Decl., ¶ 36; Ex. V.) Mr. Nedderman conveyed Gabe Galanda that he felt blindsided by Smith, who orchestrated his termination by his Nooksack clients, including Mr. Dodge. (*Id*.) Mr. Nedderman also conveyed that Smith did not behave respectfully or collegially in the course of the withdrawal and substitution process. (*Id*.)

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IV. STATEMENT OF ISSUES

1. Whether GB has carried its burden of proof on its claim that Defendants intentional interfered with GB's contractual relations? Yes.

2. Whether GB has carried its burden of proof on its claim that Defendants violated the Washington State Consumer Protection Act? Yes.

3. Whether (a) this action is an improper collateral attack on the Tribe's decision to terminate GB's Services Agreement; and (b) the Court lacks subject matter jurisdiction because the Tribe has not waived its sovereign immunity? No, no.

V. ARGUMENT

A. Legal Standard on Summary Judgment.

"Summary judgment is only appropriate when 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007) (quoting CR 56(c)). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party." *Id*. at 552. "The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment." *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Once the moving party carries its burden, "the burden shift[s] to the nonmoving party to set forth facts showing that there is a genuine issue of material fact." *Id*. at 915.

B. GB's Claim for Intentional Interference with Contractual is Supported by Competent, Admissible Evidence.

GB asserts Defendants intentionally interfered with its Services Agreements with the Tribe. This claim requires proof of: (1) the existence of a valid contractual relationship; (2) knowledge of the contractual relationship on the part of the interferor; (3) intentional

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interference inducing or causing a breach or termination of the contractual relationship; (4) defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *See Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342 (2006). Here, Defendants are only claiming that GB cannot prove the third, fourth, and fifth elements of the claim. As discussed below, each of these elements is supported by ample evidence that needs to be heard and resolved by the jury.

1. Defendants Interfered with GB's Services Agreement with the Tribe.

Defendants claim GB cannot show that Defendants acted intentionally to interfere with the Services Agreement because the written report issued by Defendants on November 13, 2018 was a privileged communication. (Motion, 11:24-13:2.) However, the investigative report did not exist in isolation. Defendants' purpose was to investigate Colegrove and "[i]f necessary, file criminal or civil charges based on the direction of the Tribal Council." No criminal or civil charges were filed, so it is apparent that the resulting bar complaint—which reiterates the false claim that GB acted improperly vis-à-vis the severance agreement—was a direct product of Defendants' investigation. The testimony from Councilmembers Frank III, McCloud, and Squally confirm that both the bar complaint and the termination of GB's Services Agreement were the products of Defendants' investigation, and Smith admits to drafting at least part of the bar complaint. In this context, the non-privileged bar complaint and the testimony from the Councilmembers is circumstantial, but no less compelling, evidence that Defendants' actions interfered with GB's Services Agreement.[7] *See Scrivener v. Clark Coll.*, 181 Wn. 2d 439, 445, 334 P.3d 541, 545 (2014) ("This is a burden of production [on summary judgment], not persuasion, and may be proved through direct or circumstantial evidence."); *see also* WPI 1.03 ("The term 'circumstantial evidence' refers to evidence from

[7] Had the investigative report been *lost* rather than privileged, GB would not be foreclosed from using circumstantial evidence to show that Defendants' intentional acts interfered with GB's Services Agreement. In that scenario, the indirect evidence would be the same as presented here, namely the sworn statements of the Councilmembers who heard and/or reviewed Defendants' report and the bar complaint which was intended to encapsulate the findings against Colegrove that also implicate GB.

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which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.")

For purposes of summary judgment, GB has carried its burden of proof as to whether GB acted intentionally in a way that interfered with GB's Services Agreement. As discussed below, Defendants actions were neither honest nor done in good faith, which means they also lacked proper means or purpose.

2. Defendants Used Improper Means and Acted with an Improper Purpose.

Where interference is alleged to have occurred in connection with the delivery of advice, the plaintiff's burden of proof is to show that "the advice was rendered dishonestly or in bad faith[.]" *Havsy v. Flynn*, 88 Wn. App. 514, 520, 945 P.2d 221, 224 (1997), as amended on reconsideration (Oct. 17, 1997) (citing Restatement (Second) of Torts § 772); *see also Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 509, 31 P.3d 698, 702 (2001), publication ordered (Sept. 12, 2001). Whether a party has acted in bad faith or dishonestly will generally be an issue of fact. *Koch* at 509; *see also Galactic Ventures*, LLC v. King Cty., No. C05-1054-RSM, 2006 WL 1587415, at *3 (W.D. Wash. June 7, 2006) (denying motion for summary judgment where plaintiff raised an issue of material fact as to whether defendant interfered for an improper purpose or through improper means).

Here, there is ample evidence Defendants did not act in good faith or with honesty when reporting alleged ethical misconduct by GB. Among other proof, Defendants applied for and then continued in the special prosecutor role despite a clear conflict of interest involving Colegrove and GB; Defendants could have interviewed Colegrove and GB to investigate any alleged improprieties relating to her severance but they declined to do so; and Defendants continued to represent the Tribe in unrelated matters (for which Defendants were well compensated) after the investigation, thereby taking revenue that would have gone to GB had the Services Agreement not be wrongfully terminated. Unlike *Koch*, where there was no evidence touching upon the alleged tortfeasor's good or bad faith, a reasonable juror could view these circumstances and properly conclude that Defendants used improper means and

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had an improper purpose when smearing GB in connection with the investigation. These are questions of fact that must be decided by the jury. *See Yuille v. State Dep't of Soc. & Health Servs.*, 111 Wn. App. 527, 533, 45 P.3d 1107, 1111 (2002) ("Good faith is wholly a question of fact.").[8]

In apparent recognition that disputes over motive and purposes cannot be resolved at summary judgment, Defendants try to foreclose the issue by citing to the June 7, 2019 letter sent by the Tribe's latest legal director, Nate Cushman, to the GB's counsel disclaiming a connection between Defendants' investigation and the termination of GB's Services Agreement. However, as noted above, three Councilmembers have attested that Defendants' investigation led directly to the termination of GB's Services Agreement and Councilmember Squally has confirmed that Mr. Cushman was not authorize to send the aforementioned letter, which was not approved by the Tribal Council. In this context, there are clear disputed issues of material fact that must be resolved by the jury at trial.

For all of these reasons, the Court should deny summary judgment as it relates to Defendants' improper means and purpose when interfering with GB's Services Agreement.

3. Defendants' Actions Caused Clear and Specific Harm to GB.

Defendants claim GB has not carried its burden of proof as it relates to its damages. Specifically, Defendants point to the noncontroversial premises that clients can fire their attorneys at any time and could terminate the Services Agreement at any time for any reason. (Motion, 16:5-22.) However, Defendants overlook that Washington courts routinely permit interference claims arising from the termination of at-will and terminable-at-will contracts. *See Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 323, 692 P.2d 903 (1984) (holding

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[8] *See also Saunders v. Meyers*, 175 Wn. App. 427, 306 P.3d 978 (2013) ("intent is a question of fact"); *State v. Kealey*, 92 Wn. App. 1056 (1998) ("subjective state of mind is a question of fact"); *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133, 137 (1991) (state of mind "is a question of fact because rather than involving a general policy or rule of law, it involves the state of mind of a specific person. . . at a specific time. . . in a specific case."); *Reymore v. Tharp*, 16 Wn. App. 150, 153, 553 P.2d 456, 458 (1976) (state of mind is a question of fact).

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that a third party could tortiously interfere with contract terminable at will); *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 140, 566 P.2d 972 (1977) ("[T]he fact that a party's terminable at will contract is ended in accordance with its terms does not defeat that party's claim for damages caused by unjustifiable interference, for the wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have continued in effect.") (quotation omitted); *Awana v. Port of Seattle*, 121 Wn. App. 429, 436, 89 P.3d 291 (2004) (at-will employees do have a claim for interference against a third party that encourages termination of their employment); *Eserhut v. Heister*, 52 Wn. App. 515, 519 n. 4, 762 P.2d 6 (1988), rev'd on other grounds, 62 Wn. App. 10, 812 P.2d 902 (1991) ("A contract that is terminable at will is, until terminated, valid and subsisting, and the defendant may not interfere with it.").

GB has shown that it received average annual revenues of approximately $121,000 during the three years that the Services Agreements were in place. Had Defendants not brought about the unnecessary termination of the Services Agreement, GB had a reasonable expectation that it would have earned similar revenue in the coming years—including at least the amounts that Defendants received after interfering and taking over GB's work for the Tribe. This is sufficient proof of damages to overcome summary judgment.

C. GB's Claim for Violations of the Consumer Protection Act is Supported by Admissible, Competent Evidence.

Defendants' actions also violate the Consumer Protection Act ("CPA"), which prohibits unfair or deceptive business practices. These claims are analyzed in view of the five elements of *Hangman Ridge Training Stables, v. Safeco*, 105 Wn.2d 778, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice; (2) caused by the defendant; (3) that occurred in trade or commerce; (4) which impacted public interest; (5) and caused injury to plaintiff in her or her business or property. *Id*. at 780. Defendants challenge GB's proof on multiple elements of the CPA claim, but each attack falls short. As discussed below, the Court should deny summary judgment.

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1. Defendants Engaged in Unfair and Deceptive Acts and Practices.

The CPA does not define "unfair" or "deceptive." Instead, courts have developed standards on a case-by-case basis. *Ivan's Tire Service v. Goodyear Tire*, 10 Wn. App. 110, 517 P.2d 229 (1973). As the Washington Supreme Court has explained. Washington courts have "allowed the definitions [of unfair or deceptive acts or practices] to evolve through a gradual process of judicial inclusion and exclusion." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179 (2013). "In the final analysis, the interpretation of RCW 19.8.020 is left to the state courts." *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972) (internal citations omitted). Accordingly, whether an act is unfair or deceptive for purposes of the CPA is a question of law for the Court. *See Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775. 786, 336 P.3d 1142 (2014); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

With respect to deceptive acts or practices, Washington courts have concluded that there are several routes a court can take when determining if a defendant's conduct is deceptive. Blatant fake misrepresentations that result in actual deception are obviously deceptive, although actual deception is not required, only the capacity to deceive. *Hangman*, supra, 105 Wn.2d at 785. A truthful statement "may be deceptive by virtue of the 'net impression' it conveys." *Panag*, 166 Wn.2d at 50. Acts or practices are also unfair or deceptive when the Legislature declares that a violation of a particular statute constitutes a violation of the CPA. *Hangman Midge*, 105 Wn.2d at 786. As relevant here, the Washington Rules of Professional Conduct ("RPC") place clear guardrails around conduct that is unfair or deceptive in connection with attorney-client relationships. For example, RPC 4.4(a) prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. Comment 1 to this Rule states as follows:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. *It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer*

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relationship.

RPC 4.4, Comment 1 (emphasis added). Similarly, RPC 2.1 requires a lawyer to render candid advice, and RPC 8.4 prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. These Rules, both individually and collectively, reinforce that an attorney must use honesty when engaging with clients and third parties and refrain from deceit or misrepresentation—either affirmatively or through omission.

Defendants did not deal with the Tribal Council or GB with honesty or good faith as it related to the special investigation. Absent such good faith and honesty, no privilege or immunity is afforded their statements and actions.[9] Defendants ignored clear conflicts of interest and they shared demonstrably false findings with the Tribal Council (as reflected by the feedback from the above-referenced Tribal Councilmembers and the non-privileged bar complaint) without making any effort to substantiate these claims. On their face, these were unfair and deceptive practices as contemplated by the CPA.

2. Defendants' Actions Occurred in "Trade or Commerce."

Defendants claim GB's allegations do not implicate "trade or commerce," as required to establish a CPA violation. (Motion, 19:22-21:2.) Defendants depict GB's claim as being limited to performing a shoddy investigation on behalf of the Tribe (*i.e.*, an offense addressable with negligence or malpractice claims), which they characterize as being non-entrepreneurial and therefore excluded from the CPA. Defendants are wrong. "Trade or

[9] Defendants cite to *McNamara v. Koehler*, 429 P.3d 6, 13 (Wn. Ct. App. 2018), review denied, 192 Wn. 2d 1021, 433 P.3d 816 (2019) for the proposition that privileged statement do not constitute unfair or deceptive acts. In *McNamara*, the Court found that statements on the defendant law firm's website were accurate or a fair abridgement in wrongful death plaintiffs' original complaint, and therefore protected under the fair report privilege. Here, Plaintiff is entitled to no such privilege, but even if they were, the privilege is conditioned on good faith conduct and the delivery of "honest advice." *Koch*, *supra*, 108 Wn. App. at 506. Moreover, the functions of a Tribal Counsel are neither judicial not quasi-judicial, and Defendants' reliance on *Twelker v. Shannon & Wilson, Inc*., 88 Wn.2d 473, 477, 564 P.2d 1131 (1977) to establish "absolute privilege" is simply wrong.

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commerce" extends to the way a law firm obtains, retains, and dismisses clients. *Short v. Demopolis*, 103 Wn. 2d 52, 61, 691 P.2d 163, 168 (1984). Here, Defendants misused their position as a special prosecutor to bring about the unnecessary and unwarranted termination of GB's Services Agreement, and then Defendants took over new assignments and engagements that would have flowed to GB but-for Defendants' unfair and deceptive practices. Defendants' actions fit squarely within the scope of misconduct that is addressable under the CPA.

3. Defendants' Actions Affect the Public Interest.

Defendants dispute that GB's allegations of misconduct affect the public interest, but the evidence here is substantial that Defendants' unfair and deceptive tactics are part of a pattern or generalized course of conduct. The likelihood that additional plaintiffs have been or will be injured in the same fashion can change a factual pattern from a private dispute to one that affects the public interest. *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984). An act or practice impacts the public interest when (1) it is part of a pattern or generalized course of conduct, and (2) there is a real and substantial potential for repetition of the defendant's conduct after the act involving plaintiff. *Eifler v. Shurgard Capital Management Corp*., 71 Wn. App. 684, 697, 861 P.2d 1071 (1993); *see also* RCW 19.86.093 ("In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons. RCW 19.86.093.

As detailed above, Defendants have demonstrated a disturbing pattern of interfering with existing attorney-client relationships between Native American tribes and their outside counsel and lobbyists, often by using the pretext of an investigation to spread misinformation and discord that negatively impacts the incumbent law firm. These unfair and deceptive practices have caused harm to GB with regard to the Nisqually Indian Tribe; to the BCR law firm in Wyoming with regard to the Northern Arapaho Indian Tribe; to Floyd, Pflueger &

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Ringer in Washington with regard to members of the Nooksack Indian Tribe; and to Josh Clause in Washington, D.C. as it related to the extensive roster of Native American lobbying clients held by Sixkiller Consulting. These are not isolated incidents and they establish both that Defendants' practices injure other persons and have the capacity to injure other persons. For these reasons, summary judgment should be denied as to the public interest element.

4. GB Has Suffered Obvious Injury to Its Business and Property.

Defendants claim their unfair and deceptive practices have not caused injury to GB's business and property. This is clearly not accurate. GB has experienced quantifiable losses of revenue due to the termination of the Services Agreement, which includes the fees paid to Defendants for the matters that would have been handled by GB but-for Defendants' interference. Moreover, GB has suffered injury and loss to its reputation and goodwill within the Nisqually Tribal community due to Defendants' false and deceptive practices. In the CPA context, monetary damages need not be proved; unquantifiable damages may suffice. *Nordstrom, Inc. v. Tampourlos,* 107 Wn. 2d 735, 740, 733 P.2d 208, 211 (1987) (loss of goodwill); *Nw. Airlines, Inc. v. Ticket Exch., Inc.*, 793 F.Supp. 976 (W.D. Wash., 1992) (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 312–13, 858 P.2d 1054 (1993) (damage to professional reputation). For these reasons, summary judgment should be denied as to the injury element.

5. Proximate Causation Has Been Established.

Defendants also taking a passing shot at GB's ability to show that Defendants' unfair and deceptive practices proximately caused injury. As noted above, three current Councilmembers have confirmed under oath that the Tribal Council terminated GB's Services Agreement as a direct result of Defendants' investigation. This is direct evidence that is more than sufficient to satisfy GB's burden of proof of causation. By disputing the testimony of the Councilmembers, Defendants have highlighted a disputed issue of material fact that can only

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be resolved by the jury at trial. *Hartley v. State*, 103 Wn. 2d 768, 778, 698 P.2d 77, 83 (1985) ("As a determination of what actually occurred, cause in fact is generally left to the jury. As we discussed above, such questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible.")

D. GB's Claims are Not Precluded by Sovereign Immunity.

Defendants' final argument is that GB commenced this lawsuit as a collateral attack on the Tribe's termination of the Services Agreement, and it must be dismissed because the Tribe has not waived sovereign immunity. As a preliminary matter, GB has never taken the position that the Tribe acted improperly by terminating the Services Agreement; rather, the Tribal Council was misled by Defendants who acted with an improper purpose and means.

Fundamentally, Defendants' argument regarding sovereign immunity is legally baseless. This is a tort and unfair trade practices case by a private party against three other private parties under state law. This is not a case that challenges "the actions taken by the Tribe," as Defendants contend; it challenges the tortious and deceptive actions taken by Defendants. (Motion, at 23.) Defendants claim their misbehavior is beyond this Court's review because "sovereign immunity bars the exercise of state court jurisdiction." *Id*., at 24. In *Auto. United Trades Org. v. State*, the Washington State Supreme Court rejected similar arguments that a lawsuit by a private party against the state required dismissal due to non-party tribal sovereign immunity. 175 Wn.2d 214, 235, 285 P.3d 52 (2012). The Court reasoned: "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State. An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal." *Id*. at 233. Likewise, Defendants cannot wield the Tribe's immunity as a shield to their own liability, and any concerns the Court may have about the Tribe's rights or interests[10] do not warrant dismissal. *Id*. As this Court has

[10] Defendants miscite *Wright v. Colville Tribal Enterprise Corp*., 159 Wn.2d 108, 112, 147 P.3d 1275 (2006) for the proposition that "State courts have no jurisdiction over disputes where its involvement would infringe on an Indian tribe's right of self-governance." Although the Supreme Court affirmed tribal corporate sovereign

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already ruled, any such concerns can be addressed in *limine*, immediately prior to Plaintiff's case being presented to the jury.

VI. CONCLUSION

Defendants have failed to establish any grounds for the dismissal of GB's claims for intentional interference and violations of the CPA. For all of these reasons, the Court should deny Defendants' Motion for Summary Judgment in its entirety.

DATED: August 4, 2020

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I certify that this memorandum contains 8,145 words, in compliance with the Local Civil Rules.

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immunity, it was not as a matter of tribal "self-governance." *See id*., at 115-116. Further, Defendants cannot point to any Nisqually law or right that Plaintiffs' state law claims "infringe." Motion, at 24-25. Indeed, state laws—such as those at bar, most notably the CPA—have no bearing upon the Tribe. *Humes v. Fritz Cos., Inc.*, 125 Wash. App. 477, 490, 105 P.3d 1000 (2005) (citing *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on Indian lands . . ."). If the Tribe had concerns about its rights or interests being infringed, the Court can be sure its Tribal Council would have chosen to do something other than "stay out of it." (Galanda Decl. ¶ 30.)