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 12 *Quechan Tribe of the Fort Yuma Indian*
 13 *Reservation, Keeny Escalanti, Sr., and*
 14 *Mark William White II*

15 **IN THE UNITED STATES DISTRICT COURT**
 16 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

17 WILLIAMS & COCHRANE, LLP; and
 18 FRANCISCO AGUILAR, MILO
 19 BARLEY, GLORIA COSTA, GEORGE
 20 DECORSE, SALLY DECORSE, et al., on
 21 behalf of themselves and all those similarly
 22 situated;

23 (All 28 Individuals Listed in ¶ 13)

24 Plaintiffs,

25 v.

26 QUECHAN TRIBE OF THE FORT
 27 YUMA INDIAN RESERVATION, a
 28 federally-recognized Indian tribe;
 ROBERT ROSETTE; ROSETTE &
 ASSOCIATES, PC; ROSETTE, LLP;
 RICHARD ARMSTRONG; KEENY
 ESCALANTI, SR.; MARK WILLIAM
 WHITE II a/k/a WILLIE WHITE; and
 DOES 1 THROUGH 10,

Defendants.

CASE NO.: 17-cv-01436-GPC-MDD

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF DEFENDANTS’
 MOTION TO DISQUALIFY
 WILLIAMS & COCHRANE, LLP**

Judge: Hon. Gonzalo P. Curiel

Courtroom: 2D

Date: June 8, 2018

Time: 1:30 p.m.

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California Rule of Professional Conduct 3-310(E)2

1 **INTRODUCTION AND BACKGROUND**

2 Williams & Cochrane, LLP (“W&C”) is using confidential information from its
3 former client, the Quechan Tribe of the Fort Yuma Indian Reservation (“Tribe”) in
4 this lawsuit, in which W&C is representing itself and certain individual Tribe
5 members. This lawsuit is substantially related to W&C’s prior representation of the
6 Tribe. As a result, this is a clear-cut violation of the California Rules of Professional
7 Conduct and W&C should be disqualified from representing the individual Tribe
8 members.

9 W&C represented the Tribe in gaming compact negotiations with the State of
10 California. The Tribe replaced W&C with Rosette, LLP (“Rosette”) in June 2017 to
11 conclude those negotiations. W&C attempted to initiate the present lawsuit in July
12 2017. *See* Docket Nos. 1-3, naming the Tribe, Rosette, and other defendants in a wide
13 array of contract and tort claims centered in large part on the replacement of W&C
14 with Rosette. *Id.*

15 In its First Amended Complaint (“FAC”), W&C abandoned the state-law tort
16 claims it alleged in prior complaints but continued to assert breach of contract, breach
17 of the covenant of good faith and fair dealing, and promissory estoppel claims against
18 the Tribe. The FAC also asserts a malpractice claim against Rosette on behalf of
19 individual Tribe members. This malpractice claim, in which W&C purportedly
20 represents the individual Tribe members, is based on the notion that Rosette was
21 negligent in its work relating to the negotiation of the Tribe’s gaming compact. FAC
22 ¶ 302. The Tribe members contend that the compact ultimately negotiated by Rosette
23 was inferior to the last draft negotiated by W&C. *Id.*

24 Specifically, according to the FAC, the State “hoped to back away from the deal
25 it agreed to, and may have if Williams & Cochrane did not turn over the latest draft of
26 the compact.” *Id.* But, according to W&C, the State still backtracked in the
27 negotiations, and “rather than having a concluded compact through Williams &
28

1 Cochran, Quechan instead ended up with various alleged inferior terms, including a
2 “\$2,000,000 liability” and a “slew of ancillary concessions.” *Id.*¹

3 As a result, the malpractice claim is a direct comparison between the terms of
4 the compact W&C claims they negotiated on behalf of the Tribe, and the final terms
5 of the compact negotiated by Rosette and agreed to by the Tribe’s Tribal Council. *Id.*
6 This direct relationship between W&C’s representation of the Tribe and the claims
7 W&C now purports to bring on behalf of certain individual Tribe members—in the
8 same case where W&C is suing the Tribe—violates the California Rules of
9 Professional Conduct. *See* California Rule of Professional Conduct 3-310(E).

10 ***First***, there is no question that W&C is using the Tribe’s confidential
11 information in this lawsuit. It admits it is doing so: In footnote two of the FAC (page
12 1), W&C argues that it is entitled to not only use, but disclose, the Tribe’s confidential
13 information to allege claims against the Tribe. Even assuming for argument’s sake
14 here that W&C is able to disclose the Tribe’s confidential information in connection
15 with a fee dispute, the use of the Tribe’s confidential information in connection with
16 the individual Tribe members’ claims is grounds for disqualification. *Henriksen v.*
17 *Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 114 (1992) (there was no need to
18 “dwell on the elements of the ‘substantial relationship’ test” because there was no
19
20

21 ¹ In reality, W&C’s allegations are false; the State was not prepared to sign the
22 compact at the point in time when W&C was terminated by the Tribe. *See* Motion to
23 Dismiss, Argument, Section II; *see also* Rosette Defendants’ Memorandum in Support
24 of Special Motion to Strike, sections II, III.B. Nor was the “\$2,000,000 liability” a
25 new demand by the State. *See id.*, section III.B.2. In fact, when W&C was
26 terminated, the Tribe was still facing a \$4,000,000 liability to the State. *See id.* While
27 W&C had not addressed the issue at all in its negotiations, Rosette was able to settle
28 the Tribe’s \$4,000,000 debt to the State for half the outstanding amount, to be paid
over time, and offset by credits for money spent by the Tribe on social welfare
projects in and around the reservation. *See id.*; *see also* FAC Ex. 41, § 5.3 Provisions
for Credits. It is a fantastic deal for the Tribe, not a basis for a malpractice suit.

1 dispute that the attorney in fact acquired confidential information during his former
2 representation of respondents).

3 **Second**, even if W&C’s use of the Tribe’s confidential information was not
4 clear, it should still be disqualified from representing the individual Tribe members in
5 their purported malpractice claim against Rosette.

6 The rules regarding successive representation of clients with adverse
7 interests focus on an attorney’s duty of confidentiality. If an attorney
8 undertakes to represent a client adverse to a former client without
9 obtaining informed consent, the former client may disqualify the attorney
10 by showing a “substantial relationship” between the subjects of the prior
11 and current representations. This protects the enduring duty to preserve
12 client confidences that survives the termination of the attorney’s
13 representation. When a substantial relationship between the
14 representations is established, the attorney is automatically disqualified
15 from representing the second client.

16 *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1080-81 (C.D.
17 Cal. 2015) (citing *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283 (1994); *In re Charlisse C.*,
18 45 Cal. 4th 145, 166 n. 11 (2008); *City & Cnty. of San Francisco v. Cobra Sols., Inc.*,
19 38 Cal.4th 839, 846 (2006)).

20 There is no question that the matters are substantially related. Nor is there a
21 dispute about adversity: Rosette continues to represent the Tribe in other matters;
22 W&C is suing not only the Tribe itself, but also President Escalanti, who signed the
23 allegedly inferior compact; the Tribal Councilmembers who approved the compact are
24 unchanged; and at least several of W&C’s new individual Tribe member clients are
25 trying to recall certain Tribal Councilmembers (so that they take the positions for
26 themselves). W&C must be disqualified from representing the individual Tribe
27 members in this action.
28

1 **ARGUMENT**

2 The rules regarding successive representation of clients with adverse interests
 3 focus on an attorney’s duty of confidentiality. If an attorney undertakes to represent a
 4 client adverse to a former client without obtaining informed consent, the former client
 5 may disqualify the attorney by showing a “substantial relationship” between the
 6 subjects of the prior and current representations. *Flatt*, 9 Cal. 4th at 283; *In re*
 7 *Charlisse C.*, 45 Cal. 4th at 166 n. 11. This protects the enduring duty to preserve
 8 client confidences that survives the termination of the attorney's representation. *City*
 9 *& Cnty. of San Francisco*, 38 Cal. 4th at 846. When a substantial relationship
 10 between the representations is established, the attorney is automatically disqualified
 11 from representing the second client. *Id.*

12 **I. W&C SHOULD BE DISQUALIFIED FROM REPRESENTING TRIBE**
 13 **MEMBERS IN THEIR MALPRACTICE CLAIM AGAINST ROSETTE**
 14 **BECAUSE W&C IS REPRESENTING PARTIES WITH ADVERSE**
 15 **INTERESTS TO THE TRIBE IN A SUBSTANTIALLY RELATED**
 16 **MATTER**

17 **A. W&C Represented The Tribe In Negotiating A Gaming Compact**
 18 **With the State.**

19 W&C and the Tribe entered into the “Fee Agreement,” attached to W&C’s FAC
 20 as Exhibit 2. That Fee Agreement (Section 2) provides:

21 Client hires Firm to provide legal services in the following matter: legal
 22 advice and any litigation services necessary for the purposes of reducing
 23 Client’s payments under its tribal/State gaming compact with the State of
 24 California and seeking return of payments made under such agreement.

25 W&C alleges that it performed substantial work on drafting and negotiating the
 26 gaming compact from late 2016 to June 2017. FAC ¶¶ 87-109. Ultimately, W&C
 27 worked for the Tribe for approximately eight months, but was unable to obtain a
 28 finally-approved executed compact. Nor did it ever obtain any “return of payments
 made under” the Tribe’s prior gaming compact. Nonetheless, the Tribe paid W&C
 \$400,000 in fees. Doc. No. 29-2 (Escalanti Decl. ¶ 18); Doc. No. 29-3 (White Decl. ¶

1 18). Thus, after paying W&C's inflated flat fee for months only to arrive at what are
2 fairly standard gaming compact terms, and with W&C conceding they needed outside
3 help from a lobbyist to get the job done, the Tribe retained Rosette to finish the job.
4 The Tribe terminated W&C's representation pursuant to the Fee Agreement on June
5 26, 2017. FAC Ex. 4.

6 **B. W&C Is Representing Parties With Adverse Interests To The Tribe**
7 **And W&C Did Not Obtain the Tribe's Informed Written Consent**

8 To evaluate whether an attorney should be disqualified in cases of successive
9 representations, adverse interests are defined broadly and are not limited to a situation
10 in which an attorney's former and current employment are on opposite sides of the
11 same matter. *See Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* 36 Cal. App. 4th
12 1832, 1843 (Ct. App. 1995) (prohibiting representation where former client is
13 adversely affected by outcome, even if former client is not a party to the litigation);
14 *see also Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, 124 Cal. App. 4th 594,
15 603 (Ct. App. 2004).

16 Here, W&C represents a handful of individual Tribe members bringing a
17 negligence claim against the Rosette Defendants in the pending litigation—which
18 necessarily implicates a number of interests adverse to the Tribe.

19 **First**, the Tribe is directly adverse to W&C in this litigation. *See id.*

20 **Second**, adverse interests include where a current matter involves the work the
21 attorney performed for the former client. *See Brand*, 124 Cal. App. 4th at 603.

22 W&C's representation of the individual Tribe members necessarily implicates work
23 that W&C previously performed for the Tribe. The crux of the malpractice claim
24 against the Rosette Defendants is that they obtained a materially worse deal for the
25 Tribe than W&C purportedly would have obtained.

26 **Third**, the malpractice claim is adverse to the Tribe and the Tribal
27 Councilmembers, including President Escalanti and Councilman White, who are
28

1 Defendants in this case. The individual Tribe members (falsely) allege that the Tribal
2 Council did not have the authority to hire Rosette and claim that the Tribal
3 Councilmembers are improperly coordinating with Mr. Rosette. FAC ¶ 299(e); *see*
4 *also id.* FAC ¶¶ 233-235; FAC Ex. 39. The malpractice claim relies on these
5 allegations, therefore implicating the adversity among the individual Tribe members
6 and the current Tribal Council, who acts on behalf of the Tribe and is specifically
7 charged with managing the Tribe’s legal affairs. FAC Ex. 39. Moreover, the Tribe
8 itself is the rightful party to bring any malpractice claim against the Rosette
9 Defendants, not these individual Tribe members. Their attempt to bring the claim
10 seeks to usurp the right of the Tribal Council to do so on behalf of the Tribe and
11 further illustrates the adversity among the parties.

12 But the adversity between the individual Tribe members and the sitting Tribal
13 Council runs much deeper. As W&C and the individual Tribe members allege, “six of
14 the seven persons” on the Tribal Council were subject to recall elections in 2017 and
15 2018. *See, e.g.*, FAC ¶ 235. Those recall elections were spearheaded by at least one
16 named plaintiff W&C now represents. FAC Ex. 48 (writing that named plaintiff Sally
17 DeCorse filed recall petitions again six of seven Tribal Council members, and another
18 set of recall petitions in January 2018). Indeed, the “political turmoil” that W&C and
19 the individual Tribe members allege in the FAC is in large part an apparent problem
20 that at least several of the individual Tribe members have with the current sitting
21 Tribal Council. *See, e.g.*, FAC ¶¶ 95-97. Former Vice-President Michael Jack, for
22 example, who “stepped down” from his position in the midst of the purported
23 “turmoil” is a named plaintiff here. *Id.* This malpractice claim is an attempt to
24 impugn the Tribal Council’s management of the Tribe’s legal affairs, is motivated by
25 the political agenda of at least several of the individual Tribe members, and is directly
26 adverse to the Tribe and the Tribal Council, including President Escalanti, and
27 Councilman White.

1 **Finally**, W&C does not allege anywhere in the FAC that it obtained the Tribe’s
2 informed written consent to undertake representation adverse to it. It did not.

3 **C. The Matters Are Substantially Related.**

4 Whether two representations are substantially related depends upon the factual
5 and legal similarities of the representations. *W. Sugar Coop.*, 98 F. Supp. 3d at 1087
6 (substantial relationship test does not require an exact match between facts and issues
7 involved in the two representations). A “substantial relationship” exists when (1) the
8 attorney had a direct relationship with the former client and (2) that relationship
9 touched on issues related to the present litigation. *Id.* at 1081; *see also id.* at 1087-88
10 (finding substantial relationship existed where two representations were related to
11 whether the characterization of sugar as “natural” was false or misleading); *see also*
12 *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 713 (2003) (Two
13 representations are substantially related if “information material to the evaluation,
14 prosecution, settlement or accomplishment of the former representation given its
15 factual and legal issues is material, to the evaluation, prosecution settlement or
16 accomplishment of the current representation given its factual and legal issues.”).
17 Here, there is no credible dispute that the matters are substantially related.

18 **1. W&C Directly Represented the Tribe in Gaming Compact**
19 **Negotiations with the State.**

20 A relationship between an attorney and a former client is direct “where the
21 lawyer was personally involved in providing legal advice and services to the former
22 client.” *Jessen*, 111 Cal. App. 4th at 709. As discussed above, W&C unquestionably
23 had a “direct” relationship with the Tribe, its former client, and worked directly with
24 the current Tribal Council, including President Escalanti. *See, e.g.*, FAC ¶¶ 86-94, 98.
25 As alleged in the FAC, W&C was engaged by the Tribe in September 2016 to
26 represent and provide legal advice to the Tribe in its gaming compact negotiations
27 with the State of California and/or potential related litigation. FAC Ex. 2. W&C
28

1 represented the Tribe from October 2016 to June 2017 pursuant to the parties’ Fee
2 Agreement. FAC ¶ 3.

3 **2. W&C’s Representation of Tribe Members Relies on a**
4 **Comparison of Its Representation of the Tribe in Gaming**
5 **Compact Negotiations and Rosette’s.**

6 W&C is now representing certain individual Tribe members asserting
7 negligence and breach of fiduciary duty (collectively, the “malpractice claim”) against
8 the Rosette Defendants. The basis for this claim is that, in essence, Rosette negotiated
9 a much worse deal for the Tribe than W&C had negotiated prior to its termination.
10 False as that contention may be, it is still inherently a comparison of W&C’s work
11 with Rosette’s: “Thus, rather than having a concluded compact through [W&C], [the
12 Tribe] instead ended up with a \$2,000,000 liability, the [] loss of . . . ancillary
13 concessions under the compact, and the costs and liabilities that will accompany
14 defending a largescale federal lawsuit.” FAC ¶ 302; *see also id.* ¶¶ 297-303. In fact,
15 W&C alleges that the “tenor of the negotiations changed” after the Rosette Defendants
16 began to represent the Tribe.

17 As a result, W&C’s representation of the Tribe in gaming compact negotiations
18 with the State “touches on”—and in fact entirely overlaps with—the legal and factual
19 issues related to the malpractice claim against the Rosette Defendants. W&C is
20 therefore presumed to have access to confidential information.

21 Here, however, although the Tribe is entitled to rely on the presumption, it is
22 not necessary. W&C admits it is using the Tribe’s confidential information in this
23 lawsuit. FAC at 1, n.2. Even if W&C were permitted to use such information in a
24 narrow fee dispute with the Tribe, that is not this case. W&C is now trying to
25 represent other clients who claim, in essence, that W&C’s work was better than
26 Rosette’s—in the same case where W&C is admittedly using the Tribe’s confidential
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1 information to further its own claims against the Tribe. Accordingly, W&C must be
2 disqualified from representing the class of individual Tribe members.

3 **CONCLUSION**

4 For the foregoing reasons, the Quechan Defendants respectfully request that the
5 Court disqualify W&C as the individual Tribe members' counsel.

6
7 Dated: April 6, 2018

Respectfully submitted,

8 /s/ Christopher T. Casamassima
9 Christopher T. Casamassima
Rebecca A. Girolamo

10 WILMER CUTLER PICKERING
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12 *Attorneys for Quechan Defendants*
13 *Quechan Tribe of the Fort Yuma Indian*
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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2018, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail address denoted on the electronic Mail Notice List.

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

Executed on April 6, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima