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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

(All 28 Individuals Listed in ¶ 13)

Plaintiffs,

vs.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a 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 100**;

Defendants.

Case No.: 17-CV-01436 GPC MDD

PLAINTIFFS' CONSOLIDATED OPPOSITION TO ROSETTE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6) AND SPECIAL MOTION TO STRIKE PLAINTIFFS' EIGHTH CLAIM FOR RELIEF PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 [DKT. NOS. 52-1, 53-1]

Date: June 8, 2017
Time: 1:30 PM
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Judge: The Honorable Gonzalo P. Curiel

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INTRODUCTION

The Rosette Defendants' motion to dismiss is premised upon the principle that "anything goes" when competing for legal work and that such conduct is immunized no matter how tortious or fraudulent. That is not the law. Although the Rosette Defendants struggle to paint their actions in connection with this matter as innocuous, the detailed and well-pled allegations of the First Amended Complaint reveal otherwise, with the proposed supplemental complaint providing even more support in this regard. Certainly the Quechan Tribe could have changed counsel without breaching its contract with Williams & Cochrane ("Firm"). But it did not. Certainly Mr. Rosette could have represented the Tribe in connection with its amended compact without committing illegal and tortious acts. But he did not. Instead, as alleged in the complaint, Rosette conspired with Mssrs. Escalanti and White to oust Williams & Cochrane from the Tribe only *after* the Firm had performed its end of the bargain and more, through deception, extortion/threats to reputation, false attribution of accomplishments, scheming to set up an illegal payday lending operation using the Tribe as a shield from liability, and a reckless disregard for the interests of the class of Quechan tribal members given his professed ignorance about the state of the negotiations mere weeks before interfering with the representation. The complaint also alleges that those acts follow a nearly eight-year pattern of the Rosette Defendants' efforts to interfere with the Firm's other client relationships, aimed at putting the Firm out of business while typically attempting to defraud such tribal clients with a get-rich (or lose-money) scheme of the moment.

The Rosette Defendants' motion grossly mischaracterizes the allegations within the Complaint; rather than repeat them, the Firm will instead highlight what the complaint actually says: which is that the Firm took on an incredibly difficult situation for the Tribe, miraculously resolved it without the need for litigation, eliminated the revenue sharing payments by December of 2016, continued to push for the best possible deal for the Tribe even after its leadership changed, kept the negotiation process on track while preventing the California Gambling Control Commission from terminating the Tribe's gaming oper-

ation for nonpayment, and accomplished all of this despite the Tribe's failure to pay the Firm's monthly retainer fee for over four months *even though* the Tribe was saving over [redacted] in amended compact payments as a result of the Firm's efforts. The complaint explains how this delicate dance took an incredible amount of effort, strategy, skill, and risk for the Firm, which could have been subjected to enormous financial liability had the Tribe's gaming operation been shut down for nonpayment despite the Firm's best efforts to prevent enforcement actions during the negotiation process. In addition, on top of assuaging the past overpayments, the Firm obtained for the Tribe the right to [redacted], and much more. Thus, the Tribe got an *amazing* remedy that went far beyond what it had requested from the Firm.

The Complaint also alleges that the Tribe communicated [redacted] at the end of June 2017. Had the Tribe actually been dissatisfied with the Firm's progress as it now claims, its leadership would have complained to the Firm, and yet it did not. Had the Firm's fees been problematic, the Tribe's new leadership could have requested to renegotiate them, but it did not. Although completely blindsided by the termination notice the Firm received at the end of June instead, the Firm nonetheless turned over its incalculably valuable work product to an attorney committed to the Firm's demise on the eve of the completion of the engagement. The Tribe only paid the four months' backlog of monthly retainer payments just days before terminating the Firm, but it never paid the fee for June 2016, a month the Firm dedicated to tirelessly winding up the negotiations. Nor did the Tribe pay the promised contingency fee for achieving the desired results or any reasonable fee in lieu thereof. In reality, the Firm's reward for performing under the fee agreement was threatened and actual disparagement of its reputation, actions that were subsequently carried out and continue to occur according to the newly discovered information contained within the contemporaneously-filed First Supplemental Complaint.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) incorporates a minimal notice pleading standard that simply requires the plaintiff to provide a short and plain statement showing an entitlement to relief in order to survive a motion to dismiss. *See ESG Capital Partners, LP v. Stratos,* 828 F.3d 1023, 1032 (9th Cir. 2016). "Specific facts are not necessary; the statement need only 'give the defendants fair notice of what the… claim is and the grounds upon which it rests.'" *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (citation omitted). The general allegations comprising those grounds must only "contain sufficient factual matter accepted as true, to state a claim to relief that is *plausible* on its face (*see O'Brien v. Welty,* 818 F.3d 920, 933 (9th Cir. 2016) (citation omitted)), "such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *See Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011). The term "plausible" usually means something more than just "conceivable" or "possible" (*see Carrero-Ojeda v. Autoridad de Energia Electrica,* 755 F.3d 711, 718 (1st Cir. 2014)), typically looking at whether the alleged matter at issue is "superficially worthy of belief" or "credible." *Mendoza Manimbao v. Ashcroft,* 329 F.3d 655, 664 (9th Cir. 2002) (Trott, J., dissenting) (citing Webster's Third New International Dictionary 1736 (1976)); *accord In re Sunnyslope Hous. Ltd. P'ship,* 2012 Bank. LEXIS 687, *11 (B.A.P. 9th Cir. 2012). Ultimately, whether or not certain matter in a complaint satisfies the plausibility standard is a "context-specific" inquiry that requires a judge to "draw on" its "judicial experience and common sense." *Schatz v. Republican State Leadership Comm.,* 669 F.3d 50, 55 (1st Cir. 2012) (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009)).

ARGUMENT

I. PETITIONING RIGHTS HAVE NOTHING TO DO WITH THE FIRM'S CLAIMS AGAINST THE DEFENDANTS; NOERR-PENNINGTON HAS NO PLACE IN THIS SUIT

The Rosette Defendants' reliance on the Noerr-Pennington doctrine fails for multiple reasons. First, the Rosette Defendants were not engaged in petitioning activity that the doctrine protects. "The Noerr-Pennington doctrine derives from the First Amendment's

guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.'" *Sosa v. DIRECTV, Inc*., 437 F.3d 923, 929 (9th Cir. 2006). "Petition" is defined as "a formal written request addressed to a sovereign or political superior for a particular grace or right." Webster's Third New International Dictionary 1690 (2002). According to the motion, Mr. Rosette assisted the Tribe in compact negotiations with the State of California. Nowhere does the motion cite authority for the proposition that compact negotiations done under the auspices of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., constitute protected activity under the doctrine. Nor can they because Noerr-Pennington protects petitioning activity addressed to a "political or superior sovereign" while IGRA provides for a negotiation process between *two sovereigns,* the Tribe and the State. This is reflected in the legislative history of IGRA:

> After lengthy hearings, negotiations, and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises. . . . The Committee concluded that the compact process is a viable mechanism for settling various matters between ***two equal sovereigns***.

Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1125 (E.D. Cal. 2009), citing S. Rep. No. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). Similarly, Noerr-Pennington does not apply to business negotiations between a governmental entity and another party. *See United States ex rel. Maranto v. Maxxam, Inc*., 2009 U.S. Dist. LEXIS 14375, *18-19 (N.D. Cal. 2009) (explaining false statements in negotiations with the State of California for the purchase of land were not protected by Noerr-Pennington). Thus, the Tribe and the Rosette Defendants were not engaged in petitioning activity addressed to a superior sovereign that would fall under the doctrine.

Next, the activities comprising the bases for the Sixth and Seventh Claims were not part of the compact negotiation process. The actual compact negotiation process has nothing to do with these claims. Rather, the complaint alleges that the Rosette Defendants engaged in tortious interference with the Firm's client relationships through misrepresen-

tations taking credit for the Firm's work, threats to the Firm's reputation/extortion, false disparagement, and attempts to set up rent-a-tribe businesses that would simultaneously *displace* the Firm and *defraud* the Tribe. Dkt. No. 39, ¶¶ 1-7, 288-290, 294-296. Such acts are not incidental to the compacting process. Indeed, the legal work performed for the Tribe by the Firm and the Rosette Defendants could have pertained to anything at all, such as mundane contract review with third-party vendors. Even assuming the conduct at issue did pertain to the compacting process, it would still not be protected by Noerr-Pennington, as explained by Judge Wilken in *Maranto,* because the doctrine is not meant to protect *any* conduct whatsoever no matter how wrongful:

> Moreover, Defendants' implicit position -- that, once an individual has initiated petitioning activity, any conduct whatsoever taken in the course of that activity is out of the law's reach -- is simply untenable. The First Amendment does not grant individuals the unbridled right to do whatever they like so long as it takes place in the context of petitioning the government. Parties to litigation are not allowed to perjure themselves on the witness stand. Lobbyists do not have a constitutional right to bribe legislators. Contractors may not submit falsified safety reports when applying for building permits. Drivers are not entitled to file forged smog certificates when registering their vehicles.

Maranto, 2009 U.S. Dist. LEXIS 14375 at *32; *see also, e.g., Sosa*, 437 F.3d at 938 ("Accordingly, Noerr-Pennington immunity is not a shield for petitioning conduct that, although 'ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'"), citing *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 144 (1961).

With respect to the Eighth claim for negligence, the Rosette Defendants argue that the Noerr-Pennington doctrine immunizes an attorney from any negligence or malpractice claim whenever the work performed involves a governmental entity on the other side of the transaction. Unsurprisingly, they cite no authority for this remarkable proposition. Judge Kronstadt from the Central District explained the flaw of a similar argument: "the state law malpractice and breach of fiduciary duty claims do not arise from Defendants'

petitioning activity, but rather from the manner in which Defendants performed the duties they owed to Plaintiffs and class members." *Tanedo v. East Baton Rouge Parish Sch. Bd.*, 2011 U.S. Dist. LEXIS 163400, *14 (C.D. Cal. Oct. 24, 2011). Those are rather apt words.

II. THE LITIGATION PRIVILEGE DOES NOT APPLY TO THE CONDUCT ALLEGED IN THE SIXTH, SEVENTH AND EIGHTH CLAIMS

As an initial matter, it is questionable whether state privilege law applies at all in this case, which raises federal questions and merely includes ancillary state law claims. *See Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) ("Where there are federal question claims and pendent state law claims present, the federal law of privilege ap-plies."), citing FED. R. EVID. 501 advisory comm. note; *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 835 F.3d 1155, 1159 (9th Cir. 2016) (holding the district court erred in applying California privilege law in a dispute with both federal and state claims).

Even assuming the state privilege applies in federal question cases, it is inapplicable to the conduct underlying the Sixth, Seventh and Eighth Claims, which is apparent from the purpose behind the privilege. "[T]he litigation privilege is intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation." *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 29 (1st Dist. 1997). The litigation privilege only applies "if the statement is made with a good faith belief in a legally viable claim and in *serious* contemplation of litigation," and thus sufficiently connected to litigation. *Bailey v. Brewer*, 197 Cal. App. 4th 781, 790 (2d Dist. 2011) (emphases added).

Once again, the Rosette Defendants attempt to couch the Plaintiffs' claims as based on the legitimate provision of legal advice in connection with the Tribe's compact negotiations, and again they are wrong. The complaint alleges that the Rosette Defendants used illicit means for disrupting the Firm's client relationship with Quechan through false disparagement of the Firm's work and credentials, misrepresenting Mr. Rosette's role in

the Pauma litigation, and providing illegal financial incentive to tribal council members in connection with a rent-a-tribe payday lending operation if the Tribe ousted the Firm and retained the Rosette Defendants instead. Dkt. No. 39, ¶¶ 1-7, 288-90, 294-96. Such statements and attendant conduct are not made in serious contemplation of litigation.

Further, the complaint alleges that the Rosette Defendants and Mssrs. Escalanti and White deliberately waited to terminate the Firm until the Firm had reached an agreement in principle with the State in the compact negotiation process, hoping that the dispute was over by that point and the final details were a mere formality. Dkt. No. 39, ¶¶ 4, 194, 256-57. In addition, Mr. Rosette's declaration makes clear that his entire approach to compact dealings with the State as presented to Mssrs. Escalanti and White is NOT to resort to litigation or any other adversarial relationship (and rather to avoid it at all costs):

> I also explained my general approach to compact negotiations, which is guided by a practical, "big picture" businesslike view that tribes benefit more in the long term if they maintain constructive working relationships with the state and local governments that border their lands. This is the approach I was taking with Tonto Apache in Arizona.

Dkt. No. 31-2, ¶ 23. Thus, none of the Defendants ever seriously contemplated litigation with the State during the conduct leading up to the Rosette Defendants' disruption of the Firm's client relationship with the Tribe, which means that their statements and conduct in connection with the negotiations were not protected by the privilege. Moreover, as with the Noerr-Pennington discussion above, the Eighth claim is not premised on the fact that the Rosette Defendants contemplated litigation with the State but that they failed to conduct the negotiations with the requisite standard of care.

In addition, as with the Noerr-Pennington doctrine, federal courts have held that "the litigation privilege will not protect communication or conduct that is 'a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'" *Cabell v. Zorro Prods*., 2017 U.S. Dist. LEXIS 82413, *35 (N.D. Cal. May 30, 2017), citing *Sosa*, 437 F.3d at 938. This is exactly what the Firm alleges in its complaint – that the Rosette Defendants were motivated by malice towards

Williams & Cochrane and a desire to extend their payday lending empire, and not any desire to provide legitimate legal services. Dkt. No. 39, ¶¶ 6-7, 212-36.

Finally, the Complaint raises the issue of whether Rosette Defendants were legitimately representing the Tribe or merely Mssrs. Escalanti and White as individuals acting outside of the scope of their authority in connection with a covert payday lending operation, which would completely negate the litigation privilege because the Rosette Defendants were not authorized to file suit on behalf of the Tribe in a compact dispute with the State. Dkt. No. 39, ¶¶ 7, 234-35, 268, 299.

III. THE FIRM HAS SUFFICIENTLY PLED ITS RICO CLAIMS AGAINST THE ROSETTE DEFENDANTS

The Firm recently discovered and added a considerable amount of new information to bolster its RICO claims in the proposed supplemental complaint, which further negates the arguments in the instant motion to dismiss. Where space allows, the allegations of the proposed supplemental complaint will be raised alongside those of the First Amended Complaint, although those contained in the current complaint nonetheless state a viable RICO claim. As alleged in the complaint (and more fully in the supplemental complaint), the Rosette Defendants pursue at least twin goals: putting the Firm out of business while also angling to get into Williams & Cochrane's tribal clients through indirect means and displace all legal oversight so it can start a fraudulent rent-a-tribe online payday lending business that benefits only the operators and acts in violation of state usury laws and the Truth in Lending Act requirements.[1] Dkt. No. 39, ¶¶ 6-7, 212-36. This is exactly the fact pattern alleged at Quechan, similar to the [redacted] Dkt. No. 39, ¶¶ 145-55, 166-84.

A. A DISTINCT RICO ENTERPRISE IS SUFFICIENTLY ALLEGED

[1] The accompanying Request for Judicial Notice also shows how the Rosette Defendants have now been behind tribes breaching at least four significant commercial contracts in recent years with damages totaling more than $100 million.

The First Amended Complaint sufficiently pleads that Mr. Rosette is operating the Rosette law firm in violation of RICO, which is sufficient to allege a requisite distinction between the defendant and the enterprise. Dkt. No. 39, ¶¶ 211-36, 287-89, 293-95.

The Supreme Court explicitly rejected a similar argument as the one the Rosette Defendants make here – that Mr. Rosette cannot conspire with his own law firm to form both the RICO enterprise and the RICO defendant. "[W]e hold simply that the need for two distinct entities is satisfied; hence, the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner -- whether he conducts those affairs within the scope, or beyond the scope, of corporate authority." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001). That is exactly what the First Amended Complaint alleges with respect to Mr. Rosette's efforts within Rosette LLP and Rosette & Associates (with the aid of Mr. Armstrong and others) to tortuously interfere with Williams & Cochrane's contractual relationships to put the Firm out of business while also inducing tribal leaders to participate in payday lending or some other get-rich-quick/rent-a-tribe scheme without the knowledge or benefit of the tribal members. Dkt. No. 39, ¶¶ 6-7, 211-36, 287-89, 293-95. As to the latter aspect, the complaint alleges that Mr. Rosette is not acting alone and, in fact, is acting in concert with rogue tribal council members at multiple tribes, including Defendants Keeny Escalanti and Willie White at Quechan. *Id.*, ¶¶ 211-36, 287-89.

B. PREDICATE ACTS WITHIN THE APPLICABLE LIMITATIONS PERIOD ARE SUFFICIENTLY ALLEGED

Once again, the Rosette Defendants incorrectly state the law in arguing that their prior acts interfering with the Firm's relationship with Pauma in 2011 cannot be used as predicate acts in support of its RICO claim. Federal courts apply a four-year statute of limitations period, one that merely requires filing suit within four-years of the date on which the plaintiff knew or should have known of the injury. It does not require that all predicate acts constituting the pattern of racketeering occur within the limitations period. Otherwise the language within the statute requiring predicate acts to occur within a ten-

year period would be contradictory. *See* 18 U.S.C. § 1961(5). Judge Carter in the Central District agrees on this point:

> [Defendants] argue the Court should ignore facts occurring before the limitations period because such facts 'cannot give rise to RICO liability.'… They are incorrect. Rather, *Klehr* dictates that a predicate act that is within the limitations period must have caused the injury for which the plaintiff now seeks to recover. *Klehr* is silent on whether events or actions outside of the limitation period can constitute an element of a plaintiff's RICO claim, assuming that the plaintiff also alleges a predicate act that is (1) within the limitation period and (2) causes a separate injury that is (3) the injury for which plaintiff now seeks recovery. This makes sense because a RICO enterprise may carry on for any length of time before resulting in an injury to plaintiff. It cannot be the case that all events, interactions, and communications that are evidence of the RICO enterprise (or conspiracy) must occur during the limitations period.

Tatung Co. v. Shu Tze Hsu, 217 F. Supp. 3d 1138, 1157-58 (C.D. Cal. 2016)*, citing Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997). Therefore, the Firm's RICO claims in the First Amended Complaint fall well within the four-year limitations period based on the injuries suffered as a result of the predicate acts the Rosette Defendants committed in connection with ousting Williams & Cochrane from Quechan in 2017 to clear the way to establish a fraudulent rent-a-tribe payday lending scheme. Dkt. No. 39, ¶¶ 287-90, 293-96. The Firm may rely on the predicate acts alleged in the complaint that occurred during the past ten years including the similar interference at Pauma so long as it can plead an injury that occurred during the past four years, which it has done. Moreover, the allegations detail continuing harm to the Firm's goodwill and client relationships all the way to the present that should be subject to proof at trial, especially when read in connection with the proposed supplemental complaint. Dkt. Nos. 39, ¶¶ 6, 163, 166-84, 288-90, 294-96.

C. SPECIFIC INTENT TO DEFRAUD AND A PATTERN OF DOING SO IS SUFFICIENTLY ALLEGED

The Firm has pled a specific intent to defraud and a pattern of doing so on the part of the Rosette Defendants and the Court cannot accept their skewed version of events, namely that they were merely "advising clients and potential clients in the course of oper-

ating a legal business." *See Tatung,* 217 F. Supp. 3d at 1161 ("As an initial matter, intent to deceive is 'a factual matter rarely free from dispute and thus rarely enabled in summary proceedings [much less a motion to dismiss].'"), citing *Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1204 (Fed. Cir. 2006). The specific intent requirement under the mail/wire fraud statutes is satisfied by "the existence of a scheme which was 'reasonably calculated to deceive persons of ordinary prudence and comprehension,' and this intention is shown by examining the scheme itself." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986). Further, a "pattern of racketeering activity" under RICO is shown by just two acts of racketeering activity, which the Ninth Circuit has interpreted "broadly and literally" *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 n.1 (9th Cir. 1987); *cf. Sun Sav. & Loan Ass'n v. Dierdorff,* 825 F.2d 187, 193 (9th Cir. 1987) ("[I]t is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under [RICO]").

The allegation of the complaint should raise sufficient inference of intent to defraud and a pattern of doing so where it provides detailed information about the Rosette Defendants' establishing dozens of rent-a-tribe payday lending businesses in connection with tribes spread across the country – displacing tribal counsel in order to establish these businesses and reap the vast majority of profit unbeknownst to tribal members, using this practice to oust Williams & Cochrane from Quechan's employ, and also repeatedly attempting to do the same at Pauma. Dkt. No. 39, ¶¶ 6-7, 166-84, 211-36. The allegations further explain that the Rosette Defendants were interfering with the Firm's client relationships -- not for the purpose of generating revenue from legitimate legal services -- but to put the Firm out of business due to a personal vendetta on the part of Mr. Rosette *and* so that they could use the Firm's clients for setting up illegal businesses disguised as tribal entities. *Id.* And Defendants were certainly aware of the effect that their correspondence sent over the wires would have because it was intended to falsely disparage the Firm at Quechan, to sever the client relationship, to threaten the Firm's reputation, and to force the Firm to walk away without being paid all monies due under

the contract, thus clearing the way to start an online rent-a-tribe payday lending business.

Moreover, as explained in the First Amended Complaint, Mr. Rosette is well aware that his tribal payday lending operations could lead to RICO liability for him because he attempted to explain at a recent tribal online-based business conference how his operation was set up differently than the tribal payday lending businesses which recently landed their principal Scott Tucker in prison for RICO violations among others; the difference is not because Mr. Rosette's payday businesses do not violate state usury laws (as they try to evade them by hiding behind tribal entities just as Scott Tucker's versions did), but simply because they are better structured to look like tribal entities. Dkt. No. 39, ¶¶ 227-29. And yet, he freely admitted at this conference that his operations reap ninety-seven percent of the profits, leaving little to the host tribe supposedly owning the venture. *Id.*

D. Proximate causation is sufficiently alleged

"Proximate cause… is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 654 (2008), citations omitted. The Supreme Court says that courts "use[] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts…with a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.,* citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

While it may be true that that "there is no RICO conspiracy when an attorney advises a potential client that his or her services will provide better and more cost-effective means to achieve the client's goals," that is not the conduct upon which the Firm's RICO claims are based.[2] The First Amended Complaint alleges that the real incentive offered to certain Quechan tribal council members in exchange for retaining the

[2] This is far different from an attorney advising a tribal client to breach a contract fully performed and then hide behind sovereign immunity so it does not have to make any meaningful payments, which, as the accompanying Request for Judicial Notice indicates, Mr. Rosette has seemingly done at least four times now.

Rosette Defendants and ousting Williams & Cochrane was a portion of the profits of an online payday lending business fraudulently structured as a rent-a-tribe business in order to evade state usury laws and Truth in Lending Act requirements as well as deprive the Tribe of the vast majority of profits. Dkt. Nos. 39, ¶¶ 7, 227-29, 293-95. Flowing as a direct result of the fraudulent predicate mail and wire acts in furtherance of this plan, the Firm has pled injuries proximately caused by the RICO conspiracy in the form of contract damages but also the destruction of a client relationship, the loss of any further work that would have flowed from the relationship, and the harm to goodwill from the reputational threats, amongst others, that the Rosette Defendants transmitted via e-mail in connection with this termination and have now seemingly carried out (as is explained more fully in the supplemental complaint). *See, e.g.,* Dkt. No. 39, ¶¶ 288-90, 293-96. Even assuming the Firm had been terminated before the contingency fee attached (another factual issue not appropriate at this stage), the contract also provided for a reasonable fee for the value of services performed in lieu thereof in the event of opportunistic termination, a fee that was never paid and the firm's entitlement to which cannot be determined on a motion to dismiss. Dkt. No. 39, ¶¶ 3, 257. Finally, the First Amended Complaint also alleges that the monthly flat fee payments were fraudulently withheld from the Firm by virtue of the Rosette Defendants' use of the wires, with Quechan making 4 of the 5 belated payments days before the transmission of the termination letter and yet still withholding payment for June 2017 that Mr. Escalanti assured would be paid. Dkt. No. 39, ¶¶ 113, 199.

IV. THE COMPLAINT ALLEGES A STRONG LANHAM ACT CLAIM WHICH SHOULD EASILY DEFEAT THE IMPROPER FACTUAL ATTACK IN THE ROSETTE DEFENDANTS' MOTION TO DISMISS

A. FALSITY IS SUFFICIENTLY ALLEGED REGARDING THE *PAUMA* LITIGATION

To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was true but likely to mislead or confuse consumers. *Southland Sod Farms v. Stover Seed Co*., 108 F.3d 1134, 1139 (9th Cir. 1997). The Ninth Circuit has not

applied the Rule 9(b) heightened pleading requirements to Lanham Act claims. *See Ra Med. Sys. v. PhotoMedex, Inc*., 373 F. App'x 784 (9th Cir. 2010) (applying Rule 8 notice pleading standard to Lanham Act claims). Under either standard, the allegations of the complaint have nonetheless provided sufficient detail regarding the falsity of the statements on the Rosette website, which must be accepted as true on a motion to dismiss. *See* Dkt. No. 39, ¶¶ 147-49, 192, 274-77. The Rosette Defendants' submission of a caption page from the initial months of the Pauma matter containing Mr. Rosette's name does not prove that the statement at issue is true or not misleading.

A word-by-word analysis of the website statement reveals its falsity: "Mr. Rosette … successfully litigated a case saving the Pauma Band of Luiseno Mission Indians over $100 Million in Compact payments allegedly owed to the State of California against then Governor Schwarzenegger." In addition to this website statement, Mr. Rosette has now revealed that he also includes the same falsehood in the promotional materials he gives to prospective clients, which he no doubt provided to Quechan as well. *See* Dkt. No. 32-2.

Mr. Rosette … ***litigated***: It does not say that Rosette LLP or his firm litigated the case. It plainly states that *Mr. Rosette* personally litigated it when he did not. A simple review of the Pauma case docket shows that Mr. Rosette did not author or sign a single document. He did not make a single appearance either in court or in any discovery proceeding. And as any litigator knows, having an "idea" for litigation is certainly not the same as litigating a case based on that idea, although the Rosette Defendants' mistakenly contend that the complaint concedes that Mr. Rosette was the "brain child" of the Pauma case. Rather, the complaint quotes from Mr. Rosette's deposition assertion to that effect, but it otherwise explains that the case was litigated entirely by Cheryl Williams and Kevin Cochrane without contribution from Mr. Rosette in the form of ideas or anything else. Dkt. No. 39, ¶¶ 43-64, 138-39, 143-48, 274. Nor does his name on a caption prove that he advanced any idea in the case. As the Rosette Defendants' concede, Ms. Williams was a litigation "veteran of Milberg Weiss;" she certainly did not need direction or ideas from Mr. Rosette, who admitted in the deposition testimony quoted in the complaint that

litigation was not his forte and something he happily farmed out. Dkt. No. 39, ¶ 138. At best, what Mr. Rosette "litigated" is a disputed issue that cannot be resolved at this stage.

A Case: Mr. Rosette cannot truthfully claim to have litigated the entire Pauma case when his firm was removed during the course of an early interlocutory appeal, less than a year into a seven-year case. *See* Dkt. 39, ¶ 43-64, 138-39, 143-48, 274.

Successfully: A review of the Pauma docket shows that after Ms. Williams and Mr. Cochrane were briefly replaced with Rosette LLP attorneys after their departure from Rosette's firm in May 2010, Mr. Rosette had custody of the case for the first time without their expertise. During the ensuing 45 days till the Pauma people would vote to transfer the case to the newly formed Williams & Cochrane, Mr. Rosette filed a single brief, an opposition to the State's motion to stay the preliminary injunction relieving the Tribe of its payment obligations under its amended gaming compact. Dkt. No. 39, ¶¶ 43-52, 143-45. That brief resulted in the Ninth Circuit issuing an order staying the injunction -- ***meaning Pauma had to immediately resume making heightened payments under the amended compact***. *Id*. After Pauma retained Williams & Cochrane, the Firm filed an emergency motion that resulted in the reinstatement of the injunction, ultimately saving Pauma millions while they litigated the case to final judgment in 2016. Dkt. No. 39, ¶¶ 34-64, 143-49. Thus, the simple truth is that Mr. Rosette lost the injunction remedy for Pauma and left the tribe without *any* remedy – whether provisional or final – at the time of his removal. That cannot truthfully be described as "***successfully***" litigating the case.

$100 Million: Even if one could attribute the preliminary injunction's success to Mr. Rosette, at the time he left the case in June 2010, the injunction had only been in place since April of that year, which at most would have resulted in about $1.4 million in savings. *See* Dkt. No. 39, ¶¶ 34-64, 143-49, 274. That amount falls far short of the $100 million Mr. Rosette falsely claims he achieved for Pauma and actually shows he has been falsely taking credit for the entire case. While the motion quips, "Victory has a hundred fathers and defeat is an orphan," Mr. Rosette was assuredly the sole parent of the only defeat in the case – the motion to stay the injunction which he lost during the 45 days he

had sole custody of the case sans Cheryl Williams and Kevin Cochrane.

B. THE QUECHAN PRESS RELEASE IS MISLEADING FOR LANHAM ACT LIABILITY

Under the "false by necessary implication" doctrine, a court must analyze the message conveyed in full context and "consider the advertisement in its entirety and not… engage in disputatious dissection." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2nd Cir. 2007). "If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required." *Id.* Even if not literally false, a plaintiff may still present evidence to show that the message is misleading to consumers. *Id*. Under either scenario, the Firm's Fifth Claim has been sufficiently pled, explaining that the press release on Rosette's website falsely touts that he is solely responsible for the Quechan compact. Dkt. No. 39, ¶¶ 200, 280-84. While he disputes this is the intended message, the press release was no doubt placed on the Rosette firm's website to market their services in compact negotiations and take credit for the resulting compact as its own work product. The whole of the words and images, with the reader instructed to contact Mr. Rosette for more information, necessarily convey the false message that he single-handedly represented the Tribe in connection with the compact, which is literally false. Even if the court determines that the press release is not literally false, the Lanham Act allows the Firm to present expert testimony at trial on the resulting consumer confusion and harm to goodwill. While the Rosette Defendants present a convoluted argument about the slippery slope of parsing credit for the work of teams, this is nonsensical given that courts are routinely tasked with determining the rights of parties where one claims the other has falsely taken credit for his or her work product, *e.g.*, "reverse palming off" claims. *See HM Elecs., Inc. v. R.F. Techs., Inc.*, 2013 U.S. Dist. LEXIS 201896, *20 (S.D. Cal. October 3, 2013) ("As the Ninth Circuit explained, reverse palming off is wrongful because 'the originator of the misidentified product is involuntarily deprived of the advertising value of [his] name and the goodwill that otherwise would stem from public knowledge of the true source of the satisfactory product.'"), citing *Lamothe v. Atlantic*

Recording Corp., 847 F.2d 1403, 1407-08 (9th Cir. 1988) ("It seems to us no less 'false' to attribute authorship to only one of several co-authors…. An incomplete designation of the source of the good or service is no less misleading because it is partially correct.").

C. PROXIMATE CAUSATION IS SUFFICIENTLY ALLEGED

Whether Rule 9(b) applies to the falsity of the statement, "it does not…apply to other aspects of Plaintiff's claims, such as reliance or damages." *Waste & Compliance Mgmt. v. Stericycle, Inc*., 2017 U.S. Dist. LEXIS 162889, *5 (S.D. Cal. Oct. 2, 2017), citing *Tidenberg v. Bidz.com, Inc*., 2009 U.S. Dist. LEXIS 21916, *18 (C.D. Cal. Mar. 4, 2009); *see Maya v. Centex Corp.,* 658 F.3d 1060, 1068 (9th Cir. 2011) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."). Further, when an advertisement is shown to be literally false or false by necessary implication, as shown above, "consumer deception is presumed and 'the court may grant relief without reference to the advertisement's [actual] impact on the buying public.'" *Time Warner Cable,* 497 F.3d at 153.

The complaint nonetheless meets the Rule 8 pleading standard in alleging that Quechan tribal leaders were "deceived" by Mr. Rosette's website statements and that other tribal leaders would be likely to be deceived by the statement as well, meaning that harm to the Firm's goodwill resulted and would result because any tribal leader interested in retaining the attorneys who were victorious in the Pauma case or who negotiated the Quechan compact would mistakenly retain Mr. Rosette instead of Williams & Cochrane upon viewing the website statements. Dkt. No. 39, ¶¶ 200, 274-77, 280-84. The complaint also alleges contractual damages resulting from the statement because despite the fact that Quechan's former leadership originally sought out Williams & Cochrane for its role in the Pauma case, the complaint alleges that Mr. Rosette's efforts to take credit for the Pauma litigation had a role in luring later-appointed Quechan leadership away from the Firm with the website statement leading them to believe they could obtain the "real attorney who litigated the Pauma case" in addition to the other illegal incentives offered.

Dkt. No. 39, ¶ 192 & Prayer for Relief, ¶¶ 3-5 (seeking disgorgement of profits flowing from the false ad and injunctive relief preventing the same). While the complaint alleges Mr. Rosette also made similar misrepresentations to Quechan over the wires, the fact that he touts the same in print on his website provides credibility to such statements. After all, a reasonable consumer would assume that an attorney would not risk the liability associated with false advertising on his website, but they would be wrong in this instance.

V. THE QUECHAN TRIBAL MEMBERS HAVE STANDING TO STATE A NEGLIGENCE CLAIM AND HAVE ADEQUATELY PLED ONE AGAINST THE ROSETTE DEFENDANTS

The Rosette Defendants forgot that their tribal client is an entity consisting of tribal members and that such members are not unrelated third parties but persons intended to benefit from services performed for the Tribe. The California Supreme Court long ago recognized that non-clients can state a cause of action for negligence against an attorney with whom they have no direct contractual relationship under certain circumstances:

> [The] determination whether in a specific case the [attorney] will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the [attorney's] conduct and the injury, and the policy of preventing future harm.

Lucas v. Hamm, 56 Cal. 2d 583, 588 (1961). Indeed, a third-party beneficiary need not be specifically named or identified in the contract to have standing to bring suit. *Garratt v. Baker*, 5 Cal. 2d 745 (1936). Even outside the third-party beneficiary context, attorneys may be liable to nonclients "where it is reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others." *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1506 (9th Cir. 1993), citing *Fox v. Pollack*, 181 Cal. App. 3d 954, 960 (1st Dist. 1986) ("Following *Lucas*, attorneys acting for their clients have been held liable to third parties in other transactions…in which potential harm to the third party from professional negligence was reasonably foreseeable.").

Here, the Rosette Defendants contracted to negotiate a successor tribal/State

gaming compact for the Tribe under the auspices of IGRA. That statute specifically limits the use of the proceeds from the gaming operation to certain purposes including "to provide for the general welfare of the Indian tribe and its members." 25 U.S.C. §2710(b)(2)(B)(ii). The statute also provides for the making of per capita payments from the gaming operation to tribal members. 25 U.S.C. §2710(b)(3). Thus, both the Rosette Defendants and the Quechan tribal members understood that any attorney representation aimed at negotiating a new gaming compact for the Tribe was intended to benefit tribal members, and that they would necessarily be harmed if the negotiations went awry. *See Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 2015 U.S. App. LEXIS 7027, *71-72 (9th Cir. Ap. 28, 2015) ("Northstar has also plausibly alleged that the Schwab Advisor understood that it was the intent of the Schwab Trust to benefit the shareholders of the Fund where compelling evidence lending plausibility to the third-party beneficiary cause… is that Congress has required 'that the contract between the adviser and the company be approved by a majority of the company's shareholders.'") (citation omitted). Mr. Rosette's contract may provide that he does not represent tribal members *individually*, but he does not and cannot disavow a duty to act for their collective benefit in an IGRA-mandated process concerning the Tribe's ability to provide for its members.

In terms of sufficiency, only minimal notice pleading is required. *See Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) (indicating a complaint alleging breach of fiduciary duty need contain only a "short and plain statement of the claim," as required by Rule 8(a)). The class has met this burden by explaining the unique benefits of the compact the Firm negotiated for them and the loss of some of those benefits once Mr. Rosette came into the picture, including the disgorgement of $2 million that resulted from his negligence. Dkt. No. 39, ¶¶ 302. The complaint also explains that Mr. Rosette had no knowledge of the negotiations mere weeks before his start and his involvement was, in part, driven by animus towards the firm rather than loyalty to the client. Dkt. No. 39, ¶¶ 6-7. The class members should be entitled to conduct discovery on Mr. Rosette to determine whether his divided loyalties and impromptu approach led his conduct to fall below

the requisite standard of care, which is heightened by his supposed expertise in the field. *See Unigard Ins. Group v. O'Flaherty & Belgum*, 38 Cal. App. 4th 1229, 1237-38 (2d Dist. 1995) ("The question of whether the conduct of the [firm] breached the duty by failing to conform to the standard of care is a matter of law only if reasonable minds cannot differ on whether the conduct does or does not satisfy the standard of care. In all other cases the question will be treated as a question of fact"); *see FDIC v. O'Melveny & Myers,* 969 F.2d 744 (9th Cir. 1992) (indicating a specialized attorney must meet the standards of knowledge and skill for such specialists). This need is patent here; Defendants are hiding *all* aspects of Mr. Rosette's actions in the compact negotiation from the tribal members. They exclusively possess all the relevant evidence regarding the class members' claim, and have gone to great lengths to keep it that way – even when arm-twisting the State to publicly disclose much of the record of negotiations preceding Rosette. *See Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) ("[W]e relax pleading requirements where the relevant facts are known only to the defendant.").

VI. THE ROSETTE DEFENDANTS' ANTI-SLAPP MOTION IS WITHOUT MERIT AND SHOULD BE DENIED

A. THE ANTI-SLAPP STATUTE IS NOT APPLICABLE IN FEDERAL QUESTION CASES

The Ninth Circuit appears to have thus far applied California's anti-SLAPP statute only in diversity cases with one notable now-retired Ninth Circuit judge imploring for reconsideration of even that much:

> Our decision in *United States ex rel. Newsham v. Lockheed Missiles & Space Co*. paved the way for defendants in diversity cases to raise anti-SLAPP motions under California law…[A]s I've explained at length elsewhere, our decision to allow anti-SLAPP motions into federal court conflicts with Supreme Court precedent and permits California to override the Federal Rules of Civil Procedure-a hijacking of Congress' plenary power. [citing cases] Two decades with anti-SLAPP motions as a scourge on our docket is penance enough for our blunder in *Newsham*. It's high time for a course correction.

Fallay v. First Am. Specialty Ins. Co., 706 F. App'x 439, *450 (9th Cir. 2017). Indeed, most every case cited in the motion to strike as to the anti-SLAPP statute and the

litigation privilege is either from California state court or federal court sitting in diversity.

The Anti-SLAPP statute is anathema to federal litigation, imposing a huge barrier to the resolution of federal claims, whether they have merit or not. Any defendant can hire one of the most expensive law firms in the country by offering the incentive of keeping any anti-SLAPP fees they obtain. And with an immediate right to an interlocutory appeal, a completely frivolous anti-SLAPP motion inflicts a crushing burden and expense on a plaintiff with a potential risk of enormously inflated fees. As Judge Kozinski complained above, the anti-SLAPP process completely subverts the Federal Rules of Civil Procedure, essentially turning the pleading process on its head by requiring summary judgment at the beginning of a case before a plaintiff has had a chance to conduct any discovery to counter self-serving declarations by the defendants, as has happened here. *See Yeshiva Chofetz v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 360 (S.D.N.Y. 2000) ("The standards for granting summary judgment motions in the federal courts are clearly established in FRCP Rule 56 and federal case law… and the defendants have made no argument as to why Rule 56 should be superseded by the provisions of New York's [version of anti-SLAPP]."). These issues are compounded in federal question cases because the anti-SLAPP statute essentially gives precedence to state law claims over federal claims.

B. NEITHER SPEECH NOR PETITION RIGHTS ARE AT ISSUE IF ANTI-SLAPP APPLIES

California's anti-SLAPP statute establishes a two-part test to determine whether a cause of action should be stricken. The first prong places the burden on the moving party to show "that the cause of action arises from an act in furtherance of the right of free speech or petition—i.e., that it arises from a protected activity." *Zamos v. Stroud*, 32 Cal. 4th 958, 965 (2d Dist. 2004). If the movant meets its initial burden, only then does the burden shift to the plaintiff to demonstrate "a probability of prevailing on the cause of action." *Id*. "Only a cause of action that satisfies both parts of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Bailey,* 197 Cal. App. 4th at 788.

As an initial matter, this lawsuit has nothing to do with the Tribal Council's decision to change legal counsel in connection with its compact negotiations, no matter how hard defendants attempt to pigeon-hole it as such. The Eighth claim is instead based on the *acts* of negligence and breach of duty owed to the Quechan tribal members. *See* Dkt. No. 39, ¶¶ 298-302. As set forth above, the Quechan tribal members have standing to bring a professional negligence against the Rosette Defendants as intended beneficiaries or foreseeably harmed parties, and such claims are not subject to the anti-SLAPP statute. And, in the prescient words of Judge Kronstadt in the Central District, "Plaintiffs here sue not because Defendants petitioned the government on behalf of another client, but because Defendants allegedly represented Plaintiffs negligently and in breach of their fiduciary duty." *Tanedo,* 2011 U.S. Dist. LEXIS 163400 at *7. And as to that:

> Legal malpractice is not an activity protected under the antiSLAPP statute…. [T]he client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously.

Id., at *6-7, *citing Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532, 1535, 1540 (4th Dist. 2006).

The First Amended Complaint and its exhibits show that the compact negotiated by Williams & Cochrane was far more favorable to the Tribe and its members and would not have required, amongst other things, the Tribe to repay $2 million in past due fees, a situation that changed under Mr. Rosette's watch due to the negligent performance of his duties. This claim does not chill Mr. Rosette's petitioning activity with the State but instead encourages him to represent his client's interests competently and zealously in future compact negotiations instead of simply acceding to the State's demands so he can retain the State's negotiator as an ally he can call on for return favors as the need arises. Thus, the Rosette Defendants' motion fails to pass the first step in the process, and the suspect unilateral evidence in support of the motion should not even be considered by the

Court. *See Sprengel v. Zbylut*, 241 Cal. App. 4th 140, 156-57 (2d Dist. 2015) (Any inquiry regarding whether the shareholder plaintiff had standing to bring a malpractice claim against the attorney representing the company was not proper during the first step of the anti-SLAPP test because the alleged breach of duty was not protected activity).

To further illustrate the abject failure to pass the first part of the test, the Rosette Defendants motion completely overlooks the most recent law of the land on the anti-SLAPP statute. The California Supreme Court recently interpreted the statute so as to preclude its application to the facts of this case in *Park v. Bd. of Trustees of CSU*, 2 Cal. 5th 1057 (2017). There, the defendant argued that the plaintiff's claim that he was wrongfully denied tenure necessarily arose from the protected substance of the process in reaching the decision to deny tenure and should accordingly be struck. The California Supreme Court disagreed, and engaged in a lengthy analysis to draw a "distinction between activities that form the basis for a claim and those that merely lead to the liability creating activity or provide evidentiary support for the claim." *Id*., at 1064. In other words, "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." *Id*. at 1060. The Court cited numerous examples where the act underlying the claim is not synonymous with deliberations or evidence regarding the act. *See, e.g., San Ramon Valley Fire Prot. Dist. v. Contra Costa County Employees' Ret. Assn*., 125 Cal. App. 4th 343 (2d Dist. 2004) (no anti-SLAPP remedy where the court distinguished between the board's allegedly wrongful act (the contribution level decision) and the preceding deliberations and vote); *Graffiti Protective Coatings, Inc. v. City of Pico Rivera,* 181 Cal. App. 4th 1207, 1215, 1224 (2d Dist. 2010) (no anti-SLAPP remedy where contractor's claims were based on the award of a new contract in violation of laws regulating competitive bidding, and not on the communications by the city preceding its decision although they might provide evidence establishing what events led to the change in contract). "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply

those elements and consequently form the basis for liability." *Park*, 2 Cal. 5th at 1063.

Applying the *Park* analysis, the key elements of the Eighth claim are: (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. *Coscia v. McKenna & Cuneo,* 25 Cal.4th 1194, 1199 (4th Dist. 2001). These elements plainly show that the petitioning activity itself does not form the basis of liability; rather that basis is the substandard manner in which it was conducted and the resulting harm, just as Judge Kronstadt explained in *Tanedo*.[3]

C. THE FIRM MET ITS BURDEN UNDER PART TWO OF THE ANTI-SLAPP ANALYSIS

With respect to the second step of the anti-SLAPP analysis, Plaintiffs have met their burden of showing that the Eighth claim has merit. The only substantive arguments presented in the Rosette Defendants' anti-SLAPP motion against the merits of the claim are that: (1) Mr. Rosette did a good job because his new friend in Mr. Dhillon, the State's negotiator, came to his aid; and (2) the Quechan constitution provides that the Tribal Council has the authority to retain counsel for the Tribe.[4] While these arguments should

[3] The SLAPP authority cited by Defendants is doubtful in light of *Park*, including *Mindys Cosmetics, Inc. v. Dakar,* 611 F.3d 590 (9th Cir. 2010), which *Tanedo* distinguishes based on the fact that the trademark application was itself the basis for the claim and the plaintiff was adverse to the defendant attorney's client in the transaction (neither circumstance is present here). Indeed, none of the authorities cited in the motion stand for the proposition that a party with standing to bring suit against an attorney for malpractice is categorically barred from doing so by the anti-SLAPP statute. Such a proposition would completely overrule *Lucas v. Hamm* and its progeny, which remain good law.

[4] Tribal law should not bar the individual plaintiffs from accessing the courts to bring their claim. Indeed, even shareholders may bring a class claim on behalf of a company where they plead the futility of demanding action from the board of directors. *Arduini v. Hart*, 774 F.3d 622, 628 (9th Cir. 2014); *see* FED. R. CIV. P. 23.1(b)(3). Plaintiffs have certainly pled the futility of demanding action from Mssrs. Escalanti and White against Mr. Rosette by alleging that the three are acting in concert for purposes of profiting from illegal payday lending. Note also that the motion to strike urges the Court not to interpret or get involved in issues of tribal law and yet they ask the Court to enforce tribal law against the tribal members to bar their claim. It should decline to do so.

not even be addressed since Defendants failed to meet the first part of the test, should the Court nonetheless address them, note that Defendants have failed to present *any* evidence of the record of negotiations under Mr. Rosette to determine what he did or did not do. What we do know is that he did not prevent the imposition of a $2 million fine against the Tribe, amongst other losses. Despite Mr. Dhillon's biased account, the exhibits to his declaration show that the negotiations were in the final stages with Williams & Cochrane without any requirement or mention of the $2 million repayment that was ultimately inserted into the final compact under Mr. Rosette's watch. Given the allegations in the First Amended Complaint, the Court should find that it is at least plausible that Mr. Rosette failed to adhere to the requisite standard of care. *See Wright v. Williams*, 47 Cal. App. 3d 802, 809-10 (2d Dist. 1975) (attorney malpractice is a question of fact with the applicable standard for experts in a particular field typically determined by an expert witness in that field -- not a process that lends itself to a motion to dismiss or anti-SLAPP hearing).

D. THE FIRM REITERATES ITS DISCOVERY REQUEST TO DEFEND THE ANTI-SLAPP

The Firm reiterates its requests for deferral of the anti-SLAPP hearing under Rule 56(d) so that it can conduct discovery to obtain the record of negotiations resulting in the loss of the more favorable terms the Firm obtained for the Tribe as well as the actions or omissions taken by Mr. Rosette resulting in the $2 million obligation. Defendants are hiding all aspects of Mr. Rosette's actions in the compact negotiation and have gone to great lengths to keep it that way – even refusing to turn over the Tribal Council Resolution authorizing his contract at a time when the tribal members could have exercised their popular veto to swiftly terminate his contract. *See* Dkt. Nos. 39, ¶¶ 119-25, 235; 39-39, p. 644 (describing the "popular veto" giving "[t]he members of the Tribe… the power [to] veto any…resolution of the [Tribal] Council"); *Metabolife Int'l v. Wornick*, 264 F.3d 832, 846-47 (9th Cir. 2001) (The Ninth Circuit recognized the conflict between Rule 56(f)'s assurance that discovery will occur before summary judgment takes place and the discovery-limiting aspects of the anti-SLAPP statute; thus ordering the district court to allow discovery on information within the defendant's exclusive control).

CONCLUSION

For the foregoing reasons, Williams & Cochrane respectfully requests that the Court deny the Rosette Defendants' motion to dismiss and special motion to strike in their entirety. Should the Court find any portion of the Firm's claims deficient, Williams & Cochrane respectfully requests leave to amend to cure such deficiencies.

RESPECTFULLY SUBMITTED this 11th day of May, 2018

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