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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)

Plaintiff,

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' OPPOSITION TO WILMERHALE'S MOTION TO DISQUALIFY WILLIAMS & COCHRANE, LLP [DKT. NO. 51-1]

Date: June 8, 2018
Time: 1:30 p.m.
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

INTRODUCTION & ARGUMENT

Williams & Cochrane ("Firm") and the class of Quechan tribal members hereby submit this opposition to the motion by WilmerHale that seeks to disqualify the Firm from pressing a malpractice claims against the Rosette defendants for negligently winding up the compact negotiations between the Tribe and the State of California. *See* Dkt. No. 51-1. Before getting into substance, it is worth pointing out that the underlying motion does not mention the federal rule – whether general or local – through which WilmerHale is pursuing this motion, making it difficult for the Firm to determine whether this motion is properly before the Court. With that said, the research on this topic did reveal that the rules of professionalism for the United States District Court for the Southern District of California caution attorneys from "seek[ing] sanctions against or disqualification of any other attorney for any improper purpose." CivLR 83.4(a)(2)(f).

A. CONSIDER THE SOURCE

Thus, one consideration that should color this entire motion is the identity of the firm that is pushing the issue. As the Court is aware, WilmerHale contends that it represents both the Quechan tribe and two individuals who may or may not be Tribal Councilmembers and who at one time interfered with the contract Williams & Cochrane had with the tribe. *See, e.g.,* Dkt. No. 51-1. Seems simple enough, but things get rather messy once one takes into account the background information contained in the Fist Amended Complaint. That pleading explains how Robert Rosette publicly lauds the co-counsel relationship he has with the "true professionals" at WilmerHale in other cases, including one in which both firms represent some faction of a tribe called the California Valley Miwok Tribe that has unlawfully tried to control the government and block the enrollment of hundreds of displaced Indians simply so these individuals can obtain millions of dollars in "Revenue Sharing Trust Fund" monies that the California Gambling Control Commission has frozen and placed in a set aside account. *See* Dkt. No. 39, ¶¶ 238-44. What is more, it is our understanding that Robert Rosette has a contingency fee agreement with the discredited faction of the tribe he represents that is supposed to give him a large per-

centage of these set aside monies should he successfully free them up, and WilmerHale in turn has some contract relationship with Mr. Rosette that ties their financial fortunes together. *See id.* at ¶ 243.

Thus, the true loyalties of WilmerHale seem to lie with Robert Rosette, which in turn means they lie with the two individual Quechan defendants who Mr. Rosette must keep in power in order to keep the funds flowing. This presumably explains why WilmerHale has never been able to produce an attorney-client agreement with Quechan *the tribe* or a valid resolution hiring them to defend the tribe in this litigation. *See* Dkt. No. 239, ¶¶ 246-47. Moreover, it also explains the illogical financial situation in which Quechan finds itself. As to that, the opposition to Quechan's motion to dismiss that Williams & Cochrane filed contemporaneously herewith attaches an agenda that some segment of the Tribal Council posted showing that WilmerHale billed the tribe $118,877.60 during the month of February 2018 – a month in which the only actual work the opposing firm had to do was draft responsive motions over the course of the first nine days. This means WilmerHale is clocking in with a daily billing amount in this litigation that could total $4,245.00. This further means that the amount of fees Quechan will have paid by the time the initial motions come on for hearing may well be in the range of $750,000, if not more. All the memoranda for the pending motions filed by the opposing parties contain some form of an erroneous syllogism that posits the June 8th hearing will dismiss the case and this dismissal will lead into the resolution of all issues between the parties, which means the June 8th hearing will be VC Day ("Victory in California Day") for the varied defendants. This pie-in-the-sky fantasy does not seem to consider that a large portion of this case is likely to go forward and, should it not, Williams & Cochrane will simply re-file a nearly identical complaint in San Diego Superior Court. Thus, the three-quarters-of-a-million dollars Quechan will have likely spent for basic briefing work by the time this case rounds the first turn is just a drop in the bucket, raising really difficult questions concerning WilmerHale's true loyalties. If this firm were truly and loyally representing the interests of Quechan *the tribe*, it would simply advise it to pay the amount due or com-

municate some semblance of a reasonable settlement proposal. Yet instead, WilmerHale is locked in and focused on generating fees in excess of the amount the Quechan tribe owes in this case simply so it can meet the needs of two now-recalled Tribal Council-members and an outside attorney with seemingly compromising financial leverage. Given this, any discussion of disqualification should also look at the loyalties of the opposing law firms as well.

B. LACK OF STANDING

This discussion of sordid allegiances and dysfunctional governance raises the attendant question of whether WilmerHale – and whomever they truly represent –actually has standing to advance the motion for disqualification. "Generally, only a current or former client has standing to disqualify an attorney on the basis of conflict of interest." *Del Campo v. Mealing,* 2011 U.S. Dist. LEXIS 158019, *7 (N.D. Cal. 2011) (citing *Kasza v. Browner,* 133 F.3d 1159, 1171 (9th Cir. 1998)). "The issue of [a conflict of interest] due to successive representation of a former and a current client is not [even] relevant [in the first place], however, unless there is a former attorney-client relationship." *Lynn v. George,* 15 Cal. App. 5th 630, 637-38 (4th Dist. 2017). The manner in which Wilmer-Hale is litigating this case makes it evident that the firm has some sort of overriding attorney-client relationship with the two individual Quechan defendants, and Williams & Cochrane will not contest that fact at this juncture. The rules mentioned above, however, show rather clearly that neither of these individuals has standing to pursue a motion to disqualify against Williams & Cochrane because the firm never had a contractual rela-tionship with them. Opposing counsel is simply not able to argue this point seeing that Mr. Rosette has even gone to great lengths to explain that the representation of a tribe does not entail the representation of the individual officers who may work for the tribe. *See, e.g.,* Dkt. No. 53-1, 31:1-9.

The standing of the tribe to pursue this motion does not fare any better given the facts on the ground. The First Amended Complaint contains significant evidence-backed allegations discussing the events in the aftermath of the service of the original complaint

in this case, and how the general membership of Quechan initiated recall elections against a number of Tribal Councilmembers, including the individual defendants in this case – Keeny Escalanti, Sr. and Willie White. *See* Dkt. No. 39, ¶ 235 & nn.50-51. The outcome of the recalls was that the tribal members overwhelmingly voted to oust both Mr. Escalanti and Mr. White from office by votes of 147-80 and 209-102, respectively. *See id*. Yet, as he has done with countless other tribes including Picayune, Paskenta, and the California Valley Miwok Tribe, Mr. Rosette came to the aid of these individuals and had them dig in, entrenching themselves in power on the basis of the tried-and-trite argument that votes were legally defective in some manner. *See id.* at ¶¶ 126-28, 235, 240-43. The individual Quechan defendants are likely to respond with all sorts of argument to legitimate their actions and positions, but the fact of the matter is that a vast majority of the Quechan Tribal Council has now been recalled from office, which eviscerates the ability of this entity to make binding governmental decisions on behalf of the tribe. In situations like this, the professional rules suggest that WilmerHale should have gone to what they likely perceive to be the next rung down on the organizational ladder, and consulted the general membership of the tribe as to whether they wanted to sign off on the disqualification motion. *See* California Rules of Prof'l Conduct 3-600(B). There is no evidence that this actually happened, though, which means that the Court should abstain from making a determination on whether Quechan the tribe has standing to pursue this motion until WilmerHale obtains a legitimate resolution authorizing the pursuit of this motion from either the general membership or the reconstituted Tribal Council post-elections this fall.

C. DISQUALIFICATION FACTORS – NO "ADVERSITY"

The existence of actual standing to pursue this motion does not mean that WilmerHale has proven each and every element required to warrant the rather severe sanction of disqualification. This remedy is a "blunt tool," the "ruthlessness" for which is only warranted "after a clear showing of conflict." *Lennar Mare Island, LLC v. Steadfast Ins. Co.,* 105 F. Supp. 3d 1100, 1108 (E.D. Cal. 2015). Because disqualification is a "drastic measure," it is generally disfavored and should only be imposed when absolutely nec-

essary." *Concat LP v. Unilever, PLC,* 350 F. Supp. 2d 796, 814 (N.D. Cal. 2004); *see Gregori v. Bank of Am.,* 207 Cal. App. 3d 291, 300-01 (1st Dist. 1989) ("[M]otions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent."); *Greenfield MHP Assocs., L.P. v. Ametek, Inc.,* 2018 U.S. Dist. LEXIS 11767, *6 (S.D. Cal. 2018) ("Because of th[e] potential for abuse, disqualification motions should be subjected to particularly strict judicial scrutiny." (citing *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.,* 760 F.2d 1045, 1050 (9th Cir. 1985))) (Curiel, J.). A decision to disqualify a law firm from representing a client in a matter rests within the sound discretion of the district court and "depend[s] on the specific circumstances of each case." *White v. Experian Info. Solutions,* 2014 U.S. Dist. LEXIS 61433, *18 (C.D. Cal. 2014) (citing, *e.g.*, *Oaks Mgmt. Corp. v. Superior Court,* 145 Cal. App. 4th 453, 462 (2006)). The burden to "establish[] an ethical violation or other factual predicate upon which the motion depends" rests on the moving party. *Fid. & Deposit Co. v. Travelers Cas. & Sur. Co. of Am.,* 2017 U.S. Dist. LEXIS 133519, *13 (D. Nev. 2017) (citing, *e.g.*, *Optyl,* 760 F.2d at 1045).

The basis for the present motion is a supposed violation of California Rule of Professional Conduct 3-310(E), which provides that "[a] member shall not, without the informed written consent of the client, accept employment *adverse* to the client or former client where, by reason of the representation of the client or former client, the member has obtained *confidential* information *material* to the employment." California Rule of Prof'l Conduct 3-310(E) (emphasis added). For purposes of interpreting this rule, "[a]n adverse interest is one that is 'hostile, opposed, antagonistic … detrimental [or] unfavorable' to another's interests." *Walker v. Apple, Inc.,* 4 Cal. App. 5th 1098, 1110-1111 (4th Dist. 2016) (quoting *Ames v. State Bar,* 8 Cal.3d 910, 917 (1973)). "Although disqualification is required when an attorney represents clients with directly adverse interests… disqualification is not required 'when only a hypothetical conflict exists.'" *Id.* at 1111 (citing *Fox Searchlight Pictures, Inc. v. Paladino,* 89 Cal. App. 4th 294, 302 (2001)).

Most of the cases involving directly adverse interests that support disqualification

"reflect a paradigm that is absent here… [where] the attorney obtained confidential information about a party while associated with one firm, and then switched to another firm that already was representing that client's adversary." *UMG Recordings, Inc v. Myspace, Inc.,* 526 F. Supp. 2d 1046, 1064 (C.D. Cal. 2007) (citing, *e.g.*, *Lucent Technologies, Inc. v. Gateway, Inc.,* 2007 U.S. Dist. LEXIS 35502 (S.D. Call. 2007)). In fact, a number of courts, both state and federal, have dealt with an analogous situation where a former attorney of a corporation later represented shareholders in a derivative suit, finding that the "interests of the clients at issue are not adverse and that the presumption of a conflict under California law does not arise." *In re Oracle Corp Secs. Litig.,* 2005 U.S. Dist. LEXIS 35723, *5 (N.D. Cal. 2005) (citing *In re Dayco Corp. Derivative Sec. Litig.,* 102 F.R.D. 624, 630 (S.D. Ohio 1984) (explaining such "surface duality" only presents a potential for conflict, and is not a conflict *per se*)). One of the reasons for this is that the interests of the shareholders and the entity are so intertwined "that any distinction between them is entirely fictional." *Forrest v. Baeza,* 58 Cal. App. 4th 65 (1st Dist. 1997); *see In re Corinthian Colleges,* 2012 U.S. Dist. LEXIS 188623, *47 (C.D. Cal. 2012) (collecting cases pertaining to the only "theoretical conflict" and thus lack of antagonism between primary and derivative actions).

This scenario was presented in a recent California appellate court case that discussed the age-old opinion in a case entitled *Jacuzzi v. Jacuzzi Brothers, Incorporated,* 218 Cal. App. 2d 24 (1st Dist. 1963). *See Shen v. Miller,* 212 Cal. App. 4th 48, 60 (2d Dist. 2012). In *Jacuzzi,* a former attorney for a corporation who had worked for the company for twenty-four years represented minority shareholders in an action against the corporation. *Id.* at 27-28. Facing claims that the attorney was conflicted out from representing the minority shareholders, both the trial court and the appellate court disagreed, believing that the minority shareholders "were acting as guardians ad litem for the corporation, and were bringing the suit for the benefit of the corporation." *Id.* at 29. In sum, the appellate court held that "[s]ince [the attorney] here acts for the benefit of the corporation he previously represented it is apparent he is not representing an interest adverse to the corpora-

tion." *Id.* (citing *Meehan v. Hopps,* 144 Cal. App. 2d 284, 290 (1st Dist. 1956) ("It would be a sorry state of affairs if when a controversy arises between an attorney's corporate client and one of its officers he could not use on behalf of his client information which that officer was required by reason of his position with the corporation to give to the attorney.")).

In the present situation, the malpractice claim is in no way harmful to Quechan, and is actually intended to help the tribe. As the First Amended Complaint makes clear, the general membership of the tribe –99% percent of whom were unfamiliar to the attorneys for Williams & Cochrane – [redacted] The opposing parties try to pooh-pooh this instruction, but the Constitution for the Quechan tribe explicitly acknowledges that the general membership is the supreme governing body of the tribe because it possesses the power to veto any action by the Tribal Council that it does not like. *See* Dkt. No. 39-39, p. 644. Thus, the fact pattern in this case involves the all-powerful general membership [redacted] and then two individuals splintering off and doing their *own* thing for their *own* benefit. *See id.* at ¶¶ 109-25. The unauthorized acts by these two rogue Councilmembers caused the tribe significant financial loses, the most obvious of which is the newfound requirement that the tribe pay $2,000,000 of its missed revenue sharing payments to the State of California. *See id.* at ¶¶ 206-07. This lump sum is just one of many financial harms, with other last-minute changes to ancillary provisions of the compact including the [redacted] – a singular change that will result in millions – if not tens of millions – in lost income due to Quechan's [redacted]. *Id.* at ¶ 108; *see* Quechan Casino Resort, *Careers, available at* http://playqcr.com/section/careers (last visited May 11, 2018). Thus, the malpractice action is designed to alleviate the harms to the individual tribal members and the Quechan tribe as a whole on account

of the damage caused by some rogue actors. With that said, if there is any question about whether the individual tribal members are really adverse to Quechan, that is an issue that "should not be determined in the context of a motion to disqualify counsel." *Forrest,* 58 Cal. App. 4th at 75 (citing *Lewis v. Shaffer Stores Co.,* 218 F. Supp. 238, 239 (S.D.N.Y. 1963)). Perhaps that issue is best left for resolution once Quechan has a legitimate Tribal Council at some point this winter that is not primarily composed of recalled officials.

D. DISQUALIFICATION FACTORS – NO USE OF CONFIDENTIAL INFORMATION

On top of which, the presumption confidential information may be used in litigating the malpractice claims is both rebut by Williams & Cochrane and an argument that the Quechan tribe is precluded from raising given its past conduct in this litigation. According to California law, a subsequent matter is substantially related to a prior one "[i]f there is a *reasonable probability* that confidences were disclosed [in an earlier representation] which could be used against the client in [a] later, adverse representation." *In re County of Los Angeles,* 223 F.3d 990, 994 (9th Cir. 2000). In a somewhat circular fashion, a showing that two matters are substantially related creates a presumption that the attorney had access to confidential information in the first representation. *Flatt v. Superior Court,* 9 Cal. 4th 275, 283 (1994). This presumption arises from competing concerns that the former client does not have the power to prove what is in the mind of the attorney and the attorney should not have to "engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation." *Forrest,* 58 Cal. App. 4th at 82. Yet, these concerns are not present, and thus the presumption does not apply, in intra-organizational actions "where [such entity]… [is] so intertwined with the individual [plaintiffs] that any distinction between them is entirely fictional." *See id.*

What these rules go to show is that there should be no concern about the use of confidential information in a situation like this where the tribe is more closely aligned with the general members advancing the claim than the ousted rogue officials who are trying to prevent it from going forward. Yet, the presumption that any confidential info-

rmation will be used in this case is rebut by the actions of the individual defendants earlier on in the proceeding. As discussed in the briefing concurrently filed by Williams & Cochrane, opposing counsels devised a plan to circumvent the Court's sealing orders in this case by soliciting the assistance of Senior Advisor for Tribal Negotiations Joginder Dhillon, asking him to publicly disclose *all* of the till-then confidential compact negotiation materials between the Office of the Governor and Quechan while the tribe had Williams & Cochrane as counsel. Thus, any possible confidential information the Firm obtained from the prior representation is already public, and it was made so through the actions of the attorneys who purport to represent the Quechan defendants in this case. Given this, the presumption, to the extent it even applies, is inapposite in the case at hand where the party complaining about confidences is the same one who happened to disclose all of them.

E. DISQUALIFICATION FACTORS – NOT MATERIAL

Though the opposing parties seem to believe that disqualification turns entirely upon the existence or use of confidential information, the pertinent rule under the California Rule of Professional Conduct explains that a subsequent adverse representation is only questionable if the attorney "has [previously] obtained confidential information *material* to the employment." California Rule of Prof'l Conduct 3-310(E). Yet, opposing counsel has gone to great lengths in the underlying motion to explain that the only material information needed to adjudicate the malpractice claim is "the last [compact] draft negotiated by W&C" and "the compact ultimately negotiated by Rosette." Dkt. No. 51-1, 4:22-23. This one statement was enough to convey its point, but opposing counsel went even further and proceeded to hammer home its position on the ensuing page of the brief by reiterating in greater detail "the malpractice claim is a direct comparison between the terms of the compact W&C claims they negotiated on behalf of the Tribe, and the final terms of the compact negotiated by Rosette and agreed to by the Tribe's Tribal Council." *See id.* at 5:3-5. Thus, only two documents are in play, both of which were transmitted to the third-party the State of California, neither of which the State believes is confidential,

and all of which "Quechan" and its attorneys deliberately helped publicize on the docket for this case. Thus, all that rains down from the cries of confidentiality is crocodile tears.

F. DISQUALIFICATION FACTORS – WRITTEN CONSENT / POTENTIAL CURES

Finally, Williams & Cochrane made sure to obtain the informed written consent of the tribal members who are pursuing the class malpractice claim against Mr. Rosette. *See Greenfield,* 2018 U.S. Dist. LEXIS 11767 at *18 (explaining that the Court found persuasive attestations that the clients "know of the potential conflict, have consulted independent counsel, regarding the conflict issue, and still wish to be represented by Plaintiff's Counsel). As to that, the attorney-client fee agreement between Williams & Cochrane and the representative tribal members contains a waiver section that explains there may be potential or actual conflicts of interest and advises the tribal signatories to consult with independent counsel before executing the agreement. *See* Declaration of Cheryl A. Williams, ¶ 2. Should this be insufficient to satisfy the written consent rule in a derivative action like this, the "popular veto" section of the Quechan Constitution indicates that the general membership of the tribe can takes preeminent action with just one-hundred signatures, and, thus, Williams & Cochrane respectfully requests leave of court to add a sufficient number of tribal members to reach this figure. Certainly, a remedy like this is more appropriate than immediately issuing the harsh sanction of disqualifying the tribal members' law firm of choice, especially when very few law firms would want to get involved in an acrimonious situation like this. With that said, other remedies short of disqualification are also available, like continuing this motion until *after* the Quechan general election this fall to see how a legitimate, properly-constituted Tribal Council feels about this disqualification motion. However, should the Court find disqualification to be the appropriate outcome, then the individual tribal members ask for the opportunity to hire separate counsel to litigate the malpractice claim as part of the instant action.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court deny the motion to disqualify Williams & Cochrane, LLP.

RESPECTFULLY SUBMITTED this 11th day of May, 2018

WILLIAMS & COCHRANE, LLP, *et al*.

By: */s/ Kevin M. Cochrane*

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