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Attorneys for Defendants Quechan Tribe of the Fort Yuma Indian Reservation, Keeny Escalanti, Sr., and Mark William White II

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,

v.

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 10,

Defendants.

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

REPLY IN SUPPORT OF MOTION TO DISQUALIFY WILLIAMS & COCHRANE, LLP

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: June 8, 2018
Time: 1:30 p.m.

INTRODUCTION

Williams & Cochrane, LLP ("W&C") largely opposes the motion to disqualify it from representing individual Tribe members in their malpractice claims against the Rosette Defendants by impugning WilmerHale and asking the Court to wade into Quechan electoral affairs. The former is irrelevant, and the latter is both irrelevant and barred by well-settled caselaw. W&C's limited discussion of the relevant standards underlying the Tribe's motion is not just unpersuasive; it illustrates why the motion should be granted.

ARGUMENT

I. W&C'S FOCUS ON WILMERHALE IS MISPLACED

In its Opposition, W&C takes great issue with WilmerHale, asking the Court to "consider the source" when deciding the Motion to Disqualify, and referring to it as "WilmerHale's" motion throughout. *See* Opp'n at 1. WilmerHale's prior representations of other clients and its billings in connection with defending the Quechan Defendants in this action are not the relevant issues. The propriety of W&C's continued representation of individual Tribe members given W&C's prior representation of the Tribe is the issue before the Court.

W&C further argues that its conflict should be ignored because WilmerHale should "simply advise [the Tribe] to pay the amount due or communicate some semblance of a reasonable settlement proposal." *Id.* at 2-3. W&C maintains that doing so is the reasonable course of action because if it loses the pending 12(b) motions, then W&C "will simply re-file a nearly identical complaint in San Diego Superior Court." *Id.* at 2. These arguments likewise have nothing to do with the relevant issue before the Court. To the extent the Court takes any of this into account, it should note W&C's threat to continue litigating claims that this Court dismisses. This would force the Tribe—W&C's former client—to incur even more legal fees defending improperly-brought claims in state court that this Court will have ruled were insufficient or otherwise barred.

II. W&C'S ARGUMENT REGARDING STANDING IS AN IMPROPER REQUEST FOR THE COURT TO INTERVENE IN QUECHAN INTERNAL ELECTORAL AFFAIRS

Despite W&C's repeated attempts in its filings to cast a shadow over the legitimacy of the current leadership of the Tribe, and therefore its ability to proceed in this lawsuit, there is no credible dispute. Even in its Opposition, W&C reports the miniscule turnout for the "recall" organized by the individual Tribe member plaintiffs. *Id.* at 4 (citing recall vote results "of 147-80 and 209-102, respectively"). For a recall, or any other "veto" that W&C claims in its Opposition nullifies the actions of the Tribal Council, the Quechan Constitution requires a "majority of the adult members of the Tribe" to vote in favor of the action. *See* FAC Ex. 39 Art VII, §4. There are ***thousands*** of Tribe members, not hundreds. *See* FAC ¶ 299 (alleging there are "more than 3,200 members" of the Tribe). There was never any chance that the "recalls" would result in anything but fodder for campaigns by those Tribe members who want to take over the Tribal Council (and who are plaintiffs here).

But none of this matters for purposes of this motion. W&C's "standing" argument asks this Court to rule that the Tribal Council lacks the authority to manage the defense of this litigation.[1] Alternatively, W&C asks the Court to "abstain from making a determination on whether Quechan the tribe [sic] 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." Opp'n at 4. Both requests require the Court to intervene in Quechan tribal administrative and electoral issues. They are premised on incorrect interpretations of Quechan tribal law regarding Tribal Council authority, Tribal Council resolutions, and the retention of counsel by the Tribe. W&C's arguments also incorrectly assume the illegitimacy of the current Tribal Council, and explicitly

[1] Article III, Section, 6(d) of the Quechan Constitution, explicitly empowers the Tribal Council to "employ legal counsel." FAC Ex. 39.

acknowledge that W&C is seeking to delay resolution of the pending motions because of its interest in the outcome of Quechan electoral affairs. None of these arguments are appropriate in this lawsuit.

It is black-letter law that federal courts cannot become involved in internal tribal affairs. *See*, *e.g.*, *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (recognizing that Indian tribes are distinct, independent political communities that retain their natural rights in matters of local self-government); *Wheeler v. U.S. Dep't of Interior, Bureau of Indian Affairs*, 811 F.2d 549, 551 (10th Cir. 1987) ("The federal courts have also encouraged self-government. Specifically, they have stated that when a dispute is an intratribal matter, the Federal Government should not interfere."); *Picayune Rancheria of Chukchansi Indians v. Henriquez*, No. CV-13-01917-PHX-DGC, 2013 WL 6903750, *3 (D. Ariz. 2013) ("Federal courts lack jurisdiction to decide intra-tribal disputes."). Whatever grievances W&C and the individual plaintiffs may have with the Quechan electoral process and the procedures established by the Quechan constitution, this is not the proper forum to resolve them. *Id*. The Quechan Nation has its own court. *See* FAC Ex. 39 Art. II §1; *see also* http://quechantribalcourt.info/Home_Page.php. Challenging the legitimacy of the Tribal Council is not only well outside the bounds of this motion, but is prohibited by well-established law.

III. W&C CANNOT REPRESENT THE INDIVIDUAL PLAINTIFFS IN THEIR MALPRACTICE CLAIMS AGAINST THE ROSETTE DEFENDANTS

As explained in the opening Memorandum, W&C is subject to disqualification from the individual plaintiffs' malpractice claims because its representation of the individual plaintiffs is substantially related to its prior work for the Tribe, and the individual plaintiffs have interests that are adverse to the Tribe. *See Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283 (1994). W&C's arguments in Opposition are all inapposite, and the Court should grant the Motion to Disqualify.

A. W&C Represented The Tribe In A Substantially-Related Matter And Is In Possession Of Material, Confidential Information.

W&C does not attempt to argue that its prior work for the Tribe is unrelated to the individual plaintiffs' alleged malpractice claims. And W&C concedes that "a showing that two matters are substantially related creates a presumption that the attorney had access to confidential information in the first representation." Opp'n at 8 (citing *Flatt*, 9 Cal. 4th at 283).

W&C instead argues that "any possible confidential information [W&C] obtained from the prior representation is already public" and is "not material." Opp'n at 9. But that is just not true. In the course of any representation, clients and their attorneys engage in confidential communications that are not transmitted to the opposing party. This was no different. Of course, W&C is in possession of information through its representation of the Tribe that the State does not possess, including its then-negotiation strategy, what the Tribe's priorities were in its negotiations with the State, and any number of other attorney-client privileged communications that occurred during W&C's representation of the Tribe—much of which would be relevant to the merits of the purported malpractice claims.

After all, W&C's claims are based on its work for the Tribe over eight months. W&C generated confidential work product that the State does not have access to and was not submitted in connection with Senior Advisor Joginder Dhillon's Declaration. The suggestion that the State was aware of and has disclosed the entire universe of relevant confidential information learned by W&C in the course of its representation of the Tribe is neither credible nor consistent with the practice of law.

W&C also argues 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." Opp'n at 8. As a result, W&C's argument collapses into the notions that (1) the Tribal Council is not actually in power, and (2) that the

individual plaintiffs asserting the claim speak on behalf of the entire Tribe. Neither is true. As discussed above, the Tribal Council remains the governing body of the Tribe, and, as discussed below, there is no legal or factual basis to hold that these individual plaintiffs represent the Tribe itself.

B. The Individual Plaintiffs' Interests Are Adverse To The Tribe.

W&C does dispute that when evaluating whether an attorney should be disqualified in cases of successive representations, adverse interests are defined broadly. In its Opposition, W&C acknowledges that "[a]n adverse interest is one that is 'hostile, opposed, antagonistic . . . detrimental [or] unfavorable' to another's interests." Opp'n at 5 (citing *Walker v. Apple, Inc.*, 4 Cal. App. 5th 1098, 1110-1111 (2016)). Under this definition, and as described in the opening Memorandum, the interests of those bringing the malpractice claims are clearly adverse to the Tribe—the rhetoric and invective throughout the FAC, *ex parte* motion, and oppositions to the pending motions speaks for itself. W&C and the individual plaintiffs are "hostile, opposed, [and] antagonistic" to the Tribe and the current Tribal Council that is the governing body of the Tribe.

W&C instead contests adversity in two ways. First, W&C argues that most of the cases involving directly adverse interests arise from cases in which an attorney learns confidential information from a client while at one law firm and then switches to another law firm that already represents that client's adversary. Opp'n at 5-6. True or not, that is beside the point. The facts here are more egregious—W&C has voluntarily stepped into the conflict itself after representing the Tribe. Second, W&C analogizes the malpractice claims to a shareholder derivative suit. But that analogy fails because this is not a derivative suit, which has unique aspects that do not apply here, and because even under derivative suit caselaw, W&C would still be disqualified.

1. The malpractice claims are not like a derivative suit

There is no factual or legal predicate for holding the individual Tribe members

speak for the Tribe, or that they are pursing their claims on behalf of the Tribe. The individual plaintiffs are 28 among 3200 Tribe members. They seek damages for themselves, not on behalf of the Tribe. *See* FAC at p. 120. And unlike shareholders in a derivative suit, the individual plaintiffs here do not have standing to bring their claims. *See* Dkt. No. 53-1 at 23-24 (explaining that individual plaintiffs do not have standing to bring malpractice claims based on Rosette, LLP's Attorney Services Contract with Quechan).

The Tribe is not a corporation governed by the corporate laws that allow for derivative actions. The Quechan Constitution does not provide for a derivative action, not even in Quechan's tribal court, let alone in the federal courts. The individual plaintiffs' malpractice claims against the Tribe's legal counsel are simply not analogous to the unique procedural and substantive considerations present in a shareholder's derivative suit. *Baytree Capital Assocs., LLC v. Quan*, No. CV082822CAS (AJWx), 2008 WL 3891226, at *10 (C.D. Cal. Aug. 18, 2008) (recognizing that derivative suits raise particular considerations that other suits do not).

2. *Even derivative suit caselaw would not allow for W&C to represent the individual Tribe members here*

W&C relies on *Jacuzzi v. Jacuzzi Brothers, Inc.*, 218 Cal. App. 2d 24 (1963) for the proposition that an attorney can represent shareholders in a derivative action against a former client.[2] *See* Opp'n at 6-7. W&C, however, omits that the court's holding hinged on the attorney not having to breach any client confidences in the course of the new representation, and that it was specific to a derivative suit. *Forrest v. Baeza*, 58 Cal. App. 4th 65 (1997), another case cited by W&C is more on point. *Forrest* held that "[w]here the requisite substantial relationship between the subjects

[2] W&C discusses *Jacuzzi v. Jacuzzi Brothers, Inc*. as it was discussed in *Shen v. Miller*, 212 Cal. App. 4th 48, 60 (2012), but fails to mention that the court in *Shen* did not follow *Jacuzzi* and rather denied the motion for disqualification based on the lack on an attorney-client relationship.

of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory." *Id.* at 82.

Baytree Capital is also instructive. In *Baytree Capital*, a law firm was disqualified from representing a corporation in a derivative suit because it had previously represented one of the company's directors in a lawsuit involving similar facts, and that director was adverse to the corporation in the derivative suit. 2008 WL 3891226, at *8-11. The court reasoned that "the disqualification of [counsel] for [the corporation] on the basis of these prior relationships with parties that are presently adverse to the corporation is in complete accord with those decisions that have required substitute counsel in a derivative action to have no prior connection with the individual defendants or the corporation." *Id.* at *10. Likewise here, W&C previously represented the Tribe in its compact negotiations—involving the same facts at issue in this suit—and is presently representing individual Tribe members adverse to the Tribe. It should be disqualified from representing the individual plaintiffs.

IV. W&C DOES NOT HAVE WRITTEN CONSENT FROM ITS PRIOR CLIENT – THE TRIBE.

W&C claims it has obtained written consent of its individual Tribe member clients. It does not provide any evidence of the consents other than a sentence in the Declaration of Ms. Williams. *See* Dkt. No. 75-1 (Williams Decl.) ¶ 2. But even assuming the written consents exist and are sufficient as to W&C's current clients, that does not cure its conflict. The ***Tribe*** has not consented or waived the conflict—that is what this motion is about. The individual plaintiffs' acknowledgement of W&C's conflict is irrelevant.

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CONCLUSION

W&C does not offer any argument that prevents its disqualification from representing the individual plaintiffs in their alleged malpractice claims. The Court should grant the Motion to Disqualify.

Dated: May 18, 2018

Respectfully submitted,

/s/ Christopher T. Casamassima
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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 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 May 18, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima