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UNITED STATES DISTRICT COURT
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 others
similarly situated,

Plaintiffs,

v.

QUECHAN TRIBE OF THE FORT
YUMA INDIAN RESERVATION;
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.: 3:17-cv-01436-GPC-MDD
(publicly filed redacted version)

ORDER:

(1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS [ECF No. 50];

(2) DENYING MOTION TO DISQUALIFY [ECF No. 51];

(3) DENYING AS MOOT MOTION TO STRIKE [ECF No. 52];

(4) GRANTING MOTION TO DISMISS [ECF No. 53]; and

(5) DENYING AS MOOT EX PARTE MOTION TO EXCLUDE AND CONTINUE [ECF No. 62]

Before the Court are several motions. Defendants Quechan Tribe of the Fort Yuma Indian Reservation (“Quechan,” or the “Tribe”), Escalanti, and White

1 (collectively, the “Quechan Defendants”) have filed a motion to dismiss the operative
2 First Amended Complaint (“FAC”) and a motion to disqualify Williams & Cochrane as
3 counsel for Plaintiffs other than itself. (ECF Nos. 50, 51.) Defendants Armstrong,
4 Rosette, Rosette & Associates, and Rosette, LLP (collectively, the “Rosette Defendants”)
5 have filed an anti-SLAPP motion to strike one of the claims in the FAC and a motion to
6 dismiss the FAC. (ECF Nos. 52, 53.) In response, Plaintiffs have filed a motion seeking
7 to exclude certain evidence offered in support of Defendants’ motions or, alternatively, to
8 withhold consideration of Defendants’ motions to permit additional discovery. (ECF No.
9 62.) For the reasons stated below, the Court GRANTS in part and DENIES in part the
10 Quechan Defendants’ motion to dismiss, DENIES the motion to disqualify, DENIES as
11 moot the motion to strike, GRANTS the Rosette Defendants’ motion to dismiss, and
12 DENIES as moot the motion to exclude or continue.

13 I. Background

14 Plaintiffs’ First Amended Complaint alleges the following relevant facts.¹ Plaintiff
15 Williams & Cochrane, LLP (“W&C”), is a California legal services partnership formed in
16 2010 by Cheryl Williams and Kevin Cochrane after they left their positions at the law
17 firm of Rosette & Associates, PC. (FAC, ECF No. 39, ¶¶ 12, 46, 50.) All other Plaintiffs
18 in this case (the “Member Plaintiffs”) are enrolled members of Quechan, which is a
19 federally-recognized Indian tribe. (*Id.* ¶¶ 13, 14.) Defendant Robert Rosette serves as
20 the President and Director of Defendant Rosette & Associates, which is a general partner
21 of Defendant Rosette, LLP. (*Id.* ¶¶ 15–17.) According to Plaintiffs, Rosette is an Indian
22
23

24 ¹ Contrary to Rule 8(a)’s clear instruction, the FAC is neither “short” nor “plain.” Fed. R. Civ. P. 8(a).
25 It spans 122 pages and contains pages-long discussions of topics wholly irrelevant to the claims in this
26 case. “Ultimately, such pleading is self-defeating for plaintiffs, as it merely slows down the litigation
27 from reaching the merits of plaintiffs’ claims.” *In re Clearly Canadian Secs. Litig.*, 875 F. Supp. 1410,
28 1420 (N.D. Cal. 1995). Plaintiffs are hereby warned that should they choose to file an amended
complaint in an attempt to cure the deficiencies discussed in this ruling, their pleadings shall be short
and plain. If such an amended complaint fails to adhere to Rule 8(a)’s requirements, the Court will
consider dismissing the complaint *sua sponte*.

1 law attorney who “has a history of representing individual persons or factions within
2 tribes while purporting to represent the tribe itself.” (*Id.* ¶ 126.) Defendant Richard
3 Armstrong serves as senior of counsel at Rosette, LLP. (*Id.* ¶ 18.) Defendant Keeny
4 Escalanti is a member of the Quechan Tribe who became Tribal Chairman in 2017. (*Id.*
5 ¶ 19.) Defendant Mark William White II is a member of the Quechan Tribe who has
6 served as a member of the Tribe’s council. (*Id.* ¶ 20.)

7 **A. The Pauma Litigation**

8 In 1999, the State of California entered into a compact with 60-some Indian tribes
9 permitting the tribes to operate a threshold number of slot machines and creating a
10 licensing system for the tribes to seek permission to operate additional machines. (*Id.* ¶¶
11 32–36.) Disagreements over the maximum number of total licenses permitted under the
12 compact led to a 2004 compact amendment (the “2004 Amendment”) that altered the
13 tribe’s allocation of machines. (*Id.* ¶¶ 37–40, 135.) Under this amendment, however,
14 certain tribes—including the Pauma Band of Mission Indians (“Pauma”)—“ended up
15 paying approximately twenty-four times as much revenue sharing each year in order to
16 operate machines that should have been available under its original compact.” (*Id.* ¶ 40.)
17 Pauma was also responsible, under the 2004 Amendment, for entering into “MOUs” with
18 San Diego County to compensate the county for services relating to Pauma’s gaming
19 operations. (*Id.* ¶ 135.) Pauma retained Rosette to execute its MOU with San Diego
20 County, which he completed in 2007. (*Id.* ¶ 136.)

21 In 2009, Pauma—represented by Rosette & Associates—filed suit in this court
22 against California seeking rescission of the 2004 Amendment and restitution for the
23 additional fees paid thereunder. (*Id.* ¶¶ 41–42.) Two attorneys at Rosette & Associates
24 were exclusively responsible for litigating Pauma’s case: Cheryl Williams and Kevin
25 Cochrane. (*Id.* ¶¶ 42–43, 139.) A month after obtaining a preliminary injunction against
26 California, Williams and Cochrane left Rosette & Associates and created their own firm,
27 W&C. (*Id.* ¶¶ 45–46, 140.) California appealed the preliminary injunction to the Ninth
28 Circuit and sought a stay pending appeal. (*Id.* ¶ 48.) Williams offered to assist Rosette

1 & Associates in preparing an opposition to California’s stay motion, but Rosette &
2 Associates rejected Williams’s offer. (*Id.*) The Ninth Circuit granted the stay. (*Id.* ¶ 49.)
3 Soon after, Pauma terminated Rosette & Associates and hired W&C. (*Id.* ¶¶ 50, 144.)
4 W&C successfully moved for reconsideration of the Ninth Circuit’s stay order, and it
5 later obtained a favorable disposition of the appeal. (*Id.* ¶¶ 51, 146–47.)

6 While Rosette was representing Pauma he wrote an “opinion letter” in which he
7 explained that the savings Pauma obtained as a result of the injunction could be
8 distributed to the tribal government. (*Id.* ¶¶ 150–51.) According to Plaintiffs, this
9 opinion was meant to “get the injunction savings freed up for [Rosette’s] own personal
10 gain, not for the benefit of the Pauma General Council.” (*Id.* ¶ 151.)

11 After Pauma retained W&C, Rosette told then-Chairman Christobal Devers “to
12 withhold payment of [W&C’s] invoices” to “devastate” W&C and permit Rosette to take
13 over Pauma’s representation. (*Id.* ¶ 152.) W&C received its first paycheck from Pauma
14 almost four months after beginning its representation of Pauma. (*Id.* ¶ 153.) Before
15 W&C received that payment, Devers told Williams and Cochrane that Pauma would
16 “never” pay W&C, and he suggested that W&C walk away from the job before he
17 “ruin[ed W&C’s] reputation in Indian Country.” (*Id.* ¶ 154.)

18 **B. Relationship with La Pena Law**

19 In July 2010, Cochrane met with Michelle La Pena, a Sacramento attorney who
20 represented several gaming tribes. (*Id.* ¶¶ 157–59.) La Pena agreed to take W&C on as
21 “of counsel” in her law firm, La Pena Law. (*Id.* ¶ 160.) On August 11, 2010, Cochrane
22 presented La Pena with a litigation memorandum with which La Pena was “rather
23 impressed.” (*Id.* ¶¶ 161–62.) La Pena suggested to Cochrane that she was interested in
24 absorbing or merging with W&C. (*Id.* ¶ 162.)

25 At some point in the following days, however, Rosette told La Pena that W&C had
26 stolen his clients and suggested they would steal La Pena’s in the future. (*Id.* ¶ 163.) On
27 August 15, La Pena informed Cochrane that despite the fact that W&C produced “quite
28 stellar” work, she was terminating the of counsel relationship because of “confidentiality

1 and conflict” issues. (*Id.* ¶ 164.)

2 **C. Rosette Attempts to Insert His Firm Into Pauma’s Negotiations**

3 On August 4, 2011, California’s counsel of record in the Pauma case informed
4 W&C that Rosette and his firm had separately set up a meeting to settle the matter on
5 behalf of Pauma. (*Id.* ¶ 167.) The meeting was set up by Armstrong, who had emailed
6 California compact negotiator Jacob Appelsmith and stated that Pauma’s Tribal Council
7 wanted to sit down with California’s negotiators “without their attorneys present.” (*Id.*
8 ¶ 169–71.) Rosette followed-up Armstrong’s email with another stating that Rosette’s
9 firm was not “engaged as legal counsel on the litigation,” but that Pauma wanted to settle
10 the case. (*Id.* ¶ 172.) After W&C moved for a protective order to prevent Rosette from
11 interfering with the case, however, Appelsmith postponed the negotiations and Rosette
12 sent an email to all members of the Tribal Council except for the Chairman asking them
13 to sign two prepared letters that stated Pauma’s Tribal Council had engaged Rosette’s
14 firm for negotiation purposes. (*Id.* ¶¶ 173–76.) Pauma’s Tribal Council refused to sign
15 the letters, even after Rosette pressured the council’s chairman for the next twenty days.
16 (*Id.* ¶ 177.) Rosette made another unsuccessful attempt to get Pauma to hire him to
17 renegotiate its compact with California in November 2016, and he continues to do so
18 today. (*Id.* ¶¶ 183–84.)

19 W&C continued to represent Pauma throughout the remainder of the litigation,
20 which resulted in rescission of the 2004 Amendment and Pauma obtaining \$36.3 million.
21 (*Id.* ¶¶ 55–65.) Despite W&C’s handling of almost the entirety of Pauma’s case, Rosette
22 has published on his firms’ websites a statement that he “successfully litigated a case
23 saving the Pauma . . . over \$100 Million in Compact payments allegedly owed to the
24 State of California against then Governor Schwarzenegger.” (*Id.* ¶¶ 66, 147; ECF Nos.
25 39-6, 39-7.) The same assertion was also made in a profile of Rosette titled “25 People to
26 Watch in the Gaming industry. (*Id.* ¶ 148.) According to Plaintiffs, Rosette makes the
27 same assertions in other advertising and marketing materials. (*Id.* ¶ 149.)

28 //

D. Quechan Retains Williams & Cochrane

1 **D. Quechan Retains Williams & Cochrane**
2 Soon after the conclusion of Pauma’s litigation, Quechan President Mike Jackson
3 asked W&C to represent Quechan in a dispute over its own compact amendment that was
4 signed with California in 2007. (FAC ¶¶ 68, 71.) The Quechan Constitution empowers
5 the Tribal Council with the responsibility of choosing Quechan’s counsel. (*Id.* ¶ 186.)

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] (*Id.* ¶ 73.)

9 Failing to make timely revenue-sharing payments was “extremely dangerous under the
10 2007 Amendment” because it could have resulted in Quechan breaching the compact and
11 California halting all of Quechan’s gaming operations, [REDACTED]

12 [REDACTED] (*Id.* ¶ 74.) [REDACTED]

13 [REDACTED]

14 [REDACTED] (*Id.* ¶ 75.) [REDACTED]

15 [REDACTED] (*Id.*) [REDACTED]

16 [REDACTED] (*Id.*

17 ¶¶ 76–77.)

18 Quechan and W&C negotiated and executed a fee agreement that included (1) a
19 flat monthly fee of \$50,000 and (2) a contingency fee of any “revenue sharing discount
20 Quechan receives under a negotiated successor compact.” (*Id.* ¶¶ 78–86; *see* ECF No.
21 39-2.) Section 5 of the fee agreement, which governs the contingency fee, states that the
22 contingency fee “recognizes the unique experiences of Firm in providing the monetary
23 recovery requested by Client and the extraordinary effort involved in such negotiation
24 and/or litigation, as well as the discounted monthly flat rate.” (ECF No. 39-2 at 002.²)
25 The contingency fee is a percentage of Quechan’s “net recovery,” which is defined in

26 _____

27
28 ² Citations to specific pages in the exhibits attached to the FAC refer to the Bates Stamp numbers located at the bottom right corner of each page.

1 relevant part as “any credit, offset or other reduction in future compact payments to the
2 State in a successor compact (whether new or amended) as a result of the excess
3 payments made under Client’s tribal/State compact amended in 2006 in lieu of or in
4 addition to a monetary ‘net recovery.’” (*Id.*) Section 5(a) sets the contingency fee rate at
5 15% “[i]f the matter is resolved before the filing of a lawsuit or within 12 months
6 thereof.” (*Id.* at 003.) For purposes of Section 5(a), “the matter is resolved at the point in
7 time that the Client signs a successor compact (whether new or amended), which
8 subsequently obtains the requisite State and federal approvals and takes effect under the
9 Indian Gaming Regulatory Act.” (*Id.*) It also explains that the 15% rate “is higher than
10 the formative rates for resolving the case through court action . . . based upon the Client’s
11 express request after consultation and stated need to resolve the situation in as effective
12 and expeditious a manner as possible.” (*Id.*) In other words, by setting a higher
13 contingency fee rate for a non-litigation disposition, the fee arrangement puts a premium
14 on W&C obtaining an amended compact for Quechan without resorting to litigation.

15 Section 11 of the fee agreement discusses “Discharge and Withdrawal.” (*Id.* at
16 004.) Section 11 states that “Client may discharge Firm at any time.” (*Id.*) It goes on to
17 explain that if Quechan discharges W&C “before Client otherwise becomes entitled to
18 any other monetary constituting the ‘net recovery’ as described” in Section 5, “Client
19 agrees that Firm will be entitled to be paid by Client a reasonable fee for the legal
20 services provided in lieu of the contingency fee set forth” in Section 5. (*Id.* at 005.) The
21 amount of such an alternate fee is based on ten factors set forth in the agreement. (*Id.*)
22 After setting forth those factors, Section 11 states that “[i]n the event of Firm’s discharge
23 after . . . Client otherwise becomes entitled to any other monetary amount constituting the
24 ‘net recovery’ as described” in Section 5, “the Client will pay the contingency fee set
25 forth” in Section 5 “upon receipt of the ‘net recovery’ amount.” (*Id.*)

26 Section 13 of the fee agreement includes a “limited waiver” of Quechan’s
27 sovereign immunity. (*Id.* at 006.) In relevant part, Section 13(a) states that Quechan
28 “expressly and irrevocably waives its sovereign immunity (and any defense based

1 thereon) from any suit, action or proceeding or from any legal process with respect to any
2 claims the Firm may bring seeking payment under the terms of this agreement.” (*Id.*)
3 Section 13(c) states that W&C “shall have and be entitled to all available legal and
4 equitable remedies, including the right to restitution, specific performance, money
5 damages and injunctive and declaratory relief. The waiver with respect to any monetary
6 remedies shall only entitle the Firm to obtain any payments due to the Firm as set forth in
7 paragraphs 4 and 5 of this Agreement.” (*Id.*)

8 **E. Williams & Cochrane Negotiates On Behalf of Quechan**

9 On October 17, 2016, California sent W&C a letter agreeing to enter into
10 negotiations with Quechan. (FAC ¶ 88.) The parties held their first negotiation session
11 on November 9, 2016. (*Id.* ¶ 89.) [REDACTED]

12 [REDACTED]
13 [REDACTED] (*Id.*) [REDACTED]
14 [REDACTED] (*Id.* ¶ 90.) [REDACTED]
15 [REDACTED]

16 [REDACTED] (*Id.*) Normally, in
17 addition to SDF payments, California demands revenue sharing of at least six percent of
18 “net win” on machines beyond the tribe’s first 350 machines. (*Id.* ¶ 91.) [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED] (*Id.* ¶ 90.) [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 [REDACTED] (*Id.*) The draft compact was
25 also offered to Quechan remarkably quickly: compact negotiations for other tribes are
26 expected to take almost five years. (*Id.* ¶ 92.) [REDACTED]

27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 (*Id.* ¶¶ 93, 102.) Seeking to obtain additional favorable terms, W&C scheduled a
3 negotiating meeting with the Office of the Governor for January 31, 2016. (*Id.* ¶ 94.)

4 [REDACTED]
5 [REDACTED] (*Id.* ¶ 97.) [REDACTED]

6 [REDACTED] (*Id.*) [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] (*Id.*) In
10 March 2017, four “challenger” candidates were seated on the five-member Tribal
11 Council, and Escalanti replaced Jackson as President. (*Id.* ¶¶ 95–96.) [REDACTED]

12 [REDACTED] (*Id.* ¶¶ 98–
13 101.)

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] (*Id.* ¶ 104.) [REDACTED]

17 [REDACTED] (*Id.* ¶ 105.) [REDACTED]

18 [REDACTED]
19 [REDACTED] (*Id.*
20 ¶ 106.) [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] (*Id.* ¶ 107.) [REDACTED]

26 [REDACTED]
27 (*Id.*)
28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] (*Id.* ¶
 3 108.) [REDACTED]
 4 [REDACTED]
 5 (*Id.* ¶ 109.) [REDACTED]
 6 [REDACTED]
 7 (*Id.*) Williams sent a final “set of redlines” to the California negotiators in the early
 8 morning of June 21. (*Id.* ¶ 110.)

9 **F. Rosette’s Efforts to Interfere with W&C’s Representation of Quechan**

10 According to the FAC, in the past few years Rosette has been visiting several tribes
 11 and soliciting their business “by promising he could get them involved in the payday
 12 lending and medical marijuana fields.” (*Id.* ¶ 190.) In the spring of 2017, Rosette
 13 reconnected with Defendant White, who has an interest in “getting involved” in the
 14 marijuana industry. (*Id.* ¶ 191.) Rosette convinced White, and later then-President
 15 Escalanti, that Quechan should hire Rosette to perform its compact negotiations. (*Id.* ¶
 16 192.) Rosette suggested that Quechan could hire Rosette for a discounted fee, after
 17 which Rosette would sell Quechan a payday lending business, and if that plan succeeded,
 18 Rosette would give White and Escalanti a portion of his payday lending revenues “under
 19 the table.” (*Id.*) Rosette also “instructed” White and Escalanti to breach Quechan’s fee
 20 agreement with W&C, which led to Quechan withholding several months of payments.
 21 (*Id.* ¶¶ 193–94.)

22 **G. Quechan Fires Williams & Cochrane and Hires Rosette**

23 On June 27, prior to Quechan signing any compact with California, Williams
 24 received an email from Quechan Executive Secretary Linda Cruz containing a letter dated
 25 June 26 and signed by Escalanti. (*Id.* ¶ 112; ECF No. 39-4.) The letter was titled
 26 “Termination of Attorney-Client Relationship,” and stated that Quechan was “terminating
 27 the services of Williams & Cochrane . . . effective immediately upon your receipt of this
 28 letter.” (*Id.*) The letter stated that the “Tribe will consider all its obligations to the Firm

1 satisfied upon payment of a pro-rated fee for your services” in June, and that the “Tribe
2 will not pay any contingency fee or ‘reasonable fee for the legal services provided in lieu’
3 thereof, regardless of the outcome of its current dispute with the State of California.”
4 (ECF No. 39-4 at 012.) It further explained that W&C was not entitled to any fee under
5 Section 5 of the fee agreement because of (1) the amount of the \$500,000 monthly fee
6 was “exorbitant” and that W&C failed “to produce better-than-boilerplate terms in your
7 negotiations,” (2) “the Tribe was not represented by independent counsel in negotiating
8 the agreement,” (3) the work W&C performed was not “particularly difficult,”
9 (4) W&C’s work did not preclude it from other employment, (5) the Tribe could have
10 obtained the results of W&C’s work on its own because the concessions that W&C had
11 obtained were the “result of changes in the policy and economic condition of the State as
12 well as extensive compact litigation such as the *Pauma*” case, and (9) W&C’s invoices
13 suggested that the it had not performed the amount of work to justify the \$50,000
14 monthly fee, “let alone a contingency or other fee.” (*Id.* at 013.) Next, the letter stated:
15 “We strongly advise you against pressing your luck further out of concern for the
16 reputation of your firm in Indian Country and in the State of California.” (*Id.*) The letter
17 concluded by asking W&C to return to Quechan its case file and reminding W&C of
18 confidentiality requirements, noting that W&C must not “disclose to any employee,
19 officer, or official of the Tribe or any subdivision, agency, or enterprise of the Tribe
20 regarding any matter that was the subject of your engagement.” (*Id.*) Last, the letter
21 instructed W&C to “direct all communications regarding this matter to Robert A.
22 Rosette.” (*Id.*) Because the letter’s language was similar to Christobal Dever’s threat
23 against W&C (*see id.* ¶ 154–55), Plaintiffs allege that Rosette drafted the letter
24 terminating W&C as Quechan’s counsel. (*Id.* ¶¶ 117, 154.)

25 The termination letter was not accompanied by any record of a Tribal Council
26 vote, and California representatives—who had also received notice of W&C’s
27 discharge—were not provided such proof either. (*Id.* ¶¶ 118–19.) On June 27, a Rosette,
28 LLP associate sent Williams an email stating that it was imperative that she receive “the

1 last compact, with any redlines, that was transmitted to the State during your
2 negotiations.” (*Id.* ¶ 120.) On June 30, Williams received a cease-and-desist letter
3 signed by Escalanti—and according to Plaintiffs, drafted by Rosette—demanding that
4 Williams not speak to California officials about Quechan’s negotiations and requesting
5 that W&C send over its most recent draft compact. (*Id.* ¶ 123.) The letter also threatened
6 legal action if W&C did not comply with Quechan’s demands, and accused W&C of
7 unprofessional conduct. (ECF No. 39-5.) Soon after receiving the letter, W&C sent to
8 Quechan the copy of the latest draft compact. (FAC ¶ 125.)

9 After Quechan hired Rosette, California “changed its negotiation position” and
10 demanded that Quechan pay back all of the revenue sharing payments it had been
11 withholding. (*Id.* ¶ 205.) At the end of August 2017, Quechan—represented by
12 Rosette—signed a deal with California that reduced Quechan’s revenue sharing
13 obligations by \$4 million and increased Quechan’s machine limit. (*Id.* ¶¶ 200–01.) The
14 contents of this agreement are the same as the compact negotiated by W&C, but it does
15 not include any of the “new concessions” that California offered to W&C during the
16 earlier negotiations [REDACTED]

17 [REDACTED] (*Id.* ¶ 202.) The compact also
18 requires Quechan to pay California half of the withheld revenue sharing payments. (*Id.*
19 ¶ 206.)

20 Once the Quechan membership became aware of the Tribal Council’s actions, the
21 Tribe held recall elections that resulted in the removal of several council members
22 including White and Escalanti. (*Id.* ¶ 235.) Nonetheless, the recalled officeholders have
23 refused to step down. (*Id.*) Meanwhile, the Tribal Council has stopped making per capita
24 payments to the Tribe’s general membership as a result of what the Tribal Council
25 explains is a sudden unprofitable turn in Quechan’s casinos in California and Arizona.
26 (*Id.* ¶ 236.)

27 **H. Other General Allegations Against Rosette**

28 According to Plaintiffs, Rosette’s business strategy consists of charging clients

1 “bargain-basement of even nominal sums to perform legal tasks,” but making up for the
2 lost revenue by convincing tribes to engage in additional business transactions such as
3 “internet-based payday lending schemes.” (*Id.* ¶¶ 212–15.) Rosette’s strategy often
4 includes “remov[ing] any legal oversight that may try to curb the operations of the
5 forthcoming payday loan business,” such as removing tribal officeholders, firing the
6 tribe’s counsel, and setting up an ineffective regulatory and oversight framework. (*Id.* ¶¶
7 215–18.) One instance of this strategy led to accusations that one of Rosette’s tribal
8 clients was misusing federal grant funds. (*Id.* ¶ 219.) Rosette has set up more than thirty
9 payday loan enterprises at more than a dozen tribes. (*Id.* ¶ 222.) Plaintiffs allege that a
10 significant portion of the revenue from these enterprises goes to Rosette and “to a lesser
11 extent, his allies on the Tribal Council.” (*Id.* ¶ 228.) In performing these schemes,
12 Rosette also convinces tribal councils to hide any legal “pertinent legal actions” from the
13 general membership. (*Id.* ¶ 234.)

14 I. Plaintiffs’ Claims

15 As a result of the allegations above, Plaintiffs assert the following claims:

16 (1) breach of contract, by W&C against Quechan; (2) breach of the implied covenant of
17 good faith and fair dealing, by W&C against Quechan; (3) promissory estoppel, by W&C
18 against Quechan; (4) two violations of the Lanham Act, by W&C against the Rosette
19 Defendants; (5) violation of RICO, by W&C against the Rosette Defendants;
20 (6) conspiracy to violate RICO, by W&C against the Rosette Defendants, Escalanti, and
21 White; and (7) negligence/breach of fiduciary duty, by the Member Plaintiffs against the
22 Rosette Defendants.

23 II. Discussion

24 A. Legal Standard

25 Defendants move to dismiss Plaintiffs’ claims under Rules 12(b)(1) and 12(b)(6).
26 A motion under Rule 12(b)(1) challenges the Court’s subject-matter jurisdiction to
27 adjudicate a particular claim. Here, Quechan asserts that its tribal sovereign immunity
28 bars the Court from exercising subject-matter jurisdiction over some of W&C’s claims.

1 Under such circumstances, “the party asserting subject matter jurisdiction has the burden
2 of proving its existence, i.e. that immunity does not bar the suit.” *Pistor v. Garcia*, 791
3 F.3d 1104, 1111 (9th Cir. 2015) (internal quotation marks omitted). The Court does not
4 presume that the jurisdictional allegations are true, but rather “may hear evidence
5 regarding jurisdiction and resolve factual disputes where necessary.” *Id.* (internal
6 quotation marks omitted).

7 By contrast, a Rule 12(b)(6) motion attacks the complaint as not containing
8 sufficient factual allegations to state a claim for relief. “To survive a motion to dismiss
9 [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as
10 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
11 662, 679 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
12 While “detailed factual allegations” are unnecessary, the complaint must allege more than
13 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
14 statements.” *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion to
15 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that
16 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*
17 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

18 **B. Breach of Contract Claim (Count One)**

19 The Quechan Defendants move to dismiss W&C’s breach of contract claim to the
20 extent that W&C seeks payment under Section 5 of the fee agreement. They contend that
21 Section 11, not Section 5, governs what payment is owed to W&C in light of Quechan
22 having discharged W&C prior to the conclusion of the compact negotiations. (ECF No.
23 50 at 12–13.) Because the FAC alleges that Quechan did not pay W&C any “reasonable
24 fee” based on the ten factors set forth in Section 11 of the plea agreement, the Quechan
25 Defendants concede that W&C has sufficiently pled a breach claim with respect to
26 Section 11. (*Id.* at 12 (“W&C’s allegation that it is eligible for an Alternative Extra Fee
27 under Section 11 of the Fee Agreement is sufficiently pled under Rule 8.”).) “But the
28 plain language of the Fee Agreement,” they argue, “excludes the possibility that W&C is

1 entitled to the contingency fee under Section 5 of the Fee Agreement.” (*Id.* at 12–13.)

2 W&C argues that it is entitled to the contingency fee envisioned in Section 5 of the
3 fee agreement. It points to the provision in Section 11 that states: “In the event of Firm’s
4 discharge after . . . Client otherwise becomes entitled to any other monetary amount
5 constituting ‘net recovery’ . . . the Client will pay the contingency fee set forth” in
6 Section 5. (ECF No. 39-2 at 005.) W&C argues that Quechan is liable to W&C for the
7 Section 5 contingency fee because prior to Quechan discharging W&C as counsel,
8 Quechan was “entitled” to the net recovery it obtained as a result of its negotiated
9 compact with California.

10 The Court cannot agree with W&C that at the time Quechan discharged W&C,
11 Quechan was “entitled”—under any understanding of that term—to any of the net
12 recovery it obtained as a result of the compact it signed with California. To be entitled to
13 something is to hold a legal right to it. *See* Black’s Law Dictionary (10th ed. 2014)
14 (defining entitle as “[t]o grant a legal right to or qualify for”); Oxford English Dictionary
15 (3d ed. 2014) (defining entitled as “has a legal right or just claim to do, receive, or
16 possess something”). Under the allegations in the FAC, there is no question that, at the
17 time Quechan discharged W&C as its counsel, Quechan had no legal right to any of the
18 benefits that California had offered during the negotiations with W&C.

19 W&C’s only argument to the contrary is a citation to the Webster’s Third
20 definition of “entitled,” which is “to furnish with proper grounds for seeking or claiming
21 something.” (ECF No. 73 at 16.) W&C fails to explain why this definition supports its
22 position. Quechan’s negotiations with California were just that—negotiations. While
23 Quechan and California sought an expedited resolution of their negotiations, Quechan
24 was never “furnished” with any “grounds” for seeking or claiming the benefits that
25 California had offered up to the moment at which Quechan discharged W&C.

26 Because Quechan was not “entitled” to any of the concessions California had
27 offered during the negotiations, Quechan’s failure to pay W&C the contingency fee
28 envisioned in Section 5 of the fee agreement was not a breach of contract. To the extent

1 that Count One is premised on a violation of Section 5, that claim is dismissed with
2 prejudice.

3 **C. Sovereign Immunity—Claims Against the Tribe (Counts Two and**
4 **Three)**

5 The Quechan Defendants argue that this Court lacks subject-matter jurisdiction
6 over Counts Two and Three, which assert a breach of the implied covenant of good faith
7 and fair dealing and promissory estoppel. Quechan argues it has not waived its sovereign
8 immunity to allow such claims. “Tribal sovereign immunity protects Indian tribes from
9 suit absent express authorization by Congress or clear waiver by the tribe.” *Pistor*, 791
10 F.3d at 1110 (quoting *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir.
11 2008)). Because there is a “strong presumption against [its] waiver,” any waiver must be
12 clear and unequivocally expressed. *Bodi v. Shingle Springs Band of Miwok Indians*, 832
13 F.3d 1011, 1016–17 (9th Cir. 2016).

14 Section 13 of the fee agreement between Quechan and W&C states: “Client hereby
15 expressly and irrevocably waives its sovereign immunity (and any defense based thereon)
16 from any suit, action or proceeding or from any legal process with respect to any claims
17 the Firm may bring seeking payment under the terms of this agreement.” (ECF No. 39-2
18 at 006.) Quechan argues that while this waiver permits the breach of contract claim, it
19 does not permit the implied covenant or promissory estoppel claims because those are not
20 “claims . . . seeking payment under the terms” of the fee agreement. (ECF No. 50-1 at 8–
21 9.) Rather, the Quechan Defendants argue, those two claims are “alternative claims that
22 purport not to be based simply on breach of a specific fee provision of the Fee
23 [A]greement.” (*Id.* at 9.)

24 Contrary to the Quechan Defendants’ assertion, Quechan waived its sovereign
25 immunity with respect to W&C’s claim that Quechan breached the implied covenant of
26 good faith and fair dealing. The waiver permits the Court to exercise jurisdiction over
27 claims seeking payment under the “terms” of the fee agreement. The implied covenant of
28 good faith and fair dealing is an implied “term in every contract.” *Chodos v. West Publ’g*

1 *Co.*, 292 F.3d 992, 996 (9th Cir. 2002). Because Quechan clearly waived its immunity as
2 to claims for payment under the “terms” of the fee agreement, and the implied covenant
3 of good faith and fair dealing is a term of the fee agreement, the Court may exercise
4 subject-matter jurisdiction over W&C’s claim of breach of that term.

5 The promissory estoppel claim similarly falls within the confines of Section 13’s
6 sovereign immunity waiver. In the section of the FAC setting forth the factual predicate
7 for W&C’s promissory estoppel claim, Plaintiffs allege that as a result of certain
8 statements made to W&C by Quechan officials, W&C “work[ed] to wrap up the
9 negotiations” with California. (FAC ¶ 269.) That work falls within the terms of the fee
10 agreement, which states that Quechan will pay W&C for legal work in the pursuit of
11 “reducing Client’s payments under its tribal/State gaming compact with the State of
12 California,” which included “obtaining a successor tribal/State gaming compact with the
13 State of California.” (ECF No. 39-2 at 001.) Because terms of the fee agreement include
14 a promise to pay W&C for such work, W&C’s promissory estoppel claim—which asserts
15 that W&C has incurred uncompensated costs as a result of performing this work—is a
16 claim for payment under the terms of the fee agreement. Whether that claim has any
17 legal merit, however, is a separate question, which the Court addresses further below.

18 **D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count**
19 **Two)**

20 The Quechan Defendants argue that even if Quechan waived its sovereign
21 immunity on the claim of breach of the implied covenant of good faith and fair dealing,
22 the FAC fails to state such a claim because it is duplicative of W&C’s breach of contract
23 claim. “When the allegations of a claim for breach of the implied covenant ‘do not go
24 beyond the statement of a mere contract breach and, relying on the same alleged acts,
25 simply seek the same damages or other relief already claimed in a companion contract
26 cause of action, they may be disregarded as superfluous as no additional claim is actually
27 stated.’” *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 725 (N.D. Cal. 2014) (quoting
28 *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 400 (Ct. App. 1990)).

1 In light of the Court’s ruling that the FAC does not state a claim for relief that
2 W&C is entitled to the contingency fee in Section 5 of the fee agreement (Section II.B,
3 *supra*), W&C’s breach of the implied covenant of good faith and fair dealing claim does
4 not “seek the same damages or other relief already claimed” as W&C’s breach of contract
5 claim. The breach of contract claim, if successful, entitles W&C to a “reasonable fee”
6 under Section 11 of the fee agreement, which is determined by the interaction of 10
7 enumerated factors. (ECF No. 39-2 at 005.) By contrast, by asserting a breach of the
8 implied covenant, W&C seeks to put itself in the position it would have been had
9 Quechan never discharged W&C. That is, rather than seeking what it should be paid
10 under Section 11 of the fee agreement, in this claim W&C seeks what it would have been
11 paid under Section 5 had Quechan never discharged W&C in bad faith.

12 In other words, these two claims differ in two ways: (1) they focus on different
13 moments in the dealings between W&C and Quechan and (2) they seek different
14 remedies. As to the former, whereas the breach of implied covenant claim focuses on
15 Quechan’s allegedly wrongful discharge of W&C, the breach of contract claim focuses
16 on Quechan’s refusal to pay W&C a reasonable fee under Section 11 after that discharge.
17 As to the latter, whereas the breach of contract claim seeks recovery under the factors set
18 forth in Section 11 of the fee agreement, the breach of the implied covenant claim seeks
19 the full contingency fee under Section 5 of the fee agreement that W&C would have
20 received had it not been discharged.

21 The Quechan Defendants’ only argument in support of their motion to dismiss the
22 implied covenant claim is that it is duplicative of the breach of contract claim. They do
23 not offer any argument that the *merits* of the implied covenant claim fail. Because the
24 Court concludes that the implied covenant claim is not duplicative of the breach of
25 contract claim, the Quechan Defendants have offered no persuasive argument in support
26 of dismissing the implied covenant claim.

27 **E. Promissory Estoppel (Count Three)**

28 The Quechan Defendants argue that W&C’s promissory estoppel claim fails

1 because all relevant promises discussed in the FAC were the result of bargained
2 compromise. (ECF No. 50-1 at 15–17.) The Court agrees.

3 To succeed in a promissory estoppel claim under California law, one must show:
4 (1) “a promise clear and unambiguous in its terms,” (2) “reliance by the party to whom
5 the promise is made,” (3) the “reliance [was] both reasonable and foreseeable,” and
6 (4) “the party asserting the estoppel [was] injured by his reliance.” *Granadino v. Wells*
7 *Fargo Bank, N.A.*, 186 Cal. Rptr. 3d 408, 416 (Ct. App. 2015) (internal quotation marks
8 omitted). A plaintiff may not prevail on a promissory estoppel claim based solely on
9 promises made in a contract. *See, e.g., JMP Secs. LLP v. Altair Nanotechnologies Inc.*,
10 880 F. Supp. 2d 1029, 1041 (N.D. Cal. 2012) (“Under California law, the same
11 allegations that give rise to a breach of contract claim cannot also give rise to a claim for
12 promissory estoppel, as the former [is] predicated on a promise involving bargained-for
13 consideration, while the latter is predicated on a promise predicated on reliance in lieu of
14 such consideration.” (internal quotations omitted)). This is because the purpose of a
15 promissory estoppel claim “is to make a promise that lacks consideration (in the usual
16 sense of something bargained for and given in exchange) binding under certain
17 circumstances.” *Boon Rawd Trading Int’l Co., Ltd. v. Paleewong Trading Co., Inc.*, 688
18 F. Supp. 2d 940, 953 (N.D. Cal. 2010). Thus, the “doctrine of promissory estoppel is
19 only applicable when an alleged promise *lacks* adequate consideration.” *Id.* (emphasis
20 added). “In other words, where the promisee’s reliance was bargained for, the law of
21 consideration applies; and it is only where the reliance was unbargained for that there is
22 room for application of the doctrine of promissory estoppel.” *Healy v. Brewster*, 380
23 P.2d 817, 822 (Cal. 1963). California courts have described contract and promissory
24 estoppel claims as “not only [] distinct or alternative theories of recovery but also as
25 mutually exclusive.” *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.*, 149 Cal. Rptr.
26 3d 440, 450 (Ct. App. 2012).

27 Here, it is clear that the work W&C performed on behalf of Quechan was done in
28 exchange for Quechan’s promise to pay W&C under the terms of the fee agreement. In

1 other words, “[t]he only thing at issue here is under which provision of the contract
2 [W&C] will be paid for its services, not whether there was a contract for services at all or
3 whether the promises contained in the contract were supported by consideration.” *JMP*
4 *Secs.*, 880 F. Supp. 2d at 1041. In the section of the FAC setting forth W&C’s
5 promissory estoppel claim, it identifies the following pertinent “promises” made to
6 W&C: (1) Quechan’s informing W&C that the Tribal Council had voted to resolve the
7 dispute with California via negotiations, (2) the General Council directed the Tribal
8 Council to “execute whatever compact W&C negotiated with the State of California
9 during the remainder of the month,” and (3) members of the Tribal Council and Casino
10 Resort told W&C that the Tribal Council intended to execute whatever compact W&C
11 was able to negotiate with California within that month. (FAC ¶ 268.) To the extent that
12 these are “promises” at all, they are clearly covered by the fee agreement, in which
13 Quechan promised to pay W&C for its work in negotiating a resolution to Quechan’s
14 dispute with California. (ECF No. 39-2 at 001 (explaining that Quechan was hiring
15 W&C for legal services including “representation related to tribal/State compact such
16 as . . . obtaining a successor tribal/State gaming compact”).) If W&C worked any harder
17 at negotiating Quechan’s compact with California as a result of those statements, it will
18 be compensated through the bargained-for provision of Section 11.

19 Even if those promises could be viewed as separate from those made in the fee
20 agreement, the FAC does not allege the necessary detrimental reliance. To demonstrate
21 reliance, W&C must show that it “changed [its] position in any way because of what [it]
22 had been promised.” *Smith v. City & Cty. of San Francisco*, 275 Cal. Rptr. 17, 23 (Ct.
23 App. 1990); *see also Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist.*, 801 F.
24 Supp. 2d 1023, 1043 (S.D. Cal. 2011) (rejecting promissory estoppel claim because it
25 “failed to identify a substantial change of position in reliance” on the alleged promise).
26 Here, W&C offers no reason to believe that had these “promises” not been made, W&C
27 would have acted any differently.

28 Contrary to W&C’s assertion (*see* ECF No. 73 at 19–20), *Moncado v. West Coast*

1 *Quartz Corp.*, 164 Cal. Rptr. 3d 601 (Ct. App. 2013), does not support the viability of its
2 promissory estoppel claim. There, after it was announced that a company was going to
3 be sold, managers repeatedly told employees that if they stayed at the company until the
4 company was sold—which the employees had no obligation to do—the company would
5 pay them a bonus. *Id.* at 604–05. At least one employee turned down other employment
6 opportunities because he wanted to collect the bonus, and another forewent the
7 opportunity to move to another city. *Id.* at 605. When the employees found out that the
8 company had been sold and that they had not received any bonus, they sued. *Id.* at 605–
9 06. The trial court dismissed the plaintiffs’ promissory estoppel claim (among others).
10 *Id.* at 606. The Court of Appeal reversed. *Id.* at 610. The court explained that the
11 allegations were sufficient to state a claim for promissory estoppel because “defendants
12 promised to pay [plaintiffs] an amount sufficient to retire upon the sale of [the company]
13 if they remained employed. . . . Plaintiffs relied on this promise to their detriment by
14 remaining employed at [the company], and forgoing other employment and residential
15 opportunities.” *Id.*

16 The facts here are not analogous to those in *Moncada*. There, the promise at issue
17 exceeded the scope of the contract: whereas the employment contract governed payments
18 to the employees for their work on behalf the company, the bonus offer was in exchange
19 for the employees’ loyalty, which was not a bargained-for term of the employment
20 agreement. Here, there is no separation between the employment contract and the
21 “promises” discussed above. The promises cited in the FAC were merely requests for
22 W&C to do the work that was covered by the fee agreement. Moreover, whereas the
23 plaintiffs in *Moncada* forewent other opportunities as a result of the promises made,
24 W&C does not allege that it passed up any other opportunity while performing its work
25 for Quechan.

26 In sum, the fee agreement between Quechan and W&C determines the money
27 W&C is entitled to as a result of its work negotiating Quechan’s compact with California.
28 As stated above, W&C has pled a claim that Quechan breached that contract by failing to

1 pay W&C the “reasonable fee” envisioned in Section 11 of the fee agreement. That
2 breach of contract claim covers all of the conduct at issue in W&C’s promissory estoppel
3 claim. Any action W&C took in response to the promises alleged in the FAC were the
4 result of the bargain memorialized in the fee agreement. W&C therefore fails to state a
5 claim for promissory estoppel.

6 **F. Lanham Act Claims (Counts Four and Five)**

7 The Rosette Defendants argue that W&C’s Lanham Act claims should be
8 dismissed because (1) the statements at issue are not actionable, and (2) the FAC does not
9 allege any injury incurred by W&C that was caused by those statements. (ECF No. 53-1
10 at 18–23.)

11 The relevant portion of the Lanham Act states:

12 Any person who, on or in connection with any goods or services, . . . uses in
13 commerce any . . . false or misleading description of fact, or false or
14 misleading representation of fact, which . . . in commercial advertising or
15 promotion, misrepresents the nature, characteristics, qualities, or geographic
16 origin of his or her or another person’s goods, services, or commercial
activities, shall be liable in a civil action by any person who believes that he
or she is or is likely to be damaged by such act.

17 15 U.S.C. § 1125(a)(1)(B). To establish a violation of this provision, W&C must prove
18 (1) the Rosette Defendants “made a false statement” about its own service, (2) “the
19 statement was made in commercial advertisement or promotion,” (3) “the statement
20 actually deceived or had the tendency to deceive a substantial segment of its audience,”
21 (4) “the deception is material,” (5) the Rosette Defendants “caused its false statement to
22 enter interstate commerce,” and (6) W&C “has been or is likely to be injured as a result
23 of the false statement, either by direct diversion of” clients away from W&C and towards
24 the Rosette Defendants. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1052 (9th
25 Cir. 2008) (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir.
26 2002)).

27 W&C’s Lanham Act claims focus on two statements allegedly made by the Rosette
28 Defendants. For the reasons below, the Court finds the statement at issue in Count Four

1 actionable under the Lanham Act, but concludes that the statement at issue in Count Five
2 is not.

3 **i. Statement About the Pauma Litigation (Count Four)**

4 At issue in Count Four is the statement on Rosette’s websites that asserts he
5 “successfully litigated a case saving [Pauma] over \$100 Million in Compact payments
6 allegedly owed to the State of California.” (FAC ¶ 274.) The FAC states that this
7 statement is false because Williams and Cochrane were counsel of record for Pauma
8 between June 2010 and the conclusion of the case, and they were responsible for
9 upholding the preliminary injunction. (*Id.*) The FAC points to statements made by
10 Rosette indicating that his only contribution to the Pauma litigation was filing “one
11 substantive brief that resulted in the Ninth Circuit overturning the preliminary
12 injunction,” and that he “did not even know what was happening in the *Pauma* case” as
13 of four months after Pauma discharged Rosette’s firm and hired W&C. (*Id.* at ¶¶ 138–39,
14 274.)

15 The Rosette Defendants argue that this statement is not actionable because it is not
16 false. They point to the FAC’s allegations that Rosette’s firm represented Pauma in the
17 pre-injunction portion of the litigation and that Rosette was responsible for the “strategy
18 and ideas” behind the litigation. (*Id.* ¶¶ 41–42, 139.) The Rosette Defendants argue that
19 because Rosette was the lead partner in the Pauma litigation prior to being discharged, it
20 is not false for him to claim that he “litigated” that case, especially when the statement at
21 issue does not deny the role played by Williams or Cochrane. (ECF No. 53-1 at 20
22 (“Lead partners are ultimately responsible for the success or failure of litigation, even
23 though clients and courts understand that associates and other law firm client personnel
24 often play important roles.”).) They also emphasize that the statement about the Pauma
25 litigation does not take “credit for the subsequent developments in the Pauma Litigation
26 after [W&C] took over,” as it does not reference the “\$36.3 million award of restitution
27 for past overpayments,” which was obtained by W&C. (*Id.*)

28 The Court agrees with the Rosette Defendants that the statement that Rosette was

1 involved with, or even “litigated,” the Pauma case is not actionable. However, the
2 statements that Rosette’s litigation efforts were “successful” and that they resulted in
3 \$100 million in savings for Pauma is sufficiently misleading to plead a violation of the
4 Lanham Act. The statement that Rosette’s efforts were “successful” could be misleading:
5 according to the FAC, at the time Rosette was discharged as Pauma’s counsel, Rosette
6 had unsuccessfully opposed a motion to stay the injunction pending appeal. The
7 assertion that Rosette’s efforts saved Pauma “\$100 Million” also could be misleading:
8 Pauma had not saved anywhere near that amount of money by the time it discharged
9 Rosette as its counsel.

10 In this sense, the Count Four claim is analogous to the statement held to be
11 actionable in *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919 (9th Cir. 2010). Irwin, a former
12 employee of PhotoMedex—a company that produced and sold “lasers for use in
13 dermatological treatments”—claimed in promotional materials that he had “invented”
14 one of PhotoMedex’s products known as XTRAC. *Id.* at 922–23. The district court
15 entered summary judgment for the defendants on this claim, concluding that the claim
16 that Irwin invented XTRAC was “opinion and not misleading.” *Id.* at 923. The Ninth
17 Circuit reversed. *Id.* at 932–33. The panel explained that despite Irwin’s having been
18 “intimately involved in the development of the XTRAC system” and having invented
19 “particular components of the XTRAC in patents,” the statement was “actionable to the
20 extent it misled consumers into believing that Irwin was the sole inventor or made more
21 than his actual share of inventive contributions.” *Id.* at 932. Here, it is similarly likely
22 that a consumer reading Rosette’s statement about his work in the Pauma case would be
23 misled into believing that Rosette was solely responsible for Pauma’s \$100 million
24 savings, when in reality he was discharged as Pauma’s counsel long before that outcome
25 was reached.

26 The Rosette Defendants also argue that the FAC fails to allege causation between
27 this statement and W&C’s harm. (ECF No. 53-1 at 22–23.) The Court disagrees. The
28 FAC plausibly alleges that Rosette’s false statement about his role in the Pauma litigation

1 led to Quechan’s decision to discharge W&C as its counsel in the compact negotiations
2 with California. The FAC states that Pauma’s success in its compact litigation was the
3 motivation behind Quechan hiring W&C. (FAC ¶¶ 67–68.) It is thus plausible that if
4 Quechan officials were misled by Rosette’s statement discussed above, they came to
5 believe that it was Rosette, not Williams or Cochrane, who would give them the best
6 chance at success at their negotiations with California.

7 **ii. Statements About the Quechan Litigation (Count Five)**

8 In Count Five, the FAC points to a press release that was uploaded to Rosette,
9 LLP’s website soon after Quechan reached its agreement with California. The press
10 release states: “Governor Edmund G. Brown and [Quechan] have signed a new Tribal-
11 State Gaming Compact [] between the Tribe and the State of California. . . . The terms of
12 the new compact reduce the Tribe’s revenue sharing obligations by approximately four
13 millions dollars [] per year, and simultaneously increase the Tribe’s ability to generate
14 revenues through its gaming operations by providing the right to operate additional
15 gaming facilities and gaming devices.” (ECF No. 39-40 at 651.) The bottom of the press
16 release states: “For more information, contact: Robert Rosette (480) 889-8990
17 rosette@rosettela.com.” (*Id.*)

18 These allegations do not state a claim of violation of the Lanham Act. Based on
19 the facts alleged in the FAC, nothing about the statements above are false or misleading.
20 There is no dispute that Quechan and California agreed to a new compact that saved
21 Quechan that amount of money and increased Quechan’s amount of permitted devices.
22 In their opposition memorandum, W&C’s only argument to the contrary is that the
23 “contact information” at the bottom of the press release “necessarily convey[s] the false
24 message that [Rosette] single-handedly represented the Tribe in connection with the
25 compact.” (ECF No. 74 at 16.) The Court cannot agree. The contact information
26 statement suggests nothing more than Rosette is Quechan’s counsel, which is true.

27 Because Count Five does not allege a false or misleading statement, it fails to state
28 a violation of the Lanham Act.

1 **G. RICO Claim (Count Six)**

2 The Rosette Defendants contend that Count Six—which asserts a RICO violation
3 by the Rosette Defendants through a series of violations of the mail and/or wire fraud
4 statutes—fails because the FAC does not allege: (1) a RICO enterprise, (2) a sufficient
5 pattern of racketeering activity, or (3) causation. (ECF No. 53-1 at 10–16; ECF No. 50-1
6 at 17–22.) The Court agrees with Defendants that the FAC fails to allege a sufficient
7 racketeering activity; as a result, the Court need not address the other bases for
8 Defendants’ challenge.

9 “The RICO statute sets out four elements: a defendant must participate in (1) the
10 conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of
11 racketeering activity or collection of unlawful debt.” *Eclectic Props. E., LLC v. Marcus*
12 *& Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (citing 18 U.S.C. § 1962(c)).
13 “Racketeering activity, the fourth element, requires predicate acts.” *Id.* In Count Six,
14 W&C alleges that the Rosette Defendants have engaged in racketeering activity by
15 engaging in conduct that constitutes mail or wire fraud, in violation of 18 U.S.C. §§ 1341
16 and 1343. (FAC ¶ 286.) To establish a “pattern,” W&C must allege at least two acts
17 constituting mail or wire fraud. 18 U.S.C. § 1961(5). To allege a violation of mail or
18 wire fraud under 18 U.S.C. §§ 1341 or 1343, respectively, a plaintiff must show: (1) there
19 was a scheme to defraud; (2) the defendants used the mail (or wire, radio, or television) in
20 furtherance of the scheme; and (3) the defendants acted with the specific intent to deceive
21 or defraud. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004).

22 Rule 9(b) requires a party alleging fraud to “state with particularity the
23 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). To plead fraud with
24 particularity, the pleader must state the time, place, and specific content of the false
25 representations. *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). The
26 allegations “must set forth more than neutral facts necessary to identify the transaction.
27 The plaintiff must set forth what is false or misleading about the statement, and why it is
28 false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal

1 quotation marks omitted). The Rule 9(b) requirement allows a defendant to prepare an
2 adequate answer to the allegations of fraud. *Odom*, 486 F.3d at 553. Moreover, where
3 multiple defendants allegedly engaged in fraudulent activity, “Rule 9(b) does not allow a
4 complaint to merely lump multiple defendants together.” *Swartz v. KPMG LLP*, 476
5 F.3d 756, 764 (9th Cir. 2007). Instead, a plaintiff must identify each defendant's role in
6 the alleged scheme. *Id.* at 765.

7 W&C alleges thirteen instances of conduct that it alleges constitutes a violation of
8 the wire and/or mail fraud statutes:

- 9 (1) interfering with W&C’s contract with Pauma “by suggesting the tribe’s then-
10 Chairman demand that the firm write a legal opinion freeing up the monies saved
11 by the injunction in Pauma’s suit against the State of California”;
- 12 (2) interfering with W&C’s contract with Pauma “by instructing the tribe’s then-
13 Chairman to not pay any of the firm’s invoices and to communicate to the firm
14 that he would ‘ruin [its] reputation in Indian Count[r]y’ if it simply did not walk
15 away”;
- 16 (3) interfering with W&C’s contract with La Pena Law by telling La Pena that W&C
17 stole Rosette’s clients and “would invariably ‘steal’ her clients as well”;
- 18 (4) Armstrong’s attempting to interfere with W&C’s contract with Pauma “by trying
19 to covertly settle the tribe’s litigation with the State of California through the
20 State’s negotiator Jacob Appelsmith”;
- 21 (5) pressuring Pauma Councilmembers “into signing pre-prepared letters absolving
22 Robert Rosette of any wrongdoing in trying to settle the tribe’s compact
23 litigation”;
- 24 (6) interfering with W&C’s contract with Pauma by telling Devers “to relay a message
25 to the current Tribal Council that [Rosette] could re-do their compact and would
26 like to discuss the matter with them free of charge”;
- 27 (7) interfering with W&C’s contract with Quechan by telling councilmembers that
28 Rosette “was responsible for litigating the Pauma suit upon which the tribe’s
dispute with the State of California was in part based”;
- (8) interfering with W&C’s contract with Quechan by telling councilmembers that
W&C “had failed to ‘produce better-than-boilerplate terms in your negotiations’”;
- (9) interfering with W&C’s contract with Quechan by telling councilmembers “to
withhold payment of the monthly flat fee from” W&C;
- (10) interfering with W&C’s contract with Quechan by telling councilmembers “to fire

1 [W&C] at the conclusion of the negotiations, right before the tribe signed the
2 resultant compact”;

3 (11) interfering with W&C’s contract with Quechan “by preparing and transmitting the
4 June 26, 2017 termination letter” indicating that Quechan would not comply with
5 the fee agreement and threatening W&C not to push its luck “out of concern for
6 the reputation of your firm in Indian Country and in the State of California”;

7 (12) demanding W&C to “turn over work product of incalculable value so the Rosette
8 defendants could use the firm’s intellectual property for their own benefit to finish
9 up the Quechan work they had fraudulently taken away”;

10 (13) interfering with W&C’s contract with Quechan by preparing and transmitting the
11 June 30, 2017 cease-and-desist letter that again threatened “legal action against”
12 W&C.

13 (FAC ¶ 287.)

14 These allegations fail to state with particularity the circumstances constituting the
15 fraud and fail to provide the specific content of the false representations. In addition, the
16 allegations merely lump the named defendants together and fail to identify each
17 defendant’s role. At best, only one of these allegations suggests that the lumped-together
18 Rosette Defendants have violated the federal wire or mail fraud statutes.

19 The allegations above can be separated into substantive groups. The first group
20 consists of allegations regarding Rosette’s “suggesting” that another party to engage in,
21 or “instructing” another party to engage in, certain conduct (Allegations 1, 2, 6, 9, and
22 10). But none of the conduct that Rosette Defendants sought to produce in those
23 allegations was fraudulent. Or, put in terms of the mail and wire fraud statutes, none of
24 these actions detail any “scheme to defraud.” For example, while Rosette’s instruction to
25 the Quechan councilmembers to breach their contract with W&C (Allegation 9) might
26 constitute interference with W&C’s contract, it in no way could be considered an attempt
27 at deceit. “It is long settled that, absent any element of deception, allegations of threats
28 and abusive conduct simply do not constitute ‘a scheme to defraud.’” *A. Terzi Prods.,*
Inc. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 500 (S.D.N.Y. 1998) (quoting
Fasulo v. United States, 272 U.S. 620 (1926)); *see also McEvoy Travel Bureau, Inc. v.*
Heritage Travel, Inc., 904 F.2d 786, 791 (1st Cir. 1990) (“[N]ot every use of the mails or

1 wires in furtherance of an unlawful scheme to deprive another of property constitutes
2 mail or wire fraud.”).

3 The next group of allegations consists of those in which Rosette engaged in
4 conduct on behalf of another (Allegations 4, 5, 11, 12, and 13). These actions also fail to
5 suggest a scheme to defraud. Perhaps the closest allegation is Armstrong’s attempt to
6 interfere with W&C’s contract with Pauma by trying to “covertly” settle that litigation
7 and then asking the Pauma Councilmembers to sign a letter stating that they had
8 authorized that action. But there is no allegation suggesting that Armstrong did so
9 through deceit. As for the allegations that Rosette drafted letters to W&C on behalf of
10 Quechan—*i.e.*, the termination letter, the letter demanding W&C hand over the relevant
11 work, and the cease-and-desist letter—these allegations do not set forth what is false
12 about the statements or suggest that Rosette was anything but forthright about the current
13 state of Quechan’s legal representation or the likely consequences of W&C continuing to
14 withhold the requested documents.

15 Two of the allegations above suggest that Rosette made certain assertions about
16 W&C: a statement to La Pena that W&C had “stolen” Rosette’s client (Allegation 3), and
17 a statement to Quechan that W&C had not been able to produce, through its negotiations
18 with California, anything better than “boilerplate” terms (Allegation 8). Neither of these
19 statements are fraudulent; rather, they are vague statements of opinion asserted in the
20 midst of hard-nosed business tactics. *Cf. United States v. Goodman*, 984 F.2d 235, 240
21 (8th Cir. 1993) (“Without some objective evidence demonstrate a scheme to defraud, all
22 promotional schemes to make money, even if ‘sleazy’ or ‘shrewd,’ would be subject to
23 prosecution on the mere whim of the prosecutor.”).

24 Last, the Court is left with the statement found actionable under the Lanham Act
25 above—that is, Rosette’s misleading statement that he successfully litigated the Pauma
26 litigation and saved that tribe \$100 million. Even assuming that this statement is
27 actionable as wire fraud, none of the other allegations suggest a violation of the wire or
28 mail fraud statutes. Count Six therefore fails to allege a sufficient pattern of racketeering

1 activity, and fails to state a claim that the Rosette Defendants violated RICO.
2 Supplementation and clarification of this count, however, may lead to an actionable
3 claim. As a result, the claim is dismissed without prejudice.

4 **H. RICO Conspiracy Claim (Count Seven)**

5 Defendants next challenge the RICO conspiracy claim in Count Seven. This
6 conspiracy claim is asserted against the Rosette Defendants, Escalanti, and White, and is
7 supported by allegations of conduct that differ from those listed in Count Six.

8 **i. Sovereign Immunity**

9 Before considering the merits of this claim, the Court must address Escalanti and
10 White's assertion that they are protected by Quechan's sovereign immunity in this suit.
11 (*See* ECF No. 50-1 at 9–12.) Escalanti and White argue that because they were acting in
12 their official capacities when engaging in the conduct discussed in this claim, the Tribe's
13 sovereign immunity extends to them. The Court disagrees.

14 In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court rejected this same
15 argument. There, the defendant—a member of the Mohegan Tribe of Indians of
16 Connecticut—asserted that the tribe's sovereign immunity protected him against a suit
17 arising from a car accident he caused while acting in the scope of his employment as a
18 driver for Mohegan's casino. *Id.* at 1289. The Supreme Court of Connecticut held that
19 because the defendant was acting within the scope of his employment during the
20 accident, he was protected in the suit by the Tribe's sovereign immunity. *Id.* at 1290.
21 The United States Supreme Court reversed, holding that the relevant analysis is not
22 whether the defendant was acting in his official capacity during the incident at issue, but
23 rather whether the real party in interest in the suit was the Tribe. *Id.* at 1290–92. The
24 Court explained that in determining the real-party-in-interest defendant in a case, a court
25 “may not simply rely on the characterization of the parties in the complaint, but rather
26 must determine in the first instance whether the remedy sought is truly against the
27 sovereign.” *Id.* at 1290. A case in which the real party in interest is the sovereign is one
28 where “the relief sought is only nominally against the official and in fact is against the

1 official's office and thus the sovereign itself." *Id.* at 1291; *see also id.* ("That is why,
2 when officials sued in their official capacities leave office, their successors automatically
3 assume their role in the litigation."). By contrast, a suit against an officer in his personal
4 capacity is one that seeks "to impose *individual* liability upon [that] government officer
5 for actions taken under color of state law." *Id.* (quoting *Hafer v. Melo*, 502 U.S. 21, 25
6 (1991)). Under the facts of that case, the Court held that the Tribe was not the real party
7 in interest because the suit was against the defendant "to recover for his personal actions,
8 which 'will not require action by the sovereign or disturb the sovereign's property.'" *Id.*
9 (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 687 (1949)).

10 Here, W&C's RICO conspiracy claim against Escalanti and White, discussed in
11 greater detail below, is clearly a personal-capacity suit. It alleges that Escalanti and
12 White have joined forces with the Rosette Defendants to create a fraudulent payday
13 lending scheme. If Escalanti and White are found liable, *they* will have to pay damages
14 to W&C, not Quechan. In other words, a finding of liability against Escalanti and White
15 on this count "will not require action by [Quechan] or disturb [Quechan's] property."³ *Id.*

16 **ii. Sufficiency of the Allegations**

17 Having concluded that Escalanti and White do not enjoy the protections of
18 Quechan's sovereign immunity under the facts of this claim, the Court considers whether
19 the allegations supporting this claim are sufficient. They are not.

20 A RICO conspiracy can be proven in two ways: "Plaintiffs must allege either an
21 agreement that is a substantive violation of RICO or that the defendants agreed to
22 commit, or participated in, a violation of two predicate offenses." *Howard v. Am. Online*
23 *Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). W&C alleges the following conduct as predicate
24 acts:

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26
27 ³ In support of this argument, the Quechan Defendants offer declarations by those Escalanti and White.
28 (ECF Nos. 50-2, 50-3.) Because it is clear that this is a personal-capacity suit, the Court need not
consider the contents of those declarations. As a result, the Court need not address Plaintiffs' motion to
exclude those declarations. (ECF No. 62.) That aspect of Plaintiffs' motion is DENIED as moot.

- 1 (1) White communicated to the Quechan General Council “that he had an attorney
2 ‘friend’ who could get the tribe involved in the online payday lending industry if
3 he were elected to office”;
- 4 (2) White and Rosette met in Arizona “to discuss the online payday lending scheme”;
- 5 (3) On another occasion, White, Escalanti, and Rosette met to discuss the same
6 scheme;
- 7 (4) Defendants caused Quechan to terminate W&C using the “pretense” that W&C
8 failed to produce “better-than-boilerplate terms” when negotiating with California
9 and “had been ‘grossly overcompensated’”;
- 10 (5) Defendants caused Quechan to terminate its “longstanding general counsel, the
11 Morisset law firm” and hire Rosette;
- 12 (6) Defendants arranged to “hide the contract and authorizing resolution for Robert
13 Rosette and his firm so the General Council of the tribe could not veto the
14 agreement”;
- 15 (7) Defendants strategized how to keep Escalanti and White in power after their recall
16 elections;
- 17 (8) Defendants discontinued per capita payments to Quechan’s general membership
18 “on the basis that California and Arizona casinos operated by Quechan [were] not
19 making a profit,” and instead using such funds “as seed money for a payday
20 lending scheme”; and
- 21 (9) Taking “additional actions over the course of the past year to set up a[] payday
22 lending enterprise, covertly using, amongst others, the revenue sharing money
23 Quechan has saved during that time that . . . has neither gone to the general
24 membership in the form of per capita payments nor even been publicly accounted
25 for.”

26 (FAC ¶ 294.) W&C alleges in a conclusory fashion that defendants “either conspired to
27 participate in or conduct an enterprise aimed at creating a sham online payday lending
28 business at the tribe in an environment that avoid detection by the tribe at large.” (FAC ¶
29 293) The FAC further states that these actions constitute a RICO conspiracy because in
30 engaging these actions, the relevant defendants sought to “set up a sham payday lending
31 business that would personally enrich those in power rather than the tribe generally.” (*Id.*
32 ¶ 295.)

33 Plaintiffs fail to sufficiently allege that defendants agreed to violate the substantive
34 provisions of RICO or agreed to commit, or participated in, a violation of two predicate

1 offenses. As an initial matter, W&C’s RICO conspiracy claim suffers a vital flaw:
2 nowhere in the FAC is there an allegation that these payday lending schemes are
3 fraudulent or constitute mail or wire fraud. The FAC alleges that the Consumer Financial
4 Protection Bureau and “a spate of plaintiff’s attorneys” have sued over these payday
5 lending practices (FAC ¶ 223), but it does not suggest that such litigation has resulted in
6 findings or judgments suggesting the schemes are fraudulent. And while the FAC offers
7 allegations that the loans at issue are predatory (*see id.* ¶ 221 (describing how a loan in
8 such a scheme might involve 800% interest)), it does not state—and W&C offers no
9 argument suggesting—that these loans involve any aspect of deceit. As a result, the
10 “objective” of the agreement described in Count Seven was not one to violate RICO’s
11 substantive provisions.

12 Having concluded that the objective of the agreement alleged in Count Seven was
13 not one to violate RICO, the Court must ask whether Count Seven alleges that the
14 relevant defendants “agreed to commit, or participated in, a violation of two predicate
15 offenses.” *Howard*, 208 F.3d at 751. The FAC asserts that the actions above constitute
16 agreements “to engage in at least two acts of mail or wire fraud.” (FAC ¶ 294.) The only
17 allegation above that suggests any fraudulent activity, however, is Allegation 8, which
18 asserts that Defendants withheld per capita payments from Quechan membership using
19 the allegedly false pretense that Quechan’s casinos were not profitable. While Allegation
20 9 also suggests deceitful activity, it is much too vague: Plaintiffs’ assertion that some of
21 the relevant defendants took “additional steps” towards the scheme does not identify any
22 particular conduct. In the absence of another viable allegation suggesting that the
23 relevant defendants in Count Seven agreed to commit or participated in wire or mail
24 fraud, the RICO conspiracy claim fails.⁴

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26
27 ⁴ It may be—though it is far from clear—that the alleged conspiracy that Plaintiffs are targeting is one in
28 which the relevant defendants have agreed to keep for themselves funds that have been earned through
Tribe-sponsored payday lending and to which the members are entitled. If *that* is the conspiracy at issue
here—again, the verbosity of the FAC makes it impossible to tell—the Court has concerns that such a

1 It may be the case that the payday lending scheme alleged by Plaintiffs constitutes
 2 an agreement to violate RICO because the scheme is based on fraud. It also may be the
 3 case that the relevant defendants have agreed to commit wire or mail fraud on two
 4 different occasions. But either the FAC fails to demonstrate such illegality, or the
 5 relevant allegations are so buried beneath the other 120-some pages of allegations that the
 6 Court cannot reasonably detect them. Because a clarifying amendment to the FAC might
 7 be able to cure this deficiency, Count Seven is dismissed without prejudice.

8 **I. Negligence/Breach of Fiduciary Duty (Count Eight)**

9 Count Eight of the FAC asserts a putative class action legal malpractice claim by
 10 the Member Plaintiffs against the Rosette Defendants, stemming from Rosette's
 11 completion of Quechan's negotiations with California. (FAC ¶¶ 297–303.)

12 **i. The Member Plaintiffs' Ability to Sue**

13 The Rosette Defendants contend first that this claim must be dismissed because the
 14 Member Plaintiffs were never clients of the Rosette Defendants.⁵ (ECF No. 53-1 at 23–
 15 24.) In moving to dismiss this claim, the Rosette Defendants ask the Court to take
 16 judicial notice of the Attorney Services Contract between Rosette LLP and Quechan,
 17 which states:

18 [T]he Tribe should be aware that Firm's representation is with the Tribe and
 19 not with its individual members, officers, executives, shareholders, directors,
 20 partners, or persons in similar positions, or with its agencies, parent,
 21 subsidiaries, or other affiliates. In those cases, the Firm's professional

22 conspiracy has not caused any harm to W&C. If Plaintiffs choose to amend their complaint, they must
 23 be clear as to how this alleged abuse of power affected, or will affect, W&C itself.

24 ⁵ The Court DENIES the Quechan Defendant's motion to disqualify W&C as counsel for the Member
 25 Plaintiffs on this claim. (ECF No. 51.) The Quechan Defendants argue that by representing the Member
 26 Plaintiffs, W&C is representing "parties with adverse interests to the Tribe." (ECF No. 51-1 at 4.) They
 27 explain that because W&C previously represented the Tribe, it cannot now represent the Tribe's
 28 members because those parties are adverse in this litigation. The Member Plaintiffs, however, are not
 adverse to the Tribe in this litigation. The Members Plaintiffs are not suing the Tribe; rather, they are
 suing the Rosette Defendants. And there is no reason to believe that, if the Member Plaintiffs succeed in
 their malpractice claim, the Tribe would be harmed in any way. The only consequence of a successful
 malpractice claim by the Member Plaintiffs would be that the Rosette Defendants will pay damages to
 the Member Plaintiffs.

1 responsibilities are owed only to that entity, alone Of course, Firm can
2 also represent individual members, . . . but any such representation will be
the subject of a separate engagement letter.

3 (ECF No. 54-2 at 26.⁶) This document makes clear that the Rosette Defendants did not
4 represent the Tribe's individual members. The Member Plaintiffs respond by arguing
5 that even if the contract between Quechan and the Rosette Defendants excluded the
6 individual Quechan members as recipients of those legal services, the Rosette Defendants
7 held a duty to protect the Quechan membership because it was foreseeable that any
8 negligence by the Rosette Defendants would harm Quechan's membership. The Court
9 agrees.

10 Even assuming the attorney services agreement between Rosette LLP and Quechan
11 is judicially noticeable, the fact of that agreement does not preclude the Member
12 Plaintiffs from pursuing a malpractice claim. Under California law, an individual may
13 pursue a legal malpractice claim against an attorney even if the plaintiff and attorney
14 were never previously in privity. In *Lucas v. Hamm* the Supreme Court of California
15 rejected the proposition that beneficiaries of a will could not sue an attorney for
16 negligently preparing the will on the ground that the beneficiaries and the attorney were
17 never in privity. 364 P.2d 685 (Cal. 1961). In explaining this doctrine, the court noted:

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

23 *Id.* at 687. The predominant inquiry in this analysis "is whether the principal purpose of
24 the attorney's retention is to provide legal services for the benefit of the plaintiff."

25 *Goldberg v. Frye*, 266 Cal. Rptr. 483, 489 (Ct. App. 1990).

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27
28 ⁶ The cited pagination of Defendants' exhibits refer to the pagination provided by the CM/ECF system.

1 Considering the facts alleged in the FAC, the policy considerations discussed
2 above lead to the conclusion that the Member Plaintiffs may pursue a malpractice claim
3 against the Rosette Defendants. The purpose of the transaction for which the Rosette
4 Defendants were responsible—the compact negotiations with California—was to increase
5 Quechan’s wealth, which is distributed to its members in the form of per capita payments.
6 (*See* FAC ¶ 236.) As a result, Quechan’s efforts in renegotiating its compact with
7 California were motivated by, at least in substantial part, an intention to benefit its
8 members. If the Rosette Defendants’ malpractice resulted in higher costs and lower
9 revenues to the Tribe, it is reasonably foreseeable that the members would be harmed in
10 the form of lower per capita payments. Such loss to the members is both certain and
11 closely connected: if the Tribe holds fewer funds, the distributions to members will be
12 lower. Because Quechan is nothing if not a collection of its members, the principal
13 purpose of Quechan retaining the Rosette Defendants to obtain a favorable outcome of
14 the compact negotiations was to benefit the financial lives of Quechan’s members.

15 **ii. Sufficiency of the Allegations**

16 Having concluded that the Member Plaintiffs may pursue a malpractice claim
17 against the Rosette Defendants, the Court must next consider whether they have
18 sufficiently stated such a claim. The Court agrees with the Rosette Defendants that the
19 FAC’s allegations of malpractice are insufficient.

20 The FAC does not point to any conduct by the Rosette Defendants suggesting their
21 representation fell below the appropriate standard of care. Rather, the FAC focuses only
22 on the consequences of the Rosette Defendants’ representation. It points to the fact that
23 Quechan ended up with a compact that was less favorable for Quechan than W&C’s last
24 draft compact. In this sense, the Member Plaintiffs’ theory resembles one of *res ipsa*
25 *loquitor*: because the outcome of the Rosette Defendants’s negotiations differed
26 significantly from what California offered W&C, they argue, one can infer negligence on
27 the part of the Rosette Defendants.

28 It may be the case that these allegations would normally suffice to raise an

1 inference of negligence. But here, the FAC includes a wrinkle fatal to the Member
2 Plaintiffs' theory. According to the FAC, California's bargaining stance changed
3 dramatically after Quechan switched its representation from W&C to Rosette. (FAC ¶
4 205 ("The reason Quechan did not immediately execute the compact after putative
5 President Keeny Escalanti removed [W&C] from the representation seems to be that the
6 Office of the Governor changed its negotiation position following the firm switch,
7 suddenly demanding that Quechan pay back all the revenue sharing payments that the
8 tribe missed under the 2007 Amendment.")) In light of this fact, the differences between
9 Quechan's final compact and W&C's draft are not stark enough to draw a reasonable
10 inference of negligence by the Rosette Defendants.

11 As the FAC states, "the core material terms" of Quechan's finalized compact "are
12 *one and the same* with those negotiated by [W&C] up through the draft compact it sent to
13 the State of California on June 21, 2017." (FAC ¶ 202 (emphasis added).) The largest
14 difference between W&C's draft and the finalized compact is that Quechan was required
15 to repay half what it had withheld from California under the 2007 Amendment. (*Id.* ¶
16 206.) But as the FAC concedes, this was the result of California's negotiators "suddenly"
17 changing their position and demanding that Quechan pay back *all* of what Quechan
18 owed. (*Id.* ¶ 205.) The FAC explains that the Rosette Defendants were able to negotiate
19 that demand down to Quechan paying only half of what it previously owed. (*Id.* ¶ 206.)
20 The remaining differences between W&C's draft compact and the final compact—which
21 the FAC itself calls "ancillary" (FAC ¶ 204)—are not significant enough to suggest that
22 the Rosette Defendants negligently concluded the compact negotiations.

23 It is *possible* that the Rosette Defendants were negligent in negotiating on behalf of
24 Quechan, and that this negligence resulted in a compact less favorable to Quechan. But
25 the Member Plaintiffs' failure to allege any unreasonable conduct by the Rosette
26 Defendants leaves their negligence theory short of plausible. By failing to allege facts
27 pertaining to the Rosette Defendants' actual conduct during the Quechan negotiations, the
28 Member Plaintiffs rely solely on the differences between W&C's draft compact and the

1 final compact signed by Quechan. The difference between the two compacts, however, is
 2 not so severe to raise the inference of negligence the Member Plaintiffs suggest. As a
 3 result, the Member Plaintiffs' allegations are insufficient to state a claim of legal
 4 malpractice.⁷

5 Further amendment, however, may nudge this claim "across the line from
 6 conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As a
 7 result, the Court dismisses this claim without prejudice.

8 **III. Conclusion**

9 For the reasons explained above, the Court issues the following rulings:

- 10 1. The Quechan Defendants' motion to dismiss (ECF No. 50) is **GRANTED in**
 11 **part and DENIED in part.**
- 12 2. The Quechan Defendants' motion to disqualify W&C as counsel for the
 13 Member Plaintiffs (ECF No. 51) is **DENIED.**
- 14 3. The Rosette Defendants' motion to dismiss (ECF No. 53) is **GRANTED.**
- 15 4. The Rosette Defendants' motion to strike Count Eight (ECF No. 52) is
 16 **DENIED as moot.**
- 17 5. Plaintiffs' *ex parte* motion to exclude declarations and continue consideration
 18 of the above motions (ECF No. 62) is **DENIED as moot.**

19 The Court dismisses Counts Three, Five, Six, Seven, and Eight. Because this is the
 20 first time the Court has addressed these deficiencies in Plaintiffs' pleadings, and for the
 21 additional reasons listed above, the Court dismisses these claims without prejudice.

22 However, because the fee agreement between W&C and Quechan makes clear that W&C
 23 is not entitled to a "contingency fee" under Section 5, any amendment in an effort to save
 24 that aspect of the breach of contract claim would be futile. The Court therefore dismisses
 25

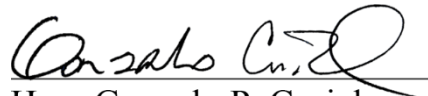
26
 27 ⁷ In light of the Court's dismissal of Count Eight, the Rosette Defendants' motion to strike that count
 28 (ECF No. 52) is DENIED as moot. Moreover, in reaching its conclusions as to Counts Six, Seven, and
 Eight, the Court did not rely on the declarations found at ECF Nos. 50-4, 52-2, or 52-3. As a result, the
 remaining portion of Plaintiffs' motion to exclude (ECF No. 62) is also DENIED as moot.

1 with prejudice Count One to the extent that it alleges a breach of Section 5 of the fee
2 agreement.

3 The Court notes that a motion by Plaintiffs seeking leave to file a supplemental
4 complaint is currently pending in this case. (ECF No. 71.) A hearing for that motion is
5 currently scheduled for July 6, 2018, and the deadline for responsive memoranda has not
6 yet passed. In light of the pendency of that motion, the Court orders the following. If
7 Plaintiffs wish to file an amended complaint responding to the deficiencies discussed in
8 this ruling, they may wait to do so until the Court rules on their motion for leave to file a
9 supplemental complaint, after which they may file one comprehensive operative
10 complaint. Once the Court rules on the motion to file supplemental pleadings, the Court
11 will set a deadline for Plaintiffs to file an amended complaint.

12 **IT IS SO ORDERED.**

13 Dated: June 7, 2018

14 
15 Hon. Gonzalo P. Curiel
16 United States District Judge
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