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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP; and
FRANCISCO AGUILAR, MILO
BARLEY, GLORIA COSTA, GEORGE
DECROSE, 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,

Defendant.

Case No.: 3:17-cv-01436-GPC-MSB

**ORDER DENYING WILLIAMS &
COCHRANE’S MOTION TO
DISMISS QUECHAN TRIBE’S
ANSWER TO PLAINTIFFS’ FIRST
AMENDED COMPLAINT AND
COUNTERCLAIMS PURSUANT TO
RULES OF CIVIL PROCEDURE
12(b)(1) AND 12(b)(6)**

[ECF No. 138]

Plaintiff/Counter-Defendant Williams & Cochrane (“W&C”) is a law firm that specializes in Indian law. Defendant/Counter-Plaintiff Quechan Tribe of the Fort Yuma Indian Reservation (“Quechan” or “the Tribe”) hired W&C to negotiate with the State of California on its behalf regarding the Tribe’s gaming compact. After months of

1 negotiations, Quechan terminated W&C, refused to pay any contingency fee, and
2 demanded that W&C hand over the Tribe's case file.

3 In this litigation, W&C sued Quechan for terminating W&C and refusing to pay
4 the attorneys' fees W&C claims it is owed under their agreement. The Tribe filed
5 counterclaims against W&C, contending that W&C's representation was deficient and
6 that the firm has refused to turn over Quechan's case file. W&C initially responded by
7 moving to strike Quechan's answer, and the Court denied that motion. W&C now moves
8 to dismiss Quechan's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(1),
9 for lack of jurisdiction and Rule 12(b)(6) for failure to state a claim.

10 For the reasons articulated below, the Court finds that Quechan has sufficiently
11 alleged an injury and causation to establish Article III standing; therefore, Quechan has
12 demonstrated that the Court has subject-matter jurisdiction over the Tribe's
13 counterclaims. Moreover, the Court finds that W&C's 12(b)(6) arguments are
14 procedurally improper because it failed to raise them in its previously filed Rule 12(f)
15 motion to strike. Accordingly, the Court denies W&C's motion to dismiss.

16 I. BACKGROUND

17 A. Factual Background

18 1. Quechan Hires W&C for Compact Negotiations

19 The following factual allegations are taken from Quechan's Counterclaims.
20 Quechan is a federally-recognized Indian tribe located along the Colorado River. CC,
21 ECF No. 94 ¶¶ 14, 20. Its operations and the majority of the reservation land is in
22 California. *Id.* ¶ 20. The Tribe negotiated gaming compacts with the State of California
23 in 1998 and 2006. *Id.* ¶ 22. In the summer of 2016, the Tribal Council of Quechan
24 sought representation to reduce its payment obligations to the State under the compact
25 amended it had signed in 2006 ("2006 Amendment"). *Id.* ¶ 23. The Tribe had owed
26 approximately \$4 million to the State under that amendment. *Id.* ¶ 3. The Tribal Council
27 contacted W&C, a law firm in California. *Id.* ¶¶ 16, 24. Cheryl Williams and Kevin
28 Cochrane are attorneys at W&C.

1 In September 2016, the Tribe hired W&C for representation in gaming compact
2 negotiations and for resolution of Tribe's underpayments, and the parties executed an
3 Attorney-Client Fee Agreement. *Id.* ¶ 25. The Fee Agreement provides that the Tribe
4 would pay W&C \$50,000 per month for its services. *Id.* ¶ 26. The Fee Agreement also
5 provides that the Tribe may have access to its case file upon request at any reasonable
6 time, and that at the end of the engagement, the Tribe may request the return of its case
7 file. *Id.*

8 2. W&C Begins Negotiations with California as Quechan's Counsel

9 The initial compact negotiations between Quechan and the State began on
10 November 9, 2016. *Id.* ¶ 27. On December 6, 2016, the State provided to W&C an
11 initial discussion draft of a gaming compact for the Tribe. On December 14 and
12 December 28, 2017, Ms. Williams sent to Michael Jackson, Sr., who was President of
13 Quechan at the time, the draft compact. *Id.* ¶ 29. W&C asserted that the draft compact
14 was "as good as it can get from a financial perspective," and that the "vast majority of the
15 draft compact was boilerplate." *Id.*

16 On January 11, 2017, Ms. Williams sent the State a letter requesting that the State
17 and the California Gambling Control Commission ("CGCC") refrain from enforcing the
18 Tribe's payment obligations under the 2006 Amendment, i.e. the underpayments. *Id.* ¶
19 31. On January 18, 2017, the State responded that it did not have the legal authority to
20 excuse the Tribe's payment obligations. *Id.* ¶ 31. W&C met with the State on January
21 31, 2017, for further negotiations. *Id.* ¶ 32. As of that date, W&C had not provided a
22 revised draft to the State in response to the State's December 6, 2016 initial discussion
23 draft. *Id.* In an email dated February 3, 2017, Ms. Williams claimed that W&C had the
24 legal and textual authority to support the Tribe making reduced payments to the State
25 under the 1999 compact terms. *Id.* ¶ 33. Ms. Williams also stated that California agreed
26 to increase Quechan's gaming machine limit by 100, but other issues would take some
27 time to iron out and W&C would work hard to redline the draft compact. *Id.*

1 At some point around the end of March or beginning of April 2017, Ms. Williams
2 sent a letter to the Tribal Council asserting that W&C had done its best to buy time to
3 keep the December draft compact offer on the table. *Id.* ¶ 34. Quechan alleges that
4 W&C did very little or no work at all between December 2016 to that time. *Id.* Quechan
5 further alleges that W&C made this representation to induce the Tribe into maintaining
6 its relationship with W&C. *Id.* W&C further reported to the Tribe that negotiations with
7 the State would continue and that the CGCC sought the payments the Tribe owed. *Id.*

8 On April 13, 2017, Ms. Williams emailed the State a revised draft compact. *Id.* ¶
9 35. This draft was nearly identical to the State's December 2016 draft. *Id.* In May 2017,
10 the State and W&C exchanged compact drafts. *Id.* ¶ 36. On June 9, 2017, Mr. Cochrane
11 emailed the CEO of Quechan's casinos and explained that the compact would be ready to
12 sign within the following week. *Id.* ¶ 37. Quechan alleges that this statement was not
13 true, as the State was not ready to sign any draft of the compact in existence at that time.
14 *Id.*

15 W&C and the State met on June 14, 2017. *Id.* ¶ 38. W&C sent the State a revised
16 compact draft on June 21, 2017. *Id.* This was not a final draft and the State was not
17 prepared to sign it. This draft did not address the underpayment issue; furthermore, there
18 was a litany of other unresolved issues. *Id.*

19 3. Quechan Has Concerns with W&C and Hires New Counsel

20 Back in April 2017, the Quechan Tribal Council reviewed the status of the
21 negotiations and W&C's work. *Id.* ¶ 39. It was clear to the Tribal Council that W&C
22 was not diligently pursuing negotiations and that W&C was having difficulties in the
23 negotiations. *Id.* W&C had recommended retaining a lobbyist in Sacramento, for an
24 additional fee, to assist getting the compact approved. *Id.* The Tribal Council was also
25 concerned with the fact that the underpayment issue was unresolved, as the drafts
26 exchanged to that point did not deal with that issue. *Id.*

27 Based on these concerns, coupled with Quechan's payment of \$50,000 a month to
28 W&C, the Tribal Council started to explore the possibility of hiring new counsel to

1 replace W&C. *Id.* ¶ 40. Because the Tribal Council was dissatisfied with W&C’s fees
2 and performance, it invited Robert Rosette, an Indian law attorney, to discuss the
3 possibility of Rosette LLP (Mr. Rosette’s firm) representing the Tribe in compact
4 negotiations. *Id.* ¶ 43. After meeting with Mr. Rosette, the Tribal Council hired him on
5 June 26, 2017. *Id.*

6 Also on June 26, 2017, Quechan President Escalanti sent W&C a letter terminating
7 the firm’s representation. *Id.* ¶ 44. Escalanti asked W&C to transmit the Tribe’s entire
8 case file to its new counsel, Rosette LLP. *Id.* W&C had not sent the Tribe the most
9 recent draft compact at that time. *Id.* ¶ 46. Moreover, W&C refused to give the Tribe or
10 its counsel the full case file. *Id.*

11 On June 30, 2017, President Escalanti sent a letter to W&C demanding its case file
12 and most recent draft compact. *Id.* W&C eventually sent the most recent draft of the
13 compact but has refused to send the case file or any time records. *Id.* ¶ 47.

14 Rosette LLP proceeded to conduct negotiations on behalf of the Tribe, even though
15 it did not have access to the full case file. *Id.* ¶ 48. In July 2017, Rosette LLP submitted
16 to the State the first of several draft compacts. *Id.* ¶ 49. On August 4, 2017, Mr. Rosette
17 met with the State to discuss the terms of the compact. Over the following weeks, the
18 parties discussed a multitude of issues, including the \$4 million dollar underpayment
19 owed to the State under the 2006 Amendment. *Id.* The parties resolved this issue,
20 agreeing that the Tribe would pay the state half of the amount owed. *Id.* ¶ 50. In late
21 August 2017, negotiations concluded, and Quechan obtained significant benefits beyond
22 what W&C had been able to achieve. *Id.* ¶ 52. The parties signed the compact in August
23 2017. *Id.*

24 B. Procedural History

25 On March 2, 2018, W&C filed its First Amended Complaint against Defendants
26 Quechan, Mr. Rosette, Rosette & Associates, PC, Rosette, LLP, Richard Armstrong,
27 Keeny Escalanti, and Mark William White. ECF No. 39. On June 21, 2018, the Quechan
28 filed an Answer to the First Amended Complaint and Counterclaims. ECF No. 94.

1 Count I of Quechan's counterclaims brings a claim for breach of fiduciary duty.
2 *Id.* at 15. The Tribe alleges that W&C failed to perform under the Fee Agreement in
3 exchange for the \$50,000 monthly fee, dragged out negotiations to extend its
4 representation and collect more monthly fees, and falsely represented to the Tribe that
5 W&C was effectively and diligently performing its duties. *Id.* at 15-16. Quechan claims
6 that W&C's conduct caused the Tribe to expend \$50,000 a month for eight months
7 without receiving service from W&C consistent with its fiduciary obligations. *Id.* at 16.

8 In Count II, Quechan claims that W&C breached the implied covenant of good
9 faith and fair dealing by failing to perform under the Fee agreement, structuring
10 negotiations to elongate the timeframe of its representation and maximize its fees, and
11 failing to attempt to resolve the underpayment issue. *Id.* at 17-18. As a result, the Tribe
12 was allegedly deprived of efficient and competent representation. *Id.* Count III advances
13 a negligence claim against W&C. Quechan asserts that W&C was obligated to promptly
14 release all of Quechan's papers and property upon termination of W&C's representation.
15 *Id.* at 18. Quechan alleges that though President Escalanti and the Tribe's counsel have
16 repeatedly requested the Tribe's entire case file, W&C has only turned over a draft
17 compact, and has refused to send the case file. *Id.* at 18-19. Quechan claims that it did
18 not have all available information relating to the compact negotiations, which extended
19 the negotiations, resulting in increased legal fees to conclude the negotiations. *Id.* at 19.
20 The breach of contract claim in Count IV asserts a similar theory. Quechan alleges that
21 the Fee Agreement provides that Quechan may have access to its case file upon request at
22 any reasonable time, and at the end of W&C's representation, the Tribe may request the
23 return of its case file. *Id.* at 20.

24 Count V brings an unfair competition claim. *Id.* at 21. Quechan alleges that W&C
25 has engaged in unfair competition by violating the California Rules of Professional
26 Conduct and breaching fiduciary duties. *Id.* Quechan alleges in Count V that it has been
27 injured in its business and property because it has incurred additional legal expenses to
28 conclude the compact negotiations, W&C continues to improperly withhold the case file,

1 and the Tribe has incurred further legal expenses in this action to respond to W&C's
2 unlawful business practices. *Id.* Finally, in Count VI, Quechan seeks to set off any
3 damages that W&C may be entitled to from its affirmative claims against Quechan. *Id.* at
4 22.

5 A day after the Tribe filed its counterclaims, W&C filed a Motion to Strike
6 Quechan Tribe's Answer to Plaintiffs' First Amended Complaint and Counterclaims, or,
7 Motion to Continue Response Obligation under Federal Rule of Civil Procedure 12. ECF
8 No. 95. W&C argued that Quechan's answer was premature and procedurally improper
9 because W&C had not served Quechan with its amended complaint and at the time
10 Quechan filed its responsive pleading, the Court was considering a motion by W&C for
11 leave to file a supplemental complaint.

12 The Court construed W&C's motion as a motion to strike under Federal Rule of
13 Civil Procedure 12(f). *See* Order, ECF No. 135 at 12. The Court found that striking the
14 answer was not appropriate because the answer was not redundant, immaterial,
15 impertinent, or scandalous. *Id.* The Court ordered W&C to file an answer to Quechan's
16 counterclaims within 14 days. *Id.* at 13.

17 W&C did not file an answer, but instead, brought this instant motion. W&C
18 moves to dismiss Quechan's counterclaims under Rule 12(b)(1), contending that
19 Quechan lacks Article III standing because it has not shown an injury attributable to
20 W&C. In the alternative, W&C contends Quechan fails to state a claim upon which relief
21 can be granted.

22 II. DISCUSSION

23 A. Legal Standard

24 1. Rule 12(b)(1)

25 The jurisdiction of federal courts is constitutionally-limited to actual cases or
26 controversies. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Raines v.*
27 *Byrd*, 521 U.S. 811, 818 (1997)). The standing to sue doctrine is "rooted in the
28 traditional understanding of a case or controversy" and "limits the category of litigants

1 empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.” *Id.*
2 The party invoking federal jurisdiction bears the burden of establishing Article III
3 standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

4 A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227
5 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). “In a facial attack, the challenger
6 asserts that the allegations contained in a complaint are insufficient on their face to
7 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
8 Cir. 2004). “By contrast, in a factual attack, the challenger disputes the truth of the
9 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.*

10 2. Rule 12(b)(6)

11 A Rule 12(b)(6) motion attacks the complaint as not containing sufficient factual
12 allegations to state a claim for relief. “To survive a motion to dismiss [under Rule
13 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a
14 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)
15 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While “detailed
16 factual allegations” are unnecessary, the complaint must allege more than “[t]hreadbare
17 recitals of the elements of a cause of action, supported by mere conclusory statements.”
18 *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion to dismiss, the non-
19 conclusory ‘factual content,’ and reasonable inferences from that content, must be
20 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,
21 572 F.3d 962, 969 (9th Cir. 2009).

22 B. Analysis

23 1. Article III Standing

24 As a preliminary matter, Quechan contends that W&C’s motion violates the
25 Court’s order denying W&C’s motion to strike. Quechan notes that the Court ordered
26 W&C to file an answer to Quechan’s counterclaims, but W&C has not done so and
27 instead filed this motion to dismiss.
28

1 W&C brings two sets of arguments for dismissal here. W&C argues, pursuant to
2 Federal Rule of Civil Procedure 12(b)(1), that the Court lacks subject-matter jurisdiction
3 over Quechan’s counterclaims because Quechan does not have Article III standing.

4 W&C also argues that W&C fails to state a plausible claim for relief under Rule 12(b)(6).

5 Federal Rule of Civil Procedure 12(b)(1) allows a party to raise the defense of lack
6 of subject-matter jurisdiction. Rule 12(h)(3) states: “If the court determines at any time
7 that it lacks subject-matter jurisdiction, the court must dismiss the action.” “The
8 objection that a federal court lacks subject-matter jurisdiction, may be raised at any stage
9 in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y&H Corp.*, 546
10 U.S. 500, 500 (2006) (citing Fed. R. Civ. P. 12(b)(1) & 12(h)(3)). “The defense of lack
11 of subject matter jurisdiction cannot be waived, and the court is under a continuing duty
12 to dismiss an action whenever it appears that the court lacks jurisdiction.” *Augustine v.*
13 *United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citations omitted).

14 Though the Court ordered W&C to answer Quechan’s counterclaims, the Court
15 maintains its duty to ensure that it has subject-matter jurisdiction over Quechan’s
16 counterclaims. The Court must have subject-matter jurisdiction at every step of this case.
17 Accordingly, the Court will address W&C’s arguments for dismissal under Rule 12(b)(1).

18 a. Injury

19 The doctrine of standing is rooted in the “Cases or Controversies” clause of Article
20 III of the Constitution. *Spokeo*, 136 S.Ct. at 1547. To establish standing, a plaintiff must
21 demonstrate a “personal stake in the outcome of the controversy.” *Gill v. Whitford*, 138
22 S.Ct. 1916, 1929 (2018). Federal courts “enforce that requirement by insisting that a
23 plaintiff satisfy the familiar three-part test for Article III standing: that [the plaintiff] ‘(1)
24 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
25 defendant, and (3) that is likely to be redressed by a favorable judicial decision.’” *Id.*
26 (quoting *Spokeo*, 136 S.Ct. at 1547).

27 W&C first contends that Quechan cannot show that they suffered any injury from
28 W&C’s representation. “[T]he plaintiff must have suffered an injury in fact—an invasion

1 of a legally protected interest which is (a) concrete and particularized, and (b) actual or
2 imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (citations and
3 quotation marks omitted). “A ‘concrete’ injury must be ‘de facto’; that is, it must
4 actually exist.” *Spokeo*, 136 S. Ct. at 1548 (citing Black’s Law Dictionary 479 (9th ed.
5 2009)). “‘Concrete’ is not, however, necessarily synonymous with ‘tangible.’” *Id.* The
6 Supreme Court has recognized that “intangible injuries can nevertheless be concrete.” *Id.*
7 at 1549.

8 According to W&C, the firm accomplished what Quechan had hired it do, which
9 was to reduce the Tribe’s payments to the State. W&C’s alleges that its representation
10 actually benefitted the Tribe, thus the Tribe cannot claim that it was injured. As evidence
11 of this, W&C notes that many of the material terms in the signed compact were terms
12 negotiated by W&C. Moreover, the signed compact (which allegedly was largely
13 W&C’s doing) was publically celebrated by President Escalanti. W&C argues that it is
14 therefore inconceivable that Quechan can claim it was harmed by W&C’s legal work.

15 In Counts III, IV, and V (negligence, breach of contract, unfair competition),
16 Quechan alleges that under the Fee Agreement and California law, W&C was required to
17 provide Quechan the entire case file upon termination of W&C’s representation.
18 Quechan alleges that W&C has failed to do so, thus depriving Quechan of its access to
19 information to which it is entitled. This is sufficient to constitute an injury. Moreover,
20 Quechan has alleged further injuries arising from the deprivation of its case file. In
21 Counts III and V, Quechan alleges that it and Rosette did not have all available
22 information regarding the compact negotiations, which extended the negotiations and
23 thus increased Quechan’s legal fees expended to conclude the negotiations. Quechan has
24 therefore alleged an economic injury.

25 Furthermore, Counts I and II (breach of fiduciary duty and breach of the implied
26 covenant of good faith and fair dealing) allege that W&C dragged out the negotiations in
27 order to prolong the period of its representation and therefore extend the time in which it
28 would collect the \$50,000 monthly fee. Quechan claims that because of these stall

1 tactics, it overpaid W&C. This alleged overpayment of fees constitutes an injury. The
2 Court finds that Quechan has sufficiently alleged an injury-in-fact.

3 b. Causation

4 W&C contends that even if any injury exists, Quechan inflicted such injury on
5 itself, and Quechan has not alleged that W&C plausibly caused any injury. “To survive a
6 motion to dismiss for lack of constitutional standing, plaintiffs must establish a ‘line of
7 causation’ between defendants’ action and their alleged harm that is more than
8 ‘attenuated.’” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. CV 17-
9 8587-GW(ASX), 2018 WL 3004594, at *5 (C.D. Cal. June 8, 2018) (quoting *Maya v.*
10 *Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011)). “To show causation, the plaintiff
11 must demonstrate a ‘causal connection between the injury and the conduct complained
12 of—the injury has to be fairly traceable to the challenged action of the defendant, and not
13 the result of the independent action of some third party not before the court.” *Salmon*
14 *Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (quoting
15 *Lujan*, 504 U.S. at 560-61).

16 As to Quechan’s allegation that it was injured by not having its case file, that
17 injury is alleged to be caused by W&C’s refusal to turn it over. In regards to Quechan’s
18 claim that it allegedly overpaid W&C for months of fees that it should not have, that
19 injury is alleged to be caused by W&C failing to work diligently and intentionally
20 extending the negotiations in order to collect the monthly fees. Therefore, Quechan has
21 sufficiently alleged an injury caused by W&C’s conduct. The Court finds that Quechan
22 has demonstrated its standing under Article III to raise its counterclaims.

23 2. W&C’s 12(b)(6) Arguments

24 The Court will turn back to Quechan’s argument that W&C’s motion violates the
25 Court’s order for W&C to answer the counterclaims. Though, as discussed above, this
26 did not prevent W&C from raising its lack of subject-matter jurisdiction arguments,
27 motions to dismiss under Rule 12(b)(6) are treated differently in some aspects than those
28 under Rule 12(b)(1).

1 Rule 12(g)(2) states that, except as provided in Rule 12(h)(2) or (3), “a party that
2 makes a motion under this rule must not make another motion under this rule raising a
3 defense or objection that was available to the party but omitted from its earlier motion.”
4 W&C brought a motion “under this rule” (Rule 12) when it filed its motion to strike, and
5 now W&C has brought another motion under Rule 12 raising the defense of failure to
6 state a claim. That defense was available to W&C when it filed its motion to strike.
7 W&C could have raised its 12(b)(6) arguments together with its initial 12(f) motion to
8 strike.¹ See Fed. R. Civ. P. 12(g)(1) (“A motion under this rule may be joined with any
9 other motion allowed by this rule.”). W&C cannot raise its 12(b)(6) arguments in this
10 second motion.

11 W&C contends that a party can file a motion to strike and then follow that up with
12 a Rule 12(b) motion. The Court disagrees.

13 Rule 12(g) is written in broad terms and requires consolidation of Rule 12
14 defenses and objections whenever a party makes a motion under “this rule.”
15 Motions to strike and for a more definite statement are motions under Rule
16 12 and thus clearly are within the language of subdivision (g). Nor is there a
17 policy reason why a party should be permitted first to attack the opposing
18 party’s pleading under Rule 12(e) or Rule 12(f) and then be allowed to
19 follow with a Rule 12(b) motion when these defenses and objections might
20 have been presented together.

21 . . .

22 Therefore, a litigant moving to strike or for a more definite statement
23 should be barred from making a second preliminary motion based on any
24 Rule 12 defense that he reasonably was capable of asserting with the initial
25 motion.

26 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1388 (3d
27 ed. 2018).

28 ¹ Indeed, W&C is aware of Rule 12’s requirements, as it opposed part of the Tribe, Escalanti, and
White’s motion to dismiss as untimely because one of their arguments “should have been brought in
connection with the first motion to dismiss.” W&C Opp., ECF No. 148 at 5 (citing Fed. R. Civ.
12(g)(2)).

1 W&C asserts that the Ninth Circuit has addressed a situation like this and held that
2 Rule 12(g)(2) does not apply. W&C is incorrect. In *Aetna Life Insurance Co. v. Alla*
3 *Medical Services, Inc.*, the defendants filed a motion to stay or dismiss the federal case
4 based upon concurrent state proceedings dealing with the same issues. 855 F.2d 1470,
5 1474 (9th Cir. 1988). The district court denied the motion. The defendants then brought
6 a motion to dismiss under Rule 12(b)(6). The district found that the motion was barred
7 by Rule 12(g) because they had previously filed a motion under 12(b). *Id.* at 1472.

8 On appeal, the defendant argued that the initial motion to stay was not brought
9 pursuant to Rule 12. *Id.* at 1475. The Ninth Circuit agreed, finding that the motion to
10 dismiss or stay based on a pending state court action involving the same subject matter
11 was not a Rule 12(b) motion. *Id.* Accordingly, the court of appeals concluded that the
12 district court erred in holding that the second motion violated Rule 12(g). *Id.*

13 *Aetna* is inapposite. There, defendants brought a motion to dismiss or stay based
14 on parallel state court proceedings. The Ninth Circuit found that such motion is not a
15 Rule 12(b) motion. For that reason, Rule 12(g)'s bar did not apply because Rule 12(g)
16 prohibits successive Rule 12 motions. The defendants did not bring a Rule 12(f) motion,
17 as is the case here, and nowhere in *Aetna* did the court of appeals address Rule 12(f)
18 motions in conjunction with Rule 12(g)'s prohibition. To the contrary of W&C's
19 position, courts have found that a Rule 12(f) motion will trigger Rule 12(g)'s bar on
20 second motions. See *Baroness Small Estates, Inc. v. BJ's Restaurants, Inc.*, No. SACV
21 11-468-JST (EX), 2011 WL 13228020, at *2 (C.D. Cal. Sept. 15, 2011) (denying second
22 Rule 12(f) motion as procedurally improper because "Baroness waived its objections to
23 those allegations by not including them in its first 12(f) motion."); *Broomfield v.*
24 *Doolittle*, 2 F.R.D. 517, 519 (S.D.N.Y. 1942) (denying motion to dismiss as untimely
25 because defendants previously brought a Rule 12(f) motion).

26 W&C contends that, for policy reasons, the Court should entertain its 12(b)(6)
27 arguments. This Court is of a different view. At this juncture, both parties have brought
28 improper, successive 12(b)(6) arguments. The Court does not believe that round after

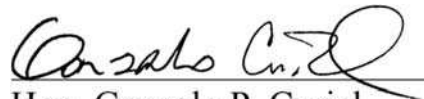
1 round of Rule 12 motions for claims and counterclaims is an efficient use of the Court's
2 resources, when those motions could have been consolidated into one motion.
3 Furthermore, allowing such practice would grant an end run around Local Rule 7.1(h),
4 which requires that memoranda in support of all motions noticed for the same motion day
5 must not exceed twenty-five pages. As this Court has noted before, parties on both sides
6 have previously failed to comply this rule. Order, ECF No. 157 at 2. In sum, the motion
7 practice in this case needs to start falling in accordance with the federal and local rules.
8 The Court denies W&C's arguments for dismissal of Quechan's counterclaims for failure
9 to state a claim.

10 III. CONCLUSION

11 For the reasons explained above, the Court denies Williams and Cochrane's
12 Motion to Dismiss Quechan Tribe's Answer to Plaintiffs' First Amended Complaint and
13 Counterclaims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).
14 Within 14 days, W&C must file an answer to Quechan's counterclaims.

15 **IT IS SO ORDERED.**

16 Dated: November 26, 2018

17 
18 Hon. Gonzalo P. Curiel
19 United States District Judge
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