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WILLIAMS & COCHRANE, LLP, *et al*.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

(All 28 Individuals Listed in ¶ 13)

Plaintiff,

vs.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*; **ROBERT ROSETTE**; **ROSETTE & ASSOCIATES, PC**; **ROSETTE, LLP**; **RICHARD ARMSTRONG**; **KEENY ESCALANTI, SR.**; **MARK WILLIAM WHITE II**, *a/k/a WILLIE WHITE*; *and* **DOES 1 THROUGH 10**;

Defendants.

Case No.: 17-CV-01436 GPC MDD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIAMS & COCHRANE'S (1) MOTION TO STRIKE QUECHAN TRIBE'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT AND COUNTERCLAIMS, OR, (2) MOTION TO CONTINUE RESPONSE OBLIGATION UNDER FEDERAL RULE OF CIIVL PROCEDURE 12

Date: August 24, 2018
Time: 1:30 p.m.
Dept: 2D
Judge: The Hon. Gonzalo Curiel

INTRODUCTION

On June 7, 2018, this Court issued an order on the Rule 12 motions filed by the Defendants in this action that allowed three of the eight claims within the First Amended Complaint to proceed and granted Williams & Cochrane ("Firm") and the proposed class of Quechan General Councilmembers (collectively, "Plaintiffs") leave to amend the remaining five claims in one fashion or another. *See* Dkt. No. 89, 28:19-22. Since a separate motion for leave to file a proposed First Supplemental Complaint was pending at the time of the issuance of the June 7th order, the Court concluded its order by explaining that it would establish a timeline for filing a comprehensive Second Amended Complaint after ruling upon the supplemental complaint. *See id.* at 89, 39:6-8. Thus, the impression the order conveyed was that the next step in the pleading stage would be the filing of the Second Amended Complaint at some reasonably distant point in the future since the June 7th order was not final as to any of the Defendants; after all, the Plaintiffs could amend, amongst other things, their promissory estoppel claim against the Quechan tribe, their malpractice claim against the Rosette Defendants, and their RICO conspiracy claim against the litany of Tribal Councilmembers and complicit attorneys named therein.

Nevertheless, on June 21, 2018, the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan") filed an Answer to the First Amended Complaint, which contains six counterclaims that predominantly turn upon a supposed ethical failing on the part of Williams & Cochrane that the lead attorney with WilmerHale has been planning since shortly after service of the original complaint as retribution for the Firm filing this suit against his "client." The problem with filing this Answer now is that it triggers a response from Williams & Cochrane regarding an underlying pleading the other parties contend is now "moot" or nonexistent (*see* Dkt. No. 91, 2:10-16 (explaining the claims in the First Amended Complaint do not exist because "the Court has given Plaintiff an opportunity to file a new pleading")), and one the Firm would likely have to prepare while simultaneously making largescale revisions to its First Amended Complaint. The timing of this Answer does not appear to be a coincidence, and seems to just be an effort by the opposing

parties to inundate the attorneys for Williams & Cochrane with work while they pursue their objective of "keeping the case moving efficiently." Dkt. No. 91-1, p. 6. The thing is, though, the filing of a premature Answer is antithetical to the very notions of efficiency and orderliness that are embodied in the Federal Rules of Civil Procedure, and there is simply no reason why WilmerHale cannot refile a substantively-similar Answer as its response to the future Second Amended Complaint when the time comes. Given that, Williams & Cochrane respectfully requests that the Court either strike[1] the Answer from the docket or continue/eliminate any response obligation under Federal Rule of Civil Procedure 12 until *after* both the filing of the Second Amended Complaint and WilmerHale has an opportunity to file an updated pleading.

I. THE ANSWER IS "PREMATURE" AND SHOULD BE STRICKEN FROM THE DOCKET

Pleadings no less than motions are subject to the same timeliness requirements of the Federal Rules of Civil Procedure and may be struck if filed out of time without first obtaining leave of court. *See, e.g., Canady v. Erbe Elektromedizin GmbH,* 307 F. Supp. 2d 2, 7 (D.D.C. 2004). The pertinent rule of the Federal Rules of Civil Procedure – Rule 15(a)(3) – explains that "any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days *after* service of the amended pleading, whichever is later." Fed. R. Civ. P. 15(a)(3). Considering that the time to respond to the original complaint expired at some point in February 2018, the only provision of this rule that is at issue is the latter part explaining a response must occur "within 14 days *after* service of the amended pleading." What this means is that an answer filed *before* an amended complaint is accepted is procedurally defective. *See, e.g., Rosales v. Corizon, Inc.,* 2016 U.S. Dist. LEXIS 106843, *4 (S.D. Ind. 2016) (striking an answer that was filed prior to the acceptance of an amended complaint as "premature"); *Stickney v. Pillsbury Co.,* 2003 U.S. Dist. LEXIS 28296, *33 (D. Neb. 2003) (explaining a

[1] This motion to strike is simply procedural in nature and does not prejudice Williams & Cochrane's right to challenge the counterclaims in the Answer from a substantive perspective through a special motion to strike under California law.

"defendant could not file an answer to an amended complaint before it was filed"). This is the case whether the actual amended pleading is preliminarily lodged with the court or the plaintiff is simply seeking leave to file the document in the first place. *See Ransom v. Lemmon,* 2012 U.S. Dist. LEXIS 113392, *2 (N.D. Ind. 2012) (striking an answer where a proposed amended complaint "only appeared on the docket as an exhibit to the Motion for Leave to Amend"); *Rush v. Am. Home Mortg., Inc.,* 2010 U.S. Dist. LEXIS 9663, *3 (D. Md. 2010) (explaining that seeking leave to amend a complaint "delay[s] Defendants' Answer").

Curious situations like this in which a party actively *wants* to file an Answer early are rather rare in the case law – typically, the situation is the opposite one and involves a defendant trying to file an answer long after time has expired. However, federal district courts have dealt with and addressed a comparable situation in which a party files an answer in an admiralty or asset forfeiture action before a claim is even made. The relevant supplemental rule of the Federal Rules of Civil Procedure bears language reminiscent of Rule 15(a)(3), explaining that "[a] claimant must serve and file an answer to the complaint or a motion under Rule 12 within 21 days after filing the claim." Fed. R. Civ. P. G(5)(b); *see also* Fed. R. Civ. P. C(6). In one such case, an answer arose two days before the filing of the operative claim and the United States Court of Appeals for the Fifth Circuit explained that the district court was within its discretion to strike the answer since it did not arise within the requisite number of days "*after* the filing of [the] claim." *See United States v. $38,570 U.S. Currency,* 950 F.2d 1108, 1115 (5th Cir. 1992). Lower courts have reached similar holdings, finding that the "[f]iling of an answer prior to the filing of a verified claim is not in accordance with the requirements of" the supplemental rule of the Federal Rules of Civil Procedure and should thus be struck from the docket. *See United States v. $49,400 U.S. Currency,* 2009 U.S. Dist. LEXIS 81518, *1-*2 (N.D. Miss. 2009). With the text of these supplemental rules mirroring that of Rule 15(a)(3), there is plenty of legal support for the Court striking the premature Answer and requiring WilmerHale to refile it during the requisite time period *after* the filing of the amended

complaint.

II. THE ANSWER IS OR WILL SOON BE A "NULLITY," WHICH SHOULD OBVIATE ANY RESPONSE OBLIGATION ON THE PART OF WILLIAMS & COCHRANE

The first argument perceives the Answer from the vantage point of what it really is, a premature response to a pleading that has yet to be filed. However, what if the Answer is really just a response to a First Amended Complaint that the other parties insist sits in a purgatory state where it repents for its sins of verbosity but is otherwise immune from any motion or pleading practice? If that is the case, then the Answer is *still* improper from a procedural perspective because there is simply nothing to answer for at this juncture. The case law makes this point abundantly clear as it explains that an answer directed at a certain pleading becomes a "nullity" when that pleading is no longer the operative or controlling one. *See, e.g., Choice of Champions Int'l v. Champions Choice USA, Inc.,* 2009 U.S. Dist. LEXIS 136498, *2-*3 (S.D. Fla. 2009) (explaining a filed answer was a nullity "since it was a response to a complaint which the plaintiff abandoned in favor of the amended complaint"); *Chevron Corp. v. Donzinger,* 2013 U.S. Dist. LEXIS 25709, *11 (S.D.N.Y. 2013) (indicating that answers "filed improperly… are nullities"). Thus, whether the First Amended Complaint is *presently* operative or controlling really is of no significance; what is, is that this pleading has been set to the side and will soon not be operative *at all* once the Plaintiffs use the leave to amend that this Court has previously granted. In other words, even if the Answer is not now a nullity, the inevitable filing of the Second Amended Complaint will nullify this responsive pleading in short order.

What then should the Court do in this situation if it does not strike the pleading altogether? Conveniently enough, the only other known instance of a defendant filing a premature Answer occurred in the familiar *Pauma* suit, wherein the State of California strategically tried to file an answer to the original complaint in the hopes that doing so would somehow defeat the leave to amend the Court had previously granted. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* No. 09-01955, Dkt. Nos. 129 & 130 (S.D. Cal. Sept. 9, 2011) (setting forth "Defendants' Answer

to Complaint" and the subsequent "First Amended Complaint of the Plaintiff Pauma Band of Mission Indians"). Much in line with the case law cited above, the solution devised by the district court in that situation was to simply ignore the original answer and require the defendants to respond to the amended pleading that the Court and all the parties knew well in advance would be forthcoming. *See id.* at 142-1. The same outcome is equally appropriate here as a fallback remedy in the event that the Court does not strike the Answer from the docket outright.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court either strike the Answer from the docket or obviate the need for a response under Rule 15 given the previously-granted leave to file a Second Amended Complaint.

RESPECTFULLY SUBMITTED this 22nd day of June, 2018

WILLIAMS & COCHRANE, LLP, *et al*.

By: */s/ Kevin M. Cochrane*

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