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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

Outliers Collective, a Nonprofit Mutual
 Benefit Corporation,

Plaintiff,

v.

The Santa Ysabel Tribal Development
 Corporation, a Tribally chartered
 corporation; GardenPharma, LLC, a limited
 liability company; David Chelette, an
 individual; and DOES 1 through 50,
 Inclusive,

Defendants.

Case Number: 3:18-cv-00834-JAH-KSC

**SANTA YSABEL TRIBAL
 DEVELOPMENT CORPORATION AND
 DAVID CHELETTE’S JOINT REPLY IN
 SUPPORT OF MOTIONS TO DISMISS**

[Fed. R. Civ. P. 12(b)(1); 12(b)(7)]

Judge: Honorable John A. Houston
 Magistrate: Honorable Karen S. Crawford

Hearing Date: October 22, 2018
 Hearing Time: 2:30 p.m.
 Courtroom: 13B

Defendants Santa Ysabel Development Corporation (“Tribal Corporation”) and David Chelette (together, the Tribal Corporation and David Chelette are referred to as the “Tribal Defendants”) submit this joint reply in support of their motions to dismiss. In those motions, the Tribal Defendants set forth detailed analyses and numerous reasons why Plaintiff’s Complaint must be dismissed. Specifically, the Tribal Corporation argued that federal jurisdiction is lacking, the waiver of sovereign immunity is ineffective as to Plaintiff’s Complaint, and absent tribal entities are indispensable parties. Mr. Chelette argued that federal jurisdiction is lacking, the Tribal Corporation is the real party in interest, Mr. Chelette is protected from suit by qualified immunity,

1 and absent tribal entities are indispensable parties.

2 In response, Plaintiff filed a barebones Memorandum of Points and Authorities in
3 Opposition to Defendants' Motion to Dismiss (ECF Doc. No. 16, hereafter referred to as the
4 "Opposition") that is largely unresponsive to the arguments set forth by the Tribal Defendants.¹
5 The Opposition reinforces the Tribal Defendants' contentions that this Court lacks jurisdiction and
6 the Complaint must be dismissed.

7 ARGUMENT

8 Plaintiff's Complaint seeks adjudication of matters the Court simply lacks jurisdiction to
9 resolve. Plaintiff asks this Court to adjudicate a simple breach of contract dispute that does not
10 arise under federal law. Plaintiff fails to explain the ways in which the Court would be required
11 to interpret or consult federal law in resolving the claims in the Complaint. Further, Plaintiff
12 reads into the Land Use Agreement ("Agreement") nonexistent prerequisites to contract
13 termination in an attempt to revive the now-expired limited waiver of sovereign immunity.
14 Finally, Plaintiff largely fails to provide any substantive response to the Tribal Defendants'
15 contention that absent tribal entities are indispensable to the resolution of the claims in the
16 Complaint. This Court does not have jurisdiction to adjudicate this case and the Complaint must
17 be dismissed.

18
19
20 ¹ The Opposition is wholly unresponsive to Mr. Chelette's arguments that (1) the Tribal
21 Corporation is the real party in interest; (2) Mr. Chelette is protected from suit by immunity; and
22 (3) Back Country is an indispensable party to any claims filed against Mr. Chelette. Pursuant to
23 Local Rule 7.1.f.3.b, an opposition filing "must contain a . . . complete statement of all reasons in
24 opposition to the position taken by the movant . . ." Because the Opposition does not respond to
25 several substantive arguments, the Court should rule that Plaintiff has conceded those issues. *See*
26 *e.g.*, *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1078 (7th Cir. 2016) ("[B]y
27 failing to respond in any way to any of the arguments advanced by Defendants . . . Plaintiffs
28 have waived their claims."); *Cunningham v. Tennessee Cancer Specialists, PLLC*, 957 F. Supp.
2d 899, 921 (E.D. Tenn. July 12, 2013) (citation omitted) ("[W]hen a plaintiff files an opposition
to a dispositive motion and addresses only certain arguments raised by the defendant, a court
may treat those arguments that the plaintiff failed to address as conceded."). Further, the
Opposition appears to agree with Mr. Chelette's assertion that the Tribal Corporation is the real
party in interest because the Opposition focuses solely on the Land Use Agreement, to which Mr.
Chelette was not a party.

I. PLAINTIFF FAILS TO DEMONSTRATE HOW RESOLUTION OF ITS BREACH OF CONTRACT CLAIMS PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW

As the Tribal Defendants fully briefed, federal question jurisdiction under 28 U.S.C. § 1331 requires a plaintiff's complaint to "establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law." *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28 (1983)). Plaintiff makes no attempt to meet either of these tests. Rather, Plaintiff's Opposition argues that the subject matter of the Agreement—medical cannabis—vests the Court with jurisdiction. This is not the test for determining whether a federal question exists, and Plaintiff provides no case law to support its departure from standards set forth in *Peabody Coal*.

Plaintiff claims, without citation to legal authority, that the Court has jurisdiction because the subject matter of the Agreement concerns a "federally regulated substance."² Specifically, Plaintiff argues it "has asserted a federal question in light of the subject matter of the agreement and the federal regulation of that subject matter." Opposition at 5. However, the Ninth Circuit expressly rejects the notion of federal question jurisdiction over breach of contract claims arising out of agreements which may have some tangential relation to the federal government or federal law but do not actually raise questions of federal law. *See, e.g., Peabody Coal Co.*, 373 F.3d at 949 (discussing *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965) wherein a dispute over a contract authorized by federal law and approved by federal officials did not present a federal question because the dispute "involved a straightforward interpretation of the . . . contract itself").

Plaintiff's generalized assertions in the Opposition fail to adequately explain precisely how the "right to relief necessarily depends on resolution of a substantial question of federal law." *Peabody Coal Co.*, 373 F.3d at 949 (citation omitted). The Complaint undeniably presents a breach of contract action, plain and simple. Ninth Circuit precedent holds that a simple

² Plaintiff provides no legal support for its conclusory position that cannabis is regulated by federal law.

1 contractual dispute does not invoke federal court jurisdiction. “[F]ederal courts do not have
2 jurisdiction over run-of-the-mill contract claims” involving tribes or tribal entities. *Cabazon*
3 *Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055 (9th Cir. 1997) (citing *Gila River Indian*
4 *Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980)).

5 It is telling that Plaintiff cannot state with specificity how any federal laws are necessary
6 to resolve its breach of contract based claims. Adjudicating the claims in the Complaint would
7 not require reference to or interpretation of any federal laws. The Complaint does not assert that
8 Tribal Defendants violated any federal laws. The Complaint does not call into question the rights
9 of the Plaintiff or the Tribal Defendants under federal law. Rather, every one of the Plaintiff’s
10 claims stem from an alleged breach of contract and infringement of other contractual rights.
11 Moreover, the relevant contract—the Land Use Agreement—is governed by tribal law, not
12 federal law. Plaintiff cites to no case law that stands for the proposition that contract disputes
13 regarding subject matter tangentially related to federal law vests the court with federal question
14 jurisdiction—nor could it because the law does not support such a position.

15 In this straightforward contract dispute, the subject matter of the Agreement is irrelevant
16 to Plaintiff’s claims. The lack of any federal question in the Complaint can be illustrated by
17 replacing all references to “cannabis” in the Complaint to “tomatoes.” Plaintiff’s claims alleging
18 non-performance and breach would remain unchanged. Resolving the claims in the Complaint
19 does not require an analysis of federal law whatsoever, regardless of the type of plants Plaintiff
20 grew, and regardless of the subject matter of the Agreement. Ultimately, the subject matter of the
21 Agreement is not relevant to the claims Plaintiff has chosen to bring in its Complaint. The
22 Agreement could relate to virtually any subject matter and the Complaint would remain an
23 ordinary breach of contract dispute that does not implicate any federal laws.

24 In an effort to save its case, Plaintiff requests that the Court stay this action to allow the
25 parties to conduct arbitration, despite the fact that Plaintiff never initiated arbitration. Opposition
26 at 6. Alternatively, Plaintiff asks that the Court permit Plaintiff to file an amended complaint
27 requesting the Court compel arbitration. Opposition at 6. Such an amendment would be futile
28 because the Court cannot compel arbitration unless it possesses jurisdiction to do so. For a

1 federal court to compel arbitration or enforce an arbitration award, federal jurisdiction must exist
 2 over the underlying claims of the dispute. *See, e.g., Vaden v. Discover Bank*, 129 S. Ct. 1262,
 3 1271 (2009) (stating the Federal Arbitration Act requires an independent jurisdictional basis over
 4 the parties' dispute for access to a federal forum). Plaintiff's request for leave to amend should
 5 be denied. "A district court does not err in denying leave to amend where the amendment would
 6 be futile . . . or where the amended complaint would be subject to dismissal." *Saul v. U.S.*, 928
 7 F.2d 829, 843 (9th Cir. 1991) (citations omitted).

8 Plaintiff also requests leave to "further address the jurisdictional issue." Opposition at 6.
 9 This request is borderline frivolous and must be denied. Tribal Defendants clearly and
 10 thoroughly raised a number of "jurisdictional issues," including the lack of a federal question, in
 11 their motions to dismiss. Plaintiff had an opportunity to respond in detail to these issues in its
 12 Opposition. Instead, Plaintiff chose to submit a barebones filing that was largely unresponsive to
 13 the Tribal Defendants' numerous jurisdictional arguments. Rather than addressing these
 14 jurisdictional issues in the Opposition, Plaintiff now requests an opportunity to submit additional
 15 briefing. Plaintiff essentially asks for another bite at the apple that it threw away. Such a request
 16 is inappropriate and would amount to nothing more than a waste of judicial resources.

17 **II. THE TRIBAL CORPORATION TERMINATED THE AGREEMENT AND THE** 18 **LIMITED WAIVER OF IMMUNITY IS EXPIRED**

19 Plaintiff believes that the mere existence of a sovereign immunity waiver is sufficient to
 20 vest this court with jurisdiction. It is not. "To confer subject matter jurisdiction in an action
 21 against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory
 22 authority vesting a district court with subject matter jurisdiction." *Alvarado v. Table Mt.*
 23 *Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007). Not only has Plaintiff failed to present a federal
 24 question, but the limited waiver of immunity is expired because the Tribal Corporation
 25 terminated the agreement on April 24, 2017 (*see* Chelette Decl., ¶ 20) and Plaintiff did not file
 26
 27
 28

1 suit until more than a year after the date of termination.³ Plaintiff attempts to revive the waiver
 2 by arguing that the Agreement remained in effect even after the Tribal Corporation terminated
 3 the Agreement.⁴

4 Plaintiff mistakenly reads into the Agreement an unwritten and unfounded requirement
 5 that the Agreement cannot be terminated until each and every dispute resolution procedure
 6 described in the Agreement takes place. Specifically, Plaintiff claims the Tribal Corporation
 7 could not terminate the Agreement until after the “meet and confer” process was completed.
 8 However, the meet and confer process is not a prerequisite to contract termination. In fact,
 9 Section 14.4(c) of the Agreement expressly recognizes “the [Tribal Corporation] may exercise its
 10 rights and remedies at any time, in any order, to any extent, and as often as the [Tribal
 11 Corporation] deems advisable.” One such right, of course, is the right to terminate for Plaintiff’s
 12 breach of contract subject only to Plaintiff’s right to cure.

13 Plaintiff’s misguided reading of the Agreement limits the Tribal Corporation’s right to
 14 terminate the Agreement and seeks to impose additional obligations on the Tribal Corporation as
 15 preconditions to termination. Specifically, Plaintiff argues that the parties are obligated to meet
 16 and confer before the Tribal Corporation can exercise its right to terminate the Agreement. It
 17 appears that Plaintiff is conflating the “meet and confer” process required as a condition
 18 precedent to *arbitration* with the “notice and cure” process that is a condition precedent to
 19 *termination*. The Agreement gives the Tribal Corporation the absolute right to terminate the
 20 Agreement after “the expiration of all notice and cure periods” without the need to first go
 21 through any “meet and confer” process. Section 16.2(b); *see also* Section 14.4(a) (stating the
 22 Tribal Corporation may terminate if an Event of Default occurs and following applicable notice
 23 and cure periods). The notice and cure periods are addressed in Section 14.2, entitled “Notice of
 24

25 ³ Under the terms of the Land Use Agreement, the waiver of sovereign immunity expired one
 26 year after the termination of the Agreement.

27 ⁴ The essence of Plaintiff’s argument is that the Tribal Corporation failed to properly terminate
 28 the Agreement. This issue goes to the merits of Plaintiff’s Complaint and thus could only have
 been resolved through timely-filed arbitration. *See* Agreement, Section 17.2(a).

1 Default” and Section 14.3, entitled “Opportunity to Cure Default.” The Tribal Corporation
2 complied with these notice and cure provisions (*see* Chelette Decl., ¶¶ 15–17, 20, 23), and
3 eventually exercised its right to terminate the Agreement by written notice dated April 24, 2017.
4 The termination notice clearly outlined the Tribal Corporation’s compliance with the notice and
5 cure periods.

6 The meet and confer process is a completely separate procedure from the notice and cure
7 procedure. Each of these processes are described in different sections of the Agreement and
8 neither section references the other. *See* Section 14 (describing events of default, notice, and cure
9 periods); Section 17.3 (outlining the meet and confer process for “Claims”). Further, the meet
10 and confer section of the Agreement contains no language on contract termination and the
11 termination provisions do not require the Tribal Corporation to meet and confer prior to electing
12 to terminate the Agreement.

13 There is absolutely nothing in the meet and confer procedure that can be interpreted as
14 revoking the Tribal Corporation’s right to terminate the Agreement. And there is absolutely no
15 requirement in the Agreement that the parties engage in the meet and confer process as a
16 prerequisite to the Tribal Corporation exercising its right to terminate the Agreement. In
17 Plaintiff’s view, it could continually request to meet and confer over and over again as a method
18 of keeping the Agreement alive. This is not what the Agreement states and is nonsensical.
19 Further, the meet and confer procedure is clear that if a party is unsatisfied with the result of that
20 process, they may initiate arbitration. The Plaintiff never initiated arbitration.

21 The Tribal Corporation exercised its right to terminate the Agreement on April 24, 2017.
22 The Tribal Corporation reiterated and clarified that decision several times in writing to the
23 Plaintiff. Chelette Decl., ¶ 22. Per the termination notice and the terms of the Agreement, the
24 Agreement was terminated effective immediately. The Complaint was filed on April 30, 2018—
25 more than a year after the Agreement was terminated. The waiver was expired—and therefore
26 void—at the time the Complaint was filed.

27 The Opposition attempts to invoke sympathy by arguing its position on the merits of the
28 dispute. But before the Court buys into this plea, it should consider the following: first, the Land

1 Use Agreement was terminated because Plaintiff failed to pay approximately \$1.5 million dollars
 2 in taxes, despite being provided numerous opportunities to make payments; second, under
 3 prevailing law, any perceived inequities cannot bring the expired immunity waiver back to life.
 4 “[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending
 5 on the equities of a given situation.” *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*,
 6 757 F.2d 1047, 1052 n.6 (9th Cir. 1985) (citation omitted).

7 **III. PLAINTIFF FAILS TO RESPOND TO THE TRIBAL DEFENDANTS’ SPECIFIC** 8 **REASONS AS TO WHY ABSENT TRIBAL PARTIES ARE INDISPENSABLE**

9 The Tribal Defendants devoted substantial portions of their motions to arguing that
 10 additional tribal entities are indispensable parties. The legal standards for these arguments are
 11 highly specific to the facts of each case and the allegations in a complaint. The Ninth Circuit uses
 12 multi-factor tests to consider whether absent parties are necessary and indispensable. *See, e.g.*,
 13 *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir.
 14 1991) (articulating factors for considering whether an absent party is necessary); *Salt River*
 15 *Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161–62 (9th Cir. 2002) (articulating
 16 factors for considering whether a necessary party is indispensable). The Tribal Defendants
 17 analyzed these factors in detail as to each absent party, based on the specific allegations in the
 18 Complaint and the relief requested by Plaintiff.

19 In response, Plaintiff largely ignores the specific reasons why Tribal Defendants claim
 20 the absent tribal entities are necessary and indispensable. For instance, Plaintiff alleges the Tribal
 21 Defendants barred Plaintiff from accessing the premises. Complaint, ¶ 30. In fact, a license
 22 issued by the Santa Ysabel Tribal Cannabis Regulatory Agency (“Regulatory Agency”) is
 23 required to access the premises, and the Regulatory Agency revoked Plaintiff’s license, resulting
 24 in Plaintiff’s inability to gain access to the premises. The Tribal Corporation has no power to
 25 issue, revoke, or reinstate that license. It was the Regulatory Agency—not the Tribal
 26 Defendants—who barred Plaintiff’s access to the premises. Plaintiff additionally alleges the
 27 Tribal Defendants illegally took possession of Plaintiff’s “then growing medical cannabis”
 28 plants. *See, e.g.*, Complaint, ¶¶ 30, 43. However, it was the Regulatory Agency (and again not

1 one of the Tribal Defendants) who disposed of Plaintiff's cannabis plants pursuant to Tribal law,
2 and only after the plants were abandoned by Plaintiff. The Tribal Defendants asserted the
3 Regulatory Agency is a necessary and indispensable party to claims involving Plaintiff's
4 property because the Regulatory Agency is the entity responsible for proper disposal of cannabis
5 and cannabis-related products abandoned at the premises.

6 Plaintiff's response to these arguments is simply to express that it has "no known issue
7 with [the Regulatory] Agency" and did not have a contract with the Regulatory Agency.
8 Opposition at 4. This response is insufficient considering the allegations in the Complaint and
9 the Tribal Defendants' uncontroverted evidence which demonstrates that the Regulatory Agency
10 has complete control over access to the premises as well as disposal of cannabis and cannabis-
11 related products. The Complaint unquestionably takes issue with Plaintiff's inability to access
12 the premises and the disposal of Plaintiff's property left on the premises. These matters are
13 within the purview of, and were decided by, the Regulatory Agency. Contrary to Plaintiff's
14 generalized assertions, it appears that the Plaintiff *does* have an issue with the Regulatory
15 Agency.

16 The Tribal Defendants also argued the Iipay Nation of Santa Ysabel ("Tribe") is a
17 necessary and indispensable party regarding tax matters because Plaintiff seeks a declaration
18 from the Court regarding its specific obligations to pay tribal tax to the Tribe. In response,
19 Plaintiff presents an equitable argument that the Tribal Corporation cannot claim the Tribe is an
20 indispensable party to any action because this would amount to an "illusory representation" in
21 the Agreement. Opposition at 4. This is a distortion of the Tribal Defendants' position. They do
22 not claim that the Tribe is an indispensable party to "any" action arising out of the Agreement.
23 Rather, the Tribal Defendants argue that the Tribe is an indispensable party to Plaintiff's specific
24 claims alleging it had no obligations to pay tribal tax to the Tribe.

25 Plaintiff claims the Tribal Defendants failed to meet their "heavy" burden regarding the
26 indispensable parties but fails to substantively respond to any of the factors and reasoning set
27 forth by the Tribal Defendants.

28

CONCLUSION

Plaintiff's Complaint is defective for a multitude of reasons which cannot be overcome. The Opposition further clarified that no amendment can save the Complaint because there are no facts the Plaintiff could allege, or claims it could bring, that would vest this Court with jurisdiction. The Tribal Defendants respectfully request this Court dismiss the Complaint in its entirety with prejudice and without leave to amend.

Respectfully submitted this 15th day of October 2018.

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/s/ Keith Anderson

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*Attorneys for Defendants Santa Ysabel Tribal
Development Corporation and David Chelette*

CERTIFICATE OF SERVICE

I hereby certify that, on October 15, 2018, a true and correct copy of:

**SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION AND DAVID
CHELETTE'S JOINT REPLY IN SUPPORT OF MOTIONS TO DISMISS**

Was served on Counsel for Plaintiff electronically through CM/ECF.

DATED: October 15, 2018

CEIBA LEGAL, LLP

By: /s/ Little Fawn Boland

Little Fawn Boland