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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP, Plaintiff, v. ROBERT ROSETTE; ROSETTE & ASSOCIATES, PC; ROSETTE, LLP; QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*; *and* DOES 1 THROUGH 100, Defendants.	Case No.: 17-cv-01436-GPC-MDD **THE QUECHAN TRIBE'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND MOTION FOR ENTRY OF FINAL JUDGMENT**
QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*, Counterclaim-Plaintiff, v. WILLIAMS & COCHRANE, LLP, Counterclaim-Defendant.	Date: December 20, 2019 Time: 1:30 PM Dept: 2D Judge: Hon. Gonzalo P. Curiel

INTRODUCTION

On September 10, 2019, the Court issued an order granting, with prejudice, Defendant Quechan Tribe of Fort Yuma Indian Reservation's ("Quechan" or "the Tribe") motion to dismiss Plaintiff Williams & Cochrane's ("W&C") "reply claim" for tortious breach of contract against the Tribe and certain individual Tribe members. *See* ECF No. 216 (the "September 10 Order"). The September 10 Order dismissed the reply claim (properly, a "counterclaim in reply") for the following reasons: (i) the individual Tribe members were not parties to the underlying contract, and therefore could not be liable for the tortious breach of that contract, *see id.* at 17-18; and (ii) the factual bases for the reply claim—two pre-litigation letters sent by the Tribe to W&C—were protected by the litigation privilege, *see id.* at 19-21.

W&C filed a motion for reconsideration of the September 10 Order. ECF No. 219 (the "Motion"). However, the Motion is only a motion for ***partial*** reconsideration of that order. It does ***not*** challenge the Court's dismissal of the individual defendants. Accordingly, even if the Court granted this Motion—and it should not— the former individual defendants would still not be parties to this litigation. The Tribe is the only remaining defendant among the defendants previously referred to by the parties and the Court as the "Quechan Defendants."

The Motion is replete with wholly irrelevant facts from other cases and arguments not previously raised. But, in substance, W&C argues that the Court's September 10 Order was erroneous, citing two recent California Court of Appeals cases regarding the litigation privilege. *See* ECF No. 219-1 at 3-9; Declaration of Cheryl Williams ("Williams Decl."), ECF No. 219-2 ¶ 4. Neither case, however, changes the law regarding the scope of the litigation privilege. Nor does the Motion reveal new facts to merit reconsideration of the September 10 Order. Accordingly, it fails entirely to satisfy the well-settled standards for motions for reconsideration, and should be denied.

W&C alternatively seeks partial judgment on its counterclaim in reply in order to appeal the Court's ruling on the litigation privilege issue. Because the standards for partial judgment under Fed. R. Civ. P. 54(b) are not met, this request should be denied as well.

ARGUMENT

I. W&C FAILS TO IDENTIFY NEW FACTS OR LAW WARRANTING RECONSIDERATION OF THE SEPTEMBER 10 ORDER

A. Legal Standards

Motions for reconsideration are governed by Civil Local Rule 7.1(i), which provides that parties may seek reconsideration by submitting an affidavit setting forth, *inter alia*, "what new or different facts and circumstances are claimed to exist which did not exist, or were not shown" when the original motion was presented. Civ. L.R. 7.1(i)(1). Accordingly, reconsideration of a prior order is appropriate only "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah Cty. Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).

A motion for reconsideration "is not an opportunity to renew arguments considered and rejected by the court, nor is it any opportunity for a party to re-argue a motion because it is dissatisfied with the original outcome." *S.E.C. v. Schooler*, 2014 WL 2515128, at *1 (S.D. Cal. Jun. 4, 2014) (quoting *FTC v. Neovi, Inc.*, 2009 WL 56130, at *2 (S.D. Cal. Jan. 7, 2009)); *see also Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). It is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters.*, 229 F.3d at 890.

W&C presents no new facts or law, and the Court's September 10 Order was both correct and just. The Court should deny the Motion.

B. W&C Relies on Cases That Do Not Change the Law

The September 10 Order dismissed W&C's counterclaim in reply against the Tribe because it necessarily relied on prelitigation correspondence between the Tribe and W&C. The correspondence was "made in serious contemplation of potential litigation," and, as a result, the tortious breach of contract claim was barred by the litigation privilege. ECF No. 216 at 20. The Court also noted that because the privilege "is absolute and applies regardless of malice," the Tribe did not lose this protection even if it forwarded the letters to parties other than W&C. *Id.* at 20-21.

W&C submitted a declaration setting forth its proffered bases for reconsideration of the Court's ruling on the litigation privilege issue. The declaration relied on two recent California Court of Appeal decisions—*Mancini & Assocs. v. Schwetz*, 39 Cal. App. 5th 656 (2019), and *People v. Toledano*, 36 Cal. App. 5th 715 (2019)—as the sole grounds for reconsidering the September 10 Order. *See* Williams Decl. ¶ 4. Neither case changed the applicable legal principles surrounding the litigation privilege, and therefor neither meet the standards for reconsideration. If anything, they both demonstrate the soundness of the Court's reasoning.

Mancini sets forth precisely the same legal standards as the cases applied by the Court in the September 10 Order. *Compare* ECF No. 216 at 19 ("[The litigation privilege] applies to any communication made (1) in a judicial or quasi-judicial proceeding, (2) by litigants or other participants authorized by law, in or out of court, (3) to achieve the objects of litigation, (4) which has some connection or logical relation to the action.") (citing *Silberg v. Anderson*, 50 Cal. 3d 205, 215 (1990)) *with Mancini*, 39 Cal. App. 5th at 661 ("The privilege applies when statements are made in judicial or quasi-judicial proceedings by litigants or other participants to achieve the objects of the litigation [and] have some connection or logical relationship to the

litigation.") (citing *Silberg*, 50 Cal. 3d at 215). Indeed, it is well-settled, and has been for decades, that the litigation privilege applies only to communicative acts, and not to non-communicative conduct. *See LiMandri v. Judkins*, 52 Cal. App. 4th 326, 345 (1997). Applying these well-established legal standards, the *Mancini* court held that the litigation privilege did not protect the defendant's ***non***-communicative conduct.

In *Mancini*, a law firm that prevailed in litigation on behalf of a client sued the judgment debtor to recover attorney's fees. The law firm's claims against the judgment debtor (*i.e.* the defendant in the underlying litigation) arose primarily out of a settlement between the firm's former client and the judgment debtor/defendant. That settlement released the judgment debtor/defendant from the underlying judgment, which included an award of fees and costs to the firm. *See Mancini*, 39 Cal. App. 5th at 659-60. The court held that the actual execution of the settlement agreement was communicative. *Id.* at 661. But beyond the execution of the settlement agreement, there was "a course of tortious conduct to deprive [the law firm] of its attorney fees." *See id.* Notably, the judgment debtor/defendant rekindled a relationship with the firm's former client, and then convinced her—after being approached by a collections agent retained by the law firm—to release him from the judgment. *See id.* Accordingly, the *Mancini* court held that the litigation privilege did not apply to the course of non-communicative conduct designed to evade the judgment. *See id.*

W&C's counterclaim in reply is based exclusively on communications between W&C and the Tribe: *i.e.* the two June 2017 demand letters. *See* ECF No. 216 at 6-7 (citing the relevant allegations). It involves none of the alleged non-communicative conduct present in *Mancini*. In its September 10 Order, the Court described the reply claim as "consist[ing] of prelitigation ***communications*** asking for the Tribe's case file." *Id.* at 20 (emphasis added). Thus, *Mancini*'s finding of, and reliance on, non-communicative conduct is inapplicable here.

That *Mancini* involved some facts that are superficially analogous to the present case—a law firm advancing tortious breach of contract claims to seek recovery of unpaid legal fees—is completely irrelevant to whether the case changed the applicable law surrounding the litigation privilege. *Mancini* did not break new legal ground with its focus on the distinction between communications and non-communicative conduct. It has been the law for decades. *See, e.g.*, *LiMandri*, 52 Cal. App. 4th at 345; *Kupiec v. Am. Int'l Adjustment Co.*, 235 Cal. App. 3d 1326, 1331 (1991) (holding that the litigation privilege "applies only to communicative acts and does not privilege tortious courses of conduct.")). Motions for reconsideration "may ***not*** be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enterprises*, 229 F.3d at 890 (additional emphasis added). *Mancini* is not a basis for a motion for reconsideration.

Similarly, the second case on which W&C relies, *Toledano*, does not make new law relevant to this issue; nor does it support W&C's position that reconsideration of the September 10 Order is warranted. To the contrary, *Toledano* supports the Court's reasoning in the September 10 Order. In *Toledano*, the Court of Appeal held (apparently for the first time in California) that the litigation privilege applies to criminal extortion prosecutions. *See Toledano*, 36 Cal. App. 5th at 727-28. While this may have been a change in the law, it is irrelevant to this civil action.

Next, *Toledano* distinguished between allegedly extortionate threats that would be privileged from those that would not be covered by the privilege. *See id.* at 728-29. In reaching its distinction, *Toledano* relied on the well-settled (and entirely not new) principle that a communication must be connected to contemplated litigation in order to be protected by the privilege. *See Aronson v. Kinsella*, 58 Cal. App. 4th 254, 266 (1997) ("[I]f the statement is made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement is

sufficiently connected to litigation and will be protected by the litigation privilege."); *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 36 (1997) (noting that the "mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future is insufficient to invoke the litigation privilege."). Based on this long-established doctrine, and upholding the application of the litigation privilege to other statements, *Toledano* concluded that a threat made by the defendant, an attorney, to disclose a witness's extra-marital affair unless she paid him $350,000, was not sufficiently related to the witness's request for a restraining order against the defendant's client, and therefore not protected by the privilege. *See Toledano*, 36 Cal. App. 5th at 728-29.

W&C relies on *Toledano* to argue that the Tribe's alleged threat to ruin W&C's reputation in Indian Country was insufficiently connected to any litigation contemplated by the Tribe's two demand letters. But *Toledano* is not new law on this point. And this argument was squarely addressed and rejected by the Court in the September 10 Order in any event. *See* ECF No. 216 at 20. While W&C may disagree with the Court's underlying determination that the demand letters "were made in serious contemplation of potential litigation," ECF No. 216 at 20, a motion for reconsideration "is not an opportunity to renew arguments considered and rejected by the court, nor is it any opportunity for a party to re-argue a motion because it is dissatisfied with the original outcome." *Schooler*, 2014 WL 2515128, at *1. Like *Mancini*, *Toledano* is not a basis for a motion for reconsideration.

Regardless, *Toledano* actually ***supports*** the September 10 Order on this issue. *See Toledano*, 36 Cal. App. 5th at 728. The holding in *Toledano* was based on the court distinguishing between threatening language that is "part of the adversary system," and therefore protected, from the threat to disclose a party's long-term affair, which was not connected to litigation and therefore was not privileged.

Here, as the September 10 Order correctly recognized, the two demand letters

communicated facts relating to W&C's performance under its fee agreement with the Tribe, the Tribe's termination of W&C, and the Tribe's request for its case file—facts which form the "main premise" of the claims, defenses, and counterclaims in this case. "It follows that these letters were made in serious contemplation of potential litigation." ECF No. 216 at 20.

Toledano also supports the Court's conclusion that the demand letters are protected despite their allegedly aggressive content. "The privilege applies regardless of whether the communication was made with malice or intent to harm, and whether the alleged conduct was fraudulent, perjurious, unethical, or even illegal." *Toledano*, 36 Cal. App. 5th at 727 (citing *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 919-20 (2004)). *Compare id. with* ECF No. 216 at 20 ("[A]lthough W&C takes issue with the aggressive language in [the demand letters], the litigation privilege is absolute and applies regardless of malice.") (citing *Malin v. Singer*, 159 Cal. App. 4th 1283, 1301-02 (2013)).

W&C proffers two recently-decided cases which neither change the law nor support its position that the litigation privilege should not apply. The Court should decline W&C's invitation to relitigate issues the Court considered and addressed in the September 10 Order, and deny the Motion.

II. PARTIAL JUDGMENT IS NOT WARRANTED UNDER RULE 54(b)

A. Legal Standards

A court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties, only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). Rule 54(b) is a limited exception to the "foundational" final judgment rule, which limits appellate jurisdiction to issues arising from a final order. *See, e.g.*, *Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 627 (9th Cir. 2015). Thus, "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings

and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981); *see also Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir. 2004) ("[I]n the interest of judicial economy Rule 54(b) should be used sparingly.").

In assessing whether partial judgment is warranted under Rule 54(b), courts are required to weigh "the importance of juridical concerns with piecemeal appeals." *Jewel*, 810 F.3d at 628. Thus, courts must consider factors such as "the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980); *see also Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005) (noting the importance, under Rule 54(b), of ensuring the "case would [not] inevitably come back to this court [on appeal] on the same set of facts.").

B. Partial Judgment is Not Warranted Because the Reply Claim Arises From the Same Operative Facts as the Remaining Claims to be Decided

The crux of the analysis under Rule 54(b) is whether there is "no just reason for delay[ing]" entry of partial judgment on some, but not all, claims between two parties. Fed. R. Civ. P. 54(b); *Curtiss-Wright*, 446 U.S. at 10; *see also Wood*, 422 F.3d at 879-880 ("We start (and mostly stop) with juridical concerns . . . about the interrelationship of the claims or issues, and the effect of the relationship on the likelihood of piecemeal appeals.").

W&C seeks to disguise the litigation privilege issue as a severable "claim," without addressing the effect of partial judgment on the rest of the claims in this case. This is error. The counterclaim in reply is for tortious breach of contract, and is based on the same set of facts—W&C's representation of the Tribe and the Tribe's termination of that representation—as W&C's remaining claim against the Tribe and the Tribe's pending counterclaims against W&C. Fact discovery on those claims has

just opened.

Where claims "rely on inter-connected factual allegations," partial judgment is rarely appropriate because of the inevitability that the case would "come back to this court on the same set of facts." *Jewel*, 810 F.3d at 629 (quoting *Wood*, 422 F.3d at 879); *see also U.S. ex rel. Technica, LLC v. Carolina Cas. Ins. Co.*, 2011 WL 1121276, at *4 (S.D. Cal. Mar. 21, 2011) (holding that where "plaintiff's claims arose from the same contract . . . as the breach of contract claim still remaining to be litigated," such overlap weigh against partial judgment). Just so here. Permitting W&C to appeal the Court's ruling on the counterclaim in reply while the rest of the case proceeds would be inefficient, and would constitute an end run around the juridical concerns underpinning the final judgment rule. *See Curtiss-Wright*, 446 U.S. at 8 ("Consideration of [judicial administrative interests] is necessary to assure that application of [Rule 54(b)] effectively 'preserves the historic federal policy against piecemeal appeals.'") (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)). The request for partial judgment should be denied.

III. CONCLUSION

For the foregoing reasons, reconsideration of the September 10 Order is not warranted, and partial judgment is inappropriate. The Tribe therefore respectfully requests that the Court deny the Motion in its entirety.

Dated: October 25, 2019

Respectfully submitted,

/s/ Christopher T. Casamassima
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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 25, 2019 at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima