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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.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*,

Counterclaim-Plaintiff,

v.

WILLIAMS & COCHRANE, LLP,

Counterclaim-Defendant.

REDACTED

Case No.: 17-cv-01436-GPC-DEB

DEFENDANT AND COUNTERCLAIM-PLAINTIFF THE QUECHAN TRIBE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Notice of Motion; Separate Statement of Undisputed Material Facts; Vittor Declaration Filed Concurrently]

Date: December 11, 2020, 1:30 p.m.
Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Trial Date: Not Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

I. INTRODUCTION

In 2016, the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or the "Tribe") retained Williams & Cochrane, LLP ("W&C") to negotiate a new gaming compact with the State of California. After more than eight months and $400,000 in attorneys' fees, W&C had not completed the negotiations. The Tribe was dissatisfied with W&C's work and terminated W&C under the explicit and discretionary right of termination contained in Section 11 of its Attorney-Client Fee Agreement ("Fee Agreement") with W&C.

In response, W&C filed this lawsuit, alleging a slew of outlandish and baseless claims, most of which have been dismissed by the Court. What remains are W&C's claims that (1) the Tribe breached the implied covenant of good faith and fair dealing by not paying W&C a contingency fee in addition to the $400,000 the Tribe had already paid W&C; and, alternatively, (2) the Tribe breached Section 11 of the Fee Agreement by terminating it without paying an additional "reasonable fee" in lieu of the contingency fee. The Tribe counterclaimed for, *inter alia*, breach of fiduciary duty.

During discovery, W&C did not even try to dispute the Tribe's straightforward explanation—advanced in declarations filed over two years ago—that the Tribe terminated W&C because it was dissatisfied with its work. *See* ECF Nos. 29-2, 29-3. W&C did not take any depositions of Tribe witnesses. It obfuscated in discovery responses. And in the depositions of W&C's only two principals, they both refused to answer questions seeking facts that could support their claims. Accordingly, the undisputed—and now indisputable—facts definitively show that W&C's claims are meritless. The Tribe is entitled to summary judgment—not just on W&C's claims, but on the Tribe's breach of fiduciary duty counterclaim against W&C as well.

W&C's implied covenant claim fails for four reasons: (1) under well-settled California law, the implied covenant cannot be applied by W&C to limit the Tribe's discretionary power explicitly granted to it in Section 11 of the Fee Agreement; (2) the Tribe's termination under Section 11 did not deprive W&C of a contract right to which

it was entitled, because the conditions entitling W&C to the contingency fee had not yet occurred; (3) the Tribe's termination was not in bad faith; and (4) the Fee Agreement's definition of the contingency fee results in no damages.

W&C's breach of contract claim under Section 11 fails because W&C has already been more-than-fairly compensated, and there is no evidence to support an additional "reasonable fee" pursuant to the relevant factors listed in Section 11. W&C, for example, did not even keep time records to substantiate the amount of its work.

The Tribe is also entitled to summary judgment on its breach of fiduciary duty counterclaim because the undisputed facts show that W&C misled the Tribe regarding the applicability and calculation of the contingency fee while representing the Tribe.

II. STATEMENT OF FACTS

A. The 1999 Compact and the 2006 Amendment

Quechan first entered into a class III gaming compact with the State of California (the "State") in 1999. *See* Separate Statement of Undisputed Material Facts ("SUF") ¶ 1; Ex. 1 (the "1999 Compact").[1] The 1999 Compact allowed the Tribe to operate casinos on its reservation in exchange for certain financial obligations, and was substantively similar to approximately 60 other tribal gaming compacts entered into by California around the same time.

The 1999 Compact was effective until 2006, when Quechan amended its compact with the State. *See* SUF ¶ 2; Ex. 2 (the "2006 Amendment"). The 2006 Amendment increased the number of gaming devices the Tribe could operate, in exchange for increased payment obligations to the State. SUF ¶ 3. Of note, it replaced a prior payment mechanism related to defraying State's regulatory costs—the "Special Distribution Fund" ("SDF")—with a new formula, which resulted in increased payments to the State. Ex. 2 § 4.3.3. The 2006 Amendment remained in effect until 2017, when it was replaced by a new compact. *See* Ex. 32 ("2017 Compact").

[1] All references to exhibits refer to exhibits to the concurrently-filed Declaration of Joshua A. Vittor, unless otherwise noted.

B. The Pauma Litigation

In the years after the execution of the 1999 compacts by different California tribes, disputes arose between the tribes and the State over how to interpret the compacts.[2] As relevant here, in 2015, the Ninth Circuit ruled in favor of the Pauma Band of Luiseño Mission Indians ("Pauma"), resolving a longstanding litigation between that tribe and the State regarding a 2004 amendment to Pauma's 1999 gaming compact. *See Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155 (9th Cir. 2015). Pauma was awarded approximately $36 million, which was the difference between the revenue sharing payments Pauma made to the State under its 2004 amendment and the revenue sharing payments it would have made under the 1999 compact, had it not entered into the 2004 amendment. *See id.* at 1168-69. W&C represented Pauma at the time of the Ninth Circuit's decision. *Id.* at 1159.

C. The W&C Fee Agreement

In 2016, Quechan sought to negotiate a new compact with the State. The Tribe hired W&C, and entered into the Fee Agreement in September 2016. *See* SUF ¶ 4; Ex. 4. The Fee Agreement contained three different payment provisions: a monthly fee (Section 4), a contingency fee (Section 5), and a reasonable fee that W&C could earn as an alternative to the contingency fee in the event the Tribe terminated W&C before W&C was entitled to a contingency fee (Section 11). *See generally* Ex. 4.

Section 4 called for a monthly flat fee of $50,000. *Id.* § 4; SUF ¶ 5. It is undisputed that, during the course of W&C's representation of the Tribe, the Tribe paid W&C $400,000 in legal fees pursuant to Section 4. *See* SUF ¶ 6.

Section 5 outlined a contingency fee that would be triggered "in the event [the Tribe] receives a monetary award or other sum resulting from the representation . . . ."

[2] *See generally In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010).

Ex. 4 § 5. If W&C's representation of the Tribe was "resolved via negotiation" of a new compact, the contingency fee was to be "calculated by totaling the amounts [the Tribe] receives—both monetary and/or as a credit, offset, or other reduction in future compact payments—***for the excess payments it made under [the 2006 Amendment]***." *Id.* (emphasis added); *see also* SUF ¶ 8. Thus, the contingency fee was to be based on a portion of the compensation received by the Tribe from the State for payments made by the Tribe under the 2006 Amendment that were determined to be in "excess" of what it should have been paying. As acknowledged by Cheryl Williams—one of W&C's two principals—in an email days before the Fee Agreement was executed, [redacted]. Ex. 3 at WC5424; SUF ¶ 9.

Section 11 explicitly granted the Tribe the discretion to terminate W&C "at any time," but provided W&C with an opportunity to obtain an additional "reasonable fee for the legal services provided" in the event the Tribe terminated W&C before the Tribe was "entitled" to a "net recovery," as defined in Section 5. *See* Ex. 4 § 11. This reasonable fee was to be "in lieu of the contingency fee," and it would be calculated pursuant to an evaluation of factors listed in Section 11 of the Fee Agreement—a methodology that was separate and distinct from the computation of the contingency fee under Section 5. *See id.*; *see also* SUF ¶¶ 11, 45.

D. W&C's Representation of the Tribe

W&C commenced compact negotiations with the State on the Tribe's behalf in October 2016. It sent a letter to then-Governor of California Jerry Brown, purporting to accomplish two objectives: (1) to trigger the existing compact's "dispute resolution process contained within Section 9.1" of the existing compact, through which the Tribe would contest revenue sharing payments under that agreement, and (2) "to commence formal compact renegotiations pursuant to Section 12" of the existing compact, in order

to replace that compact with a new one. SUF ¶ 12; Ex. 5 at DOJ00384. On October 17, 2016, Joginder Dhillon, Governor Brown's Senior Advisor for Tribal Negotiations at the time, responded to W&C's letter, agreeing to enter into negotiations for a new compact with the Tribe. *See* Ex. 6 at DOJ00391. Mr. Dhillon took the position that negotiations for a new compact and dispute resolution regarding the existing compact "are two separate processes." *Id.*; *see also* SUF ¶ 13.

After an initial negotiation session between the parties on November 9, 2016, the State sent a draft compact to W&C on December 7, 2016. *See* Ex. 10 ("December 2016 Draft"); SUF ¶ 15. The December 2016 Draft included a significant reduction in SDF payments from the Tribe to the State, based not on the Tribe's net win, as it had been under the 2006 Amendment, but rather on a pro rata share of the State's regulatory costs. *See* December 2016 Draft, Ex. 10 § 4.3. Mr. Dhillon estimated the new payment structure would reduce the Tribe's annual compact payments by approximately $4 million. *See* Ex. 12 at DOJ01204; SUF ¶ 17. W&C told the Tribe the State's offer was "as good as it can get from a financial perspective." *See* Ex. 11 at QUECHAN-WC-00006184.

The draft's proposed pro rata payment structure was consistent with terms provided by the State to other tribes around the same time. *See* SUF ¶¶ 18, 20. Thus, the State was offering a new SDF payment provision to Quechan that was similar to terms offered to other tribes, and was not specifically tied to any excess payments made by Quechan under prior compacts. *See id.* ¶¶ 20-21. Indeed, the State's December 2016 Draft did not mention any excess payments made under the 2006 Amendment. *See generally* Ex. 10; *see also* SUF ¶ 21.

W&C did not send the State written revisions to the State's December 2016 Draft until April 13, 2017. *See* SUF ¶ 25; Exs. 16-17. After sending one more redline to the State in May, SUF ¶ 27, W&C sent a third redlined draft to the State on June 21, 2017 that included, among other things, a new provision defining revenue sharing payment obligations to non-gaming Indian tribes, which neither the State nor the Tribe had seen.

See SUF ¶¶ 30-31; Ex. 27 § 5.2. Mr. Dhillon and Sara Drake, a senior California Department of Justice attorney responsible for advising the Governor on compact negotiations, testified that [redacted]. *See* Dhillon Depo. Tr. (Ex. 37) 120:7-24; 133:5-10; Drake Depo. Tr. (Ex. 38) 60:24-61:1. W&C had not even sent a copy of the June 21 draft compact to the Tribe before sending it to the State because, as Ms. Williams admitted to Ms. Drake at the time in an email, ***W&C was not sure the State would agree to it***. *See* Ex. 31 at DOJ01857.

E. The Tribe's Termination of W&C

During W&C's representation of the Tribe, the Tribe became frustrated with W&C's lack of progress and apparent difficulty concluding the negotiations. *See* SUF ¶ 33. The Tribe was also concerned with its obligation to pay W&C's $50,000 monthly fee, without any incentive for W&C to work quickly. *See, e.g.*, Ex. 14 at QUECHAN-WC-00004192. Eventually, the Tribal Council concluded that W&C "has not provided services adequate of the level [of] compensation," and began looking for new counsel. Ex. 19 at QUECHAN-WC-00006982.

On June 27, 2017, then-Quechan President Keeny Escalanti sent a letter to W&C, [redacted]. *See* SUF ¶ 34; Ex. 30. [redacted]. *See* Ex. 30 at WC2949-50. In total, after more than eight months, W&C had attended three negotiation sessions with State negotiators, had provided three sets of revisions to the State, and was paid $400,000 in fees. *See id.*; *see also* SUF ¶¶ 6, 14, 22, 25-27, 29-30.

F. The 2017 Compact

The Tribe replaced W&C with Rosette, LLP ("Rosette"). *See* SUF ¶ 35. Rosette completed the compact negotiations, and the Tribe signed a new compact with the State in August 2017. *See* Ex. 32 ("2017 Compact"); SUF ¶ 36. It is undisputed that there

are substantive differences between the executed 2017 Compact and the last draft sent by W&C to the State on June 21, 2017 (*see* SUF ¶ 37)—a draft that the Tribe never even saw prior to W&C's termination. *See* SUF ¶ 31. For example, the 2017 Compact has a completely different revenue sharing structure for payments to non-gaming tribes compared to W&C's June 21 draft. *Compare* Ex. 27 § 5.2 *with* Ex. 32 §§ 5.2, 5.3.

III. PROCEDURAL HISTORY

W&C filed this action in July 2017. ECF No. 1. After prior motion practice, there remain only two claims by W&C against the Tribe: a breach of contract claim, and an implied covenant of good faith and fair dealing claim. *See* Fourth Amended Complaint ("FAC"), ECF No. 220 ¶¶ 205-217; *see also* ECF No. 313 at 4.

In its order granting in part the Tribe's motion to dismiss the (first) Amended Complaint, the Court specifically addressed the limitations of and distinction between these two claims. *See* ECF No. 89 (the "June 2018 Order"). Because the Tribe was not entitled to any monetary recovery from the State at the time it terminated W&C, W&C was not entitled to the contingency fee when it was terminated, and the non-payment of the contingency fee under Section 5 could not, as a matter of law, constitute a breach of contract. *See id.* at 15-16. W&C's breach of contract claim was therefore dismissed to the extent it was premised on the non-payment of a contingency fee. *Id.* Consequently, the breach of contract claim is based on the Tribe's alleged failure to pay W&C an additional "reasonable fee" under Section 11.

The Tribe has counterclaims against W&C for: (1) breach of fiduciary duty; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; and (4) breach of contract. *See* Counterclaims, ECF No. 94 ¶¶ 56-90; ECF No. 313 at 4.

IV. LEGAL STANDARDS

Summary judgment "shall" be granted if the moving party shows, based on the materials in the record, including depositions, documents, and admissions, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c)(1)(A); *see also Matsushita Elec. Indus. Co.*

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A fact is only material if it affects the outcome of the claims on which summary judgment is sought. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

V. W&C'S IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM FAILS AS A MATTER OF LAW

To prove its claim for a breach of the implied covenant of good faith and fair dealing, W&C must establish the following elements: "(1) the existence of a contract; (2) [that W&C] did all, or substantially all of the significant things the contract required; (3) the conditions required for the defendant's performance had occurred; (4) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1048 (N.D. Cal. 2020) (citations omitted).

W&C cannot establish these required elements for four reasons, each of which is independently sufficient to grant summary judgment on the implied covenant claim in favor of the Tribe. ***First***, applying the implied covenant to restrict the Tribe's right to terminate W&C impinges on a discretionary power expressly granted to the Tribe in the Fee Agreement, in contravention of clearly established California law. ***Second***, the conditions required to trigger the contingency fee—*i.e.*, the Tribe's realization of monetary benefits from a final, operative gaming compact—had not occurred at the time of W&C's termination. ***Third***, the undisputed facts show that the Tribe's termination of W&C was reasonable, and not done in bad faith. And ***fourth***, W&C cannot prove entitlement to any damages under Section 5 of the Fee Agreement.

A. The Implied Covenant May Not Be Applied to Restrict a Discretionary Power Expressly Granted to the Tribe

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349 (2000) (citations omitted). And while it exists to

ensure that "no party to the contract will do anything that would deprive another party of the benefits of the contract," *Digerati Holdings, LLC v. Young Money Ent., LLC*, 194 Cal. App. 4th 873, 885 (2011) (citations omitted), "***there can be no implied covenant where the subject is completely covered by the contract***." *Lippman v. Sears, Roebuck & Co.*, 44 Cal. 2d 136, 142 (1955) (emphasis added); *see also City of Glendale v. Superior Court*, 18 Cal. App. 4th 1768, 1778 (1993). Thus, "the scope of conduct prohibited by the covenant . . . is circumscribed by the purposes and express terms of the contract." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 371 (1992) (citations omitted). And here, Section 11 of the Fee Agreement precludes W&C's implied covenant contingency-fee theory.

W&C contends it is entitled to a contingency fee under Section 5 of the Fee Agreement because the Tribe's termination of the Fee Agreement was an improper effort to avoid the obligation to pay W&C a contingency fee. But Section 11 gives the Tribe the right to "discharge [W&C] ***at any time***." SUF ¶ 10 (emphasis added). It then provides that W&C may be entitled to a "reasonable" fee "in lieu" of a contingency fee in the exact circumstances that occurred here: if W&C was terminated before it was entitled to a contingency fee under Section 5 of the Fee Agreement. *See* SUF ¶ 11; *see also* June 2018 Order, ECF No. 89 at 15 (holding that W&C was not entitled to a contingency fee under the terms of Section 5 of the Fee Agreement); *infra* V.B.

Because Section 11 of the Fee Agreement provides for the possibility of an alternative reasonable fee "in lieu" of a contingency fee under Section 5, the Fee Agreement itself precludes W&C's theory that the implied covenant entitles it to a contingency fee. To allow W&C's implied covenant theory to proceed would retroactively change the express terms of the Fee Agreement to restrict the Tribe's discretionary—and explicit—rights under the Fee Agreement. That is not allowed under California law.

Carma is instructive. *See* 2 Cal. 4th at 371-74. There, a landlord's absolute right to terminate a lease and negotiate directly with a tenant's prospective sublessor

was upheld, despite the tenant's claim that the landlord had exercised that right in bad faith. The California Supreme Court held that "[w]e are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement." *Id.* at 374.

Consistent with *Carma*, the Court of Appeal subsequently held that the implied covenant of good faith and fair dealing may only be applied to restrict a party's use of a discretionary power explicitly provided by the contract where the application of the covenant was necessary to save the contract from being illusory:

> The conclusion to be drawn is that courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement. In all other situations where the contract is unambiguous, the express language is to govern, and "no obligation can be implied . . . which would result in the obliteration of a right expressly given under a written contract.

Third Story Music, Inc. v. Waits, 41 Cal. App. 4th 798, 808 (1995) (quoting *Gerdlund v. Elec. Dispensers Int'l*, 190 Cal. App. 3d 263, 277-78 (1987) (holding that the implied covenant did not impose a "for cause" requirement on a termination provision that permitted an employer to terminate an employee "at any time and for any reason")).

This narrow exception does not apply here. "[R]egardless of how [the] power was exercised," the Fee Agreement "would have been supported by adequate consideration." *Id.* Specifically, the Tribe provided ample consideration for the Fee Agreement in the form of its $50,000 monthly payments to W&C. *See* SUF ¶¶ 5, 6.

The clear conclusion to be drawn from long-established California law is simple: where a defendant was "given the right to do what [it] did by the express provisions of the contract there can be no breach" of the implied covenant. *Carma*, 2 Cal. 4th at 374; *see also Third Story*, 41 Cal. App. 4th at 808; *Gerdlund*, 190 Cal. App. 3d at 277-78. Just so here. As the Tribe has maintained ever since it terminated W&C, Section 11 of the Fee Agreement expressly applies. *See* SUF ¶ 34. As a result, there can be no

breach of the implied covenant based on Section 5, and the Court should grant summary judgment on the claim.

B. The Conditions Required for the Contingency Fee Had Not Occurred at the Time W&C Was Terminated

Even if the implied covenant could be applied to limit the Tribe's termination right under Section 11—which, as noted above, it cannot—under California law, there can be no breach of the implied covenant of good faith and fair dealing absent a showing that "benefits due under the [contract]" were withheld. *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990); *see also Keshish v. Allstate Ins. Co.*, 959 F. Supp. 2d 1226, 1233 (C.D. Cal. 2013) ("[A] necessary prerequisite to [an implied covenant claim] is a showing that ***benefits due*** under the [contract] were withheld unreasonably or without proper cause.") (emphasis added). The implied covenant is only violated in a professional services contract if such termination "was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation ***already earned***." *Agosta v. Astor*, 120 Cal. App. 4th 596, 608 (2004) (emphasis added) (quoting *Guz*, 24 Cal. 4th at 353 n.18).

W&C's implied-covenant claim fails because no "benefits" were "due" or "already earned" to W&C under Section 5 of the Fee Agreement. As already held by this Court, the conditions precedent to trigger the Tribe's obligation to pay the contingency fee had not yet been met. *See* June 2018 Order, ECF No. 89 at 15 (holding that W&C was not entitled to a contingency fee because "Quechan was never 'furnished' with any 'grounds' for seeking or claiming the benefits that California had offered up to the moment at which Quechan discharged W&C.").

The 2017 Compact had not been signed by the Governor when the Tribe terminated W&C in June, and was not signed until late August. Indeed, the State's two principal negotiators both testified that [redacted]. *See* Dhillon Depo. Tr. (Ex. 37) at 120:7-24; Drake Depo. Tr. (Ex. 38) at 60:24-61:1. W&C's principals likewise conceded at

deposition that [redacted]. *See* Cochrane Depo. Tr. (Ex. 39) at 336:24-337:11 [redacted]; Williams Depo. Tr. (Ex. 40) at 326:11-14 [redacted]. And it is undisputed that the Tribe had not even seen the June 21 W&C draft when W&C was terminated, because W&C was not sure the State would sign it. *See* SUF ¶ 31; Ex. 31. Put simply, "the draft compact was just that, a draft." *Pauma Band of Luiseno Mission Indians v. California*, No. 18-56457, 2020 WL 5225700, at *9 (9th Cir. Sept. 2, 2020).

Regardless, even the Governor's signature would not have caused the contingency fee to be owed to W&C, because the Governor's signature is not nearly the end of the compact approval process. Once signed, a compact must be ratified, first by both houses of the California legislature, and then signed again by the Governor. SUF ¶ 40. After this, the compact is then sent by the State to the U.S. Department of the Interior for approval, and the notice of approval is then published in the *Federal Register*. SUF ¶ 41. The compact would not have been operative—and the Tribe would not have been "entitled" to any of the benefits it provided—until after the completion of this process. *See* SUF ¶¶ 40-41. W&C was well aware of this, as evidenced by its effort in June 2017 to convince the Tribe to hire a lobbyist to usher the compact through the legislature. *See* Exs. 24, 25. W&C does not dispute this legislative process and ratification requirement. *See* Williams Depo. Tr. (Ex. 40) at 194:3-12. The implied covenant claim therefore fails because there were no "benefits due" or "already earned" by W&C when it was terminated. *See Keshish*, 959 F. Supp. 2d at 1233; *Agosta*, 120 Cal. App. 4th at 608; *Guz*, 24 Cal. 4th at 353 n.18.

California law on the recoverability of contingency fees where the underlying contingency occurred after the end of the attorney-client relationship is in accord with this result. Almost fifty years ago, the California Supreme Court made clear that "the cause of action to recover compensation for services rendered under a contingent fee

contract does not accrue until the occurrence of the stated contingency." *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (1972). And as the Court of Appeal more recently put it: "No recovery, no fee, regardless of the work." *Jalai v. Root*, 109 Cal. App. 4th 1768, 1779 (2003). Echoing Section 11 of the Fee Agreement, "an attorney employed under a contingent fee contract and discharged prior to the occurrence of the contingency is limited to *quantum meruit* recovery for the reasonable value of services rendered up to the time of discharge, rather than the full amount of the agreed contingent fee." *Spires v. Am. Bus Lines*, 158 Cal. App. 3d 211, 215-16 (1984) (citations omitted).

W&C cannot use an implied-covenant theory to get a contingency fee based on a result that did not occur until well after it was terminated.

C. The Tribe Was Justified in Terminating W&C

W&C's implied covenant claim also fails because there is no genuine dispute of material fact that the Tribe's termination of W&C was not done in bad faith. "A breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself and it has been held that bad faith implies unfair dealing rather than mistaken judgment." *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990) (internal quotation marks and citations omitted). In order to withstand summary judgment, W&C must present evidence demonstrating the Tribe's "failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence, but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints [W&C's] reasonable expectations." *Id.* at 1395. W&C cannot meet this high standard.

First, as discussed above, Section 11 of the Fee Agreement provides that the Tribe could terminate W&C "at any time." SUF ¶ 10.

Second, even in the absence of Section 11, California law allows a client to terminate its attorney at its discretion, and therefore the Tribe's conduct was justified. *Fracasse*, 6 Cal. 3d at 790 ("[T]he client's power to discharge an attorney, with or without cause, is absolute.").

Third, the undisputed evidence shows that the Tribe had more than a reasonable basis for terminating a firm that, in nine months, had attended three negotiation sessions and sent three draft compacts to the State despite being paid $400,000. *See* SUF ¶¶ 6, 14, 22, 25-27, 29-30.

W&C has relied on a single line from the Tribe's termination letter, in which President Escalanti [redacted] *See* Ex. 30 at WC2950. But on its face, even if the language takes a strong tone, it does not support an inference that President Escalanti terminated W&C to improperly avoid paying a contingency fee. President Escalanti explained the circumstances of the termination at the very outset of this litigation—he was dissatisfied with W&C's work. *See* SUF ¶ 33; Declaration of Keeny Escalanti, ECF No. 29-2 ("Escalanti Decl.") ¶¶ 4-7; Declaration of Mark William White II, ECF No. 29-3 ("White Decl.") ¶¶ 4-7. That is a legally sufficient and justifiable basis for terminating an attorney. *Fracasse*, 6 Cal. 3d at 790 ("[T]he client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgement or the capacity of the attorney") (citations omitted). W&C cannot now credibly dispute these facts and did not even try to do so during discovery.

Even though the Tribe first explained its termination of W&C through President Escalanti and Councilman White's declarations more than two and a half years ago, ***W&C did not depose President Escalanti or Councilman White***. In fact, W&C noticed a handful of depositions—none of which included witnesses from the Tribe—but then cancelled every single one of them W&C has had years to challenge President Escalanti's and Councilman White's declarations, and has failed to do so.

This should be dispositive of W&C's implied covenant claim. In the insurance context—by far the most frequent application of the implied covenant of good faith and fair dealing—summary judgment is appropriate "when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for

example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law." *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161 (9th Cir. 2002). So too here: Under the undisputed facts, the Tribe had at least genuine questions regarding W&C's performance, and its termination of W&C was therefore reasonable. *Id.*; *see also Lunsford v. Am. Guar. & Liab. Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994).

D. W&C Cannot Establish A Factual Basis For A Contingency Fee

Finally, the plain language of the Fee Agreement and W&C's contemporaneous admissions show it is not entitled to any contingency fee, under any legal theory. As a result, there are no facts in dispute that would entitle W&C to damages based on the contingency fee, and the Tribe is entitled to summary judgment. *See, e.g.*, *Hamadah v. Sannoufi*, 2018 WL 1407045, at *5 (C.D. Cal. Jan. 25, 2018) ("Summary judgment is proper for a 'failure to introduce any evidence of damages,' where damages are an essential element of the claim.") (quoting *Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 752 (9th Cir. 2001)). In fact, as explained *infra* in Section VII of this Memorandum, the inverse is true: Because the undisputed facts show that W&C made misrepresentations about the contingency fee while it owed a fiduciary duty to the Tribe, the Tribe is entitled to summary judgment against W&C on the ***Tribe's*** breach of fiduciary duty counterclaim.

Section 5 of the Fee Agreement governs the contingency fee:

> [The] contingency fee will be a percentage of the "net recovery" . . . In the event Client's matter is resolved via negotiation or settlement, the term "net recovery" shall include any credit, offset or other reduction in future compact payments to the State in a successor compact (whether new or amended) ***as a result of the excess payments made*** under [the 2006 Amendment] . . . . Whether resolved through negotiation, settlement, or legal action, the contingency percentages set forth in the schedules below shall be calculated by totaling the ***amounts Client receives*** – both monetary and/or as a credit, offset, or other reduction in future compact payments – ***for the excess payments it made under [the 2006 Amendment].***

Thus, the Fee Agreement explicitly contemplates how the contingency fee is derived: by taking a percentage of compensation the Tribe receives from the State that is attributable to any "excess payments" made by the Tribe under the 2006 Amendment.

Section 5's distinction between savings that constitute a specific "net recovery" for "excess payments" under Section 5, on one hand, and a potential decrease in future payments to the State resulting from the renegotiation of compact terms, on the other, is not in dispute. In an email from Ms. Williams to the Tribal Council shortly before the Fee Agreement was executed, she wrote, [redacted] *See* SUF ¶ 9 (emphasis added).

W&C reiterated [redacted] *See* Ex. 18 at WC0015 (April 14, 2017 email from Ms. Williams stating that [redacted]); Ex. 23 at WC0017 (June 9, 2017 email from Ms. Williams to casino CEO Charles Montague). In deposition, both Ms. Williams and Mr. Cochrane repeatedly [redacted] *See* Cochrane Depo. Tr. (Ex. 39) at 197:5-8, 269:6-8, 271:1-4, 300:15-301:10; Williams Depo. Tr. (Ex. 40) at 183:15-184:13, 202:8-21. Accordingly, W&C cannot explain away its own repeated admissions, in writing, that [redacted]. SUF ¶ 9.

Here, the State offered the revised terms that resulted in the 2017 Compact's substantial savings in the very ***first*** draft it sent to W&C in December 2016. *See* SUF

¶¶ 15-17; Ex. 10 (December 2016 Draft). Specifically, the State offered to reduce the Tribe's SDF payments from 10% of the Tribe's net win under the 2006 Amendment to a pro rata share of the State's regulatory budget. *See* Ex. 10 § 4.3

This change in revenue sharing obligations was by no means a unique offer to the Tribe by the State. To the contrary, the new SDF provision—§ 4.3— was extended to other Tribes at the time, and since. *See* SUF ¶18; Ex. 12 at DOJ01204 (January 3, 2017 letter from Joginder Dhillon to President Jackson, citing recent compacts with similar terms); SUF ¶ 20; *see also* Dhillon Depo. Tr. (Ex. 37) at 72:14-22. Indeed, W&C's own expert witness concedes that the State was offering this type of SDF payment structure to tribes "as a matter of course." Forman Depo. Tr. (Ex. 43) at 109:18-110:14. In fact, ***each*** of the publicly-available new class III gaming compacts executed between tribes and the State since January 1, 2016 have substantively identical SDF payment structures, each based on a pro rata share of the State's regulatory budget. *See* SUF ¶ 20; *see also* Request for Judicial Notice ("RJN"). The State was transparent on this point with W&C during its negotiation. Shortly after sending W&C the December 2016 Draft compact, it provided W&C with comparable terms it had recently offered to other tribes. *See* SUF ¶ 18. The reduction in revenue sharing obligations the State offered in December 2016 in its very first draft was therefore what Ms. Williams told the Tribe [redacted] *See* SUF ¶ 9. The contingency fee provision, by W&C's own admission, does not apply.

The analysis can end there. But the undisputed facts also show that, far from acknowledging any ***excess*** payments by the Tribe, the State was pursuing over $4 million in ***underpayments*** from the Tribe due under the 2006 Amendment while W&C was attempting to negotiate the new compact. *See* Ex. 15 at QUECHAN-WC-00006199-201; Ex. 21 at QUECHAN-WC-00003443-46. As late as May 2017—a month before W&C was terminated—W&C wrote to the Tribe expressing its concern that the State may pursue litigation against the Tribe due to the Tribe's underpayment

of amounts owed to the State. *See* SUF ¶ 28; Ex. 21 at QUECHAN-WC-00003446. And it is undisputed that the Tribe ultimately agreed to pay the State $2 million to resolve this underpayment dispute. SUF ¶ 39.

There are no facts on which W&C can claim a contingency fee based on compensation for "excess payments" under Section 5. W&C's principals' decision to refuse to testify about the subject in their depositions further cements the conclusion that W&C cannot prove contingency-fee damages. Summary judgment is warranted.

VI. W&C IS NOT ENTITLED TO AN ADDITIONAL "REASONABLE FEE" UNDER SECTION 11 OF THE FEE AGREEMENT

To prevail on a breach of contract claim, a plaintiff must show: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiffs." *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1004 (2016) (citing *Careau*, 222 Cal. App. 3d at 1388). To prevail on a breach of contract claim under Section 11, W&C needs to establish that the Tribe breached Section 11 by not paying an additional "reasonable fee," and the amount of that fee. W&C can do neither, despite three years of litigation and almost a year of discovery, during which time W&C had repeated opportunities to identify or produce evidence supporting its entitlement to an additional reasonable fee pursuant to the factors set forth in Section 11. The Tribe is entitled to summary judgment.

A. W&C's Breach of Contract Damages Theory Cannot be Based on its Contingency Fee Damages Theory

Section 11 of the Fee Agreement states that, in the event of a discharge before the contingency fee attached, W&C could receive only a "reasonable fee for the legal services provided in lieu of the contingency fee set forth in paragraph 5." SUF ¶ 11. Section 11 then specifies that any such fee would be calculated by evaluating a list of ten factors. *See id.*

At every step in this litigation, W&C has failed to proffer even a basic theory of damages "resulting" from the Tribe's alleged breach. The only basis for damages

W&C has articulated throughout this litigation is based on the contingency fee—in its complaint, in written discovery, and in deposition. *See* FAC, ECF No. 220 ¶¶ 211, 217 (requesting $6,345,399.97 for both claims); Plaintiff's Amended Initial Disclosures (Ex. 34) at 4 (claiming $6,345,399.97 in "actual contract damages"); Williams Depo. Tr. (Ex. 40) at 187:16-23 [redacted]; Ex. 10 to FAC, ECF No. 220-10. However, as noted above repeatedly, the Court has already dismissed a contingency fee theory of liability for W&C's breach of contract claim. *See* ECF No. 89 at 15 ("Quechan's failure to pay W&C the contingency fee envisioned in Section 5 of the fee agreement was not a breach of contract.").

W&C's inability to identify damages under Section 11 as distinct from Section 5 is fatal to its claim. That is because Section 11 expressly describes any reasonable fee to be provided as "in lieu of" the contingency fee, and lists the factors on which that separate fee is to be measured. *See* SUF ¶ 11. The common meaning of "in lieu of" is "in place of" or "instead of." *Anaheim Union High Sch. Dist. v. Am. Fed. of State*, 222 Cal. App. 4th 887, 894 (2013). The Section 11 reasonable fee cannot be the same thing as the Section 5 contingency fee, or else Section 11 would be superfluous. *See, e.g.*, *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1507 (2013) ("When interpreting a contract, [courts] strive to interpret the parties' agreement to give effect to all of a contract's terms, and to avoid interpretations that render any portion superfluous, void or inexplicable."). Any theory of damages under W&C's breach of contract claim must arise under the Section 11 factors, and cannot be calculated pursuant to Section 5.

B. W&C Has No Facts to Support An Additional Fee Under Section 11

W&C has already received "a reasonable fee for the legal services provided"—$400,000. *See infra* VI.C; SUF ¶ 6. It is not entitled to any more, and W&C cannot prove otherwise. As a result, its breach of contract claim fails. *See Behnke v. State Farm Gen. Ins. Co.*, 196 Cal. App. 4th 1443, 1468 (2011) ("Damages are an essential element of a breach of contract claim.").

Section 11 of the Fee Agreement lists the factors that dictate whether it is entitled to an additional fee "in lieu" of the contingency fee outlined in Section 5. SUF ¶ 45. Broadly speaking, they bear on the quality, quantity, and value of W&C's work during its retention. *Id.* Through remarkable decisions W&C made prior to and during the litigation, W&C has precluded itself from being able to prove either its entitlement to a reasonable fee under Section 11 or what the amount of that fee would be. Because W&C cannot establish damages, summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (no "genuine issue of material fact" if nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case"); *Weinberg*, 241 F.3d at 751 (summary judgment appropriate when plaintiff cannot provide evidence on damages, leaving a jury to speculation or guesswork).

First, the Fee Agreement states that any additional "reasonable fee" must consider "the time and labor required." SUF ¶ 45. But ***W&C did not keep time records***. *See* SUF ¶ 42. In deposition, Ms. Williams and Mr. Cochrane testified that [redacted]. SUF ¶¶ 43, 44. This failure precludes W&C's ability to prove any amount of an additional "reasonable fee" under Section 11.

Second, in written discovery, W&C refused to provide a basis for its Section 11 damages calculation—which must include an evaluation of the relevant factors—or provide the basis for its entitlement to a Section 11 fee. *See, e.g.*, Ex. 36 at 12-14 (Request 7) (answering that the Fee Agreement "provides as it provides"); Ex. 35 at 8-10 (Interrogatory 2) (directing Tribe only to Fee Agreement and assortment of letters in support for entitlement to Section 11 fee); *id.* at 10-11 (Interrogatory 3) (similar).

Third, in their depositions, W&C's principals [redacted]. For example, when asked at deposition [redacted] *See, e.g.*,

Cochrane Depo. Tr. (Ex. 39) at 327:11-13 [redacted], 330:5-8; Williams Depo. Tr. (Ex. 40) at 186:13-15 ("There's going to be a carte blanche instruction when it comes to asking for beliefs or perceptions or what have you."), 191:18-192:1. Astonishingly, W&C's principals even testified at deposition that any evidence regarding the Section 11 factors was ***irrelevant***. *See* Cochrane Depo. Tr. (Ex. 39) at 224:24-25 [redacted]. When asked about [redacted] *See, e.g.*, *id.* at 326:9-13. A non-moving party cannot rely on "pleadings themselves" to avoid summary judgment. *Celotex*, 477 U.S. at 324. And whether or not W&C's privilege assertions are legitimate—the fact that W&C waived any work product protection during discovery (*see* ECF No. 271-1 at 1) suggests they are not—they preclude W&C from now relying on evidence, including testimony, it refused to produce.[3]

W&C has disclaimed the relevance of the only contractual damages theory available to it, and claimed privilege over the potentially relevant facts. Summary judgment on W&C's Section 11 claim is therefore appropriate. *See, e.g.*, *Weinberg*, 241 F.3d at 751 ("Because [plaintiff] failed to offer competent evidence of damages, dismissal on summary judgment was appropriate.").

[3] *See, e.g.*, *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998) (granting summary judgment after plaintiff "refused to produce evidence regarding" essential element of claim); *Planned Parenthood Fed'n. of Am., Inc. v. Ctr. For Med. Progress*, 402 F. Supp. 3d 615, 721 (N.D. Cal. 2019) (barring party from introducing damages evidence because he "shut down questioning at his deposition on the basis of privilege"); *Hasbro, Inc. v. Sweetpea Entm't, Inc.*, 2014 WL 12561624, at *2 (C.D. Cal. Mar. 18, 2014) (barring damages evidence because plaintiff's principal "raised the shield of attorney-client privilege in order to refuse to testify about such damages during his deposition"); *Ford v. City of Los Angeles*, 47 Cal. App. 5th 227, 286 (2020) ("[T]he law does not permit a party to use [] privilege as both a shield and a sword.").

C. The Tribe Has Already Paid W&C a Reasonable Fee for the Legal Services it Provided

The amount of any "reasonable fee for the legal services provided" under Section 11 must take into account the money paid to W&C under Section 4. *See* SUF ¶¶ 11, 45. Pursuant to Section 4, the Tribe already paid W&C $400,000 during its representation. SUF ¶¶ 5-6. Any evaluation of damages under Section 11 must take into account the "amount of the fee" already paid. SUF ¶ 45. The question is whether an additional fee is required to compensate W&C for the "legal services provided."[4]

The reasonable fee contemplated in Section 11 is directly analogous to the *quantum meruit* theory of recovery discussed in *Fracasse* and its progeny—both ensure attorneys discharged prior to completion of the representation are fairly compensated for services rendered pre-discharge. *See Fracasse*, 6 Cal. 3d at 786, 791. W&C was fairly compensated, and it cannot proffer facts to dispute this conclusion.

The "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257, 272 (2007) (citations omitted). As explained above, however, W&C cannot produce evidence proving the number of hours expended on the Tribe's compact negotiations, and neither Ms. Williams nor Mr. Cochrane [redacted]. SUF ¶¶ 42-44.

Moreover, W&C originally [redacted]. *See* Ex. 3 at WC5423. Using W&C's own valuation of its work as a barometer, it would have had to bill 1,142.8 hours to incur a $400,000 fee. And "[t]he record does not reflect that amount of work." Ex. 41, Expert Report of Steven Hart at 14-15. W&C

[4] *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) ("A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations.") (citations omitted); Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together . . . .").

attended three negotiation sessions with the State and drafted three sets of minimal redlines on a compact initially drafted by the State. SUF ¶¶ 14, 22, 25-27, 29-30. It did not provide its first set of redlines to the State for ***four-and-a-half months*** after receiving the State's initial draft compact. SUF ¶ 25. The undisputed facts show that W&C received more than ample compensation for the work it did, and W&C cannot put forth any evidence that could prove otherwise. Summary judgment is appropriate.

VII. THE TRIBE IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF FIDUCIARY DUTY COUNTERCLAIM

The Tribe is also entitled to summary judgment on its counterclaim against W&C for W&C's breach of fiduciary duty. *See* Counterclaims, ECF No. 94 ¶¶ 56-63.

It is undisputed that W&C owed a fiduciary duty to the Tribe during its representation of the Tribe, and, accordingly, that W&C owed the Tribe "a fiduciary relation of the very highest character, [which] binds the attorney to most conscientious fidelity." *Cal. Self-Insurers' Sec. Fund v. Superior Court*, 19 Cal. App. 5th 1065, 1071 (2018) (internal citations omitted). An attorney breaches its fiduciary duty where the attorney inflates or otherwise misrepresents his or her fees to the client.[5]

As discussed above in Section V.D, there are no facts on which W&C can base its contingency-fee claim. W&C's contention that it is owed $6 million is a sham that it started peddling to the Tribe during its representation, and continued asserting in this litigation. This campaign to first trick, and now force, the Tribe into paying over $6 million dollars—on top of the $400,000 dollars the Tribe already paid W&C—for the minimal work it did is a clear breach of the fiduciary duty W&C owed the Tribe.

Ms. Williams first assured the Tribe that [redacted]

[5] *See, e.g.*, *Bird, Marella, Boxer & Wolpert v. Superior Court*, 106 Cal. App. 4th 419, 430-31 (2003) ("This fiduciary duty requires fee agreements and billings '[to be] fair, reasonable ***and fully explained to the client.***'") (quoting *Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569, 1572 (1991)) (emphasis added); *see also Knight v. Aqui*, 966 F. Supp. 2d 989, 997 (N.D. Cal. 2013) ("An attorney who misapplies the law of attorney's fees to the client's financial detriment breaches the duty of care to the client.") (citing *Schultz v. Harney*, 27 Cal. App. 4th 1611, 1621 (1994)).

[redacted] *See* SUF ¶ 9. But then right from the start, the State's opening offer did just that: it provided the Tribe with the same reduction in revenue sharing obligations it had offered to other Tribes. *See* SUF ¶¶ 17, 18, 20. Because the State's initial offer meant W&C would not be entitled to a contingency fee under its own explanation of Section 5, W&C reinterpreted the contingency fee to provide it with a windfall; such a reading is incompatible with the Fee Agreement, with the compact W&C was hired to negotiate, and with W&C's fiduciary obligations to the Tribe.

W&C sought, and still seeks, to charge the Tribe 15% of $39,732,774. FAC, ECF No. 220 ¶¶ 55, 207. W&C arrived at $39,732,774 in exactly the same way the restitution award was calculated in *Pauma*—[redacted]. *Compare* Ex. 18 at WC0015 [redacted] *with Pauma*, 813 F.3d at 1168-69. But this methodology has no basis in the Fee Agreement. $39,732,774 is what the Tribe might have recovered ***if*** it obtained a *Pauma*-theory recovery. But it is undisputed that never happened.

The Tribe never recovered any money from the State, and the reductions in the amount the Tribe was to pay going forward in a new compact were never correlated to any excess payments by the Tribe in any compact draft. Rather, as explained in Section V.D, *supra*, the State was pursuing ***underpayments*** from the Tribe, which W&C noted to the Tribe as late as May 2017, and which the Tribe ultimately resolved in the 2017 Compact. *See* SUF ¶ 39. It is therefore undisputed that the trigger for a contingency—a "credit, offset, or other reduction in future compact payments . . . for the excess payments [the Tribe] made under [the 2006 Amendment]"—never occurred; neither in W&C's final draft nor in the final, executed 2017 Compact. SUF ¶¶ 8, 32, 38.

Beyond this fundamental falsity in W&C's contingency-fee theory, there is another level of deception to W&C's attempt to obtain this $6 million-plus fee from

the Tribe: the purported contingency fee is actually not contingent on anything. Regardless of the payment mechanisms in the compact, the contingency fee W&C was attempting to extract from the Tribe would remain the same. That is because, under the *Pauma*-calculation, W&C's concocted fee amount was already fixed—[redacted]. *See* SUF ¶ 46. Amounts that the Tribe would pay the State under a new compact were not even part of W&C's contingency fee calculation. Instead, W&C—without any legitimate basis whatsoever—[redacted] *See id.* As a result, according to W&C, the Tribe owed W&C 15% of $39,732,774, regardless of how much the Tribe would pay to the State under a new compact going forward. That is not a contingency fee under any definition.

W&C's statements to the Tribe were simply false, and an effort to trick the Tribe into paying it more than $6 million dollars. This was nothing less than an outrageous breach of an attorney's fiduciary duty to its client. W&C misled the Tribe about the Fee Agreement, while collecting $50,000 a month. The underlying facts are not in dispute. Summary judgment on the Tribe's fiduciary duty counterclaim is appropriate. *See Schultz*, 27 Cal. App. 4th at 1621; *Bird, Marella*, 106 Cal. App. 4th at 430-31. The Tribe is entitled to disgorgement and restitution of the $400,000 it paid to W&C pursuant to the Fee Agreement,[6] and the opportunity to pursue punitive damages.

VIII. CONCLUSION

For the foregoing reasons, the Tribe is entitled to summary judgment on both of W&C's remaining claims, and on its breach of fiduciary counterclaim against W&C.

[6] *See Meister v. Mensinger*, 230 Cal. App. 4th 381, 396 (2014) ("Where a breach of fiduciary duty occurs, a variety of equitable remedies are available, including . . . rescission, and restitution, as well as incidental damages.") (quoting *Hicks v. Clayton*, 67 Cal. App. 3d 251, 264 (1977)).

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, 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 September 17, 2020 at Los Angeles, California.

/s/ Joshua A. Vittor
Joshua A. Vittor