Christopher T. Casamassima (SBN 211280)
chris.casamassima@wilmerhale.com
Kathleen Moran (SBN 272041)
katie.moran@wilmerhale.com
Joshua A. Vittor (SBN 326221)
joshua.vittor@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue, Suite 2400
Los Angeles, CA 90071
Tele: (213) 443-5374 / Fax: (213) 443-5400

Attorneys for Defendant
Quechan Tribe of the Fort Yuma Indian Reservation

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-TWR-DEB

THE QUECHAN TRIBE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF WILLIAMS & COCHRANE, LLP'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 330]

[Response to Separate Statement of Undisputed Material Facts Filed Concurrently]

Date: December 11, 2020
Judge: Hon. Todd W. Robinson
Courtroom: 3A
Trial Date: Not Set

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INTRODUCTION

Plaintiff Williams & Cochrane, LLP ("W&C") moves affirmatively for summary judgment on its two remaining claims against the Quechan Tribe ("Quechan" or the "Tribe"), while at the same time effectively conceding that it lacks sufficient evidence to prove such claims. It has not come close to showing, as a moving party with the burden of proof at trial must, that "no reasonable trier of fact could find other than" for W&C. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). For that reason alone W&C's motion should be denied. For the reasons stated in the Tribe's motion for summary judgment on the same claims, *see* ECF No. 329-1, summary judgment ***in favor of the Tribe*** is, in fact, warranted on W&C's claims.

W&C also moves for summary judgment on the Tribe's counterclaims against W&C. But W&C's brief virtually ignores the facts of the case. And it certainly does not establish that no triable issues of material fact exists as to any of Quechan's four remaining counterclaims. *See* Fed. R. Civ. Proc. 56(c). Rather than grappling with either the evidence or the elements of the claims advanced against it, W&C instead argues, erroneously, that summary judgment is justified because of (i) an unrelated comment about damages made by counsel for the Tribe at a discovery hearing at which W&C lost each dispute raised,[1] and (ii) a purported insufficiency of expert testimony despite W&C's failure to depose the Tribe's noticed expert. Both arguments are meritless.

Eschewing evidence and legal elements alike, W&C resorts to rehashing a definitively disproven narrative, and legal arguments that have been previously rejected by multiple judges presiding over this case. By way of pertinent—but non-exhaustive—example:

[1] As Judge Curiel recently observed, "[t]hroughout its pleadings, W&C clothe their legal contentions in personal and sarcastic barbs. This creates an unnecessary distraction and produces many pages of irrelevant material on the issues before the Court . . . ." ECF No. 285 at 20 n.9.

- W&C attempts to relitigate discovery disputes it raised, fully litigated before both Magistrate Judge Berg and Judge Curiel, and lost. *See* ECF 330-1 ("Mot.") at 6-7, 22; *see also* ECF Nos. 271, 284, 290, 292, 296, 311, 313. W&C's tired refrain that the Tribe produced only "six substantive e-mails" during discovery, Mot. at 7, is both categorically untrue and, in any event, irrelevant to whether summary judgment is appropriate.
- W&C has the audacity to argue that it is entitled to legal fees from the Tribe for 7 months, between July 2017 and January 2018, during which time W&C (i) was no longer representing the Tribe; (ii) performed no legal work on the Tribe's behalf; and (iii) had, through its initiation of this lawsuit, sued the Tribe for over $6 million. *See* Mot. at 15.
- Ignoring the terms of its Fee Agreement with Quechan, which govern an evaluation of any contract damages in this case, W&C suggests that legal fees allegedly earned by the Tribe's litigation counsel in an entirely different matter supports W&C's claim of contract damages here. *See* Mot. at 17-18.
- W&C continues to ignore Judge Curiel's ruling on the Tribe's motion to dismiss that the contingency fee cannot be a basis for W&C's breach of contract claim, because W&C was not entitled to the contingency fee at the time it was terminated. *See* ECF No. 89 at 14-16.

W&C's motion for summary judgment should be denied in its entirety.

STATEMENT OF FACTS

The Tribe set forth the facts relevant to the claims between it and W&C in its motion for summary judgment. *See* ECF No. 329-1 at 8-13.[2] To avoid unnecessary

[2] References to the "SUF" refer to the Tribe's Separate Statement of Undisputed Material Facts, filed with its motion for summary judgment. *See* ECF No. 329-2. Exhibits 1-44 refer to the exhibits to the Declaration of Joshua A. Vittor, filed with the

repetition, the Tribe summarizes them only briefly here.

In 2015, the Ninth Circuit affirmed an award of approximately $36 million to the Pauma Band of Luiseño Mission Indians ("Pauma"), as a result of litigation between Pauma and the State of California (the "State") regarding how to interpret Pauma's class III gaming compact. *See Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1168-69 (9th Cir. 2015). Because, according to the court, the State had misrepresented to Pauma material terms of the compact, the monetary award represented the amount Pauma had paid to the State under the terms of its then-operative amended compact in excess of what Pauma would have paid had the compact not been amended. *See id.* W&C represented Pauma at the conclusion of that litigation. *Id.* at 1159.

A year later, Quechan—a completely different tribe from Pauma, which was neither party to nor involved at all in the *Pauma* litigation—sought to renegotiate its class III gaming compact with the State. *See* Ex. 4. In September 2016, Quechan and W&C entered into an Attorney-Client Fee Agreement ("Fee Agreement"), which provided for three mechanisms through which the Tribe could potentially compensate W&C: a monthly fee of $50,000 (Section 4), a contingency fee to be paid under certain circumstances (Section 5), and a "reasonable fee" that could be awarded "in lieu of" a contingency fee if the Tribe terminated the representation before the contingency fee attached (Section 11). *See id*. §§ 4, 5, 11.

Section 5 of the Fee Agreement outlined the parameters of a contingency fee to which W&C would be entitled "in the event [the Tribe] receives a monetary award or other sum resulting from the representation . . . ." *Id.* § 5. If that occurred, the Tribe was to pay to W&C a contingency fee "calculated by totaling the amounts [the Tribe] receives—both monetary and/or as a credit, offset, or reduction in future compact payments—for the excess payments it made" under the compact that was operative at

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Tribe's motion. *See* ECF No. 329-3. Pursuant to Judge Robinson's Standing Order, other documents already available on the docket are referred to by their docket number.

the time. *Id.*; *see also* Ex. 2 (the "2006 Amendment"). Cheryl Williams, one of W&C's two principal attorneys, assured the Tribe prior to the execution of the Fee Agreement that the contingency fee would apply to only compensation received by the Tribe for "excess payments" paid by the Tribe to the State under the 2006 Amendment, and not to other compact payment "[redacted]." Ex. 3 at WC5424.

Section 11 of the Fee Agreement provided the Tribe with the right to terminate W&C "at any time." Ex. 4 § 11. And if the Tribe terminated W&C before the contingency fee was triggered under Section 5, Section 11 expressly provided for a "reasonable fee for the legal services provided," payable to W&C "in lieu of" the contingency fee. *Id.* This reasonable fee was to be calculated by evaluating factors listed in Section 11—*i.e.* a different methodology than that to be used to calculate the contingency fee under Section 5. *Compare id.* § 5 *with id.* § 11.

On December 7, 2016—less than two months after W&C initiated compact negotiations with the State on Quechan's behalf—the State sent a proposed compact to W&C for the Tribe's consideration. *See* Ex. 10 ("December 2016 Draft"). The State's offer included a revised structure of compact payments, based on a pro rata share of the State's regulatory budget, which the State estimated would reduce the Tribe's annual compact payment obligations by approximately $4 million. *See* Ex. 10 § 4.3; Ex. 12 at DOJ01204. The proposed pro rata payment structure was offered by the State "as a matter of course," Forman Depo. Tr. (Ex. 43) at 109:18-110:14, and was substantively identical to every other new class III gaming compact executed between California Indian tribes and the State between 2016 and the present. *See* Request for Judicial Notice, ECF No. 331.

W&C informed the Tribe that the December 2016 Draft was "as good as it can get from a financial perspective." Ex. 11 at QUECHAN-WC-00006184. Despite this, months passed between the State's initial draft and a responsive draft from W&C. *See*

Exs. 16-17. During this time, the Tribe became frustrated with W&C's lack of progress, as well as its ongoing obligation to pay W&C $50,000 per month, with no incentive for W&C to work quickly. *See* 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; *see also* Ex. 14 at QUECHAN-WC-00004192. Accordingly, on June 27, 2017, having paid W&C $400,000 in fees already, the Tribe terminated W&C's representation pursuant to Section 11 of the Fee Agreement. *See* Ex. 30. The termination letter requested W&C to "promptly return [the Tribe's] entire case file." *Id.* at WC2950. W&C did not comply with this request. *See* ECF Nos. 231-5, 231-6, 231-7.

Six days before being terminated, W&C sent the State a redlined draft of the compact. *See* Exs. 26-27. It included, among other revisions, a new provision defining revenue sharing obligations to non-gaming Indian tribes, which neither the State nor the Tribe had seen. Ex. 27 § 5.2. According to Ms. Williams, W&C had not sent a copy of the revised draft to the Tribe because W&C was not sure the State would agree to it at the time. *See* Ex. 31 at DOJ01857. As the State's two lead negotiators testified, Ms. Williams's concerns were warranted: [redacted] *See* Dhillon Depo. Tr. (Ex. 37) at 120:7-24; 133:5-10; Drake Depo. Tr. (Ex. 38) at 60:24-61:1.

The Tribe replaced W&C with Rosette, LLP ("Rosette") as counsel in its ongoing negotiations with the State, *see* Ex. 29 at DOJ01856, and executed a new compact with the State in August 2017. *See* Ex. 32 ("2017 Compact"). There are substantive differences between the executed 2017 Compact and the last redlined draft W&C provided to the State. *Compare* Ex. 27 § 5.2 *with* Ex. 32 §§ 5.2, 5.3; *see also* Expert Report of George Forman (Ex. 42) at 13-14. Neither the December 2016 Draft, nor any of the responsive drafts provided by W&C to the State, nor the final 2017 Compact contain a single reference to any excess payments paid by the Tribe to the State under the 2006 Amendment. *See generally* Exs. 10, 27, 32.

ARGUMENT

I. LEGAL STANDARDS

In order to prevail on a motion for summary judgment, a moving party must show "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). Where the moving party will have the burden of proof on an issue at trial—as is the case here for both W&C's breach of the covenant of good faith and fair dealing and its breach of contract claim—the moving party must "affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun*, 509 F.3d at 984. "If the moving party fails to meet this initial burden, summary judgment must be denied and the court need not consider the non-moving party's evidence." *Synbiotics Corp. v. Heska Corp.*, 137 F. Supp. 2d 1198, 1202 (S.D. Cal. 2000) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970)).

II. W&C'S EFFORT TO RELITIGATE DISCOVERY DISPUTES THAT HAVE BEEN FULLY RESOLVED BY BOTH MAGISTRATE JUDGE BERG AND JUDGE CURIEL IS IRRELEVANT

W&C opens its motion by making the spurious argument that its dissatisfaction with the Tribe's discovery responses entitles W&C to summary judgment. *See* Mot. at 6-7. The truth is that W&C's complaints about the Tribe's discovery responses lacked merit, were fully litigated during discovery, and were resolved against W&C.

During discovery, W&C sought to pierce the Quechan's attorney-client privilege over communications between the Tribe and Rosette. Both Magistrate Judge Berg and Judge Curiel ruled in favor of the Tribe. *See* ECF Nos. 271 (discovery motion through which W&C challenged the documents over which the Tribe made legitimate privilege claims); 284 (April 17, 2020 Order, signed by Magistrate Judge Berg, overruling 6 of W&C's privilege objections and ordering supplemental information from the Tribe regarding others); 290 (supplemental information submitted by the Tribe in response

to Judge Berg's April 17 order); 292 (W&C's motion for reconsideration of Judge Berg's April 17 order); 296 (May 8, 2020 Order, signed by Judge Berg, overruling W&C's remaining privilege objections); 311 (Tribe's opposition to W&C's motion for reconsideration); 313 (June 23, 2020 Order, signed by Judge Curiel, denying W&C's motion for reconsideration).

The legal grounds on which W&C premised its privilege objections were completely baseless. So much so that during the discovery conference on the issue, Judge Berg observed that W&C's legal theories were "so far afield and such a stretch, ***I have trouble even stating that this claim was made in good faith***. I am really sorely disappointed that I am even having to spend time addressing it. To me, that plaintiff even makes this argument is beyond reason[.]" *See* ECF No. 311-2 (04/16/20 Hr'g Tr. at 25:22-26:1) (emphasis added). Judge Berg also remarked during the hearing that he was "a little surprised we are discussing [this] because, as to this argument, it seems to me this is Ethics 101, taught in first-year law school . . . ." *Id.* at 27:13-18.

W&C further expressed its dissatisfaction with the Tribe's discovery responses in a motion to compel further responses to interrogatories regarding the manner in which the Tribe retains documents. *See* ECF No. 297. This motion was based on the demonstrably false assertion that the Tribe had only produced six emails from members of the Tribal Council during W&C's representation of the Tribe. In reality, the Tribe produced several hundred emails to and among Councilmembers. ECF No. 297-6 at 3-4. The source of the discrepancy is no mystery—W&C, by its own admission, excluded from its count all emails it did not find helpful, or had already seen. *See id.* at 4; ECF No. 297-2 ¶ 5. Recognizing this, Judge Berg "agree[d] with the Tribe that Plaintiff's selectively narrow interpretation of the discovery to date is not helpful to the Court's appraisal of this dispute." ECF No. 303 at 5 (May 27, 2020 Order, signed by Judge Berg, resolving W&C's motion to compel further interrogatory responses).

Ignoring the litany of rulings rejecting its frivolous arguments and untrue factual representations, W&C again now falsely argues, in the instant motion, that the Tribe

produced only "six substantive e-mails" and that the Tribe's assertion of privilege was improper. Far from entitling W&C to summary judgment, these are already-litigated and fully-resolved sideshows that serve only to further illustrate that W&C's claims have no merit whatsoever.

III. W&C HAS NOT DEMONSTRATED THAT A REASONABLE TRIER OF FACT COULD FIND FOR W&C ON ITS CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

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). As demonstrated in the Tribe's motion for summary judgment, W&C's claim fails for several reasons, each of which is independently sufficient to warrant granting summary judgment in the ***Tribe's*** favor, let alone to deny the instant motion. *See* ECF No. 329-1 at 14-24.

A. The Implied Covenant Cannot Limit the Express Terms of the Fee Agreement

The implied covenant may not be applied to restrict the Tribe's discretionary power to terminate W&C "at any time." Ex. 4 § 11. This is because it is well-settled that "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). Thus, here, conduct expressly permitted by Section 11 of the Fee Agreement may not be frustrated through operation of law by the implied covenant of good faith and fair dealing.

The parties agree that the California Supreme Court's decision in *Carma* offers

the relevant framework for considering the applicability of the implied covenant to a discretionary contract right. *See* Mot. at 9 (citing *Carma*). In *Carma*, a tenant argued that its landlord had violated the implied covenant by terminating the lease and negotiating directly with a third party with whom the tenant had originally sought to enter into a subleasing agreement. *See Carma*, 2 Cal. 4th at 351-53. A clause in the original lease permitted the landlord to terminate the lease upon notification by the tenant of a prospective sublease, and also permitted the landlord to enter into a new lease with the tenant's proposed sublessor. *See id.*

In evaluating whether the landlord's exercise of this right violated the implied covenant, the California Supreme Court recognized that discretionary contract powers that affect the rights of another must be exercised in good faith. *Id.* at 372. That is where W&C's discussion of *Carma* begins and ends. W&C's brief ignores the rest of the court's analysis of the application of the implied covenant to rights expressly conveyed by contract, in which it concluded that no 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. Thus, *Carma* held that the landlord's termination of the lease, and subsequent negotiation with the tenant's proposed sublessor was ***not*** a violation of the implied covenant, because such conduct was "expressly permitted by the lease," and that conduct expressly permitted by a contract "can ***never*** violate an implied covenant of good faith and fair dealing." *Id.* at 376 (emphasis added).

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)); *Carma*, 2 Cal. 4th at 374 (holding that 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). But "obliterating" the Tribe's express right to apply Section 11 of the Fee Agreement to terminate the representation is exactly what W&C

is seeking to do. By arguing that the Tribe cannot exercise its right of termination under Section 11 (which includes the potential alternative reasonable fee), W&C is effectively reading Section 11 out of the contract entirely, and claiming that it must be paid a contingency fee it had not yet earned. The argument flies in the face of well-settled contract law. *See 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."). Section 11 applies to the Tribe's termination of W&C, which means that any additional fee beyond the $400,000 W&C already received must be "in lieu of" the contingency fee described in Section 5 of the Fee Agreement. *See* ECF No. 329-1 at 15, 25.

B. The Contingency Fee Had Not Been Earned at the Time of W&C's Termination

The implied covenant only protects the pretextual termination of a professional services contact if such termination was intended to frustrate a party's right to a "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) (internal citations omitted); *see also Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990) (no breach of the implied covenant absent showing that "***benefits due***" under the contract were withheld). And Judge Curiel held—over two years ago—that W&C was not entitled to a contingency fee at the time of its termination. *See* ECF No. 89 at 15. W&C's claim therefore fails.

The undisputed facts make this clear. The Fee Agreement states clearly that the contingency fee would only attach "in the event [the Tribe] receives a monetary award or other sum resulting from the representation . . . ." Ex. 4 § 5. That ***never*** happened—either before or after W&C was terminated.

The compact was neither signed nor agreed to—by either the State or the Tribe—at the time the Tribe terminated W&C's representation. *See, e.g.*, Dhillon Depo Tr.

(Ex. 37) at 120:7-24; Drake Depo. Tr. (Ex. 38) at 60:24-61:1; Williams Depo. Tr. (Ex. 40) at 326:11-14 ([redacted]). Indeed, W&C had not even shared its draft with the Tribe prior to its termination, because it wasn't sure the State would agree to it. *See* Ex. 31. "[T]he 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).

Even after it was signed—two months after W&C was fired—W&C concedes that the 2017 Compact did not go into effect until January 22, 2018, when its approval was published in the *Federal Register*. *See* Mot. at 15. So even though W&C was terminated and was no longer doing any work for the Tribe, W&C seeks summary judgment for monthly fees from when it was terminated in June 2017 until the compact was effective in January 2018. There is absolutely no basis for this result in the Fee Agreement, or in common sense. In fact, during this time, W&C not only was no longer the Tribe's counsel, but was in fact ***suing the Tribe.*** *See* ECF No. 1.

What is more, W&C's galling request for additional monthly fees is necessarily based on the premise that, had the representation continued, W&C faced months more work to get the compact executed, ratified by the State legislature, and approved by the U.S. Department of Interior. *See, e.g.*, Exs. 24-25 (emails from W&C to Tribe explaining the necessity of hiring lobbyists to usher the compact through this process); Williams Depo. Tr. (Ex. 40) at 194:3-12. There is simply no rational reading of the facts to support the conclusion that, at the time W&C was terminated, it had "already earned" the contingency fee. *Agosta*, 120 Cal. App. 4th at 608. To the contrary, the opposite is true. The undisputed facts prove the contingency fee was ***not*** earned—just as the Court held more than two years ago. *See* ECF No. 89 at 15-16.

W&C's position finds no more refuge in the law than it does in the facts. W&C admits it was unable to find any California authority to apply the implied covenant to require a client who has terminated its lawyer to pay a contingency fee that had not accrued at the time of the termination. *See* Mot. at 10. There is a reason for this:

California courts have held for decades 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); *see also Jalai v. Root*, 109 Cal. App. 4th 1768, 1777 (2003) ("No recovery, no fee, regardless of the work."). W&C's efforts to analogize its claim for a contingency fee here to cases brought by terminated employees for unpaid sales commissions, *see* Mot. at 11, is unavailing. W&C was never an employee of the Tribe, and attorney-client relationships—particularly ones with contingency fees—are governed by different rules than employment relationships. *See, e.g.*, *Spires v. Am. Bus Lines*, 158 Cal. App. 3d 211, 215-16 (1984) ("[A]n attorney employed under a contingent fee contract and discharged prior to the occurrence of the contingency is limited to . . . recovery for the reasonable value of services rendered up to the time of discharge, rather than the full amount of the agreed contingent fee.") (citations omitted). Judge Curiel's order on the motion to dismiss has already decided the issue. *See* ECF No. 89 at 15-16. But even if it did not, under California law, the undisputed facts of the case, and W&C's own legal arguments, W&C was never entitled to a contingency fee under the Fee Agreement.

C. The Tribe Did Not Act in Bad Faith

In order to prevail on its implied covenant claim, W&C must establish that the Tribe "***unfairly*** interfered with the plaintiff's right to receive the benefits of the contract." *Epic Games*, 435 F. Supp. 3d at 1048. This showing requires a "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," intended to frustrate W&C's right to collect the contingency fee. *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). Because W&C will have the burden of proof at trial, to prevail on its motion for summary judgment it must show that the evidence could not support a rational finding of fact other than that the Tribe acted in bad faith. *Soremekun*, 509 F.3d at 984; *Synbiotics*, 137 F. Supp. 2d at 1201-02.

W&C has submitted little more than speculation and conjecture to establish the Tribe's bad faith, far short of the evidence required to meet this lofty standard. For one thing, the generalized statements of W&C's two expert witnesses about whether "last-minute terminations" are common, *see* Mot. at 13-14, prove ***nothing*** about the Tribe's motivations for terminating W&C. *See, e.g.*, *Cal. Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 47-48, 55-56 (1985) (holding that "direct evidence" of a defendant's bad faith is required to establish a breach of the implied covenant). Indeed, both Mr. Forman and Mr. Miranda admitted at deposition that they lack any expert opinions about Quechan's reasons for its termination of W&C. *See* Forman Depo. Tr. (Ex. 43) at 193:21-24 (answering "No" to the question "Are you offering an expert opinion about why Quechan fired Williams & Cochrane?"); Miranda Depo. Tr. (ECF No. 332-7) at 109:14-17 ("I do not know the inner workings of Quechan.").

The remainder of W&C's evidence similarly fails to establish that the Tribe's termination of W&C was done in bad faith. *See* Mot. at 14-15. That an attorney at Rosette emailed a State senator's office seeking "to discuss the legislative process for getting [Quechan's] compact ratified," ECF No. 330-47 at 2, demonstrates nothing more than the legislature's involvement in the ratification process, as discussed above. Similarly, public statements evidencing the Tribe's satisfaction with the final 2017 Compact say nothing about how the Tribe felt about W&C, its performance under the Fee Agreement, or the state of negotiations at the time of the termination. *See* Mot. at 14. This is particularly true of a Facebook post from April 18, 2020, which W&C inexplicably contends is relevant to the Tribe's motivations for conduct that occurred three years earlier. *See* ECF No. 330-50 at 2.

W&C's dearth of evidence as to the Tribe's motivations requires denial of its motion. *See Synbiotics*, 137 F. Supp. 2d at 1202 ("If the moving party fails to meet this initial burden [to submit evidence establishing its claim], summary judgment must be denied and the court need not consider the non-moving party's evidence."). It is also in stark contrast to the uncontroverted evidence submitted by the Tribe.

More than two years ago, in declarations filed in this litigation, former President Escalanti and former Councilman White explained that the Tribal Council terminated W&C because it was dissatisfied with W&C's work. *See* Escalanti Decl. ¶¶ 4-7; White Decl. ¶¶ 4-7. W&C chose not to depose any Tribe members at all, including former President Escalanti and former Councilman White. Their uncontroverted declarations are sufficient to demonstrate affirmatively that the Tribe did ***not*** act in bad faith. *See 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 judgment or the capacity of the attorney.") (citations omitted). W&C has proffered no evidence to rebut the sworn testimony of the Tribe's leaders about the Tribe's motivation at the time of W&C's termination.

D. W&C Has Not Established Any Damages Under Section 5 of the Fee Agreement

W&C argues that it is entitled to "the full contingency fee," without presenting any evidence about what that fee actually is. *See* Mot. at 15. That failing alone is grounds to deny W&C's motion.

Even if that was not the case, W&C's summary judgment motion on its breach of covenant claim should be denied—and the Tribe's granted—because the Fee Agreement states that the contingency fee "shall be calculated by totaling the amounts [the Tribe] receives . . . ***for the excess payments*** it made under the [2006 Amendment]." Ex. 4 § 5 (emphasis added). Because it is undisputed that the Tribe received nothing from the State "for the excess payments it made" under the 2006 Amendment, W&C is not entitled to any money under Section 5.

Prior to the signing of the Fee Agreement, W&C assured the Tribe that "[redacted]" Ex. 3 at WC5424. Three months later, in the first written draft

compact it sent to the Tribe, the State offered to reduce the Tribe's compact payments to a pro rata share of the State's regulatory budget. *See* Ex. 10 § 4.3. This reduced payment structure, which survived virtually unchanged through the various drafts and was included in the final 2017 Compact, *see generally* Exs. 27, 32, had nothing to do with any "excess payments" made by the Tribe under the 2006 Amendment. Rather, it was substantively identical to payment structures offered to ***every single tribe*** that negotiated a new compact with the State since 2016. *See* ECF No. 331. Indeed, what W&C describes as the "epitome of professional perfection," Mot. at 17, W&C's own expert described as a "matter of course." Forman Depo. Tr. (Ex. 43) at 109:18-110:14.

One might wonder, then, where W&C's request for a contingency fee of 15% of $39,732,774 even comes from. *See* Fourth Amended Complaint, ECF No. 220 ¶¶ 55, 207. The answer is that it is a mirror image of the (absolutely unrelated) damages analysis in *Pauma*. The Pauma damages theory is completely inapplicable to the facts and Fee Agreement. So much so that it is not only a frivolous damages theory, but, as discussed in the Tribe's motion for summary judgment, W&C's effort to trick the Tribe into paying a contingency fee based on the Pauma calculation was a breach of W&C's fiduciary duty to the Tribe. *See* ECF No. 329-1 at 29-31.

In *Pauma*, the Ninth Circuit held that State had misrepresented a material fact during negotiations of Pauma's amended compact, but for which Pauma would not have agreed to the amendment. *See Pauma*, 813 F.3d at 1166-67. The court therefore affirmed as restitution to Pauma an award of approximately $36 million in "overpayments," *i.e.* the difference between the revenue sharing payments Pauma had made under its amended gaming compact, and the payments Pauma would have made under the original compact had it never been amended. *See id*. at 1168-69.

W&C calculates its proposed contingency fee here in exactly the same way the *Pauma* court did: by taking the Tribe's compact payments under the 2006 Amendment, and subtracting what the Tribe would have paid under the 1999 Compact. *See* Ex. 18 at WC0015. But this case is about a contingency fee defined by a contract, not a court-

fashioned restitution award for a misrepresentation claim in a different case. Quechan, unlike Pauma, neither sued nor recovered any money from the State attributable to any "overpayments" it paid under the 2006 Amendment. As W&C has conceded repeatedly, Quechan was ***never*** likely to obtain a *Pauma*-style recovery, because its situation vis a vis the State was so different from Pauma's. *See* Mot. at 2 (noting "eight years had passed since Pauma filed suit"); *see also* ECF No. 207-1 at 11 (describing the Quechan matter as involving "remarkably different facts"). In any event, it is undisputed that is not what happened.

W&C has argued throughout this litigation that the news of *Pauma* was what inspired the Tribe to seek to retain W&C with hopes of getting what Pauma got. *See, e.g.*, Mot. at 1-2. In fact, it is W&C that seeks to duplicate *Pauma*, by porting the damages methodology used there to a completely different set of facts, and without a shred of legal support. It is the Fee Agreement—not *Pauma*—that governs W&C's entitlement to a contingency fee, and under its express terms, no fee is due.

W&C is not entitled to summary judgment on its implied covenant claim.

IV. W&C HAS NOT DEMONSTRATED THAT A REASONABLE TRIER OF FACT COULD FIND FOR W&C ON ITS BREACH OF CONTRACT CLAIM

As an alternative to its implied covenant claim, W&C claims the Tribe breached the Fee Agreement, entitling it to additional fees under Sections 4 and 11. To merit summary judgment on this claim, W&C must show that a rational juror must find that (i) W&C performed under the Fee Agreement; (ii) the Tribe breached the Fee Agreement; and (iii) W&C was damaged by that breach. *See Orcilla v. Big Sur, Inc.*, 244 Cal. App. 982, 1004 (2016). Because this showing has not been made, and for the reasons explained in the Tribe's motion, *see* ECF No. 229-1 at 24-29, W&C's claim for summary judgment on its own claim must be denied.

A. The Tribe Did Not Breach Section 4 of the Fee Agreement

W&C first contends that the Tribe breached Section 4, which required a flat,

monthly payment of $50,000. *See* Ex. 4 § 4. The Tribe complied with this obligation, and paid W&C $400,000 throughout its representation of the Tribe, despite many months during which W&C did little to no work. *See* Cochrane Depo. Tr. (Ex. 39) at 291:8-12 ([redacted]); SUF ¶¶ 6, 14, 22, 25-27, 29-30 (demonstrating gaps of inactivity from W&C). W&C's assertion that the Tribe did not pay "***any*** fees under a contract it voluntarily negotiated," Mot. at 17, is categorically untrue.

Similarly, W&C's vague contention that the Tribe was late in making some of its payments, Mot. at 16, is also a nonstarter. "[W]hen a party performs but misses a deadline," courts apply the doctrine of substantial performance, and excuse any delays unless it is shown that time was of the essence. *Magic Carpet Ride LLC v. Rugger Inv. Group, L.L.C.*, 41 Cal. App. 5th 357, 364 (2019). W&C has not even attempted to show that time was of the essence here.

W&C has also failed to show that it suffered any damages as a result of any delay in the Tribe's monthly payments. W&C's argument that the Tribe materially breached the Fee Agreement by failing timely to make payments under Section 4 is belied by the only California authority on which it relies, which held only that a ***complete*** failure to pay constituted a material breach. *See Brown v. Grimes*, 192 Cal. App. 4th 265, 277-78 (2011). It is undisputed that the Tribe paid W&C $400,000 in monthly fees, and therefore did not materially breach Section 4.

W&C also argues that it is entitled to a small amount of unpaid fees under Section 4. But as well-settled California law makes clear, W&C's own breach of the Fee Agreement, as well as its fiduciary duty and other ethical obligations it owed to the Tribe, preclude any claim it might have to such fees. An "attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility." *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli*, 113 Cal. App. 4th 1072, 1076 (2003) (citation omitted); *see also Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manuf. Co.*, 6 Cal. 5th 59, 89-90 (2018) ("As California courts

have often noted . . . a fiduciary's breach of trust undermines the value of his or her services.") (collecting cases); *Goldstein v. Lees*, 46 Cal. App. 3d 614, 618 (1975) ("Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will . . . acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.") (citation omitted).

As discussed below, and in the Tribe's motion for summary judgment, W&C breached the fiduciary duty it owed to the Tribe by misleading tribal leaders about how its contingency fee would be calculated. *See* ECF No. 329-1 at 29-31; *infra* § V. Thus, W&C told the Tribe, repeatedly and erroneously, [redacted] despite the fact that the Tribe had not—and still has not—received any money from the State attributable to past "excess payments," as the clear terms of the Fee Agreement require. *See* Ex. 18 at WC0015; Ex. 23 at WC0017. W&C therefore breached the "fiduciary relation of the very highest character" by seeking to exploit financially its own client, in contravention of the clear terms of the Fee Agreement. *See Cal. Self-Insurers' Sec. Fund v. Superior Court*, 19 Cal. App. 5th 1065, 1071 (2018) (internal citations omitted). Such a breach precludes any recovery of unpaid fees under the Fee Agreement. *See Sheppard*, 6 Cal. 5th at 89-90.

W&C also breached the Fee Agreement by refusing to provide the Tribe with access to its case file, despite the Tribe's numerous requests for it to do so. *See* Ex. 4 § 12 (providing that "[a]t the end of the engagement, [the Tribe] may request the return of [its] case file."). The Tribe first requested its file in the termination letter. *See* Ex. 30 at WC2950 (requesting "prompt[] return" of the file). It followed up several days later. *See* ECF No. 231-2. W&C ignored both requests, and ignored similar requests from the Tribe's counsel during this litigation. *See* ECF Nos. 231-5, 231-6, 231-7 (January 2018 correspondence between counsel regarding the Tribe's case file). This refusal to provide the Tribe with its own case file violates not only the Fee Agreement,

but also the California Rules of Professional Conduct, which clearly require attorneys to "release to the client, at the request of the client, all client materials and property" at the termination of a representation, "whether the client has paid for them or not." Cal. Rules Prof. Conduct 1.16(e)(1); *see also Kallen v. Delug*, 157 Cal. App. 3d 940, 950 (1984) ("It is a breach of the duty imposed by [the ethical rules governing attorneys] to retain a client's case files after discharge . . . ."); *Taylor v. Cnty. of Los Angeles*, 50 Cal. App. 5th 205, 212 (2020) (holding terminated attorney's failure to deliver case files upon request was "improper" and supported inference that terminated attorney "did no work—at least, no work of use to anyone").

B. The Tribe Did Not Breach Section 11 of the Fee Agreement

W&C also fails to proffer any evidence in support of its claim for a "reasonable fee" pursuant to Section 11 of the Fee Agreement. As an initial matter, W&C's request for "at least half of the contingency fee for the breach of Section 11," Mot. at 18, yet again ignores both the clear language of the Fee Agreement and prior Court rulings. In June 2018, Judge Curiel dismissed W&C's breach of contract claim to the extent it was based on Quechan's failure to pay the contingency fee. *See* ECF No. 89 at 15-16 ("Because Quechan was not 'entitled' to any of the concessions California had offered during the negotiations [at the time of the termination], Quechan's failure to pay W&C the contingency fee envisioned in Section 5 of the fee agreement was not a breach of contract."). Indeed, Section 11 explicitly provides that, if W&C was terminated prior to the triggering of the contingency fee, W&C could receive only a "reasonable fee for the legal services provided ***in lieu of*** the contingency fee set forth in paragraph 5." Ex. 4 § 11 (emphasis added); *see also Anaheim Union High Sch. Dist. v. Am. Fed. of State*, 222 Cal. App. 4th 887, 894 (2013) (noting common meaning of "in lieu of" is "in place of" or "instead of"). Accordingly, Section 11—which sets forth a list of specific factors to consider in determining the amount of any additional fee—and not Section 5 governs any evaluation of damages for the breach of contract claim.

In the two-and-a-half years since Judge Curiel dismissed the contingency fee as

a basis for W&C's breach of contract claim, W&C has failed to proffer evidence of damages based on anything other than the contingency fee. For example, W&C refused to answer discovery requests regarding its Section 11 damages calculation. *See, e.g.*, Ex. 36 at 12-14; Ex. 35 at 8-11. At deposition, W&C's two principals each refused to testify about [redacted]. *See, e.g.*, Cochrane Depo. Tr. (Ex. 39) at 224:24-25, 327:11-13; Williams Depo. Tr. (Ex. 40) at 186:13-15.

That W&C lacks any evidentiary support for its Section 11 damages theory is made clear by its opening brief, which instead simply states it is entitled to half of the amount of the contingency fee it requested. *See* Mot. at 18. But that is not how Section 11 works. Section 11 provides for the opportunity of an "reasonable" fee based on the amount and quality of work performed. *See* Ex. 4 § 11.

Here, however, W&C did not keep any billing records, *see* Ex. 33, and it is black-letter California law that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended . . . multiplied by a reasonable hourly rate." *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257, 272 (2007) (citations omitted); *see also Taylor*, 50 Cal. App. 5th at 207 ("[C]ontemporaneous time records are the best evidence of lawyers' hourly work."). At deposition, [redacted]. *See* Williams Depo. Tr. (Ex. 40) at 224:4-7; Cochrane Depo. Tr. (Ex. 39) at 241:24-242:6. As a result, there is a complete failure of proof as to the amount of time W&C worked.

In fact, the evidence that could possibly show, even in a general sense, how much work W&C performed for the Tribe demonstrates that it was minimal. W&C 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. W&C then refused to share its work with the Tribe after it was fired—a decision that the California Court of Appeal recently held supports an inference that it "did no work." *Taylor*, 50

Cal. App. 5th at 212. By any evaluation, the $400,000 W&C has already been paid is more than reasonable to compensate it for the minimal amount of work the record reflects it did. *See* Expert Report of Steven Hart (Ex. 41) at 14-15.[3]

"Damages are an essential element of a breach of contract claim." *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal. App. 4th 1443, 1468 (2011). Accordingly, because W&C cannot make any affirmative showing of its entitlement to relief, the Court should deny W&C's summary judgment motion. *Synbiotics*, 137 F. Supp. 2d at 1201-02. Indeed, the Court should grant summary judgment in the opposite direction, ***against*** W&C. *See* ECF No. 329-1 at 24-28. W&C has not proffered a theory—let alone any evidence—demonstrating its entitlement to damages based on the only provision of the contract on which it can recover: Section 11. Summary judgment must accordingly be denied.

V. W&C IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE TRIBE'S COUNTERCLAIMS

To prevail at summary judgment on the Tribe's counterclaims, W&C must show the absence of a genuine issue of material fact or must establish that the Tribe lacks sufficient evidence to prove each of its four remaining counterclaims. *See Olivier v. Baca*, 913 F.3d 852, 857 (9th Cir. 2019). W&C's motion does neither. W&C doesn't even identify the elements of any of the Tribe's counterclaims, nor explain why there are no issues of material fact. This is in and of itself sufficient to deny W&C's motion.

The Tribe has already shown why summary judgment should actually be granted in ***the Tribe's*** favor with respect to its claim for breach of fiduciary duty. *See* ECF No. 329-1 at 29-31. W&C assured the Tribe, prior to signing the Fee Agreement, that its contingency fee would not apply to [redacted]

[3] W&C even strays beyond the Fee Agreement altogether, arguing that it is somehow entitled to fees allegedly charged by the Tribe's litigation counsel in a different case in a different forum concerning different legal issues. *See* Mot. at 17-18. This is yet another example of W&C's effort to personalize this dispute, despite repeated admonition from the Court to refrain from doing so. *See, e.g.*, ECF No. 285 at 20 n.9.

[redacted] Ex. 3 at WC5424. W&C then received from the State a draft compact that included a reduction in revenue sharing obligations that W&C's own expert admits the State was offering to other tribes at the time (and since) "as a matter of course." Forman Depo. Tr. (Ex. 43) at 109:18-110:14; *see also* Request for Judicial Notice, ECF No. 331. The offer was not correlated to anything W&C did, and it did not mention excess payments. This was, without question, a [redacted] Ex. 3 at WC5424.

Rather than admit any of this to the Tribe, W&C attempted to mislead the Tribe into believing that Section 5 required it to pay to W&C 15% of $39,732,774, *i.e.* the difference between what the Tribe paid to the State under the 2006 Amendment and what it would have paid under the 1999 Compact. *See* Ex. 18 at WC0015. As discussed above, this calculation derives from *Pauma*, *see* 813 F.3d at 1168-69, but ignores the plain language of both the Fee Agreement and the draft compacts. W&C's interpretation of the "contingency fee" ***is not actually contingent on anything***. It depends only on how much the Tribe paid under the 2006 Amendment—a fixed amount—and then simply subtracts the amount the Tribe would have paid under the unamended terms of its 1999 Compact. It did not take the new 2017 Compact into consideration at all. That is not a contingency fee. W&C tried to exploit its own client into paying it more than $6 million dollars for reasons entirely divorced from the Fee Agreement it signed. This is a paradigmatic breach of an attorney's fiduciary duty, and the Tribe is entitled to summary judgment. *See, e.g.*, *Bird, Marella, Boxer & Wolpert v. Superior Court*, 106 Cal. App. 4th 419, 430-31 (2003) ("Th[e] 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)).

With respect to the Tribe's other counterclaims, issues of triable fact abound. W&C's argument that the Tribe lacks sufficient expert testimony to establish its

malpractice claim is unavailing. Stephen Hart—a well-qualified attorney with significant experience in the field of Indian gaming—submitted uncontested opinions about W&C's failure to comport with its duty of care, including its lack of diligence in its billing practices (Ex. 41 at 15), its slow progress in compact negotiations (*id.* at 11-12), and its misrepresentations about the contingency fee (*id.* at 17-18). Lynda Shely—an expert in legal ethics—opines that W&C's "[f]ailure to promptly provide a client with their file upon termination is a violation of W&C's ethical obligations owed to Quechan." ECF No. 322-63.

As discussed above, W&C misrepresented, repeatedly, its fees to its client, which is independently sufficient to establish the firm's malpractice in addition to its breach of fiduciary duty. *See 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)). W&C also failed to deliver the Tribe's case file upon request, breaching both the Fee Agreement and its ethical responsibilities. *See supra* § IV.A. And—perhaps most significantly—the Tribe has submitted substantial evidence supporting the conclusion that W&C was not diligently performing its obligations under the Fee Agreement. *See, e.g.*, Escalanti Decl. ¶¶ 4-7; White Decl. ¶¶ 4-7; *see also* Ex. 14 at QUECHAN-WC-00004192. The record is replete with evidence that, at minimum, raises fact issues as to the Tribe's counterclaims.

Rather than grapple with any of this, W&C devotes several pages of its brief to asserting abject falsities and flinging more personalized barbs at the Tribe's lawyers. *See, e.g.*, Mot. at 21 (arguing, erroneously, that the Tribe "was not paying the monthly flat fee for [the] vast majority of the representation"). W&C's lengthy block quote of an argument made by the Tribe's counsel at a discovery hearing at which W&C lost every single dispute it raised, *see id.* at 20, is both taken out of context and irrelevant. As stated during that hearing, the Tribe seeks to recover the $400,000 in monthly fees the Tribe paid during the course of the representation.

W&C has failed to demonstrate that no triable issues of fact exist as to the Tribe's counterclaims. Its motion should be denied. *See Olivier*, 913 F.3d at 857.

VI. MR. HART'S EXPERT REPORT SHOULD NOT BE EXCLUDED

W&C's request to exclude Mr. Hart's expert report—a request that was not properly noticed, *see* ECF No. 330—should be summarily denied. A trial court has "broad latitude" in performing its gatekeeping role with respect to expert opinions, including in determining an expert's reliability, *United States v. Gadson*, 763 F.3d 1189, 2012 (9th Cir. 2014), and "rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Committee Notes. Mr. Hart is qualified, his expert report is reliable, and W&C fails to demonstrate otherwise.

As disclosed in his report, Mr. Hart has ample experience in "Indian law generally and tribal gaming law in particular," including but not limited to the successful negotiation of over 25 gaming compacts. Hart Report (Ex. 41) at 1-2; Exhibit 1 to Hart Report, ECF No. 329-44 at 21-26. Regardless, it is well established that "[s]o long as the expert's testimony is within the reasonable confines of his subject area, a lack of particularized expertise generally goes to the weight of the testimony [to be determined by the factfinder], not its admissibility." *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1111 (N.D. Cal. 2018) (citations and quotations omitted). Because Mr. Hart's opinions are clearly within the "reasonable confines" of his expertise in Tribal gaming law, his opinions are admissible.

W&C argues that Mr. Hart's alleged failure to disclose that he was deposed in May 2012 and June 2016 justifies the wholesale exclusion of his opinions. Mot. at 24-25. W&C is wrong. Mr. Hart's report states that he has "not testified in trial or by deposition in the last four (4) years." Hart Report (Ex. 41) at 2. This is consistent with his disclosure obligations under the Federal Rules. *See* Fed. R. Civ. P. 26(a)(2)(B)(v). Neither of the depositions about which W&C complains are within four years of Mr. Hart's July 13, 2020 report.

W&C also takes issue with Mr. Hart's statement that he is "not aware of any circumstance where such a high recurring retainer would be coupled with a 15% success-based contingency fee in tribal compact negotiations or in tribal litigation related to compact negotiations." Hart Report (Ex. 41) at 14. The contract W&C contends renders this opinion "less than forthcoming," Mot. at 24, is from 11 years ago, does not reference Mr. Hart, and provides for a contingency fee ***instead of*** a monthly fee. *See* ECF No. 330-63. W&C's effort to poke holes in Mr. Hart's report is disingenuous, and fails. And it is not a basis for exclusion in any event.

Finally, even if W&C did have good-faith concerns with Mr. Hart's qualifications and disclosures, it could have taken his deposition. It didn't even try. W&C cannot now decry the reliability of Mr. Hart's report when it voluntarily waived the opportunity to challenge his qualifications and disclosures in discovery.

CONCLUSION

W&C has failed to demonstrate its entitlement to summary judgment on its claims against the Tribe. W&C also fails to demonstrate the absence of issues of material fact with respect to the Tribe's counterclaims or that it would be entitled to summary judgment in any event. And last, W&C's attempt to exclude Mr. Hart as an expert is procedurally flawed and substantively meritless. W&C's motion for summary judgment should be denied in its entirety.

Dated: October 16, 2020

Respectfully submitted,

/s/ Christopher T. Casamassima
WILMER CUTLER PICKERING
HALE AND DORR LLP
Christopher T. Casamassima
Kathleen Moran
Joshua A. Vittor

Attorneys for Defendant/Counterclaimant Quechan Tribe

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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 October 16, 2020 at Los Angeles, California.

/s/ Joshua A. Vittor
Joshua A. Vittor