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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.

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

REPLY IN SUPPORT OF THE QUECHAN TRIBE'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 329]

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

W&C primarily opposes the Tribe's motion for summary judgment by airing a litany of baseless grievances about discovery and its lack of evidence to support its claims or defeat the Tribe's counterclaims. W&C's gripes were fully litigated and almost entirely decided against W&C, with Judge Berg questioning whether W&C's arguments were "made in good faith," commenting that W&C's positions were "beyond reason" and contrary what was "taught in first-year law school," and holding that W&C's arguments reflected a "selectively narrow interpretation of the discovery to date." *See* ECF No. 347 at 11. W&C's *ad hominem* attacks on counsel for the Tribe in its opposing filings—claiming that counsel "suppressed" and "interfered" with discovery—are directly belied by the rulings of Judge Berg and Judge Curiel, as well as two out of District judges, and ignore Judge Curiel's admonition to W&C to refrain from "personal and sarcastic barbs" that "create[] an unnecessary distraction and produce[] many pages of irrelevant material." *See* ECF No. 285 at 20 n.9.

In its Opposition, W&C also makes the procedural arguments that summary judgment on W&C's implied covenant claim is precluded by law of the case, and that the Tribe's breach of fiduciary duty counterclaim cannot proceed to trial because the Tribe did not adequately plead it. Both arguments, as shown *infra*, are as spurious as W&C's complaints about discovery and should be rejected out of hand. Moreover, because W&C offers essentially no substantive response to the Tribe's affirmative request for summary judgment on its breach of fiduciary counterclaim, summary judgment on the Tribe's counterclaim should be granted in favor of the Tribe.

What little W&C does offer on the merits likewise fails. As explained below, W&C relies on inapposite case law, erects straw men, and ignores critical undisputed facts that dispose of its arguments. The Court should grant the Tribe's Motion.

I. ADDITIONAL DISCOVERY UNDER RULE 56(d) IS UNWARRANTED

W&C devotes nearly half of its Opposition to arguing that the Court should reopen discovery, which has been closed for months. Requests for additional discovery in opposition briefs (as opposed to by motion) are "plainly inadequate." *Weinberg v.*

Whatcom Cnty., 241 F.3d 746, 751 (9th Cir. 2001). That alone disposes of W&C's request. But even if the Court does consider W&C's request, it comes nowhere close to demonstrating that more discovery is warranted under Rule 56(d). First, a party must have been diligent in pursuing discovery before summary judgment. *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989). The requesting party also must show (i) the specific facts it seeks to elicit from reopening discovery; (ii) that those facts exist; and (iii) that those facts are "essential" to oppose summary judgment. *See Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018) (citations omitted).

W&C does not meet any of these requirements. It is simply not true that W&C never had the opportunity to "conduct meaningful discovery." Cochrane Decl., ECF No. 349-1 ¶ 6. Rather, it had almost a year to conduct discovery—including an extension of deadlines that the parties agreed, at W&C's insistence, would be a "one-time continuance." ECF No. 294. W&C, however, did not propound ***any*** contention interrogatories or requests for admission that would elucidate the facts it seeks. It also did not take ***any*** depositions. W&C's lack of basic diligence precludes it from complaining now that it lacks sufficient facts or did not have the opportunity to obtain them during discovery. *See Mackey*, 867 F.2d at 524; *Radin v. Hunt*, 499 Fed. Appx. 684, 685 (9th Cir. 2012) (affirming denial of supplemental discovery because "Plaintiff's failure to engage in discovery earlier was not excusable").

W&C also fails to demonstrate the existence of what it now claims it is seeking: additional, unproduced "documents surrounding the negotiations and execution of the Attorney-Client Fee Agreement during the fall of 2016." Cochrane Decl., ECF No. 349-1 ¶ 7. The reality is that W&C requested these documents during discovery, and the Tribe produced all non-privileged documents in its possession responsive to that request. *See* ECF No. 297-7. As a result, this is a red herring and a moot issue.

The insinuation in W&C's Opposition that additional unproduced responsive documents exist (or were improperly destroyed) is utterly baseless. To the contrary, W&C raised the same accusations during discovery, which the parties fully litigated

and Judge Berg resolved. ECF Nos. 297, 297-5, 303. W&C did not depose the Tribe's IT professional, Ramon Flores, who verified the Tribe's interrogatory responses regarding email and e-discovery issues, *see* ECF No. 297-5 at 19-20, or the Tribe's Vice President, Virgil Smith, who provided a sworn declaration explaining that email was not the Tribal Council's primary means of communication. *See* ECF No. 297-9. W&C has absolutely no basis to claim that any relevant unproduced documents exist.

W&C's complaints about the Tribe's privilege assertions are likewise without any merit. W&C litigated those issues fully in front of Judge Berg; lost; and then challenged Judge's Berg's rulings by moving for reconsideration in front of Judge Curiel, who upheld all of Judge Berg's decisions. *See* ECF No. 313.

W&C also fails to show that additional discovery is "essential" to oppose the Tribe's motion. W&C believed it had sufficient evidence to move for summary judgment on ***all*** of the claims and counterclaims pending between it and the Tribe, and attached 69 exhibits. *See* ECF No. 330. This is at odds with the notion that W&C requires additional evidence to prosecute its claims or to defend against the Tribe's counterclaims, and is sufficient reason to deny this request. *See, e.g.*, *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1076 (9th Cir. 2019) (denying request for further discovery because movant "relied on hundreds of pages of declarations, deposition transcripts, and admissions" in summary judgment filings). Additionally, as explained *infra*, W&C does not need additional evidence to defend itself against an argument that the Fee Agreement is "ambiguous" because the Tribe is not making that argument.

The request for supplemental discovery under Rule 56(d) should be denied.

II. W&C'S IMPLIED COVENANT CLAIM FAILS

A. Summary Judgment On W&C's Implied Covenant Claim Is Not Barred By Law Of The Case

W&C argues in its Opposition that summary judgment on its implied covenant claim is barred by the law of the case. That is incorrect. Law of the case applies only when the "issue in question was actually considered and decided." *USW v. Ret. Income*

Plan for Hourly-Rated Emples. Of ASARCO., Inc., 512 F.3d 555, 564 (9th Cir. 2008). Judge Curiel did not consider or decide the issues raised by the Tribe in its Motion.

In its motion to dismiss the First Amended Complaint, the Tribe argued that W&C's implied covenant claim was duplicative of the breach of contract claim and, as a result, the implied covenant claim should be dismissed as superfluous. ECF No. 50-1 at 19-21. In his Order on the Tribe's motion to dismiss, Judge Curiel distinguished W&C's breach of contract claim—premised on Section 11 of the Fee Agreement—from the implied covenant claim, which was based on Section 5. *See* ECF No. 89 at 18. Accordingly, Judge Curiel simply held that the two claims could proceed past the pleading stage because the Tribe's only argument for dismissal of the implied covenant claim was that it was duplicative of the breach of contract claim. Judge Curiel explicitly did ***not*** consider the merits of the implied covenant claim. *See id.* Law of the case does inoculate W&C's implied covenant claim from summary judgment.

B. The Implied Covenant Does Not Apply To The Facts Here

W&C's substantive response regarding the implied covenant claim fares no better than its law of the case argument. W&C concedes that the Tribe had a unilateral, discretionary right to terminate W&C "at any time." ECF No. 349 ("Opp.") at 13; *see also* Ex. 4 § 11.[1] But then W&C ignores the well-settled California rule that the implied covenant cannot be breached where a defendant was "given the right to do what [it] did by the express provisions of the contract[.]" *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992). Instead, W&C seeks to recast the claim not as an attempt to restrict the Tribe's explicit contractual right to terminate W&C at the Tribe's discretion, but as a claim to prevent the Tribe from "wrongfully us[ing] this discretionary power to in turn deprive [W&C] of a fixed benefit under the [] Fee Agreement." Opp. at 13. W&C's effort to mischaracterize its claim falls flat.

A contingency fee is not a "fixed benefit." The premise of a contingency fee is

[1] References to Exhibits 1-44 refer to the exhibits to the Declaration of Joshua A. Vittor, filed with the Motion. *See* ECF No. 329-3.

that it is contingent on something that, here—undisputedly—had not occurred at the time W&C was terminated. *See Fracasse v. Brent*, 6 Cal. 3d 784, 792 (1972) (holding that a claim for recovery under a contingency fee "does not accrue until . . . the stated contingency"). Neither the State nor the Tribe had agreed to or signed the draft compact before W&C's termination, *see, e.g.*, Ex. 31, and W&C concedes that the final compact was not operative until January 2018—7 months after the termination. *See* ECF No. 330-1 at 22. The contingency fee never accrued.[2]

W&C relies on *Kelly v. Skytel Commc'ns Inc.*, 32 Fed. Appx. 283, 285 (9th Cir. 2002), claiming that it illustrates the "almighty reach of the implied covenant." Opp. at 14. *Kelly*, however, does nothing of the sort. In *Kelly*, the Ninth Circuit recognized that parties to a contract effectively "opt out" of the implied covenant when they confer unrestricted discretion on one party. *See Kelly*, 32 Fed. Appx. at 285. There, unlike here, an employment contract provided for sales commissions to be determined pursuant to criteria and a process described in the agreement. *Id.* at 286. The Ninth Circuit held the covenant applied to ensure that the employer conducted that process for awarding the sales commission, as outlined in the agreement, in good faith. *See id.* at 285-86. But, relying on *Carma*, *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995), and other well-established authority, *Kelly* also acknowledged that "[w]hen a contract expressly confers unrestricted discretion on one party, courts may ***not*** imply a covenant of good faith and fair dealing to limit that party's discretion and contradict the contract's express terms." 32 Fed. Appx. at 285 (emphasis added). While the unique facts in *Kelly* led to the result there, *Kelly* confirmed the long-standing principle in California law that "there can be no implied covenant where the subject is completely covered by the contract." *Lippman v. Sears, Roebuck & Co.*, 44

[2] W&C's erroneous interpretation of the contingency fee as a "fixed benefit" also shows why it fails to establish damages on its implied covenant claim, *see infra* § II.C; ECF No. 329-1 at 21-24, and why the Tribe is entitled to summary judgment on its breach of fiduciary duty counterclaim. *See infra* § IV; ECF No. 329-1 at 29-31.

Cal. 2d 136, 142 (1955). That principle directly applies here.

The Tribe had full discretion to terminate W&C "at any time," and, if terminated, W&C could then show its eligibility for an additional fee under Section 11. As a result, when the Tribe exercised its discretion and terminated W&C, the only issue remaining was whether W&C was entitled to an additional fee under the factors outlined in Section 11. The Tribe had discretion to terminate W&C, and it did. The implied covenant does not provide an end-run around the clear terms of Section 11. Applying the implied covenant as W&C suggests "would result in the obliteration of a right expressly given under" the Fee Agreement. *Third Story Music*, 41 Cal. App. 4th at 808 (internal citations omitted). That is not allowed under California law. *Id.*

C. Section 5 of the Fee Agreement Is Not a Basis For Damages Here

Even assuming *arguendo* the application of the implied covenant and its breach—which W&C cannot prove[3]—W&C must still also show that it was damaged. *See, e.g.*, *Hamadah v. Sannoufi*, 2018 WL 1407045, at *5 (C.D. Cal. Jan. 25, 2018) (holding that summary judgment is "proper for a failure to introduce any evidence of damages, where damages are an essential element of the claim."). W&C cannot.

W&C argues that the Tribe terminated it to avoid paying a contingency fee that was "fixed" at 15% of $39,732,774, or approximately $6.3 million. *See* Opp. at 13, 18. But W&C's proposed contingency fee calculation has no basis whatsoever in the Fee Agreement. *See* ECF No. 329-1 at 21-24. In an effort to inject a fact issue where none exists, W&C claims that the Tribe is arguing that Section 5 of the Fee Agreement

[3] *See* ECF No. 329-1 at 19-21. The Opposition tries to shift the burden of proof on to the Tribe to establish a "justification" for terminating W&C. *See* Opp. at 17. It is W&C's burden to present evidence of the Tribe's bad faith. *See, e.g.*, *Am. Hardware Mutual Ins. Co. v. Escamilla*, 2010 WL 11574194, at *5 (N.D. Cal. Sept. 30, 2010) (noting the proponent of a claim under the implied covenant bears the burden to prove the defendant's bad faith). The Tribe has nonetheless provided such evidence, in the form of President Escalanti's and Councilmember White's declarations. *See* ECF Nos. 29-2, 29-3. The Court should decline W&C's invitation to ignore both this uncontroverted evidence and W&C's lack of evidence putting the facts in dispute.

is ambiguous as to the requirements for triggering the contingency fee. *See* Opp. at 8, 11, 18. Not so: Section 5 defines the contingency as a percentage of the "net recovery," which, in turn, is defined as "any credit, offset or other reduction in future compact payments to the State in a successor compact . . . as a result of ***the excess payments made***" under the 2006 Amendment. Ex. 4 § 5 (emphasis added). Thus, the contingency fee must be based on the amount of the monetary benefit received by the Tribe "for the excess payments it made" under the 2006 Amendment. *Id.*

Rather than calculate a contingency fee as mandated by the Fee Agreement, W&C has put forward an entirely separate methodology based on the fee award in the *Pauma* case. But this approach—taking Quechan's payments under the 2006 Amendment and subtracting what it would have paid under the 1999 Amendment—does not prove whether any of those prior payments were ***excess payments***, as is required for a contingency fee under Section 5. Pauma's prior payments, by contrast, were determined by a court to be in excess of what Pauma should have paid. *See Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1166-67 (9th Cir. 2015). That never happened here, nor did the State ever even suggest as much.

Neither the final 2017 Compact nor W&C's June 2017 draft compact makes any mention of payments under the prior compact, "excess" or otherwise. And in May 2017—a month before it was terminated—W&C advised the Tribe about the State's pursuit of ***under***payments, a dispute that was not settled until the final compact was signed and the Tribe agreed to ***pay the State***—not the other way around—to satisfy its past payment deficiencies. *See* Ex. 21; Ex. 32 § 4.8. Thus, even if W&C had not been terminated, and even if the State and the Tribe had accepted the June 2017 draft, and even if one overlooks that there was months' more work required to make the compact operative, Section 5 still does not result in the contingency fee that W&C is claiming because there were never any "excess payments." *See generally* Exs. 27, 32.

The 2017 Compact provided the Tribe an estimated $4 million in annual savings—a reduction of ***future*** compact payments—but no compensation for ***past***

payments the Tribe made under the 2006 Amendment. *Compare* Ex. 4 § 5 *with* Ex. 32. In fact, it is undisputed that the estimated $4 million reduction in revenue sharing obligations was in the State's first compact offer to Quechan, *see* Ex. 10 § 4.3, and was substantively similar to reductions in revenue sharing offered by the State to California tribes "as a matter of course." *See* ECF No. 329-1 at 23; ECF No. 347 at 19; Forman Depo. Tr. (Ex. 43) at 109:18-110:14. There is no nexus between this reduction in payments and any prior payments the Tribe made under the 2006 Amendment. Each California tribe got the ***same offer***—this was not a concession specific to the Quechan, nor was it tailored to any prior payments from Quechan to the State. *See id.*

The only evidence W&C cites to even try to connect the compact to Section 5's "excess payment" requirement is the initial letter exchange between W&C and the State to commence negotiations in October 2016. *See* Opp. at 20. But this letter explicitly distinguishes compact negotiations from dispute resolution, and says nothing about the terms of the State's December 2016 draft or the terms of any subsequent draft. In fact, as W&C concedes, W&C's June 2017 draft is silent as to the dispute regarding the Tribe's past payments to the State. *Id.* at 17 n.1 (acknowledging the State and the Tribe did not begin discussing the Tribe's "past due revenue sharing payments until ***after*** Mr. Rosette came into the picture") (emphasis in original).

W&C has been trying, for years now, to use the award in *Pauma* as a template for the Quechan contingency fee. Indeed, as the Opposition argues, W&C seeks to transform Section 5 into a "fixed benefit," *id.* at 13, that, by W&C's logic, is not contingent on anything, and would have resulted in the same windfall to W&C regardless of what the new compact said. This is inconsistent with the language of the Fee Agreement, the resulting compact, and the core principles undergirding contingency fees. *See, e.g.*, *Estate of Stevenson*, 141 Cal. App. 4th 1074, 1084 (2006).

III. W&C IGNORES THE PLAIN LANGUAGE OF SECTION 11

The Tribe demonstrated in its Motion that W&C lacks evidence to prevail on its claim under Section 11 because of the conscious choices it made before and during this

litigation, including Ms. Williams and Mr. Cochrane's failure to keep time records and their complete disclaimer of the relevance of Section 11. *See* ECF No. 329-1 at 25-27.

In response, W&C concedes, as it must, that its breach of contract claim is governed by Section 11. *See* Opp. at 20-21. And it is Section 11's test, and ***not*** Section 5, that must govern any evaluation of damages on the breach of contract claim. *See* ECF No. 89 at 14-16. W&C, however, asks the Court to ignore the clear terms of Section 11, referring instead to the "omitted terms" doctrine, unrelated cases involving successor attorneys, and fees allegedly paid by a different tribe to WilmerHale in a different case. *See* Opp. at 21-24. None of that has any bearing whatsoever on evaluating the terms of the Fee Agreement. *See Fosson v. Palace (Waterland), Ltd.*, 78 F.3d 1448, 1455 (9th Cir. 1996) (holding a "clear and unambiguous contractual provision providing for an exclusive remedy for breach will be enforced" under California law).

W&C also ignores entirely the Tribe's argument that it has already paid a reasonable fee to W&C for the services it provided. *See* ECF No. 329-1 at 28-29. W&C's suggestion that the Tribe "refused to make ***any*** payments" under the Fee Agreement (Opp. at 1), is simply false. As W&C has admitted both at deposition and again its summary judgment brief, the Tribe paid $400,000 to W&C over the course of the representation. *See* Cochrane Depo. Tr. (Ex. 39) at 291:8-12; ECF No. 349-4 ¶ 6 (noting that the amount paid was undisputed). W&C fails to proffer evidence supporting its entitlement to more than that.

IV. THE OPPOSITION DOES NOT RESPOND TO THE MERITS OF THE TRIBE'S FIDUCIARY DUTY CLAIM

In response to the Tribe's argument for summary judgment on its breach of fiduciary duty counterclaim, W&C argues that the counterclaim is not sufficiently pled. *See* Opp. at 25. But the Tribe's fiduciary duty claim has always been premised on allegations that W&C intentionally (and repeatedly) misled the Tribe, including with respect to the likelihood of a "*Pauma*-like" recovery from the State. *See*

Counterclaims, ECF No. 231 at 28-30 (¶¶ 2-5). The Court has already denied W&C's motion to dismiss, and a motion for judgment on the pleadings, as to this claim, holding that the Tribe's counterclaim was well pled. ECF Nos. 173, 285.

W&C confuses Rule 12 with Rule 56. At the summary judgment stage, the Court evaluates claims and defenses on the basis of the undisputed facts developed during discovery. Indeed, that is the point of discovery—to build a factual record to establish claims and defenses for trial, and where appropriate, summary judgment. Accordingly, even assuming *arguendo* that the Tribe was relying on facts outside the four corners of the counterclaims as pled before discovery, that still does not justify denial of the Motion. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1524 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997). When a party first raises an issue at summary judgment, courts "should treat the filing as a request to amend the pleadings and should consider whether the evidence presented creates a triable issue of fact." *Id.* (collecting cases); *Synoptek, LLC v. Synaptek Corp.*, 2018 WL 3359017, at *11 n.17 (C.D. Cal. Jun. 4, 2018). Here the undisputed facts conclusively show that W&C breached its fiduciary duty to the Tribe.

W&C's Opposition simply ignores the arguments raised in support of summary judgment on the Tribe's fiduciary duty claim.[4] *See* ECF No. 329-1 at 29-31. "[F]ailure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue." *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (collecting cases); *see also Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017). The Tribe is therefore entitled to summary judgment on its fiduciary duty claim.

[4] In addition to arguing that the Tribe had not sufficiently pled its breach of fiduciary duty claim, W&C refers to equitable defenses with no analysis whatsoever, contending that the Tribe had not performed the Fee Agreement "***at all.***" Opp. at 25. That is false, as a matter of undisputed fact. The Tribe paid W&C $400,000 under the Fee Agreement. *See* ECF No. 349-4 ¶ 6; *supra* § III.

Dated: November 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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 November 6, 2020 at Los Angeles, California.

/s/ Joshua A. Vittor
Joshua A. Vittor