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Attorneys for Defendants Quechan Tribe of the Fort Yuma Indian Reservation, Keeny Escalanti, Sr., and Mark William White II

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP; and FRANCISCO AGUILAR, MILO BARLEY, GLORIA COSTA, GEORGE DECORSE, SALLY DECORSE, et al., on behalf of themselves and all those similarly situated;

(All 28 Individuals Listed in ¶ 13)

Plaintiffs,

v.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally-recognized Indian tribe; ROBERT ROSETTE; ROSETTE & ASSOCIATES, PC; ROSETTE, LLP; RICHARD ARMSTRONG; KEENY ESCALANTI, SR.; MARK WILLIAM WHITE II a/k/a WILLIE WHITE; and DOES 1 THROUGH 10,

Defendants.

CASE NO.: 17-cv-01436-GPC-MDD

REPLY IN SUPPORT OF QUECHAN DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO FRCP 12(b)(1) AND 12(b)(6)

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: June 8, 2018
Time: 1:30 p.m.

INTRODUCTION

Williams & Cochrane, LLP ("W&C") does nothing in its Opposition to salvage its claims for a contingency fee under Section 5 of the Fee Agreement, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and RICO. W&C sidesteps the relevant authority and raises extraneous issues that do not address the arguments raised by the Quechan Defendants in their motions to dismiss. The Quechan Defendants' motions should be granted with prejudice.

First, Section 11 of the Fee Agreement between W&C and the Tribe permits the Tribe to "discharge [W&C] at ***any*** time." It also governs the availability and amount of any fees to which W&C may be entitled in the event W&C was terminated before a contingency fee attached. Accordingly, W&C is simply not entitled to the 15% contingency fee described in Section 5 of the Fee Agreement.

Second, W&C fails to point to any facts that differentiate its claim for breach of the implied covenant of good faith and fair dealing from its claim for breach of contract. As W&C admits, the two claims "share allegations and damages." The implied covenant claim should be dismissed as duplicative. And if not duplicative, it is barred by sovereign immunity.

Third, as a matter of law, W&C cannot demonstrate that it detrimentally relied on the Tribe's alleged "promises" beyond providing the services it was required to perform under the Fee Agreement. The claim is therefore barred by W&C's breach of contract claim and must be dismissed.

Fourth, W&C fails to allege a RICO violation, does not explain how the purported underlying RICO activity caused it harm, and comes nowhere close to alleging that President Escalanti and Councilman White knowingly agreed to enter into any conspiracy, let alone a RICO conspiracy targeted at W&C that would fall outside their sovereign immunity. The claim must therefore be dismissed.

ARGUMENT

I. W&C'S BREACH OF CONTRACT CLAIM FOR THE $6.2 MILLION CONTINGENCY FEE IS BARRED UNDER THE FEE AGREEMENT

W&C cannot rely on the plain language of Section 5 of the Fee Agreement for its claim that it is entitled to a contingency fee. W&C instead claims that a "holistic" reading of the Fee Agreement entitles it to a $6.2 million contingency fee, even though W&C was terminated before the Tribe signed a compact with the State. Opp'n 15-17. No matter what kind of reading one gives to the Fee Agreement, its language on this issue is clear and speaks for itself.

The contingency fee in Section 5 applies only "if the representation matter is ***resolved*** through settlement or negotiations." Opp'n at 15 (emphasis added); FAC Ex. 2 § 5. The Fee Agreement states the matter is "resolved" at "the point in time that [the Tribe] signs a successor compact." FAC Ex. 2 § 5(c). In its Opposition, W&C essentially admits as much: "[T]his portion of Section 5 lays out the basic situation in which the contingency fee normally attaches . . . at the point in time when [the Tribe] signs the negotiated compact." Opp'n at 16.

W&C also concedes that the facts it alleges regarding its termination are squarely contemplated in Section 11: "[W]hat happens then if Quechan decides to terminate [W&C] right before signing the compact . . . ? That situation is dealt with in the 'discharge and withdrawal' provisions of Section 11." Opp'n at 16; FAC Ex 2, § 11. This is the ***Tribe's*** point. *See* Doc. No. 50-1 (explaining that Section 11 of the Fee Agreement applies and, as a result, the "Fee Agreement excludes the possibility that W&C is entitled to the contingency fee under Section 5"). Because W&C was terminated prior to "the point in time that [the Tribe] sign[ed] a successor compact," Section 11—not Section 5—determines whether and the extent to which W&C is due any additional fee subsequent to its termination. W&C's claim for a 15% contingency fee under Section 5 of the Fee Agreement should be dismissed with prejudice.

II. W&C'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED

A. The Good Faith and Fair Dealing Claim Is Impermissibly Duplicative Of The Breach of Contract Claim

W&C does not dispute that California law precludes claims for breach of the implied covenant of good faith and fair dealing that are "based on the same breach" as a companion breach of contract claim. *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 327 (2000); *see also Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.*, No. 12-cv-2079, 2013 WL 4027858, at *10 (S.D. Cal. Aug. 5, 2013) (dismissing implied covenant claim where allegations "do not go beyond a mere statement of contract breach" and seek same damages as breach of contract action); *Top Agent Network, Inc. v. Zillow, Inc.*, No. 14-cv-04769-RS, 2015 WL 7709655, at *9 (N.D. Cal. Apr. 13, 2015) (dismissing claim where complaint "plainly cite[d] the same alleged conduct to support its claim for breach of the implied covenant of good faith and fair dealing"). While conceding the two claims have "shared allegations and damages," Opp'n at 17, W&C still attempts to the distinguish the two claims. Its attempt fails.

First, W&C acknowledges that the breach of contract and breach of good faith and fair dealing claims are both based on "the termination of Williams & Cochrane." Opp'n at 19. W&C then argues that the breach of good faith and fair dealing claim survives because it is based on its termination "before Quechan reasonably believed that the contingency fee attached under section 5 of the agreement." *Id.*

This cannot be the basis of a good faith and fair dealing claim. Not only is it still based on the same termination of W&C that the breach of contract claim alleges, but the Tribe was entitled to terminate W&C "at any time." FAC Ex. 2, § 11. Section 5 of the Agreement simply does not apply.

Section 11 determines whether W&C is entitled to any additional fees after termination. The Tribe believed it was not. W&C disagrees and has sued. The

resulting claim under Section 11 is the one and only claim that W&C has pled that can proceed here. There is no additional viable claim to conjure from these facts.

What is more, W&C now argues that its good faith and fair dealing claim is premised on the Quechan's "***reasonabl[e]***" belief that Section 5 did not obligate it to pay W&C a contingency fee. Opp'n at 19. If Quechan's belief was reasonable, then it did not violate the covenant of good faith and fair dealing. That is because a good faith and fair dealing claim requires alleging something "distinct" from a breach of a contract's terms, such as when a defendant acts "in bad faith to frustrate the agreed common purpose of the contract." *Top Agent Network, Inc.*, 2015 WL 7709655 at *9; *Svenson v. Google, Inc.*, 65 F. Supp. 3d 717, 725-26 (N.D. Cal 2014) (citing *Guz*, 24 Cal. 4th at 353, n.18) (dismissing plaintiff's claim, finding that the bad faith alleged by the plaintiff on the part of Google was "simply breaching the contract" at issue, which was duplicative of the plaintiff's breach of contract claim).

Here, W&C's good faith and fair dealing claim adds nothing to its breach of contract claim. W&C's good faith and fair dealing claim simply does not plead facts that distinguish it from W&C's breach of contract claim. Instead, as in *Top Agent Network*, W&C "plainly cites" the same facts and allegations for both claims. 2015 WL 7709655, at *9. Accordingly, the good faith and fair dealing claim should be dismissed under Rule 12(b)(6).

B. If Not Duplicative Of The Breach of Contract Claim, Then The Good Faith and Fair Dealing Claim Is Barred By The Tribe's Sovereign Immunity

As explained in the Quechan Defendants' opening Memorandum, the Tribe waived its sovereign immunity only as to claims seeking payment under the terms of the Fee Agreement. *See* FAC Ex. 2 § 13. W&C claims that the Tribe's limited waiver applies to all "contract-esque" claims, including a good faith and fair dealing claim because it is purportedly an implied term in the contract. Opp'n at 9. But W&C is incorrect. The Tribe did not waive its sovereign immunity for "contract-

esque claims." The waiver is specific, limited, and to the extent the good faith and fair dealing claim is distinct from a contract claim for "payment under the terms of the Fee Agreement," it is barred by the Tribe's sovereign immunity and should be dismissed under Rule 12(b)(1).

III. W&C CANNOT PLEAD A PROMISSORY ESTOPPEL CLAIM

A. W&C Does Not Allege A Promissory Estoppel Claim

Promissory estoppel is inapplicable where a plaintiff's only reliance is the performance of an act previously bargained for—*e.g.*, pursuant to a contract. *See* Doc. No. 50-1 at 15-16; *see also Walker v. KFC Corp.*, 728 F.2d 1215, 1220 (9th Cir. 1984) ("Promissory estoppel is not . . . designed to give a party . . . a second bite at the apple in the event it fails to prove a breach of contract."); *JMP Secs. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1041-42 (N.D. Cal. 2012) (dismissing promissory estoppel claim as barred by its breach of contract claim).

Here, W&C fails to engage the Tribe's argument that the promissory estoppel claim is barred by its breach of contract claim. All the cases that W&C cites in its Opposition involve the inapposite situation in which the validity or existence of a contract was in dispute. *See, e.g.*, *Moncada v. West Coast Quartz Corp.*, 221 Cal. App. 4th 768 (2013) (plaintiff-employees promised, but never paid, retirement bonuses to stay with defendants' company through sale); *Toscano v. Greene Music*, 124 App. 4th 685 (2004) (plaintiff relinquished previous employment based on defendant's promise of new position, which was then rescinded); *Shepard v. Morgan Keegan & Co.*, 218 Cal. App. 3d 61 (1990) (plaintiff hired by out-of-state employer-defendant but fired before beginning employment). That is not the alleged fact pattern at issue here.

The parties agree that they operated with the understanding that there was an existing contractual relationship in which the Tribe was to pay W&C for legal services related to the Tribe's California compact negotiations. *See* Mem. at 16-17; FAC ¶¶ 68, 76-86; FAC Ex. 2, § 2 ("Client hires Firm to provide legal services . . .

for the purposes of reducing Client's payments under its tribal/State gaming compact with the State of California . . . ."). And where the existence of a contract is ***not*** in dispute, a promissory estoppel claim is barred by a plaintiff's breach of contract claim. *Rowland v. JPMorgan Chase Bank, N.A.*, No. C 14-00036 LB, 2014 U.S. Dist. LEXIS 32284, at *22 (N.D. Cal Mar. 12, 2014) (citing *JMP Securities*, 880 F. Supp. 2d at 1041). W&C admits as much in its Opposition. Opp'n at 21 ("There may be ***some*** merit to the argument that a promissory estoppel claim is unnecessary when the alleged damages are available under a breach of contract claim.") (emphasis in original).

W&C also fails to point to any facts showing that it relied to its detriment on the purported "promises" made by the Tribe, which is a requirement for promissory estoppel. Opp'n at 21-22; FAC ¶ 269. Nor can it. W&C's work to "wrap up the [Compact] negotiations" was the ***same service that it was hired to perform*** under the Fee Agreement. *See* FAC ¶ 268-69. W&C did not rely on any purported "promises" to do anything other than the work it was hired to do. Under well-settled law, the promissory estoppel doctrine is therefore inapplicable, and the claim must be dismissed. *See Patriot Sci. Corp. v. Korodi*, 504 F. Supp. 2d 952, 968 (S.D. Cal. 2007); *JMP Securities*, 880 F. Supp. 2d at 1041-42 (barring promissory estoppel claim where only issue was "under which provision of the contract" plaintiff would be paid).

B. If W&C Had Alleged A Distinct Factual Basis For A Promissory Estoppel Claim, It Would Be Barred By The Tribe's Sovereign Immunity

Like W&C's good faith and fair dealing claim, the Tribe has not waived its sovereign immunity as to any promissory estoppel claim. Promissory estoppel exists to fill gaps where there is no consideration; that is, where there is no contract. *Patriot Sci. Corp*, 504 F. Supp. 2d at 968. W&C's promissory estoppel claim cannot—by definition—seek payment ***under the terms of the contract.*** The Tribe's limited

waiver of sovereign immunity therefore does not extend to this claim and the claim cannot survive the Tribe's 12(b)(1) motion.

IV. W&C DOES NOT PLEAD A RICO CONSPIRACY CLAIM

W&C cannot allege a plausible claim for conspiracy to violate RICO against President Escalanti and Councilman White. Despite its arguments to the contrary, W&C has not alleged facts sufficient to establish the requisite elements of a substantive RICO violation. And, where there is no underlying RICO violation, W&C's conspiracy claim necessarily fails. *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Beyond that, W&C also fails to—and cannot—adequately plead a conspiracy. Its RICO conspiracy claim should be dismissed with prejudice.

A. W&C Fails to Allege Facts Sufficient to State a RICO Claim

1. W&C fails to allege an enterprise

W&C does not point to any facts establishing that President Escalanti and Councilman White were part of any association-in-fact RICO enterprise. W&C makes only conclusory statements in its Opposition that the defendants engaged in an "associated in fact" enterprise "aimed at creating a sham online payday lending business." *See, e.g.*, FAC § 293. To be sure, these are the relevant buzzwords from various authorities defining such an enterprise. Opp'n at 24-25. But this is insufficient. W&C does not identify any ***facts*** showing any agreement between the defendants—for example, how defendants associated together to create the purported pay day lending business or how the defendants coordinated their activities as a continuing unit. *See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Comm. to Protect Our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1175-76 (E.D. Cal. 2017); *Doan v. Singh*, 617 F. App'x 684, 686 (9th Cir. 2015). Nor can W&C make these allegations. The pay day lending business that W&C alleges—falsely—the defendants contemplated at one point never happened, and ***W&C does not even allege that it did***. *See* FAC ¶¶ 211-230 (alleging pay day lending operations by Rosette and not alleging such a business was established by

defendants here). Without such facts, W&C cannot establish the association-in-fact enterprise required for a RICO violation.

2. W&C does not allege RICO predicate acts

Absent from W&C's Opposition is any rebuttal to President Escalanti and Councilman White's argument that W&C failed to allege facts showing that they engaged in RICO predicate acts. This is not a surprise. W&C cannot, and has not, identified any facts showing that the either defendant engaged in any fraudulent activity. As W&C implicitly acknowledges in the FAC, neither they nor the Tribe ever operated any pay day lending business. *See id.*

Instead, as discussed in the Quechan Defendants' opening memorandum, W&C vaguely alleges that the defendants used the mails or wires to perpetuate fraud.[1] Mem. At 20-21. This is plainly insufficient under Rule 9. W&C must allege particularized facts, such as the time and place of the alleged wrongful conduct, and specific conduct of individual defendants. *See, e.g.*, *Sanford v. Memberworks, Inc.*, 625 F.3d 550, 557-58 (9th Cir. 2010) (predicate acts must be plead with particularity under Rule 9). Because W&C does not allege these facts, its RICO claim fails.

On top of these threshold failings, W&C admits that its claim for conspiracy to commit a RICO violation is a restyled tortious breach of contract claim—which it dropped from the FAC to avoid being subject to an anti-SLAPP motion. *See* Opp'n at 25 ("[I]n the event the tortious breach of contract does not constitute a harm in and of itself . . . ."). But it is well-settled law that the list of RICO predicate acts is exhaustive and, accordingly, a breach of contract is not such a predicate act. *See Nguyen v. Hartford Life Ins. Co.*, No. SACV 090244 AG (SSx), 2009 WL 10673922, at *2 (C.D. Cal. June 2, 2009) (dismissing RICO claim based on failure to honor insurance contract); *see also Annulli v. Panikkar*, 200 F.3d 189, 200 (3d Cir. 1999),

[1] In its Opposition, W&C refers to its proposed Supplemental Complaint. Opp'n at 24. The Court has not ruled on W&C's Motion for Leave to File Supplemental Complaint, Doc. No. 71, and it is therefore not before the Court at this time.

abrogated on other grounds in Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000) ("[I]f garden-variety state law crimes, torts, and contract breaches were to constitute predicate acts of racketeering (along with mail and wire fraud), civil RICO law, which is already a behemoth, would swallow state civil and criminal law whole."); *Vega v. Ocwen Fin. Corp.*, No. 2:14–cv–04408–ODW(PLAx), 2015 WL 1383241, at *7 (C.D. Cal. Mar. 24, 2015); *cf. Hilton v. Apple, Inc.*, No. CV 13-7674 GAF (AJWx), 2014 WL 12597143, at *8 (C.D. Cal. Jan. 9, 2014). W&C should not be permitted to turn this—now admitted—breach of contract matter into a RICO case.

3. W&C fails to allege harm to its business or property

W&C also fails to allege facts showing that it suffered a "concrete" or "tangible" harm to a "specific business or property interest" from the purported pay day lending business. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) ("A plaintiff asserting injury to property" must "allege 'concrete financial loss'" and "harm to a specific business or property interest") (citing *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (emphasis added); *In re Chrysler-Dodge-Jeep EcoDiesel Mktg.*, No. 17-md-02777-EMC, 2018 U.S. Dist. LEXIS 42971, *82 (N.D. Cal. Mar. 15, 2018) (same).

Instead, W&C includes a litany of generic allegations about pay day lending businesses and other tribes with such businesses. *See, e.g.*, FAC ¶¶ 211-222. But according to W&C, the "direct harm" it suffered was from the alleged improper termination and breach of the Fee Agreement. *See* Opp'n at 25. The alleged discussions regarding pay day lending did not even allegedly cause harm to W&C. Rather, the FAC alleges that W&C's financial losses were "***contract damages***" of over six million dollars. FAC ¶ 296. To make the point even clearer, W&C argues in its Opposition that the harm it suffered was a "***tortious breach of contract***." Opp'n at 25. As discussed above, the alleged breach of the Fee Agreement cannot be the basis for a RICO violation.

As for W&C's alleged "indirect harms," W&C fails to meet even its purported

"relatively low" pleading threshold. Opp'n at 25. W&C only vaguely argues that there are "any number of indirect harms" that may include damage to W&C's relationships with the Office of the Governor and other tribal clients. W&C does not allege, however, any facts or "concrete financial loss" from these purported injuries. *Canyon County*, 519 F.3d at 975. It does not come close to making the requisite allegations to show harm to its specific business or property.

B. The RICO Conspiracy Claim Against President Escalanti and Councilman White Is Barred By Sovereign Immunity

Finally, W&C's allegations and arguments ***support*** the argument that the RICO conspiracy claim against President Escalanti and Councilman White is barred by the Tribe's sovereign immunity. As discussed above, the harm alleged by W&C that results from the so-called predicate acts was that W&C was terminated by the Tribe. Opp'n at 25; FAC ¶¶ 291-96. Because the power to hire and fire attorneys is granted to the Tribal Council by the Tribe's Constitution, *see* FAC Ex. 39 Art. III, §6(d), W&C could only have been terminated by the Tribe itself, acting through its elected officials in their official capacity. Mem. at 9-10. Accordingly, the June 26, 2017 termination letter was signed by President Escalanti as "President, Fort Yuma Quechan Indian Tribe," *see* FAC, Ex. 4, and the resolution hiring Rosette to replace W&C was enacted by the Tribal Council. *See* Doc. No. 29-2 Ex. A. And W&C seeks the same "contract damages" against the Tribe for RICO as it does for its purported wrongful termination. Opp'n at 11-13; FAC ¶ 296. The Tribe's sovereign immunity thus extends to President Escalanti and Councilman White and bars W&C's RICO conspiracy claim. *See Muller v. Morongo Casino, Resort & Spa*, No. EDCV 14-02308-VAP (KKx), 2015 WL 3824160, at *3, 7-8 (C.D. Cal. June 17, 2015).

CONCLUSION

For the reasons discussed in the Quechan Defendants' motions to dismiss and above, the Court should grant the motions with prejudice.

Dated: May 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, 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 address 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 May 18, 2018, at Los Angeles, California.

/s/ Christopher T. Casamassima
Christopher T. Casamassima