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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON

9 PAUL GRONDAL, a Washington
10 resident; and THE MILL BAY
11 MEMBERS ASSOCIATION, INC., a
12 Washington Non-Profit Corporation,

13 Plaintiffs,

14 vs.

15 UNITED STATES OF AMERICA, et al.,

16 Defendants.

No. 2:09-cv-00018-RMP

**FEDERAL DEFENDANT'S
RESPONSE WAPATO HERITAGE
LLC'S MOTION FOR TRANSFER
PURSUANT TO 28 USC § 1631 OR
FOR PARTIAL SUMMARY
JUDGMENT**

December 8, 2020

Without Oral Argument

17 **I. INTRODUCTION**

18 Wapato Heritage, LLC's ("WHL") motion is ambiguous as to what its
19 purported claims are, who they actually belong to, and against whom they are
20 asserted. A close look at the WHL's Cross-claims reveals WHL's purported claims for
21 "overpayment" and "underpayment," which were asserted to try to create "conflicts"
22 and to unnecessarily prolong this litigation, must be dismissed. WHL fails to state a
23 claim for relief, cannot assert claims on behalf of Evans' estate, and its request to
24 transfer Claims its claims against Defendant Allottees and time-barred claims against
25 the United States to the Court of Federal, is improper. For these reasons, including
26 those reasons previously raised in Federal Defendants' and Tribes' motions to dismiss
27 (ECF Nos. 570, 571), WHL's motion must be denied.
28

II. FACTUAL BACKGROUND

WHL's claims appear solely based on the inadmissible audit conducted by the Sells Group,¹ which found purported overpayments by Evans or underpayments to Evans on separate leases. ECF No. 574-1. The Sells Group Audit was conducted in 2005 with participation from Webb, who was Evans' guardian, accountant, and also served as the Personal Representative of Evans' estate. ECF Nos. 572 at p. 2, 398 at p. 3. The Sells Group determined that Evans' "bookkeeper" made numerous errors that purportedly resulted in: (1) alleged overpayments by Evans to the BIA between 1996 and 2005 under the Master Lease (ECF No. 574-1 at p. 4); and (2) under a separate sublease, alleged underpayments by the Colville Tribal Enterprises Corporation ("CTEC") to Evans principally between 1994 and 1998² (ECF No. 574-1 at p. 7). Any claims Evans had – including potential claims against his "bookkeeper" – belong to Evans' estate. ECF No. 572 at p. 7 (stating that any funds due would be to Evans or his Estate).

In 2003, Webb was named the personal representative of Evans' non-trust estate. ECF No. 398 at p. 3 (citations therein). Contentious litigation surrounding

¹ "[C]ourts in this circuit have routinely held that unsworn expert reports are inadmissible." *Harris v. Extendicare Homes, Inc.*, 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011) (listing cases); *Shuffle Master, Inc. v. MP Games LLC*, 553 F. Supp. 2d 1202, 1210–11 (D.Nev. 2008) (citing various authorities and explaining that unsworn expert reports are not admissible to support or oppose summary judgment).

² In 1994, Evans and CTEC signed a sublease, however, that sublease was not approved by the BIA until 1998. The Sells Group nonetheless determined that CTEC should have started paying 6% (rather than 5%) pursuant to that sublease starting when CTEC signed it rather than when the BIA approved the lease in 1998. The Sells Group's interpretation of 1994/1998 sublease is a legal conclusion that is disputed and has not been litigated by the contracting parties.

1 Evans' estate lasted until 2011. Part of the estate litigation involved allegations by
 2 Evans' sole surviving daughter that Mr. Webb and his counsel, Mr. Arch, had, among
 3 other things mismanaged Evans' funds while he was alive. *See e.g.*, ECF No. 398-4.

4 Notably, Webb *never* brought to the probate court's attention his 2005
 5 participation in the Sells audit or his receipt of the Sells Audit in 2007.³ Webb also has
 6 never brought any potential claims the Evans' estate may have been available due to
 7 the Sells' audit against Evans' "bookkeeper."

8 III. LAW AND ANALYSIS

9 A. WHL's fifth claim for "overpayment" under the Master Lease against 10 "Defendant Allottees" must be dismissed.

11 i. WHL fails to state a claim for "overpayment" against Defendant Allottees.

12 Preliminarily, the Federal Defendants are not aware of, and have not found, any
 13 federal common law cause of action for "overpayment." To the extent WHL attempts
 14 to plead a breach of contract claim by alleging that amounts are due to it "under the
 15 terms of the Master Lease" (ECF No. 228 at p. 30), it has failed to do so. *See also Bell*
 16 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("The pleading must contain
 17 something more...than...a statement of facts that merely creates a suspicion [of] a
 18 legally cognizable right of action.") (internal citation omitted). There is no allegation
 19 in WHL's Amended Complaint that the Defendant Allottees failed to comply with the
 20 payment or audit *terms of the Master Lease*. *See* ECF No. 228 (emphasis added).

21 Under the terms of the February 2, 1984, Master Lease entered between Evans
 22 as the Lessee and Allottees as the Lessor. Evans was required to perform annual audits
 23 and provide the results, including the sales receipts to support the audit, to the Lessor
 24

27 ³ The state court probate record is devoid of any reference to the Sells audit; however,
 28 Federal Defendants have not yet deposed Mr. Webb.

(i.e. the Allottees) and the Secretary. ECF No. 73-3 at p. 11.⁴ The Master Lease did not require the Defendant Allottees to verify these annual audits, nor did it require Defendant allottees to verify payments transmitted by Evans to the BIA for the Allottees. *See id.* Thus, WHL’s requested inference that the Defendant Allottees had some obligation under the contract to verify that Evans was making the correct payment is without merit.

WHL also has not, and cannot, state a claim for unjust enrichment against Defendant Allottees. *See Empire Health Found. v. CHS/Cnty. Health Sys. Inc.*, 370 F. Supp. 3d 1252, 1262–63 (E.D. Wash. 2019) (“parties to a valid, binding contract may not claim unjust enrichment”). “Unjust enrichment is an *equitable* rather than a legal claim; consequently, no action for unjust enrichment lies where a contract governs the parties’ relationship to each other.” *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003) (emphasis added). Since the Master Lease governed the parties’ duties and responsibilities concerning payment, WHL cannot bring an equitable claim of unjust enrichment. Moreover, “[h]e who seeks equity must do equity.” *McQuiddy v. Ware*, 87 U.S. (20 Wall.) 14, 19 (1873).

In short, WHL’s bare allegation that it wants “judgement against Defendant allottees, jointly and severally, for the amount due *under the terms of the Master lease*, as reported by the Sells Report” does not state a claim for breach of the Master Lease or for any other claim against the Defendant allottees. *See* ECF No. 228 at p. 30 (emphasis added).

ii. WHL is not the proper party to bring a claim for overpayment against the Defendant Allottees.

As WHL acknowledges, and has long known, the alleged injury from any claimed overpayment belongs not to WHL but rather it was (assuming *arguendo* the

⁴ The “audits” provided by Evans did not contain receipts. ECF No. 90-16 p. 687.

1 overpayment exists) to Evans' estate. ECF No. 572 at p. 7. WHL is not Evans' estate,
2 nor is it the personal representative of Evans' estate. *See e.g.*, ECF No. 90-13 ("A
3 review of William Evans will and the intermittent order by Administrative Law Judge
4 Hammitt, indicate the Bureau of Indian Affairs has never recognized Wapato Heritage
5 LLC as Mr. Evans representative."). The personal representative of the Evans' estate
6 has not brought any claims in this lawsuit. *See* RCW 11.48.090 (actions for recovery
7 on contract may be maintained by the personal representative of an estate). WHL is
8 not the real party in interest for any purported "overpayment" claim. *See* Fed. R. Civ.
9 P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.").

10 Fed. R. Civ. P. 17(a)(3) allows a party relief where counsel makes an
11 "understandable" mistake in naming the real party in interest, but WHL being the
12 named party here was an, intentional, purposeful, and strategic choice rather than an
13 understandable mistake. *See Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123,
14 1129 (9th Cir. 2017) (Rule 17 relief is available when plaintiff makes an "honest" or
15 "understandable" mistake); *see also Esposito v. United States*, 368 F.3d 1271, 1276
16 (10th Cir. 2004) (discussing at length the history of the rule and the advisory
17 committee notes). An opportunity to substitute the real party in interest should be
18 allowed *except*, when like here, the party acts in bad faith and the opposing party has
19 been prejudiced. *See also Hassanati ex rel. Said v. Int'l Lease Fin. Corp.*, 643 Fed.
20 Appx. 620, 623 (9th Cir. 2016) (Reinhardt, J., dissenting) (discussing equitable
21 principals considered in Rule 17 analysis).

22 Here, Webb did not, and has not, brought to the state probate court's attention
23 the Sells audit, which would have revealed errors over the course of many years by
24 Evans' "bookkeeper." In the rather contentious state court probate proceeding (*e.g.*
25 ECF 398-4), Mr. Webb revealing long running errors made in the accounting or
26 management of Evans' funds might have very well been cause for removal of Mr.
27
28

1 Webb as the personal representative of Evans' estate.⁵ *See Young v. Boatman*, 192
2 Wn. App. 1034 (2016) (finding the district court erred in denying petition to remove
3 personnel representative when he had a conflicting "between maximizing the Estate
4 while trying to avoid personal liability."). In light of these circumstances as well as to
5 avoid discovery related to the estate in this case, Webb and his counsel had every
6 incentive to try to bring claims in (and attempt to receive judgment in) the name of
7 WHL rather than the real party in interest.

8 Moreover, any claim by WHL or Webb that an "understandable" mistake was
9 made in bringing its Cross-claims in 2010 or its Amended Cross-claims in 2012 in
10 WHL's name would be a stretch. Numerous learned attorneys have represented Webb
11 and WHL *for years* and have no doubt expended *innumerable hours* on these issues.
12 Indeed, over seven years ago in the Evans' state probate action, Webb filed a
13 declaration acknowledging any claims of the estate must be brought in the name of the
14 Personal Representative. Ex. A (Webb Decl. filed in state probate). Yet, even now, as
15 WHL argues its purported claims belong to Evans estate, it makes no attempt to
16 substitute parties.
17

18
19 ⁵ Reasons for removing a personal representative are waste, embezzlement,
20 mismanagement, incompetence, *or any other reason satisfactory to the court*. RCW
21 11.28.250. Interested persons may bring a petition for a report on the affairs of the
22 estate (RCW 11.68.065) or a citation (RCW 11.68.070, 11.96A.060) in which
23 proceeding the court issues a show cause order to the personal representative. If
24 founded, the court may assess to a personal representative whose actions have
25 damaged an estate a sum sufficient to make the estate financially whole, which sum
26 shall be paid from the personal representative's own pocket. *Baker-Boyer Nat'l Bank*
27 *v. Garver*, 43 Wash. App. 673, 686, 719 P.2d 583, *review denied*, 106 Wn.2d 1017
28 (1986). *See also* RCW 11.106.070.

1 The Federal Defendants have also been prejudiced by Webb decision to have
2 counsel bring claims in WHL's name rather than the as the personnel representative of
3 Evans' estate. This prejudice is magnified by *years of litigation* and a trial date that is
4 a mere three months away. Since the personal representative of Evans' estate is not a
5 party, Evans' estate has not produced any initial disclosures or made other discovery
6 disclosures. Moreover, until WHL's most recent change, the Federal Defendants
7 would have been forestalled in conducting *non-party financial* discovery of Evans'
8 estate. Conducting discovery now, on short notice, related to Evans' activities over 15
9 years ago will be difficult at best, if not impossible. Unless Webb has preserved all
10 relevant financial information, such as bank records, it is unlikely information will be
11 available.⁶

12 Finally, as a matter of equity, Evans' alleged injury was not caused by the
13 Defendant Allottees. Any injuries to Evans through alleged overpayments – according
14 to the Sells audit – were due to the negligence or malpractice of Evans'
15 “bookkeeper.”⁷ ECF 346-9. Allowing WHL to substitute the real party in interest at
16 this late date in order to maintain claims against faultless “Defendant Allottees” rather
17 than the party at fault, Evans' “bookkeeper,” is not something the government in good
18 conscious can condone.⁸ The equities are not in WHL or Mr. Webb's favor. *See*
19 *McQuiddy*, 87 U.S. (20 Wall.) at 19.
20

21
22 ⁶ For example, bank records typically go back seven years depending on the bank.

23 ⁷ It is also possible Evans had other reasons for the payments made such as kindness
24 to his fellow family members (the other Indian Allottees), his own ego or as
25 inducement for future support for his planned projects. It is unlikely we will ever truly
26 know his intentions given his death and the passage of time.

27 ⁸ Furthermore, “No money accruing from any lease or sale of lands held in trust by the
28 United States for any Indian shall become liable for the payment of any debt of . . .

1 *iii.* Transfer to the Court of Federal Claims is improper.

2 WHL cannot escape dismissal of its fifth claim through transfer to the Court of
 3 Federal Claims since a transfer would be improper. Under the Tucker Act, the Court
 4 of Claims has jurisdiction over claims upon which judgement could be entered
 5 “*against the United States.*” 28 USC § 1491 (a)(1)(emphasis added); *see also Moody*
 6 *v. United States*, 931 F.3d 1136, 1141 (Fed. Cir. 2019) (citing *Wapato I* and holding
 7 that leases and permits subject to BIA approval do not, as a matter of law, confer
 8 subject matter jurisdiction in the Claims Court). WHL decided not to bring its
 9 “overpayment” claim against the United States because it wanted to try to create
 10 conflicts in and between the United States and the allottees. ECF No. 315 at p. 10.
 11 Having made its choice, WHL cannot now assert its overpayment claim is against the
 12 United States and have it belatedly transferred to the Court of Federal Claims. The
 13 Court of Federal Claims has no jurisdiction over WHL’s claims against Defendant
 14 Allottees and a transfer is improper.

15 **B. WHL’s sixth claim for “underpayment” under a sublease between**
 16 **Evans and CTEC but directed solely against the BIA for a breach of**
 17 **trust must be dismissed.**

18 WHL’s “Sixth Claim” alleges “underpayment” of amounts purportedly due by
 19 CTEC to Evans under a sublease between CTEC and Evans. ECF No. 228 at p. 30.
 20 WHL directs this claim not against CTEC, which is not a party here, but rather *solely*
 21 *at the BIA* apparently based on an alleged *breach of fiduciary duty to WHL. Id.* (WHL
 22 requests “the Court to enter an Order which compels the BIA, in its capacity as a
 23

24 _____
 25 such Indian . . . , *except with the approval and consent of the Secretary of the Interior.*”
 26 25 U.S.C. § 410; *see also First Citizens Bank & Tr. Co. v. Harrison*, 181 Wn. App.
 27 595, 606 (2014) (“money from the lease of Indian trust land remains protected even
 28 after it has been paid”).

1 fiduciary . . . to immediately collect [alleged underpayments] from CTCR [sic] . . .”
2 *Id.* There are no facts alleged that any Indian allottee was injured arising out of the
3 sublease besides purportedly Evans. See ECF No. 574-1 (showing that even though
4 CTEC allegedly underpaid Evans, Evans did not underpay the BIA other than
5 nominally, *i.e.* less than \$100 a year over the 11 years).

6 Again, WHL is not the real party in interest to any claims belonging to Evans’
7 estate for alleged underpayments between 1994 and 1998,⁹ and WHL has long known
8 the United States does not owe it a trust duty. *See* ECF No. 570 at p. 11 (citing
9 *Wapato Heritage, LLC V. United States*, 2:08-cv-00177-RHW (“*Wapato I*”) at ECF
10 No. 82 at p. 6.). Before filing *Wapato I*, WHL’s accountant (Webb) and WHL’s
11 attorney (Arch) were not only aware of the Sells audit but actually received a copy of
12 the audit in 2007.¹⁰ Not only did WHL not bring a claim for these purported
13 underpayments in *Wapato I* on behalf of Evans’ estate, but WHL again brings a
14 breach of fiduciary duty claim here while knowing that no fiduciary duty is owed to it
15 as a Washington State corporation. WHL’s breach of fiduciary duty claim must be
16 dismissed. Also, there is no “understandable” mistake which would allow for the
17 substitution of parties with respect to WHL’s breach of fiduciary duty claim. *See*
18 Section III(A)(ii), *supra* (discussing Fed. R. Civ. P. 17(a)(3))
19

20 WHL also cannot morph its breach of trust claim into a “contract” claim¹¹ to
21 attempt to transfer it to the Court of Federal Claims, and even if it could do so,
22

23 ⁹ WHL was not even in existence until July of 2002. ECF No. 398-2.

24 ¹⁰ The Attorney representing WHL was informed of the audit via letter dated March
25 24, 2006. ECF No. 90-16 p. 687.

26 ¹¹ WHL’s amended answer and counter claim is styled as a breach of trust claim but
27 WHL now implies, by citing the Tucker Act (28 USC § 1491(a)(1)), that its claim
28 against the United States is a “contract” claim.

1 transfer would be futile. Neither Evans (or his estate) or Chief Evans, Inc., as Lessor
2 in the sublease, nor CTEC, as Lessee in the sublease, are parties to this action. Even if
3 Evans had brought a breach of contract claim, a necessary party was not named in this
4 suit, *i.e.* the party Evans actually contracted with, CTEC. Indeed, none of the parties to
5 that sublease are parties to this suit and thus WHL's morphed contract claim arising
6 out of that sublease must be dismissed for failure to join a necessary party. *See*
7 *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1156-57
8 (9th Cir. 2002) ("a party to a contract is necessary.").

9 Even if WHL could belatedly bring suit on behalf of Evans' estate against
10 CTEC for failure to pay under the terms of the sublease, it would have had to file that
11 action in tribal court. *See Clements v. Confederated Tribes of Colville Reservation*,
12 2:19-CV-201-RMP, 2019 WL 6051104, at *3 (E.D. Wash. Nov. 15, 2019). Both
13 Evans and CTEC agreed that the "Colville Tribal Court has *exclusive jurisdiction*"
14 over any dispute arising out of that lease. ECF No. 574-3 at p. 20 (emphasis added).
15 This Court would not have jurisdiction over such a contract dispute just because
16 federal officials approved the contract. *See also Peabody Coal Co. v. Navajo Nation*,
17 373 F.3d 945, 949, 951 (9th Cir. 2004) (affirming dismissal based on lack of subject
18 matter jurisdiction of coal companies claim against the Navajo Nation arising out of a
19 mineral lease dispute).
20

21 And finally, even if WHL could bring suit on behalf of Evans' estate and solely
22 against the United States in the Court of Federal Claims, its claims from 1994-1998
23 are barred. The six-year statute of limitations for individual Indian claims filed under
24 the Tucker Act, 28 U.S.C. § 1491(a), is set forth in 28 U.S.C. § 2501. The Supreme
25 Court in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), reaffirmed
26 a long line of Supreme Court cases that held that *this statute of limitations* is
27 jurisdictional and cannot be waived. The limitations period of six years in the Court
28 of Federal Claims and does not allow for equitable tolling and the Court of Federal

1 Claims is forbidden from considering whether certain equitable considerations warrant
 2 extending a limitations period. The limitations period is a condition of the waiver of
 3 sovereign immunity and must be strictly construed and exceptions are not to be
 4 implied. *See Soriano v. United States*, 352 U.S. 270, 276 (1957).

5 IV. CONCLUSION

6 The Federal Defendants are not the insurer for Evans' "bookkeeper" or WHL's
 7 counsel. WHL may be correct that this case is about conflicts and breaches of
 8 fiduciary duties, but the conflicts and breaches of fiduciary duty appear to lie with
 9 Evans' "bookkeeper" (Webb) and WHL's counsel (Arch) not the Federal Defendants.
 10 To the extent the beneficiaries of Evans' estate were injured, their cognizable claims
 11 are not against the Federal Defendants. Enough time and expense has been spent
 12 pursuing questionable claims *against* faultless individual Allottees *by* improper
 13 parties. WHL's motion must be denied and its purported remaining claims dismissed.

14 RESPECTFULLY SUBMITTED this 13th day of November, 2020.

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22 CERTIFICATE OF SERVICE

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