4th Civil No. E060447

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

WELLS FARGO BANK, N.A., as Trustee,
Plaintiff, Respondent, and Cross-Appellant,
v.

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian tribe,
Defendant, Appellant, and Cross-Respondent,

EAST VALLEY TOURIST DEVELOPMENT AUTHORITY, an unincorporated entity,
Defendant and Cross-Respondent,

GOLDENTREE 2004 TRUST, GOLDENTREE CREDIT OPPORTUNITIES FINANCING I, LTD. and GOLDENTREE CREDIT OPPORTUNITIES SECOND FINANCING, LTD.,
Intervenor-Defendants and Cross-Respondents.

Appeal from the Superior Court for the State of California
Country of Riverside, Palm Springs Division
(Case No. INC 1205391)
The Hon. Randall D. White, Hon. Jeffrey L. Gunther, Hon. Harold W. Hopp, and Hon. John G. Evans

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CROSS-APPELLANT WELLS FARGO BANK, N.A.'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

Page

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES CONTINUED

Page(s)

STATE CASES

TABLE OF AUTHORITIES CONTINUED

Page(s)

STATE CASES

FEDERAL CASES

TABLE OF AUTHORITIES CONTINUED

Page(s)

OTHER STATE CASES

STATE STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

In a twist worthy of Franz Kafka, the court below held that the party that lent $46,570,000 cannot – following the borrower's default – collect on distributions the borrower receives each month of $668,000 for its affiliated tribal members. That such payments were able to elude capture by a lender was plainly never meant to be: the parties' contracts provided that the lender, plaintiff Wells Fargo,[1] would always have the right to "all amounts payable" to the borrower.

The court below, however, construed the undefined word "payable" as a matter of law, and without the benefit of parol evidence, to mean that the very distributions that defendant EVTDA paid to defendant Cabazon every month since April 2012 were never actually "payable."

The trial court later concluded that Wells Fargo – which obtained a $65 million judgment against Cabazon but did not prove that EVTDA was required to deposit those distributions into a certain bank account – was not entitled to prevailing-party attorneys' fees, and was, instead, required to pay nearly $1 million in fees to EVTDA. These findings are prejudicial error.

Intervenor-defendant GTAM, who did not claim a right to the distributions, but allied with Cabazon to prevent Wells Fargo from

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[1] All capitalized terms and party names are as defined in Wells Fargo's opening brief.

obtaining them, stretches the doctrines of waiver and forfeiture beyond their breaking points to contend that Wells Fargo lost its right to have the trial court consider extrinsic evidence in determining whether the distributions were "payable." GTAM does so notwithstanding that such evidence was proffered and discussed in Wells Fargo's briefing below and at oral argument. Most telling, given that this matter is before the Court following a summary adjudication, is Cabazon's admission that the distributions were "payable," and diametrically opposed positions taken by GTAM and Cabazon on whether Cabazon held the distributions in trust for GTAM. GTAM also urges that the Court ignore dispositive provisions of the Commercial Code as well as the contracts between Wells Fargo, Cabazon and EVTDA, arguing only that they are "inapplicable." Cabazon's admission shows a triable issue that should have prevented summary adjudication, and the statutes and contracts show defendants should not have prevailed as a matter of law.

Cabazon's defense of the denial of attorney's fees to Wells Fargo turns solely on Cabazon's contention that there is no fee-shifting provision in the relevant contract, notwithstanding that one is incorporated by reference into the contract. Cabazon ignores the dispositive reasons explained in Wells Fargo's opening brief why the trial court erred as a matter of law when it denied Wells Fargo a fee award.

EVTDA's defense of its fee award glosses over, *inter alia*, the fact that EVTDA was awarded fees for work shared counsel did solely for Cabazon's benefit.

For the foregoing reasons, as explained more fully below and in Wells Fargo's opening brief, the trial court's orders should be reversed and this action remanded for further proceedings.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS FOR SUMMARY ADJUDICATION OF THE INJUNCTIVE RELIEF CLAIM.

A. The Court Erred in Ruling that the Continuing Distributions by EVTDA to Cabazon Were Not "Payable" and Therefore Not DARs.

In its Opposition,[2] GTAM describes its construction of the relevant contracts and the so-called structural subordination of Wells Fargo and its security (the DARs) in the "capital structure" of Cabazon and EVTDA. GTAM asserts that the Resort revenues EVTDA continues to pay to Cabazon are not DARs because payments after default violate the Bridge Loan. But GTAM ignores the central issue on appeal: when EVTDA

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[2] GTAM submitted a cross-respondent's brief (the "Opposition" or "Opp.") to Wells Fargo's cross-appeal, in which Cabazon and EVTDA joined. Wells Fargo thus refers to the arguments made in the cross-respondent's brief as made by "GTAM." "Movants" refers collectively to GTAM, Cabazon, and EVTDA.

distributes Resort revenues to Cabazon, at Cabazon's direction, despite a breach of the Bridge Loan, are those distributions "payable" and thus DARs?

While GTAM touts the "capital structure" and the purported structural subordination of Wells Fargo's Note, GTAM is simply wrong. First, contrary to GTAM's representation that there is some sort of "overall capital structure," Cabazon has admitted, and EVTDA's ordinance reflects, that Cabazon and EVTDA are separate entities with separate debt structures, with the debts of one unenforceable against the other. (5:RA1384-1386; 6:RA1421.) The Bridge Loan is the debt of EVTDA, secured by EVTDA's assets, and the Bridge Lenders have no security in any of Cabazon's assets, except to the extent the assets are primarily used for the Resort's benefit (and that limited security interest was not perfected). (3:RA0861-864; 4:RA0903; 8:RA2133, 2243-2245; 9:RA2308-2310; 13:RA3730; 22:RA5670-5705.) In contrast, the Note is Cabazon's debt, and Wells Fargo has an assignment of and perfected security interest in the DARs. (5:RA1217-1219, 1236, 1253-1254, 1282-1284.)

Second, GTAM's contention – that no DARs exist when the Bridge Loan is in default – fails to acknowledge that EVTDA continues to distribute Resort revenues to Cabazon pursuant to Cabazon's direction, despite any Bridge Loan prohibition. Cabazon, not Wells Fargo, is circumventing the agreed "capital structure." Cabazon is only entitled to

receive distributions after Wells Fargo is paid, and is not entitled to any distributions on default of the Transaction Agreements (5:RA1254-1258), but continues to receive Resort revenues after such default and continues to use them for its benefit. GTAM's characterization of Wells Fargo as circumventing the "capital structure" by filing this action does not reflect the reality of this situation, where Cabazon has flouted its debts, obligations, and any "capital structure."

Moreover, the definition of DARs – money "payable" by EVTDA to Cabazon – includes money that "may, can, or should be paid" (e.g. if money has been paid or is being paid or is being paid, the money is "payable"), as well as dividends or other monies EVTDA pays pursuant to Cabazon's direction. GTAM avoids quoting the entirety of the definition of DARs – for good reason, because its myopic view of DARs as being solely tied to the amounts permitted under the Bridge Loan cannot stand when the definition is actually examined:

> [A]ll of the gross revenue, receipts, distributions, dividends, income and other amounts payable to [Cabazon] from [EVTDA], other than any Reimbursement Payment. [DARs] include all moneys deposited by [EVTDA], at the direction of [Cabazon], in the Custodial Account.

(5:RA1253.) The second sentence indicates that DARs expressly "include," but are not limited to, "all moneys deposited by" EVTDA into the Custodial Account (e.g., what the Bridge Loan permits, the PAMDs). The definition's exclusion of "Reimbursement Payments" (payments from

EVTDA to Cabazon for services rendered by Cabazon employees (5:RA1254), which have no connection to the Bridge Loan) from "amounts payable" demonstrates that "payable" must necessarily encompass other payments aside from those authorized by the Bridge Loan. Had the definition of DARs solely been tied to the Bridge Loan, the drafters would not have needed to exclude Reimbursement Payments from "payable" and would have limited DARs to amounts deposited by EVTDA in the Custodial Account rather than adding the expansive phrase "all . . . distributions, dividends, income and other amounts." By including distributions and dividends, it necessarily includes revenues payable by EVTDA at Cabazon's direction. Each of these aspects of the definition must be given effect. (Cal. Civ. Code, § 1641.)

It is not only the plain language of the definition of DARs which supports Wells Fargo's definition of DARs, but also extrinsic evidence. Wells Fargo demonstrated that the trial court failed to follow the proper standards for interpreting the word "payable" and thus erred in either (1) determining that "payable" was not reasonably susceptible to Wells Fargo's interpretation or (2) resolving any ambiguity regarding "payable" in determining a question of fact based on the conflicting extrinsic evidence. In doing so, the trial court erroneously concluded that none of the distributions that EVTDA made to Cabazon after April 2012 were not "payable."

GTAM does not dispute that the proper test for determining the meaning of contractual language is (1) where the meaning of contractual language is disputed, the court must provisionally receive extrinsic evidence relevant to show whether the contract is reasonably susceptible of a particular meaning and (2) if that evidence reveals that the language is reasonably susceptible to both of the urged interpretations, the court must construe the meaning of the contract using the extrinsic evidence – unless the evidence contradicts, in which case an issue of fact is created precluding summary judgment. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351.) GTAM concedes that the trial court failed to follow this analysis. (Opp. at 4.)

Instead, GTAM argues that Wells Fargo has forfeited or waived this argument. In the alternative, GTAM contends that other contractual provisions demonstrate that the term "payable" is unambiguous and that, even if extrinsic evidence were admitted, the evidence does not show that "payable" is reasonably susceptible to the meaning Wells Fargo asserts. GTAM is wrong.

1. Wells Fargo Has Not Forfeited or Waived Any Right to Introduce Extrinsic Evidence on Appeal.

GTAM contends that Wells Fargo has either waived or forfeited its argument that the Court should have interpreted "payable" using extrinsic evidence. GTAM's position is unavailing: Wells Fargo brought the issue

to the trial court's attention and the summary adjudication briefing discussed the extrinsic evidence.

Under waiver, "a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) Waiver requires express or implied agreement to an action taken by the trial court. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.) While forfeiture is a related concept, forfeiture does not rely on express or implied conduct; a party forfeits the right to appeal an issue because it was not timely presented before the trial court. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649.)

Although the concepts differ, fairness is the underlying rationale for both, to the trial court and the opposing litigant who should have an opportunity to consider and argue all issues. (*JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 179; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.)

Wells Fargo neither waived nor forfeited its argument that extrinsic evidence should be admitted to demonstrate the meaning of "payable." Courts emphasize that "[t]he critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court." (*Boyle, supra*, 137 Cal.App.4th at p. 649.) In *Boyle, supra*,

137 Cal.App.4th 645, appellant argued that an expedited summary judgment procedure pursuant to local rules was inconsistent with the notice required in the summary judgment statute. Although appellant stated in his summary judgment briefing that the local rules conflicted with the statute, respondent represented that appellant had forfeited or waived his challenge to the local rule by failing to support its argument in the trial court "by argumentation and citations to authority." (*Id.* at pp. 649-650.) The court disagreed, holding that the summary judgment briefing "fully stated the nature and specific grounds for the challenge, and was sufficient to bring the matter to the trial court's attention. Further argumentation and citation of authority was not necessary to avoid forfeiture of the issue on appeal." (*Id.* at p. 650.)

As in *Boyle*, and as critical for preserving claims on appeal, the issue of presenting extrinsic evidence to demonstrate the meaning of "payable" was presented before the trial court. As GTAM recognizes (Opp. at 23), Wells Fargo argued during the summary adjudication hearing that, under *Wolf*, extrinsic evidence demonstrated that "payable" was reasonably susceptible to Wells Fargo's definition. (RT71:19-82:11.)

Even if the argument at the hearing was not sufficient to preserve the argument on appeal (which it was), Wells Fargo's briefing was sufficient. Indeed, GTAM's repeated contention (see Opp. at 23, 28) that none of the extrinsic evidence was in the briefing is belied by Wells Fargo's arguments

in opposing summary adjudication that the continuing distributions were "payable" – and thus DARs – based upon the same extrinsic evidence offered in the appellate briefing: the resolutions and tribal ordinances (compare Cross-Appellant Wells Fargo's Brief ("XAB") at 63-64 with 8:RA1982-1983); DARs as dividends (compare XAB at 64 with 8:RA1983); and GTAM's acquiescence to the continuing distributions[3] (compare XAB at 63, 65 with 8:RA:1984). Wells Fargo's separate statement of disputed facts referenced the extrinsic evidence. (13:RA3491-3491, 3494, 3504, 3508-3509, 3512, 3515-3523.) While the exact legal argument and authority were not mentioned in Wells Fargo's briefing, given the discussion of the extrinsic evidence in the brief, Wells Fargo necessarily argued that extrinsic evidence should be admitted to construe the word "payable." As in *Boyle*, Wells Fargo need not provide all arguments and citations to avoid forfeiture, as long as the specific grounds for the challenge are presented to the trial court – which they were.[4]

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[3] Cabazon's admissions in the financial statements were argued at the hearing. (Compare XAB at 64-65 with RT76:1-77:9.)

[4] While GTAM makes much of Wells Fargo's statement in its briefing that "payable" was unambiguous (Opp. at 22), this in itself cannot achieve either a waiver or a forfeiture. Indeed, during the course of the briefing, it became apparent that "payable" was reasonably susceptible to more than one meaning, as Movants and Wells Fargo had differing interpretations. Wells Fargo also argued during the hearing that "payable" was ambiguous. (RT73:11-16, 79:9-17.)

The policy behind waiver and forfeiture, fairness, has been fulfilled here. (*JRS Products, Inc, supra*, 115 Cal.App.4th at p. 179; *Richmond, supra*, 196 Cal.App.3d at p. 874.) The court actively participated in the discussion of the extrinsic evidence. (RT71:19-82:11.) Movants argued in their reply papers that the extrinsic evidence did not make the continuing distributions "payable" (12:RA3390-3392, 3459-3462; 12:RA3412-3413, 3422-3423, 3429-3433; 13:RA3491-3491, 3494, 3504, 3508-3509, 3512, 3515-3523.)

Indeed, GTAM assumes that a waiver is effectuated by first mentioning an argument at the hearing, a result that is not supported either by GTAM's authority nor the facts of this case. GTAM's authorities mostly find forfeiture or waiver where the issue was not presented at all in the trial court.[5]

The only case GTAM cites which discusses a waiver based on an argument made at a hearing, *In re Marriage of Crosby & Grooms* (2004) 116 Cal.App.4th 201, 212, is inapposite. There, the husband contended on appeal that the trial court should have used Oregon's child support guidelines, not California's, due to Oregon's lower cost of living. His

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[5] See, e.g., *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1320 (forfeited argument since first made on appeal); *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1336 (same); *Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 750 (same); *F.D.I.C. v. Dintino* (2008) 167 Cal.App.4th 333, 355 (same); *McMillan v. Stroud* (2008) 166 Cal.App.4th 692, 705, fn. 13 (same).

arguments before the trial court, which GTAM admits are "vague" (Opp. at 24), amounted to a request that the court use Oregon or Idaho guidelines because the family lived in Oregon and the parties agreed to Oregon law, but he never argued that Oregon law should apply due to a lower cost of living. (*Id.* at pp. 211-212 & fn. 8.) Here, the arguments were far from "vague": Wells Fargo described the extrinsic evidence in both the briefing and during the hearing, and specifically referenced the legal standard and supporting authority at the hearing. Notably, *Crosby* assumes that a forfeiture would not occur had the arguments at the hearing been sufficiently specific, a failing not present in this case.

Wells Fargo has neither waived nor forfeited its argument that extrinsic evidence should be admitted to demonstrate the meaning of "payable."[6]

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[6] Although GTAM states that Wells Fargo took contrary positions during discovery (Opp. at 23), GTAM fails to cite any cases wherein a position taken in discovery constitutes a waiver or forfeiture. Nor did Wells Fargo ever argue "against" an evidentiary submission in its briefing, as GTAM represents. (*Id.* at 23-24.)

2. "Payable" Is Reasonably Susceptible to Wells Fargo's Interpretation.

a. The Terms of the Transaction Agreements Demonstrate that "Payable" Is Reasonably Susceptible to Wells Fargo's Definition.

GTAM wrongly argues that Wells Fargo's definition of "payable" fails when analyzed in the context of the Transaction Agreements. GTAM itself ignores that context, referencing only EVTDA's requirement to deposit funds into the Custodial Account equal to PAMDs. (Opp. at p. 27.) GTAM's cherry-picking ignores other sections indicating "payable" is reasonably susceptible to Wells Fargo's interpretation.

The definition of DARs itself indicates that what is payable is not limited to the amounts permitted under the Bridge Loan, as discussed *supra*.

Likewise, under the Tribal Covenant, Section 8.7(b) of the Indenture, Cabazon has an obligation to deposit distributions into the Custodial Account independent of the Bridge Loan. (5:RA1241-1242.) That obligation is distinct from EVTDA's PAMD-limited permission to distribute revenue, and must be given effect. DARs must also include distributions not permitted under the Bridge Loan to avoid making Section 8.7(b) surplusage, given Cabazon's covenant in Section 8.7(a) to comply with the PAMD-limited provisions of the APA. (XAB at 72-73.)

Lastly, the APA expressly states the Wells Fargo's security interest in the DARs was created "for the benefit and security of" the Noteholder and "as security for the performance of [Cabazon's obligations]." (5:RA1252, 1254.) If DARs were tied to the Bridge Loan, as GTAM asserts, Wells Fargo would have no security on default of EVTDA's and Cabazon's obligations. Wells Fargo does not need collateral when EVTDA deposits money into the Custodial Account, since Wells Fargo controls that account. (See 5:RA1254-1258.) Only when EVTDA and Cabazon fail to deposit Resort revenues into the account that security is essential, regardless of a Bridge Loan default. Otherwise, the point of security would be obviated[7] – a result which "bother[ed]" the trial court when it issued its tentative order granting the movants' motion for summary adjudication.[8] (RT75:2-9.)

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[7] See Cal. Civ. Code, § 1652 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."); *Anderson v. Badger* (1948) 84 Cal.App.2d 736 ("If general intent and purpose was to bind respective parties as they would be bound by a purchase and sales agreement, a limitation of defendant's obligation to that of a mere agent would be repugnant to general purpose and intent and could be disregarded.").

[8] GTAM represents that Wells Fargo has a remedy during default, but it "may not circumvent the capital structure in order to exercise it." (Opp. at 30, fn. 21.) GTAM fails to identify this remedy.

Therefore, the provisions of the Transaction Agreement indicate, at the very least, that "payable" is reasonably susceptible to both interpretations.

b. Had the Trial Court Considered Extrinsic Evidence, Summary Adjudication Would Have Been Precluded.

GTAM does not dispute that the lower court failed to consider extrinsic evidence (Opp. at 4) – indeed, its main argument rests on Wells Fargo's purported forfeit of the argument. GTAM then argues that the extrinsic evidence does not create a triable issue of fact. However, in so doing, GTAM actually creates triable issues of fact as to the interpretation of the extrinsic evidence.

GTAM's fallback argument to Wells Fargo's extrinsic evidence is to question how the specific extrinsic evidence can "change" the terms of the Bridge Loan and the Transaction Agreements. (Opp. at 29-33 & fn. 22.) GTAM, yet again, misses the point. The extrinsic evidence does not alter any of the terms of the agreement, but reveals that either (1) "payable" is reasonably susceptible to Wells Fargo's interpretation or (2) a question of fact exists based on conflicting evidence as to the meaning of "payable." Either of these results should have precluded summary adjudication here.

(i) Cabazon's Direction to EVTDA to Distribute Resort Revenues After April 2012 Demonstrates that the Continuing Distributions Are Payable.

In its Opening Brief, Wells Fargo showed that EVTDA's continued distributions are "payable" because they were done at Cabazon's direction to continue distributions after default and EVTDA's governing ordinance that obligates EVTDA follow Cabazon's directions. (XAB at 63-64.) The ordinance, however, provides that any distributions must be made subject to EVTDA's debt "requirements and limits" – as GTAM argues (Opp. at 29, fn. 18). The extrinsic evidence therefore supports both proffered meanings. (XAB at 69.)

Although GTAM repeats its mantra that distributions are prohibited while the Bridge Loan is in default, and therefore the ordinance and Cabazon's directives cannot demonstrate that "payable" means "may, can, and should be paid," GTAM admits that EVTDA makes distributions as Cabazon directs. (XAB at 28.) GTAM does not explain why amounts EVTDA is required by Cabazon to distribute are not "payable" to Cabazon, in any common-sense meaning of the word.

EVTDA's continuing distribution of Resort revenues at Cabazon's direction is a clear course of conduct evidencing that EVTDA and Cabazon believe that the distributions are permitted. (See *Southern Cal. Edison Co.*

v. Superior Court (1995) 37 Cal.App.4th 839, 851 (conduct relevant to show meaning reasonably susceptible).) Prior to March 2012, Cabazon authorized EVTDA to distribute $1,121,600 monthly "unless and until otherwise directed by" Cabazon, without a caveat that the distributions were subject to any Bridge Loan restriction. (7:RA1885.) In March 2012, when contemplating defaulting under its debts, EVTDA resolved that it "be, and hereby is, authorized and directed to continue monthly distributions to [Cabazon], but only as and to the extent [EVTDA] is authorized and directed to make such distributions pursuant to the further direction of [Cabazon] as required under [EVTDA's] enabling Ordinances." (7:RA1882.) After Cabazon promptly adopted a resolution directing EVTDA to distribute $668,000 monthly (6:RA1605-1606; 7:RA1886), EVTDA made the required distributions. Clearly, EVTDA and Cabazon believe that such distributions comply with tribal law.

GTAM casts the continued distributions as a violation of the ordinance. (Opp. at 29, fn. 18.) Any conflict between the ordinance and the actions of Cabazon and EVTDA creates a material issue of fact as to whether the distributions are "payable" by EVTDA, which precludes summary adjudication.

(ii) Cabazon Created a Triable Issue of Material Fact as to "Payable" When It Admitted It Breached the Indenture.

Cabazon admitted in its financial statements that it considered the continuing distributions to be DARs when it stated that EVTDA's failure to deposit distributions into the Custodial Account "is an event of default under Section 6.1(d) of the Indentures." (XAB at 64-65.) GTAM, however, spins Cabazon's admission as an acknowledgement that a breach occurred due to Cabazon's failure to pay Wells Fargo, not a failure to deposit DARs into the Custodial Account. (Opp. at 29-30.) But Section 6.1(a) and (b) of the Indenture refer to payment defaults (5:RA1158), while Section 6.1(d), the section the financial statement references, covers defaults caused by "the failure of the Tribe to perform or observe any *other* covenant or agreement." (*Ibid.*) The admission thus refers to EVTDA's failure to deposit funds into the Custodial Account, not a payment default. GTAM's reading of Cabazon's financial statements in implausible.

Moreover, Cabazon clearly interpreted that admission as relating to its failure to deposit DARs into the Custodial Account. Although a Cabazon representative denied, in errata after the deposition, that Cabazon's admission of default was accurate, he acknowledged that Cabazon had admitted in its financial statements to defaulting "by virtue of failing to make those deposits . . . ." (7:RA1827-1830.) In other words, he

gave Cabazon's admission the same interpretation Wells Fargo does: the distributions were DARs, and the failure to deposit them in the Custodial Account breached Cabazon's covenants under the Indenture.

Plainly, with Wells Fargo and Cabazon through its admission advancing one definition of "payable," and GTAM (joined on appeal by Cabazon) advancing another definition, summary adjudication was improper.

(iii) The Distributions Are Dividends, and Are Thus "Payable."

In its Opening Brief, Wells Fargo showed that the Offering Memorandum's and the Transaction Agreements' characterization of distributions of Resort revenues as dividends demonstrated the distributions are "payable," since dividends create a debt in favor of the payee. (XAB at 64.) GTAM contends in opposition that the Offering Memorandum predates the APA and therefore does not control the definition of DARs as amended in the APA. This contradicts GTAM's trumpeting of the Offering Memorandum in other contexts (see Opp. at 40) and ignores the inclusion of "dividends" in the definition of DARs. The Offering Memorandum is clear evidence of Cabazon's understanding that distributions constituted dividends, regardless of its prior date.

GTAM's contention that the characterization of distributions as "dividends" does not exempt the distributions from other operative terms in the Transaction Agreements is unavailing, as discussed *supra*.

(iv) The Bridge Lenders' Acquiescence Demonstrates that the Continuing Distributions Are Payable.

GTAM does not dispute that movants have repeatedly represented that, even if the Bridge Loan is in default, EVTDA may distribute Resort revenues to Cabazon with GTAM's consent, forbearance, or acquiescence – and that such distributions continue at Cabazon's direction. (See 5:RA1390-1392; 6:RA1635-1636, 1646, 1653-1654, 1657; 13:RA3736-3737; 21:RA1887-1958.) Because EVTDA continues to distribute Resort revenues after default per Cabazon's instructions, with the Bridge Lenders' knowledge and acquiescence, such distributions are therefore "payable."

GTAM takes issue, however, with Wells Fargo's argument that the record does not indicate that the Bridge Lenders have taken any action to stop the distributions or ask that the distribution be returned. In doing so, GTAM refers to a separate lawsuit against Cabazon seeking a declaration that distributions are held "in trust" and for damages (the "GTAM Action," see GTAM's RJN Ex. A) (Opp. at 32) filed months after the trial court's order on summary adjudication and entry of judgment. Evidence of the GTAM Action is not contained in the record nor was ever considered by

the trial court. Since an appeal reviews the correctness of a judgment at the time it was entered, on the record before the trial court, not based on facts occurring after the entry of the judgment appealed on, the GTAM Action cannot be considered here. (*In re Zeth S.* (2003) 31 Cal.4th 396 405.)

Even if post-judgment documents could be relevant (which they are not), the mere fact that GTAM filed an action does not demonstrate that the conditions precedent to recovery under Section 6.19(c) have been met. Distributions must only be returned "upon written requests of the Administrative Agent [which is not GTAM] or [EVTDA]" (3:RA0724), and the GTAM Action does not satisfy that condition. Notably, GTAM dismissed its breach of contract claim, which demanded damages in the amount of the distributions, soon after filing the GTAM Action (see Wells Fargo's RJN, Ex. 1), so all that remains is a declaratory relief claim. Moreover, GTAM concedes it filed the GTAM Action expressly in an attempt (albeit misguided) to correct a vulnerability it perceived to its position on appeal: to argue that it did not "consent" to the distributions. (See Wells Fargo's Opposition to GTAM's RJN, Ex. 1.) GTAM should not be permitted to use judicial notice as GTAM seeks to do here, to show that it sought to do after judgment what it perhaps should have done before summary adjudication was granted, to bolster its argument on appeal.[9]

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[9] GTAM contends, in a footnote, that its reservation of rights shows it has not acquiesced to the distributions. (Opp. at 33, fn. 25.) However, a

B. The Trial Court Erred In Disregarding the Tribal Covenant, Under Which Cabazon Is Obligated, Independent from the Bridge Loan, to Deposit DARs.

Under the Tribal Covenant,[10] Cabazon has an obligation to deposit Resort revenue distributed to it into the Custodial Account – an obligation that the trial court disregarded in granting Movant's motion for summary adjudication. GTAM, in its Opposition, does not address Wells Fargo's arguments in its Opening Brief as to the difference between the Tribal Covenant – which is independent of the Bridge Loan – and the EVTDA Covenant[11] – which expressly ties its obligation to deposit distributions to the amount permitted under the Bridge Loan. In addition, GTAM fails to dispute that the conflicting evidence concerning Cabazon's admission in financial statements and the "capital structure" create a triable issue precluding summary adjudication. Instead, GTAM mischaracterizes Wells Fargo's arguments and interprets the Tribal Covenant in a manner contrary to the rules of contractual construction. Its argument, however, is

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reservation of a right to take action at an unspecified future time does not mean that distributions being made at the direction of Cabazon, with GTAM's acquiescence, are not "payable."

[10] The Tribal Covenant, Section 8.7(b) of the Indenture, as amended, provides, "[s]o long as the Notes are Outstanding . . . [Cabazon] shall deposit or cause to be deposited all of the [DARs] into the Custodial Account promptly after receipt thereof." (5:RA1241-1242.)

[11] The EVTDA Covenant, Section 2 of the APA, provides that "as long as any of the Senior Notes . . . [are] outstanding . . . [EVTDA] shall deposit in the Custodial Account [DARs] equal to [PAMDs] . . . " (5:RA1254.)

ineffective – the trial court erred in resolving conflicting evidence concerning whether the Tribal Covenant imposed a separate duty on Cabazon to deposit distributions. Having done so, it improperly granted summary adjudication.

GTAM first asserts that the Tribal Covenant only recognizes that DARs must be deposited into the Custodial Account, and Wells Fargo fails to show how the Tribal Covenant alters the definition of DARs. (Opp. at 35.) This mischaracterization of Wells Fargo's argument can be summarily dismissed – Wells Fargo does not argue that the Tribal Covenant itself demonstrates that the continuing distributions are "payable," but that once the distributions are determined to be "payable", see *supra*, the Indenture mandates that Cabazon deposit the funds regardless of any Bridge Loan default.[12]

GTAM's contention that the Tribal Covenant is a "guarantee" of EVTDA's pledge of DARs and therefore only requires that Cabazon ensures that DARs flow to the Custodial Account (Opp. at 36) is likewise unavailing. Section 8.7(a) (not the Tribal Covenant) requires Cabazon to comply with the APA, and to cause the EVTDA to comply with its

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[12] While the Tribal Covenant itself does not demonstrate that distributions after default are DARs, that covenant, taken in conjunction with Section 8.7(a)'s separate covenant requiring Cabazon to comply with the APA, demonstrates that DARs are not limited to amounts permitted under the Bridge Loan. (XAB at 72-73.)

provisions; in that sense, it could be deemed a form of "guarantee." The Tribal Covenant in Section 8.7(b), however, does not refer to the APA, and provides "[Cabazon] *shall deposit* or cause to be deposited all of the [DARs] . . ." (5:RA1241-1242 emphasis added))[13] (Opp. at 36.) When each word is given significance to avoid surplusage, as required (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 49), "shall deposit or cause to be deposited" must be interpreted to give meaning to *both* "shall deposit" and "shall cause to be deposited." (See *Cardio Diagnostic Imaging Inc. v. Farmers Insurance Exchange* (2012) 212 Cal.App.4th 69, 75 (holding that must interpret contract stating "backs up or overflows" "in a way that gives meaning to both 'backs up' and 'overflows.'").) Under the Tribal Covenant, therefore, Cabazon has its own independent mandate to "deposit" distributions, not merely to "cause" EVTDA to deposit them.[14]

GTAM asserts that the Tribal Covenant only protects Wells Fargo in the event EVTDA were to distribute Resort revenue directly to Cabazon when it is not in default under the Bridge Loan, but not where a "senior" creditor is not being paid. The Tribal Covenant does not support this statement, since it – unlike the EVTDA Covenant – contains no reference

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13 GTAM disingenuously omits "shall deposit" from its quotation of the Tribal Covenant.

14 Although GTAM states that EVTDA is the only entity authorized to operate the Resort, such a fact has no relevance to the Tribal Covenant's mandate for Cabazon to deposit distributions. The Tribal Covenant does not impact the Resort's operation.

to distributions permitted under the Bridge Loan. GTAM does not dispute the clear difference in language between the Tribal and EVTDA Covenants, or explain why that difference should not be given effect.

Therefore, Cabazon has an obligation, independent from EVTDA's obligation and the Bridge Loan, to deposit DARs into the Custodial Account.

C. The Trial Court Erred In Finding that the Note Was Subordinated to the Bridge Loan, Since Triable Issues of Material Fact Exist.

In its Opening Brief, Wells Fargo demonstrated that the trial court erred in holding that any injunctive relief would subordinate the Bridge Loan to the Transaction Documents, since a triable issue of material fact exists. GTAM's argument supports the existence of a triable issue of material fact. Indeed, as GTAM's argument has the same failing as its prior arguments: its refusal to acknowledge that Cabazon continues to receive distributions pledged to Wells Fargo.

GTAM admits that no written subordination agreement exists. (Opp. at 39.) Instead, GTAM argues that Wells Fargo's and Saybrook's claim to Resort revenues is structurally subordinated to the Bridge Loan – payment to EVTDA's creditors is a "necessary predicate" to distributing Resort revenues to Cabazon for the payment of Cabazon's creditors. (Opp. at 38-40.) GTAM cites no case enforcing a "structural subordination" to

determine competing lien claims, without reference to the priority provisions of the Commercial Code and other governing law. That omission is telling: GTAM cannot show, under the California Commercial Code, the law of trusts or otherwise, that it has a right in the ongoing distributions senior to that of Wells Fargo. Talk of "capital structure" is cheap, but the actual priorities must be determined by governing substantive law. As demonstrated *infra* and in Wells Fargo's Opening Brief, Wells Fargo's prior security interest in and right to distributions received by Cabazon is prior to any claim of GTAM.

Wells Fargo is not making a claim to Resort revenues in the possession of the EVTDA. Once Resort revenues reach Cabazon, however, Wells Fargo is entitled to payment as agreed in its Transaction Agreements. Wells Fargo is merely seeking to enjoin Cabazon from taking distributions to which, as between Cabazon and Wells Fargo, Wells Fargo has a superior right.

GTAM contends that because Wells Fargo and Saybrook agreed to the structural subordination and they cannot compel Cabazon to deposit funds in the Custodial Account.[15] (Opp. at 40-41.) As evidence, GTAM

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[15] GTAM also states that Wells Fargo and Saybrook specifically bargained for their junior position in the capital structure when they negotiated to lend directly to Cabazon and receive a higher interest rate. (Opp. at 41-42 & fn. 34.) The evidence GTAM cites does not support its statement.

points to statements made in such documents as the Offering Memorandum, Bridge Loan, and in Wells Fargo's briefing in support of its preliminary injunction which, at the most, stand for the unremarkable propositions that Wells Fargo can only get paid out of funds distributed to Cabazon, or other tribal assets; Wells Fargo took the risk that EVTDA would not make distributions to Cabazon; and EVTDA is contractually prohibited from distributing revenues to Cabazon if the Bridge Loan is in default. (See Opp. at 40-42.) None of these documents demonstrate that either Wells Fargo and Saybrook agreed to or were informed of the possibility of the situation occurring now – that on default of the Bridge Loan, EVTDA would distribute Resort revenues directly to Cabazon, permitting Cabazon to ignore its debts, the waterfall, and Wells Fargo's lien.[16] GTAM makes no showing that in this situation, Wells Fargo is not entitled to assert its lien.

GTAM fails to address most of the facts Wells Fargo asserted in its Opening Brief that demonstrate triable issues of material fact exist. To the extent that GTAM contests Wells Fargo's right of recourse against all Cabazon assets except for certain real property held in trust (5:RA1175), and its reliance on certain sections of the California Uniform Commercial

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16 GTAM also points out that Wells Fargo consented to the Bridge Loan. However, any such consent would merely permit the agreement to become effective, leaving the relative priority of the liens unaffected.

Code as to the rights of secured parties[17] (Opp. at 40-41 & fn. 33), GTAM's arguments presuppose that it has a continuing security interest in the Resort revenues after they have been distributed to Cabazon or that the distributions are held "in trust" for GTAM's benefit. As discussed in Section II, D., *infra*, a triable issue of fact exists as to whether GTAM's lien in EVTDA's assets survives the transfer to Cabazon and whether Cabazon holds the distributions "in trust" for GTAM's benefit, as GTAM contends, or merely owes a debt to EVTDA.[18] Likewise, a triable issue of material fact exists as to these issues and whether they demonstrate that Wells Fargo's security interest in distributed funds is subordinated to the lien or rights of GTAM.[19]

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[17] GTAM asserts that Wells Fargo relies on "inapplicable" provisions of the Uniform Commercial Code, without any further explanation.

[18] GTAM cites Commercial Code provisions which purport to stand for the proposition that its security right in the collateral continues even after disposition to Cabazon. (Opp. at 41 & fn. 33) All of these sections are subject to the limitations imposed by Division 9 – including Section 9332, which permits a transferee to take assets free of a security interest unless it is colluding with the transferor to violate the rights of the secured party. (See, e.g., 12:RA3175-3188, 3346, 3350.) As discussed in Section II.D.3., no collusion has been asserted or shown here. Funds distributed to Cabazon by EVTDA are therefore free of any security interest GTAM has in EVTDA's bank accounts or other assets.

[19] GTAM rejects Wells Fargo's showing that it is entitled to an injunction requiring EVTDA to deposit distributions pursuant to Section 9406 of the California Commercial Code (XAB at 76-79), stating that the argument is based on an assumption that the distributions are "properly made." (Opp. at 39, fn. 30.) Wells Fargo is entitled to an injunction against EVTDA if the distributions constitute DARs subject to its lien. Because, as Wells Fargo has shown, distributions are "payable" by EVTDA

D. Triable Material Facts Exist as to Whether GTAM Has a Lien in or Claim Against Distributions While in Cabazon's Possession.

Under the express terms of the Bridge Loan limiting GTAM's security interest in Cabazon's assets to "tangible and intangible personal property . . . the primary use of which is for the benefit of the [Resort]" (3:RA0891, 0893), the Bridge Lenders – as GTAM has admitted – have no security interest in Cabazon's bank accounts. (5:RA1379; 7:RA1834-1835.) Despite this contractual provision, GTAM claims that distributions in Cabazon's possession are held in a trust under Section 6.19(c) of the Bridge Loan (3:RA0724) and that its assignment of EVTDA's contractual rights under Section 6.19(c) gives it a continuing interest in those distributions. GTAM is wrong.

1. Section 6.19(c) Creates a Debt, Not a Trust.

In its Opening Brief, Wells Fargo demonstrated that a material issue of triable fact existed as to whether Section 6.19(c) (3:RA0274) created a debt or a trust. In doing so (and contrary to GTAM's contention that Wells Fargo, in its appellate briefing, only relied on Cabazon's commingling of

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and therefore DARs, Wells Fargo is entitled to an injunction against EVTDA as an account debtor regardless of any Bridge Loan default. Contrary to GTAM's argument (Opp. at 30, fn. 20), that injunction can be entered against EVTDA even if EVTDA does not have an independent obligation under the APA to make the deposit. (XAB at 77-78.)

funds (Opp. at 44)), Wells Fargo pointed to Section 6.19(c)'s failure to require Cabazon to segregate and invest distributions or to forbid Cabazon from using the funds for its own benefit, GTAM's knowledge that the distributions funded government programs (i.e., GTAM knew that Cabazon used the funds for its own benefit), and Cabazon's admission that, during the drafting of the Bridge Loan, there was no "thought regarding the maintenance of such a segregated account." (XAB at 82-83.) Indeed, the movants themselves created a triable issue of material fact in the lower court when GTAM claimed that Section 6.19(c) barred comingling of funds and Cabazon claimed the exact opposite. (*Id.* at 83.)

In its Opposition, GTAM asserts that a trust was created solely by virtue of the use of the word "trust" in Section 6.19(c). In doing so, GTAM essentially ignores the test of whether a trust or a debt is created: a determination of the intent of the parties by the circumstances of the transaction and the subsequent conduct of the parties, e.g., whether the funds are segregated and prohibited from being used by the payee for its own purposes.[20] (*Petherbridge v. Prudential Sav. & Loan Ass'n* (1978) 79 Cal.App.3d 509, 516, 517, 522.)

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[20] While GTAM states, correctly, that the existence of a trust is to be determined "objectively" (Opp. at 43), that "standard" does not supplant the determination of the intent of the parties, it merely means that the intention of the parties is to be determined objectively. (*Prebytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 931.)

Indeed, GTAM dismisses all of Wells Fargo's evidence, contending that neither pre-breach nor post-breach conduct is relevant to determine whether the parties intended a trust. (Opp. at 44 & fn. 37.) GTAM does not explain why pre-breach conduct nor the specific evidence Wells Fargo proffered is not probative, merely stating that Section 6.19(c) applies only on default, and the conduct Wells Fargo points to arose before that time. GTAM's assertion not only contradicts the rules of contract interpretation, which examines the intention of the parties at the time of drafting (see Cal. Civ. Code, § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting . . . . ")), but also the very case it cites, *Petherbridge*, *supra*, 79 Cal.App.3d at pp. 516-517, 522. In that case, the court held that the circumstances around the transaction must be examined and also examined circumstances before the dispute arose in holding that a debt, not a trust, was created. (*Ibid.*) This makes sense: what the parties intended when they agreed is best demonstrated by their conduct while in agreement, not their conduct once they became adverse.

Having brushed off all pre-breach evidence, GTAM then argues that post-breach conduct of Cabazon's comingling and use of the funds cannot be evidence of an intent to create a trust, since that conduct constitutes a breach of the trust. (Opp. at 44.) GTAM does not point to any particular provisions of the Bridge Loan mandating segregation of funds or forbidding

the use of the funds for Cabazon's own purposes – and none exist. Even after default, under Section 6.19(c), Cabazon is under no obligation to return distributions to EVTDA unless and until the Bridge Lenders' Administrative Agent or the EVTDA so demands (3:RA0274) (which they have not, 12:RA3159-3160); the Bridge Loan therefore expressly contemplates Cabazon's continued possession and use of the distributions after default, without segregation, for an indefinite period. Indeed, since GTAM knew before default that distributions to Cabazon were used to support Cabazon's government and member services (see 11:RA3021-22, 3039-3040; 10:RA2778-2779), GTAM necessarily knew that after a default, Cabazon would continue to comingle the funds and use them for the same purposes.[21]

Lest we wonder what evidence would be probative according to GTAM, GTAM points to the term "trust" in Section 6.19(c). But the mere use of "trust" is not dispositive of an intent to create a trust; it is only one of the factors to be considered. (*Petherbridge, supra*, 79 Cal.App.3d at p. 519.) While GTAM represents that the use of the word "trust" is "heavily

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[21] GTAM further argues that it properly noticed a default and that it filed; after the judgment, a lawsuit to enforce its rights under Section 6.19(c). (Opp. at 44.) These actions do not demonstrate that Section 6.19(c) creates a trust or that the Administrative Agent or EVTDA made the requisite demand, merely that it noticed a default and filed an action. Moreover, as stated *supra*, the GTAM Action is not relevant to any issues on appeal. (*In re Zeth S., supra*, 31 Cal.4th at 405.)

consider[ed]" by courts in inferring intent (Opp. at 45), even the case GTAM cites for that proposition (*Petherbridge*, which never states that use of the term is "heavily considered") proves its representation wrong, as the sentence after the quotation in GTAM's parenthetical makes clear: "the use by the parties of the words 'in trust' is not conclusive proof of their intent to create a trust relationship; the language employed by the parties is only one of the evidentiary facts to be considered." (*Petherbridge*, *supra*, 79 Cal.App.3d at p. 519.) Indeed, in *Petherbridge*, the plaintiff homeowner, similar to GTAM here, relied exclusively on the language of the contract that money paid to defendant bank was, at defendant's discretion, to "be held . . . in trust." (*Id.* at pp. 516, 519.) The appellate court rejected plaintiff's contention, holding that the intent of the parties, as demonstrated by the circumstances of the transaction, their relationship, and their conduct, "overwhelmingly" supported the trial court's determination that the parties did not intend to create a trust. (*Id.* at pp. 517-523.) The result should be the same here.

GTAM also cites *Lonely Maiden Productions, LLC v. Goldentree Asset Management, LP.* (2011) 201 Cal.App.4th 368 to support its proposition that the term "trust" alone may indicate an intention to create a trust. Similar to *Petherbridge*, this case supports Wells Fargo's position, not GTAM's. In *Lonely Maiden*, GTAM, the defendant, argued that a trust was not created, and therefore GTAM could foreclose on its security, the

general deposit accounts of payroll processing company Axium. Plaintiffs, clients of Axium, argued that the funds were held in trust to pay payroll obligations, not for Axium's general use. The appellate court disagreed, holding that plaintiffs failed to demonstrate any intent to create a trust. (*Id.* at p. 372.) The court pointed out that plaintiffs did not identify any specific language in the written agreements and the agreements, in any event, did not impose any "express limits" on the use of the funds. (*Id.* at pp. 377, 380-381.) Nor was there any evidence that the funds were separated into impound accounts. (*Id.* at pp. 380-381.)

Having cited to *Lonely Maiden*, GTAM attempts to distinguish the contracts in *Lonely Maiden* and the Bridge Loan here, stating that, unlike the *Lonely Maiden* service agreements, Section 6.19(c) imposes "clear and express limits on the use of wrongful distributions, and provides a way for the Bridge Lenders to recover those distributions." (Opp. at 45.) What these specific "clear and express limits" are, GTAM does not say – and there are none that have ever prevented Cabazon from using the funds as it wishes or from claiming them as its own. Essentially, GTAM argues that use of the word "trust" itself creates "clear and express limits." As *Petherbridge* makes clear, it does not.

GTAM's argument that a trust was created must be rejected since a triable material issue exists (at the very least) as to whether Section 6.19(c) creates a debt, not a trust.

2. Any Claim of GTAM Under Section 6.19(c) Is Subject to Wells Fargo's Prior Perfected Lien.

GTAM asserts that its lien on EVTDA's contractual right under Section 6.19(c) of the Bridge Loan gives GTAM a continuing interest in post-default distributions. (Opp. at 43-44, fn. 35-36.) That argument is likewise unavailing. Whatever claims EVTDA has under Section 6.19(c) are unsecured and, regardless of any attempted reservation of an equitable interest, are subject to Wells Fargo's prior perfected security interest. (Cal. U. Com. Code, §§ 9202, 9322(a)(2).) GTAM's rights, if any, as EVTDA's secured party are similarly junior to Wells Fargo's lien.

GTAM contends, without any authority, that Section 6.19(c) "operates to vest in the EVTDA the sole interest in all transfers it makes to the Tribe in violation of the Bridge Loan." (Opp. at 45.) This contention, however, contradicts the California Commercial Code. "An agreement between the debtor and secured party which prohibits a transfer of the debtors' rights in collateral or makes the transfer a default does not prevent the transfer from taking effect." (Cal. U. Com. Code, § 9401, subd. (b).) Moreover, even if GTAM has attempted to reserve any rights in the distribution, GTAM cannot claim any rights that are contrary to the remainder of Division 9 of the Commercial Code, such as the rights of priority of secured creditors. (Cal. U. Com. Code, §§ 9202, 9322, 9332.)

Wells Fargo's perfected security interest thus attaches to distributions made by EVTDA after default regardless of Section 6.19(c).

GTAM's argument is also barred by the express provisions of the Bridge Loan. Under the Bridge Loan, Cabazon has a limited waiver of sovereign immunity in the event of a prohibited distribution: the Bridge Lenders' recourse for damages is only as to "assets held by [Cabazon] . . . used in connection with" the Resort. (3:RA0674, 0744.) (See *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369 (waiver of sovereign immunity is "strictly construed and applied.").) The Security Agreement similarly limits the Bridge Lenders' recourse against Cabazon in the event of prohibited distributions to the "Collateral," which expressly excludes "tangible and intangible personal property of [Cabazon] the primary use is not for the benefit of the [Resort]." (3:RA0861, 0863.)

GTAM has never asserted that Cabazon's bank accounts are primarily used for the benefit of or in connection with the Resort (and they are not). By accepting the terms of Cabazon's limited sovereign immunity waiver, GTAM has agreed that it cannot recover prohibited distributions after their transfer to Cabazon, whether under the Bridge Loan or as EVTDA's secured creditor under the Security Agreement, and is limited to recourse against Resort-related assets.

Likewise, Bridge Loan Section 12.09 does not extend the Bridge Lenders' senior lien to improper distributions or create an enforcement mechanism for such a lien. Although Section 12.09 provides a right of limited recourse against Cabazon when EVTDA is in default and continues to distribute money to Cabazon (3:RA0753), this section does not grant the Bridge Lenders a lien on distributions received by Cabazon, much less a lien that would have priority over Wells Fargo's perfected security interest. The Bridge Lenders can only make a claim against Cabazon equal to the amount of impermissible distributions as an exception to Cabazon's law forbidding enforcement of "obligation(s) of the [EVTDA]" against the Tribe. (5:RA1381; 6:RA1421.) Nor does Section 12.09 provide recourse against all of Cabazon's assets; any recourse against Cabazon would, as noted above, be limited under Cabazon's waiver of sovereign immunity to assets used in connection with the Resort.

Wells Fargo's perfected security interest in distributions received by Cabazon is prior to any claim of EVTDA or its secured creditor under Section 6.19(c), as well as any claim by GTAM under Section 12.09, and under Cabazon's limited waiver of sovereign inmunity, GTAM has no recourse against prohibited distributions in the possession of Cabazon.

3. Since EVTDA and Cabazon Did Not Collude Against the Bridge Lenders, Any Lien of the Bridge Lenders Terminated on Distribution to Cabazon.

In its Opening Brief (at 85-87), Wells Fargo demonstrated that the Bridge Lenders' lien in EVTDA's funds extinguishes upon their transfer to Cabazon under Section 9332 of the California Uniform Commercial Code ("Section 9332"): in order for the Bridge Lenders to retain their security interest, they must demonstrate that EVTDA and Cabazon acted "in collusion" to violate the Bridge Lenders' rights. (Cal. U. Com. Code, § 9332; see *Amegy Bank Nat. Ass'n v. Deutsche Bank Corp.* (M.D. Fla. 2013) 917 F.Supp.2d 1228, 1239 (party seeking to demonstrate lien after transfer has burden to demonstrate collusion).) GTAM, in its Opposition, makes no attempt to show collusion or to refute Wells Fargo's evidence of no collusion.[22]

Instead, GTAM asserts, in one sentence buried at the end of a long footnote, that Section 9332 does not apply since the transfers from EVTDA to Cabazon "are prohibited by the Bridge Loan and explicitly protected by Section 6.19(c)." (Opp. at 44, fn. 36.) GTAM cites no authority in support of this proposition and, as explained above, authority is to the contrary. The Bridge Loan's provisions forbidding distributions after default or

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[22] Even had it done so, the evidence would have created a triable issue of fact.

making such distributions after default do not void the transfer or prevent the transfer from taking effect. (Cal. U. Com. Code, § 9401, subd. (b).)

In addition, Section 6.19(c), even if it creates, in concert with Section 12.09, a lien (which it does not), does not preclude the application of Section 9332. In fact, this is exactly the issue Section 9332 was designed to resolve – who has priority when funds subject to a security interest are transferred to a non-collusive transferee. (See *Orix Financial Servs., Inc. v. Kovacs* (2008) 167 Cal.App.4th 242, 246 (Section 9332 affords broad protection to transferees).) The rule is clear: the rights of the transferee and its secured creditors trump those of the transferor's secured creditor. Even junior creditors of the transferee may enforce their liens once the senior lienholder's lien is discharged under Section 9332. (See Comment 2 to Cal. U. Com. Code, § 9315 (Section 9332 permits most transferees to take funds free of a security interest) (12:RA3175-3184, 3346-3350]); Comment 5 to Cal. U. Com Code, § 9607 (junior secured party may collect and enforce under § 9607; whether that party has priority in the proceeds depends on Section 9332) (12:RA3185-3188, 3346-3350).)

In sum, Section 9332 unequivocally supports Wells Fargo's entitlement to the transferred funds.

E. Triable Material Facts Existed as to Whether Wells Fargo Has an Adequate Remedy at Law Due to Defendants' Insolvency.

Wells Fargo, in its Opening Brief, demonstrated that EVTDA and Cabazon are insolvent, and thus the inadequacy of damages element for both specific performance – a prerequisite for obtaining injunctive relief on a contract – and injunctive relief has been met. (XAB at 14, 87-88.) GTAM does not contest the specific evidence Wells Fargo proffered in support of insolvency, but contends that specific performance is not available to enforce a contract to lend money, insolvency does not suffice to demonstrate inadequacy of damages for an action under a contract to lend money, and Wells Fargo is not entitled to injunctive relief since the trial court denied Wells Fargo's motion for a preliminary injunction. GTAM is wrong on all counts.

Indeed, GTAM's arguments as to the availability of specific performance or the sufficiency of proof of insolvency for an action on a contract to lend money (e.g., for repayment of the loan) fail because they are based on a mischaracterization of Wells Fargo's permanent injunction claim as a "contract to lend money." The injunction would enforce EVTDA's and Cabazon's covenants and obligations under the Indenture and the APA to deliver specific collateral in Cabazon's possession into the Custodial Account, not to make monthly repayments of the loan under the

Note. Those obligations of delivery of the collateral into the Custodial Account are separate and distinct from the obligations under the Note to make payments and can be specifically enforced. (See Cal. U. Com. Code, § 9601 (secured party entitled to cumulative remedies, including judgment and enforcing a security interest); *KMAP, Inc. v. Town & Country Broadcasters, Inc.* (1975) 49 Cal.App.3d 544, 547-548 (defendant's breaches of promissory note and security agreement "resulted in two separate wrongs which gave rise to several cumulative remedies.").) Therefore, none of the arguments that GTAM makes in support of its theory that specific performance is not permitted for contracts to loan money, or that that remedy is strictly limited, are apposite here.[23]

Even if GTAM correctly characterized the Transaction Agreements and Wells Fargo's claim, GTAM wrongly contends that specific performance is flatly barred for contracts to lend money. None of the authority GTAM cites (Opp. at 46-47 & fn. 38) – a Supreme Court case and two treatises – bars specific performance for contracts to lend money. Indeed, *Great-West Life & Annuity Ins. Co. v. Knudson* (2002) 534 U.S. 204, 210-211, the sole case GTAM cites for this proposition, provides that specific performance would be permitted for such contracts where money

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[23] Contrary to GTAM's assertions, Wells Fargo has never claimed that its judgment is "an adequate remedy for [Cabazon's] alleged breach of contract, and that an injunction is simply unnecessary." (Opp. at 49.)

damages are inadequate. (See also John R. Kennel, *Loans, advances, or payment of money* (Supp. 2015) 81A CJS § 70 ("[T]he general rule is subject to exceptions where the borrower's remedy at law is inadequate . . . the remedy may lie where the loss to the borrower . . . may be such as to be not fully compensable by an award of money damages.").)[24] *Great-West* does not preclude proof of insolvency as a basis for specific performance – nor even mention insolvency.

GTAM then backtracks on its assertion of a purported bright-line rule, contending that specific performance of "a contract to lend money" is not available based on insolvency alone. (Opp. at 47-48.) This is also an incorrect statement of the law. Under California law, insolvency is sufficient to demonstrate an inadequate remedy at law to award equitable remedies:

> "The mere fact that there may be a remedy at law does not oust the jurisdiction of a court of equity. To have this effect, the remedy must also be speedy, adequate, and efficacious to the end in view. It must reach the whole mischief and secure the whole right of the party . . ." . . . [¶] The remedy of damages, in the context and circumstances of this case, is not

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[24] GTAM further represents that 12 Corbin, Contracts (2012) § 63.7 at p. 248 states that specific performance is unavailable for "money debts or other unilateral contracts." (Opp. at 47, fn. 38.) Even then, Corbin does not report an unqualified rule – stating that "there is generally no difficulty in determining the amount of damages" (emphasis added) and specific performance is precluded where the money judgment does not differ from the requested specific performance. (12 Corbin, Contracts (2012) § 63.7 at p. 248.) As stated *supra*, Wells Fargo's claim for damages and injunctive relief differ.

> an adequate and complete remedy. . . . A fair inference from the uncontested facts here is that the money judgment is uncollectable. [¶] The fact of insolvency – the inability to meet one's debts as they mature — gives rise to a reasonable inference that any money judgment would not be efficacious.

(*Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 264-265 (citing *Quist v. Empire Water Co.* (1928) 204 Cal. 646, 652-653).)

The cases GTAM cites (Opp. at 47-48) do not support its proposition. Two of the cases – *Morrison v. Land* (1915) 169 Cal. 580 and *First Nat'l State Bank of New Jersey v. Commonwealth Fed. Sav. & Loan Ass'n of Norristown* (3d Cir. 1980) 610 F.2d 164 (applying New Jersey law) – do not involve insolvent parties, nor is insolvency even mentioned. The other two out-of-state cases, *Jamison Coal & Coke Co. v. Goltra* (1944) 143 F.2d 889 (applying Pennsylvania law) and *Geo. E. Warren Co. v. A.L. Black Coal Co.* (1920) 102 85 W.Va. 684, are also inapposite here. These cases recognize that insolvency is to be considered in determining whether the remedy at law by way of a money judgment is adequate, unless enforcement would result in the plaintiff obtaining a preference over other creditors. (*Jamison, supra*, 143 F.2d at p. 894; *Geo. E. Warren Co., supra*, 85 W.Va. at pp. 673-67.) Here, as demonstrated above and in the Opening Brief, this rationale would not apply since Wells Fargo has a senor security interest in the distributions.[25]

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[25] GTAM dismisses Wells Fargo's case law where the courts granted preliminary injunctions based on insolvency, asserting that different policy

GTAM does not contest the significant evidence Wells Fargo submitted to demonstrate Cabazon's and EVTDA's insolvency, or offer any evidence that the parties are not insolvent. Instead, GTAM contends that a year before the hearing on the motions for summary adjudication, the trial court denied Wells Fargo's motion for preliminary injunction, and the same result applies here. (Opp. at 48.) However, the court denied the motion without prejudice and invited Wells Fargo to re-file if it could establish insolvency. (4:RA1019-1021; RT10:4-8; RT10:4-8.) Since that hearing, discovery revealed evidence of insolvency. (See, e.g., 8:RA2047-2055, 2138-2139; 9:RA2367-2367; 13:RA3660-3662, 3693-3694, 3698, 3715-3717, 3726-3727, 3741-3742, 3745-3746.) While GTAM faults Wells Fargo for not offering any evidence showing that the Resort is likely to cease operations, that is not the only way to prove "insolvency," and the trial court made no ruling to that effect. (See 4:RA1021; RTL9:4-8.) The prior ruling of the trial court does not preclude injunctive relief.

Therefore, Wells Fargo demonstrated that a triable issue of material fact existed on the issue of inadequacy of remedies due to insolvency.

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concerns such as preserving the status quo apply to preliminary injunctions, but not permanent injunctions. (Opp. at 47, fn. 40.) However, both preliminary and permanent injunctions are permitted where legal remedies are inadequate (Cal. Civ. Code, § 3422, subd. (1); Cal. Code Civ. Proc., § 526, subd. (a)(4)), and GTAM does not explain why insolvency cannot demonstrate inadequacy of monetary compensation for both forms of injunctions.

III. THE TRIAL COURT ERRED IN DENYING WELLS FARGO ATTORNEYS' FEES AND GRANTING EVTDA ATTORNEYS' FEES.

A. The Trial Court Erred In Denying Wells Fargo's Motion for Attorneys' Fees.

In its Opening Brief, Wells Fargo demonstrated that the trial court erred in denying its motion for attorneys' fees based on Section 8 of the APA for multiple reasons: (1) the trial court failed to apply the standard used in awarding EVTDA's attorneys' fees, under which a prevailing party determination must be made for each contract (the "Multiple Contract Rule") (XAB at 94-98); (2) had the trial court applied the Multiple Contract Rule, it would have held that Wells Fargo was a prevailing party on the claims brought under the Indenture and the Note (*id.* at 99-101); and (3) even if the rule employed by the trial court were correct, it abused its discretion in holding that Wells Fargo was not a prevailing party (*id.* at 102-109).

In its Cross-Respondent's Brief ("XRB"), Cabazon does not dispute that the trial court applied the wrong standard for determining the prevailing party to Wells Fargo's motion for attorneys' fees – a standard contrary to the one the trial court applied to EVTDA's motion. Indeed, it admits that only one prevailing party is entitled to attorneys' fees under Section 1717 of the California Civil Code ("Section 1717") on any one

contract (XRB at 94) and that the trial court "concluded that Indenture and APA are 'separate and independent agreements'" (*id.* at 30-31) – thereby conceding that the Multiple Contract Rule was the appropriate rule. In addition, Cabazon expressly declined to address Wells Fargo's showing that, under any standard, it was the prevailing party. (*Id.* at 27, fn. 12.)

Instead of addressing the majority of Wells Fargo's arguments, Cabazon argues solely that Wells Fargo is not entitled to attorneys' fees under the contract. Cabazon's argument lacks merit.

1. The Denial of the Motion for Attorneys' Fees Should Be Reviewed *De Novo*.

Cabazon contends that an order denying an award of attorneys' fees is reviewed under an abuse of discretion standard. (XRB at 25.) But the issue Cabazon asserts here – whether the terms of the Indenture provide a legal basis for an award of attorneys' fees to Wells Fargo – is reviewed *de novo*. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1605; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 59.)

2. Wells Fargo Is Entitled to Attorneys' Fees.

a. The Indenture and Note Incorporate By Reference the APA's Attorneys' Fees Provision.

In arguing that the Indenture does not contain an attorneys' fees provision, Cabazon ignores that the Indenture and the Note incorporate the APA by reference and therefore incorporate the APA's attorneys' fees provision.

Where a contract (which does not contain an attorneys' fees provision) incorporates by reference another contract's attorneys' fees clause, a prevailing party is entitled to recover fees. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 490-91 & fn. 8; *Republic Bank v. Marine Nat. Bank* (1996) 45 Cal.App.4th 919, 921.)

Here, the first cause of action on which Wells Fargo prevailed as against Cabazon is based on breach of the Indenture and the Note. (See 1:AA0010-11.) The Indenture incorporates by reference the "remedies" and "terms and provisions" of the APA (15:RA4174, 4187) and the Note incorporates by reference the Indenture (15:RA4211). Moreover, the Indenture expressly provides, in Section 6.5(a), that Wells Fargo, as trustee, can "protect and enforce its rights and the rights of the Owners under applicable law and under this Indenture" and the APA. (15:RA4153, 4172-4173.)

"The phrase 'incorporation by reference' is almost universally understood, both by lawyers and nonlawyers, to mean the inclusion, within a body of a document, of text which, although physically separate from the document, becomes as much a *part* of the document as if it had been typed in directly." (*Republic Bank, supra*, 45 Cal.App.4th at p. 922.) The Note incorporates by reference, and thus includes, the entirety of the Indenture, and the Indenture incorporates by reference, and thus includes, all "remedies" and "terms and provisions" of the APA – including the provision for attorneys' fees in Section 8.

Notably, Cabazon fails to distinguish Wells Fargo's authority in the Opening Brief or dispute that the Indenture and the Note incorporate by reference the APA and thus its attorneys' fee clause. Instead, it ignores these facts inconvenient to its position and asserts that Wells Fargo cannot ask for attorneys' fees based on a provision in a contract which was not the subject of its breach of contract claim. (XRB at 26.) However, the cases Cabazon cites for this proposition, *Khajavi, supra*, 84 Cal.App.4th at p. 63, and *Brittalia Ventures Co., Inc. v. Stuke Nursery Co., Inc.* (2007) 153 Cal.App.4th 17, fail to aid it. Neither case presented the issue here, where the contract without the attorneys' fee clause incorporates by reference the contract with an attorneys' fee clause. (See *Khajavi, supra*, 84 Cal.App.4th at pp. 59-63 (plaintiff failed to prove that oral employment contract under which he sued contained an attorneys' fees clause although other

employees had written contracts with fee clauses); *Brittalia Ventures, supra*, 153 Cal.App.4th at pp. 29-31 (plaintiff estopped from arguing that it was entitled to attorneys' fees based not on the contract it sued on, but on contract defendants asserted defensively as the definitive contract in the case and plaintiff had to (and did) defeat).) Under *Arntz* and *Republic Bank*, Wells Fargo is entitled to recover attorneys' fees on its successful first cause of action based on the Indenture's incorporation of the APA attorneys' fees provision in Section 8.

b. <u>The APA's Attorneys' Fee Provision Applies to Wells Fargo's Successful Breach of Contract Claims</u>.

Although Wells Fargo demonstrated in its Opening Brief that Section 8 provides for attorneys' fees in this action, Cabazon ignores the clear language of the provision and asserts that Section 8 is limited to compensation for claims asserted only under the APA itself, and therefore, even if incorporated by reference, cannot extend to claims asserted under the Indenture and the Note.[26] (XRB at 28.) But Section 8 is not as narrow as Cabazon contends.

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[26] Cabazon chides Wells Fargo for purportedly failing to quote Section 8 (XRB at 28), despite Wells Fargo's quotation of that attorneys' fees provision. (XAB at 99.) Indeed, Cabazon is guilty of the same conduct of which it erroneously accuses Wells Fargo: it fails to quote the provision, but for two cherry-picked words, in an attempt to bolster its argument. (XRB at 28.)

Contrary to Cabazon's narrow interpretation of Section 8, that section compels the conclusion that an award of attorneys' fees is not limited to claims asserted under "this Agreement" (i.e., the APA), but also (1) "where the conditions for the disbursement of funds under [the APA] are not fulfilled;" (2) "if any material controversy arises [under the APA]," or (3) Plaintiff "is made a party to any litigation pertaining to [the APA], or *the subject matter hereof.*" (15:RA4131 (emphasis added).) As Wells Fargo explained in more detail in its Opening Brief, and although only one condition is necessary, all three of these conditions are satisfied: "the conditions for disbursement of funds under [the APA]" were not fulfilled since the funds were not deposited into the Custodial Account and Saybrook received no payments on its Note (thus leading to breach of contract); Cabazon's breach of its obligations under the Indenture to "cause" EVTDA to deposit DARs into the Custodial Account created a "material controversy;" and Wells Fargo was made a party to litigation pertaining to *the subject matter* of the APA, i.e., the Senior Note Transaction.

Section 8 applies to the current action to support an award of attorneys' fees from Cabazon to Wells Fargo.

c. Wells Fargo May Recover Attorneys' Fees Under Section 8 of the APA Even Though the Indenture Contains a Compensation Provision.

The Tribe's contention that Section 8 of the APA (compensation of custodian) should not apply since its application conflicts with and renders Section 7.4 of the Indenture (compensation of trustee) superfluous (XRB at 29) is likewise erroneous.

Section 7.4 of the Indenture – which Cabazon also failed to quote – provides that:

> *Subject to the provisions of any contract between [Cabazon] and [Wells Fargo]*, [Cabazon] shall pay to [Wells Fargo] reasonable compensation for all services performed by it hereunder as agreed from time to time by [Cabazon] and [Wells Fargo] and also their reasonable expenses, charges and other disbursements and those of its attorneys, agents (including expert consultants) and employees incurred in and about the administration and the performance of their powers and duties hereunder, and shall indemnify and hold [Wells Fargo] harmless against any liabilities that they may incur in the proper exercise and performance of their powers and duties hereunder . . .

(15:RA5179 (emphasis added).) That this compensation provision applies "subject to the provisions" of other contracts (including the APA) indicates that Section 7.4 is intended to *supplement*, not replace, the compensation provisions in other agreements, and thus the two provisions do not contradict each other. Indeed, the plain language of the two provisions

demonstrates that they compensate Wells Fargo in different circumstances, but do not replace, overlap, or make each other meaningless.

While Cabazon contends that each different contract provision must be applied according to its separate terms (XRB at 29), Cabazon disregards the language of Section 7.4 which provides that the Indenture's compensation provision is subject to the provisions of any agreement between Cabazon and Wells Fargo, including the APA, which the Indenture incorporates by reference. Section 7.4 of the Indenture and Section 8 of the APA can each be applied without rendering the other inoperative or meaningless.

The authority Cabazon cites for its proposition that Section 7.4 and Section 8 should be separately applied neither stands for that proposition nor is analogous here. In *Amtower*, *supra*, 158 Cal.App.4th at pp. 1588, 1605-1611, two agreements contained two different obligations – a Merger Agreement between two corporations concerning the acquisition of a company (which included an attorneys' fees provision) and an employment agreement between the president of the acquired company and the acquiring company. The court rejected defendants' argument that the employment agreement incorporated by reference the whole of the Merger Agreement (including the attorneys' fees clause) since there was no express incorporation of the Merger Agreement, both contracts expressly stated they were integrated, and nothing in the plain language of the employment

agreement suggested that the parties intended to incorporate by reference the Merger Agreement. (*Id.* at pp. 1605-1608.) The issue in *Amtower* was whether the attorneys' fee clause was incorporated into the employment contract, not that different provisions must be applied according to their separate terms, as Cabazon represents. Here, the Indenture expressly incorporates by reference the APA's terms.

Cabazon's citation of *Neilson v. Swanberg* (1929) 99 Cal.App. 270, 279 for the same proposition is puzzling. In that case, defendant contended that plaintiff had failed to prove performance under a lease, which was referred to in another agreement's clause forbidding plaintiff's assignee from selling ice cream during the length of the lease. The court held that plaintiff need not prove performance under the lease, since the lease was referred to only to fix the time wherein the assignee could not operate a business. (*Ibid.*) The court stated that "Where reference is made in a contract to another writing for a specified purpose, such writing becomes a part of the contract for such purpose only." (*Ibid.*) This does not support Cabazon's proposition at all.

Therefore, the attorneys' fees provision in the APA can – and should – be applied to Wells Fargo's breach of contract claim.[27]

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[27] Cabazon makes one last effort to support the trial court's denial of attorneys' fees to Wells Fargo, contending that Wells Fargo cannot recover fees under Section 8 because it was unsuccessful on all claims based on the APA, and only one prevailing party can be entitled to fees under the APA.

B. The Trial Court Erred In Awarding EVTDA Attorneys' Fees from Wells Fargo, Rather than Cabazon, and Approved an Unreasonable Amount of Fees to EVTDA.

1. The Trial Court Abused Its Discretion Since It Held Wells Fargo, not Cabazon, Liable for EVTDA's Attorneys' Fees.

The clear language of the attorneys' fees provision in Section 6 of the APA, under which EVTDA sought attorneys' fees, mandates that Cabazon is to pay attorneys' fees to EVTDA.[28] (18:RA4987-4988.) EVTDA, however, asserts that Cabazon's payment of attorneys' fees contravenes the reciprocity requirement of Section 1717 of the Civil Code. EVTDA is wrong.

First, the reciprocity requirement does not implicate the attorneys' fee clause in the present case, since the requirement affects who is entitled

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(XRB at 30-31.) This relies on a profound misunderstanding of Wells Fargo's argument. Wells Fargo claims attorneys' fees for its successful claims based on the Indenture and Note, under the Indenture and Note's incorporation by reference of the APA. This does not abrogate the limitation of one prevailing party per contract. (See *Arntz*, *supra*, 47 Cal.App.4th 464, 490-91 & fn. 8 (each phase of the trial involved separate contracts, with separate victors, appellate court remanded for trial court to determine prevailing party for each contract, including the "Collateral Agreement" which did not contain a fee provision, but incorporated by reference the attorneys' fee provision of the other agreements).) For example, EVTDA may still be awarded fees based under the APA while Wells Fargo is awarded fees under the Indenture and Note.

[28] Section 8 contains similar language mandating Cabazon to pay attorneys' fees.

to attorneys' fees, not who is liable for attorneys' fees. "Section 1717 permits the party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611 (emphasis added).) The EVTDA's own authority reinforces this rule. For example, Section 1717, which EVTDA quotes, specifically states that it applies to whom may be awarded attorneys' fees. (Cal. Civ. Code, § 1717, subd. (a) ("[T]he party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees.") (emphasis added).) Likewise, the cases on which EVTDA relies also support Wells Fargo's interpretation of the attorney's fees provision. *Covenant Mut. Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 323 explains that section 1717 "imposes reciprocity" when a contract "only authorizes attorney fees for only one of the two parties to an agreement. If the other party wins a lawsuit, he or she is entitled to an attorney fee award just as if the contract term applied expressly to both." Nor does *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, hold any different. There, the contract provided for a unilateral attorneys' fees provision only permitting defendant to recover its attorneys' fees. The court stated that the fee provision must be applied "equally to all parties to the contract" to award plaintiff fees. (*Ibid.*) Under the reciprocity mandate of Section 1717, the attorneys' fees provisions at issue here – which are unilateral in

that they only provide for Wells Fargo to recover attorneys' fees (18:RA4987-4988) – permit EVTDA here to obtain attorneys' fees as a prevailing party since Wells Fargo would have been entitled to fees had it prevailed. But this entitlement does not impact Cabazon's liability for the fees.

Second, EVTDA suggests that Cabazon, as "an affiliate of the prevailing party" (XRB at 32), should not be liable for fees. However, both EVTDA and Cabazon have consistently maintained that they are separate and distinct entities (5:RA1381, 1384-1386), and the parties entered into a three-party agreement providing that Cabazon would pay attorneys' fees.[29] EVTDA and Cabazon offer no reason why the Court should not respect the allocation of responsibilities freely entered into by the three parties.

EVTDA miscasts Wells Fargo's argument on appeal as requesting compensation under an independent contractual obligation (Section 8 of the APA) not governed by Section 1717's reciprocity requirement and asserted for the first time too late, after judgment. (XRB at p. 33.) Wells Fargo

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[29] EVTDA also cites *Abdullah v. United Savings Bank* (1996) 43 Cal.App.4th 1101 for the proposition that if Wells Fargo could have sought attorneys' fees had it prevailed, it must be liable for the fees since it did not prevail. *Abdullah*, however, is inapposite. In that case, the appellate court held the trial court properly imposed liability on plaintiff for attorneys' fees even though he was not a signatory to the contract because he would have been entitled to fees had he prevailed. (*Abdullah*, *supra*, 43 Cal.App.4th at p. 1111.) That case did not present the issue of which party was liable for fees where an nonprevailing third party was specifically identified in the contract as being liable for attorneys' fees.

does not make any such contention in its appellate briefing. Indeed, Wells Fargo explicitly argued that the attorneys' fees provisions here comply with the purpose and clear language of Section 1717's reciprocity mandate. Moreover, Wells Fargo sought fees in its complaint, not initially after judgment. (1:AA0017.) Nor is Section 8 of the APA relevant to EVTDA's request for attorneys' fees under Section 6 of the APA.

In a footnote (XRB at 33, fn. 15), EVTDA claims that Wells Fargo's interpretation of Section 6 does not make sense due to the provision that requires that "All advances, charges, costs and expenses, including reasonable attorney's fees, incurred or paid by [Wells Fargo] in exercising any right, power or remedy conferred by this Agreement, or in the enforcement thereof, shall become a part of the indebtedness secured hereunder." (18:RA4987.) According to EVTDA, the provision would require its attorneys' fee award to be "part of [Cabazon's] indebtedness" under the Transaction Agreements, and the indebtedness is only owed to Wells Fargo. (XRB at 33, fn. 15.) But at least this interpretation places the indebtedness on the correct party – Cabazon – and reinforces Wells Fargo's assertion that Cabazon is liable for attorneys' fees under section 6. If examined under EVTDA's interpretation, wherein Wells Fargo is liable for fees, the phrase makes no sense at all, since the fees owed by Wells Fargo would somehow be "part of [Cabazon's] indebtedness." While perhaps not

commonplace, this allocation of liability is what the parties negotiated and agreed to.

The trial court erred in ignoring the contractual allocation under the APA and holding that Wells Fargo, not Cabazon, was liable for EVTDA's attorneys' fees.

2. The Trial Court Abused its Discretion Since It Compensated Cabazon, a Losing Party, for Its Attorneys' Fees.

Wells Fargo demonstrated, in its Opening Brief, that the trial court abused its discretion in awarding EVTDA the entirety of attorneys' fees requested, without deducting fees that were incurred for Cabazon's defense. Indeed, the trial court, effectively awarded Cabazon – whom no one contends is a prevailing party due to the $65 million judgment against it – attorneys' fees it would not have been entitled had EVTDA not been a party to the action.

The EVTDA's arguments in response are meritless. EVTDA never disputes that the award of attorneys' fees includes fees incurred on behalf of Cabazon's defense of the second cause of action. EVTDA does not even attempt to distinguish *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, wherein the appellate court determined that the prevailing party – jointly represented by the same attorney as another defendant – was entitled to "some portion of his attorney fees" but cautioned the trial court

as to "the complete overlap of his defense" with the other defendant, and held that that party could "recover only reasonable attorney fees incurred in his defense of the action . . . To the extent his shared counsel engaged in litigation activity on behalf of [the other defendant] for which fees are not recoverable, the court has broad discretion to apportion fees." (*Id.* at p. 443.) Indeed, ignoring that portion of *Zintel*, the EVTDA fails to make any attempt to allocate fees.

Instead, EVTDA first contends that the trial court's award was reasonable because such fees – incurred on the second cause of action alone – represent half of the fees Wells Fargo sought for the entire action. (XRB at 34.) But EVTDA was awarded fees attributable to two parties' defense when Cabazon has not been and cannot be judged a prevailing party. Therefore EVTDA's fees (attributable to two parties) and Wells Fargo's fees (attributable to one party) cannot be compared. EVTDA's rationale actually supports Wells Fargo's position: EVTDA's fees should be discounted under EVTDA's argument by 50%.

EVTDA's representation that it only sought recovery of the fees that "*it actually incurred and paid* to defeat Plaintiff's second cause of action" is likewise unavailing. (XRB at 34 (emphasis in original).) Whether EVTDA paid for the attorneys' fees does not demonstrate the reasonableness of the fees – and EVTDA submits no evidence that it indeed

paid all the fees for both itself and Cabazon aside from its counsel's conclusory statement.

While EVTDA represents that the declaration its counsel submitted in support of its motion for attorney's fees includes "detailed information about the tasks completed in defense of Plaintiff's second claim," it conceals, by the use of passive voice, in whose defense the tasks were completed, Cabazon or EVTDA. (XRB at 35.) Indeed, in the declaration, the attorneys admit they jointly represent EVTDA and Cabazon (17:RA4749), the work was done on behalf of both parties (see e.g., joint briefing, preparing separate written responses to discovery, and reviewing and producing both parties' documents, 17:RA4753-4756, 4757-4760, see also 5:AA969; 1:RA001; 18:RA4813-4814, 4892), and, most damaging to their position that the trial court awarded reasonable fees, that certain tasks were conducted solely on behalf of Cabazon (see, e.g., drafting written discovery to Wells Fargo, 17:RA4755-4756; 18RA4830-4859). Therefore, while EVTDA contends that the declaration was competent evidence supporting its fee request (XRB at 34), the declaration actually demonstrates the opposite: that EVTDA is not entitled to all the fees it requested and that the trial court abused its discretion in failing to subtract fees attributable to Cabazon's defense from the attorneys' fee award and – most egregiously – awarded Cabazon for being a losing party subject to a multi-million dollar judgment.

The trial court abused its discretion in awarding all attorneys' fees requested to EVTDA. The order granting EVTDA attorneys' fees should be reversed with instructions to apportion fees between those incurred in Cabazon's defense and EVTDA's defense of the second cause of action.

IV. CONCLUSION

For the foregoing reasons, Wells Fargo requests that this Court grant the relief described in detail at the conclusion of Wells Fargo's opening brief.

Dated: July 20, 2015

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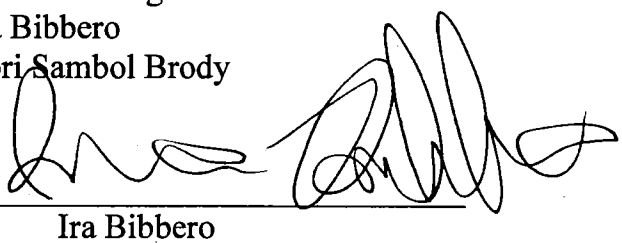
By 
Ira Bibbero
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CERTIFICATE OF COMPLIANCE WITH RULE 8.204

Pursuant to Rule 8.204 of the California Rules of Court, the attached Cross-Appellant Wells Fargo Bank, N.A.'s Reply Brief is proportionately spaced, has a typeface of 13 points or more and contains 13,976 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 20, 2015

BROWNE GEORGE ROSS LLP
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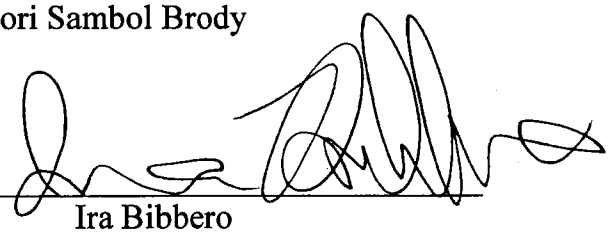
By 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, CA 90067.

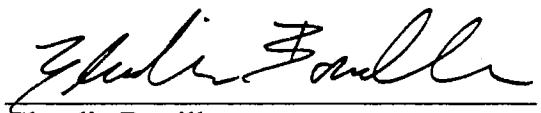
On July 20, 2015, I served true copies of the following document(s) described as **APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 20, 2015, at Los Angeles, California.



Claudia Bonilla

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Court of Appeals of the State of California
4th Appellate District, Division 2 - Case No. E060447

(Riverside SC Case No. INC 1205391)
Reply Brief filed electronically

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