4th Civil No. DO69556

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLLATE DISTRICT, DIVISION ONE

YAVAPAI-APACHE NATION,

Plaintiff, Respondent, and Cross-Appellant,

vs.

LA POSTA BAND OF DIEGUENO MISSION INDIANS,

Defendant, Appellant, and Cross-Respondent.

CROSS-RESPONDENT'S RESPONSE TO CROSS-APPEAL AND APPELLANT'S REPLY IN SUPPORT OF APPEAL

Appeal from the Superior Court for the County of San Diego,

Case. No. 37-201-00048045-CU-BC-CTL

The Honorable Joan Lewis

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INTRODUCTION

Plaintiff Yavapai-Apache Nation ("YAN") argues conflicting positions that cannot be reconciled. On one hand, YAN argues that Defendant La Posta Band of Diegueno Mission Indians' (La Posta's) cross-complaint for declaratory relief was not supported by an actual case and controversy and was properly dismissed. On the other hand, YAN argues that its denials and affirmative defenses to the unripe cross-complaint entitle YAN to a jury trial on unpled and unknown accusations of fraud. YAN cannot have it both ways.

Only if, as La Posta argues, its cross-complaint pled facts sufficient to show an actual case and controversy warranting declaratory relief can YAN's denials and affirmative defenses be considered, but would be futile. The trial court erred when it denied La Posta's Motion [for Judgment] on the Pleadings. La Posta pled facts showing that the parties' Second Amended and Restated Loan Agreement ("SARLA") does not allow YAN recourse to La Posta's Revenue Sharing Trust Fund distributions ("RSTF"), which the parties agree are Excluded Assets under the SARLA: "In any action or proceeding against [La Posta] to enforce the Loan Documents, [YAN] agrees that it shall have no recourse against any Excluded Assets." 1 Appellant Appendix ("AA") 126:§ 13.04. Moreover, the documents integrated into the SARLA show that La Posta never pledged its RSTF as recourse: ""in no event shall Pledged Revenues include . . . any trust land or trust assets of [La Posta]." 1 AA 310, ¶ 2(c).

YAN would have this Court ignore all cannons of interpretation and give priority to a five word proviso within the SARLA over the entire agreement and the integrated documents. The SARLA is clear and when read in its entirety, YAN's arguments fail. This Court should remand this matter with instructions to the trial court to grant La Posta declaratory relief finding that La Posta never pledged and YAN has no recourse to Excluded Assets, including the RSTF.

Alternatively, if this Court finds that, as YAN argues, La Posta's declaratory action is unripe until YAN obtains a finding of fraud and chooses to enforce its $44 million judgment against La Posta's RSTF, then YAN's denials and affirmative defenses are also unripe and the matter cannot be remanded for another jury trial on unpled and unknown accusations of negligent misrepresentation and concealment. In this situation, this Court must deny YAN's cross-appeal and uphold the trial court's decision to preclude jury instructions on YAN's unknown theories.

Finally, YAN's efforts to show its grant of a loan payment extension to La Posta damaged YAN are unsupported by the plain language of the SARLA when considered along with the fact that La Posta was unable to make any loan payments. YAN ignores the default and acceleration provisions and instead relies upon its own lawyers' testimony to create damages to support its theory of intentional misrepresentation. The trial court undercut La Posta's ability to provide expert testimony to challenge YAN's lawyers' testimony and did not fully consider the facts surrounding the grant of the payment extension. This Court should reverse the trial court's erroneous order finding damages related to the forbearance.

La Posta respectfully requests that this Court reverse the trial court's erroneous December 30, 2014 Findings and Order because the payment extension did not cause damages.

La Posta respectfully requests that this Court reverse the trial court's denial of La Posta's Motion [for Judgment] on the Pleadings and find that there is an actual case and controversy supporting La Posta's declaratory action and either (i) remand for additional proceedings on La Posta's cross-complaint or (ii) interpret the SARLA to find that La Posta never pledged its RSTF and that YAN has no recourse to enforce any judgment against La Posta's RSTF and remand with instructions for the trial court to grant La Posta's declaratory relief.

Finally, La Posta respectfully requests that this Court deny YAN's cross-appeal and uphold the trial court's April 1, 2015 order refusing jury instructions on unpled accusations of negligent misrepresentation and concealment.

COUNTER STATEMENT OF FACTS

As detailed in La Posta's Opening Brief, YAN suggested it intended to pursue extra-contractual recourse shortly after filing its complaint, but YAN never amended its complaint to include any causes of action for fraud. YAN never revealed its theory of fraud until late in 2014, well after La Posta could have conducted any discovery into the accusations.

Initially, at a September 19, 2014 hearing, the trial court suggested that YAN should amend its complaint (1 Reporter's Transcript ("RT") 2:14-17; 3:4-10; 6:18-21),

but later changed its course to allow YAN to submit a motion in limine on whether YAN was entitled to a jury trial on unpled accusations of fraud:

> Well, that's the way I'm going to do it is a motion in limine. That's the only way that I can do it to get it before me before the spring. And I'm not going to do it later than that. 1 RT 17:16-19.

Over La Posta's objection, the trial court granted YAN's motion to expand its theory of recovery and ordered exactly what YAN had requested—a single unpled accusation of intentional misrepresentation. 2 AA 554; 2 AA 629-630. But even after the trial court granted YAN's motion, YAN sought to again expand its theory of recovery with additional unpled and unraised accusations.

On September 26, 2014, La Posta filed motions requesting that its declaratory action be heard first, that pursuant to the SARLA the parties waived their rights to a jury, and that the trial court conduct a bench trial on all triable issues. 2 AA 389; 2 AA 530. On October 24, 2014, at a trial call hearing, the trial court was not prepared to hear the dispute over the jury waiver and instead, focused on how to manage the bench trial on contract damages. *See* 3 RT 11:2-8; 16:4-14. The trial court was aware that La Posta intended to call an expert witness to testify to the calculations of damages under the SARLA. 3 RT 72:7-8. YAN explained it only intended to rely on its lawyers' testimony. 3 RT 72:9-14. La Posta made it clear that it intended to put the interpretation of the SARLA as used to calculate damages before the trier of fact. 3 RT 73-74.

The November 13, 2014 Trial Call and Bench Trial

On November 13, 2014, the parties appeared before the trial court for the second trial call for the November 24, 2014 bench trial on damages, as well as to argue La Posta's motion that the SARLA prohibited jury trials. 3 RT 87:11-17. Instead, the trial court surprised the parties and decided to use the trial call as the bench trial on contract damages. YAN is incorrect to state that "[w]ith the consent of the parties, the trial court held a bench trial on November 13, 2014." Respondent's Brief ("RB"), p 20.

The trial court explained that it was setting aside the dispute over the jury waiver and began asking both parties questions about the contract damages. 4 RT 88:21-89:23. The trial court pressed the parties to identify the relevant portions of the SARLA necessary to determine "the issue of compounding versus non-compounding interest." 4 RT 91:4-7. The trial court made it clear that it was not interested in the actual calculation of damages. *See* 4 RT 130:6-8. Instead, the trial court sought to interpret the SARLA as to how damages should be calculated. 4 RT 99:21-28. The trial court focused on whether there was a default to control how interest accrued and compounded. 4 RT 102:8-16.

Believing this initial discussion was to clarify the issues to be tried on November 24, 2014, La Posta explained that "there are additional parts of the loan agreement that need to be understood, which include the default provisions and acceleration provisions… [and] the context of the request for the forbearance, [and] grant of the forbearance need to be considered to show what was actually asked for." 4 RT 91:16-22. La Posta explained that the forbearance created a latent ambiguity because "the contract

doesn't cover the effect of a forbearance." 4 RT 94:24-26; 8:-12. La Posta explained that it had an expert witness prepared for trial.[1] 4 RT 95:9-25. La Posta urged the trial court to consider not just the SARLA, but the documents integrated into the SARLA, La Posta's request for the payment extension, YAN's grant of the payment extension, and to allow expert testimony on damages. 4 RT 91:16-24. Because the SARLA does not contemplate how to manage a payment extension, La Posta argued the trial court should consider evidence surrounding the request.[2] 4 RT 94-95.

La Posta explained that it intended to offer evidence that the request for the payment extension never asked for any delay in compounding and accruing interest—compounding interest was part of a bargained for exchange in return for the payment extension. 4 RT 94:12-15; 4 RT 113:3-11. La Posta also opposed YAN's attorneys' testimony, submitted *via* spreadsheets with damage calculations, and offered an expert accountant to testify as to how the contract should be applied. 4 RT 98:9-14, 18-25; 4 RT 115:18-26.

YAN relied on the SARLA § 2.06 and that the "three most important words" of 2.06 were "past due amounts" and that "accrued and unpaid interest on. . . past due amounts (including interest on past due interest) shall be compounded monthly." 4 RT

[1] "Well, our main position, your Honor, is we don't think the lawyers should testify as to what the contract means. We think somebody that's trained in calculation and amortization to these type of loans should testify or present evidence as to what the contract means. . . We believe that somebody in the business of it should be the one to supply the evidence. That's why we asked for Mr. Corti to be able to appear." [HT p 11, lines 9-20.]

[2] The court questioned the need for any extrinsic or parole evidence when the parties stipulated that the SARLA is unambiguous. HT pp 8-9. La Posta explained that without the request for the forbearance, the SARLA may be unambiguous as to the calculation of payments and compounding interest. Id. However, it is self-evident that as applied to the situation, the parties dispute the interpretation of the SARLA and a latent ambiguity exists. Another latent ambiguity exists as to the limits to YAN's recourse under the Loan Documents, which is discussed *infra*.

103:18-23. Then YAN looked to Section 2.02(a) which signaled that La Posta was to begin making monthly payments of accrued interest on August 1, 2009. 4 RT 104:6-8. Thus, YAN argued, "if no compound interest is due prior to that time, then that resolves the whole case because, to the extent that there's an extension, that earlier grace period has the same meaning." 4 RT 104:8-11. YAN believed that compounding was only permitted where amounts were due and not paid, and there were "no amounts due and not paid during the grace period." 4 RT 111:16-20. YAN argued that during the grace period YAN could not "possibly compound interest . . . [s]o for that period of time there would be no compounding interest because no amount was due." 4 RT 122:5-17.

La Posta explained to the court that from May 2009 to August 2009, payments were not due because it was a negotiated term of the SARLA—not because YAN had granted a grace period for those three months. 4 RT 106:7-13. That period is distinguishable from the reprieve granted after La Posta's request for an extension of time to make payments. 4 RT 105:7-13. La Posta then explained that it missed the first payment on August 1, 2009 (and every payment thereafter). 4 RT 101-04; 4 RT 120:22-24. Missing that first payment triggered the default and acceleration provisions at SARLA § 7.01. 4 RT 105:14-17, 23. The SARLA mandates that the acceleration provision takes effect upon default for nonpayment without any act by YAN. 4 RT 106-07. The acceleration provision requires La Posta to pay on the Obligations. 5 RT 106; 4 RT 107:23-26.

La Posta explained the disjoint between its October 7, 2009 request for a forbearance and YAN's January 14, 2010 grant forbearance and that based on the two

letters, YAN had not granted a sufficient grace period to cover all unpaid months from August 1, 2009 to June 1, 2010. 4 RT 109-11.

YAN offered a "contemporaneous invoice[3] from YAN which shows that we did not compound that interest." 4 RT 113:25-28; 121:22-26. And YAN argued that "[t]here was no default because nobody ever believed that there was a default." 4 RT 120:7-8.

The trial court explained that it did not need to consider the actual calculations of damages, "[b]ecause I'm either going to find that the interpretation that the plaintiff proposes is accurate or the interpretation that you [La Posta] proposes is accurate." 4 RT 116:1-10. "It doesn't matter to me if it's $1 million or $10 million, it's just whether or not the interpretation of the contract, whether I agree with the plaintiff's position or [La Posta's] position in the interpretation of the contract." 4 RT 117:2-9. "[I]t's really who I agree with when I look at the contract provisions and try to interpret them, whether [La Posta] was in default back in August and September or not, and then try to figure out at that point if I agree with plaintiffs or the defendants in this case for purposes of damages." 4 RT 128:20-26.

It was not until the end of the hearing that the trial court notified that parties that it was treating this November 13, 2014 trial call hearing as the parties' bench trial on damages and saw no need to conduct a trial on November 24, 2014. 4 RT 136:3-7. The

[3] La Posta vehemently objected to the inclusion of the "contemporaneous invoice:" "They know that we strongly object to that invoice. That invoice was brought by us. We found it. It hadn't been produced in discovery. We brought it to settlement negotiations hoping to identify what was actually taking place. Their client said that they didn't know and the person that created it wasn't there. We also think there should be 60 more of them if you consider the monthly invoices, we've got one. We don't know if that invoice has been remade or retooled based on any other agreements. 4 RT 124: 6-16. However, as discussed below, the invoice does not prove YAN's interpretation is correct.

trial court explained, "this breach of contract trial, in my opinion, has gone forward right now and the court can conclude one way or the other on the issue before it." 4 RT 132:15-17. "I'm actually treating this as if it were the trial." 4 RT 136:3-4. YAN's counsel agreed that "this was a bench trial as far as I'm concerned." 4 RT 126:28-127:1.

La Posta pressed the court for the hearing on the jury waiver dispute—the matter that had been scheduled for that day: "[w]e had anticipated the hearing on the jury trial issue today." 4 RT 130:9-14; 131:13-14. "I know you did." 4 RT 131:15. Ultimately, La Posta reluctantly acknowledged the trial court's instruction. 4 RT 132:18-20. The trial court cancelled the November 24, 2014 trial date. 4 RT 135:3-19.

The Findings and Order

After the November 13, 2014 hearing on contract damages, each party filed a proposed statement of the decision; the trial court wholly adopted YAN's statement as its December 30, 2014 Findings and Order after Hearing. *See* 3 AA 793-99. In that order, based on YAN's lawyer's interpretation of the SARLA, the trial court found that the four-month payment extension caused YAN $262,081.65 in damages. *Id.* That formed the basis for damages to allow the jury trial on the unpled accusation of intentional misrepresentation.

The order quoted SARLA § 13.03: "YAN may proceed in a further phase of trial with its contention that La Posta committed 'any act of fraud in connection with,' inter alia, the SARLA." *See* 3 AA 797:¶ 17. The trial court merely adopted a proposed statement of decision that quoted a contract, but YAN took the quoted contract language to mean that the trial court had literally authorized YAN to proceed to a jury trial on "any

act of fraud," known or unknown, and essentially that YAN could use the jury trial to fish for fraud. This misconstruction culminated at the January 23, 2015 trial call over the parties' dispute about the proper verdict form.

The January 23, 2015 Trial Call Hearing

On January 23, 2015, YAN argued at another trial call that the SARLA "talks about any act of fraud" and "fraud is a basket into which there's intentional fraud, negligence [sic] misrepresentation, and concealment." 5 RT 146:21-25. YAN acknowledged La Posta's resistance to an open jury trial on unknown accusations: "Opposing counsel disagrees and they are trying to plead our case in a different way by saying, 'No, you only get to go for intentional misrepresentation, not the others.'" 5 RT 146-47.

The trial court asked La Posta to explain, "what legal authority you have to narrow down the perimeters of the plaintiff's case in a fraud cause, and until you do that I'm going to -- fraud is fraud and they have to end up meeting the elements of whatever identifiable fraud they think they get." 5 RT 149-553. La Posta made its position clear:

> We agree that there are three types of fraud, there are three sets of distinct elements for each three types of fraud. What we're looking at is, like any fraud claim plead with specificity, looking at their motions in limine and the five points they identify in their motions in limine as the basis on line with their accusations, those five points are clearly within the realm of intentional fraud. There is no accusation or allegation of any sort of duty so negligent interpretation isn't there with any specificity, and there is no allegation or facts they were held or concealed. 5 RT 147-48.

The trial court summarized that there was no complaint but "there's this fraud claim that was not plead so you don't have a cause of action for fraud, as we all know," but that "there was a very specific paragraph as to what plaintiff was entitled to and there was setting forth exactly what they thought they would have to prove." 5 RT 149-50. YAN persisted that it was entitled to an open trial on any type of fraud. 5 RT 150.

After the hearing, the parties continued to dispute the proper verdict forms, each holding their own views of the trial court's instructions. On February 24, 2012, the parties each filed proposed general and special verdict forms. *See* 1 Respondent's Appendix ("RA") 0012-0026; 1 RA 0028-0060.

On April 1, 2015, the trial court resolved the dispute with its Order Regarding Special Verdict Form and Plaintiff's Motion in Limine No. 3, which clearly explained that because YAN limited itself to a single unpled accusation of intentional misrepresentation, the verdict form should be limited to the single unpled accusation of intentional misrepresentation. 3 AA 800.

The trial court explained "it was always the Court's intention that the fraud issue was limited to that framed by the motion in limine itself," thus that YAN's motion in limine "expressly defined" YAN's theory of fraud and that was specific as to what facts and evidence it sought to present to the jury if YAN had amended its complaint—the trial court quoted the specific unpled accusation from YAN's motion in limine. 3 AA 802; 3 AA 803:26-28. To allow YAN to proceed with "any act of fraud" would expand the scope of the fraud evidence beyond YAN's arguments in its motion in limine and "[t]o

permit YAN to present unspecific and unpled acts of fraud that were not the subject of the motion in limine would be prejudicial to La Posta." 3 AA 803: 4-5, 17-28.

The trial court concluded that YAN had presented its theory of its fraud claims in its motion in limine and YAN's theory was limited to the specific unpled accusation within its motion in limine.[4] The trial court then approved the use of La Posta's proposed verdict form for intentional misrepresentation instructions. 3 AA 804:1-4.

The Verdict

The jury trial subsequently began on May 4, 2015 with *voir dire* and concluded on May 7 with a jury verdict. A significant component of the verdict, as disused below, was the jury finding that La Posta's representation—a request for a payment extension—was not "a substantial factor in causing harm to YAN." 3 AA 806, ¶ 5.[5]

The Final Judgment

On September 28, 2015, the parties filed competing motions for judgment on the pleadings as to La Posta's cross-complaint declaratory action. 3 AA 809-819, 968-986. To its motion, La Posta attached, among other things, all of the documents that were integrated into the SARLA by way of the definitions for Loan Documents[6], Collateral

[4] Dissatisfied with the trial court's decision, on May 1, 2015, YAN filed a complaint it its own court alleging negligent misrepresentation and concealment arising from the exact same factual scenario before the trial court. 3 AA 954-963.

[5] Paragraph 5 on the Verdict considering causation was nearly identical to the language in YAN's proposed verdict forms. See ¶ 5 "Was the Yavapai-Apache Nation's reliance on the La Posta Band of Diegueno Mission Indians' representation a substantial factor in causing harm to the Yavapai-Apache Nation?"; ¶ 9 "Was the La Posta Band of Diegueno Mission Indians' concealment a substantial factor in causing harm to the Yavapai-Apache Nation?"; ¶ 15 Was the Yavapai-Apache Nation's reliance on the La Posta Band of Diegueno Mission Indians' representation a substantial factor in causing harm to the Yavapai-Apache Nation?"

[6] The Loan Documents are: SARLA the Note; the Collateral Documents; the Environmental Certificate, and any other subsequent agreements. 1 AA 103:§ 2.04; 1 AA 95.

Documents[7], and Security Agreement[8]. 3 AA 826-911. Because the SARLA incorporated all of these documents, the trial court needed each in order to interpret the SARLA and give meaning to each term contained therein.

On October 27, 2015, the trial court issued its tentative decision on the motions. On October 29, 2015, the trial court heard the competing motions and granted YAN's motion and denied La Posta's motion. On October 30, 2015, YAN filed a Notice of Ruling. La Posta filed a motion for reconsideration, which was denied, and on November 13, 2015, the trial court entered a final judgment finding, in part, that "YAN shall recover from La Posta $44,470,704.98 in principal and $4,422,702.99 prejudgment interest (at 10%per annum, between October 31, 2014 and October 29, 2015), for a total of $48,893,407.97 in damages." 3 AA 1082:¶ 2. The judgment did not restrict YAN's ability to enforce the judgement or YAN's recourse.

LA POSTA'S RESPONSE TO YAN'S CROSS-APPEAL

I. Even though YAN never pled any species of fraud, the trial court did not err by precluding a jury trial on unpled and unknown theories.

Fraud must be pled with specificity. There is no way around that expectation. It is one of the core fundamentals of civil jurisprudence. YAN never pled fraud. *See* 1 AA 63-68. YAN never amended its complaint to plead fraud. By dodging the pleading

[7] The "Collateral Document[]" includes "the Security Agreement and any other security agreement, pledge agreement, deposit account control agreement, or other collateral security agreement hereafter . . . to secure the Obligation." 1 AA 91.

[8] The "Security Agreement" means "the Security Agreement dated December 21, 2005, and amended and restated on November 7, 2006 between [La Posta] and [YAN], as assignee of Chase Bank, as secured party." 1 AA 100.

requirements, YAN also dodged any expectation that it adhere to the applicable standards of limitation for the species of fraud, as well as any demur from La Posta.

When given the opportunity to identify what it should have pled, or would have pled, YAN identified a single instance of intentional misrepresentation. 1 AA 293-294. YAN never identified any accusations of negligent misrepresentation or concealment.

Even if, *arguendo*, the trial court acted correctly when it allowed an unpled accusation of intentional misrepresentation to go to jury trial, without pleading or otherwise identifying any allegations or unpled accusations of negligent misrepresentation or concealment, YAN had never advanced any theory of fraud beyond intentional misrepresentation.

Because negligent misrepresentation and concealment were never identified, they were not properly before the trial court or La Posta. Thus, the trial court's decision to omit jury instructions for negligent misrepresentation and concealment was not an error instructing the jury, it was a decision to limit trial to the YAN's singular theory of the case.

A. Either La Posta's cross-compliant is unripe and thus improper before the trial court or it is ripe and YAN's affirmative defenses are viable. YAN cannot have it both ways.

YAN asks the Court to uphold the dismissal of La Posta's cross-complaint as unripe while simultaneously and necessarily asking the Court to assume La Posta's cross-complaint is ripe and justiciable for the sole purpose of allowing YAN to advance its theory that unpled accusations of negligent misrepresentation and concealment deserve a jury trial.

YAN spends nearly thirteen pages of its brief arguing that La Posta's cross-complaint was not ripe and properly dismissed by the trial court. RB, pp. 25-38. Then, YAN spends another ten pages arguing that its affirmative defenses to La Posta's cross-compliant support its theory that it is allowed a jury trial on unpled and unknown accusations of negligent misrepresentation and concealment. Consequently, it appears that YAN argues the trial court was correct to dismiss the cross-complaint but not correct to dismiss YAN's affirmative defenses.

While under some circumstances, a party may argue alternate theories of a case simultaneously. However here, YAN has not argued alternate theories—it simply wants the best of both worlds. YAN can either protest that the cross-complaint is unsupported by an actual case and controversy in its effort to bar the claim, or it can rely on its the cross-complaint as a basis to support its theory that it is entitled to a jury trial on unpled and unknown accusations of negligent misrepresentation and concealment. Not both.

B. YAN never pled or otherwise identified any unpled accusations of negligent misrepresentation or concealment.

Fraud allegations "involve a serious attack on character" and therefore must be pled with specificity. *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469. Fraud must be pled specifically; general and conclusory allegations do not suffice. *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 74. Fraud must be pled with more detail than other causes of action. *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 240. This particularity requirement demands that a plaintiff plead facts which show how, when, where, to whom, and by what means the

representations were tendered. *Cansino,* 224 Cal.App.4th at 1469 (internal quotations omitted.) The requirement serves two purposes: first, it gives the defendant notice of the definite charges to be met; second, the allegations should be sufficiently specific so that the court can weed out non-meritorious actions on the basis of the pleadings. *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 989.

As best it could under the circumstances, with the April 1, 2015 order on the competing verdict forms, the trial court applied this heightened standard to YAN's unpled accusation of intentional misrepresentation in its motion in limine. The trial court found that YAN "was specific as to what evidence it sought at trial" and "similarly specific as to what facts would be alleged" if YAN had amended its complaint, thus the trial court found that La Posta "was not prejudiced" by the fact that YAN did not plead fraud because the unpled accusation "was expressly defined." 3 AA 802:10-11, 26-28.

The trial court acknowledged that the SARLA allows YAN to bring "any act of fraud," but that YAN had limited itself with the specific language in its motion in limine and to "permit YAN to present unspecific and unpled acts of fraud that were not the subject of the motion in limine would be prejudicial to La Posta." 3 AA 803:17-28. In other words, YAN had a contractual right to raise "any act of fraud," and exercised its contractual right by identifying only the one theory of intentional misrepresentation.

By applying the heightened pleading standards to YAN's unpled accusation of fraud, the trial court correctly found that YAN had identified the specific how, when, where, to whom, and by what means the singular unpled accusation of intentional misrepresentation was tendered. The trial court was correct in that YAN's motion in

limine gave La Posta notice of the definite charges to be met which allowed the court to prevent non-meritorious actions before the jury trial turned into a fishing expedition. See Cal. Code Civ. Proc. § 128.

The trial court was also correct to exclude the unknown and unpled accusations of negligent misrepresentation and concealment from the jury for the same reasons: YAN never identified the specific how, when, where, to whom, and by what means these other fraud claims could have been viable.

C. California law does not allow unpled accusations of fraud to advance to a jury trial.

YAN presents the theory that it did not need to plead fraud because (1) proving "no fraud" was necessary to La Posta's cross-complaint declaratory action; (2) "proof of fraud also amounts to failure of proof of one of La Posta's affirmative defenses; and, (3) YAN was entitled to prove fraud as an affirmative defense to La Posta's cross-complaint declaratory action. RB pp. 49-50.

However, as discussed above, if the cross-complaint is unripe, two of YAN's arguments necessarily fail. And because YAN mischaracterizes La Posta's denials as affirmative defenses, its last argument has little merit.

1. Fraud is not an element of La Posta's cross-complaint.

YAN mischaracterizes the substance of the cross-complaint when YAN argues that fraud was an element of the cross-complaint. RB, p. 49. La Posta never pled fraud, or its absence, and YAN never proffered an affirmative defense of fraud.

La Posta clearly alleges that it is seeking a declaratory judgment pursuant to Cal. Code Civ. Pro. § 1060. Cross-Complaint ¶ 4. Under § 1060, in order to proceed on its declaratory action, La Posta only needs to plead that there is a contract between the parties and facts showing that there is an actual controversy relating to the legal rights under that contract so as to desire a declaration of such rights. La Posta's allegations are clearly based on the language of the SARLA (referred to as the Loan Agreement in the cross-complaint) and related to its rights and for a determination of the construction of the contract:

- ¶ 10: Pursuant to the express terms of the Loan Agreement, YAN has limited recourse to La Posta's Casino Assets, as that term is defined in the Loan Agreement.

- ¶ 12: The Loan Agreement expressly provides that "In any action or proceeding against Borrower to enforce the Loan Agreement, Lender agrees that it shall have no recourse against any Excluded Assets," which is defined as cash, cash equivalents or any property of borrower that is not Casino Assets.

- ¶ 13: Under the Loan Agreement, La Posta did not provide recourse to its revenues haring trust funds ("RSTFs") in case of a judgment adverse to La Posta.

- ¶ 14: Also pursuant to the express terms of the Loan Agreement, any liens held by YAN resulting from the Loan Agreement are limited to the collateral specifically pledged to the payment of La Posta's obligations.

- ¶ 15: La Posta has not pledged its RSTFs as collateral under the Loan Agreement.

- ¶ 24: In an email dated July 8, 2013, YAN's counsel, Ira Bibbero . . . stated that "[i]f, on the other hand, the YAN has other recourse, the assets will constitute a down payment on the judgment," signaling that YAN seeks other assets (beyond those pledged Casino Assets) to satisfy any future judgment adverse to La Posta.

- ¶ 29: There is a real and actual controversy between La Posta and YAN concerning their respective rights and obligations concerning whether YAN is

entitled to La Posta's RSTFs from the State of California and distributed by the CGCC.

- ¶ 30: La Posta contends that YAN is not entitled to its RSTFs as recourse for any future judgment adverse to La Posta because they were not pledged as such under the Loan Agreement and YAN has no right to attach or seize such assets.

- ¶ 31: YAN contends that it is entitled to La Posta's RSTFs as recourse if it obtains a favorable judgment pursuant to the terms of the Loan Agreement.

- ¶ 32: YAN is bound by the terms of the Loan Agreement and Loan Agreement in any present and future enforcement efforts, and lacks any authority to attach La Posta's RSTFs or to attach assets in any manner inconsistent with the terms of the Loan Agreement.

- ¶ 33: La Posta desires a judicial determination of its rights and duties with regard to its RSTFs, as well as a judicial declaration stating that La Posta's RSTFs were not pledged as recourse under the Loan Agreement and that YAN is prohibited from enforcing any future judgment in YAN's favor against La Posta's RSTFs.

The Court must accept the pleadings as true. See *AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579, 591 ("When determining whether a complaint states a cause of action we are obligated to presume the material allegations of the complaint are true.")

La Posta's allegations, taken as true, show a controversy exists over the parties' rights under the SARLA. La Posta did not allege the parties' rights were somehow affected by a finding of fraud—it is clear that, as alleged, La Posta believes fraud is irrelevant to the parties' rights. La Posta pled the existence of the contract, facts to the language of the contract, and facts to the dispute over the language of the contract. There is an actual case and controversy pled.

Moreover, YAN misstates La Posta's prayer for declaratory relief. As YAN argues, "La Posta sought a declaration that YAN is not entitled to recourse beyond the

collateral it pledged in connection with the SARLA." RB, p 49. This is simply not accurate. La Posta sought a declaratory judgment that

> La Posta's RSTFs were not pledged as Recourse pursuant to the terms of the Loan Agreement and, accordingly, YAN has no legal right to enforce any future judgment against La Posta's RSTF. 1 AA 80; ¶ 3.

This requires a showing that RSTFs were not pledged and YAN has no recourse to RSTF—this does not require a showing of the absence of fraud. The "absence of fraud" is not an element of La Posta's pleadings and La Posta's declaratory action is in no way contingent on fraud. Had the cross-complaint been adjudicated, arguendo, YAN's denials may have constituted a sufficient basis to put the interpretation of the SARLA before the trial court. However, YAN continues to oppose adjudication of the cross-complaint, thus YAN cannot rely on its interpretation of La Posta's declaratory action to bolster its theory it is entitled to a jury trial on unpled and unknown accusations of fraud.

YAN misuses *Gunderson v. Gunderson* (1935) 4 Cal.App.2d 257, 260, to support its theory that YAN is entitled to a jury trial on unpled accusations of fraud because La Posta sought declaratory relief. But YAN's misuse of *Gunderson* and its self-serving mischaracterization of La Posta's declaratory action do not support YAN's theory.

YAN argues that *Gunderson* supports the faulty premise that "[o]nly such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action or to negative an inference from an act which in itself is indifferent." RB, p 51 (quoting *Gunderson*, 4 Cal.App.2d at 260). YAN paraphrases this: "In other words, it is not necessary to allege facts which negates

(sic) an element of a claim." RB, p 51. But YAN's snippet from *Gunderson* misapplies the case.

Gunderson was a suit between divorcees. *Id.* at 258. Upon divorce, pursuant to court order,[9] the ex-wife was to receive certain benefits from her ex-husband until she remarried; the benefits were reduced upon her remarriage. *Id.* at 258. Two years after the divorce, the ex-wife sued alleging she had not received the full benefits but did not include in her complaint the fact that she had not remarried—remaining unmarried was a prerequisite to her continued benefits.

Gunderson states that in California, "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language." *Id.* at p 260. The opinion continues:

> Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action or to negative an inference from an act which is in itself indifferent. The party must allege every fact which he is required to prove, but must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule. *Id.* at 260–61.

The court could not determine whether the ex-wife had remarried from the facts alleged in her complaint. *Id.* at 260. The court found that the ex-wife had an obligation to allege that she never remarried—a negative allegation—because without

[9] The court treated the divorce order as a contract. *Gunderson* at 260.

demonstrating that she had not remarried—a necessary condition for full benefits—all of her allegations could be true but she may still not be entitled to recover. *Id.* at 261. The court concluded, "[w]e are satisfied that the failure to negative remarriage in the complaint constitutes a fatal omission to allege a part of the original substantive cause of action." *Id.* at 261. Thus, by failing to allege all necessary facts, even those facts that are "negative," the ex-wife failed to properly allege a cause of action.

YAN's construction of *Gunderson*—"it is not necessary to allege facts which negates an element of a claim"—is incorrect. RB, p 51. *Gunderson* says that at times, a negative allegation—*i.e.*, never remarried—may be necessary to support a claim. *Gunderson*, 4 Cal.App.2d at 261. Applying *Gunderson* in the context of YAN's complaint, for example, had YAN not alleged that La Posta failed to repay the loan—a negative allegation—YAN may have had a true complaint but remain unable to collect because failure to pay is a negative that must be proven by YAN as part of the original substantive cause of action for breach of contract. However, YAN does not use *Gunderson* to support its own complaint, it uses *Gunderson* to attack La Posta's cross-complaint.

If, *arguendo*, La Posta's cross-complaint is considered despite YAN's arguments that it is unripe, when *Gunderson* is considered in its entirety, it is clearly inapplicable to La Posta's declaratory action. La Posta alleges the Loan Agreement does not allow recourse to the RSTF and the RSTF were not pledged as recourse.

In a declaratory relief action, the burden rests on the plaintiff to produce evidence to establish the allegations of its complaint. *Roadside Rest, Inc. v. Lankershim Estate*

(1946) 76 Cal.App.2d 525, 526. La Posta's allegations concern the rights of the parties' pursuant to the SARLA. La Posta must prove, through the canons of construction, that the SARLA does not allow recourse to La Posta's Excluded Assets, including the RSTF, under any circumstances. Thus, fraud is not an element of La Posta's cross-complaint that could allow YAN another jury trial.

2. La Posta's denials, explanation of its denials, and affirmative defenses do not require La Posta to disprove fraud and do not permit YAN to a trial on unpled and unknown accusations of fraud.

La Posta's general denial of YAN's complaint cannot be construed to mean that "La Posta implicitly alleged that it did not commit fraud." RB, p 50. YAN relies on *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, but that case cannot be construed to create a burden for La Posta to prove it did not commit fraud. Likewise, *Jose Realty Co. v. Pavlicevich* (1913) 164 Cal. 613, cited by YAN, does not support YAN's contention that it never had to plead fraud to entitle it to a jury trial on unpled and unknown accusations.

In relevant part, *FPI Development* explains the types of matters that "are not put in issue by a denial" which "plumbs the line between defenses by denial and defenses by allegation of new matter." *FPI Development* 231 Cal.App.3d at 383. The California Supreme Court explains that a defendant's denial is limited to the allegation in the complaint, and statements that alleged facts are untrue—*e.g.*, the denial—make the allegation a material issue.

FPI Development distinguishes a denial from an affirmative defense, explaining that an affirmative defense accepts a plaintiff's allegation as true but offers a basis to avoid culpability. *Id.* at 383. The Court relied on Professor Pomeroy's Code Remedies (5th ed. 1929) § 549, to explain the difference between a denial and a defense. *FPI Development* 231 Cal.App.3d at 383 fn 4. Pomeroy refers to the factual basis supporting a defense as a "new matter" and compares his concept of "new matter" to the common law plea and avoidance. *Id.* Thus, where a denial does not need additional facts and puts the alleged facts into issue, an affirmative defense accepts the allegation but must supply new facts to avoid the allegation:

> All facts which directly tend to disprove any one or more of these averments may be offered under the general denial: all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded. *FPI Development,* 231 Cal.App.3d at 383 fn 4.

FPI Development does not flex far enough to support YAN's theory that it is entitled to a jury trial on unknown and unpled accusations of negligent misrepresentation and concealment because La Posta issued a general denial. YAN relies on La Posta's explanation of its general denial as some indication that La Posta did more than deny YAN's allegations—YAN construes La Posta's explanation into an affirmative defense that creates what Pomeroy would call a "new matter" placing a burden to disprove fraud on La Posta. This is not a proper application of *FPI Development.*

The common thread within ¶¶ 6, 11, 14, 16, 18, 20, 22, 25, and 27 of YAN's complaint is the allegation that the amount owed by La Posta to YAN arising from the

breach of the SARLA exceeds $36 million. RB, p 49. La Posta's general denial served, in relevant part, to create a material issue as to the amount owed. YAN's form interrogatory sought the facts and documents that supported the denial. La Posta provided an explanation for its denial of these several paragraphs:

> With respect to YAN's Complaint, La Posta denies the following allegations:
>
> ¶¶ 6, 11, 14, 16, 18, 20, 22, 25, 27: Denied insofar as these paragraphs can be interpreted as allegations that La Posta owes sums due under the Loan Documents in excess of $36 million. Plaintiff alleges in paragraph ¶ 4 that La Posta was obligated to repay to Plaintiff the total sum of $22,637,500 million plus interest pursuant to the Loan Agreement. By La Posta's calculations in accordance with the terms of the Agreement, this figure is incorrect, and YAN has not otherwise demonstrated that sums due and owing under the Loan Agreement currently exceed $36 million.
>
> Moreover, these paragraphs are denied insofar as they may be construed to allege that all funds "due and owing" entitle YAN to attach any assets of La Posta beyond the scope of the "Collateral" as defined in the Loan Agreement, as YAN has no recourse to any assets not so defined, including La Posta's Revenue Sharing Trust Funds, which were not pledged as recourse pursuant to the express terms of the Loan Agreement. 1 AA 337-338

In its effort to create an issue of fraud to compensate for its deficient pleading, YAN has paraphrased this detailed explanation to simply, "YAN has no recourse to any assets . . . which were not pledged as recourse . . . ." to try to construe La Posta's denial into an affirmative defense that requires La Posta to prove it never committed fraud. RB, p. 50. YAN argues that "[b]ecause YAN's recourse depends on whether La Posta committed fraud, La Posta implicitly alleged that it did not commit fraud." RB, p 50.

When viewed as a whole, La Posta's interrogatory response confirms its denial and does not create a "new matter" as described by *FPI Development*. The first portion of the explanation clearly explains that La Posta has denied that the amount owed is in excess of $36 million, making the amount owed a material issue. That matter was tried and is now on appeal.

The second part of the explanation denies that YAN is entitled to any recourse beyond those assets defined, or not defined, by the Loan Documents. However, YAN pled no allegations as to its recourse under the Loan Documents, so that portion is superfluous. But also, La Posta's explanation disclaimed its denial to the extent that the allegations "may be construed" to be something more—construed into an allegation over recourse.[10]

Even if, *arguendo*, La Posta's explanation created a "new matter" as to recourse, that would not require La Posta to show that over the entirety of the venture with YAN that it did not commit fraud. The relevant facts to the limits of YAN's recourse are the Loan Documents, which show that La Posta never pledged its RSTF as security, that the RSTF and other tribal assets are Excluded Assets, and Excluded Assets are never available as recourse to YAN: "In any action or proceeding against [La Posta] to enforce the Loan Documents, [YAN] agrees that it shall have no recourse against any Excluded Assets." 1 AA 126:§ 13.04.

[10] When La Posta supplied the explanation, it also indicated that "[d]iscovery and investigation are ongoing" and expressly reserved the right to amend its response. Unfortunately, as the case history reveals, by the time La Posta had sufficient discovery responses from YAN to revisit its responses, the discovery period was concluding and YAN had begun to advance its unpled accusations of fraud, pushing for a jury trial.

YAN further presses its argument by relying on *Jose Realty Co. v. Pavlicevich* (1913) 164 Cal. 613. But, like *FPI Development*, *Jose Realty* does not support YAN's contention that it never had to plead fraud because fraud was one of La Posta's affirmative defenses.

In *Jose Realty*, a plaintiff sought to quiet title to a parcel of land. "The complaint was an ordinary one to quiet title. The defendant set up a deed to himself from a trustee and executed in pursuance of a sale had under a trust deed. Fraud was not pleaded, but the Supreme Court held that plaintiff was permitted to introduce evidence upon the question as to whether there had been a default under the trust deed, if such proof established fraud." *Harker v. Rickershauser* (1928) 94 Cal.App. 755, 762.

Thus, under the circumstances in *Jose Realty* surrounding the property transfer, the Court allowed evidence of fraud, even though fraud was not pled, because proving fraud served to void the effect of the sale of property—simply put, *Jose Realty* supports the limited, now expired premise, that if fraud renders a property transaction void it does not need to be pled.

The limits to *Jose Realty* are explained by *Borneman v. Salinas Title Guarantee Co.* (1944) 66 Cal.App.2d 500, which rejected *Jose Realty* and found that since *Jose Realty*, the California Supreme Court has laid "down the rule that where title is sought to be quieted against an instrument of conveyance on the ground that the instrument was procured by fraud the facts constituting the fraud must be pleaded in the complaint." *Id.* at 504; *see also Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214 ("And there are many cases holding that, where the legal title is in the defendant, and the plaintiff seeks to quiet

title on the ground defendant's title was secured from plaintiff by fraud, the plaintiff must plead and prove facts constituting the fraud.)

Thus, while *Jose Realty* was never overruled, the Court has acknowledged it's no longer applicable. No case has ever relied upon *Jose Realty* to allow unpled accusations of fraud outside of circumstances surrounding suspicious property conveyances. *Jose Realty* is certainly inapplicable to support YAN's theory that it never needed to plead fraud.

3. YAN's affirmative defenses to La Posta's counter-complaint are inapplicable to bolster YAN's own complaint.

Based on YAN's arguments to the trial court and to this Court, YAN's affirmative defenses to La Posta's cross-complaint are irrelevant because, *arguendo*, there was no case and controversy underlying La Posta's declaratory action. Nonetheless, YAN argues "proof of fraud was offered to prove YAN's affirmative defense that La Posta's cross-complaint was barred by La Posta's 'negligent, intentional or bad faith conduct.'" RB, p 50 (*quoting* YAN's Affirmative Defenses 1 AA 203:¶ 4).

Affirmative defenses must not be pled as "terse legal conclusions," but "rather ... as facts averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint." *FPI Development,* 231 Cal.App.3d at 384 (internal quotations omitted.) It is axiomatic that "[a] party who fails to plead affirmative defenses waives them." *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.

A significant concern with YAN's argument is that YAN acknowledged to the trial court that it did not plead fraud as an affirmative defense:

> Court: Do your affirmative defenses set out fraud in response to the Cross-Complaint? Do you have an affirmative defense of fraud?
>
> Bibbero: Not in so many words. We have an affirmative defense of, I believe it's negligence, intentional and some other.
>
> Court: That doesn't answer my question, though. Is there an affirmative defense that they acted fraudulently –
>
> Ison: No, there is not.
>
> Bibbero: Not in those words. But it's –
>
> Court: Well, you keep saying 'not in those words' as far as putting it before the Court or the plaintiffs. I mean fraud is -- I just don't agree with you, and maybe I'm wrong, but I don't agree that you can do it the way that you are saying it. 1 RT 11:20-12:9
>
> * * *
>
> Bibbero: Your Honor, I'm confused. The plaintiffs are moving for permission to put forth the
>
> Court: Elements. As you call it, "elements of fraud" without having a fraud claim, a fraud cause of action or a fraud affirmative defense.
>
> Bibbero: Okay.

Moreover, in YAN's interrogatory responses, it did not supply any information regarding its "negligence, intentional, or some other" affirmative defense and did not supplement its interrogatory response. *See* 2 AA 514-18; 2 AA 522-26.

Without a clear and properly pled affirmative defense of fraud, La Posta had no contemporary basis to demur. La Posta sought clarification on YAN's affirmative

defenses and received nothing to indicate in any way that fraud was pled as an affirmative defense. YAN should not be allowed to avoid its responsibility to properly plead its affirmative defenses and now claim that, because La Posta did not demur, YAN now has an enhanced right to a jury trial on unpled and unknown accusations of negligent misrepresentation and concealment.

Moreover, had YAN intended its blasé defense to serve as a "new matter," it failed to act accordingly. Well after the opportunity to amend pleadings passed, when YAN filed its motion on the pleadings to prevent trial on La Posta's cross-complaint, YAN did not proffer any evidence to support its claimed affirmative defense or to defend against La Posta's declaratory action with claims of negligent misrepresentation or concealment. *See* 3 AA 809. YAN limited its argument to the language within the SARLA and opposed any extrinsic evidence. *See* 3 AA 1009-10.

Thus, *arguendo*, if any of YAN's affirmative defenses to La Posta's cross-complaint are viable despite, *arguendo*, no case and controversy supporting the cross-complaint; and, if YAN's general language in its affirmative defenses can be construed to mean fraud; and, if YAN's failure to comply with discovery and provide any factual basis for its purported fraud defense is ignored; and, if YAN's decision to file a motion on the pleadings to oppose the cross-complaint instead of develop its affirmative defenses is overlooked, YAN still has no basis to demand a jury trial on its unpled and unknown accusations of negligent misrepresentation and concealment. YAN's reliance on *Pullen v Heyman Bros.*, (1945) 71 Cal.App.2d 444 is misplaced.

In *Pullen*, the plaintiff pled fraudulent misrepresentation arising from several agreements related to construction projects. *Id.* at 446. The defendant answered that there was no fraud. *Id*. at 447. The issues at trial were whether there was a false representation, whether plaintiff knew the representation was false, and whether plaintiff was justified in relying on the representation. *Id*. at 447. The trial court found for plaintiff; defendant appealed. *Id*. at p 448.

The pertinent portion of the defendant's appeal focused on "the sufficiency of the evidence to support the allegation of fraud in the complaint." *Id*. at 448. The defendant argued that the representation proven by the evidence did not conform to the allegations in the complaint. *Id*. at 448.

The court explained that the "general rule is that fraudulent representations relied upon must be pleaded," but "[t]his does not mean that all of the allegations of the complaint must be proved." *Id*. at 448. The Court stated that "[i]n the absence of a demurrer, fraud may be alleged in substance and effect and the evidence must conform thereto, but the proof need not be a verbatim recitation of the allegations of the complaint…[h]ere, the substance and effect of the representations proved conformed to the allegations of the complaint." *Id*. at 448.

Pullen does not help YAN for several reasons. First, the plaintiff in *Pullen* pled fraud, but YAN never pled fraud in its complaint. Second, YAN never clearly pled fraud in its affirmative defenses, which foreclosed La Posta's opportunity to demur. *Pullen* does not support YAN's contention that because La Posta never demurred YAN is free to raise unpled accusations of fraud. Third, YAN's affirmative defenses are inapplicable

because the cross-complaint was defeated at the pleading stages. Fourth, *arguendo*, if the Court accepts the unpled accusations of fraud in YAN's motion in limine as sufficient to allow a jury trial, those unpled accusations did not include negligent misrepresentation or concealment, so those causes were never raised.

II. The trial court correctly prevented jury instructions on negligent misrepresentation and concealment because YAN had not raised either theory.

If the question of whether YAN was entitled to a jury trial on unpled and unknown accusations of negligent misrepresentation and concealment could be reduced to a question of instructional error, the trial court acted properly by excluding the verdict forms for negligent misrepresentation and concealment. The propriety of jury instructions is a question of law that this Court reviews *de novo*. *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.

Generally, "[u]pon request, a party is entitled to correct, non-argumentative instructions on every theory of the case advanced by the party that is supported by substantial evidence." *Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754; relying on *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572. "[T]he duty of the court is fully discharged if the instructions given by the court embrace all the points of the law arising in the case." *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.

"It is hornbook law that each party to a lawsuit is entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence." *Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 806;

overruled on other grounds by *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548. "It is incumbent upon the trial court to instruct on all vital issues involved." *Id*.

What is more, "appellate courts generally are unwilling to second guess the tactical choices made by counsel during trial . . . where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.

If, *arguendo*, YAN was entitled to jury instructions, it was only entitled to jury instructions on its theory of the case. YAN's tactic was not to amend its pleading to properly allege any of the species of fraud. Instead, YAN's strategy was to pursue a jury trial on a single unpled accusation of fraud—a theory the trial court accepted despite La Posta's repeated objections. YAN chose to only identify a single unpled accusation of intentional misrepresentation in its motion in limine—YAN could have advanced many theories of fraud, but limited itself to the single unpled accusation. YAN clearly expressed in its motion that its evidence was based on a single factual scenario and YAN clearly stated its theory of intentional misrepresentation. 1 AA 293-94.

Based on the sole theory of intentional misrepresentation, the trial court acted correctly by allowing jury instructions on that single theory. The trial court fulfilled its duty by allowing instructions that embraced YAN's theory of intentional misrepresentation. The trial court did not second guess YAN's tactical choices when YAN deliberately chose not to amend its pleading or when YAN advanced its single theory of intentional misrepresentation.

This Court should not second guess YAN's tactics now. Based on its position before the trial court, and its appeal here, it appears YAN is disappointed with its deliberate decision to limit itself to a single theory of intentional misrepresentation. But YAN's disappointment in its tactics are not a basis to support its appeal.

Because YAN chose not to advance theories of negligent misrepresentation and concealment, YAN was not entitled to jury instructions on negligent misrepresentation and concealment and the trial court was correct to preclude additional instructions related to those fraud theories.

III. The jury verdict foreclosed any claims of negligent misrepresentation and concealment.

Even if, *arguendo*, YAN had some legal authority to support its theory that it is entitled to a jury trial on unpled and unknown accusations of negligent misrepresentation and concealment, and the language in the SARLA allowing YAN to bring suit based on "any act of fraud" were sufficient to allow YAN to advance unpled and unknown accusations of fraud to a jury trial, the jury verdict prevents these unpled claims from being brought now.

"A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" *Soule v. General Motors Corp.* (1994) 8 Cal.4th at 580; quoting Cal. Const., art. VI, § 13. Instructional error in a civil case is not ground for reversal unless it is probable the error prejudicially affected the verdict. *Id.* at 580.

Error cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 359-360, quotations and citations omitted.

A. The jury instruction for intentional misrepresentation substantially covered the subject matter of negligent misrepresentation and concealment.

The jury found that La Posta's representation—the request for a payment extension—was not a substantial factor in causing YAN harm. By finding no causation, the jury foreclosed any other claims of fraud.

Generally, "[t]he elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*quoting* 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778); *see also* Civ. Code, § 1709. Under Civ. Code, § 1710, deceit is broken into four species: intentional misrepresentation, negligent misrepresentation, concealment, and promissory fraud.

Despite the differences among the nature of the representation,[11] all species of fraud require a showing that the deceit caused damages. Deception without resulting loss

[11] See, e.g,, *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845. ("Claims for negligent misrepresentation and intentional concealment deviate from this set of elements"); *Small v. Fritz Companies, Inc.* 30 Cal.4th 167, 173–174 ("The tort of negligent misrepresentation does not require scienter or intent to defraud.") *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735 (Concealment requires a showing that the defendant suppressed facts or used facts to mislead and "was under a legal duty to disclose" those suppressed facts.)

is not actionable fraud. *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818. "Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown." *Id*. Thus, "[t]he tort of negligent misrepresentation does not require scienter or intent to defraud, but it does, of course, require a showing of resulting damage." *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364. And with concealment, "if damages do not flow from the concealment, but rather from some other extrinsic factor, the award of damages would be improper." *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1166.

The commonality of the causation element among intentional misrepresentation, negligent misrepresentation, and concealment is made clear by the identical use in the California Civil Jury Instructions §§ 1900, 1901, and 1903, which were adopted by YAN in its February 24, 2015 Plaintiff's Proposed Verdict Forms and by the trial court in the verdict form supplied to the jury.

To the trial court, YAN argued that "[f]raud is a basket into which there's intentional fraud, negligence [sic] misrepresentation, and concealment" and La Posta acknowledged the three types of fraud but noted there are distinct elements which allowed La Posta, and ultimately the trial court, to identify YAN's sole theory as intentional misrepresentation. 5 RT 146:23-25[CITE] But the law is clear that all types of fraud require causation.

Thus, the jury instruction submitted to the jury substantially covered the essential subject matter of the jury instructions rejected--causation. Because all species of fraud

require that the alleged representation caused damages, and the instruction given on causation was identical to the causation instructions proposed and rejected, and with only a single representation at issue, the causation instruction covered the same subject matter necessary to prove both negligent misrepresentation and concealment.

B. Based on the evidence, the jury found that La Posta's request for a payment extension did not cause YAN's harm.

Because causation is a necessary element for all types of fraud, and all of YAN's theories of fraud, past and present, arise from the same facts, the jury verdict finding no causation related to the facts precludes all other types of fraud.

YAN confirmed to La Posta that its sole factual theory for all of its accusations of fraud, if allowed before the jury, involves the requested extension of time by La Posta to pay back the loan. *See* 5 RT 150: 7-11.

The joint witness lists and stipulated evidence were all prepared before the trial court limited YAN to its single theory of intentional misrepresentation. In other words, YAN had identified all witnesses and exhibits in anticipation of a trial on any act of fraud. And YAN does not claim that it was not afforded the opportunity to present any evidence or witnesses at trial.

The trial focused on evidence surrounding La Posta's request for a payment extension. The jury found no intentional misrepresentation. More significantly here, the jury found no causation. "Was YAN's reliance on La Posta's representation a substantial factor in causing harm to YAN?" The jury answered "No." 3 AA 806-08. By finding that the representation was not "a substantial factor in causing harm to YAN," the jury

verdict foreclosed any findings of both negligent misrepresentation and concealment. According to the jury, no causation exists between La Posta's request for a payment extension—YAN's "sole factual theory" of fraud—and YAN's damages. 1 AA 806-808. Because the jury instructions substantially covered the subject matter of the excluded instructions, i.e., causation, which is a necessary element of all species of fraud, and the jury found no causation, the trial court did not err by preluding any additional instructions.

Buried in a footnote, YAN expresses its opinion that "[t]he jury verdict is wrong as a matter of law—and would have been vulnerable to revision on an motion for judgment notwithstanding the verdict—because the trial court already found that granting the extension caused YAN $262,081.65 in damages." RB, p 57 fn 15. However, YAN did not make a motion for judgment notwithstanding the verdict. YAN did not appeal the jury verdict. And the jury's decision was within its authority to find that La Posta's request for a payment extension was not a *substantial factor* in causing YAN harm—*i.e.*, $262.081 is not substantial compared to $44 million laws because of YAN's bad business decision.

Because the jury instructions substantially covered all issues, and the jury found no causation, the trial court did not err by precluding additional instructions on fraud.

CONCLUSION TO LA POSTA'S RESPONSE

Because YAN only raised a single theory of its case—intentional misrepresentation—the trial court correctly prevented YAN from bring unpled and unknown theories of negligent misrepresentation to the jury. La Posta never pled fraud in its cross-complaint and never raised fraud as an affirmative defense, YAN never pled fraud as an affirmative defense. And even if, arguendo, the trial court did err by precluding additional instructions, the instructions given to the jury substantially covered the appropriate subject matter and the jury verdict finding no causation foreclosed any additional theories of fraud.

LA POSTA'S REPLY SUPPORTING ITS APPEAL

IV. The trial court erred when it found that there must be a finding of fraud before La Posta's declaratory action can be ripe.

La Posta's position is clear: SARLA never allows YAN recourse to La Posta's Excluded Assets, which include its RSTF:

> Section 13.04 No Management; Limitations to Recourse. In any action or proceeding against Borrower to enforce the Loan Documents, Lender agrees that it shall have no recourse against any Excluded Assets. 1 AA 126:§ 13.04.

YAN disputes the plain language in SARLA § 13.04 and contends that if a "condition precedent" is satisfied – a finding of fraud against La Posta – then YAN has limitless recourse to any of La Posta's assets. RB, p. 36. And until there is a finding of fraud, there is no case and controversy supporting La Posta's declaratory action. RB, p. 30.

This difference of interpretations of the parties' rights under SARLA is the essence of La Posta's declaratory action—it is an actual controversy between the parties to a contract for a determination of the construction and an explanation of the parties' rights under the contract—specifically the limits to YAN's recourse. *See* Cal. Code Civ. Proc. § 1060. The controversy to the limits to recourse has existed since YAN filed its complaint, it has been the driving force behind YAN's California and Tribal Court lawsuits and it underlies this appeal. The controversy will even exist, *arguendo*, if there ever were to be a finding of fraud against La Posta.

The dispute between the SARLA § 13.04 and the phrase "notwithstanding" in § 13.03 is an actual controversy between the parties over their respective rights under the SARLA. It is the type of actual controversy contemplated by CCP § 1060. Thus, the trial court erred when it found that YAN "does not presently contend that it is entitled to La Posta's RSTF" and thus La Posta's declaratory action was not ripe. 3 AA 1066.

A. Standards of Review

While the parties agree that this Court's review of a trial court's decision on a motion for judgment on the pleadings is reviewed *de novo,* whether a claim presents an 'actual controversy' within the meaning of CCP § 1060 is also a question of law that is reviewed *de novo*. *Environmental Defense Project of Sierra Cnty. v. Cnty. of Sierra*, (2008) 158 Cal.App.4th 877, 884-85. When sufficient facts are alleged showing declaratory relief is appropriate, declaratory relief must be granted. See *Columbia Pictures Corp. v. DeToth*, (1945) 26 Cal.2d 753, 762. In a declaratory relief action, the

burden rests on the plaintiff to produce evidence to establish the allegations of its complaint. *Roadside Rest, Inc. v. Lankershim Estate* (1946) 76 Cal.App.2d at 526.

B. When La Posta's alleged facts are taken as true, there is clearly an actual controversy warranting declaratory relief.

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." *Maquire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 728. The interpretation of a contract is clearly a proper subject of declaratory relief." *Southern California Edison Co. v. Sup Court* (1995) 37 Cal.App.4th 839, 846. "It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief." *Fowler v. Ross* (1983) 142 Cal.App.3d 472, 478; *Caira v. Offner* (2005)126 Cal.App.4th 12, 24.

When facts are properly alleged regarding a contract's construction and its effect, even if such effect is to occur in the future, declaratory action is appropriate when there is a current dispute over the application of the terms to be interpreted. For example, in *AICCO, Inc. et. al v. Ins. Co. of North America, et. al*, (2001) 90 Cal.App.4th 579, the trial court dismissed the plaintiffs' declaratory action finding there was no justiciable dispute because the effects of the terms to be declared would not occur until the future.

In *AICCO*, defendant insurance company ("INA") was losing money on billions of dollars of asbestos insurance coverage and sought to "shed its obligations" for those

policies. *Id.* at 584. INA did so by transferring its policies to a sister corporation. By transferring its policies, INA claimed to be free of any asbestos-policy liability. *Id*. at 585.

Plaintiff insurer ("AICCO") and several of INA's competitors filed an action against INA (and co-defendants) seeking a declaration, in pertinent part, that INA remained liable under the transferred policies. *Id*. at 586. The trial court granted INA's demur ruling that assessing the liability to satisfy the obligations undertaken by INA was 'speculative' and 'premature.' *Id*.

In relevant part, this Court reversed the trial court, finding that AICCO's allegations created a justiciable dispute. *Id*. at 590. INA argued that it had not yet disclaimed any liability to any policy holder, thus whether INA would ever disclaim liability was a matter for an unknown future day. *Id*. at 591. The Court disagreed with INA.

As required upon review of the demur, the Court accepted AICCO allegations as true: that INA claimed it was free of any obligation to policyholders, that INA's assignee was liable, and if the assignee could not pay, the policy holders were without recourse against INA. *Id*. The Court found the allegations sufficient to support the declaratory action even though no policyholder sought to recover from INA, INA had not refused to cover outstanding liability, and the assignee had not been unable to pay any policy holder.[12]

[12] On remand, the trial court granted AICCO's motion for summary judgment finding that INA's transfer of liabilities was unlawful, but the case was ultimately dismissed for lack of standing after California's voters passed

Similarly, YAN, like INA, has attempted to inject faux preconditions to curtail La Posta's declaratory action – that YAN has not obtained a finding of fraud and has not made any effort to obtain any recourse from La Posta's RSTF or other Excluded Assets. Like INA, YAN claims that its available recourse is a question left for some unknown future date - when YAN has obtained a finding of fraud – and therefore La Posta's declaratory action is unripe and non-justiciable. (RB, p. 30-31). However, like AICCO, La Posta has pled facts to create a justiciable dispute. *See, e.g.*, 1 AA 77-79, ¶¶ 10, 12, 13, 14, 15, 24, 31.

"When determining whether a complaint states a cause of action we are obligated to presume the material allegations of the complaint are true." *AICCO, Inc.* 90 Cal.App.4th at, 591. Accepting La Posta's allegations as true, the Court should find that the allegations demonstrate that there is an actual controversy and dispute *right now* over the limits to YAN's recourse, *i.e*., YAN never has recourse La Posta's RSTF.

Moreover, while YAN asserts here that there must be a finding of fraud before YAN has limitless recourse to La Posta's assets, the argument is deceptive. RB p 36. Even though YAN takes this position now, the trial court's final judgment does not place any restraint on YAN, which emphasizes the need for a declaration of the limits to YAN's recourse. The final judgment simply states that, "YAN shall recover from La Posta $44,460,704.98 in principal and $4,422,702.99 in prejudgment interest . . . ." The judgment does not contain any preconditions to YAN's enforcement and it does not

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Proposition 64 on November 12, 2004. *AICCO, Inc. v. Insurance Co. of North America* (Cal. Ct. App., May 10, 2006, No. A110367) 2006 WL 1280620, at *2.

require YAN to provide any showing it obtained a finding of fraud before YAN can impose a lien on La Posta's RSTF. If, without a finding of fraud, YAN were to file a lien with the California Gambling Control Commission ("CGCC"), *arguendo*, the CGCC would see a valid judgment and likely impose the line on La Posta's RSFTF. La Posta would be compelled to refile the exact cause for declaratory action for an interpretation of the SARLA and likely for injunctive relief to prevent YAN from taking extra-contractual recourse. La Posta should not be required to wait to be harmed by a lien and forced to engage in another lawsuit before it can have its rights declared under the SARLA.

C. The purpose of a declaratory action is to resolve probable future controversy.

The purpose of declaratory relief is "to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs." *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th at 884, *as modified (Jan. 9, 2008); quoting Travers v. Louden* (1967) 254 Cal.App.2d 926, 931, 62 Cal.Rptr. 654. It "is to be used in the interests of preventive justice, to declare rights rather than execute them." *Id.*

The "actual controversy" language in CCP § 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties. *Sherwyn v. Department of Social Services* (1985) 173 Cal.App.3d 52. For a probable future controversy to constitute an "actual controversy," however, the probable future controversy must be ripe. *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885, *as modified (Jan. 9, 2008)*. A "controversy is 'ripe' when it has

reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22.

YAN's entire effort to prevent adjudication of La Posta's cross-complaint hinges on its perception that "absent a determination of fraud, YAN does not have a right to La Posta's RSTF payments." RB p 30. Thus, YAN argues, any ruling by the trial court would be based on a "theoretical 'future judgment'" and so would be speculative. RB, p. 31. YAN further argues that La Posta's claims are based on a "hypothetical judgment" that could be obtained sometime in the future and that the trial court "had no way of knowing what rights that judgment would declare." RB, p. 31.

YAN's argument has succinctly described the scenario where preventative justice is required to declare rights under the SARLA before either party needs to bring additional litigation. The limit to YAN's recourse to collect on its $44 million judgment is a very probable future controversy that can only be resolved by an interpretation of the SARLA. In retrospect, had the trial court considered La Posta's cross-complaint first, the parties could have avoided three years of litigation in two courts on the same facts. The actual controversy that existed when La Posta filed its cross-complaint still exists now.

The parties have long been at a point where an intelligent and useful decision can be made as to the limits of YAN's recourse. By waiting until YAN moves to enforce its judgment, regardless of any other findings, will pass the point where a declaratory action is ripe and will require La Posta to seek injunctive and other relief to prevent YAN from extra-contractual recourse.

V. La Posta is not seeking an advisory opinion.

The parties dispute the impact of *Pacific Legal Foundation v. CA Coastal Com.* (1982) 33 Cal.3d 158, 170, and *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, to determine whether La Posta has sought an advisory opinion. While La Posta only relied upon these cases for their general explanations of the relevant law, they are substantively instructive as a contrast to the instant matter.

In *Pacific* the plaintiffs were seeking a declaration of the facial invalidity of guidelines adopted by the California Coastal Commission in the California Coast Act of 1976. The plaintiffs there acknowledged "that no specific application of the guidelines is involved; rather, the case is merely a general challenge on statutory and constitution grounds to the Commission's access policies contained in the guidelines." 33 Cal.3d at p. 169.

In holding the controversy there not ripe for adjudication, the California Supreme Court stated: "the abstract posture of this proceeding makes it difficult to evaluate even the issues relating to the consistency of the guidelines of the Coastal Act. Plaintiffs are in essence inviting us to speculate as to the type of developments for which access conditions might be imposed, and then to express and opinion on the validity and proper scope of such hypothetical exactions. We decline to enter into such a contrived inquiry." *Id.* at p. 172.

In *Wilson,* the plaintiff's efforts to stop a condemnation action were not ripe because the action required the trial court to speculate on future developments and future legislative action to initiate eminent domain. 191 Cal.App.4th at 1583. There was no

evidence that any future development would affect plaintiff's property or the defendants would ever seek to acquire plaintiff's property. *Id*. at 1584.

In sharp contrast to the premature declaratory actions in *Pacific* and *Wilson,* the dispute over the limits to YAN's recourse is neither abstract nor contrived. *See* 3 AA 1082. YAN has a judgment for $44 million that has no restrictions on YAN's ability to collect upon that judgment. The parties disagree whether specific contractual provisions allow YAN recourse to collect that judgment from La Posta's RSTF payments or other Excluded Assets. There is a second trial underway on YAN's second effort to find fraud. While YAN argues that this dispute is not concrete until there is a finding of fraud against La Posta, that is only the case if the Court accepts YAN's interpretation of the SARLA as correct. Even if YAN were to obtain a finding of fraud, La Posta maintains that YAN would never have recourse to Excluded Assets regardless of any finding of fraud, so the dispute remains.

VI. The SARLA, and the documents integrated into the SARLA, make it clear that YAN may never recover any Excluded Assets, including La Posta's RSTF.

YAN emphasizes its belief that "La Posta concedes the contract is unambiguous," in an effort to preclude the Court's consideration of documents other than the SARLA. RB, p. 27. However, SARLA § 8.04 explains the Loan Documents constitute the entire agreement. The Loan Documents include, in relevant part, the SARLA, the Note, and the Collateral Documents. The Collateral Documents include the Security Agreement. The Security Agreement includes the December 21, 2005 Security Agreement as amended and restated on November 7, 2006. All of these documents must be considered when

evaluating the construction and interpretation of the SARLA. These documents clearly show that La Posta never pledged its RSTF and that YAN has never had any expectation to Excluded Assets, including the RSTF.

YAN argues that "even had the trial court not found the controversy unripe," such error was harmless because La Posta's motion for judgment on the pleadings would have been denied anyways. RB, p. 34. YAN makes this argument by concluding that "the plain language of the SARLA provides that if any of the three conditions [contained in SARLA §13.03(a)] is satisfied, Section 13.04 [which excludes recourse to Excluded Assets] does not limit YAN's recourse." RB, p.36. However, such an interpretation is in direct contradiction with the canons of construction used to interpret contracts.

A. The use of the term "notwithstanding" relates to the limited waiver of tribal sovereign immunity and does not serve to render the SARLA § 13.04 superfluous.

The SARLA § 13.03(a) explains the parties' waivers of tribal sovereign immunity. The first sentence in this section explains that the parties each waive immunity from suits related to the Loan Documents and limits the recovery to any suit to the Collateral "in a manner consistent with Section 13.04." The second sentence expands the waiver of immunity and allows recourse "beyond the interest in the Collateral," but does not abrogate Section 13.04. Read together, an interest beyond the Collateral necessarily stops at La Posta's Excluded Assets.

YAN misconstrues *Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, and *Mejia v. Reed* (2003) 31 Cal.4th 657, in an effort to show the use of the term "notwithstanding" in the SARLA § 13.03(a) overrides all other language in

the Loan Documents and thus allows YAN limitless recourse to La Posta's assets. RB p 36. Both *Faulder* and *Mejia* show that the use of the phrase "notwithstanding" in a proviso is used to limit only what it describes.

- In *Faulder,* "notwithstanding any other provision of law" has a broad effect to override all *contrary* law. 114 Cal.App.4th at 1373.

- In *Mejia*, the phrase "notwithstanding any other provision of this chapter" limited the effect to one portion of law, but still made the section susceptible to other law. 31 Cal.4th at 666.

In the SARLA, the proviso "notwithstanding the foregoing sentence" limits the effect of the phrase to the single sentence describing the limits of the tribes' waivers of sovereign immunity, and does not serve to nullify any other section of the SARLA. Moreover, the exclusion of the RSTF as recourse is supported by the documents integrated into the SARLA, which in no way are contemplated by the SARLA § 13.03(a).

- In the November 7, 2006 Amended and Restated Security Agreement, the "Grant of Security Interest" expressly states that "in no event shall Pledged Revenues include . . . any trust land or trust assets of [La Posta]." 1AA 310, ¶ 2(c).

- The Amended and Restated Security Agreement[13] states that "in no event shall Pledged Revenues include … (D) any trust lands or trust assets of Debtor." 1 AA 310:2(c).

Thus, *arguendo,* even if the proviso in the SARLA § 13.03(a) did have an effect on § 13.04, the RSTF are still excluded pursuant to the Loan Documents.

[13] The Amended and Restated Security Agreement has the exact same provisions contained in Section 13.03 and 13.04 of the SARLA.

VII. The trial court erred by adopting YAN's misinterpretation of the SARLA which found damages to support its fraud accusation.

The trial court erred when it adopted YAN's interpretation of the SARLA as to the calculation of damages arising from the breach. If a trial court interprets a contract without consideration or extrinsic evidence, or if the extrinsic evidence, it considers is not conflicting, its determination is a question of law that reviewing courts reviewed *de novo*. *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.

A. YAN misconstrues the facts to undervalue La Posta's argument.

In its brief, YAN argues that the SARLA includes a grace period from May 1, 2009 to August 1, 2009 "during which La Posta had no obligation to make any payments whatsoever" and thus there was "no amount 'past due' at any time before August 1, 2009." RB p 11-12; 39. Then concludes that because "compounding is only permitted on past due amounts, there was no amount compounded before August 1, 2009." RB p 12.This is factually inaccurate. Under the negotiated terms of the SARLA, payments were not scheduled to begin until August 1, 2009. The purposes for the August 1, 2009 date are not at issue. But what is relevant is that the period between May 13, 2009 and August 1, 2009 where La Posta was not required to make payments under the SARLA is different than the payment extension YAN granted, where the SARLA required payment but YAN allowed reprieve.

La Posta's position is that with the default of the first payment on August 1, 2009 payment, the Obligations became immediately due and payable without action by YAN. 1 AA 119:§ 7.02(a). The Obligations include "all unpaid principal of and accrued and

unpaid interest on the Restructured Loan." Thus, when La Posta missed the August 1, 2009 payment, all Obligations became immediately due, which was the accrued interest from May 13, 2009 through July 31, 2009.

YAN inflates La Posta's position by stating that, under La Posta's interpretation "any breach at any time results in compounding back to May 13, 2009." RB, at 41. But YAN's misunderstanding of La Posta's argument ignores the effect of SARLA Section 7.02(a) and the SARLA's opportunity to cure a default.

Because La Posta did not make a single payment under the SARLA, the accelerated Obligation included the initial (unpaid) principal balance along with all (unpaid) accrued interest, which dates to May 1, 2009 when interest began to accrue and because due on August 1, 2009, then continued over the life of the loan because La Posta never cured the default by making a payment. For example, *arguendo*, if La Posta had made three years' worth of payments and then missed a single payment, only the *unpaid* principal and *unpaid* interest related to the single missed payment would be accelerated and compounding would begin on those amounts.

YAN's exaggeration of La Posta's position makes it appear as if La Posta is seeking to owe more money—which is untrue. La Posta is merely applying the facts to the SARLA. La Posta is not arguing for retrospective compounding of interest. Rather it correctly takes into account the acceleration of the Obligation due to the missed August 2009 payment, and every other payment, and compounds interest pursuant to the terms of the SARLA.

Additionally, YAN misconstrues La Posta's argument because it fails to take into account the acceleration of the Obligations in its own interpretation and calculations pursuant to SARLA Section 7.02. Instead, YAN focuses solely on SARLA Section 2.06 to determine when and how interest was calculated. While SARLA Section 2.06 does control default rates, Sections 2.02 and 7.01 must also be considered in order to accurately assess damages as a result of the breach. Under those provisions, La Posta's default for nonpayment in August 2009, triggered the interest and compounding of interest with principal for the life of the loan – once compounding started, it didn't stop because La Posta did not cure, so any future nonpayment pursuant to the forbearance had no effect. YAN was therefore wrong in calculating damages because it does not take into account how Section 2.02. 2.06, ad 7.01 work together upon the event of default for nonpayment.

B. The trial court erred when it ignored several provisions of the SARLA that controlled when interest compounds and accrues.

YAN contends that La Posta's damages calculations are wrong because La Posta compounds interest incorrectly because the forbearance meant that there were no payments *due* to allow compounding interest under SARLA Section 2.06. However YAN fails to consider that the forbearance did not offer reprieve for all missed payments, thus the default and acceleration provision that took effect and required compounding and accruing interest on all unpaid amounts dated back to August 1, 2009.

YAN admits that, pursuant to the January 14, 2010 letter, YAN granted an extension explaining that no *payments* were due between January 18, 2010 and May 3,

2010, but YAN's letter did not account for the missed payments that were due from August 1, 2009 to January 1, 2010. RB, p.42, emphasis added. Because La Posta missed those payments La Posta defaulted, and pursuant to the acceleration provision, interest started compounding right away and unpaid amounts became due without any necessary action by YAN. *See* 1 AA 119:§ 7.02(a). Thus, even if the forbearance did not require seven monthly *payments*, interest had already begun to compound and accrue and was due because of the default.

C. Default and acceleration happened automatically under the SARLA. YAN is incorrect to argue there was no default because no one said there was a default.

YAN attempts to ignore the SARLA § 7.01(a) that requires acceleration "without any election or action" by YAN claiming that SARLA Section 7.01(c) "makes acceleration only one option for YAN, and which required YAN to make an election of its options upon La Posta's default." RB p 44.

The plain language of Section 7.01(a) mandating acceleration cannot be ignored: "[t]he Obligations shall immediately become due and payable without any election or action on the part of the Lender." The mandatory acceleration relates solely to defaults as a result of non-payment or breach of a representation. *See* 1 AA 116:6(a); 1 AA 119(a). But Section 7.01(a) does allow YAN to elect to accelerate the Obligations for any other default besides non-payment and breach of a representation. *See* 1 AA 119(a).

YAN wants the Court again to make sections of the SARLA superfluous based on the term "notwithstanding." Under YAN's interpretation, the automatic acceleration of Section 7.01(a) has no meaning and should be ignored completely, and instead Section

7.01(a) and (c) taken together means that the acceleration of the Obligations in the event of *any* default is at the election of YAN. But the canons of construction do not support that interpretation. Moreover, YAN admits that "there was no evidence to show that YAN ever exercised that option." RB p 44. And there is no evidence to show that it expressly waived its rights under § 7.01(a).

CONCLUSION TO LA POSTA'S REPLY

La Posta pled sufficient facts to show an actual case and controversy arising under the SARLA as to its construction and to the parties' rights. Under the Loan Documents, the SARLA and the documents integrated into the SARLA, it is clear that La Posta's Excluded Assets—i.e., its RSTF—are never available as recourse and were never pledged as security. The trial court erred by denying La Posta's Motion [for Judgment] on the Pleadings.

Moreover, when considering the substance of La Posta's request for a payment extension, YAN's grant of a payment extension, and La Posta's default, under the SARLA it is clear that the payment extension could not have stalled compounding and accruing interest, thus YAN suffered no damages from the payment extension. The trial court erred by finding the forbearance caused YAN damages.

RELIEF REQUESTED

For these reasons, La Posta respectfully requests that this Court reverse the trial court's erroneous December 30, 2014 Findings and Order because the payment extension did not cause damages.

La Posta respectfully requests that this Court reverse the trial court's denial of La Posta's Motion [for Judgment] on the Pleadings and find that there is an actual case and controversy supporting La Posta's declaratory action and either (i) remand for additional proceedings on La Posta's cross-complaint or (ii) interpret the SARLA to find that La Posta never pledged its RSTF and that YAN has no recourse to enforce any judgment against La Posta's RSTF and remand with instructions for the trail court to grant La Posta's declaratory relief.

Finally, La Posta respectfully requests that this Court deny YAN's cross-appeal and uphold the trial court's April 1, 2015 order refusing jury instructions on unpled accusations of negligent misrepresentation and concealment.

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204 of the California Rules of Court, I hereby certify that the Cross-Respondent's Response to Cross-Appeal contains 11,795 words, including footnotes.

I hereby further certify that the Appellant's Reply in Support of Appeal contains 4,530 words, including footnotes.

Therefore, I hereby certify that the total number of words in the combined Cross-Respondent's Response to Cross-Appeal and Appellant's Reply in Support of Appeal is 16,325.

In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ Justin Gray
Justin Gray

STATE OF CALIFORNIA
Court of Appeal, Fourth Appellate District Division 1

PROOF OF SERVICE

(Court of Appeal)

Case Name: **The Yavapai-Apache Nation v. La Posta Band of Deigueno Mission Indians**
Court of Appeal Case Number: **D069556**
Superior Court Case Number: **37-2013-00048045-CU-BC-CTL**

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