NO. 19-71522

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PINOLEVILLE POMO NATION, a federally-recognized Indian tribe; PINOLEVILLE GAMING AUTHORITY; PINOLEVILLE GAMING COMMISSION; PINOLEVILLE BUSINESS BOARD; PINOLEVILLE ECONOMIC DEVELOPMENT, LLC, a California limited liability company; ANGELA JAMES; LEONA L. WILLIAMS; LENORA STEELE; KATHY STALLWORTH; MICHELLE CAMPBELL; JULIAN MALDONADO; DONALD WILLIAMS; VERONICA TIMBERLAKE; CASSANDRA STEELE; JASON EDWARD RUNNING BEAR STEELE; and ANDREW STEVENSON,

Petitioners,

v.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA,

Respondent, and

JW GAMING DEVELOPMENT, LLC, a California limited liability company,

Real Party in Interest.

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of California (No. 3:18-cv-02669-WHO)

ANSWER TO PETITION FOR WRIT OF MANDAMUS BY REAL PARTY IN INTEREST JW GAMING DEVELOPMENT, LLC

Gregory M. Narvaez (No. 278367)
John M. Peebles (No. 237582)
Tim Hennessy (No. 233595)
FREDERICKS PEEBLES & PATTERSON LLP
2020 L Street, Suite 250
Sacramento, CA 95811
Telephone: (916) 441-2700
Email: gnarvaez@ndnlaw.com

Attorneys for Real Party in Interest
JW Gaming Development, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, Rule 26.1, Real Party in Interest, JW Gaming Development, LLC, hereby certifies, by and through its counsel of record, that it is a privately-held limited liability company organized under the laws of the State of California. No parent corporation or publicly held corporation owns 10% or more of stock or any other interest in JW Gaming Development, LLC.

Dated: July 10, 2019

FREDERICKS PEEBLES & PATTERSON LLP

By: /s/ Gregory M. Narvaez
Gregory M. Narvaez

Attorneys for Plaintiff-Appellee
JW Gaming Development, LLC

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INTRODUCTION

The petitioner Pinoleville Pomo Nation (the "Tribe"), through its leadership, has perpetrated decades of fraud against a variety of persons and entities, available information shows. Over the course of this time, and during the course of perpetrating and concealing its many frauds, the Tribe has entered numerous contracts. The sole claim against the Tribe in this case—the claim that remained fully active in the district court prior to the emergency stay entered by this Court—is for breach of one such contract.

The district court order that Petitioners[1] ask this Circuit to vacate is sound and unremarkable.[2] It simply, and correctly, held that plaintiff and real party in interest JW Gaming Development, LLC ("JW Gaming") is entitled to discovery on alleged misrepresentations that were made during the formation of the subject contract (a promissory note between JW Gaming and the Tribe *et al.*) because those matters are relevant to the contract claim pending in the district court. In

[1] The Petitioners are the Tribe, three tribal government bodies (Pinoleville Gaming Authority, Pinoleville Gaming Commission, and Pinoleville Business Board), a company owned by two of the individual defendants (Pinoleville Economic Development, LLC), and eleven individuals sued in their individual capacities.

[2] The referenced order [Dist. dkt. 90] was issued by the District Judge on April 12, 2019. It is referred to herein as the "Discovery Order," and in other ways that makes the reference clear in context.

doing so, the district court relied on established law of the Ninth Circuit and a recent opinion from its district:

> Reformation is "a remedy for a contract obtained through fraud or mistake at the time of contracting." *Ritter v. JPMorgan Chase Bank, N.A.*, No. C 17-02919 JSW, 2017 WL 7243542, at *3 (N.D. Cal. Nov. 21, 2017). "[A] court may reform a contract when (1) one party seeks reformation, (2) that party's assent was induced by the other party's misrepresentations as to the terms or effect of the contract, and (3) the party seeking reformation was justified in relying on the other party's representations." *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012).

2 App. 337 (Order [Dkt. 90] at 1).[3]

[3] Discovery relevant to the remedy of reformation goes to the core dispute under the contract claim. Two provisions of the contract are potentially at odds, and they determine against what assets JW Gaming may enforce any money judgment it obtains in this case. Under one interpretation, which JW Gaming will submit is the correct interpretation, a money judgment in favor of JW Gaming is collectible against all assets of the Tribe (or at least assets beyond the revenues of a non-existent casino). Under the other interpretation, a money judgment in favor of JW Gaming is collectible only against revenues of a non-existent casino.

In its dispositive motion on the contract, JW Gaming will argue that to the extent the parties contracted for the latter result (which JW Gaming will assert did not occur), the Court should reform the contract, or otherwise exercise its equitable powers, to make a money judgment collectible against all assets of the Tribe (or at least assets beyond the revenues of a non-existent casino gaming facility). In order to make this argument for reformation, JW Gaming will need to show that its assent to the contract (including the provision limiting recourse for collection) was induced through fraudulent misrepresentations.

In order to obscure this unremarkable and straightforward order and frame it as clearly erroneous, Petitioners engage in analytical gymnastics. One of the main ways Petitioners do so is by setting up a straw-man argument that discovery regarding misrepresentations in the formation of the contract is actually discovery on a fictional tort claim against the Tribe for fraud-in-the-inducement, Pet. Br. [Cir. Dkt. 2] at 20-21, an assertion with no basis in law or fact.[4] Petitioners then dedicate almost the entirety of their brief to knocking down the straw man, arguing that an order allowing discovery on the fictional tort claim is improper. In particular, Petitioners argue that the Tribe did not waive its immunity to any such (fictional) tort claim and that the Discovery Order disregards that immunity and tramples on decades of longstanding precedent. Pet. Br. [Cir. Dkt. 2] at 24.

Relatedly, and in a similarly faulty argument, Petitioners assert that the discovery sought is improper because it is relevant to the fraud and RICO claims currently on interlocutory appeal (and thereby subject to an automatic stay). From

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What is more, at least some of the fraudulent representations on which the District Court permitted JW Gaming to obtain discovery are contained within the four corners of the subject contract. *See, e.g.*, Supp. App. 15 (Promissory Note [Dkt. 1-4] at 13 of 85). Under Petitioners' arguments in its briefing here, a contract claimant would be barred from seeking discovery on the veracity of representations and warranties a party makes *within the very contract on which the dispute centers*—an untenable situation with patently unreasonable results.

[4] To be clear, the instant litigation contains no tort claim against the Tribe.

that premise, Petitioners argue that the District Court acted outside of its jurisdiction in violation of the automatic stay on the fraud and RICO claims. However, in so arguing, Petitioners ignore the situation at bar, where the discovery sought is relevant to the active contract claim, even if it may also have overlapping relevance to the stayed fraud and RICO claims.

In reality, the Discovery Order resolved a routine discovery dispute about the relevance of certain information to a pending claim on the contract (as to which the Tribe granted a very broad waiver of its tribal sovereign immunity). The Tribe acknowledged as much in its initial briefing on the question before the district court, only raising the issue of sovereign immunity in subsequent briefing after it lost the relevance dispute. As such, the Discovery Order raises no novel questions, nor will the Discovery Order result in any greater prejudice to Petitioners than any other litigant faces in a dispute over relevance.

In short, the circumstances presented here do not give rise to the drastic and extraordinary remedy Petitioners seek. JW Gaming respectfully requests that the Court deny Petitioners' requests for a writ of mandamus and a *Cohen* appeal.

RELEVANT BACKGROUND

I. Factual Overview[5]

A. The Initial Fraud

Defendants induced JW Gaming to loan the Tribe $5.38 million by falsely claiming that JW Gaming would be matching virtually dollar-for-dollar an earlier loan of approximately $5 million that defendant Canales Group LLC made to the Tribe. As evidence of the purported Canales loan, and later to conceal that no such loan had occurred, Defendants provided JW Gaming two sham promissory notes obligating the Tribe and PED to pay Canales Group an amount that has now grown to approximately $10 million.[6] Once JW Gaming's $5.38 million was under Defendants' control, they used millions for themselves. They concealed much of their misappropriation through an accounting of the Tribe that conceals at least

[5] This brief contains only a condensed version of those facts previously presented in JW Gaming's opposition to the emergency motion to stay [App. Dkt. 5-1], and in JW Gaming's answering brief [App. Dkt. 17]. This brief provides other salient facts—either contained in the complaint but not emphasized in prior briefing, or uncovered through discovery and ongoing investigation in the district court. The materials contained in JW Gaming's Second Supplemental Appendix were not filed with the district court, pursuant to the District Judge's civil standing order (eff. Jan, 18, 2018) at par. 4. However, JW Gaming's portion of the joint discovery statements filed with the district court described the matters reflected in these materials. All of these records were obtained through JW Gaming's discovery and investigation.

[6] As of the date of this filing (July 10, 2019), the Tribe is in apparent breach of its obligation to pay Canales Group about $10 million under the now-matured promissory note between the Tribe and Canales Group.

approximately $850,000.

B. The Notes to JW Gaming and Canales Group

Angela James and Leona Williams then sent JW Gaming a notice of default on the Tribe's letterhead asserting that JW Gaming was obligated to give the Tribe more money, and that by failing to do so JW Gaming was putting the casino project in jeopardy. [Supp. App. at 10]. In response, JW Gaming proposed to invest an additional $850,000 with the Tribe in exchange for more control over the project. Compl. ¶¶ 216-17 [Petitioners App. at 34]. The Defendants declined. Compl. ¶ 218 [Pet. App. at 218].

To resolve the Tribe's notice of default, it was agreed that JW Gaming and Canales Group would take separate promissory notes with the Tribe for the amount each had purportedly invested with the Tribe. JW Gaming entered a note dated July 10, 2012 in the principal amount of $5.38 million. *See* JW Note [Supp. App. 12-22]. The note provides that "[n]otwithstanding any other provision of [the note], any award or judgment . . . may be enforced and collected only as against the [casino] Revenues or the deposit or securities accounts into which the same have been deposited." [Supp. App. 14]. However, another provision of the note states that if the Tribe fails to open a gaming facility by July 10, 2015, the note "will be immediately due and payable." [Supp. App. 13]. The note "irrevocably waives the sovereign immunity of all Tribal Parties and their Affiliates . . ., and all

defenses based thereon," [Supp. App. 14], for "any dispute . . . related to" the note [Supp. App. 17].

Later, JW Gaming obtained a copy of the note that Canales Group had entered with the Tribe, also dated July 10, 2012, in the principal amount of $5.352 million. See Canales Note [Supp. App. 24-27]. Unlike the JW Gaming note, the Canales Group note bears interest back-dated to May 30, 2008, [Supp. App. 24], making it more valuable than the Tribe's note with JW Gaming. Also, unlike the JW Gaming Note, the Canales Group note omits any reference to casino revenues, but instead provides the note "may be enforced and collected" against all revenues of the Tribe. [Supp. App. at 25]. Finally, the Canales note has a maturity date of July 10, 2019—the date of this filing—which is four years after the JW Gaming note matured on July 10, 2015 (also the same day the four-year statute of limitations would have run on the JW Gaming note). [Supp. App. at 24].

C. The Tribe's Concealment of Its Notes with JW Gaming and Canales Group

In other litigation, the Mendocino County Superior Court ordered the Tribe to produce all of its contracts between 2009 and 2016 containing a waiver of the Tribe's sovereign immunity. *See* Declaration of Tim Gill at ¶ 14 [Supp. App. 34]. However, the Tribe did not produce either of its promissory notes to JW Gaming or Canales Group LLC, *see id.* at ¶ 15 [Supp. App. 34], both of which contain waivers of the Tribe's sovereign immunity. What is more, in later depositions, the Tribe's

two signatories to the Tribe's two notes with JW Gaming and Canales Group LLC—Leona Williams and Angela James—recalled virtually nothing about the Tribe's dealings with JW Gaming. Deposition of Leona Williams, Vol. I, (Sept. 26, 2017) at 182:12-15 [Supp. App. 53] (did not remember whether the Tribe borrowed money from JW Gaming at some point in July of 2010); *see also* Deposition of Angela James, (Sept. 27, 2017), at 62:2-5 [Supp. App. 61] (could not recall whether she intended to defraud JW Gaming at the time of signing the JW Note because she did not recall anything about JW Gaming). Also, contrary to the since-discovered note between the Tribe and Canales Group, Leona Williams testified the Tribe had no contracts with Canales Group, *see* L. Williams Depo. at 23 [Supp. App. 50]. Consistent with that testimony, Michael Canales testified that Canales Group had never loaned money to the Tribe. *See* Deposition of Michael Canales (Sept. 19, 2017) at 24:3-17 [Supp. App. 65].

Forster-Gill, Inc., the plaintiff in the other litigation, came to obtain the JW Note and the Canales Note only through its own independent investigation into the Tribe.

D. Government Actions Against the Tribe's Accounting Personnel

All three of the individuals responsible for the Tribe's internal and external accounting and auditing have been the subject of adverse government action related to their professional work.

The Tribe's longtime external auditor, Rudolph G. Vargas, recently relinquished his CPA license to resolve an enforcement action against him and his accounting firm by the California Board of Accountancy. A copy of the accusation, stipulation, and order are publicly available at https://www.dca.ca.gov/cba/discipline/actions/ac-2016-72.pdf. In the action, Mr. Vargas stipulated to lying to regulators about his compliance with professional auditing standards.[7] He also stipulated to failing to perform audits in accordance

[7] Relevant to this point, Mr. Vargas stipulated as follows:

> 18. On or about March 29, 2010, [Vargas] wrote a letter to Kay Lewis (Lewis), an Investigative CPA with the [California Board of Accountancy], in which [Vargas] claimed that he had completed peer review in 2001 and 2005, and that "one that we wanted to do for 2008 was never finished . . . ." This statement was false. At the time of [Vargas]'s letter, [Vargas] had not completed a peer review since on or about December 18, 2002, based on a system review for the year ending December 31, 2001.
>
> 19. On or about April 9, 2010, [Vargas] wrote another letter to Lewis in which [Vargas] stated that he would be scheduling a new peer review for 2009. [Vargas] never scheduled, began, or completed a peer review for 2009.
>
> 20. On or about April 14, 2010, Lewis sent [Vargas] a letter requesting that he explain why the 2008 peer review was not completed. On or about April 25, 2010, [Vargas] wrote a letter to Lewis stating that [Vargas] was in the process of obtaining a peer review for 2009. That statement was false and/or misleading.

Dec. and Order (https://www.dca.ca.gov/cba/discipline/actions/ac-2016-72.pdf), Ex. A at ¶¶ 18-20.

with Generally Accepted Government Auditing Standards (GAGAS),[8] in addition to other matters. In his work for the Tribe, Mr. Vargas performed federally-mandated Single Audits, Compl., Ex. 39 [Dist. Dkt. 1-5] at 36 of 83 (Data collection form for Single Audit listing primary auditor contact as Rudolph G. Vargas), which must be in accordance with GAGAS, *see Government Auditing Standards* (2018 Revision), United States Government Accountability Office, Comptroller General of the United States (July 2018) at § 1.09.c. ("The Single Audit Act Amendments of 1996 (Public Law 104-156) requires that GAGAS be followed in audits of state and local governments and nonprofit entities that receive

[8] Relevant to this point, Mr. Vargas stipulated as follows:

> 23. At some point in 2013, a CPA firm performed a peer review of [Vargas]'s practice. On or about January 28, 2014, the CPA firm issued a peer review report for [Vargas]'s practice for the year ending December 31, 2012. The report documented numerous significant deficiencies in [Vargas]'s practice, including the following: lack of a written quality control document; lack of a monitoring or inspection process; lack of documentation of Respondent's communication of certain matters to those charged with governance for the engagements that were reviewed; failure to undergo an external peer review once every three (3) years; and failure to document essential compliance requirements for Single Audit engagements. [Vargas] received a peer review rating of FAIL.

Dec. and Order (https://www.dca.ca.gov/cba/discipline/actions/ac-2016-72.pdf), Ex. A at ¶ 23.

federal awards.") (publicly available at https://www.gao.gov/assets/700/693136.pdf).[9]

Mr. Vargas's counterparts within the Tribe—Michelle Campbell (Fiscal Director), and Kathy Stallworth (Accounting Manager)—were previously criminally indicted by a federal grand jury in the Northern District of California on the grounds that, while working for another tribal government, they and others "conspired to participate in the alteration and destruction of Tribal and Casino records, with the intent to impede, obstruct and influence [a federal National Indian Gaming Commission] investigation." *United States v. Hunter et al.*, 3:06-cr-00565-CRB (N.D. Cal.), Superseding Indictment [Doc. 43] at ¶ 36.[10] Specifically, the superseding indictment charged that "[i]n or around July 2003, defendants [Michelle Campbell and Kathy Redhorse-Stallworth] and others, met to alter,

[9] Additionally, Mr. Vargas was involved with Leona Williams and Kathy Stallworth in a private corporation chartered in 2006. *See* https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=02793243-5482002; *also see* https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=02793243-11749443.

[10] One of the indicting Assistant United States Attorneys was now-District Judge Haywood S. Gilliam, Jr., s*ee* 3:06-cr-00565-SI, Indictment [dkt. 1], filed Aug. 15, 2006, at 4, which is presumably what led to his recusal from presiding over this action, s*ee* Order of Recusal [Dkt. 45].

mutilate, conceal, cover up, falsify and make false entries in Tribal and Casino financial and business records."[11] *Id.* at ¶ 37.b.

E. False Financial Statements

The Tribe maintains multiple sets of false financial statements that it has provided to third-parties at various times and in various circumstances. None of the available financial statements—which span multiple years—accurately reflects the Tribe's financial condition. For example, none of the financial statements obtained—except the one submitted to the CPA who (unwittingly) prepared the sham accounting for the Tribe in 2011—reflects the Tribe's now-$18 million in liabilities to JW Gaming and Canales Group. *See e.g.*, 2 Supp. App. at pp. **18** (Vargas audited financial for year ended 12/31/2014 showing liabilities of $407,147 in 2013, and $812,358 in 2014), **67** (Vargas audited financials for 2015 showing liabilities of $423,195 for year ended 12/31/2015), **183** (Vargas audited financials for 2016 showing liabilities of $3,015,960 for the year ended 12/31/2016), **222** (unaudited Tribe financial for 2017 showing liabilities of

[11] Michelle Campbell pleaded guilty to failure to file her tax return and was sentenced to, among other things, restitution and five years' probation. *United States v. Campbell*, 3:06-cr-00565-SI, Sentencing Memorandum [Doc. 331] at 1; Judgment [Doc. 332] at 1-2. That probation concluded in October 2013. *Id.*, Probation Form 12 [Doc. 353]. The charges against Kathy Stallworth were later dismissed without prejudice. *United States v. Kathy Redhorse-Stallworth*, 3:06-cr-00565-CRB, Notice of Dismissal [Doc. 291] at 1.

$5,839,199.54) . Nor do the available financial statements reflect millions of dollars in other known liabilities of the Tribe. *See id.* Other financial statements artificially inflate Tribe revenues available for debt service. All of these false financial statements artificially improve the Tribe's financial condition.

Even the financial statements supposedly audited by the Tribe's external auditor, Mr. Vargas, are apparently false. *See id.* None of the financial statements reflects the full extent of financial liabilities of the Tribe. *Id.* What is more, until just recently, the supposedly audited financial statements did not reflect millions of dollars in mortgages the Tribe has taken out on property under its ownership (including tribal offices and tribal housing). *Id.* Nor do the audited financial statements note many related-party transactions, such as the Tribe's transfer of improved real property, valued at approximately $1.3 million, from itself to Pinoleville Economic Development LLC (the limited liability company owned by Angela James and Leona Williams) on or about April 15, 2016, *see* Compl. ¶¶ 455-458 [App. 1 [dkt. 1-3] at 66].

F. Additional Loan Frauds

All, or substantially all, of the aforementioned audited and unaudited financial statements were obtained through subpoenas of third parties involved in financial and real estate transactions involving the Tribe. In each case, the Tribe provided the financial statements to the third-parties to obtain a financial benefit

(loans, generally). Because the financial statements are demonstrably false, but were provided to third-parties to induce them to rely on them in making financial decisions, the subpoenas naturally uncovered various loan frauds.

One such loan fraud occurred in 2017 when the Tribe secured a loan of over $2 million. In that transaction, the Tribe provided the lenders financial statements omitting tens of millions of dollars in liabilities. *See* citations to financial statements in Sec. I.E., *supra*. Additionally, although the Tribe was sued by a creditor for about $1.8 million for breach of a promissory note and other damages just months before the loan closed, [2 Supp. App. at 118-119 (email from Tribe counsel to then-plaintiff acknowledging representation of Tribe et al. in the referenced litigation), and 132-36 (copy of Tribe promissory note of $250,000 to then-plaintiff provided by email to counsel for Tribe in that action)], the Tribe later certified to the lender that the Tribe had no threatened or pending litigation against it, *see* Tribe Loan Agmt with Lender at ¶ 3.4 [2 Supp. App. 146], and that the financial statements the Tribe provided were true and correct, *see id.* at ¶ 3.8 [2 Supp. App. 146-47]; *see also* Tribe Borrower Certificate to Lender [2 Supp. App. 166-67]. In reliance on these misrepresentations, the loan documents were signed on February 15, 2017, *see* Email from P. McCoy to Tribe Reps [2 Supp. App. at 137], and the transaction was finalized some time later.

JW Gaming has obtained evidence of additional loan frauds.[12]

G. Additional Looting and Money Laundering

Available information indicates JW Gaming's money was not invested into a casino project, but instead was siphoned into a long-running embezzlement and money-laundering scheme. As an initial matter, the falsified entries in the 2011 accounting the Tribe provided to JW Gaming increased from the approximately $324,000 alleged in the complaint, to at least approximately $850,000. This is based on partial information obtained from just two payees (Kandy Investments LLC, and Forster-Gill, Inc.), and additional discovery will almost certainly increase the dollar figure of missing money. The whereabouts of this money remains unknown to JW Gaming.

In addition to the looting alleged in the complaint, there is substantial evidence of additional looting of the Tribe by the Defendants. One illustrative example pertains to real property situated at 292 Gobbi Street in Ukiah, California. Through a series of conveyances and loan transactions on this property, about $1 million was likely siphoned from the Tribe. To begin, the Tribe purchased the

[12] In conjunction with the 2017 loan, information shows the Tribe also obtained an additional loan of approximately $450,000 from at least one other lender. *See* Tribe Internal Financial Stmt. for 2017 [2 Supp. App. at 222] (showing note payable of $468,500 to "Comm Reinvt Fund"). Information obtained suggests the Tribe did not disclose tens of millions of dollars in liabilities, or the then-pending litigation, to secure this additional loan.

Gobbi property in the name of Michael Canales. *See* Deed of Trust between Tribe and Michael Canales [2 Supp. App. 226.] In connection with the purchase, the Tribe and Canales entered a note in the approximate amount of $631,000 secured by a deed of trust on the property. *Id.* Subsequently, however, the Tribe (under signatures of Leona Williams and Angela James) assigned its beneficial interest in the note and deed of trust to Pinoleville Economic Development LLC (the entity owned by Angela James and Leona Williams). *See* Assignment of Deed [2 Supp. App. 231]. A short time later, Michael Canales borrowed an additional $500,000 on the property from a private money lender (named Cavanaugh). *See* Deed of Trust [2 Supp. App. 237]. To facilitate that transaction, PED (under signature of Angela James) subordinated its $631,000 note and deed of trust to the note and deed of trust of the incoming lender (Cavanaugh) of $500,000. *See* Subord. Agmt. [2 Supp. App. 233-34]. Later, after delinquencies in the payments to the lender of the $500,000, the Tribe: accepted title to the property from Canales, *see* Grant Deed [2 Supp. App. 247], forgave the $631,000 loan to Canales, *see* Sub. Of Trustee and Full Reconveyance [2 Supp. App. 245-46], and restructured the debt on the property by assuming a portion of the pre-existing debt on the property, *see* Assumption Agmt. [2 Supp. App. 257-58], and taking out another $300,000 loan on the property (from a lender named Shapiro), *see* Deed of Trust [2 Supp. App. 252-53]. Relevant to the latter transaction, Canales claimed a loss for tax purposes

of approximately $546,734, *see* Cal. Franch. Tax B. Form 593-C [2 Supp. App. 267-68], despite apparently having never invested any of his own money into the property. The Tribe continues to service the debt on the property. *See* Billing Stmt. from Loan Svcr. [2 Supp. App. 279-83]. In relation to just this property at Gobbi Street, the Tribe incurred, and continues to incur, losses likely exceeding $1 million, while Michael Canales claimed a tax benefit of nearly $550,000.

II. Procedural History

A. The Complaint

In December of 2016, after JW Gaming learned from the information produced by the Tribe to Forster-Gill, Inc.—the plaintiff in another case against some of the defendants—that Canales Group had never invested $5.352 million with the Tribe, or any amount close to it, JW Gaming commenced suit in Mendocino County Superior Court on March 1, 2018. Defendants removed the action to federal court on May 7, 2018.

The complaint asserts six claims. The first claim is against the Tribe and Tribal Entity Defendants for breach of JW Gaming's 2012 note with the Tribe. The second claim is for fraud, and the third through sixth claims are for violations of RICO. The second through sixth causes of action are against only the individual defendants and Canales Group LLC.

The complaint sets out the relief requested in this action. Against the Tribal Entity Defendants, JW Gaming seeks damages under the note, the appointment of a receiver, and a declaration that the note is a full recourse obligation. Doc. 1-1 at 76-77. Against the remaining individual defendants and Canales Group, the complaint seeks treble damages and attorney fees under RICO.

B. The District Court Declines to Dismiss the Fraud and RICO Claims against the Individual Tribal Defendants

Following removal, the individual defendants moved to dismiss the second through sixth causes of action (against the individual defendants and Canales Group LLC), and the Tribal Entity Defendants (but not the Tribe) moved to dismiss the first cause of action. This Court denied their motions by order dated October 5, 2018. [Doc. 55].

C. Interlocutory Appeal

The Tribal Defendants took an interlocutory appeal from the district court's October 5 order, [Doc. 57], but Tang and the Canales Defendants did not. The Tribal Defendants sought interlocutory review of the Court's denial of the Individual Tribal Defendants' asserted defense of tribal sovereign immunity.

D. The Instant Petition and Emergency Motion

JW Gaming began to obtain discovery related to the breach of contract claim from the defendants and from third parties. In light of the information provided by some of the third parties, including the apparent evidence of additional

misrepresentations and misuse of funds, as illustrated above, JW Gaming issued the third-party subpoenas which led to the Tribe's objections, the Discovery Order, and the writ petition.

By order dated June 26, 2019, [dkt. 6], a panel of this Circuit granted the Tribe's request for an emergency stay of discovery in the district court pending this Circuit's consideration of the Tribe's petition for writ of mandamus. The writ petition seeks to vacate a discovery order of the district court. The panel further ordered JW Gaming to respond to the writ petition on or before July 10, 2019. *Id.*

ARGUMENT

I. The Petition should be denied under each of the four *Bauman* factors

A. Legal Standard[13]

"The writ of mandamus is a 'drastic and extraordinary' remedy." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). A mandamus petitioner bears the burden of establishing that "right to issuance of the writ is 'clear and indisputable.'" *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)). Even when a petitioner has carried this burden, this Circuit may not

[13] The entirety of this legal standard derives nearly verbatim from *In re Bozic*, 888 F.3d 1048, 1052 (9th Cir. 2018).

grant relief unless it is "satisfied that the writ is appropriate under the circumstances." *Id.*

This Circuit considers five factors, first outlined in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), when assessing whether mandamus relief is appropriate:

> (1) whether the petitioner has other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules"; and (5) whether the district court's order raises new and important problems, or legal issues of first impression.

In re Van Dusen, 654 F.3d at 841 (quoting *Bauman*, 557 F.2d at 654–55). Clear legal error is necessary, but not sufficient, for issuance of the writ. *See Cheney*, 542 U.S. at 380 (holding that the writ is appropriate only when the petitioner has "no other adequate means to attain the relief he desires" (quoting *Kerr*, 426 U.S. at 403)); *In re Henson*, 869 F.3d 1052, 1058 (9th Cir. 2017) ("[S]atisfying the third *Bauman* factor—clear error—is necessary for granting the writ.").

B. The third *Bauman* factor: The Discovery Order is not clearly erroneous as a matter of law.

Here, Petitioners have not shown that the Discovery Order is "clearly erroneous as a matter of law." Relying on very clear authority from this Circuit

and the Northern District of California—authority to which Petitioners have cited no counter-authority—the Discovery Order simply ruled that JW Gaming was entitled to discovery under its contract claim for misrepresentations on which JW Gaming relied in assenting to the subject contract. There is no error in that ruling, and certainly no clear error. The only errors Petitioners can point to are those of their own invention.

Petitioners acknowledge that the district court currently has jurisdiction over the contract claim. Pet. Br. [Cir. Dkt. 2] at 18 ("The only claim over which the district court currently has jurisdiction is JW Gaming's breach of contract claim."). The Discovery Order held, based on applicable law, that discovery into misrepresentations that occurred at the time of formation of the contract are relevant to the contract remedy of reformation, "which is not an independent cause of action," and is therefore relevant directly to the contract claim. Because that discovery is relevant to the contract claim, it is within the jurisdiction of the district court, and, importantly, within the scope of the contract's broad waiver of the Tribe's immunity "[w]ith respect to all Claims," with a "Claim" defined as "any dispute between any Tribal Party or JW Gaming that is related to this Promissory Note[.]" Supp. App. 14 and 17 (Promissory Note, Compl. Ex. 26 [Dist. Dkt. 1-4] at 3 and 6).

In their petition, Petitioners ignore the discovery's relevance to the contract claim—a claim over which Petitioners concede the district court maintains jurisdiction—and they instead repeatedly stress the discovery's potential overlapping relevance to the fraud and RICO claims. However, Petitioners have not cited a single authority in the District Court or before this Circuit, nor provided argument in either forum, to support their position that the district court is preempted of jurisdiction over discovery relevant to an active claim if that discovery is also potentially relevant to a stayed claim.[14]

Instead, Petitioners contort the district court's holding, the relevant law, and make a glaring leap of logic to support the remainder of their argument in support of their petition. Specifically, and without any apparent reasoning or support, Petitioners assert that by obtaining discovery on misrepresentations leading to the formation of the contract (which misrepresentations primarily concern, simply, how much money was actually invested in the casino project), JW Gaming has created a new tort claim for fraud against the Tribe. Pet. Br. [Cir. Dkt. 2] at 20-21 ("In its Discovery Order, the district court overtly conflated JW Gaming's breach of contract claim with its fraud claim[.] . . . In doing so, the district court conflated

[14] Indeed, the result urged by Petitioners would seemingly grind to a halt those cases in which an interlocutory appeal is taken as to some but not all claims, as all claims with potentially overlapping relevance would be stayed if even one of them is appealed.

the tort cause of action for fraud as it pertains to the contract, with the contract cause of action for breach of contract."). Petitioners, however, do not explain how they reached such a conclusion. In fact, as reflected in the authorities JW Gaming provided to the district court (and on which the Discovery Order relies), Petitioners' conclusion is contrary to law. *See* 2 App. 210 (Jt. Stmt. [Dist. Dkt. 88] at 6 ("[R]eformation of contract is not an independent cause of action, but rather a remedy for a contract obtained through fraud or mistake at the time of contracting[.]") (citing *Ritter v. JPMorgan Chase Bank*, No. C 17-02919-JSW, 2017 WL 7243542, *3 (N.D. Cal. 2017) (citations omitted))).

Pointing to the fictional fraud claim by JW Gaming against the Tribe, Petitioners proceed to argue that the Tribe has not waived sovereign immunity to such a tort claim. By extension, Petitioners argue, "the order granting JW Gaming discovery rights on its fraudulent inducement claim was a blatant violation of Petitioners' sovereign immunity." [Cir. Dkt. 2 at 24-25]. Going even further, Petitioners argue that "the district court has put Petitioners in an untenable position whereby compliance with the Discovery Order or the pending discovery requests directed to the Tribe may constitute an unintended waiver of Petitioners' sovereign immunity with respect to JW Gaming's fraud claim." Pet. Br. [Cir. Dkt. 2] at 25. On these fictional bases, Petitioners assert that "the district court undeniably acted

outside its jurisdiction and authority and its Discovery Order is clearly erroneous as a matter of law." *Id.*

Of course, no such fraud claim by JW Gaming against the Tribe exists, therefore no sovereign immunity of the Tribe is implicated beyond that waived in the subject contract, and accordingly Petitioners can point to no error of law in the Discovery Order, much less one that is clear.[15] As such, Petitioners do not even begin to demonstrate a "right to issuance of the writ [that] is 'clear and indisputable.'" *Cheney*, 542 U.S. at 381 (quotation omitted).

Even assuming *arguendo* that the Discovery Order was clearly erroneous, it need not be, and under the circumstances of this case, should not be, set aside. *See In re Bozic*, 888 F.3d at 1052 ("Clear legal error is necessary, but not sufficient, for issuance of the writ.") citing *Cheney*, 542 U.S. at 380. Petitioners did not cite any authority below—neither in the meet-and-confer process with JW Gaming, nor in the joint discovery statements to the district court—countering the authority cited

[15] As the Magistrate Judge recognized in his order of June 19, the underlying discovery dispute "is strictly over the relevance of certain discovery to a breach of contract claim." Supp. App. 120 (Order [Dist. Dkt. 108] at 1). Such matters are left to the wide discretion of the trial court, *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981) ("Determinations of relevance in discovery matters are left to the trial court's discretion and will not be reversed absent abuse of discretion."), resulting in even greater deference to the District Court in this instance than is ordinarily afforded under the already demanding showing required to obtain a writ of mandamus.

by JW Gaming in support of the information's relevance to the contract remedy of reformation. As the party seeking to quash subpoenas under Rule 45, Petitioners failed to carry their burden of showing that the law relied upon in the Discovery Order is erroneous.

Moreover, had they raised any such authority, JW Gaming would have shown the information's relevance to other aspects of the contract claim as well. Indeed, a closer examination of the discovery sought shows its relevance to the contract claim, on many grounds, not just for the issue of reformation. For example, the contract contains a subordination clause providing that "the loan evidenced by [the JW Note] . . . shall unconditionally be and remain at all times prior and superior to the $5,352,000 [loan] made by [Canales Group] . . . to the Tribe[.]" *See* JW Note [Supp. App. at 15]. Discovery to date shows hundreds of thousands of dollars paid to Canales Group between 2012 and 2015. Much of the information ordered discoverable by the Discovery Order is relevant to the Tribe's apparent breach of that subordination clause.

Additionally, the information ordered discoverable by the Discovery Order is also relevant to whether the Tribe obstructed the occurrence of a potential *de facto* condition precedent in the contract. Specifically, one of the two potentially inconsistent clauses in the contract provides that JW Gaming can collect a money judgment only against revenues of a (nonexistent) casino. The discovery sought is

relevant to what steps the Tribe took to bring such a casino to fruition, or if, on the other hand, the entire "project" was a ploy to defraud JW Gaming and other investors for the Defendants' personal benefit. While this discovery almost certainly overlaps with the fraud and RICO claims, it has independent significance to the contract claim (including whether the Tribe performed in good faith under the contract), *see Oracle Corp. v. Falotti*, 319 F.3d 1106, 1111-12 (9th Cir. 2003) ("Under California law, both parties to a contract owe duties of good faith and fair dealing. [citation]. These duties prevent one party from frustrating the other party's right to receive benefits from a contract between the parties. [citation]."). *See also Mundy v. Household Fin. Corp.*, 885 F.2d 542, 544 (9th Cir. 1989) ("[T]he relief available for breach of the implied covenant is limited to traditional contractual remedies.") (citations omitted).

Indeed, under Petitioners' argument here, a non-breaching party under a contract would be barred from seeking discovery on whether a counter-party obstructed performance of the contract. Instead, using the situation here as an example, the non-breaching party (JW Gaming) would only be permitted to show that the breaching party (the Tribe *et al.*) did not pay JW Gaming, and would not be permitted discovery on whether the breaching party obstructed JW Gaming's ability to reap the benefit of the contract (a money judgment collectible against real assets of the breaching party). Aside from a generalized citation to *Jasper v.*

Maxim Integrated Prod., Inc., 108 F. Supp. 3d 757, 765 (N.D. Cal. 2015), which found that a state-law contract claim did not give rise to federal question jurisdiction, *id.* at 765-66, the Tribe cites no meaningful authority for its position. Indeed, it would defy common sense for a party to a contract to be barred from seeking discovery on whether the other party obstructed the development of the project whose revenues are arguably the only source of repayment available on a money judgment on the contract. Because the information ordered discoverable in the Discovery Order is relevant in other ways which were not presented to the district court in light of the arguments raised by Petitioners, even a finding of clear error at this juncture should not persuade this Court to vacate the Discovery Order.

C. The fifth *Bauman* factor: The Discovery Order raises ordinary and routine relevance questions, not any new or important problems.

Contrary to Petitioners' late-coming argument on sovereign immunity, the dispute giving rise to the Discovery Order "is strictly over the relevance of certain discovery to a breach of contract claim." Magistrate Order [Dkt. 105] at 1. Indeed, Petitioners recognized as much in their initial briefing in the district court on the discovery issue, as they did not once mention sovereign immunity, but focused only on relevance and burdensomeness. *See* Jt. Stmt. [Dkt. 88] at 3 ("The third-party subpoenas issued by Plaintiff should be quashed because they seek information which is irrelevant to the one claim currently pending in this [District]

Court."); *see also id.* ("Moreover, even if relevant to the contract claim, the document requests are extraordinarily broad and impose an undue burden on subpoena recipients.[fn]"). In the same filing, Petitioners acknowledged they, as the party moving to quash the third-party subpoenas, bore the burden of persuasion under Rule 45. *Id.* at 3 ("The party moving to quash bears the burden of persuasion under Rule 45[.]").

Only after the Discovery Order found the requested material was relevant to JW Gaming's contract claim, and the parties were ordered to meet and confer on modifying the subpoenas, did the Tribe raise its sovereign immunity argument for the first time. *See* Jt. Stmt. re Modified Subpoenas [Dkt. 96]. Now, in the instant petition, and in an apparent effort to raise concerns beyond plain relevance, Petitioners double down on their sovereign immunity argument.

Stated properly, the only true issue at hand is the relevance of certain discovery requests to the contract claim, not any late-coming arguments regarding sovereign immunity. The issue is relevance, not sovereign immunity, because the Tribe waived its immunity to all disputes related to the contract.

In short, the Discovery Order raises no important problems that justify the Ninth Circuit intervening in an everyday discovery dispute about relevance.

D. The first and second *Bauman* factors: Petitioners have other adequate means of relief and they will not suffer prejudice that cannot be corrected on appeal.

Petitioners' argument on the first two *Bauman* factors ties back to their faulty argument on the third *Bauman* factor, specifically that the information ordered discoverable is irrelevant to the contract claim (to which the Tribe waived its sovereign immunity), even though, as JW Gaming explains above, such information is relevant to that claim (and therefore within the waiver of the Tribe's sovereign immunity). The discovery is relevant to determining the amount Canales invested in the casino project, ascertaining the amounts the Tribe paid to Canales Group, and ascertaining the true amount of JW Gaming's money that was invested in the casino project. As such, the Tribe stands to suffer no prejudice because the information ordered discoverable in the Discovery Order is relevant to a core issue arising under the contract claim.

Assuming *arguendo* that the information sought was not so clearly relevant to the contract claim, Petitioners would not suffer prejudice not correctible on appeal. All of Petitioners' asserted harms stem from their late-coming argument that such discovery would violate the Tribe's sovereign immunity. However, on this point, the Tribe voluntarily chose to grant the broad waiver of its immunity under the contract. While some sovereigns elect to place strict limitations on waivers regarding available remedies, *see Pauma Band of Luiseno Mission Indians*

v. State of California, 813 F.3d 1155, 1169-70 (9th Cir. 2015), the Tribe here did not. Instead, it granted a nearly unconditional waiver of its immunity, including of all defenses based thereon (such as the immunity defense it is now raising in regard to the Discovery Order):

> With respect to all Claims, the Tribe hereby irrevocably waives the sovereign immunity of all Tribal Parties and their Affiliates (including, without limitation, the Gaming Authority and the Gaming Commission), and all defenses based thereon, for the following purposes only: (i) the adjudication and enforcement of Claims in the United States District Court for the Northern District of California, and all courts to which appeals therefrom may occur[.] . . ..

See JW Note at 3 [Supp. App. at 14]. As relevant to such waiver, the Note defines the term "Claim" as follows:

> "Claim" means any dispute between any Tribal Party or JW Gaming Development that is related to this Promissory Note, whether arising during or after the expiration of the Development Agreement or the maturity of any Interim Tribal Note.

Id. at 6 [Supp. App. at 17]. Taken together, the Tribe granted a broad waiver of its sovereign immunity and that of other Tribal Parties with respect to "any dispute" "related to [the JW Note]." What is more, the waiver of immunity extends to disputes "arising during or after the expiration" of the development agreement that *preceded* execution of the subject contract, meaning the waiver of immunity is likely also retroactive, extending back in time from the JW Note in which it was granted. While the precise breadth of the waiver need not be decided here because

JW Gaming only brings a claim for breach of the JW Note, it is evident that the Tribe intended the waiver to be broad, and thus, to the extent there is ambiguity with respect to the relevance of the information ordered discoverable in the Discovery Order, the Tribe ultimately granted the waiver, and it should not be permitted to convert every dispute over relevance on the contract claim into a dispute about the policies and concerns underlying tribal sovereign immunity. Indeed, to the extent there are disputes about the relevance of certain discovery here, the parties hereto will bear the same potential prejudices as would any party to any litigation regarding that issue. Given the broad waiver of immunity here, the Tribe should not be deemed to suffer unique prejudice whenever it loses a relevance dispute simply because it generally possesses sovereign immunity.

E. The fourth *Bauman* factor: The district court has consistently demonstrated due regard for applicable law.

On this *Bauman* factor, Petitioners return to their argument that the Discovery Order allows discovery of information on a fictitious fraud claim against the Tribe, thereby violating tribal sovereign immunity, the automatic stay of the fraud and RICO claims, and thereby exceeded its jurisdiction. Pet. Br. at 29. As discussed above, these assertions are faulty.

CONCLUSION

For the reasons stated above, JW Gaming respectfully asks the Court to deny the petition for writ of mandamus and deny Petitioners' request to convert the petition into a *Cohen* appeal.

Dated: July 10, 2019

FREDERICKS PEEBLES & PATTERSON LLP

By: /s/ Gregory M. Narvaez
Gregory M. Narvaez

Attorneys for Real Party in Interest
JW Gaming Development LLC

STATEMENT OF RELATED CASES

Real Party in Interest, JW Gaming Development, LLC, knows of no related cases pending in this Court other than the interlocutory appeal by the individual tribal defendants currently pending in this Circuit, as identified in Petitioners' statement of related cases.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 7,610 words, excluding the items exempted by Fed. R. App. P. 21(a)(2)(c) and Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the page limit of Cir. R. 21-2(c) and 32-3.

Dated: July 10, 2019 /s/ Gregory M. Narvaez