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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

ANGELA JAMES; LEONA L. WILLIAMS; MICHAEL R. CANALES; MELISSA M. CANALES; JOHN TANG; 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; LENORA STEELE; KATHY STALLWORTH; MICHELLE CAMPBELL; JULIAN J. MALDONADO; DONALD WILLIAMS; VERONICA TIMBERLAKE; CASSANDRA STEELE; JASON EDWARD RUNNING BEAR STEELE; ANDREW STEVENSON; CANALES GROUP, LLC, a California limited liability company; LORI J. CANALES; KELLY L. CANALES; and DOES 1 through 20,

Defendants.

Case No.: 3:18-cv-02669-WHO

TRIBAL DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

HEARING DATE: November 13, 2019
TIME: 2:00 p.m.
LOCATION: San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Notice. TO ALL PARTIES AND ATTORNEYS OF RECORD, PLEASE TAKE NOTICE that on November 13, 2019 at 2:00 p.m., before the Honorable William H. Orrick of the above entitled court, located at 450 Golden Gate Avenue, San Francisco, CA 94102-3489, Defendants, the Pinoleville Pomo Nation, a federally-recognized Indian tribe, Pinoleville Gaming Authority, Pinoleville Gaming Commission, Pinoleville Business Board, Pinoleville Economic Development, LLC, (collectively, the "Tribe"), Angela James, Leona L. Williams, Lenora Steele, Kathy Stallworth, Michelle Campbell, Julian J. Maldonado, Donald Williams, Veronica Timberlake, Cassandra Steele, Jason Edward Running Bear Steele, and Andrew Stevenson (collectively, the "Individual Tribal Defendants" and together with the Tribe, the "Tribal Defendants"), by and through their counsel, will appear in a special and limited capacity to present their Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rule 56.

Relief Requested. The Tribe respectfully requests that this Court enter summary judgment in its favor on the First Cause of Action in the complaint. The Individual Tribal Defendants request that this Court enter summary judgment in their favor on Causes of Action Two through Six.

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I. INTRODUCTION

For nearly two decades, the Pinoleville Pomo Nation (the "Tribe") has been actively working to build a casino on its tribal lands in Mendocino County. Once built, revenue from the casino will help fund the operation of Pinoleville's tribal government, which provides a broad range of essential services to both tribal and non-tribal members on and around the Pinoleville Reservation. Beginning in 2008, Plaintiff JW Gaming Development, LLC ("JW Gaming" or "Plaintiff") loaned the Tribe a total of $5.38 million to fund the initial stages of a casino development, with the understanding that the Tribe would need to secure permanent financing to complete planning and construction of a casino. The promissory note the Tribe issued to JW Gaming provides that the loan would be repaid from revenues generated from the casino gaming operation. *See* Doc. 1-1, Complaint ("Compl.") at Exhibit 26, Promissory Note executed July 10, 2012 ("Promissory Note" or "Note"), at 2. As a small tribe funded primarily by federal grants, the Tribe could not finance a casino development without the assistance of investors who would agree to be repaid once the casino was operational.

For these reasons, the Note to JW Gaming expressly limits JW Gaming's recourse in the event there is a dispute with the Tribe regarding payment of the debt. It states that any award or judgment against the Tribe for nonpayment "may be enforced and collected only as against the [casino] Revenues or the deposit or securities accounts into which the same have been deposited." Note at 3. This limitation of recourse clause, to which the parties expressly agreed when allocating risk associated with the transaction, is clear, unambiguous and unquestionably enforceable under the substantive contract law of California.

Over the next three years, the Tribe, through its casino development consultant, used JW Gaming's loan proceeds to finance initial development efforts for a casino, including optioning real estate, obtaining required approvals under federal and state law, negotiating and completing a tribal-state gaming compact with the State of California and an intergovernmental services agreement

with Mendocino County, and performing environmental impact assessments. When the Tribe was unable to open a casino and repay JW Gaming by the Note's maturity date, JW Gaming brought this suit against the Tribe for breach of contract, and against various officers and employees of the Tribe for fraud and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq.[1]

Plaintiff, however, cannot succeed on any of these claims because the legal basis for its claimed damages is fundamentally flawed. Because the Note clearly limits JW Gaming's recourse to revenues from a casino gaming operation, and a casino has not yet been built despite the good faith efforts of the Tribe, the Tribe's failure to pay the Note on the maturity date has not resulted in damages to JW Gaming as a matter of law. The failure to pay therefore does not give rise to a cause of action for breach. As a consequence, the Tribe is entitled to summary judgment on JW Gaming's First Cause of Action for breach of contract.

In addition, the damages JW Gaming seeks in connection with its non-contractual claims are the same damages it claims are due on the Note, or, in the case of RICO, an amount directly tied to those damages. Because JW Gaming fails to allege any damages arising from the purported fraud and RICO violations that are separate from the alleged contract damages, it has failed to allege any actual monetary loss that could support its fraud and RICO theories. Therefore, the Individual Tribal Defendants are entitled to summary judgment on the Second through Sixth Causes of Action as well.

[1] The First Cause of Action for breach of contract is against the Pinoleville Pomo Nation, Pinoleville Gaming Authority, Pinoleville Gaming Commission, Pinoleville Business Board, and Pinoleville Economic Development, LLC (previously defined as the "Tribe"). The Second through Sixth Causes of Action, the claims for fraud and RICO violations, are against Angela James, Leona L. Williams, Lenora Steele, Kathy Stallworth, Michelle Campbell, Julian J. Maldonado, Donald Williams, Veronica Timberlake, Cassandra Steele, Jason Edward Running Bear Steele, and Andrew Stevenson (previously defined as the "Individual Tribal Defendants").

For these reasons, as elaborated and supplemented below, the Court should reject Plaintiff's claims in their entirety and enter judgment for the Tribal Defendants.

II. STATEMENT OF UNDISPUTED FACTS[2]

A. Background

The Pinoleville Pomo Nation is a federally recognized Indian tribe with headquarters near Ukiah, California. Compl. at ¶ 8. The Tribe is governed by a seven-member Tribal Council. Compl. at ¶ 9. Defendant Leona L. Williams has served as the elected Chairperson of the Tribal Council for more than twenty six years and Defendant Angela James serves as the elected Vice Chairperson. Compl. at ¶¶ 34, 39.

The Tribe possesses reservation lands that are eligible for casino gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. Compl. at ¶ 101. The Tribe designated defendant Michael Canales and his company, Canales Group LLC, as the Tribe's contact for development of the casino (the "Pinoleville Casino Project"). Compl. at ¶ 103.

In 2008, Michael Canales and John Tang (also defendants in this action) approached the late James Winner regarding Mr. Winner's potential financial investment with the Tribe to aid in development of the Pinoleville Casino Project. Compl. at ¶ 104. After performing due diligence regarding the transaction, JW Gaming invested a total of $5,380,000 in the Pinoleville Casino Project over the course of the next three years. Compl. at ¶ 164. In March 2009, Mr. Winner, Michael Canales and John Tang, formed a joint venture for the purpose of facilitating development of the project. Compl. at ¶ 133; *id.* at Exhibit 10, Joint Venture Agreement dated March 9, 2009 (the "Joint Venture Agreement" or "JVA"). The Joint Venture Agreement acknowledged that JW Gaming's investment served as pre-development funding for the project and that the parties would

[2] The undisputed facts supporting this motion are contained entirely in JW Gaming's complaint. *See* Doc. 1-1. The Tribal Defendants admit these allegations for purposes of this summary judgment motion only.

need to secure permanent financing for construction of the casino itself. Compl. at ¶ 130; JVA at p.1.

In early 2012, near the conclusion of the loan funding, the Tribe sent to the Canales-Winner joint venture a 30-day notice of default for failure to perform. Compl. at ¶ 210. The notice stated that the developer had put the project in jeopardy and requested that it demonstrate an ability to continue funding the casino development through permanent financing. Compl. at ¶ 212.

When an agreement on further funding could not be reached, the Canales Group and JW Gaming agreed to dissolve the joint venture and each take a promissory note with the Tribe in the amount of their investments. Compl. at ¶ 235. In July 2012, the Tribe issued the Promissory Note whereby the Tribe agreed to repay JW Gaming the principal amount of $5,380,000 plus interest. Compl. at ¶ 239. The Note contains a maturity date of July 10, 2015 in the event the Tribe failed to open a casino or other gaming facility before that date. Compl. at ¶ 252.

Following execution of the Note, the Tribe continued to pursue development of the Pinoleville Casino Project. Compl. at ¶ 267. However, it was unable to secure a development partner to provide additional project financing. Compl. at ¶ 269. As a consequence, a casino has not been built and the Tribe has been unable to repay the loan. Compl. at ¶ 277.

JW Gaming filed suit on March 1, 2018. Its complaint alleges a claim against the Tribe for breach of the Note as follows:

> 301. Beginning on July 10, 2015, and continuing to present, the Tribal Organization Defendants have had the duty under the Company-Tribe 2012 Note to remit payment to the Company in the amount of the full principal balance of $5,380,000.00, plus interest and other sums in accordance therewith.
>
> 302. The Tribal Organizational Defendants breached the Company-Tribe 2012 Note by failing to provide full payment to the Company on July 10, 2015.

> 303. As a result of the breaches alleged herein, the Company has been damaged in the amount of $5,380,000.00 plus contractual interest and other sums.

Compl. at ¶¶ 301-303.

JW Gaming also alleges claims against the Individual Tribal Defendants for fraud and deceit pursuant to Civil Code § 1710 (Second Cause of Action) and violations of RICO (Third – Sixth Causes of Action). With respect to the fraud claim, JW Gaming alleges it suffered damages as follows:

> 327. The Company, having been presented with a copy of the Sham 2008 Canales Note and believing it was making a matching investment of an amount previously loaned to the Tribe by Michael Canales and Canales Group, reasonably relied on the veracity of the Sham 2008 Canales Note and funded the Company Loan of $5,380,000.00 into the bank account of the Gaming Commission, which was chaired by Angela James.

Compl. at ¶ 327.

> 367. The Company, as a result of its reliance on the Falsified 2011 Accounting, has continued to accrue economic damage related to the Tribe's nonpayment of the Company Loan.

Compl. at ¶ 367.

> 376. The Company, as a result of its reliance on the Sham 2012 Canales Note, has continued to accrue economic damage related to the Tribe's nonpayment of the Company Loan.

Compl. at ¶ 376.

With respect to the racketeering claims, JW Gaming alleges the following damages:

> 540. The conspiracy among the Non-Governmental Defendants was the direct and proximate cause of the Company loaning the Tribe $5,000,000.00 through a Gaming Commission bank account, and another $380,000.00 through payments to John Tang and Michael Canales.

Compl. at ¶ 540.

In its prayer for relief, JW Gaming requests "[a]n award of treble damages [under RICO] against the [Individual Tribal Defendants], jointly and severally, **based on the damages to which the Company is entitled under the Promissory Note**, but in no event less than $21,000,000.00." Compl., Prayer for Relief, ¶ 3 (emphasis added).

B. Terms of the Promissory Note

The Promissory Note between JW Gaming and the Tribe contains the following relevant terms:

> **Maturity Date and Payment of Promissory Note**: The Development Agreement called for a maturity date of this loan to become due and payable on the earlier of (i) six and one-half (6 ½) years after the Effective Date or (ii) the First Permanent Financing Funding Date. The Parties agree that changed market and financial conditions require that a new maturity date be established for this Promissory Note. The Tribe shall repay JWG the principal and interest due under this Promissory Note. The Tribe shall repay JWG the principal and interest due under this Promissory Note by making payments in an amount equal to twenty percent (20%) of the Tribe's Revenues from the casino or gaming operation, until all the principal and interest of this Promissory Note is paid in full. Payment will be made in installments, with the first installment due and payable quarterly starting with the first quarter after the gaming operation opens. Installments will be equal to twenty percent (20%) of the Tribe's Revenue. The Tribe shall provide JWG a quarterly accounting of its Revenues. Payments will be made on a quarterly basis until all the principal and interest of this Promissory Note are paid in full. If the Tribe fails to open a casino or other gaming facility within three years (3) of the date listed above, at the outset of this Promissory Note, then this Promissory Note will be immediately due and payable.

Note at 2.

> **Dispute Resolution**: The Parties agree that any Claim will be governed by the following dispute resolution procedures:

> (a) **Limited Waiver of Sovereign Immunity**. The Parties acknowledge that the Tribe is a federally recognized Indian Tribe and that the Tribe and its Affiliates possess sovereign immunity from unconsented suit and certain other legal proceedings. Nothing in this Promissory Note will be deemed to be a waiver of the Tribe's sovereign immunity except as provided in this Note. 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, (ii) the adjudication and enforcement of Claims in any State court in which venue is proper, and all courts to which appeals therefrom may occur; and (iii) at the election of any Party, the adjudication of any Claims by binding arbitration under the commercial arbitration rules of the American Arbitration Association, which arbitration will be conducted in Sacramento California.
>
> (b) **Limitation of Recourse**. Notwithstanding any other provision in this Promissory Note, any award or judgment against a Tribal Party for money with respect to a Claim may be enforced and collected only as against the Revenues or the deposit or securities accounts into which the same have been deposited.

Note at 3.

The Note contains the following definitions:

> "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.
>
> "Revenues" means, with respect to any period of time, all revenues of any nature derived directly or indirectly from the Gaming Operation or the operation of the Facilities and permitted under GAAP to be included in the Gaming Authority's total revenues for that time period, less any credits or refunds to customers, guests or patrons that are not considered Costs of Operations and not applied in any previous time period to reduce Revenues. "Revenues" do not include (i) any gratuities or service charges added to a customer's bill that are passed onto employees of the Gaming Authority, (ii) revenues for which any credit or refund is given, (iii) Promotional Allowances, (iv)

> any sales, excise, gross receipt, admission, entertainment, tourist or other taxes or charges (or assessments equivalent thereto, or payments made in lieu of such taxes pursuant to any agreements entered into by the Tribe with such entity, (vi) proceeds of gaming Authority indebtedness, and (vii) proceeds from insurance or condemnation (other than proceeds of business interruption insurances and other proceeds received to reimburse the Gaming Authority for any cost accounted for under GAAP Costs of Operations).
>
> "Gaming Operation" means a "gaming operation" as defined in the Indian Gaming Regulatory Act ("IGRA"), which is located on or within fifty-five (55) miles of the Original Rancheria Land.
>
> "Facilities" means the Gaming Facility and the Ancillary Facilities, if determined necessary by the Tribe.
>
> "Gaming Facility" means all buildings, structures and improvements, along with all furniture, fixtures, equipment and personal property used or to be used in connection with the Gaming Operations, including any expansions, repairs, replacements or improvements thereto occurring during the term of this Promissory Note.

Note at 6-8.

Finally, IGRA defines Gaming Operation as "each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses. A gaming operation may be operated by a tribe directly; by a management contractor; or, under certain conditions, by another person or other entity." 25 C.F.R. § 502.10.

III. SUMMARY JUDGMENT STANDARD

The Tribal Defendants move for summary judgment pursuant to Rule 56. A party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 599 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly

preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Interpretation of a contract is a matter of law which is particularly appropriate for resolution on summary judgment. *See Miller v. Glenn Miller Prods., Inc*., 454 F.3d 975, 990 (9th Cir. 2006); 10B Fed. Prac. & Proc. Civ. § 2730.1 (4th ed.).

IV. ARGUMENT

In its complaint, JW Gaming alleges that the Tribe breached the Note by failing to provide full payment on or before the Note's maturity date, and that the company has been damaged in the amount of $5,380,000 plus interest as a result. In making this claim, JW Gaming ignores language in the contract that expressly limits its recourse to revenues from a casino gaming operation or the accounts into which those revenues have been deposited. This limitation of recourse clause is clear and unambiguous and must be enforced as written under California law. Because it is undisputed that a casino has not been constructed and that no revenues exist, JW Gaming cannot as a matter of law prove that it has suffered damages or that the Note has been breached. Summary judgment must therefore be granted on its breach of contract claim.

Further, because JW Gaming fails to allege any damages arising from the purported fraud and RICO violations that are separate from the alleged contract damages, it has failed to allege any actual monetary loss as required to support its fraud and RICO theories. The Individual Tribal Defendants are therefore entitled to summary judgment on the Second through Sixth Causes of Action in the complaint.

A. The Rules of Contract Construction.

The fundamental rules of contract construction in California[3] are based on the premise that the interpretation of a contract must give effect to the mutual intention of the parties at the time the

[3] The Note "is governed by the laws of the State of California." Note at 4.

contract is formed. Cal. Civ. Code § 1636. Such intent is to be inferred, if possible, solely from the written provisions of the contract. *Id*. at § 1639. The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," controls judicial interpretation. *Id*. at §§ 1638, 1644. Further, a contract's meaning must be ascertained by reading the contract as a whole, "each clause helping to interpret the other." *Id*. at § 1641. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." *Id*. at § 1653. Finally, "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." *Id*. at § 1647.

B. The Tribe Is Entitled to Summary Judgment on the Contract Claim Because The Limited Recourse Clause Has Not Been Breached.

Here, the plain language of the Promissory Note demonstrates the parties intended that (1) should the Tribe fail to open a casino or other gaming facility within three years, (2) the Note would become immediately due and payable, (3) whereby JW Gaming would either obtain payment directly from the Tribe, or (4) JW Gaming would have a Claim against the Tribe which would be governed by the Note's Dispute Resolution terms, which (5) clearly limit JW Gaming's recourse to the Revenues or the accounts into which the same have been deposited.

1. Upon Maturity of the Note, JW Gaming Possessed a Claim for Repayment.

The "Maturity Date and Payment of Promissory Note" section of the Note provides in part: "If the Tribe fails to open a casino or other gaming facility within three years (3) of the date listed above, at the outset of this Promissory Note, then this Promissory Note will be immediately due and payable." Note at 2. When these circumstances occurred, JW Gaming attempted to collect repayment of the Note directly from the Tribe. When the Tribe declined to repay the Note until casino revenues were available, a dispute arose that is related to this Note. That is, JW Gaming had a "Claim," as that term is defined in the Note, against the Tribe for repayment. *See* Note at 6.

2. Claims Related To The Note Are Governed By Its Dispute Resolution Terms Including the Limitation of Recourse Provision.

The Court must look to the Dispute Resolution terms of the Note, because they explicitly apply to all Claims. Note at 3 ("The Parties agree that any Claim will be governed by the following dispute resolution procedures[.]"). The Dispute Resolution terms include the following recourse limitation clause: "Notwithstanding any other provision in this Promissory Note, any award or judgment against a Tribal Party for money with respect to a Claim may be enforced and collected only as against the Revenues or the deposit or securities accounts into which the same have been deposited." Note at 3.

Such limitation-of-recourse clauses are common in agreements between sophisticated parties, including circumstances such as those here, where a Tribal party has agreed to waive its sovereign immunity. *See, e.g.*, *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194, 1216-17 (Cal. App. 2016) (in context of casino development transaction, contract provision limiting plaintiff-contractor's recourse "solely to casino assets" was valid and enforceable and evidence that defendant-tribe accepted plaintiff's proposal to include a limited waiver of sovereign immunity in contract).

Regardless of the circumstances, California law dictates that an express limitation on recourse clause must be enforced. *See Teresi v. Martin*, No. B190146, 2007 WL 117690, at *1, 3 (Cal. App. Jan. 18, 2007) (noting as valid a "limited recourse promissory note" to plaintiff under which plaintiff could not enforce the note against the promisor, and could look solely to another note for payment). *See also Whitmire v. Comm'r of Internal Revenue*, 178 F.3d 1050, 1052 (9th Cir. 1999) (applying limited recourse provision of promissory note to court's analysis of the amount of each person's liability); *Durment v. Burlington Ins. Co.*, LA CV14-01231 JAK, 2014 WL 12599787, at *3-5 (C.D. Cal. May 16, 2014) (granting defendants' motion to dismiss for failure to allege damages where contract included "Limited Recourse" provision stating "sole and exclusive source of payment of [plaintiff's] claim . . . shall be from" a lawsuit against, or the assignment of

certain party claims against, insurance carriers); *Sandelman v. B & B Property Mgmt., LLC*, No. C08-00681 HRL, 2008 WL 2986337, at *1 (N.D. Cal. Aug. 1, 2008) (denying plaintiff's request for unpaid principal and interest on a promissory note where the "Limitation on Recourse" clause of the note precluded such relief).

The limitation of recourse provision in the Note is valid and must be enforced under the substantive contract law of California.

3. The Limitation of Recourse Clause Limits Enforcement of an Award or Judgment for Nonpayment to Casino Revenues.

Reading the contract's words "in their ordinary and popular sense," Cal. Civ. Code § 1644, it is unambiguous that "any award or judgment" that JW Gaming may receive against the Tribe "for money with respect to a Claim" for repayment of the Note, may be "enforced and collected only as against" the three sources listed in the provision: (1) Revenues; (2) the deposit accounts into which Revenues have been deposited; and (3) the securities accounts into which Revenues have been deposited. The contract is so clear on this point that JW Gaming readily admits its rights are limited as described above. *See* Compl. at ¶ 250 ("The Company-Tribe 2012 Note limits recourse for its breach[.]"). Rule 56 requires that this Court give effect to this admission when ruling on this motion. *See, e.g., Elsayed v. Maserati North America, Inc.*, 215 F. Supp. 3d 949, 953 n.1 (C.D. Cal. 2016) (noting that on motion for summary judgment, the complaint's allegations can serve as admissions against plaintiffs).

To ensure the recourse limitation provision would be given effect, the parties included a "notwithstanding" clause at the beginning of the sentence. Courts have found that including such a term signals an intent that the section will trump all other potentially conflicting terms in the document. *See Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have interpreted similar

'notwithstanding' language ... to supersede all other laws, stating that '[a] clearer statement is difficult to imagine.'" (omission and alteration in original) (citation and internal quotation marks omitted)); *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014) ("As a general matter, 'notwithstanding' clauses nullify conflicting provisions of law."); *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("The Supreme Court has indicated as a general proposition that statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."); *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.,* 272 F.3d 1155, 1166 (9th Cir. 2001) ("[T]he '[n]otwithstanding any other provision of law' clause demonstrates that Congress intended to supersede any previously enacted conflicting provisions." (second alteration in original)).

Applying this principle of construction here, the limitation on recourse in the Dispute Resolution section trumps all other potentially conflicting provisions in the Note. To the extent the language which states "[i]f the Tribe fails to open a casino or other gaming facility within three years (3) of the date listed above, … then this Promissory Note will be immediately due and payable" potentially conflicts with the limitation on recourse, the recourse limitation overrides it. The notwithstanding clause "really could not be clearer." *Illinois Nat'l Guard v. Federal Labor Relations Auth*., 854 F.2d 1396, 1402 (D.C. Cir. 1988). According to the plain language of the Note, then, any damages sought by JW Gaming in its breach of contract claim are limited to casino Revenues as a matter of law.

4. Because No Casino Revenues Exist, the Demand For Payment and Lack Thereof Does Not Give Rise to a Cause of Action for Breach.

It follows from this interpretation that, if no Revenues exist, the Tribe's failure to remit payment in response to a demand does not give rise to a cause of action for breach. In *In re Integrated Res., Inc.*, 123 B.R. 181, 183 (Bankr. S.D.N.Y. 1991), the bankruptcy court for the Southern District of New York interpreted a similar provision as here and found that, in light of the

limited recourse, a demand for payment and lack thereof by the promisor does not give the promisee a breach of contract claim.

In *In re Integrated Res., Inc.*, AIP received an extension of credit in the principal amount of $10,000,000 from each of Canadian Imperial Bank of Commerce, The Chase Manhattan Bank, N.A., and Israel Discount Bank of New York (collectively, "Banks") on an unsecured basis. 123 B.R. at 183. The promissory notes delivered by AIP and accepted by the Banks contained a clause limiting the recourse available to the Banks to capital contributions in the event of a payment default by AIP. Upon default, the Banks filed breach of contract claims setting forth the loan amounts they are owed and alleging that they made proper demand upon AIP for payment, that they had not been paid, and, therefore, AIP is in default on the promissory notes. It was undisputed that AIP had failed to create the funds into which capital contributions were to be made.

In holding that the limited recourse provisions were enforceable, notwithstanding AIP's failure to create the fund to which recourse was limited, the Southern District of New York explained as follows:

> **First . . . in light of the limited recourse provision in the Notes, the demand for payment and the lack thereof—alone, does not give rise to a cause of action** . . . The Notes do not expressly condition the applicability of the recourse provision upon the existence of capital contributions. Indeed, pursuant to the demand promissory note, upon demand by the holder of the Note, the Note would be paid by the promisor. If the promisor refused or was unable to pay on demand, the promisee's recourse was explicitly limited to capital contributions. The Notes do not state that capital contributions do or will exist, nor do the Notes state that capital contributions will be set aside or placed in escrow for payment of the promisee.

123 B.R. at 185 (emphasis added).

The same reasoning applies in this case. The Note does not expressly condition the applicability of the recourse provision upon the existence of Revenues. Upon maturity, the Note is to be paid by the Tribe. If the Tribe refuses or is unable to pay, JW Gaming's recourse is explicitly

limited to Revenues, which is defined as "all revenues of any nature derived directly or indirectly from the Gaming Operation or the operation of the Facilities." Note at 6. Gaming Operation is defined as it is in IGRA, as an "economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses." It is undisputed that no such Gaming Operation is in existence here (Compl. at ¶ 277); therefore, no Revenues can exist either.

As with the promissory notes in *In re Integrated Res., Inc.*, the Note does not state that a Gaming Operation does or will exist. Nor does it state that Revenues do or will exist. Because it is undisputed that Revenues are not available to repay the Note, the mere demand for payment and lack thereof does not give rise to liability for breach. *See In re Integrated Res., Inc.,* 123 B.R. at 185. Nor can JW Gaming prove it suffered damages as required to state a breach of contract claim. *See Durment v. Burlington Ins. Co*., LA CV14-01231 JAK, 2014 WL 12599787, at *3-5 (C.D. Cal. May 16, 2014) (granting defendants' motion to dismiss for failure to allege damages where contract contained limited recourse provision). Only if Revenues were available, and the Tribe declined to use them to repay the Note, could JW Gaming have a viable claim for breach of contract.

5. The Context in Which the Note Was Made Supports this Interpretation.

Under California law, a contract's meaning must be ascertained by reading the contract as a whole, "each clause helping to interpret the other." Cal. Civ. Code § 1641. It also must be determined by reference to the circumstances under which it was made and the subject matter to which it relates. *Id*. at § 1647. The fact that the Note is a contract between a federally-recognized Indian tribe and a casino developer supports the conclusion (already made clear by the Note's plain language) that the parties intended to limit JW Gaming's recourse to Revenues from a casino operation.

Indian tribes enjoy sovereign immunity "from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc*., 523 U.S. 751, 760 (1998). "As a

matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity." *Id*. at p. 754. Because tribal immunity from suit is a central feature of tribal sovereignty, it generally is not waived in the absence of valuable consideration, including conditions on which the tribe consents to be sued and the manner in which the suit may be conducted. *See American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir.1985) (citing *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). If a tribe "does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied." *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001) (quoting *Namekagon Dev. Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508, 509 (8th Cir. 1975)).

Here, the parties specifically agreed on how to address disputes under the Note. In exchange for the Tribe's agreement to waive its sovereign immunity for disputes relating to payment, JW Gaming agreed to limit its recourse to Revenues. This is a common compromise reached in the tribal-developer context as it gives the developer the ability to seek redress in the courts, but at the same time limits the sources of funding available to satisfy a judgment in the event the developer succeeds. *Cf.*, *Findleton*, 1 Cal. App. 5th at 1216-17. Given this context, the dispute resolution provision must be strictly construed to give effect to the mutual intent of the parties that JW Gaming's recourse be limited to Revenues from a casino operation.

In sum, the Note in this case unambiguously states that JW Gaming's recourse is limited to Revenues from a casino operation. JW Gaming was fully aware at the time of drafting that limiting its recourse in the event of nonpayment created a risk that it might not be able to collect on a judgment until a casino was built and operational. It chose to accept the Note with such risk spelled out in clear and unambiguous terms. It "cannot expect this court to rewrite [the] agreement" to create a cause of action where none exists. *Sagonowsky v. More*, 64 Cal. App. 4th 122, 133-34

(Cal. App. 1998). Therefore, this Court must grant summary judgment in favor of the Tribe on the First Cause of Action.

C. The Individual Tribal Defendants Are Entitled to Summary Judgment on the Fraud and RICO Claims.

In addition to granting summary judgment to the Tribe, this Court must grant summary judgment to the Individual Tribal Defendants on Causes of Action Two through Six because JW Gaming has failed to allege any actual monetary loss separate from the breach of contract damages. Contract damages are not present here for the reasons explained above. Therefore, the tort and statutory claims which rely on those exact same damages are dead in the water too.

1. JW Gaming fails to allege separate damages in support of fraud.

In its Second Cause of Action, JW Gaming alleges intentional misrepresentation under Section 1710 of the California Civil Code. Intentional misrepresentation requires proof of "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 990 (2004) (citing *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996)).

JW Gaming's intentional misrepresentation cause of action must be denied because it fails to allege any damages separate from damages resulting from the alleged breach of contract. In cases involving misrepresentation relating to a contract, the law is clear that unless a plaintiff merely seeks to rescind the contract, it must suffer actual monetary loss to recover on a fraud claim. *See All. Mortg. Co. v. Rothwell*, 900 P.2d 601, 609 (1995) (citing *Molko v. Holy Spirit Assn.*, 762 P.2d 46 (1988); *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices*, 207 Cal. App. 3d 1277, 1285 (1989). JW Gaming is not asking to rescind the contract; therefore, it must show actual monetary loss to recover for fraud. *See Empire West v. Southern California Gas Co.*,12 Cal. 3d 805, 810 n. 2 (1974) (fraud without damage furnishes no ground for action).

JW Gaming plainly limits its damages on that claim to nonpayment of the Note. *See* Compl. at ¶ 367 ("The Company, as a result of its reliance on the Falsified 2011 Accounting, has continued to accrue economic damage related to the Tribe's nonpayment of the Company Loan.") and ¶ 376 ("The Company, as a result of its reliance on the Sham Canales Note, has continued to accrue economic damage related to the Tribe's nonpayment of the Company Loan."). As established above, however, nonpayment of the Note does not constitute damage in this case. Moreover, even if nonpayment did constitute damage here, a plaintiff may not recover in tort the same damages as are awarded for breach of the contract; such recovery would constitute impermissible duplicative damages. *See Allen v. Packer, No. B238909*, 2013 WL 3288015, at *12 (Cal. Ct. App. June 28, 2013). All of the damages that JW Gaming is claiming under Section 1710 are already requested and covered by its breach of contract claim, and therefore not recoverable under its fraud theory. *See id.* ("The measure of damages for breach of contract is damages that would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by the parties, at the time they contracted, as a probable result of the breach.") (citing Civ. Code, § 3300; *Walker v. Signal Companies, Inc.*, 84 Cal. App. 3d 982, 993 (1978)).

While JW Gaming spares no paper in alleging deception on the part of the Individual Tribal Defendants, it fails to connect those actions to any monetary loss other than nonexistent contract damages. California law is clear that "fraud without damage is not actionable." *Furia v. Helm*, 111 Cal. App. 4th 945, 956 (2003). Thus, summary judgment is warranted on the Second Cause of Action as a matter of law.

2. JW Gaming fails to allege separate damages in support of racketeering.

RICO "is aimed at 'racketeering activity'" and "creates a private cause of action for treble damages by providing '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the

cost of the suit, including a reasonable attorney's fee.' (18 U.S.C. § 1964(c).)." *Gervase v. Superior Court,* (1995) 31 Cal. App. 4th 1218, 1228 (1995).

For purposes of RICO, a plaintiff must allege: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as "predicate acts") (5) causing injury to plaintiff's business or property.'" *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL–CIO*, 770 F.3d 834, 837 (9th Cir. 2014).

In order to seek a civil remedy for a RICO violation, a "person [must be] injured in his business or property by reason of a violation of section 1962" of the RICO statute. 18 U.S.C. § 1964(c). This injury must be a "concrete financial loss, and not mere injury to a valuable intangible property interest." *Oscar v. University Students Co–operative Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc) (citation omitted) (internal quotation marks omitted). *See also Berg v. First State Ins. Co.*, 915 F.2d 460, 463–464 (9th Cir. 1990) (cancellation of insurance policies did not result in injury to plaintiff insureds' "business or property" under RICO).

The Third Circuit addressed the requirement that a plaintiff asserting a claim under RICO allege a "tangible economic harm." *Impress Commc'ns v. Unumprovident Corp.*, 335 F. Supp. 2d 1053, 1063 (C.D. Cal. 2003) (quoting *Maio v. Aetna, Inc.*, 221 F.3d 472, 488 (3d Cir. 2000). In rejecting the plaintiff's allegation of economic harm, the *Maio* court looked at two types of economic harm: the diminished economic value of the policy itself, and the overpayment in premiums for an inferior health care product. *Maio*, 221 F.3d at 488. As to the first type of economic harm, which is the type that applies in this case, the court based its reasoning on a breach of contract theory. The plaintiffs claimed a diminution in the value of their property--*i.e.*, their insurance policy. *Id*. at 488. The nature of the plaintiffs' property interest was their contractual right to receive benefits under their policy. *Id*. at 489. When property interests are in the nature of a contract right, economic harm arises only with financial losses caused by the defendants' breach. *Id*. at 490. If the contract had not been breached by denial of adequate benefits to the plaintiffs, the

court reasoned, the plaintiffs had not pled an injury to their property rights sufficient to support a RICO claim. *Id*.

Similarly, here, as with the fraud claim, the only injury alleged in support of the RICO claims is nonpayment under the Note. Compl. ¶ 540, Prayer for Relief ¶ 3. As demonstrated above, that payment is not currently due and the Note has not been breached; thus there has been no injury from nonpayment. Therefore, JW Gaming cannot allege injury under RICO any more than it can allege an injury due to fraud, and summary judgment must be entered on Causes of Action Three through Six.

V. CONCLUSION

For the reasons set forth above, the Tribal Defendants respectfully request that the Court grant summary judgment in their favor and dismiss Plaintiff's complaint in its entirety.

DATED this 16th day of October, 2019.

Respectfully Submitted,

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J.W. Gaming Development, LLC v. Angela James et al.

U.S.D.C. Northern District of California Case No. 3:18-cv-00669-HSG

I declare that I am employed with the law firm of Berg Hill Greenleaf & Ruscitti LLP, whose address is 1712 Pearl Street, Boulder, Colorado 80302. I am over the age of 18 and am not a party to this case. On October 16, 2019, I caused the following document to be served as described as:

TRIBAL DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

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