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JW Gaming Development, LLC

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 D. 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 (RMI)

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS and OPPOSITION TO TRIBAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Judgment on the Pleadings
Hearing Date: Dec. 4, 2019
Time: 2:00 p.m.

MSJ Hearing Date: Nov. 13, 2019
Time: 2:00 p.m.

Courtroom 2, 17th Floor
Judge William H. Orrick

NOTICE OF MOTION

TO THE PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, December 4, 2019, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 on the 17th floor, of the above-entitled Court, located at 450 Golden Gate Ave., San Francisco, CA 94102, Plaintiff JW Gaming Development, LLC ("JW Gaming") will and hereby does move this Court for an order awarding judgment on the pleadings in favor of JW Gaming, and against defendants Pinoleville Pomo Nation ("Tribe") and Pinoleville Gaming Authority on the first cause of action for breach of contract. JW Gaming further moves the Court to direct that its entry of judgment on the first cause of action be deemed a final judgment under Fed. R. Civ. P. 54(b).

The motion for partial judgment on the pleadings is brought pursuant to Fed. R. Civ. P. 12(c), and the motion to make any judgment granted in connection with that motion a final judgment is made pursuant to Fed. R. Civ. P. 54(b). The bases for these motions are set forth more fully in the memorandum of points and authorities below. These motions are based on this notice, the memorandum of points and authorities, the papers and pleadings on file herein, and on such matters as may be adduced at the hearing of this matter.

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INTRODUCTION AND STATEMENT OF THE ISSUES

Plaintiff JW Gaming Development, LLC ("JW Gaming") moves for partial judgment on the pleadings on the first cause of action for breach of contract. That contract is the $5.38 million promissory note ("Note") between the promisee, JW Gaming, and promisors Pinoleville Pomo Nation ("Tribe") and Pinoleville Gaming Authority. JW Gaming also opposes the motion for summary judgment filed by the Tribal Defendants, Doc. 129.[1]

The central issue is not whether the Tribe failed to repay the Note when it became "immediately due and payable" – the Tribe undisputedly did not repay the Note – but the recourse available to JW to enforce a judgment resulting from the Tribe's breach. That question is, in the first instance, one of law ascertained from the text of the Note employing long-settled maxims of contractual interpretation. The language within the four corners of the Note unambiguously demonstrates that the Tribe agreed to immediately repay JW Gaming from all of its available revenues if the Tribe failed to open a casino by July 10, 2015. The Tribe takes the view that its promise cannot be enforced because of the Note's recourse provision, but its interpretation contravenes the express intent of the parties by making the Tribe's promise of immediate repayment in the absence of gaming revenues a nullity. The unambiguous contract language is grounds to grant JW Gaming's motion for judgment on the pleadings and to deny the Tribal Defendants' motion for summary judgment.

Should the Court deem the contract ambiguous, the Court may consider extrinsic evidence to ascertain the intent of the parties. Extrinsic evidence may also be considered to expose an ambiguity that may not be facially evident. JW Gaming therefore submits evidence of the parties' negotiation of the Note, which reveals the parties expressly intended that the Tribe's debt would be collectable from non-gaming sources on July 10, 2015, if no casino were opened by then, and that the recourse provision did not express their intent in the event the Note matured in the no-casino scenario. If the evidence of the parties' intent is genuinely disputed, then summary judgment cannot be granted. But

[1] The "Tribal Defendants" are all the named defendants except Michael R. Canales, Melissa M. Canales, Lori J. Canales, Kelly L. Canales, Canales Group LLC, and John Tang.

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if the Tribe cannot show that a genuine dispute exists, then summary judgment for JW Gaming would be warranted. *See* Fed. R. Civ. P. 56(f).

Additionally, the equities of the case counsel that Plaintiff is entitled to recover its $5.38 million from the Tribe, and the Court may impose equitable remedies appropriate to achieve that fair and just result.[2] The availability of equitable remedies warrants denial of the Tribal Defendants' motion for summary judgment.

Further, even fully accepting the Tribal Defendants' premise that the recourse provision operates in these circumstances to constrain enforcement and collection, the judgment that follows from their argument would not be dismissal, but an award in favor of JW Gaming, collectable from future casino revenues.

Finally, the Tribal Defendants' motion for summary judgment on the fraud and RICO claims should be denied because, contrary to the Tribal Defendants' argument, JW Gaming was damaged by the defendants' fraud and racketeering activity independent of the damage it suffered through the Tribe's breach of contract.

STATEMENT OF FACTS

I. The Note.

The Tribal Defendants' statement of undisputed facts admits 18 paragraphs of the Complaint (not including the Tribal Defendants' statements that only describe JW Gaming's allegations). Doc. 129 at 8-10. The terms of the Note are also undisputed. *Id.* at 11-13.

The same facts are properly treated as undisputed for the purpose of JW Gaming's Rule 12(c) motion, even where the Tribal Defendants' "Partial Answer" does not admit them.[3] *See Lloyd v.*

[2] As discussed below, equitable considerations are material even if facially the recourse provision unambiguously favors the Tribe.

[3] When the Tribal Defendants filed their "Partial Answer" (Doc. 61) the fraud and RICO claims were the subject of an interlocutory appeal from the denial of the individual Tribal defendants' sovereign immunity defense. *See* Order Denying Motion to Dismiss (Oct. 5, 2018), Doc. 55; Mem. Op., *JW Gaming Dev't, LLC v. James*, Ninth Cir. No. 18-17008 (Oct. 2, 2019), filed herein as Doc. 123 (affirming order). As a result, the Tribal Defendants declined to substantively respond to a large number of the Complaint's allegations on the ground that they pertained to those claims. *See* Partial Answer, Doc. 61. They gave this non-response to 14 of the 18 paragraphs they now rely on in their

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Franklin Life Ins. Co., 245 F.2d 896, 897 (9th Cir. 1957) (holding that an admission of facts for the purposes of a moving party's summary judgment motion only is "invalid," and that a "concession of fact on motion for summary judgment establishes the fact for all time between the parties. The party cannot gamble on such a conditional admission and take advantage thereof when judgment has gone against him.").

The uncontested facts as pled thus establish that JW Gaming, the Pinoleville Pomo Nation, and the Pinoleville Gaming Authority (along with Canales Group LLC and John Tang) agreed to the Note, dated July 10, 2012, the contents of which are not disputed. Compl. ¶ 239 & Ex. 26 (Doc. 1-4 at p. 10-20, the Note); Doc. 129 at 9, 11-13. The Note called for the Tribal Parties to repay JW Gaming $5.38 million previously loaned to the Tribe by JW Gaming, plus interest. Note at 2. The money was loaned "in order for the Tribe to pursue a gaming enterprise." Note at 1. The Note provides that the Tribe would begin repaying the Note in quarterly installments of 20% of revenue from its casino "starting with the first quarter after the gaming operation opens," and continuing "until all the principal and interest of [the Note] are paid in full." *Id.* It then provides the alternative maturity date: "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." *Id.* The Tribe did not open a casino within three years. Compl. ¶ 277. The Tribe has not repaid the loan. Compl. ¶¶ 278, 302; *see* Doc. 129 at 9 ("the Tribe has been unable to repay the loan"). The Note also contains a "recourse provision" which states, in part, that

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motion for summary judgment on the contract claim. *See* Partial Answer, Doc. 61, ¶¶ "34-70," "99-238," "256-277." *Compare* Doc. 129 at 8-9 (admitting and relying on 14 paragraphs within those ranges). In light of the Tribal Defendants' current admissions, the disingenuous non-responses given in their Partial Answer should not be treated as denials for purposes of JW Gaming's motion for judgment on the pleadings.

Of the other four paragraphs of the Complaint admitted in the Tribal Defendants' motion, two are also admitted in the Partial Answer (¶¶ 8 & 9), and two are effectively admitted with statements that the Note "speaks for itself" (¶¶ 239 & 252).

In addition, the Tribal Defendants' motion admits that the Tribe has not repaid JW Gaming (Doc. 129 at 9:18), consistent with the facts alleged in the Complaint, *see*, *e.g.*, Compl. ¶¶ 278, 302, although the Tribal Defendants do not cite the Complaint regarding this fact.

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"any award or judgment against a Tribal Party for money with respect to a Claim [related to the Note] may be enforced or collected only as against the [casino] Revenues." The main legal issue to be resolved by the motions is the interplay between the recourse provision and the maturity provision under the circumstances.

II. Extrinsic evidence that illuminates the parties' intent.

Additional facts not outlined in the Complaint are pertinent to JW Gaming's opposition to the Tribal Defendants' summary judgment motion. As detailed below, 2012 correspondence between JW Gaming and Melissa Canales, the Tribe's agent for negotiating the Note, shows that JW Gaming and the Tribe mutually intended that the Tribe's debt would be immediately collectable from non-gaming sources if, by July 10, 2015, it had not opened a casino. Through multiple drafts, they added language to the Note's maturity provision to express that intent. The seemingly contradictory language found in the recourse provision, applicable to circumstances where a casino had been opened but the Tribe was failing to pay as agreed, was carried over verbatim from a prior agreement with no discussion, and with neither party revealing any intent that it should override and nullify the three-year maturity provision they specifically agreed to.

On March 28, 2012, the first draft of the Note was prepared by Melissa Canales and emailed to Michael Canales. *See* Declaration of Jack Campbell ("Campbell Decl."), Ex. A. According to the Tribe, Melissa Canales was the Tribe's agent for purposes of the negotiation and execution of the JW Gaming Note in 2012, and she and the Tribe communicated with one another regarding these negotiations. *See* Declaration of Gregory M. Narvaez ("Narvaez Decl."), Ex. S (Tribe's Response to Request for Admissions, Nos. 24 & 25). From 2006 through 2014, Canales Group LLC was also an agent for the Tribe for the purpose of negotiating agreements relating to the Tribe's casino project. *Id.* (Tribe's Response to Request for Admissions, Nos. 11-19).

In the body of the March 28 email, Melissa Canales explains to Michael Canales: "I have merely scribed the terms of repayment from the Development Agreement along with necessary definitions and miscellaneous terms appropriate for the note." Campbell Decl. Ex. A, at JW019327. She continues, "There are several terms which likely must be updated according to today's circumstances. I am specifically referring to the maturity date of the note." *Id.* Minutes later,

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Michael Canales forwarded the draft Note to JW Gaming, explaining that the draft "is a starting point that Melissa has scribed[,]" and that JW Gaming would "need to taylor [sic] the document to [JW Gaming]'s needs and what is agreeable to [JW Gaming]." *Id.* at JW019329.

The draft Note, which is dated March 22, 2012, contains the dispute resolution section, which includes the recourse provision, identical to the earlier development agreement. *Id.* at JW019332. Regarding maturity, the draft explains the maturity date of the development agreement, and states that the "Parties agree that changed market and financial conditions demand that a new maturity date be agreed to." *Id.* at JW019331. The following sentence contains the maturity date for the development agreement, plus a blank line where the parties could insert a new maturity date. *Id.*

Melissa Canales and JW Gaming (through its then-counsel) exchanged revised drafts on April 6, April 12, and May 17, 2012. Campbell Decl. Ex. B, C, & D. In each of these drafts, the recourse provision remains unchanged. The May 17 draft adds language to the maturity provision that is not relevant to the question at issue in this brief.

On May 21, 2012, Melissa Canales emailed JW Gaming and others a further revised draft of the Note. Campbell Decl. Ex. E. This draft revises the maturity provision. *Id.* at JW019703. These revisions address the percentage of casino revenues that will go to repay the Note, and the frequency of such payments from casino revenues. The revisions also address maturity in the event a casino is not constructed. In language substantially similar to the language in the executed Note, the draft provides: "If the Tribe fails to open a casino or other gaming facility within three years (3), then the Promissory Note will be due and payable." *Id.* The draft contains no revisions to the recourse provision, which remains unchanged from the original draft. *Id.* at JW019704.

In the body of her email, Melissa Canales explains the revisions to the maturity provision. *Id.* at JW019701. Relevant here, she explains: "Additionally, I added a clause that will come into play if a gaming enterprise is never opened. We agreed that the note would be due and payable 3 years from this promissory note if a gaming facility is not opened." *Id.*

On July 2, 2012, JW Gaming emailed a further revised draft of the Note to Melissa Canales. Campbell Decl. Ex. F. This draft contains no edits to the recourse provision, *id.* at JW019853, but it contains what would become the final edits to the maturity provision, *id.* at JW019852. The edits to

the maturity provision clarify that the maturity date is three years from "the date listed above, at the outset of this Promissory Note[.]" *Id.* Especially relevant here, the edits insert the word "immediately" before "due and payable." *Id.* Together, these edits cause the relevant sentence of the maturity provision to read as follows: "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." *Id.*

On July 10, 2012, Melissa Canales emailed JW Gaming the final version of the Note, executed by John Tang, Canales Group LLC (through signature of Michael Canales), and the Tribe (through signatures of Leona Williams and Angela James). Campbell Decl. Ex. G. The final version lacked a signature on behalf of Pinoleville Gaming Authority. *Id.* at JW019877.

On July 12, 2012, JW Gaming emailed a copy of the Note, executed by JW Gaming (through signature of Donna Winner). Campbell Decl. Ex. H. In the body of the email, then-counsel for JW Gaming noted that the Note "should be held until the Tribe forwards the appropriate Gaming Commission [sic] signature." *Id.* at JW020005. JW Gaming's counsel also discussed the Note between the Tribe and Canales Group: "Melissa indicated she would forward a copy of the Promissory Note between the Tribe and the Canales Group once it was executed." *Id.*

On August 10, 2012, Melissa Canales emailed JW Gaming a copy of the Note's fully executed signature page bearing the signature of Angela James on behalf of the Pinoleville Gaming Authority. Campbell Decl. Ex. I.

On November 1, 2012, Melissa Canales emailed JW Gaming a copy of the note between Canales Group and the Tribe, which is dated July 10, 2012. Campbell Decl. Ex. J. The body of Melissa's email states, "I just got my hands on a copy of this note. Looks like it was executed a few months ago." *Id.* at JW020090.

III. Defendants' inequitable conduct.

The broader factual context also impacts JW Gaming's recovery of contract damages. The fraudulent inducement of the loan to the Tribe, the further misrepresentations that led JW Gaming to agree to the Note, and the misuse of the loan proceeds to personally benefit the defendants rather than to open a casino, all constitutes conduct that would make it inequitable to apply the Note's recourse

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provision to thwart JW Gaming's recovery. The following is a condensed account of some of the defendants' inequitable conduct.[4]

The Tribe (along with other 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 $5.352 million that Canales Group made to the Tribe. Campbell Decl. Ex. K (Joint Venture Agreement), Ex. L at JW018727 (Melissa Canales stating approximately "10.7 million" was "already invested"), Ex. H & I (transmission of final 2012 Note, completed signature page), Ex. M (2008 Canales Note), Ex. J (2012 Canales Note), Ex. N at JW012881-82 (John Tang stating "Mike [Canales] has been funding this himself…" and "Mike will have about $5m invested in the project") and JW012880 (Jim Winner stating "I am willing to match whatever Michael [Canales] has put in the Casino part of the deal"), Ex O at JW018693 (John Tang stating to Jim Winner, "I want to emphasize again that the $5m that you and Mike [Canales] put into this deal is a loan to the Pinoleville.") and JW018695-96 (Jim Winner requesting confirmation of Canales investment). To satisfy JW Gaming of the Canales investment, defendant John Tang provided JW Gaming a $5.352 million promissory note between Canales Group and Pinoleville Economic Development LLC ("PED"). *Id*. Ex. M. The Tribe and Canales Group later, in 2012, entered into another promissory note, again reciting that Canales Group "provided a loan of $5,352,000.00 plus interest" to the Tribe. *Id.* Ex. J. In fact, as Michael Canales testified in 2017, neither he nor Canales Group had ever loaned the Tribe any money. Narvaez Decl. Ex. W. Tribal chairperson Leona Williams testified in 2017 that the Tribe had no contracts with Canales Group. *Id.* Ex. X; *see also id.*, Ex. Y (Leona Williams testifying in another deposition that neither Michael Canales, his company, nor his family were casino investors).

[4] JW Gaming has previously sought written discovery regarding defendants' fraudulent conduct, but the Tribal Defendants have been uncooperative, despite orders approving that type of discovery as relevant to the contract claim. Order on Discovery Dispute (Apr. 12, 2019), Doc. 90; Order (June 19, 2019), Doc. 108; Order [Denying Petition for Writ of Mandamus], Ninth Cir. Case No. 19-71522 (Aug. 28, 2019), filed herein as Doc. 117. As of the time of the filing of this brief, JW Gaming and the Tribal Defendants are in the process of submitting discovery dispute letters to the magistrate judge assigned to discovery in this matter. Thus, to the extent additional discovery is required to develop these facts, the Court is requested to deny the Tribe's motion, or defer it, to allow time for such discovery. *See* Fed. R. Civ. P. 56(d).

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In 2011, the Tribe provided JW Gaming an accounting of the Tribe's expenditure of the JW Gaming loan proceeds. Campbell Decl. Ex. P, Q & R. The accounting listed false and inflated payments, concealing the Tribe's actual use of the loan. Declaration of Tim Gill, Aug. 9, 2018 (Doc. 18-2) ¶¶ 29-31. The accounting also states that $400,000 was paid to PED, a company owned, at the time, by Leona Williams and Angela James. Campbell Decl. Ex. R; Narvaez Decl. Ex. S (Tribe's Response to Request for Admissions Nos. 28-41); *id.* Ex. Y (Leona Williams testifying that she, Angela James, and Michael Canales were member of PED).

The defendants' looting of the Tribe, and theft from third-parties like JW Gaming, has been ongoing for more than a decade, available information shows. For example, JW Gaming has obtained some of the Tribe's bank records for the year 2015 (the year JW Gaming's Note became "immediately due and payable"). Those records show 103 checks in widely varying amounts and at irregular intervals were paid from the Tribe's bank account to Leona Williams, Angela James and Lenora Steele, in the aggregate amount of $283,976.93. Narvaez Decl. ¶ 5 & Ex. U. The same bank records also show the Tribe making tens of thousands of dollars in payments to the landlord of Angela James and to Citi Mortgage, believed to be the mortgage company of Lenora Steele. *Id.* In that single calendar year, the Tribe also made hundreds of thousands of dollars in payments to credit cards (the holders of which have not yet been identified). *Id.*[5]

Other records for 2015 (and records from at least 2005 to 2015) show the Tribe diverting valuable assets to or for the benefit of Michael Canales and Canales Group LLC. *Id.* Ex. T (Leona Williams and Angela James caused the Tribe to pay $631,320.64 for the benefit of Michael Canales, secured by 2005 deed of trust; Tribe then assigned its beneficial interest to PED in 2006; PED then subordinated the debt to a new $500,000 loan taken by Canales; Tribe then forgave its $631,320.64 loan to Canales, assumed $418,266 of the new Canales loan, using another $300,000 loan to the Tribe, took title to the property, and continues to service the debt).

[5] Relevant to the defendants' fraud against third parties, the Tribe's 2015 bank records show the Tribe receiving private donations to the Head Start preschool program it administers, only for those donations to be deposited directly into the account from which defendants made payments to and for the benefit of themselves. Narvaez Decl. Ex. U, pp. 58-61.

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In contrast, JW Gaming did not receive a single payment from any of the defendants, despite JW Gaming having previously loaned the Tribe $5.38 million and despite the Tribe's note to JW Gaming becoming "immediately due and payable" on July 10, 2015.[6]

LEGAL STANDARDS

"Judgment on the pleadings under Rule 12(c) is proper when the moving party establishes on the face of the pleadings that there is no material issue of fact and that the moving party is entitled to judgment as a matter of law." *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 937 fn.1 (9th Cir. 2011).

Similarly, a party is entitled to summary judgment under Rule 56 when the "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); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue exists if the non-moving party presents evidence from which a reasonable fact-finder, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson* at 248-49.

ARGUMENT

I. The elements of breach of contract are satisfied.

Under California law, the elements of a cause of action for breach of contract are: (1) the existence of the contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the

[6] The Tribe has continued to engage in similar conduct, as other records suggest that in 2016 and 2017 the Tribe defrauded at least one other third-party, like JW Gaming, by inducing that lender to fund over $2 million for the benefit of the Tribe by falsely stating the Tribe had no then-pending litigation, and by furnishing the lender with financial information that falsely and artificially enhanced the Tribe's creditworthiness by concealing debts of the Tribe (including the approximately $18 million in debt to JW Gaming and Canales Group). Narvaez Decl. Ex. V.

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defendant's breach; and (4) damages to the plaintiff as a result of the breach. *Dillon v. Continental Casualty Co.*, 278 F.Supp.3d 1132, 1138 (N.D. Cal. 2017).

Here, the elements for breach of contract are easily satisfied: JW Gaming and the two Tribal Parties entered into the Note on or about July 10, 2012.[7] Because JW Gaming's money was invested with the Tribe prior to execution of the Note, JW Gaming fully performed its obligations to the Tribe, i.e., providing the money. Under the Note, if the Tribe failed to open a casino on or before July 10, 2015, then the Note became "immediately due and payable." The Tribe did not open a casino on or before that date (or at any time to the present), and the Tribe has not made any payments to JW Gaming. *See* Doc. 129 at 15 ("the Tribe declined to repay the Note until casino revenues were available"). As a result of the Tribe's failure to pay the Note upon maturity, JW Gaming has been damaged in the amount of $5.38 million, plus interest. These facts satisfy all four elements of the cause of action for breach of contract.

The recourse provision that is the focus of the Tribal Defendants' motion does not alter this conclusion – in particular, it does not mean JW Gaming suffered no damage. Assuming the recourse provision applies (JW Gaming argues that it does not), it would not excuse the Tribe from its contractual duty to immediately repay the Note if no casino were opened on or before July 10, 2015. That promise contained no limitation on the source of the funds the Tribe would use to repay the Note. To the contrary, inherent in the Tribe's promise was an obligation to use non-casino sources to satisfy its debt, since necessarily the Tribe would not have any casino revenues at the point when the Note was "immediately due and payable." (This is in contrast to the Tribe's duty to pay in installments starting with the first quarter after the casino opens, a payment obligation which *was* limited to casino revenues.) If no Tribal casino were opened within three years, then the Tribe had an immediate and unconditional duty to pay. The Tribe's failure to pay on that date, from whatever funding sources, was therefore a breach of the contract that damaged JW Gaming. Neither the

[7] The Note expressly binds the Pinoleville Pomo Nation and the Pinoleville Gaming Authority. Note at 2, 3. They both executed the Note. Note at 10. JW Gaming does not presently seek judgment on the pleadings as to the other Tribal entity defendants (the Pinoleville Gaming Commission, Pinoleville Business Board, and Pinoleville Economic Development, LLC), sued as "successors and assigns" of the Gaming Authority.

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"immediately due and payable" provision nor the recourse provision (assuming it applies here) allow the Tribe simply to choose not to pay and thereby escape all liability.

The Tribe seeks to avoid liability, heavily relying on *In re Integrated Resources, Inc.*, 123 B.R. 181 (Bankr. S.D.N.Y. 1991); *see* Doc. 129 at 18-20 (arguing that the Tribe's failure to pay when due "does not give rise to liability for breach"). However, the Note's recourse provision is distinguishable from the recourse provision of the contract at issue in *Integrated Resources*. In that case, the promissory notes provided that, in the event of a payment default by the borrower, "[n]o recourse shall be had *for payment* of any principal hereof or interest hereon, if any, or for any claim based hereon … against any property or assets owned, leased, acquired or held by Borrower other than the capital contributions of Borrower's partners." 123 B.R. at 182 fn.2 (emphasis added). The *Integrated Resources* provision thus allowed the borrower to commit a payment default, after which the borrower automatically had no duty to pay except from certain assets. One of the key distinctions here is that the recourse provision in JW Gaming's Note, to the extent it even applies, purports to limit the lender's recourse only with respect to collecting a judgment, while the *Integrated Resources* notes directly limited the borrower's duty to pay, should it default.[8] The Tribe, however, had (and has) the duty to pay the Note immediately upon the three-year accrual date, if no casino were opened, from any funding source available, and the recourse provision does not purport to alter that duty, nor to alter JW Gaming's contractual right and expectation to receive immediate payment upon accrual.

The only issue the recourse provision addresses is how JW Gaming's resulting "award or judgment against a Tribal Party for money with respect to a Claim may be enforced or collected" – only against non-existent casino revenues, as the Tribe contends, or against all the Tribe's available assets, as JW Gaming argues. The answer depends on whether, and how, the recourse provision applies these circumstances, discussed below.

[8] The *Integrated Resources* notes also contained no provision that contradicted the recourse provision (e.g., if borrower has no capital contributions within three years, then the debt is immediately due and payable). *See* 123 B.R. at 183 (notes payable "on demand"). This contrasts with the JW Gaming Note, where it was the nonexistence of the recourse revenues that made the debt immediately due and payable.

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II. The contract is a general recourse obligation of the Tribe.

The core dispute regarding the Note concerns JW Gaming's recourse for the Tribe's breach of its agreement to immediately pay the Note if it had not opened a casino by July 2015. To resolve this question, the Court should look first to the text of the contract. To the extent the agreement is ambiguous, or to uncover a latent ambiguity, the Court can look to extrinsic evidence, which in this case shows that the parties intended the Note to be full recourse in the set of circumstances present here. Finally, no matter what the plain language or extrinsic evidence shows of the parties' intent, because the Tribe used fraud to induce JW Gaming to enter the Note, the Court may equitably shape JW Gaming's relief, if necessary, to make the Note a full recourse obligation of the Tribe.

A. The language within the four corners of the contract shows it is general recourse.

"Interpretation of a contract is a matter of law, as is the determination of whether a contract is ambiguous." *Beck Park Apartments v. U.S. Dep't of Housing & Urban Dev.*, 695 F.2d 366, 369 (9th Cir. 1982); *see also Wolf v. Superior Court*, 114 Cal.App.4th 1343, 1351 (2004). "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation." *Santisas v. Goodin*, 17 Cal.4th 599, 608 (1998) (citing Cal. Civ. Code § 1636). When a court interprets a contract to determine the parties' intent, "[t]he whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Lockyer v. R.J. Reynolds*, 107 Cal.App.4th 516, 525 (2003); *see also* Cal. Civ. Code § 1641. A court should "seek to interpret the contract in a manner that makes the contract internally consistent." *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 872 (9th Cir. 1979). "A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1170 (9th Cir. 2015) (citation omitted); *see id.* at 1171 ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.") (citation omitted).

The "clear and explicit meaning" of contractual provisions "interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by

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usage, controls judicial interpretation." *Santisas*, 17 Cal.4th at 608 (internal quotation marks and citations omitted); *see also* Cal. Civ. Code § 1644. "If the meaning a layperson would ascribe to contract language is not ambiguous," the Court applies that meaning. *Santisas* at 608. Contract language is ambiguous if it is "capable of two or more constructions, both of which are reasonable." *TRB Ins., Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19, 27 (2006).

The recourse question turns on two sentences in the Note. The Tribe rests its position on the following single-sentence paragraph entitled "Limitation of Recourse" within the section entitled "Dispute Resolution." That sentence provides:

> (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 for securities accounts into which the same have been deposited.

Note at 3. The term "Revenues" has a definition spanning 14 lines. Note at 8. In short, the term means "all revenues of any nature derived directly or indirectly" from a casino and ancillary facilities operated by the Tribe.

On the other hand, to support its interpretation of the Note, JW Gaming relies primarily on one sentence from a paragraph in the Note entitled "Maturity Date and Payment of Promissory Note." Note at 2. That sentence provides:

> 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. This sentence follows a recitation earlier in the paragraph regarding the maturity date of the earlier development agreement pursuant to which JW Gaming made its investment, and a statement that a new maturity date was proper due to "changed market and financial conditions." *Id.* The next five sentences discuss how repayment would be calculated from "Revenues," which, as discussed above, are revenues from an anticipated gaming facility. *Id.* That discussion of payment from "Revenues" provides that the Tribe would pay 20% of the Revenues to JW Gaming, "starting with the first quarter after the gaming operation opens," and continuing on a quarterly basis "until all the principal and interest of this Promissory Note is paid in full." *Id.* Immediately following this discussion, the paragraph concludes with the alternative maturity date triggered by the Tribe's

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"fail[ure] to open a casino or other gaming facility with three years," in which case the "Note will be immediately due and payable." *Id.*

The court can resolve the recourse question under long-recognized canons of textual interpretation, many of which have been codified under California law. Foremost among these is that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638; *see ASP Properties Group, L.P. v. Fard, Inc.*, 133 Cal.App.4th 1257, 1269 (2005) ("Interpretation of a contract must be fair and reasonable, not leading to absurd conclusions."). Here the clear and explicit language of the two sentences results in a tension in the event, as here, the Tribe failed to open a casino on or before July 10, 2015. In that circumstance, the Note becomes "immediately due and payable." Because the failure to open a casino triggered the maturity, there is very obviously no source of gaming revenues to repay the Note. Thus, in order to repay the Note at maturity, the Tribe would necessarily have to make its payments from sources other than a gaming facility, because none exists.

In tension with this is the Note's single-sentence paragraph providing that a money judgment "may be enforced and collected only as against the Revenues [of a casino]." Compounding this tension is that the limitation purports to apply "[n]otwithstanding any other provision in th[e] Promissory Note[.]" Applying this language to the case at hand would lead to the following conclusion: even though the Note became "immediately due and payable" on July 10, 2015 because of the absence of a casino—and thus "due and payable" from sources other than a casino—any resulting "award or judgment against a Tribal Party for money with respect to a Claim may be enforced and collected only as the Revenues [of a casino]." As a practical matter, this would mean that although the Note became "immediately due and payable" from non-gaming sources on July 10, 2015, any *money judgment* resulting from the Tribe's failure to make such payment from non-gaming sources could be enforced and collected only against gaming sources. The real-world implication of that conclusion is that it would render the agreed-upon maturity date of July 10, 2015 meaningless. This is because any judgment or award resulting from the Tribe's breach of its promise to pay from non-gaming sources on that date, in the event that only non-gaming sources were available because no casino had been opened, would be collectible only against a non-existent gaming revenue source.

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The Tribe's clear and express promise would be unenforceable. *See* Tribe's Br., Doc. 129, at 19-20 (concluding that "[i]f the Tribe refuses or is unable to pay, JW Gaming's recourse is explicitly limited to [gaming] Revenues"). This is precisely the type of "absurd conclusion" courts avoid when construing the terms of a contract. *See ASP Properties*, 133 Cal.App.4th at 1269.

Put differently, under the Tribe's view, its promise to pay on July 10, 2015 would be contingent on two mutually exclusive events: (1) the Tribe had not opened a casino; and (2) the Tribe possessed casino revenues. Since both cannot be true simultaneously, the Tribe's interpretation is an unreasonable, disfavored one. *See Pauma*, 813 F.3d at 1170. The Note remains susceptible only to the reasonable construction put forth by JW Gaming. *See TRB Ins.*, 40 Cal.4th at 27.

Also instructive here is the canon that contract provisions specific to an issue govern more general provisions. This canon is firmly settled under California law. The Civil Code states it succinctly: "Particular expressions qualify those which are general." Cal. Civ. Code § 3534. The Code of Civil Procedure contains a more expansive enunciation:

> [I]n the construction of the instrument[,] the intention of the parties[] is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Cal. Code Civ. Proc. § 1859. As one California appellate court articulated it: "[U]nder well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." *Prouty v. Gores Technology Group*, 121 Cal.App.4th 1225, 1235 (3d. Dist. 2004) (citing Code Civ. Proc. § 1859, Civ. Code § 3534, and cases including *Nat'l Ins. Underwriters v. Carter*, 17 Cal.3d 380, 386 (1976)).

Applied to the matter at hand, this canon counsels that, in this case, where the absence of a casino triggered the maturity date, the Note is a general recourse obligation of the Tribe. Between the two sentences of concern, the one regarding the maturity date defines the parties' rights and obligations in these specific circumstances. It expressly declares that the Note becomes "immediately due and payable" on July 10, 2015 if a casino is not constructed by that date. The sentence concludes a paragraph in which the payment structure from gaming revenues was set forth,

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meaning the sentence contemplated the alternative scenario in which a casino was not built to achieve the gaming revenue payment structure. Moreover, the words in the sentence are clear and explicit. The phrase "due and payable" is a term of art, which means: "(Of a debt) owed and *subject to immediate collection* because a specified date has arrived or time has elapsed, or some other condition for collectability has been met." Black's Law Dict. (11th ed. 2019), due and payable (italics added); *see Hebrank v. Linmar Mgmt., Inc.*, No. 3:13-cv-2179-GPC-JMA, 2014 WL 3741634, *3 (S.D. Cal. Jul. 29, 2014) ("When something is 'due' in the context of payment, it is 'immediately enforceable.'"). Incorporating the definition into the maturity provision here, the Note was "owed and subject to immediate collection because . . . [a] condition for collectability [i.e., failure to open a gaming facility] has been met." The phrase expressly pertains to the immediate collectability of the debt in the event the casino was not opened. It therefore follows that the provision expressly contemplates that the debt had to be collectible against some immediately available asset. Because the condition that triggers the collectability is the nonexistence of a casino, the phrase contemplates that the debt was subject to "immediate collection" from non-gaming assets.

In contrast to the specificity of the maturity provision, the recourse provision is broad and non-specific, purporting to apply "Notwithstanding any other provision in th[e] Promissory Note[.]" The recourse provision then purports to limit the assets against which "any award or judgment" may be "enforced and collected." Those assets are identified as gaming revenues—specifically, "the Revenues or the deposit or securities accounts into which the same have been deposited." By limiting the recourse to gaming revenues, the recourse provision is inconsistent with the maturity provision (which makes the note immediately collectible *because* there are no gaming revenues). In this circumstance, California law provides that the maturity provision, which is more specific, governs the non-specific recourse provision, and the Note is a general recourse obligation.

The Tribe focuses on the use of the word "notwithstanding" in the recourse provision, but this word does not sweep away the Tribe's agreement to make the Note immediately collectable if no gaming revenues were available within three years. The Ninth Circuit has "repeatedly held" that a "notwithstanding" clause "is not always construed literally." *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996). Despite appearing to be facially absolute, such a clause must be

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"harmonize[d]" with the whole of the agreement or statute, so that every part of the whole is given effect, and no provision is rendered "nugatory" or "superfluous." *Id.* at 797. Thus, for instance, in *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993) (on which the Tribe relies), the Court held that a "notwithstanding" clause (calling for rental rates to be capped according to market data) in federal housing assistance contracts would override another section of the contracts (providing that rents would be adjusted according to a formula) because applying the "notwithstanding" clause would not render the formula provision a "nullity," and because that construction was "plainly consistent" with the federal law underlying the agreements. *Id.* at 19. Under the Court's interpretation, the "notwithstanding" clause would operate only in "exceptional cases," allowing the formula provision to "remain the presumptive adjustment called for under the contract." *Id.* The two provisions worked together in support of the overall purpose. This is in contrast to the Note in this case, where applying the recourse provision, "notwithstanding" the Tribe's specific agreement to make the debt immediately collectable if no gaming revenues existed by July 2015, would entirely nullify the Tribe's promise.

Still other canons support the conclusion that in these circumstances, the Note is a general recourse obligation of the Tribe. Among them is that a "contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civ. Code § 1643. It is unreasonable to interpret the Note in a way where JW Gaming's $5.38 million loan became a gift to the Tribe that need not be repaid if a casino was not built. Since the money had already been loaned, the parties' primary purpose for entering the Note was to adjust the terms of repayment, including the Tribe's agreement to new maturity dates. As discussed above, the Note explains that "changed market and financial conditions require that a new maturity date be established," and the parties accordingly altered the due date set out under the previous development agreement. Note at 2.[9] A contractual

[9] According to the Note, under the prior development agreement the loan was to mature on the earlier of: (i) July 29, 2015 (six and one-half years after the "Effective Date," defined in the Note as January 29, 2009), or (ii) the "First Permanent Financing Funding Date." Note at 2, 7. By agreeing to the Note, JW Gaming allowed the Tribe to receive permanent financing without triggering repayment of

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interpretation that would cancel out such a fundamental part of the parties' agreement is unreasonable. And because the contrary interpretation carries out the specific and express promise in the maturity provision, that interpretation can be enforced "without violating the intention of the parties."[10]

The Tribe also argues that the recourse provision is tied to its waiver of sovereign immunity, and therefore must be "strictly construed" in the Tribe's favor. Doc. 129 at 21. To the contrary, however, the Note provides that it "shall not be construed more strongly for or against any Party hereto[.]" Note at 5. Furthermore, even the cases the Tribe relies on for its strict construction argument recognize that the terms of a valid agreement can contradict the conditions of a waiver of sovereign immunity. In *Namekagon Dev. Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975), the tribal housing authority's immunity from suit was waived by tribal ordinance, and the same ordinance excluded all the authority's property from judicial execution upon any judgment arising from such a suit. *Id.* at 509. Acknowledging that the waiver found in the ordinance should be "strictly construed and applied," the Court nevertheless turned to a provision in an agreement between the authority and the plaintiff, which stated that certain "funds have been reserved … and will be available to effect payment and performance" by the authority. *Id.* The Court construed this "express promise" as a waiver of the authority's "immunity from levy and execution to the extent of claims against those funds from the performance of the Namekagon contract." *Id.* at 510. This case is similar, in that the Tribe's express promise giving JW Gaming the

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the JW Gaming loan, instead deferring repayment to "the first quarter after the gaming operation opens," and setting out an installment plan tied to the Tribe's casino revenues. Note at 2. But it still kept July 2015 as the drop-dead date. *Id.* Moreover, the Note contemplated that the Tribe would accelerate the casino project, as it called for the casino to open by July 2015, rather than merely for permanent financing to be funded by then.

[10] Other canons, although not discussed at length here, support JW Gaming's interpretation. *See* Cal. Civ. Code §§ 1640 ("When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."); 1647 ("A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."); 1649 ("If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.").

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right to collect payment from non-gaming sources if no casino (and thus no gaming revenues) existed by July 2015, demonstrates that the Tribe intended to waive its immunity from judicial suit and execution to enforce the performance of that promise.[11]

In sum, the foregoing establishes the Tribe's unambiguous agreement that, after three years, if it had not opened a casino, the Note would be "immediately due and payable," and JW Gaming would have the right to enforce that obligation and collect the debt from sources then available – necessarily including assets other than gaming revenues. On this basis, JW Gaming requests that the Court grant judgment on the pleadings on the first cause of action, and deny the Tribal Defendants' motion for summary judgment on that claim.

B. Extrinsic evidence shows the contract was intended to be general recourse.

Extrinsic evidence may be used "to explain or interpret ambiguous contract language," *Lonely Maiden Prods., LLC v. GoldenTree Asset Mgmt., LP*, 201 Cal.App.4th 368, 376 (2011), or to expose a "latent ambiguity" revealing "more than one possible meaning to which the language of the contract is yet reasonably susceptible." *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384, 391 (2006). A court "cannot consider such evidence if the language of the contract is not reasonably susceptible of interpretation and is unambiguous." *John Hancock Ins. Co. v. Goss*, No. 14-cv-04651-WHO, 2015 WL 5569150, *3 (N.D. Cal. Sept. 1, 2015) (internal quotation marks omitted). Furthermore, where the evidence shows the parties' intent and, through their inadvertence, the contract language "does not truly express the intention of the parties, it may be revised." Cal. Civ. Code § 3399; *see Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524-27 (2002) (revising contract term under § 3399 based on "the failure of both sides to catch the erroneous language").

[11] The fact that the Tribal Defendants have made an argument that sovereign immunity principles should inform the Court's interpretation of the contract does not transform the issue of contract interpretation into one of sovereign immunity. Therefore, a denial of their motion for summary judgment would not constitute an immediately appealable collateral order, as if it were a denial of a claim of sovereign immunity. *See Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (immediate appeal of order denying claim of tribal sovereign immunity was available in part because it resolved an issue completely separate from the merits of the underlying action); *see also Johnson v. Jones*, 515 U.S. 304 (1995) (defendant invoking qualified immunity cannot immediately appeal summary judgment order determining whether genuine issue of fact exists).

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Here, the extrinsic evidence shows that the parties intended that the Note be paid from, and collectible against, all assets of the Tribe in the event a casino was not opened on or before July 10, 2015. The evidence shows that while the recourse provision was cut and pasted from an earlier agreement, the maturity provision was specifically drafted by the Tribe (through its agent) to address JW Gaming's primary concern, repayment, and therefore better reflects the true intent of the parties. Indeed, email correspondence between the negotiators of the Note expressly discuss this understanding of the maturity provision. "[S]eparately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." *Seagate Technology LLC v. Dalian China Express Intern. Corp.*, 169 F.Supp.2d 1146, 1157 (N.D. Cal. 2001) (quoting Restatement (Second) of Contracts § 203 (1981)). Where "boilerplate" provisions were not "the subject of any discussion between the parties, [and] are completely at odds with the negotiated terms of the contracts," "basic contract law principles … counsel against construing these boilerplate provisions in a way that would nullify the basic terms and conditions of the parties' agreement." *IV Solutions Inc. v. United Healthcare Services Inc.*, No. CV 12-4887 GAF (MRWx), 2012 WL 12887401, *6 (C.D. Cal. Nov. 19, 2012). In light of the extrinsic evidence, the Tribal Defendants are not entitled to judgment as a matter of law.

The maturity provision was a focal point in the negotiation of the Note, having been the subject of redline edits and discussed in the body of emails. The first edits of the provision are in the draft Note circulated by Melissa Canales on May 28, 2012. While the initial language of the maturity provision (derived from the development agreement) addressed maturity where a casino was successfully developed, this draft circulated by Melissa Canales added language for maturity in the event a facility was not timely developed. As Melissa Canales explained in her email, this early draft of the maturity provision reflected the understanding among those involved in negotiations that the Note would mature in three years if a casino was not developed in that time.

The very next draft of the Note, circulated by JW Gaming on July 2, 2012, reaffirms the parties' understanding that the Note matured in three years if a casino was not developed, and confirms that the boilerplate language of the recourse provision was not specifically negotiated for. While there were no edits to, or discussion of, the recourse provision, the edits to the maturity

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provision further clarify (1) the maturity date in the event a casino was not opened, and (2) that the Note would be repaid from non-gaming sources in the event the Note matured due to non-development of a casino. Specifically, this draft added language clarifying that the three-year window to develop a casino began running from the date at the outset of the Note (i.e., July 10, 2012). Especially pertinent here, the draft added the word "immediately" before the clause "due and payable," further emphasizing that the Note was payable from non-gaming sources – the only sources that would be immediately available – in the event a casino was not opened within three years. Together, these redline edits to the maturity provision were as follows:

> 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 thise Promissory Note will be immediately due and payable.

Draft Note, in redline to reflect edits, at 2 (added language in underline, and deleted language stricken through). These would constitute the final edits to the maturity provision, with the executed version containing this same language.

Furthermore, these final edits to the maturity provision were among only about four edits made to the Note at this stage, underscoring that the parties found this provision particularly significant, and that they sought to make their intentions unmistakably clear.

In contrast, the recourse provision was never discussed or negotiated, which is evidence that it was not intended to trump the very specific language of the maturity provision. The language of the recourse provision set forth in the draft attached to Melissa Canales's email of March 28, 2012 is identical to the language of that provision in the executed Note. And the language in the Note is identical to that in the development agreement, Melissa Canales having cut and pasted it directly from the development agreement. Indeed, neither the recourse provision, nor any part of the Note's dispute resolution section, was ever a point of discussion, revision or negotiation in any of the email correspondence between JW Gaming and Melissa Canales during the negotiation of the Note. All of this indicates that the recourse provision was boilerplate language pulled from an earlier agreement, and was not a focal point of the negotiations regarding the Note. This extrinsic evidence shows that the drafters never intended for the recourse provision to override the maturity provision in the event the two came into tension, as they have done in this case.

The full recourse nature of the Tribe's debt to Canales, which was negotiated at the same time as the JW Gaming Note, is further evidence that the Tribe intended its debt to JW Gaming be collectible against all assets of the Tribe. "Several contracts relating to the same matter, between the same parties, and made as parts of substantially one transaction, are to be taken together." *Holguin v. Dish Network LLC*, 229 Cal.App.4th 1310, 1320 (2014), quoting Cal. Civ. Code § 1642. "The language of Civil Code section 1642 has been somewhat broadened by construing it as a declaration of common law principles." *Id.* (quoting Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 747, p. 836.). In this regard, "[a]lthough Civil Code section 1642 references the 'same parties,' the common law rule is not so limited." *Id.* at 1322 (citing *Harm v. Frasher*, 181 Cal.App.2d 405, 415 (1960)). Thus, "[w]here … the written instruments are all part of the same transaction, they may be considered together even when the counterparties to each instrument are different." *Id.* (citing *Harm*, and *Brookwood v. Bank of America*, 45 Cal.App.4th 1667, 1675 (1996)). When taken together, the contracts "must all be construed together, and effect given if possible to the purpose to be accomplished." *Id.* (quoting *Mayers v. Loew's, Inc.*, 35 Cal.2d 822, 827 (1950)).

Here, the full recourse nature of the Canales note shows that the JW Gaming Note was also intended to be a full recourse obligation of the Tribe. Both notes were entered to memorialize the investments JW Gaming and Canales Group made to the Tribe to develop the casino.[12] *See* Note at 1 ("Both Canales Group LLC and JW Gaming Development LLC loans constitute the entire Interim Tribal Loan under the Development Agreement."). They were each entered as part of the transaction to resolve the Tribe's notice of default to J2M and to dissolve J2M. *See* Doc. 129 at 9.

The Canales note has a maturity date of July 10, 2019 (seven years from execution). It contains no reference to the development of a gaming facility, instead constituting a general obligation of the Tribe. It provides that "any award or judgment" resulting from the Tribe's non-payment of the note may be enforced against all liquid assets of the Tribe.[13] All of this shows that

[12] In connection with its fraud and RICO claims, JW Gaming alleges that Canales Group LLC did not actually make the claimed investment.

[13] In fact, the recourse provision in the Canales note is almost identical to the recourse provision in the JW Gaming Note. The JW Gaming Note refers to collection "only as against the Revenues…,"

the Tribe intended to repay Canales Group for money it had (purportedly) invested, irrespective of whether a casino was developed. The Tribe's intentions in this regard support the language in the maturity provision that the Tribe also intended to repay JW Gaming for its investment, even if a casino was not constructed. If this was not accurate, it would lead to an unusual result where the Tribe would repay Canales Group, but not JW Gaming, if a casino was not developed, even though only the JW Gaming Note, and not the Canales note, contained the Tribe's express and specific promise to immediately repay the debt if the casino did not open within the specified time.[14] All of this shows that the Note's recourse provision was not intended to limit JW Gaming's ability to collect on a judgment entered as a result of the Tribe's failure to perform as required by the three-year maturity provision.

In sum, the foregoing extrinsic evidence shows that the parties intended the Note to become immediately payable from non-gaming sources in the event a casino was not developed on or before July 10, 2015. It also shows that the drafters did not intend the recourse provision to nullify this objective by limiting JW Gaming's enforcement of any money judgment resulting from the Tribe's failure to pay at the three-year deadline to non-existent casino revenues. These facts foreclose summary judgment for the Tribal Defendants based on their contrary contract interpretation.

C. Equitable considerations require the debt to JW Gaming be construed as a full recourse obligation of the Tribe.

"Equitable relief is by its nature flexible, and the maxim allowing a remedy for every wrong (Civ. Code § 3523) has been invoked to justify the invention of new methods of relief for new types of wrongs." *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal.4th 362, 390 (1994). The "inherently flexible nature of equitable remedies" allows for a variety of equitable remedies "[i]n actions founded on contract." *Id.* Thus, for instance, inequitable conduct can justify an estoppel to prevent a party

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with the term *Revenues* defined to mean casino revenues, while the Canales note refers to collection "only as against Tribal revenues," with no definition of the term *revenues*. *See* Campbell Decl. Ex. J.

[14] Or (to venture further down the rabbit hole) under the Tribe's view, it could decline to repay both JW Gaming and Canales Group, since the JW Gaming Note provides that it "shall unconditionally be and remain at all times superior to the $5,352,000 Interim Tribal Loan(s) made by [Canales Group.]" Note at 4. As long as it lacked casino revenues, the Tribe would be free from any duty to repay JW Gaming, and would be barred from "repaying" Canales Group first.

from "exploiting procedural violations that are a product of its own failures to comply with governing law," particularly where the result is simply to obligate the party "to pay what it has agreed to pay." *City of Hollister v. Monterey Ins. Co.*, 165 Cal.App.4th 455, 490 (2008). Similarly, a person "cannot take advantage of his or her own act or omission to escape liability; if the person prevents or makes impossible the performance or happening of a condition precedent, the condition is excused." Witkin, Summary of Cal. Law (11th ed. 2011) Contracts, § 846. "A person who pays money under the mistaken belief that he or she is under a duty to do so," or where the "money is obtained by false representations as to its intended use," is entitled to recover the money. *Id.* § 1059. And a court may reform a contract obtained through "misrepresentations as to the terms or effect of the contract." *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012).

Here, the defendants' conduct throughout their relationship with JW Gaming makes it inequitable to restrict or deny JW Gaming effective recourse for the Tribe's breach. As outlined above, the Tribe fraudulently induced JW Gaming to provide the $5.38 million loan in 2008, and to accept the Note in 2012. The sham debt to Canales Group not only served as bait for JW Gaming's loan, it also meant a much smaller amount was available to be put toward consultants, securing the site, and securing regulatory approvals for the project, all reducing the likelihood the project would come to fruition. Furthermore, the Tribe misused the loan proceeds to personally enrich or benefit individual defendants, rather than to develop a casino or to repay JW Gaming. Finally, the Tribe's note to Canales Group was marketed to prospective financiers as an encumbrance on the project, making the project less attractive to investors. Therefore, even if, at the time of contracting, the parties intended to limit JW Gaming's recourse to revenues of a casino, the Tribe fraudulently induced JW Gaming's assent to that provision by falsely representing that more money had been spent on the casino project than in fact was. Equitable principles require that the Tribe cannot be allowed to hide behind the recourse provision to avoid repaying its debt.

III. JW Gaming was damaged by the defendants' fraud and racketeering activity.

The Individual Tribal Defendants ask for summary judgment on causes of action two through six, the fraud and RICO claims, on the ground that "JW Gaming has failed to allege any actual

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monetary loss separate from the breach of contract damages." Doc. 129 at 22. Their assertion is not correct.

The Court previously rejected the Tribal Defendants' argument that the fraud and RICO claims only allege injuries that resulted from the breach of the Note. Order Denying Motions to Dismiss, Doc. 55 at 6-7. At that time, the argument was framed in terms of proximate cause, but it remains essentially the same, and there is no basis for the Court to reconsider its earlier decision, which concluded:

> [H]ere there is evidence that the defendants' misrepresentations directly contributed to JW Gaming's decision to invest in the Casino Project. Throughout early negotiations, there were repeated references to the Canales Group investment, which creates the necessary direct relationship. Only years later did theTribe and JW Gaming enter into the Note, after fraudulent misrepresentations, investment, and misappropriation of funds had already occurred.

Doc. 55 at 7.

JW Gaming was damaged by the defendants' fraudulent conduct when, because of its reliance on the defendants' misrepresentations, JW Gaming loaned more than $5 million to the Tribe. At that time (from 2008 to 2011), JW Gaming was damaged in the amount of money taken out of its pocket. Compl. ¶¶ 326-327; *see Lazar v. Superior Court*, 12 Cal.4th 631, 646 (1996) (explaining that "fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the-bargain damages"); *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1240 (1995) ("out-of-pocket" damages aim to "restor[e] the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction"). Because the misrepresentations that induced JW Gaming to loan money to the Tribe (as well as later statements falsely accounting for the Tribe's use of the loan proceeds and concealing the initial falsehoods) were part of the larger pattern of racketeering activity (specifically wire fraud and money laundering) alleged in the RICO claims, JW Gaming's out-of-pocket losses also constitute the injury to JW Gaming's "business or property," the damage element of its RICO claims. Compl. ¶¶ 539-540; 18 U.S.C. § 1964(c); *see In re Volkswagen "Clean Diesel" Marketing*, MDL No. 2672 CFB

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(JSC), 2017 WL 4890594, *5 (N.D. Cal. Oct. 30, 2017) (noting that an "'out-of-pocket' loss satisfies" the RICO requirement for a tangible injury to a business or property interest).[15]

In short, the monetary loss JW Gaming suffered as a result of defendants' fraud and racketeering began in 2008 with the first dollar it paid to the Tribe under false pretenses. Its loss "has continued to accrue" as the Tribe has continued not to repay the money. *See* Doc. 129 at 23 (quoting Compl. ¶¶ 367, 376). Thus, the fraud and RICO damage is "related" to nonpayment of the loan, to the extent that complete repayment would make JW Gaming whole or stop its losses from accruing, but factually and legally, these injuries are distinct from the damage JW Gaming suffered as a result of the Tribe's July 2015 breach of the Note. JW Gaming suffers the damages caused by the defendants' fraudulent conduct regardless of how the language of the Note is interpreted.

IV. Entry of final judgment on the contract claim is warranted.

If the Court grants judgment in favor of JW Gaming fully resolving the contract claim, the Court is requested to determine that there is "no just reason" to delay entry of final judgment on the claim, and to direct entry of final judgment pursuant to Fed. R. Civ. P. 54(b). Resolution of the contract claim would fully decide the rights and liabilities of the Tribe and the Gaming Authority, who are not defendants with respect to any other claim in this action. Given the evidence that the Tribe continues to dissipate its assets, delaying finality until the conclusion of the remaining claims presents the risk that JW Gaming would be prejudiced in its ability to recover any of its money.

CONCLUSION

For all the foregoing reasons, JW Gaming respectfully requests that the Court grant judgment in its favor on the first cause of action and deny in its entirety the Tribal Defendants' motion for summary judgment.

[15] JW Gaming is within its rights to simultaneously pursue its contract claim and its statutory and tort claims. *See Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 990 (2004) ("when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort"); *id.* at 992 ("a contract is not a license allowing one party to cheat or defraud the other") (citations omitted). As the Tribal Defendants note (Doc. 129 at 23), JW Gaming's ultimate recovery of "overlap[ping]" damages recoverable under its various claims "would be limited by the rule against double recovery," *Lazar* at 649, but this issue centers on the amount of recovery, not the existence of damage.

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