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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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

JW Gaming cannot prove that the limited-recourse provision in the 2012 Promissory Note has been breached or that it has suffered damages for nonpayment. JW Gaming's primary argument is that, because no casino revenues exist, applying the limited-recourse provision according to its plain meaning would render the "immediately due and payable" clause in the Note a nullity and lead to absurd results. It argues that the parties must therefore have intended the Note to be a general-recourse obligation, collectible from non-gaming assets of the Tribe.

This argument, however, ignores clear language in the Note and the Development Agreement which shows that if casino revenues are not available to pay the Note, then the Note would be immediately payable from the proceeds of Permanent Financing. The parties assumed that such financing would be in place even if a casino was not completed by July 2015, and JW Gaming's loan would be paid from this source. Thus, the recourse limitation and "immediately due and payable" clauses are not irreconcilable as JW Gaming claims, and its argument that the Note must be a general-recourse obligation of the Tribe is incorrect as a matter of straightforward contract interpretation. Moreover, because the two clauses can be interpreted harmoniously, there is no ambiguity in the Note and therefore no need to resort to extrinsic evidence to determine the parties' intent. Nor are there grounds to consider JW Gaming's argument regarding "equitable considerations," which is nothing more than a disguised argument for application of equitable estoppel, which does not apply in these circumstances. Accordingly, as set forth in more detail below, no issues of material fact exist and summary judgment should be entered in favor of the Tribe as to all Counts in the Complaint.

ARGUMENT

I. ADDITIONAL UNDISPUTED FACTS FOR SUMMARY JUDGMENT

A. The Development Agreement

1. The Development Agreement is part of the Note, not extrinsic evidence.

In its opposition to the Tribal Defendants' Motion for Summary Judgment ("Opp."), JW Gaming makes multiple references to "an earlier development agreement," based on which the parties negotiated the 2012 Promissory Note. *See* Doc. 136, at 12, 20, 24, 27. This "earlier agreement" is the Development Agreement dated as of May 30, 2008, as amended on February 12, 2009 ("Development Agreement"). *See* Exhibit A. JW Gaming asserts that this Agreement constitutes extrinsic evidence and shows, in various ways, that the Note must be interpreted as a general-recourse obligation. In reality, the Development Agreement is a part of and expressly incorporated into the Note. It therefore is not extrinsic evidence at all, but rather part of the contract and integral to its meaning. As demonstrated below, the terms of the Development Agreement reveal the parties' clear intent to make the Note repayable from only two sources—Permanent Financing or casino Revenues. A correct reading of the maturity and limited-recourse provisions of the Note reveal a concomitant intent.

2. The Terms of the Development Agreement

In 2008, the Tribe's consultants, Michael Canales and John Tang, approached JW Gaming's principal, James Winner, regarding Mr. Winner's potential financial investment in the Tribe's development of the Pinoleville Casino Project. Doc. 1-1, Compl. ¶ 104. During negotiations, Canales and Tang asked Winner to make an investment of $5,352,000, matching the contributions of Michael Canales and the Canales Group to the project. *Id.* ¶ 106.

Thereafter, JW Gaming, the Canales Group and Tang formed a joint venture, J2M Gaming Development, LLC, to facilitate development of the Pinoleville Casino Project. *Id.* ¶¶ 124, 133, 154. J2M Gaming assumed the obligations of Developer under the Development Agreement. *Id.* ¶ 160. Pursuant to the Development Agreement, JW Gaming made a total investment of $5,380,000 in the Pinoleville Casino Project (the "Interim Tribal Loan"). *Id.* ¶ 164. The relevant terms of the Development Agreement include:

* The purpose of the Development Agreement is to improve the well-being of the Tribe and strengthen its self-sufficiency and self-determination. Exh. A. at Recital C.

* JW Gaming is obligated to assist the Tribe in obtaining Permanent Financing "to pay, among other things, the Interim Tribal Loan." *Id*. at Recital D.

* The Interim Tribal Loan, Section 3.1, is subject to the following:

  (f) *Maturity Date*: "All principal and interest accrued on the Interim Tribal Loan shall become due and payable on the earlier of (i) six and one-half (6 ½) years after the Effective Date, (ii) the First Permanent Financing Funding Date, or (iii) the termination of this Agreement pursuant to Section 10.3 below;" *Id*. at Section 3.1.

  (j) *Grant of Security Interest*: "The Interim Tribal Loan, together with interest thereon, shall be payable from and secured by a pledge of the following: (1) the proceeds of any Permanent Financing; and (2) all Revenues.

  To that end, the Tribe pledges and grants to the Developer a security interest in the proceeds of any Permanent Financing and all Revenues…but specifically excluding the Original Rancheria Land or any other Tribal land, to secure the Tribe's obligations under this Agreement and all Interim Tribal Notes." *Id*. at Section 3.1.

* The Limited-Recourse Clause, Section 11.1, states: "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." *Id*. at 11.1(b).

As evidenced above, the "Maturity Date," "Grant of Security Interest," and "Limitation on Recourse" provisions of the Development Agreement all expressly limit repayment of the Interim Tribal Loan (*i.e.,* the Note) to Permanent Financing and casino Revenues.

Near the conclusion of the funding of the Interim Tribal Loan, the Tribe had not yet completed the Pinoleville Casino Project, nor had JW Gaming assisted the Tribe in obtaining Permanent Financing. Compl., ¶¶ 205, 241. In 2012, the Tribe sent to J2M Gaming a 30-day notice of default for failure to perform, and requested that it demonstrate an ability to provide permanent financing for the project. *Id*. ¶¶ 210-12. In February 2012, the parties agreed to dissolve the joint venture and each take a promissory note with the Tribe in the amount of their contributions. *Id*. ¶ 235.

In July 2012, JW Gaming and the Tribe entered into the Note, which incorporated the Development Agreement, Note at 6, and pursuant to which the Tribe agreed to repay JW Gaming the principal amount of $5,380,000 plus interest. Compl. ¶ 239. The Note expressly "evidences the promises made in the Development Agreement . . . which survive mutual termination of the Development Agreement," and incorporates the Development Agreement by reference "as if fully set forth herein." Note at 6. The Note also expressly "evidences the agreed to terms of the Interim Tribal Loan repayment described in the now mutually terminated Development Agreement." *Id*.

B. The Note

The section "Maturity Date and Payment of Promissory Note" provides:

> 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 1/2) 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 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. . . 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 (emphasis added). The section of the Development Agreement limiting repayment to two sources—Permanent Financing and casino Revenues—remains unchanged in the Note. What has changed is the date such payment is owed: under the Note, payments are now owed in installments after the opening of the casino, rather than up-front upon the receipt of Permanent Financing. This provision was for the benefit of the Tribe, which would no longer have to apply the Permanent Financing to immediately repay the Interim Tribal Loan but could instead use that money to build the casino, and then repay the loan with casino Revenues. The Note retained the intention of the

parties in the Development Agreement (expressly incorporated into the Note) to limit repayment to Revenues and Permanent Financing.

In the event the Tribe failed to open a casino within three years, the Tribe then had to revert to repaying the Note from Permanent Financing. At the same time, the parties maintained the Development Agreement's recourse-limitation to ensure that, if no Permanent Financing was in place at the three-year mark and JW Gaming brought suit to collect on the Note, any judgment it obtained would be collectible only from casino Revenues. In this fashion, the Tribe would not be bankrupted or forced to dispose of other assets, such as land, and JW Gaming would have an eventual source of repayment. The Note represents a classic allocation of risk among contracting parties.

II. THE NOTE IS UNAMBIGUOUS.

JW Gaming argues that the limited-recourse clause is inconsistent with the maturity provision and therefore the parties must have intended the Note to be a general recourse obligation of the Tribe. This argument, however, ignores language in the Note and the Development Agreement which allows the two provisions to be read consistently and in accordance with the overall intent of those agreements. Therefore, the Note is not ambiguous and its limited-recourse clause must be applied as written.

A. The Parties Intended the Note To Be Payable From Revenues Or The Proceeds Of Permanent Financing.

JW Gaming concedes that "[w]hen 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." Doc. 136 at 19 (quoting *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.'" *Id.* (quoting *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." *Id*. (citing *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1170 (9th Cir. 2015) (citation omitted)).

Reading the Note as a whole, it is clear the parties intended that repayment would be conditioned on the Tribe's ability to pay from the sources identified in the Development Agreement, not from all tribal assets as JW Gaming claims. To ensure this was the case, the parties modified the maturity provision from how it appeared in the Development Agreement. The modified provision extended the maturity date into the future, and provided for repayment of the Note from casino revenues on an installment basis. This allowed the Tribe to use Permanent Financing to build and open the casino, rather than for repayment of the loan. In the event the Tribe failed to open a casino within three years, the maturity provision's "immediately due and payable" language requires that the Note be paid from any Permanent Financing in place. At the same time, the parties maintained the limited recourse provision to ensure that, if no Permanent Financing was in place at the three-year mark, and JW Gaming brought suit to collect on the Note, any judgment it obtained would be collectible only from casino Revenues.

This interpretation is supported by other provisions of the Note. For example, the section titled "Grant of Security Interest" states:

> The Interim Tribal Loan, together with interest thereon, shall be payable from and secured by a pledge of the following: (1) All revenues; or, if reasonable, (2) The proceeds of any Permanent Financing.
>
> To that end, the Tribe hereby pledges and grants to JWG a security interest in the proceeds of Revenues … but specifically excluding the Original Rancheria Land or any other Tribal land to secure the Tribe's obligations under this Promissory Note.

See Doc. 1-1, Compl. at Exh. 26 (hereinafter "Note") at 3.

The inclusion of this language disposes of JW Gaming's argument that the "immediately due and payable" and recourse limitation provisions are irreconcilable. It is clear from this clause that, if the Tribe failed to open a casino by the maturity date, the Tribe was obligated to pay the

Note out of the proceeds of a Permanent Financing, a condition that would occur before constructing and opening a casino. This accounts for the situation where Permanent Financing had been obtained but a casino was not yet built and operational. JW Gaming could be repaid even if a casino was not open. It follows that the Promissory Note's "immediately due and payable" language would not be rendered meaningless or lead to an absurd result. In this manner, the two provisions that JW Gaming claims are irreconcilable can be read consistently.

B. The Maturity Provision's Conditional Promise is Valid and Enforceable.

This type of conditional promise—one that is contingent on the ability to pay, or to pay from a certain fund or upon the happening of a certain event—has long been recognized as valid in California. *See Van Buskirk v. Kuhns*, 164 Cal. 472, 474–75 (1913); *Curtis v. City of Sacramento*, 70 Cal. 412 ("If the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him.") 3 Witkin, Civil Procedure Actions 380, 3rd Edition, provides:

> The same principle applies to a debtor's promise to pay money "when able." Ability to pay is a condition precedent to his liability, and the statute does not begin to run until he is able. *Van Buskirk v. Kuhns* (1913) 164 C. 472, 129 P. 587; *Fuller v. White* (1948) 33 C.2d 236, 238, 201 P.2d 16; *Horacek v. Smith* (1948) 33 C.2d 186, 191, 199 P.2d 929; *Maurer v. Bernardo* (1931) 118 C.A. 290, 294, 5 P.2d 36; see 28 A.L.R.2d 786.) [sic].

See, e.g., Martin v. World Savings & Loan Assn., 92 Cal.App.4th 803, 809 (2001) (court enforced borrower's promise that "if" he obtained earthquake insurance, lender would be loss payee); *Anchor Cas. Co. v. Surety Bond*, 204 Cal.App.2d 175, 179, 182–183 (1962) (where lender stated to surety that "if" it made construction loan to developer, lender would withhold $55,000 of funds and disburse only for city-required improvements, once loan was made, "th[e] promise became absolute"]). The court in *Bank of Am. Nat. Tr. & Sav. Ass'n v. Engleman*, 101 Cal. App. 2d 390, 394 (1950), recognized as follows:

> Whether the parties to a transaction intended to make the payment of money contingent must be gathered from the situation of the parties, their relationship, the subject matter, and the purpose to be accomplished as disclosed by the evidence. Also, says Professor Williston, 'if they intend that the debt shall be absolute and fix upon the future event as a convenient

> time for payment only then the debt will not be contingent; and if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time.' 3 Williston, sec. 799.

These authorities confirm that the type of conditional promise set forth in the Note is valid and enforceable in California.

C. The Tribe's Interpretation Gives Effect to Every Term of the Note and the Parties' Clear Intent.

As JW Gaming acknowledges, "[s]everal 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 *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)).

Notwithstanding these rules of interpretation, JW Gaming asks the Court to ignore the plain language of the limited-recourse provision and the Development Agreement which was expressly incorporated in the Note. JW Gaming insists that these provisions do not apply because they would transform the Note into a gift, and the Note must instead be converted into a general recourse obligation. *See* Doc. 136 at 24. As support, JW Gaming argues that "the full recourse of the Tribe's debt to [Michael] 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." *Id*. at 29. To the contrary, the Canales Note is a full recourse obligation because, following the mutual termination of the Development Agreement, it was made subordinate to the JW Gaming Note. To the extent that this Court considers extrinsic evidence, which the Tribe submits would be inappropriate in light of the clear and unambiguous terms of the Note,[1] there is ample support for this in the communications among the parties. For example, in a February 14, 2012, email from Jack Campbell of JW Gaming to John Tang, Mr. Campbell requested that the 2012 Note be given priority over repayment of the Canales Note, and asked that the Canales Note be removed as a casino development-related debt and to reclassify it so as not to encumber the permanent financing. *See* Exhibit B, Email from Jack Campbell to John Tang, Feb. 14, 2012. Campbell also requested that JW Gaming's Note, "i[f] not satisfied in whole or in part from the permanent financing," should be given second priority to various development funding, which "shall be made in preference to all other revenue payments previously set out." *Id*.

These statements support the Tribe's interpretation of Note rather than the strained one offered by JW Gaming. First, they confirm that the parties intended the Note would be "satisfied" from Permanent Financing if casino revenues were not available as a source of repayment. Second, the fact that the Canales Note was modified from the Development Agreement to expressly allow for collection against all assets of the Tribe—*i.e.,* to be a general recourse obligation—shows that the parties clearly did not intend for the JW Gaming Note to be one.[2]

The Tribe's interpretation thus gives effect to all of the Note's provisions, including the incorporated terms of the Development Agreement, the maturity provision, the grant of security

[1] The 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*, 14-CV-04651-WHO, 2015 WL 5569150, at *3 (N.D. Cal. Sept. 21, 2015) (internal quotation marks and citation omitted).

[2] This conclusion is bolstered by the fact that the Grant of Security Interest specifically excludes "the Original Rancheria Land or any other Tribal land to secure the Tribe's obligations under this Promissory Note." Note at 3.

interest, and the limited recourse clause. Applying the plain language of these clauses, because no Permanent Financing is in place, any judgment JW Gaming obtains in connection with a Claim for nonpayment under the Note may be enforced only against casino Revenues. This is the only construction that gives effect to all of the Note's terms and to the clear intent of the parties.

1. Inclusion of "notwithstanding" in the limited-recourse clause supports this interpretation.

Further, and contrary to JW Gaming's argument, this interpretation is dictated by the parties' inclusion of "notwithstanding" at the beginning of the limited-recourse clause. The "ordinary, contemporary, and common meaning" of "notwithstanding" is "without prevention or obstruction from or by." *See* Webster's Third New International Dictionary 1545 (3d ed. 1993). The meaning of "notwithstanding" is well-settled at common law, as demonstrated by Black's Law Dictionary defining it as "despite." *See* Black's Law Dictionary 1094 (8th ed. 2004). When these definitions replace the word "notwithstanding," the limited recourse clause reads, "[without obstruction by] any other provision of this agreement," or "[despite] any other provision of this agreement." Because the Note does not clearly express that the parties intended to attribute any other meaning to "notwithstanding," the limited-recourse clause must be interpreted as precluding application of any conflicting provision in the Note.

Relying on *Oregon Natural Resources Council v. Thomas,* 92 F.3d 792 (9th Cir. 1996), JW Gaming claims that the phrase "notwithstanding" is not always to be construed literally. The case is clearly distinguishable. In that case, other language in the same statute indicated that Congress intended to exclude only certain laws or rights from the application of the phrase "notwithstanding any other provision of law." *Id*. at 794. The statute contained, in one subsection, the phrase "notwithstanding any other law," while another section clearly excluded the application of a certain class of laws—all federal environmental and natural resource laws—to timber sales while still providing for judicial review of agency decisions not in accordance with applicable law. *See id*. In interpreting the statutory provisions at issue, the Ninth Circuit examined the language of other

sections of the Rescissions Act for evidence of Congress's intent, noting that it was "[m]indful ... of the common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause." *Id*. at 797 (quoting *Heckler v. Chaney*, 470 U.S. 821, 829 (1985)). The Ninth Circuit identified no less than three other sections of the statute that clarified the scope of the term "notwithstanding." And while the Court limited the term's reach as a consequence, *id*. at 796 ("'[n]otwithstanding any other law' is best interpreted as requiring the disregard only of environmental laws, not all laws otherwise applicable to Option 9 sales"), it nonetheless applied the word's ordinary meaning in construing the statute. Just as the Ninth Circuit examined other sections of the statute for evidence of Congress's intent and construed the sections so as to give effect to every clause, *id*. at 797, the same process should be applied here.

2. **The limited-recourse clause is the more specific provision.**

Relying on the canon of interpretation that contract provisions specific to an issue govern more general provisions, Opp. at 22 (citing Cal. Civ. Code §3534), JW Gaming argues the maturity provision is more specific than the recourse limitation and, therefore, the Note must be considered a general recourse obligation. Unsurprisingly, JW Gaming cites no authority in support of its position. The accepted definitions of "notwithstanding" discussed above dictate finding that the limited-recourse clause is more specific than, and therefore prevails over, potentially conflicting provisions.

To the extent the Court finds "immediately due and payable" is somehow more specific than "notwithstanding," the Court must nonetheless attempt to reconcile the clauses in a way that will give them full effect and achieve the parties' overall intent. *See Wood v. County of San Joaquin* (App. 3 Dist. 2003) 4 Cal.Rptr.3d 340 (App. 3 Dist. 2003) (holding that although generally, the more specific terms in a statute limit the more general terms, if the general and specific terms have independent purposes, this general rule does not apply). As set forth above, the

two provisions can be read in conjunction to mean that JW Gaming will be repaid from Permanent Financing or casino Revenues. If neither is available, then, as JW Gaming acknowledges (Opp. at 9), a judgment to enforce a Claim for nonpayment (to the extent one can be obtained)[3] is only collectible against future casino Revenues. The Note cannot logically be construed as a general recourse obligation.

3. **There is no breach of contract because the limited recourse clause has not been breached.**

JW Gaming's attempt to distinguish *In re Integrated Resources, Inc*., 123 B.R. 181 (Bankr. S.D.N.Y 1991), on grounds that the notes at issue there stated "no recourse shall be had for payment" rather than limiting the sources from which a judgment can be enforced, is also without merit. *See* Doc. 136 at 18. JW Gaming cites no case in which the distinction between "judgment" and "payment" made a difference in interpreting a limited recourse clause. "Judgment" may be broader than "payment," but the language "judgment against a Tribal Party for money with respect to a Claim" clearly refers to repayment of the Note. *See* Note at p. 3. The holding in *Integrated Resources* that "the demand for payment and lack thereof—alone, does not give rise to a cause of action" remains valid and persuasive here. *Integrated Resources*, 123 B.R. at 185. JW Gaming cannot prove a breach of contract has occurred as a matter of law.

III. EQUITABLE CONSIDERATIONS DO NOT REQUIRE THE NOTE TO BE CONSTRUED AS A GENERAL RECOURSE OBLIGATION.

JW Gaming claims that "equitable considerations" require the Court to ignore the plain language of the Note and construe it as a full recourse obligation of the Tribe. This is nothing more than a disguised argument for the application of equitable estoppel. *See* Doc. 136 at 30 ("inequitable conduct can justify an estoppel . . . ."). JW Gaming may not, for the first time, assert equitable estoppel to defeat summary judgment based on an unpled theory of relief.

[3] For the reasons explained in its motion for summary judgment, a judgment for breach of contract is not warranted at this time.

It is well settled that "[a] party cannot resist summary judgment on a theory of relief that is not pleaded and an opposition cannot create triable issues of material fact on unpleaded claims." *Almudai v. Dealer Servs. Corp.*, No. H034971, 2010 WL 3869785, at *12 (Cal. Ct. App. Oct. 5, 2010) (plaintiff not permitted to assert new promissory estoppel theory in opposition to summary judgment). JW Gaming did not plead equitable estoppel in its complaint as an alternative theory of relief. Moreover, the alleged conduct set forth in support of the new equitable argument is largely the same conduct JW Gaming claimed induced it to enter into the Note in the first place. *Compare* Doc. 136 at 31 *with* Doc. 1-1 ¶¶ 304-82. At no time before the current motion has JW Gaming alleged that such conduct induced it to agree to the Note's recourse provision specifically. Nor could it, given that the clause was part of the Development Agreement from the outset. For these reasons, JW Gaming may not assert an equitable estoppel theory to defeat summary judgment. *Shah v. Ctny. of Los Angeles*, No. B260591, 2016 WL 6072338, at *3 (Cal. Ct. App. Oct. 17, 2016) ("It is also well established that issues on summary judgment are framed by the pleadings, and we therefore hold plaintiff cannot defeat summary judgment on a promissory or equitable estoppel theory, neither of which were pled in his complaint.").

IV. THE FRAUD AND RICO CLAIMS DO NOT SURVIVE.

Finally, JW Gaming argues that the damages alleged for fraud and RICO are different from its contract damages and therefore those claims survive regardless of how the Court rules on the contract claim. These arguments ignore controlling case law which prohibits duplicative damages and otherwise fall flat.

As an initial matter, JW Gaming's reliance on this Court's Order denying the Tribe's motion to dismiss is misguided. In that Order, the Court did not, as JW Gaming asserts, address whether JW Gaming properly alleged fraud or RICO damages independent of its breach of contract damages. Rather, the language quoted by JW Gaming was part of the Court's analysis in determining that "JW Gaming properly allege[d] proximate cause and thus has standing to sue under RICO." Doc.

55 at 6-7. The Court's only mention of damages in the order was in the context of denying Tribal Defendants' claim of sovereign immunity. *See id*. at 5-6. As set forth in the motion for summary judgment, proximate cause and damages are two distinct and necessary elements of both fraud and RICO causes of action. Doc. 129 at 22-24.

While JW Gaming cites cases for the proposition that out-of-pocket damages may be awarded to a fraud or RICO plaintiff, the rule against duplicative damages applies to out-of-pocket damages as well. *See In re Countrywide Fin. Corp. Mortgage-backed Sec. Litig*., 943 F. Supp. 2d 1035, 1054 n.11 (C.D. Cal. 2013) ("AIG cannot recover both fraud damages and [ ] contractual damages for the same injuries" because "plaintiffs cannot recover both benefit-of-the-bargain damages for breach of contract and warranty and out-of-pocket expenses for fraud. Such a double recovery would put them in a better position than they would have been in had the contract been satisfactorily performed") (citations and internal quotation marks omitted)). Thus, JW Gaming cannot show that it suffered legally-cognizable separate damages if the breach of contract claim is dismissed. Accordingly, the fraud and RICO claims must follow the contract claim out the courthouse door.

CONCLUSION

Based on the foregoing, and the arguments raised in the Tribe's Motion for Summary Judgment, the Tribe respectfully requests that this Court grant its Motion for Summary Judgment as to all counts alleged in the Complaint.

DATED this 14th day of November, 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 November 13, 2019, I caused the following document to be served as described as:

TRIBAL DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

on the interested parties in this action addressed as follows:

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