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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiff,

v.

ANGELA JAMES; LEONA L. WILLIAMS;
 MICHAEL R. CANALES; MELISSA M.
 CANALES; JOHN TANG; PINOLEVILLE
 POMO NATION, a federally-recognized Indian
 tribe; PINOLEVILLE GAMING AUTHORITY;
 PINOLEVILLE GAMING COMMISSION;
 PINOLEVILLE BUSINESS BOARD;
 PINOLEVILLE ECONOMIC DEVELOPMENT,
 LLC; a California limited liability company;
 LENORA STEELE; KATHY STALLWORTH;
 MICHELLE CAMPBELL; JULIAN J.
 MALDONADO; DONALD WILLIAMS;
 VERONICA TIMBERLAKE; CASSANDRA
 STEELE; JASON EDWARD RUNNING BEAR
 STEELE; ANDREW STEVENSON; CANALES
 GROUP, LLC, a California limited liability
 company; LORI J. CANALES; KELLY L.
 CANALES; and DOES 1 through 20,

Defendants.

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

**TRIBAL DEFENDANTS' NOTICE OF
 MOTION AND MOTION FOR
 SUMMARY JUDGMENT ON COUNTS
 TWO THROUGH SIX**

Hearing Date: April 1, 2020
 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 April 1, 2020, 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 Avenue, San Francisco, CA 94102, the Pinoleville Pomo Nation, the Pinoleville Gaming Commission, the Pinoleville Business Board, and Pinoleville Economic Development, LLC (“the Tribe”), together with Angela James, Leona L. Williams, Lenora Steele, Kathy Stallworth, Michelle Campbell, Julian J. Maldonado, Donald Williams, Veronica Timberlake, Cassandra Steele, Jason Edward Running Bear Steele, and Andrew Stevenson (the “Individual Tribal Defendants” and, collectively with the Tribe, “Tribal Defendants”), by and through their counsel, will appear in a special and limited capacity to present this motion pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rule 56. The bases for this motion are set forth fully in the memorandum of points and authorities below. The motion is based on this notice, the memorandum of points and authorities, the papers and pleadings on file herein, admissions made by Plaintiff during a hearing before this Court on December 4, 2019, and in its brief dated December 23, 2019 [Dkt. 160], this Court’s order of January 21, 2020 [Dkt. 178], and on such matters as may be adduced at the hearing of this matter.

Relief Requested: The Tribal Defendants respectfully request that this Court enter summary judgment in their favor on Causes of Action Two through Six of Plaintiff’s Complaint.

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25 Am.Jur.2d Election of Remedies § 86

INTRODUCTION

The doctrine of election of remedies prevents a party from obtaining double redress for a single wrong. At both the December 4, 2019 hearing before this Court, and in a brief filed on December 23, 2019, JW Gaming clearly and unequivocally stated that it was electing contract remedies “in lieu of tort remedies” in this case. [Dkt. 160 at p. 19]. It made this election with full knowledge of all of the facts and with the clear hope it would incentivize the Court to deny the Tribal Defendants’ requests to add counterclaims and join additional parties to the suit, requests which, if granted, would have delayed JW Gaming’s ability to recover damages. Now that JW Gaming has secured judgment on its breach of contract claim and gained an advantage over the Tribal Defendants, the law holds that it is bound by its election and, moreover, precluded from pursuing further recovery under its fraud and RICO theories.

Furthermore, even if JW Gaming is somehow not barred from pursuing these alternative remedies, the rule against double recovery requires dismissal of the remaining claims. JW Gaming concedes that the harm it allegedly suffered under its fraud and RICO theories is the same harm it suffered for breach of contract and, as this Court ruled in its January 21, 2020 order, JW Gaming “cannot recover that money more than once.” [Dkt. No. 178, at 15, “January 21 Order”.] This ruling constitutes the law of the case and therefore governs the issue of damages in all subsequent stages of the proceeding.

For these reasons, as set forth in more detail below, the Tribal Defendants are entitled to summary judgment as a matter of law on Causes of Action Two through Six in the Complaint.

STATEMENT OF UNDISPUTED FACTS¹

JW Gaming filed this suit on March 1, 2018. [Doc 1-1, hereinafter “Complaint”.] Its Complaint alleges a claim against the Tribe for breach of contract as follows:

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

302. The Tribal Organizational Defendants breached the Company-Tribe 2012 Note by failing to provide full payment to the Company on July 10, 2015.

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

Compl. at ¶¶ 301-303.

JW Gaming also alleges claims for fraud and deceit pursuant to Civil Code § 1710 (Second Cause of Action) and violations of the Racketeer Influenced and Corrupt Organizations Act (Third – Sixth Causes of Action). With respect to the fraud claim, JW Gaming alleges it suffered damages as follows:

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

Compl. at ¶ 327.

¹ The facts in support of this motion are comprised of allegations in JW Gaming’s Complaint [Dkt. 1-1], admissions made by Plaintiff during the hearing before this Court on December 4, 2019 [Dkt. 158], and admissions in its brief dated December 23, 2019 [Dkt. 160]. The Tribal Defendants admit the allegations in the Complaint are undisputed for purposes of this motion only.

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

4 Compl. at ¶ 367.

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

8 Compl. at ¶ 376.

9 With respect to RICO, JW Gaming alleges the following damages:

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

14 Compl. at ¶ 540.

15 The Tribal Defendants asserted election of remedies as an affirmative defense to
16 Plaintiff's claims. [Dkt. 141 at p. 47.]

17 On October 16, 2019, the Tribal Defendants moved for summary judgment on the breach
18 of contract claim. [Dkt. No. 129.] On October 30, 2019, JW Gaming filed a motion for partial
19 judgment on the pleadings. [Dkt. No. 136.] This Court heard argument on those motions on
20 December 4, 2019. [Dkt. No. 158.] At that hearing, the Court indicated that it would deny the
21 Tribal Defendants' motion and grant JW Gaming's motion for partial judgment on the pleadings
22 as to the first cause of action. The Court also indicated that, if judgment were entered on the
23 contract claim, Plaintiff would be required to elect its remedies and, in response to this comment,
24 Plaintiff's counsel represented that JW Gaming would elect to proceed with its contract remedies.
25 [Dkt. 178 at 15 ("At the hearing, JW Gaming reaffirmed its request for judgment on the breach
26 of contract claim, notwithstanding the potential impact that choice might have on its fraud and
27 RICO claims.").]

1 Subsequently, in a brief submitted on December 23, 2019, JW Gaming reaffirmed in clear
 2 and unequivocal terms that it was electing to pursue contract remedies over tort and RICO. [Dkt.
 3 No. 160.] At page 19 of Plaintiff's Reply Re Motion to Dismiss Counterclaims and Motion to
 4 Strike, it states:

6 In response to the Court's comments during the hearing on
 7 December 4, 2019, JW Gaming also reiterates its request that the
 8 Court issue final judgment in favor of JW Gaming on its claim for
 9 breach of contract, provided that enforcement and collection of the
 10 judgment against the Tribe and Pinoleville Gaming Authority shall
 11 not be restricted to any particular assets of either of them. **JW
 Gaming elects such full-recourse judgment on the contract in
 lieu of tort remedies.** JW Gaming reserves the right to rescind or
 modify its election if a full-recourse judgment on the contract is
 not entered or if it is subsequently disturbed on appeal or otherwise.

12 [Dkt. 160 at p. 19 (emphasis added).]

13 On January 21, 2020, JW Gaming got its wish when this Court entered final judgment in
 14 its favor on the breach of contract action. [Dkt. No. 178.] The January 21 Order states, as
 15 relevant here:

17 JW Gaming characterizes its fraud and RICO damages as follows:
 18 "JW Gaming was damaged by the defendants' fraudulent conduct
 19 when, because of its reliance on the defendants'
 20 misrepresentations, JW Gaming loaned more than \$5 million to the
 21 Tribe." MJP 32. But the later-executed Note memorialized that
 22 loan; accordingly, **there is no distinction between the \$5.38
 million loaned as a result of the Individual Tribal Defendants'
 fraudulent conduct and the \$5.38 million that JW Gaming is
 owed under the Note.** At the hearing, counsel for JW Gaming
 23 conceded that the harm is identical, but raised that it has the
 potential to seek treble damages under the tort causes of action.

24 JW Gaming's damages for all its causes of action stem from the
 25 \$5.38 million it loaned to the Tribe; it cannot recover that money
 26 more than once. At the hearing, JW Gaming reaffirmed its request
 27 for judgment on the breach of contract claim, notwithstanding the
 potential impact that choice might have on its fraud and RICO
 28 claims. As for whether the remaining claims are impacted, I will
 address those issues after the parties have fully briefed them.

[Dkt. No. 178 at 14-15 (emphasis added).] As demonstrated below, the fraud and RICO claims are indeed impacted by JW Gaming’s election of remedies and the January 21 Order. The Tribal Defendants are entitled to summary judgment on both claims pursuant to the straightforward application of California law.

LEGAL STANDARD

Summary judgment on a claim or defense is appropriate “if the movant shows that 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). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party’s claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify “specific facts showing there is a genuine issue for trial.” *Id.* at 324. The party opposing summary judgment must present affirmative evidence from which a jury could return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc., et al.*, 477 U.S. 242, 257 (1986).

ARGUMENT

A. The Doctrine of Election of Remedies Bars JW Gaming from Pursuing its Fraud and RICO Claims.

“The doctrine of election of remedies prevents a party from obtaining double redress for a single wrong.” *See Latman v. Burdette*, 366 F.3d 774, 781 (9th Cir. 2004), as amended (June 8, 2004), abrogated on other grounds by *Law v. Siegel*, 571 U.S. 415 (2014). “The doctrine ‘refers to situations where an individual pursues remedies that are legally or factually inconsistent.’” *Id.* at 781-82 (quoting *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 49 (1974)).

1 As a general rule, three conditions must be present for a party to be bound to an election of
2 remedies: “(1) two or more remedies must have existed at the time of the election, (2) these
3 remedies must be repugnant and inconsistent with each other, and (3) the party to be bound must
4 have affirmatively chosen, or elected, between the available remedies.” *Id.* at 782 (citing 25
5 Am.Jur.2d Election of Remedies § 8).
6

7 Each of these conditions is met here. The contract and tort actions were pleaded as
8 alternative remedies to recover the \$5.38 million loaned to the Tribe. The California Court of
9 Appeal has determined in circumstances similar to those present here that contract and fraud
10 remedies are inconsistent as a matter of law. *See Roam v. Koop*, 116 Cal. Rptr. 539, 542 (4th Dist.
11 1974) (by pleading causes of action founded in tort and in contract [plaintiff] was pursuing
12 concurrent and inconsistent remedies). This Court further found that the remedies were
13 duplicative when it determined “there is no distinction between the \$5.38 million loaned as a
14 result of the Individual Tribal Defendants’ fraudulent conduct and the \$5.38 million that JW
15 Gaming is owed under the Note.” [Dkt. No. 178 at 15.] JW Gaming affirmatively chose contract
16 remedies in lieu of tort remedies in statements to this Court, and, consistent with its election,
17 secured a final judgment on its breach of contract claim. In light of this, JW Gaming is now
18 estopped from pursuing its fraud and RICO claims and recovering additional damages for what
19 is but a single wrong. *See Roam*, 116 Cal. Rptr. at 543 (“Since plaintiff Roam was pursuing two
20 inconsistent remedies and took unequivocal action available under only one of them whereby he
21 gained an advantage over, and whereby an injury—the loss of use of the property—resulted to
22 [K]oop, presumptively the doctrine of election of remedies is applicable.”); *see also Sears,*
23 *Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956) (holding that
24 employer that obtained a writ of attachment on a contract claim for “money had and received”
25
26
27
28

1 was estopped from claiming that employee was liable for any other damage arising out of the
2 same facts under the election-of-remedies doctrine); *see also Taylor v. Burlington N. R. Co.*, 787
3 F.2d 1309, 1317 (9th Cir. 1986) (citing *Sears*, 245 F.2d at 69 and noting that a plaintiff may
4 prosecute actions on the same set of facts even though the remedies the plaintiff seeks may be
5 inconsistent, but as soon as one of those actions reaches judgment, the other claims must be
6 dismissed).

8 California courts have long held that a plaintiff is estopped from pursuing damages for
9 fraud where, with full knowledge of the facts, it elects to pursue a contract remedy and takes
10 affirmative action in pursuit of that remedy. For example, in *Steiner v. Rowley*, plaintiffs brought
11 both contract and fraud claims against a real estate broker to recover a sales commission and
12 alleged secret profits. 35 Cal.2d 713 (1950). In connection with their contract claim, plaintiffs
13 obtained a writ of attachment against assets of the broker. *Id.* at 720. The trial court sustained
14 the broker's demurer to the fraud claim and, on appeal, the broker defended that ruling on the
15 grounds that plaintiffs were estopped from pursuing their tort claim under the doctrine of election
16 of remedies. *Id.* The Supreme Court of California agreed, stating:

19 Whenever a party entitled to enforce two remedies either institutes
20 an action upon one of such remedies or performs any act in pursuit
21 of such remedy, whereby he has gained any advantage over the
22 other party, * * * he will be held to have made an election of such
23 remedy, and will not be entitled to pursue any other remedy for the
24 enforcement of his right.

23 An action for tort in which exemplary damages are sought is
24 inconsistent with one for money had and received. The Steiners
25 were therefore required to make a timely election of remedies.
26 Pleading the two causes of action in the alternative did not
27 constitute an election because inconsistent counts are permissible,
28 and an election cannot be forced by demurrer. But the Steiners also
obtained an attachment. This was a positive act of a plaintiff 'in
pursuit of * * * (the contractual remedy) * * * whereby he has
gained * * * advantage over the other party * * *. The Steiners

1 were thereafter estopped to allege a cause of action in tort, and the
2 demurrer as to the fourth count was properly sustained.

3 *Id.* (internal quotes and citations omitted).

4 Similarly, in *Roam*, the California Court of Appeal held that a plaintiff who sues in both
5 contract and tort to recover for the same injury and who elects contract remedies in the course of
6 the proceeding, waives its right to pursue tort damages. As *Roam* explains:

7 Broadly speaking, election of remedies is the act of choosing
8 between two or more concurrent but inconsistent remedies based
9 upon the same state of facts. Ordinarily a plaintiff need not elect,
10 and cannot be compelled to elect, between inconsistent remedies
11 during the course of trial prior to judgment. However, if a plaintiff
12 has unequivocally and knowledgeably elected to proceed on one
13 of the remedies he is pursuing, he may be barred recourse to the
14 other. It is to such a situation that the doctrine of election of
 remedies pertains. The doctrine of election of remedies acts as a
 bar precluding a plaintiff from seeking an inconsistent remedy as
 the result of his previous conduct or election.

15 116 Cal. Rptr. at 542 (internal citations omitted).

16 It is therefore settled law in California that “[a] litigant will be held to his choice of
17 remedies if ‘having full knowledge of all of the facts has elected one of two inconsistent remedies
18 and pursues it to judgment.’” *Vlahovich v. Cruz*, 261 Cal. Rptr. 565, 568 (Cal. Ct. App. 1989)
19 (quoting *Yates v. Kuhl* (1955) 130 Cal.App.2d 536) (emphasis original).

20 That is precisely what happened here. JW Gaming’s contract and tort causes of action
21 arose from the same course of conduct and JW Gaming, with full knowledge of all the facts,
22 elected a contract remedy and pursued it to final judgment. Its statement that it “elects such full-
23 recourse judgment on the contract in lieu of tort remedies” could not have been a clearer
24 expression of its intent. Having secured such a judgment and gained an advantage over the Tribal
25 Defendants, JW Gaming is now estopped as a matter of law from pursuing its tort and RICO
26 causes of action. *See Roam*, 116 Cal. Rptr. at 543 (“Obtaining an attachment constituted a
27 causes of action. *See Roam*, 116 Cal. Rptr. at 543 (“Obtaining an attachment constituted a
28 causes of action.

1 positive act in pursuit of his contractual remedy. By levying under the writ, [defendant] was
 2 deprived of the use of his property and plaintiff obtained an advantage over him.); *see also*
 3 *Vlahovich*, 261 Cal. Rptr. at 568 (plaintiff who proceeded to judgment on judicial foreclosure
 4 action estopped from pursuing trustee's sale of property).

6 Further, and contrary to JW Gaming's counsel's suggestion at the December 4th hearing,
 7 it is immaterial for purposes of election of remedies that a plaintiff may be entitled to recover
 8 treble damages on a RICO claim. Under California law, an award of exemplary damages first
 9 requires an award of actual damages. *See Mother Cobb's Chicken Turnovers, Inc., v. Fox*, 10
 10 Cal.2d 203, 205 (1937) (an award of exemplary damages must be accompanied by an award of
 11 compensatory damage); *Cheung v. Daley*, 42 Cal. Rptr. 2d 164, 167 (Cal. Ct. App. 1995) (same).
 12 This Court found that "JW Gaming's damages for all its causes of action stem from the \$5.38
 13 million it loaned to the Tribe." [Dkt. No. 178 at 15.] Because JW Gaming has elected contract
 14 remedies and was awarded judgment on that claim, there can be no actual damages under a
 15 statutory RICO claim any more than there can be an award of compensatory damages for fraud.
 16 A plaintiff may only recover compensatory damages once. *Teutscher v. Woodson*, 835 F.3d 936,
 17 954 (9th Cir. 2016).

20 Further, California law is clear that the election of remedies doctrine applies to bar *any*
 21 recovery under an inconsistent claim, including punitive damages under a tort theory. *See Roam*,
 22 116 Cal. Rptr. at 543 (holding that an action in tort for fraud in which punitive damages are
 23 sought is inconsistent with a contract remedy); *City & Cty. of San Francisco v. Kihagi*, No.
 24 A151719, 2018 WL 6303878, at *13 (Cal. Ct. App. Dec. 3, 2018), reh'g denied (Dec. 21, 2018),
 25 review denied (Mar. 13, 2019) (finding no election of remedies but explaining that a plaintiff that
 26 obtains a remedy in a contract action, thus gaining an advantage over the defendant, is equitably
 27

1 estopped from later seeking the inconsistent remedy of punitive damages under a tort theory).
2 Because statutory treble damages of the sort available under RICO serve both a penal and a
3 deterrent function in addition to a remedial one, courts have found them to be substantially similar
4 to punitive damages. *See, e.g., Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 219 (3d
5 Cir. 1992) (noting that treble damages under federal antitrust statutes “serve a penal and deterrent
6 function in addition to a remedial one, and as a consequence do overlap somewhat with punitive
7 damages”). Therefore, the fact that punitive or treble damages may be available on the non-
8 contractual claims does not alter the conclusion that such claims are barred here.
9

10
11 This conclusion is supported by *Fineman v. Armstrong World Indus., Inc.*, the reasoning
12 of which is particularly instructive here. 980 F.2d 171. In *Fineman*, the United States Court of
13 Appeals for the Third Circuit remanded for a new trial on plaintiff’s breach of contract, tortious
14 interference, and federal antitrust claims. As in this case, punitive damages were available on
15 the state tort cause of action and treble damages were available on any compensatory damages
16 awarded under the Sherman Act claim. *Id.* at 218. Because the district court would likely
17 confront conflicting damage claims again on remand, the Third Circuit addressed the issue of
18 election of remedies. *Id.* at 217-18.
19

20 As in the instant case, damages for plaintiff’s contract, tort and federal statutory claims
21 were all predicted on a single loss. *Id.* at 218 (“The district court accurately noted that TINS had
22 premised both its antitrust and its tort damages upon its loss of future profits; we presume that
23 the breach of contract damages would be predicated upon that same loss.”). The Third Circuit
24 held that the district court appropriately limited plaintiff to a single recovery for compensatory
25 damages after the first trial:
26

27 We are unpersuaded that a plaintiff whose case concerns a single
28 course of conduct (Armstrong's interference with Stern's and

TINS' prospective contractual relationship) and a single injury (TINS' lost future profits) should recover those profits twice or thrice over for each legal theory advanced in favor of liability. This would yield an unwarranted windfall recovery. No matter how labeled, TINS presented a single loss of future profits to the jury. Simply because TINS was able to wrap that loss into several different legal theories of recovery does not entitle it to recoup twice. **Thus the district court may appropriately award a single compensatory damage figure, which might, upon retrial represent the jury award arising from the breach of contract claim, compensatory tort damages, or the antitrust damages prior to trebling.**

Id. at 218 (emphasis added). Here, as did the plaintiff in *Fineman*, JW Gaming has alleged a single loss arising from the alleged fraudulent inducement of the Note and the Tribe's failure to pay. [Dkt. No. 178 at 15.] It is therefore entitled to but one compensatory damage award. *Id.* at 219 ("In the event that TINS prevails upon more than one cause of action upon retrial, we hold that . . . TINS may only recover once for compensatory damages."). While the *Fineman* plaintiff could choose among the various remedies the jury might award after trial on its remaining claims, including remedies that carry the potential for punitive or treble damages, JW Gaming may not. It elected contract in lieu of tort remedies and the law states that it is now bound.

B. The Rule Against Double Recovery Also Requires Dismissal of the Fraud and RICO Claims.

The doctrine of double recovery "dictates that in the absence of punitive damages a plaintiff can recover no more than the loss actually suffered. The animating principle is simple: when a plaintiff seeks compensation for wrongs committed against him, he should be made whole for his injuries, not enriched." *Teutscher*, 835 F.3d at 954 (quoting *Medina v. District of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011) (internal quotes omitted); see *Dopp v. HTP Corp.*, 947 F.2d 506, 517 (1st Cir. 1991) ("[T]he law abhors duplicative recoveries. That is to say, a plaintiff who is injured by reason of a defendant's behavior is . . . entitled to be made whole—

1 not to be enriched.”)). A defendant has the right to be protected against double recovery by the
 2 plaintiff because overlapping recoveries violate the “‘fundamental fairness’ which lies at the
 3 heart of constitutional due process.” *Troensegaard v. Silvercrest Industries, Inc.*, 175 Cal.App.3d
 4 218, 227 (Cal. Ct. App. 1985) (quoting *In re Northern District of California “Dalkon Shield”*
 5 *IUD Products Liability Litigation*, 526 F.Supp. 887, 899 (N.D.Cal.1981), vacated on other
 6 grounds in *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir.1982)).

8 This rule is plainly applicable here. As noted, in its January 21 Oder, this Court found
 9 that “there is no distinction between the \$5.38 million loaned as a result of the Individual Tribal
 10 Defendants’ fraudulent conduct and the \$5.38 million that JW Gaming is owed under the Note,”
 11 and rejected any suggestion it had reached a different conclusion in ruling on the Motion to
 12 Dismiss. [Dkt. No. 178 at 15, n.9 (“I did not conclude that the fraud and RICO claims allege
 13 injuries that are distinct form the breach of contract claim; instead I determined that JW Gaming
 14 had alleged a sufficiently direct relationship between the alleged conduct and the alleged
 15 damages.”).] It further noted that “[a]t the hearing, counsel for JW Gaming conceded that the
 16 harm is identical” and ruled that JW Gaming “cannot recover that money more than once.” [Dkt.
 17 No. 178 at 15.]

20 This Court should decline to reconsider this ruling under the law of the case doctrine. *See*
 21 *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (holding that district
 22 court did not abuse its discretion to invoke law of the case where its prior decision interpreted
 23 1974 Indian fishing rights decree). But regardless of whether it does, any attempt by JW Gaming
 24 to recover tort damages would constitute impermissible duplicative damages under the law. *See*
 25 *Allen v. Packer*, No. B238909, 2013 WL 3288015, at *12 (Cal. Ct. App. June 28, 2013). For
 26 these reasons, as well, the fraud and RICO claims must be dismissed.
 27
 28

CONCLUSION

For the reasons set forth above, the Tribal Defendants respectfully request that the Court grant summary judgment in their favor on Causes of Action Two through Six in the Complaint.

DATED this 28th day of February, 2020.

BERG HILL GREENLEAF RUSCITTI LLP

/s/ Rudy E. Verner

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CERTIFICATE OF CONFERRAL

I, Rudy E. Verner, hereby certify, pursuant to Civil Local Rule 16-2(d), that
concurrence in the foregoing motion was sought from Plaintiff, through counsel Greg Narvaez,
and that no concurrence was granted.

Dated: February 28, 2020

/s/ Rudy E. Verner

Rudy E. Verner