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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 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 RESPONSE TO TRIBAL DEFENDANTS' 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

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INTRODUCTION

In their second summary judgment motion in this case, Tribal Defendants admit the facts alleged in the complaint and argue they are nonetheless entitled to judgment as a matter of law on the fraud and RICO claims.[1] Specifically, they argue that because the Court has ruled in favor of JW Gaming on its contract claim against the Tribe,[2] the doctrine of election of remedies and the rule against double recovery bar JW Gaming from continuing to pursue its tort claims against the Individual Tribal Defendants. As explained below, JW Gaming is entitled to continue pursuing its fraud and RICO claims, and the Tribal Defendants' argument to the contrary is incorrect.

BACKGROUND

I. Factual Background.

As they did in their first summary judgment motion, the Tribal Defendants again admit the allegations of the Complaint and seek to treat them as "undisputed for purposes of this motion only." Dkt. 184 at 7 fn.1; *see* Dkt. 129 at 8 fn.1. Such a limitation has been held "invalid." *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, 897 (9th Cir. 1957). "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." *Id.*

It is undisputed that from August 2008 to April 2011, JW Gaming paid $5.38 million to the Tribe as a loan for the Tribe's casino project. Compl. (Dkt. 1-1) ¶¶ 115-117, 163-164.

JW Gaming did so believing that Michael Canales and Canales Group previously provided $5.352 million for the project, and that JW Gaming was making a matching investment in a well-capitalized venture. Compl. ¶¶ 106-107. Several defendants represented to Jim Winner, former

[1] The fraud claim is asserted against the following Tribal Defendants: Angela James, Leona Williams, Lenora Steele, Michelle Campbell, Kathy Stallworth, Jason Steele, Cassandra Steele, Veronica Timberlake, Donald Williams, and Andrew Stevenson. (This claim is also asserted against non-Tribal Defendants Michael Canales, Melissa Canales, and John Tang.) The RICO claims are asserted against all of the foregoing individuals and the additional Tribal Defendant Julian Maldonado. (The RICO claims are also asserted against non-Tribal Defendants Lori Canales, Kelly Canales, and Canales Group LLC.)

[2] The "Tribe" refers to the Pinoleville Pomo Nation, the Pinoleville Gaming Commission, the Pinoleville Business Board, and Pinoleville Economic Development, LLC.

principal of JW Gaming, that Canales had invested over $5 million in the project. For instance, the 2009 Joint Venture Agreement between Winner, Michael Canales, and John Tang states: "CGLLC represents that he has provided pre-development funding in the amount of five million three hundred fifty-two thousand dollars ($5,352,000.00) prior to the execution of this agreement. CGLLC will provide the other Parties, adequate proof of such funding in the form of a PPN Resolution commemorating the loan." Joint Venture Agreement § 2.1.1, Compl. Ex. 10, Dkt. 1-2 at 44. As proof, John Tang had sent Winner a promissory note signed by Leona Williams as Vice Chairperson of Pinoleville Economic Development LLC ("PED") and Michael Canales for Canales Group LLC, in which PED promised to pay $5.38 million to Canales Group "[f]or value received from January 1, 2001 through December 10, 2008." Compl. Ex. 5, Dkt. 1-2 at 26. JW Gaming later learned that Canales did not provide any such funding. Compl. ¶¶ 123, 320 (deposition testimony of Michael Canales), 322 (deposition testimony of Leona Williams).

From November 2011 through January 2012, the Tribe, through a variety of individual actors, furnished JW Gaming a series of documents accounting for the Tribe's expenditures of the proceeds of the JW Gaming loan. Compl. ¶¶ 177-204. JW Gaming later learned that the accounting included false and double entries. *Id.* ¶ 178.

In early 2012, Canales, Tang and JW Gaming agreed to dissolve their joint venture after failing to reach agreement with the Tribe's demand for further investment. Compl. ¶¶ 210, 235. JW Gaming accepted a promissory note for the Tribe's repayment of the $5.38 million JW Gaming previously deposited with the Tribe. Compl. Ex. 26, Dkt. 1-4 at 10. Canales Group also obtained a promissory note from the Tribe for $5.352 million. Compl. Ex. 29, Dkt. 1-4 at 54. (The two notes, both signed by Leona Williams, Angela James and Michael Canales, again represent the existence of a $5.352 million loan by Canales Group to the Tribe.) The Tribe failed to pay the JW Gaming Note when it matured on July 10, 2015. Compl. ¶¶ 301-302.

The Individual defendants, acting through the Tribe and in concert with each other, have committed a pattern of similar fraudulent acts against others in addition to JW Gaming. *See* Compl. ¶ 429. The most recent known fraud occurred during the pendency of this litigation, when, in or about March of 2019, the Tribe, through defendants Angela James and Leona Williams, submitted a

fraudulent business credit application and associated financial statements to Westamerica Bank in connection with the renewal of a $100,000 business line of credit. *See* Dkt. 151-1 at pp. 2-10. Prior to that, in 2017, the Tribe, again through the individual defendants, fraudulently obtained at least one loan of more than $2 million from Clearinghouse Community Development Financial Institution, again by submitting a fraudulent loan application and false financial statements. *See* Dkt. 136-1 at 1-3, 141-366. About two years earlier, in 2015, the Tribe, again through the individual defendants, fraudulently obtained *five* loans of approximately $147,000 each (for aggregate loan proceeds of approximately $736,000) from Mid America Mortgage Inc., again by submitting fraudulent loan applications and false financial statements. *See* Declaration of Gregory M. Narvaez ("Narvaez Decl."), filed concurrently herewith, at ¶ 4.a. and Ex. A; *see also* Compl. ¶¶ 459-460.[3]

Records show that while the Tribe, through the individual defendants, fraudulently obtains monies from third parties, the individual defendants convert the Tribe's assets to their personal use. For example, at all relevant times, the Tribe was, among other things, gifting real property and assuming debt for Michael Canales (Dkt. 136-1 at 17-77), paying cash to Canales Group (the company owned, at relevant times, by the Canales Defendants and John Tang) (Dkt. 151-1 at 12-49), gifting real property to Pinoleville Economic Development LLC, the state-chartered limited liability company owned by Angela James and Leona Williams (Compl. ¶¶ 455-458; *see also* Dkt. 136-1 at 10-11), and paying cash to and for the benefit of the individual Tribal Defendants (Dkt. 136-1 at 79-139; Narvaez Decl. at ¶¶ 4.b.- 4.h. and Exs. B-H.).

[3] The Tribe and individual defendants' ability to perpetrate these frauds against private parties, and also its ability to continue receiving millions of dollars annually in federal grant funds (which the individual defendants also convert to their personal use, *see* Compl. ¶ 442), is facilitated in large part by the Tribe's ability to obtain clean audit reports of its financial statements from its phony auditor, Rudolph Vargas, who in 2016 relinquished his CPA license to settle an enforcement action against him by the California Board of Accountancy. https://www.dca.ca.gov/cba/discipline/actions/ac-2016-72.pdf. Notably, after that relinquishment, the Tribe's financial statements are now purportedly audited by its former CPA's brother, Napoleon Vargas. *See* Federal Audit Clearinghouse Image Management System, available at https://harvester.census.gov/facdissem/SearchResults.aspx.

II. Procedural Background.

JW Gaming filed its complaint in state court on March 1, 2018. The defendants removed it to federal court on May 7, 2018. Dkt. Nos. 1, 1-1. JW Gaming asserted a breach of contract claim against the Tribe and five tort claims against the other defendants: one claim of fraud and four RICO violations.

On October 5, 2018, the Court denied defendants' motion to dismiss. Dkt. No. 55. On October 2, 2019, the Court of Appeals affirmed an aspect of that denial on interlocutory appeal, holding that tribal sovereign immunity did not shield the individual Tribal defendants from suit. *JW Gaming Dev't LLC v. James*, 778 Fed. Appx. 545 (2019). The Supreme Court denied review. *James v. JW Gaming Dev't LLC*, No. 19-971, 2020 WL 1124446 (U.S. Supreme Ct., Mar. 9, 2020).

On January 21, 2020, the Court: (1) granted JW Gaming's motion for judgment on the pleadings on the contract claim; (2) denied the Tribe's motion for summary judgment on the contract claim; (3) denied the Individual Tribal Defendants' motion for summary judgment on the tort claims; (4) denied the Tribal defendants' motion to join additional defendants; (5) granted JW Gaming's motion to strike the Tribe's (though not the Individual Tribal Defendants') amended answer; and (6) granted JW Gaming's motion to dismiss the Tribe's counterclaims asserted in the amended answer. Dkt. No. 178.

Just over one month later, on February 28, 2020, the Tribal Defendants filed their second motion for summary judgment. Dkt. 184. They filed this second summary judgment motion without requesting leave of Court as required by Judge Orrick's Standing Order for Civil Cases, ¶ 6 (Eff. 1/2018).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "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).

ARGUMENT

At the close of its December 23, 2019 reply brief in support of its motion to dismiss the Tribal Defendants' counterclaims and strike their amended answer, JW Gaming stated that it would elect the entry of a "full recourse judgment on the contract in lieu of tort remedies." Dkt. 160 at 19. JW Gaming proffered this election based on its understanding of the Court's initial view, expressed at the hearing of December 4, 2019, that entry of judgment on the contract claim would require such an election. *See*

id. JW Gaming understood that the Court was inclined to rule that an award on JW Gaming's contract claim against the Tribe would moot the damages supporting JW Gaming's tort claims against the tort defendants (none of which are defendants to the contract claim).

The Court's January 21, 2020 Order, however, which granted JW Gaming's motion for judgment on the contract claim "without limitation on recourse," suggests that such an election was not necessary after all. Dkt. 178 at 19. The Court noted that "JW Gaming's damages for all its causes of action stem from the $5.38 million it loaned to the Tribe; it cannot recover that money more than once." *Id.* at 15. The Court also acknowledged JW Gaming's "request for judgment on the breach of contract claim, notwithstanding the potential impact that choice might have on its fraud and RICO claims." *Id.* But the Court declined to decide "whether the remaining claims are impacted," opting to await full briefing on those issues. *Id.* For the reasons outlined below, the tort claims are not impacted by the order directing entry of judgment on the contract claim. Therefore, no election is necessary, and JW Gaming's statement of election is ineffective.[4]

In this action involving factually and legally distinct claims against different defendants seeking (in part) overlapping compensatory damages, the real concern, evident in the Tribal Defendants' motion and the Court's comments, is avoiding a double recovery windfall for JW Gaming, which is entitled to recover only one satisfaction for its loss. Dismissing the tort claims is not the way to address this concern, particularly where the contract and tort claims involve wholly separate defendants, additional damages not available in contract are available under RICO, and JW Gaming has not yet recovered anything (even for the overlapping damages).

I. The doctrine of election of remedies does not require dismissing the tort claims.

Because the election of remedies doctrine is inapplicable under the circumstances, JW Gaming's statement in its December 2019 brief does not prevent JW Gaming from continuing to pursue, obtain judgments on, and collect on its tort claims.

This court summarized the doctrine and its rationale in a recent decision:

[4] If the Court determines an election is necessary, JW Gaming would stand by its position and elect its full-recourse judgment under the contract claim.

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> Broadly speaking, election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same set of facts. Ordinarily, a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment. The doctrine of election of remedies is but a specific application of the doctrine of equitable estoppel. The doctrine rests on the rationale that when plaintiff has pursued a remedy which is inconsistent with an alternative remedy and thereby causes the defendant substantial prejudice, plaintiff should be estopped from pursuing the alternative remedy.

Royal Primo Corp. v. Whitewater West Industries, Ltd., No. 15-cv-04391-JCS, 2016 WL 4080177, *7 (N.D. Cal. July 29, 2016) (quoting *Baker v. Superior Court*, 150 Cal.App.3d 140, 144-45 (1983)).

"Courts and commentators have long recognized the harshness of the election of remedies doctrine and have for some time looked upon it with disfavor." *Baker* at 145. Indeed, "[t]he doctrine is no longer strictly enforced in the federal courts." *Phleger v. Countrywide Home Loans, Inc.*, No. C 07-01686 SBA, 2009 WL 537189, *9 (N.D. Cal. Mar. 3, 2009). "To mitigate the doctrine's effects, courts over the years have devised various ways of narrowing its application." *Baker* at 145. One such limitation is "the requirement that the plaintiff seek inconsistent remedies based on the same set of facts." *Id.*

Thus, "the doctrine does not apply when differing operative facts are involved in the [plaintiff's] contract and tort claims." *Waffer Intern. Corp. v. Khorsandi*, 69 Cal.App.4th 1261, 1278 (1999). "This is a far-reaching limitation on the doctrine, since a claim of fraud (or any other tort) will almost necessarily involve elements differing from a contract claim." *Id.* "Nor is a tort claim forfeited by election of remedies if the facts material to the contract claim arise at a different time than those material to the tort claim …, nor if the contract and tort claims arise out of different rights and duties." *Id.*; *see Latman v. Burdette*, 366 F.3d 774, 783 (9th Cir. 2004), abrogated on other grounds by *Law v. Siegel*, 571 U.S. 415 (2004) ("Election of remedies has no application where a party has different remedies for the enforcement of different and distinct rights or the redress of different and distinct wrongs.")

> Moreover, the inapplicability of the doctrine when tort and contract claims arise out of different rights and duties *a fortiori* makes the doctrine inapplicable when plaintiff's tort claims are directed at wholly different defendants than the contract claims. Each separate defendant owes a wholly separate duty which each separately is obligated to discharge. In the instance of wholly different defendants, different operative facts and separately enforceable legal rights and duties are clearly involved.

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Waffer at 1278-79.

Remedies that "serve different interests, or exist for different reasons" are "not repugnant and inconsistent remedies," *Latman* at 782-83, so the second of the "three conditions" that "must be present for a party to be bound to an election of remedies" is absent. *See* Tribal Defs.' Ntc. of Mot. and Mot. for Summary J. on Counts Two through Six, Dkt. 184 at 11.

"Adding to these restrictions on the election of remedies doctrine is the proviso that the doctrine does not apply to forfeit tort claims unless the defendant has suffered 'substantial prejudice' as a result of plaintiff's [act indicating an election]." *Waffer* at 1279; *see Fassberg Construction Co. v. Housing Auth. of City of Los Angeles*, 152 Cal.App.4th 720, 759 (2007) (doctrine "applies only if the defendant suffered a substantial injury as a result of the plaintiff's initial election of remedies"); *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.*, 230 Cal.App.3d 207, 223 (1991) (party is "entitled to change alternative remedies until satisfaction of judgment, or application of res judicata or estoppel, vindicates one of the inconsistent rights"). Plaintiffs are therefore generally allowed to plead inconsistent legal theories, *PAE Government Services, Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 (9th Cir. 2007), and "only if the plaintiffs' actions cause substantial prejudice to the defendant are the plaintiffs required to make a binding election of remedies prior to judgment." *Sharpe v. F.D.I.C.*, 126 F.3d 1147, 1153 (9th Cir. 1997). Generally, a plaintiff is entitled to submit inconsistent legal claims to the court or the jury, and is not required to make an election between theories until after the decision or verdict and, if the defendant is found liable on multiple alternative grounds, or liable for multiple alternative remedies, then, prior to the entry of judgment, the plaintiff may be required to make his election. *May v. Watt*, 822 F.2d 896, 900-01 (9th Cir. 1987); *Ram's Gate Winery, LLC v. Roche*, 235 Cal.App.4th 1071, 1087 (2015) ("an election of remedies is required only after a decision on the merits and prior to entry of judgment"); *Copart, Inc. v. Sparta Consulting, Inc.*, 339 F.Supp.3d 959, 1000-01 (E.D. Cal. 2018); *see also Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1317 (9th Cir. 1986) (election among inconsistent remedies sought in separate actions "on the same set of facts against the same defendant in different courts" is necessary "as soon as one of those actions

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reaches judgment").[5] However, the fact that "a given set of facts fortuitously supports liability on two legal theories is not a principled reason to deny a party the right to pursue each theory." *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 310 (2006) (internal quotation marks omitted).

In short, whatever the circumstances, "[b]efore an equitable estoppel can properly be applied, there must be an inequity to be remedied by the estoppel." *Waffer*, 69 Cal. App.4th at 1279.

A. JW Gaming's tort claims and its contract claim are based on different operative facts that occurred at different times, arise from different rights and duties, and are directed at wholly different defendants.

In *Waffer*, the California Court of Appeals rejected the application of the election doctrine where the plaintiff had obtained a writ of attachment and a judgment for over $2.5 million based on a breach of contract claim against a corporate defendant, while pursuing fraud and conversion claims against two individual defendants. *Waffer*, 69 Cal.App.4th at 1267-68. After emphasizing the numerous limitations on the election doctrine, the court identified the factual circumstances that made the doctrine unavailable, specifically that the attachment was obtained against non-tort defendants under a different claim; the tort claims did not arise from a breach of the contract, but from distinct fraudulent acts; and that the tort defendants did not show substantial prejudice caused by the remedy awarded on the contract. *Id.* at 1273-80. The instant case presents very similar circumstances, supporting the same conclusion that the election of remedies doctrine does not apply. *See id.* at 1280.

Here, the Court granted summary judgment on JW Gaming's claim against the Tribe for breach of the Note. This order applies, and the eventual final judgment based on the order will apply, to the Tribe. The order does not adjudicate the rights or duties of the individual defendants, who are not parties to the Note. JW Gaming is suing the individual defendants for fraud and RICO violations, not for breach of the Note.

[5] Even then, the attempted election may be ineffective. *See Far West Federal Bank, S.B. v. Office of Thrift Supervision*, 119 F.3d 1358, 1366 (9th Cir. 1997) (holding that purported election of specific performance in lieu of rescission and restitution was ineffective because award of specific performance was vacated, as "the doctrine of election of remedies 'applies only where a party pursues a remedy that he actually has'") (quoting Restatement (Second) of Contracts § 378 cmt. c).

The tort claims against the individual defendants do not arise out of the same operative facts as the contract claim, but instead arise, in large part, from different operative facts occurring at a different time from the breach of contract. The contract claim involves the Note entered in 2012 and Tribe's failure to pay upon maturity in 2015, in breach of a duty imposed by contract. The tort claims involve false representations by some of the individual defendants several years before the Note was conceived of, including representations beginning in 2008 that Michael Canales had invested over $5 million in the Tribe's gaming project when he had not, a false accounting in 2011-2012 of how the Tribe had used the money JW Gaming loaned to it, as well as a pattern of large-scale self-enrichment by Tribal officials organized with others to fleece lenders, the federal government, and tribal members alike. This conduct is distinct from the Tribe's failure to pay under the Note.

Further, this conduct breached duties not imposed by contract, but separate duties imposed by common law and statute. An action for fraud "advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future." *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 992 (2004) (quoting *Lazar v. Superior Court*, 12 Cal.4th 631, 646 (1996)). "In addition, 'California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." *Id.* (quoting *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1064 (1999)). "[C]ontract remedies alone do not address the full range of policy objectives underlying the action for fraudulent inducement of contract." *Lazar* at 646. Similarly, RICO "provides a statutory remedy of treble damages for any individual 'injured in his business or property by reason of a violation' of the statute," reflecting an "'aggressive initiative'" by Congress "'to supplement old remedies'" for such injuries. *Uthe Technology Corp. v. Aetrium, Inc.*, 808 F.3d 755, 759 (9th Cir. 2015), quoting 18 U.S.C. § 1964(c) and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985). In light of this congressional intent, "RICO's provisions must therefore be construed 'liberally' in keeping with the broad remedial purposes of the statute." *Id.*, quoting *Sedima* at 498. "Simply put, a contract is not a license allowing one party to cheat or defraud the other." *Robinson* at 992 (internal quotation marks omitted).

The set of claims in this case stands in contrast to cases where fraud and contract claims *were* based on the same set of operative facts. *E.g., Lifeline Food Co., Inc. v. Gilman Cheese Corp.*, No.

5:15-cv-00034-PSG, 2015 WL 2357246, *5-6 (N.D. Cal. May 15, 2015) (promissory fraud claim was premised upon an allegedly false promise to perform the same obligations that formed the basis for the breach of contract claim). This case is instead in line with those where fraud and other tort claims "arise out of different obligations and different operative facts" from contract claims. *Baker*, 150 Cal.App.3d at 146; *Kraif v. Guez*, No. CV 12-06206 SJO (SHx), 2013 WL 12121362, *3 (C.D. Cal. Apr. 16, 2013) (contract claim and fraudulent inducement claim arise out of a different set of facts and duties); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974) (election doctrine "has no application" to pair of claims seeking in turn to vindicate a contractual right and "independent statutory rights accorded by Congress," even where "both were violated as a result of the same factual occurrence"); *Schnabel v. Lui*, 302 F.3d 1023, 1038-39 (9th Cir. 2002) (fraud caused harms distinct from contract damages); *Robinson*, 34 Cal.4th at 990 (noting that "'when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort'" because such fraudulent conduct is "separate from the breach itself") (quoting *Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70, 78 (1993)).

B. The purported election of contract remedies did not prejudice the tort defendants.

Furthermore, the individual defendants have shown no substantial prejudice, whether from the Court's order, or in anticipation of the final judgment that will eventually be entered on the contract claim, or from the statement of election in JW Gaming's brief. As noted, the order directs entry of judgment on the contract claim against the Tribe, not the tort defendants. The Court did not adjudicate the tort defendants' liabilities when it granted summary judgment on the contract claim. The order did not award any prejudgment remedies, such as attachment.

Nor did the statement regarding election in JW Gaming's brief confer an advantage to JW Gaming or prejudice the tort defendants. The Court granted JW Gaming's motion for judgment on the contract despite expressly declining to decide how such a judgment would impact the other claims, if at all. In other words, it was not *because of* JW Gaming's statement regarding election that the Court granted JW Gaming's motion.

In the cases on which the Tribal Defendants rely, the plaintiffs were found to have elected their remedy because they had obtained and levied writs of attachment. *Roam v. Koop*, 41 Cal.App.3d 1035, 1040 (1974); *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956); *Steiner v. Rowley*, 35 Cal.2d 713, 720 (1950).[6] These plaintiffs made their elections by acting in pursuit of a contract remedy and thereby gaining an advantage over the defendants, and as a result the plaintiffs were estopped from seeking further relief arising from the same set of facts, based on different legal theories, from the same defendants. *Roam* at 1040; *Steiner* at 720. The Tribal Defendants have not shown anything close to comparable circumstances in this case. The tort defendants have not already paid JW Gaming, nor is there any court order or judgment directing them to pay. JW Gaming is not seeking to take an inequitable second bite at the apple, but is attempting to ensure that it can fully recover its damages from any or all of the responsible defendants.

II. Pursuing the tort claims is permitted under the one satisfaction rule.

The Tribal Defendants also argue (like the individual defendants did in *Waffer*) that JW Gaming is barred from pursuing tort remedies against them because JW Gaming is seeking contract remedies against the Tribe for the same damage, JW Gaming's $5.38 million out-of-pocket loss. *See Waffer* at 1280-81. For several reasons, the defendants are incorrect.

It is an "undeniable proposition" that JW Gaming is not entitled to a double recovery. *Waffer* at 1281. As the Court held, JW Gaming "cannot recover [the $5.38 million it loaned to the Tribe] more than once." Dkt. 178 at 12. "The fact that [JW Gaming] is not entitled to a duplicative recovery from the individual defendants, however, does not translate into a conclusion that [JW Gaming] is not entitled to *any* recovery from the individual defendants." *Waffer* at 1281. The "possibility of unjust enrichment through duplicative recoveries" does not, by itself, require an election of remedies where the required conditions are absent. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 51 n.14. "[J]udicial relief can be structured to avoid such windfall gains." *Id.* "It is correct that [JW Gaming] may not recover twice for the same damage. Subject to that proviso, however, [JW Gaming] may pursue a full

[6] In light of the complete overhaul of California's attachment laws in the 1970s, and the courts' more skeptical approach to the election of remedies doctrine, the continued viability of these cases is in doubt. *Waffer*, 69 Cal.App.4th at 1269-70.

recovery by prosecuting its tort claims against the individual defendants." *Waffer* at 1281. To "pursue a full recovery," JW Gaming is entitled to litigate the merits of its claims against the tort defendants and obtain a judgment reflecting each defendant's liability, with JW Gaming's ultimate right to recover compensatory damages from each defendant offset by the amount JW Gaming collects from other defendants to compensate for the same damage.

Not only is JW Gaming entitled to litigate all of its claims even if defendants face liability for duplicative damages, but JW Gaming's RICO remedy is not fully duplicative of its contract and fraud remedies. Thus, a judgment for breach of contract will not provide full satisfaction of the RICO claim. Because RICO provides the statutory remedy of treble damages, while no such remedy is available under the contract, even if a judgment on the contract were fully satisfied, that recovery would not extinguish JW Gaming's claim to RICO damages under the "one satisfaction" rule. *Uthe*, 808 F.3d at 759-62.

In *Uthe*, the Ninth Circuit explained that the "one satisfaction rule reflects the equitable principle that a plaintiff who has received full satisfaction of its claims from one tortfeasor generally cannot sue to recover additional damages corresponding to the same injury from the remaining tortfeasors[.]" *Uthe* at 760. "'[T]he law, that is, does not permit a plaintiff to recover double payment.'" *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971)). "A corollary principle of the one satisfaction rule is that 'payment made by a joint tortfeasor diminishes the claim against the remaining tortfeasors.'" *Id.* (quoting *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 (9th Cir. 1987)).

Uthe analyzed "how the one satisfaction rule interacts with RICO's treble damages provision," and concluded that a plaintiff's full recovery of its *actual* damages does not bar the plaintiff from pursuing *treble* damages under RICO. *Id.* at 760-62.[7] In essence, because the recovery of actual damages does not constitute complete recovery of the remedy available under RICO, permitting the plaintiff to seek treble damages even after recovering actual damages would not lead to double recovery or an unjust enrichment, but rather would "assur[e] the tort victim one complete satisfaction of its

[7] *Uthe* noted that "the measure of damages corresponding to a federal law cause of action such as RICO should be governed by the federal law of damages rather than by state law." *Uthe* at 760 n.3.

claim, neither more nor less." *Id.* at 761 (internal quotation marks omitted). "'[T]he "full satisfaction" to which treble damages claimants are entitled is "three times the proven actual damages" – any award less than that amount constitutes an incomplete recovery.'" *Id.* at 762 (quoting *In re Nat'l Mortg. Equity Corp. Mortg. Pool*, 636 F.Supp. 1138, 1152 (C.D. Cal. 1986)).

A judgment for JW Gaming's actual damages on the contract claim – to the extent that judgment is *paid*, and not merely awarded – will "constitute partial credit toward the full measure of damages for which a defendant may be liable under RICO," but cannot fully extinguish JW Gaming's claim to those damages. *Uthe* at 762.[8]

Arguing to the contrary, Tribal Defendants cite the rule of *Mother Cobb's Chicken* – that an award of exemplary damages must be accompanied by an award of compensatory damages. Dkt. 184 at 9 (citing *Mother Cobb's Chicken Turnovers, Inc. v. Fox*, 10 Cal.2d 203, 205 (1937); *Cheung v. Daley*, 35 Cal.App.4th 1673, 1677 (1995)). In *Mother Cobb's* and *Cheung*, the court and the jury respectively found the plaintiffs suffered no compensable damages. *Mother Cobb's* at 205 (no damages for unfair competition because defendant's business did not, in fact, cause confusion in the minds of the public); *Cheung* at 1677 (jury found defendant acted with fraud, oppression or malice, but that plaintiffs were entitled to "0.00" compensatory damages). Therefore, no exemplary damages were available.

In contrast, however, where compensatory damages are excluded from the judgment solely to avoid providing the plaintiff a double recovery, California law allows an award of exemplary damages. *See Personalized Workout of La Jolla, Inc. v. Ravet*, No. D060244, 2014 WL 68753, *17 (Cal. Ct. App. Jan. 9, 2014). The requirement for actual damages "is simply the requirement that a tortious act be proven if punitive damages are to be assessed." *Yates v. Nimeh*, 486 F.Supp.2d 1084, 1088 (N.D. Cal. 2007). Thus, a claimant may still obtain punitive damages even where his "award of compensatory

[8] The one satisfaction rule against double recovery has no practical impact until JW Gaming recovers from a defendant. A plaintiff may seek and obtain judgment on multiple claims, or against multiple defendants, even if the judgments create identical or overlapping liabilities. 47 Am Jur. 2d Judgments § 769. The one satisfaction rule simply bars the plaintiff from being paid more than once for the same wrong. *Id.* The rule, therefore, comes into play when the plaintiff is paid, and not before then. *Id.* § 771.

damages was completely offset." *Id.*; *see Esparza v. Specht*, 55 Cal.App.3d 1, 9 (1976) (observing, "There is no justice in allowing the perpetrator of a fraud to avoid the related consequences of punitive charges attendant with his fraudulent acts simply by paying the actual damages claimed by the defrauded after a bitter lawsuit and before the jury returns what appears to be a certain verdict."); *Fullington v. Equilon Enterprises, LLC*, 210 Cal.App.4th 667, 685-90 (2012) (summarizing, "the question relevant to determining whether a plaintiff may recover punitive damages is whether he or she suffered a tort for which the law permits the recovery of damages – *not* whether those damages have (or have not) already been paid"). Under these decisions, JW Gaming is entitled to litigate the merits of its claims against all defendants, even though it is not entitled to recover duplicative compensatory damages.

CONCLUSION

For the foregoing reasons, JW Gaming respectfully requests that the Court deny the Tribal Defendants' motion.

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