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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 THEIR 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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ARGUMENT

In their motion, the Tribal Defendants demonstrated that the doctrine of election of remedies and the rule against double recovery bar JW Gaming from continuing to pursue its tort and RICO claims. In response, JW Gaming concedes that its statement in an earlier brief was an election of remedies. And it states that it “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.”¹ Dkt. 186, “Response” at 10. In doing so, JW Gaming admits that it made the election for the purpose of prompting the Court to enter judgment in its favor.² Now that the Court has done exactly that, JW Gaming claims that an election was not necessary after all and the election it made with full knowledge of the facts was somehow ineffective. *Id.* In other words, it argues it should be permitted to make an election and obtain a judgment in its favor, and then reverse course and pursue the very claims it had just chosen to forgo.

Neither law nor equity permits this sort of maneuvering. JW Gaming’s election of remedies is a binding stipulation and the doctrine of judicial estoppel precludes it from taking a position that is inconsistent with that election. Further, JW Gaming’s arguments in opposition to summary judgment fail because JW Gaming conceded that the damages on its contract and tort claims were identical and this Court ruled that JW Gaming cannot recover that amount

¹ See *id.* at 10 (“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[.]”)

² This is supported by the fact that JW Gaming had ample time between the December 4th hearing and the filing of its reply brief to research the doctrine of election of remedies and assert the position it takes here.

more than once. JW Gaming cites a handful of cases in which the election of remedies doctrine was held not to apply, but a key distinction exists between those cases and this one: none involved an unequivocal choice by a plaintiff to accept one theory of recovery to the exclusion of other theories *that seek the exact same damages*. In the end, JW Gaming cannot escape the consequences of its election and pursue recovery of the same damages from the Individual Tribal Defendants. Accordingly, for the reasons below and those set forth in the motion, the Tribal Defendants are entitled to summary judgment on Causes of Action Two through Six.

I. JW Gaming’s Clear Election of Remedies Remains Effective.

JW Gaming argues that the doctrine of election remedies is inapplicable under the circumstances and therefore its statement in its December 2019 brief—a statement intended to prompt the Court to deny various relief sought by the Tribal Defendants and grant judgment on its contract claim—does not prevent it from continuing to pursue tort damages.

“The doctrine of election of remedies is based upon the principles of equity. Thus, whether an act constitutes an election of remedies is dependent on the facts and law of each case.” 28 Cal. Jur. 3d Election of Remedies § 11. Under the doctrine, a plaintiff with multiple remedies on the same set of facts must ultimately “choose or elect between them; and if he has clearly elected to proceed on one, he is bound by this election and cannot thereafter pursue the other.” 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 174, pp. 243-244; *see Teutscher v. Woodson*, 835 F.3d 936, 956 (9th Cir. 2016) (a party is bound by its election if it “affirmatively chose[], or elected, between the available remedies”) (internal quotations and citations omitted).

There is no question that JW Gaming’s statement in its December 19 brief constitutes an affirmative choice between the contract and tort remedies. Further, the statement constitutes a binding stipulation on the record. *See Christian Legal Soc. Chapter of the Univ. of Calif. v.*

1 *Martinez*, 561 U.S. 661, 676–78 (2010); *see also* *Trinidad y Garcia v. Thomas*, 683 F.3d. 952,
2 982 (9th Cir. 2012) (concessions “have the effect of withdrawing a fact from issue and
3 dispensing wholly with the need for further proof”). Because this Court subsequently relied on
4 that stipulation, the doctrine of judicial estoppel precludes JW Gaming from now arguing that
5 its election was ineffective.
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7 Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage
8 by asserting one position, and then later seeking an advantage by taking a clearly inconsistent
9 position. *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600–601 (9th Cir.
10 1996). Courts invoke judicial estoppel not only to prevent a party from gaining an advantage
11 by taking inconsistent positions, but also because of “general consideration[s] of the orderly
12 administration of justice and regard for the dignity of judicial proceedings,” and to “protect
13 against a litigant playing fast and loose with the courts.” *Russell v. Rolfs*, 893 F.2d 1033, 1037
14 (9th Cir. 1990).
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16 In *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001), the Ninth
17 Circuit laid out factors that courts may consider in deciding whether to apply judicial estoppel.
18 First, a party’s later position must be “clearly inconsistent” with its earlier position. *Id.* at 782
19 (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001)). Second, courts inquire whether the
20 party succeeded in persuading a court to accept that party’s earlier position. *Id.* Third, courts
21 look to whether the party seeking to assert an inconsistent position would derive an unfair
22 advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 783.
23 *Hamilton* also notes that the Supreme Court did “not establish inflexible prerequisites or an
24 exhaustive formula for determining the applicability of judicial estoppel” and that “[a]dditional
25 considerations may inform the doctrine’s application in specific factual contexts.” *Id.* at 783.
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1 These factors favor application of the doctrine of judicial estoppel here. JW Gaming's
2 position that it is not prevented from pursuing tort remedies is clearly inconsistent with its
3 earlier election of a contract remedy. Its election was clear and unequivocal, made on the record,
4 and made in response to the Court's suggestion that entry of judgment on the contract claim
5 would require such an election. Second, it is apparent that JW Gaming succeeded in persuading
6 the Court to accept its election as the Court denied relief that would have prolonged or avoided
7 JW Gaming's receipt of a judgment on its contract claim and granted JW Gaming's request for
8 a full recourse judgment on that claim. Third, the Tribal Defendants would suffer severe
9 prejudice if JW Gaming was both awarded judgment on the contract claim and permitted to
10 pursue the same damages through its tort theories. The Individual Tribal Defendants, all of
11 whom are officers or employees of the Tribe, would be required to endure a year of intrusive
12 discovery and then potentially a trial, only for this Court to rule that any damages JW Gaming
13 proves on its tort claims are duplicative of the damages awarded on its contract claim. This is the
14 precise type of prejudice equitable doctrines are intended to prevent.

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18 For these reasons, this Court should hold that JW Gaming is judicially estopped from
19 disclaiming its previous election of a contract remedy.

20 **II. The Rule Against Duplicative Recovery Bars JW Gaming's Pursuit of its Tort Claims.**

21 JW Gaming's main argument is that, regardless of its election, it should be permitted to
22 pursue its tort and RICO claims because those claims arise out of different facts from the
23 contract claim and involve the alleged breach of separate duties under the law. However,
24 even if JW Gaming can somehow avoid its stipulation, it is barred from pursuing its fraud and
25 RICO claims because it is limited to a single award of compensatory damages under the law.
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1 In California, a plaintiff is barred from recovering under both contract and tort theories
2 where it identifies no damages distinct from those awarded for breach of contract. This rule
3 was explained in clear and simple terms in *Walker v. Signal Companies, Inc.*, 149 Cal. Rptr.
4 119 (Cal. App. 1978), a case that, like here, involved claims for breach of contract and fraud
5 against the defendants. After a trial, the jury awarded plaintiffs \$11,928 in damages on their
6 contract claim and \$5,000 on their fraud claim. *Id.* at 122. On appeal, the defendants
7 contended the \$5,000 fraud judgment was duplicative of the compensatory damages awarded
8 for breach of contract, and the California Court of Appeal agreed.

9 After noting that “[a] party may recover consequential damages resulting from his acts in
10 reliance on the other party’s misrepresentations,” the court held that “[t]he same damages,
11 however, cannot be on different theories.” *Id.* It explained:

12 When we search the record for some factual basis for the
13 judgment based on fraud, we are unable to find any item not
14 otherwise included within the compensatory award for breach of
15 contract. Only one compensatory award for damages in favor of
16 the plaintiffs is proper and, accordingly, we modify the judgment.

17 *Id.* at 125-26.

18 Subsequent California decisions have applied this same rationale. *See, e.g., Tavaglione v.*
19 *Billings*, 4 Cal.4th 1150, 1159 (1993) (“[r]egardless of the nature or number of legal theories
20 advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item
21 of compensable damage supported by the evidence”); *DuBarry Internat., Inc. v. Southwest*
22 *Forest Industries, Inc.*, 231 Cal.App.3d 552, 564 (1991) (“recovery could not be twice had
23 simply because the facts would support recovery upon either [the contract or fraud] theory”);
24 *Pugh v. See’s Candies, Inc.*, 203 Cal.App.3d 743, 760, fn. 13 (1988) (“plaintiff asserting both a
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1 contract and tort theory arising from the same factual setting cannot recover damages under
2 both theories”).³

3 In its January 21, 2020 order, this Court ruled that “JW Gaming’s damages for all its causes
4 of action stem from the \$5.38 million it loaned to the Tribe; it cannot recover that money more
5 than once.” Dkt. 178 at 15. Similar to the *Walker* case, JW Gaming seeks the same
6 compensatory damages on both its contract and fraud claims.⁴ JW Gaming attempts to avoid
7 the consequences of this fact by pointing out that the contract and tort claims involve different
8 defendants and the RICO claims carry the potential for treble damages. But, critically, it
9 identifies no allegations in its complaint where it seeks anything other than the \$5.38 million,
10 and, even more detrimentally, proffers no evidence to support any additional damages. It makes
11 little sense to allow JW Gaming to pursue its fraud and RICO theories when it fails to point to
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17 ³ Courts in other jurisdictions apply the same rule. *See, e.g., Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110 (Mo. Ct. App. W.D. 2002) (holding that by waiving a tort and suing in contract, a party necessarily waives the entire tort and cannot recover part of his damages in contract and afterward maintain an action in tort for the balance); *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 185 (Tex. 1998) (holding that insured was required to elect a remedy between damages awarded by the jury on a coverage claim for property loss and identical damages for repair and restoration of property, lost profits, and replacement of lost property awarded on tort and statutory theories, where the insured showed no loss distinct from contract damages covered by the policy); *Eulrich v. Snap-On Tools Corp.*, 853 P.2d 1350, 1361 (Or. Ct. App. 1993), cert. granted, judgment vacated on other grounds, 512 U.S. 1231 (1994) (holding that although plaintiff could recover on a fraud theory from a manufacturer amounts invested in a dealership and the income foregone that could have been earned in other pursuits, the dealer could not recover for these damages and also for lost profits arising out of breach of contract, since the awards would be duplicative and the dealer was required to elect a remedy).

26 ⁴ *See* Dkt. 1-1 at ¶ 367 (“The Company, as a result of its reliance on the Falsified 2011 Accounting, has continued to accrue economic damage related to the Tribe’s nonpayment of the Company Loan.”); ¶ 376 (“The Company, as a result of its reliance on the Sham Canales Note, has continued to accrue economic damage related to the Tribe’s nonpayment of the Company Loan.”); ¶ 540; and Prayer for Relief ¶ 3.

any additional harm suffered as a result of that alleged conduct. It is therefore immaterial whether the contract and tort causes of action arose out of the same operative facts or the conduct breached separate obligations owed to the plaintiff. If the compensatory damages are the same for all claims, a plaintiff can only recover them once.

III. The Cases Cited by JW Gaming Do Not Support its Position.

For this reason, the cases cited by JW Gaming clearly do not support its position. The main case upon which it relies, *Waffer International Corporation v. Khorsandi*, 69 Cal.App.4th 1261 (Cal. 2d Dist. 1999), declined to apply the doctrine of election of remedies where the plaintiff had obtained a writ of attachment against a corporate defendant, but also alleged fraud and conversion claims against two individual defendants. *Waffer*, however, does not involve a situation where, as here, the plaintiff explicitly seeks the same compensatory damages on its contract and tort claims. It is therefore inapposite, as are the decisions in *Robinson Helicopter Company, Inc. v. Dana Corporation*, 34 Cal.4th 979 (2004), *Lazar v. Superior Court*, 12 Cal.4th 631 (1996), and *Baker v. Superior Court*, 150 Cal.App.3d 140, 145–146 (1983).

Here, the facts supporting the damages elements of breach of contract are the same facts that support damages on the fraud and RICO claims: nonpayment of the \$5.38 million. This is conclusively established by the allegations in the Complaint. *See* Compl. (Dkt. 1-1) at ¶ 367 and ¶ 376; see also Dkt. 1-1 ¶ 540, Prayer for Relief ¶ 3. JW Gaming's attempts to paint the Individual Tribal Defendants as bad actors may be unending, but, no matter how many inflammatory and distorted facts it presents in its brief, it does not and cannot allege a different set of facts related to damages. Because the damage elements of these claims share the exact same factual support, it makes no difference that the claims are levied against different parties.

While the Tribal Defendants need not show that they were prejudiced in order to obtain summary judgment under these circumstances, prejudice is clearly present here. JW Gaming stipulated to an election of contract remedies with full knowledge of all 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. The Court denied those requests and furthermore granted JW Gaming a full recourse judgment on the contract claim. To the extent it can enforce that judgment against the Tribal Defendants prior to final disposition of the remaining claims in this case, the Tribal Defendants are clearly prejudiced.

IV. JW Gaming Cannot Seek Punitive or Treble Damages Because No Actual Damages Exist to Support its Fraud and RICO Claims.

JW Gaming elected and was awarded contract damages, and, as a result, it can no longer pursue remedies under Counts Two through Six, including treble damages under RICO. Even if JW Gaming prevails on its argument that its election is ineffective, because the court has already awarded contract damages, punitive and treble damages cannot be awarded in this case. *See DuBarry Internat.*, 231 Cal.App.3d at 564 (“If a given state of facts entitles one to recover damages upon the theory of tort, and the same state of facts entitles him to recover upon the theory of contract, it would seem plain that recovery could not be twice had simply because the facts would support recovery upon either theory.”)

JW Gaming relies on *Personalized Workout of La Jolla, Inc. v. Ravet*, No. D060244, 2014 WL 68753, at *16 (Cal. Ct. App. Jan. 9, 2014), but that case (which does not involve an election of remedies) affirms that an award of actual damages for the fraud claim is required for an award of punitive damages. *Id.* at *16 (“high court has more recently affirmed that ‘actual damages are an absolute predicate for an award of exemplary or punitive damages’”) (quoting *Kizer v. County of San Mateo*, 53 Cal.3d 139, 147 (1991); accord, *Potter v. Firestone Tire &*

1 *Rubber Co.*, 6 Cal.4th 965, 1004 (1993).) Having already been awarded complete recovery in
2 the form of contract damages, as explained above, JW Gaming is prohibited from receiving a
3 double recovery of actual damages on fraud and RICO. *See City & Cty. of San Francisco v.*
4 *Kihagi*, No. A151719, 2018 WL 6303878, at *13 (Cal. Ct. App. Dec. 3, 2018), reh'g denied
5 (Dec. 21, 2018), review denied (Mar. 13, 2019) (finding no election of remedies but explaining
6 that a plaintiff that obtains a remedy in a contract action, thus gaining an advantage over the
7 defendant, is equitably estopped from later seeking the inconsistent remedy of punitive damages
8 under a tort theory). JW Gaming cannot show it suffered actual damages on its fraud and RICO
9 claims and, as a result, it cannot claim the punitive or treble damages that would otherwise be
10 available for those claims.
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13 Moreover, based on the unique facts presented in *Ravet*, the court determined that the long-
14 standing rule regarding actual damages did not apply because the jury had in fact awarded actual
15 damages against Ravet and others jointly-and-severally, and the court, properly or not, carved
16 Ravet out of that award because he had already paid actual damages in a related action. That
17 carve out allowed the court to circumvent the rule prohibiting a punitive damage award in the
18 absence of actual damages. *See Ravet*, 2014 WL 68753 at *17 (“However, unlike the jury in
19 *Cheung*, 35 Cal.App.4th 1673, the jury here did find that Ravet was liable, jointly and severally
20 with other defendants, in the amount of \$383,654 plus interest. Thus, the jury did award
21 plaintiffs compensatory damages against Ravet. However, to avoid confusion and/or a double
22 recovery against Ravet (the damages from the underlying malicious prosecution action and the
23 fraudulent transfer action were the same amount), the trial court omitted any compensatory
24 damages against Ravet in the judgment.”) Such a carve out is impossible in this case, because
25 the contract and fraud and RICO claims are raised against different parties.
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1 Similarly, JW Gaming’s distorted one-satisfaction-rule argument has no effect here. JW
2 Gaming tries to use a rule that limits a plaintiff to satisfactory damages to mean that a plaintiff
3 can only be satisfied if it receives treble or punitive damages. Under the rule, the judgment
4 against or settlement and release of one joint tortfeasor for a single injury bars suit against any
5 additional tortfeasor. *See McDermott, Inc. v. AmClyde*, 114 S.Ct. 1461, 1470 (1994). JW
6 Gaming cites *Uthe Technology Corp. v. Aetrium, Inc.*, 808 F.3d 755 (9th Cir. 2015), to argue
7 that it cannot be fully satisfied until it is awarded treble damages under RICO. According to
8 JW Gaming, if a statute makes punitive or treble damages available, a plaintiff will never be
9 fully satisfied until it is awarded all of those damages, no matter how clearly it elects to forgo
10 them. To the contrary, it is JW Gaming’s election and the rule against double recovery that
11 cancel its RICO and fraud damages, not the one-satisfaction rule.

14 It is notable that JW Gaming raises this argument, however, because “[i]n order for a court
15 to find complete satisfaction under the one satisfaction rule, there must be such an identity
16 between the injuries alleged and the remedies available that any additional recovery would
17 unjustly enrich the plaintiff.” *Uthe*, 808 F.3d at 760–61. JW Gaming thus appears to admit,
18 once again, that its causes of action in this case are based on the same set of facts and damages.
19 Regardless, *Uthe* does not consider what should occur when a plaintiff specifically elects to not
20 pursue its RICO damages. Nor does it consider what should occur when a plaintiff cannot be
21 awarded actual damages under RICO because of the prohibition against duplicative recovery.
22 These are the rules that apply here, and JW Gaming’s anomalous argument about one
23 satisfaction is not relevant.
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1 **V. The Rule in *Lloyd* Does Not Apply.**

2 Citing to *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, 897 (9th Cir. 1957), JW Gaming
3 claims that a party may not make a conditional concession of fact for purposes of summary
4 judgment. JW Gaming is incorrect.

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6 In *Lloyd*, the Ninth Circuit stated the following:

7 We hold such a condition invalid. A concession of fact on motion for summary judgment
8 establishes the fact for all time between the parties. The party cannot gamble on such a
9 conditional admission and take advantage thereof when judgment has gone against him.
10 This Court will not emasculate thus the efficient devices of summary judgment. Nor will
11 we follow the weary road of common law pleading through tortuous sinuosities whereby
12 facts admitted by a demurrer to any pleading must be established by proof in order to have
13 judgment. This is not to say that there could be no relief by the court from an erroneous
14 admission of a party. But there cannot be a tentative or conditional admission on motion for
15 summary judgment, which by definition posits that there are not in truth any unresolved
16 issues of material fact which must be tried if the wheel turns wrong. Of this all practitioners
17 should take notice. The facts should be established first, and the law can only be laid down
18 in light thereof.

19 *Id.* at 897.

20 JW Gaming's attempt to invoke *Lloyd* to its advantage in this case is without effect. First,
21 the statement upon which JW Gaming relies was dicta as the court's decision did not turn on
22 the concession. *Id.* at 897–900. Second, the specific situation presented by this case—one that
23 involves a stipulation made outside of the pleadings, thus requiring that this motion be one for
24 summary judgment rather than dismissal—does not fit within the general proposition set forth
25 in *Lloyd*. Tribal Defendants were clear that they were conditionally admitting the damage
26 allegations in the Complaint for purposes of summary judgment only. Dkt. 184 at 2-3, n.1.
27 Tribal Defendants' argument, which is that judgment is required *even if* all of the damage
28 allegations stated in the Complaint are true, is necessary in this case to decide the purely legal
question of whether those allegations require dismissal of JW Gaming's fraud and RICO claims.
If the Court rules against the Tribal Defendants as to the matter of law presented in this motion,

1 Tribal Defendants will certainly dispute each allegation of fraud and RICO violations raised in
2 the Complaint.

3 Moreover, cases in which courts have applied this rule did so because they found that
4 allowing a party's conditional concession of fact would create an advantage for that party by
5 ensuring that such fact would never be subject to judicial resolution. *See, e.g., S. Appalachian*
6 *Mountain Stewards v. Red River Coal Co., Inc.*, No. 2:17CV00028, 2019 WL 4674318, at *8
7 (W.D. Va. Sept. 24, 2019) ("By 'conceding' a fact that has the potential to subject it to liability
8 under the CWA, Red River simultaneously attempts to avoid liability under RCRA without
9 ever obtaining any judicial resolution of the point source issue."). That clearly is not the case
10 here.
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13 To the extent the Court determines *Lloyd* applies, it must nevertheless find that the Tribal
14 Defendants are not bound by the conditional admission pursuant to *Sicor Ltd. v. Cetus Corp.*,
15 51 F.3d 848, 859–60 (9th Cir. 1995). Where a party making an ostensible admission explains
16 or retracts the error in a subsequent pleading or by amendment, the trial court must accord the
17 explanation due weight. *Id.*; *see also Lacelaw*, 861 F.2d at 226 ("Factual assertions in pleadings
18 and pretrial orders, *unless amended*, are considered judicial admissions conclusively binding
19 on the party who made them.") (emphasis added); *Hooper v. Romero*, 68 Cal.Rptr. 749, 753,
20 262 Cal.App.2d 574, 580 (1968) (same).⁵ Even if the proposition of *Lloyd* applies, this
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26 ⁵ Related, the Tribal Defendants specifically identified the allegations in the complaint that it
27 was conditionally assuming were true for purposes of this motion—those relating to damages.
28 Yet, JW Gaming appears to claim that the Tribal Defendants had conditionally admitted all of
the complaint's allegations and has since filed a motion for summary judgment on that basis.
[Dkt. 191]. That motion, as with its claim here, is not supported by the law or facts for the
reasons explained above.

1 pleading resoundingly corrects that “error,” and the premise of the summary judgment
2 motion—that even if the allegations in the Complaint are true the claims must be dismissed—
3 should be upheld as merely conditional.
4

5 **CONCLUSION**

6 For the reasons above, and those set forth in the motion, the Tribal Defendants
7 respectfully request that the Court grant summary judgment in their favor on Causes of Action
8 Two through Six.
9

10 DATED this 27th day of March, 2020.

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