Gregory M. Narvaez (SBN 278367)
John M. Peebles (SBN 237582)
Tim Hennessy (SBN 233595)
PEEBLES KIDDER BERGIN & ROBINSON LLP
2020 L Street, Suite 250
Sacramento, CA 95811
Telephone: (916) 441-2700
Facsimile: (916) 441-2067
Email: gnarvaez@ndnlaw.com

Attorneys for Plaintiff
JW Gaming Development, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No. 3:18-cv-02669-WHO (RMI)

PLAINTIFF'S OPPOSITION TO TRIBE'S SECOND MOTION FOR LEAVE TO FILE A SECOND AMENDED ANSWER AND COUNTERCLAIMS

Hearing Date: December 16, 2020
Time: 2:00 p.m.

Courtroom 2, 17th Floor
Judge William H. Orrick

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INTRODUCTION

Through its proposed Second Amended Answer and Counterclaims ("SAACC"), the Pinoleville Pomo Nation et al. ("Tribe") seeks to undo this Court's prior adjudication of JW Gaming's claim against the Tribe for breach of its $5.38 million promissory note to JW Gaming (the "JW Note"). Indeed, as the Tribe admits, its "new counterclaims seek solely to rescind th[e] [JW] Note[.]" Tribe Mtn. for Leave to Amend, Dkt. 251, at 5.

There are at least two grounds for denying the Tribe leave to file the SAACC. First, the request for leave is fatally premature because it would first require the Court to vacate its prior order adjudicating the contract claim. *See* Order, Dkt. 178. Without that preliminary step, the SAACC would improperly "seek solely to rescind" a note that has already been adjudicated. Second, even if the request for leave were timely, it should be denied based on the five factors governing courts' consideration of such requests. The request comes over one year after the Tribe initiated cross-motions for judgment as a matter of law on the contract claim, and nearly three years into this litigation. Timing aside, the request is based not on new facts, but a new *theory* under which the Tribe might escape liability altogether (including seemingly rescinding the waiver of tribal sovereign immunity contained in the JW Note). That theory—that JW Gaming indirectly, through Michael and Melissa Canales, wrongfully induced the Tribe to enter the JW Note—is grounded in a fanciful and implausible narrative based loosely on the Tribe's distortions of deposition testimony of defendant John Tang (who himself admits[1] was not involved in any aspect of the negotiation of the JW Note).

The Court should deny the Tribe's request for leave to file the SAACC.

[1] Mr. Tang's testimony on this and other facts relevant to this brief can be found in the supplemental excerpts of that deposition attached as Exhibit A to the Declaration of Gregory M. Narvaez ("Narvaez Decl.") filed concurrently herewith.

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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. On October 5, 2018, the court denied defendants' motion to dismiss. Dkt. 55. On October 2, 2019, the Ninth Circuit 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., Mar. 9, 2020).

On Oct. 16, 2019—approximately two weeks after the Ninth Circuit affirmed this Court's order denying the Tribal Defendants' motion to dismiss—the Tribal Defendants moved for summary judgment on all claims, including the contract claim. Dkt. 129. In that motion, the Tribal Defendants relied entirely on the facts alleged in the complaint—facts they admitted for purposes of such motion. Dkt. 129 at 8, n. 2 ("The undisputed facts supporting this motion are contained entirely in JW Gaming's complaint. *See* Doc. 1-1. The Tribal Defendants admit these allegations for purposes of this summary judgment motion only.").

Two weeks later, on Oct. 30, 2019, JW Gaming simultaneously opposed Tribal Defendants' motion and moved for judgment in its favor on the contract claim. Dkt. 136.

On November 12, 2019—while the cross-motions on the contract claim were pending—the Tribal Defendants filed a first amended answer, counterclaims, and cross-claims ("Tribal FAA"). Dkt. 141. Contained in the Tribal FAA were new cross- and counterclaims against: JW Gaming; J2M Gaming Development LLC; JW Gaming's sole member, Donna Winner; defendant John Tang; and the Canales Defendants. Dkt. 141 at 58-61. However, simultaneously with the Tribal FAA, the Tribal Defendants dismissed with prejudice their crossclaims against the Canales Defendants. Dkt. 143.

On Nov. 26, 2019, JW Gaming moved to, among other things, strike the Tribal FAA as untimely and filed in bad faith. Dkt. 151.

On December 4, 2019, the Court heard argument on the cross motions for judgment on the contract claim, and JW Gaming's motion to strike the Tribal FAA, among other motions. Dkt. 158 (civil minutes). At the hearing, the Court announced its intent to award judgment on the contract claim in favor of JW Gaming, and to strike the Tribal FAA without leave to amend.

On Jan. 7, 2020—over one month after the Court announced its intent to rule in favor of JW Gaming on its breach of contract claim—the Tribal Defendants moved for leave to file a surreply on the contract claim. Dkt. 170. The surreply, a copy of which was submitted with the motion for leave, asserted that "the Court lack[ed] jurisdiction to order the Tribe to pay damages to JW Gaming out of its non-casino assets." Dkt. 170-2 at 2. Subsequently, the Court ordered JW Gaming to respond to the surreply (Dkt. 175), which JW Gaming did (Dkt. 177).

On January 21, 2020, the Court awarded JW Gaming judgment on its breach of contract claim, without limitation on recourse. Dkt. 178. In that order, the Court stated: "JW Gaming's motion for judgment on the breach of contract claim is GRANTED without limitation on recourse, and judgment shall be entered accordingly." Dkt. 178 at 19 (capitalization in original).

The same order also struck the Tribal FAA without leave to amend. Dkt. 178 at 16-19. In that regard, the Court found the Tribal FAA was filed in bad faith, was unduly delayed, and that its filing would have been futile. *Id.*

On February 28, 2020, the Tribal Defendants filed a second motion for summary judgment on the fraud and RICO claims. Dkt. 184. While that motion was pending, on March 23, 2020, JW Gaming moved for summary judgment on the fraud and RICO claims as to all defendants. Dkt. 191. The Court denied both motions. Dkt. 196 (denying Tribal Defendants' motion); Dkt. 237 (denying JW Gaming's motion). The Court again, however, reaffirmed that JW Gaming's breach of contract

claim had been fully and finally resolved in JW Gaming's favor. Dkt. 237 at 3 ("There is no doubt that the claim [for breach of contract] has been fully resolved[.]").

On Oct. 27, 2020—just under two weeks before the instant Tribal motion—defendant John Tang moved to dismiss the Tribal Defendants' crossclaim against him for breach of fiduciary duty. Dkt. 249. In response, the Tribe filed a statement of non-opposition to the motion. Dkt. 252.

On Nov. 5, 2020, the Tribe filed two motions, each of which seeks to unsettle the Court's January 2020 order adjudicating the breach of contract claim in favor of JW Gaming. Dkt. 251. One motion seeks leave to file a motion for reconsideration of the Court's January 21, 2020 order adjudicating the contract claim in favor of JW Gaming. As of the date of this filing, the Court has not yet disposed of that motion.

The Tribe's other motion—to which the instant brief responds—seeks leave to file the SAACC, which as previously noted, "seek[s] solely to rescind" the JW Note. *See* Tribe Mtn., Dkt. 251, at 5:18-19. The counterclaims in the SAACC rely on a theory that "the co-joint venturers [*i.e.*, the then-members of J2M], primarily through Michael Canales, on specific dates that cannot be recalled, intentionally, negligently, or innocently represented to Chairwoman Leona Williams and Vice-Chairwoman [Angela James] of the Tribe on numerous occasions in person and by telephone that the tribe would be able to open a casino and receive gaming revenues within two years of February of 2012." SAACC, Dkt. 251-2, at 58, ¶ 46. On that basis, the counterclaims allege "JW gaming is jointly and severally liable for Mr. Canales's misrepresentations since they were partners in a joint venture and their J2M LLC was a sham, shell, instrumentality and their alter ego." *Id.*

On Nov. 9, 2020, JW Gaming filed a motion requesting final judgment on the contract claim and simultaneous dismissal of all remaining claims. Dkt. 253. That motion is set for hearing on Dec. 16, 2020, the same date as the instant motion. Dkt. 254 (clerk's notice).

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DISCUSSION

I. The Tribe's motion for leave to file the SAACC is fatally premature because it seeks solely to rescind the JW Note, which has been fully adjudicated pursuant to an Order that has not been vacated.

The Tribe's motion for leave to file the SAACC should be denied because the SAACC "seek[s] solely to rescind" a contract that has already been fully adjudicated. Although the Tribe filed a motion for leave to file a motion for reconsideration concurrently with its motion for leave to amend, the former motion has not been disposed of and accordingly no motion for reconsideration of the contract claim has been filed, much less granted. As such, the SAACC pertains solely to a now-closed claim and therefore the Tribe's motion for leave to file is fatally premature and procedurally improper. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) ("A motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

II. Even if the motion for leave to file the SAACC was timely, it should be denied under the five factors relevant to consideration of such motions.

"Rule 15(a) of the Federal Rules of Civil Procedure provides that after a responsive pleading has been served, a party may amend its complaint only with the opposing party's written consent or the court's leave." *Handel v. Rhoe*, No. 14-cv-1930-BAS, 2015 WL 6127271, at *2 (S.D. Cal., Oct. 16, 2015) (citing Fed. R. Civ. P. 15(a)). "'The court should freely give leave when justice so requires,' and apply this policy with 'extreme liberality.'" *Id.* (quoting Fed. R. Civ. P. 15(a) and *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). "However, leave to amend is not to be granted automatically." *Id.* (citing *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990))). "Granting leave to amend rests in the sound discretion of the district court." *Handel, supra*, citing *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996)).

"Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the

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[party] has previously amended the [pleading]." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Of these factors, prejudice to the opposing party carries the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). A party claiming prejudice bears the burden of making that showing. *See DCD Programs*, 833 F.2d at 186. However, absent prejudice, a strong showing of the other factors may support denying leave to amend. *See id.*

Finally, a request for leave to amend is subject to heightened scrutiny where the request is made after a summary judgment motion has been filed. *See U.S. Bank Nat. Ass'n v. Wayman*, No. 13-cv-02203, 2015 WL 5772730 at *6 (S.D. Cal., Sept. 30, 2015) ("A court should more carefully scrutinize a party's attempt to raise new theories of recover by amendment when the opposing party has filed a motion for summary judgment.") (citing *Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999)). In those circumstances, it "raises concerns about seriatim presentation of facts and issues." *Id.* (citing *Parish, supra*). And, such amendments raise the specter of gamesmanship to prevent the resolution of claims. *Id.* ("A plaintiff who proposes to amend his complaint after the defendant has moved for summary judgment may be maneuvering desperately to stave off the immediate dismissal of the case.") (quoting *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 944 (7th Cir. 1995)).

A. Bad faith and undue delay

"Bad faith may be shown when a party seeks to amend late in the litigation process with claims that were or should have been apparent early on." *Harris v. Lockyer*, No. CIV S-04-1906, 2010 WL 2557219 at *1 (E.D. Cal., June 23, 2010) (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). *See also Slot Speaker Technologies, Inc. v. Apple, Inc.*, No 13-cv-01161-HSG, 2017 WL 4354999 at *2 (N.D. Cal., Sept. 29, 2017) (denying leave to amend complaint where plaintiff "had known about the facts and legal theories giving rise to its amendments since [at least seven years prior]"); *Bonin* at 845 ("[A] district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally.")

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Here, the circumstances show that, as it did with its first amended complaint, the Tribe is presenting the SAACC in bad faith as a dilatory tactic to escape final resolution of JW Gaming's breach of contract claim. As already noted, this action was filed over two and one-half years ago in March of 2018. The Tribe answered the contract claim more than two years ago in October of 2018. The Tribe initiated dispositive cross-motions on the contract claim more than one year ago in October of 2019. The Court announced its tentative ruling on the contract claim nearly one year ago in December of 2019, with its resulting order resolving the contract claim (and striking the Tribe's first amended answer, counterclaims, and crossclaims) the next month in January of 2020. In this way, it is apparent that the SAACC is being presented "late in the litigation process."

Additionally, as to the other element of bad faith, the new counterclaims presented in the SAACC "were or should have been apparent early on."[2] As noted, the SAACC seeks to entirely rescind the already-adjudicated JW Note on the dubious grounds that "the co-joint venturers [*i.e.*, the then-members of J2M], primarily through Michael Canales, on specific dates that cannot be recalled, intentionally, negligently, or innocently represented to Chairwoman Leona Williams and Vice-Chairwoman [Angela James] of the Tribe on numerous occasions in person and by telephone that the tribe would be able to open a casino and receive gaming revenues within two years of February of

[2] It is not apparent that the SAACC's so-called seven new counterclaims against JW Gaming are in in fact counterclaims. As noted, all seven of the so-called counterclaims seek "rescission based on" a variety of theories, including alleged misrepresentation (including intentional, negligent, and innocent), concealment, constructive fraud, undue influence, and mistake of fact. SAACC (Dkt. 251-1) at 59-62. They thus appear to be mere affirmative defenses to the formation of the JW Note. *Leo Svcs, Inc. v. Gabon Airlines*, No. EDCV 08-00134, 2010 WL 11596172 (C.D. Cal., June 2, 2010) ("Further, under settled California law, fraud is an affirmative defense to breach of contract claims.") (citing *Siligo v. Castellucci*, 21 Cal. App. 4th 873, 876-77 (1994) (recognizing fraud as an affirmative defense to a breach of contract action); *Ambrose v. Hammond Lumber Co.*, 43 Cal. App. 597, 600 (1919) (same)). Because none of these defenses was raised in cross-motions for judgment as a matter of law on the JW Note, *see* Dkt. nos. 129, 136, 137, 145, 146, 147, 170-2, 177, the Tribe has waived them, *see Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an affirmative defense. Ordinarily, it is incumbent on the defendant to plead and prove such a defense, and we have never recognized claim preclusion as an exception to that general rule.") (citations omitted).

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2012." Although the Tribe points to a contorted interpretation of Mr. Tang's testimony as the "new evidence" supporting this theory, it fails entirely to explain why the Tribe, and individual defendants Angela James and Leona Williams, did not know (or reasonably should not have known) long ago that Michael Canales had allegedly misled them. The Tribe further fails to explain the source of its specific factual allegation that Michael Canales, "on numerous occasions in person and by telephone," misled Angela James and Leona Williams in regard to the Tribe's ability to open a casino. Indeed, Mr. Tang provided no such detail, nor does the Tribe point to areas of his testimony where it contends he did. In fact, the basis for these more specific allegations, if true, must logically be either Michael Canales (from whom the Tribe has taken no discovery) or, most likely, the Tribal Defendants themselves.[3] Thus, although the bases for the SAACC "were or should have been apparent early on," they are only being raised now. This indicates bad faith.

Beyond simply failing to timely raise its new defense theories, the Tribe has, throughout this litigation and contrary to its new theories, affirmatively asserted it is bound by the JW Note, and that the only salient issues under the contract claim were liability and damages. *See e.g.*, "Joint Statement on Discovery Dispute over Plaintiff's Third-Party Subpoenas," Apr. 4, 2019, Dkt. 88, at 4 ("Plaintiff cannot meet its burden to prove the requested discovery is relevant. . . . Liability for breach of a note is proven by submitting evidence of nonpayment (*e.g.*, through Plaintiff's testimony or admission of records), and damages can be proven by submitting evidence of unpaid principal and interest."). *See also* Tribal Defs. Reply to Pltf.'s Mtn. to Dis., Dkt. 22, at 5 of 20 ("At its core, this case is about the Tribe's[fn] alleged nonpayment of a $5.38 million note.").[4]

[3] Or, perhaps the Tribe could have learned the information through Melissa Canales' "written disclosure of her potential conflicts of interest," but that disclosure would have allegedly occurred over seven years ago as stated in the "Acknowledgment and Waiver of Conflict of Interest" between Melissa Canales and the Tribe, dated Feb. 26, 2013. Narvaez Decl., Ex. B.

[4] While there are many more examples of the Tribe's position on the limited live issues under the JW Note, it is impractical to restate them all here.

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What is more, to the extent the Tribe did not know of events surrounding the formation of the JW Note, it could have sought discovery into those matters, but instead actively obstructed such discovery. For example, the Tribe fought vigorously to limit, and even halt, all discovery related to the events before and at the time of contracting for the JW Note. As just one example, in its failed petition to the Ninth Circuit for a writ of mandamus, the Tribe claimed this court "acted outside its authority and jurisdiction" in permitting JW Gaming discovery into the events surrounding the time the JW Note was formed. Pet. For Writ of Mandamus and Emgncy. Mtn. for Stay of Discovery, Dkt. 2, *Pinoleville Pomo Nation, et al. v. U.S. Dist. Ct. N.D. Cal.*, No 19-71522 (9th Cir.) at 2. Particularly relevant here, the Tribe claimed in its mandamus petition that "No credible argument exists that [JW Gaming's discovery and deposition requests] relate to the breach of contract claim, *which requires proof of straightforward elements of liability and damages*." *Id.* at 13 (italics added for emphasis). Consistent with that position, the Tribe declined to produce discovery related to J2M Gaming Development LLC (the entity through which the Tribe now apparently claims JW Gaming has alter ego liability) on the grounds that the information was "not relevant to the First Cause of Action." Def. Pinoleville Pomo Nation's Resp. to Pl.'s Req. for Produc. (First Set), and Def. Pinoleville Pomo Nation's Am. Resp. to Pl.'s Req. for Produc. (First Set), No. 2 (Declaration of Gregory M. Narvaez, Nov. 22, 2019, Ex. AA and BB), Dkt. 147-1.

These indicators of bad faith and undue delay are not mitigated by the Tribe's asserted "several compelling reasons" why it should be granted leave to amend. Dkt. 251 at 15-16. The Tribe first asserts that Mr. Roy (who, along with Mr. Padraic McCoy, is one of the Tribe's two attorneys of record in this action) "only recently discovered new evidence at the deposition of John Tang that supports the allegations in the amended counterclaims of wrongful conduct that improperly caused the Tribe to execute the [JW] Note." *Id.* As an initial matter, Mr. Tang's testimony does not support

the new counterclaims in the SAACC, despite the Tribe's effort to contort it to make it do so.[5] Nor does anything in Mr. Tang's testimony constitute new evidence to support leave to amend. While Mr. Tang, unsurprisingly, may have provided testimony on various nuances of his involvement in the transaction with the Tribe, the material aspects of his testimony are not new. Indeed, the Complaint, over the span of more than 563 paragraphs and 278 pages of exhibits, largely sets out the nature of JW Gaming's involvement with the parties. For example, the Complaint describes many of the circumstances under which J2M was formed, operated, and dissolved. The Complaint also describes the circumstances under which JW Gaming negotiated and executed the JW Note. All of this was sufficient to put all parties on notice of theories of the case they might pursue. Further, it is implausible that the Tribe would not have known, since at least the beginning of this case, that it had been defrauded into signing the JW Note, if that were true. It is simply not reasonable to credit the Tribe's new position that Mr. Roy substituted in seven months ago, took one deposition five months later of an individual who admittedly had no involvement in the negotiation or execution of the JW Note, and, through that deposition, uncovered new evidence to support a claim to rescind the promissory note that has been at the heart of this case since the beginning. Rather, the most likely motivation for the Tribe's newest motion for leave to amend is that, as with its first amended answer, the Tribe is trying desperately to stave off judgment on the JW Note.

The Tribe's two remaining "compelling reasons" for obtaining leave are similarly unavailing. The Tribe asserts Mr. Roy's co-counsel of record, Mr. Padraic McCoy, "did not [previously] consider, nor was he [previously] aware of any evidence supporting, the new counterclaims in the proposed SAACC." Dkt. 251 at 16. This assertion, in addition to carrying little or no weight for the

[5] The Tribe lists in its brief a slew of its interpretations of Mr. Tang's testimony. Dkt. 251 at 10-13. In an effort to maintain the brevity of this brief, JW Gaming has filed herewith a separate statement wherein JW Gaming provides a table listing the Tribe's assertions and JW Gaming's brief response to each. Together, the instant brief and the separate statement are within the page limits allowed for an opposition brief.

reasons stated in the immediately preceding paragraph, does not excuse the Tribe's failure to develop and raise its defensive theories to the contract before or during last year's dispositive motions on the contract claim.[6] Finally, there is no weight to the Tribe's argument that the deadline of March 1, 2021 for the close of fact discovery provides "plenty of time for Plaintiff to complete discovery on these limited fats issues and be ready for trial." Dkt. 251 at 16. Even if this assertion was credible, the posture of the case schedule does not change the fact that the contract claim was fully resolved through cross-motions in which both sides asserted there were no triable issues of fact and that judgment should be rendered thereon as a matter of law.

Based on these circumstances, as well as the broader context of this case, it is apparent that the presentation of the SAACC is unduly delayed and made in bad faith.

B. The proposed amendment would be futile

The motion for leave should be denied for the additional reason that amendment would be futile. *See Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003) ("Futility alone can justify the denial of a motion to amend."). "A proposed amended complaint is futile if it would be immediately subject to dismissal." *Nordyke v. King*, 644 F.3d 776, 788 n. 12 (9th Cir. 2011) (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)), *aff'd on reh'g en banc on other grounds*, 681 F.3d 1041 (9th Cir. 2012). "Thus, the proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Id.*

Here, the SAACC's so-called counterclaims against JW Gaming would be immediately subject to dismissal. First, as previously discussed, the so-called counterclaims "seek solely to rescind" a contract that has already been litigated and decided on cross-motions for judgment as a

[6] Again, it is worth noting that the Tribe (through Mr. McCoy and his then-co-counsel Mr. Verner) initiated those cross motions over one year ago, in October of 2019.

matter of law. Unless those claims are reopened, the so-called counterclaims are implausible or even barred. Second, the counterclaims are implausible in that they rely on testimony of Mr. Tang who admittedly had no involvement in, or any communication with the Tribe or anyone else regarding, the negotiation or execution of the JW Note. Tang Depo. at 275:1-4, 14-16, 276:8-11, 18-22; Narvaez Decl. Ex. A. Moreover, the counterclaims do not even allege JW Gaming had any communication directly with the Tribe during the negotiation and execution of the JW Note.[7] Rather, the counterclaims rely on an implausible theory that "the co-joint venturers [*i.e.*, the then-members of J2M], primarily through Michael Canales, on specific dates that cannot be recalled, intentionally, negligently, or innocently represented to Chairwoman Leona Williams and Vice-Chairwoman of the Tribe on numerous occasions in person and by telephone that the tribe would be able to open a casino and receive gaming revenues within two years of February of 2012." SAACC, Dkt. 251-2, at 58, ¶ 46. On that basis, the counterclaims allege "JW gaming is jointly and severally liable for Mr. Canales's misrepresentations since they were partners in a joint venture and their J2M LLC was a sham, shell, instrumentality and their alter ego." *Id.*

Essentially, the Tribe is now alleging JW Gaming, without ever having any meaningful direct contact with Tribal representatives, misled the Tribe by conspiring with its co-members of J2M and commissioning J2M's attorney Melissa Canales to clandestinely draft a note favorable to JW Gaming, while she and Michael Canales misled the Tribe about the Tribe's prospects of developing a gaming facility. Tellingly, however, in a case where over 30,000 pages of records have been exchanged among the parties, the Tribe does not point to a single document supporting this narrative. Nor does the Tribe explain why its $5.352 million note to Canales Group—executed around the same

[7] Indeed, as the documentary evidence submitted in connection with dispositive motions on the JW Note shows, JW Gaming was represented throughout the negotiation and execution of the JW Note by its then-counsel, Stephen Lightfoot. Dkt. 136-2. Further, as that same evidence shows, the Tribe, as it admitted in response to requests for admissions propounded by JW Gaming, was represented in those negotiations by its agent Melissa Canales. Dkt. 136-1 at 9, Resp. Nos. 24-25.

time as the JW Note—was collectible against all tribal revenues (not merely gaming revenues) if the Tribe always ever intended to repay casino project debt strictly from casino revenues. All of this demonstrates the counterclaims are implausible, would thus be subject to immediate dismissal, and are therefore futile.

C. The Tribe's first amended complaint, filed without leave, was previously stricken based in part on a finding that it was filed in bad faith.

Finally, the Tribe's request for leave should be denied because the Tribe has previously amended its answer, which amendment included crossclaims against J2M and Donna Winner, as well as counterclaims against JW Gaming. Even though that amended answer was ultimately stricken, it contained no allegations seeking to rescind the JW Note, even though the amendment was made more than one year into discovery in the case, and after tens of thousands of pages of records had been exchanged in discovery. At this stage of the proceedings, a second amended answer asserting entirely new theories would be unjust.

D. JW Gaming would suffer extreme prejudice by the filing of the SAACC.

As noted, of the five factors courts consider with respect to requests for leave to amend, prejudice to the opposing party carries the greatest weight. *Eminence Capital*, 316 F.3d at 1052.

Here, the extreme prejudice JW Gaming would suffer under the SAACC is readily apparent. During the nearly three years this case has been pending, JW Gaming has pursued discovery, developed its contract claim, and ultimately engaged in cross-motions for judgment on the JW Note on the issues the parties had identified and placed before the Court for resolution. Now, after all of the time and resources invested in getting to this point, the SAACC presents entirely new theories as to why the JW Note should be rescinded entirely. Not only would the new theories in the SAACC require substantial additional discovery and perhaps a trial, they would change the entire calculus of the case, as it is unclear how a rescission of the JW Note would impact the waiver of tribal immunity

therein and what viable claims JW Gaming would then have against the Tribe. The Court should shield JW Gaming from this extreme prejudice.

CONCLUSION

For the foregoing reasons, JW Gaming asks that the Court deny the Tribe's second motion for leave to amend its answer.

Dated: November 19, 2020

Peebles Kidder Bergin & Robinson LLP

By /s/ Gregory M. Narvaez
Gregory M. Narvaez
Attorneys for Plaintiff
JW Gaming Development, LLC

PEEBLES KIDDER LLP
2020 L ST., STE. 250
SACRAMENTO, CA