UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JW GAMING DEVELOPMENT, LLC,

Plaintiff,

v.

ANGELA JAMES, et al.,

Defendants.

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

ORDER ON MOTIONS FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION, FOR LEAVE TO AMEND THE COMPLAINT, AND TO ENTER JUDGMENT

Re: Dkt. Nos. 251, 253

I granted a motion for judgment on the pleadings in favor of plaintiff JW Gaming Development, LLC ("JW Gaming") against certain defendants (the "Tribal Defendants")[1] a year ago, based on a breach of contract claim. Litigation of other claims has proceeded. The Tribal Defendants now seek to undo the breach of contract determination because, they contend, they have discovered new evidence that the contract was fraudulently induced and should be rescinded. They move for leave to file a motion to reconsider the judgment on the pleadings and amend the complaint.

Those motions are denied. The Tribal Defendants have not discovered new evidence of fraud. Their new rescission theory is entirely unsupported by the substantive evidence on which they rely. Even if there were some scintilla of new evidence that hinted at fraudulent inducement, of which there is none, the strong indications of bad faith by the defendants and the prejudice to JW Gaming foreclose this belated attempt to revive the claim.

[1] The Tribal Defendants are the Pinoleville Pomo Nation, Pinoleville Gaming Commission, Pinoleville Business Board, Pinoleville Economic Development, LLC (collectively, "the Tribe"), and Angela James, Leona Williams, Lenora Steele, Kathy Stallworth, Michelle Campbell, Julian Maldonado, Donald Williams, Veronica Timberlake, Cassandra Steele, Jason Edward Running Bear Steele, and Andrew Stevenson (the "Individual Tribal Defendants").

Separately, JW Gaming moves to enter judgment on the breach of contract claim and dismiss its other claims. That motion is granted. If its other claims are dismissed, there is no just reason to delay entering final judgment on the breach of contract claim.

BACKGROUND

I have previously addressed the facts of this dispute in a series of orders on motions to dismiss and strike, for summary judgment, and for judgment on the pleadings. *See* Dkt. Nos. 55, 178, 196, 236, 237. I discuss here only those facts necessary to understand and resolve the present motions.

JW Gaming was formed by the late James Winner. *See* Order on Motion for Summary Judgment, Motion for Judgment on the Pleadings, Motion for Joinder, and Motion to Strike and Dismiss ("Prior Order") [Dkt. No. 178] 2. In 2008, defendants Michael Canales and John Tang approached Winner about investing in the development of a casino (the "Casino Project"). *Id.* The three ultimately formed a joint venture agreement in March 2009 to facilitate the project's development. *Id.* JW Gaming claims that various defendants fraudulently induced it into investing $5,380,000 into the project by falsifying documentation of a matching investment that never existed. *Id.* JW Gaming also alleges that the Individual Tribal Defendants used the money for personal purposes. *Id.* In early 2012, the Tribe requested continued funding, the parties could not reach an agreement, and the joint venture was dissolved. *Id.* 2–3.

On July 10, 2012, the Tribe and JW Gaming signed a Promissory Note, the instrument at issue in the breach of contract claim. The Note provided that JW Gaming would invest in the Casino Project, included the terms that governed the investment, and made a limited waiver of the Tribe's sovereign immunity. *Id.* 3.

JW Gaming filed this case in state court in March 2018 and the defendants removed it to federal court. Dkt. Nos. 1, 1-1. After I denied the defendants' motions to dismiss and strike, the Individual Tribal Defendants unsuccessfully appealed my order denying them immunity on fraud and RICO claims that JW Gaming brought; I denied their motion to stay the breach of contract claim while that appeal was addressed. *See* Dkt. Nos. 55, 57, 85. In their Answer, the Tribal Defendants asserted that the Note "speaks for itself" and included fourteen affirmative defenses.

Dkt. No. 61 ¶¶ 279–303; *id.* at 13–14. The parties presented a series of discovery disputes to Magistrate Judge Robert M. Illman. Prior to referring discovery to Judge Illman, I addressed one discovery dispute on the breach of contract claim; the defendants sought a writ of mandamus from the Court of Appeals on that dispute, which was denied. *See* Dkt. Nos. 90, 107, 117.

The Ninth Circuit affirmed my denial of sovereign immunity on October 2, 2019; the mandate issued on October 28, 2019. On October 16, 2019, the Tribal Defendants moved for summary judgment on the breach of contract claim. Dkt. No. 129. On October 30, JW Gaming moved for judgment on the pleadings. Dkt. No. 136. On November 12, 2019—the day before their opposition for the judgment on the pleadings would be due—the Tribal Defendants filed an Amended Answer. Dkt. No. 141. JW Gaming moved to dismiss and strike that Amended Answer. Dkt. No. 151.

On December 4, 2019, at a hearing on the motions, I indicated my tentative view that I would deny the Tribal Defendants' motion for summary judgment and grant JW Gaming's motion for partial judgment on the pleadings on the breach of contract claim. *See* Prior Order 4. On January 7, 2020—more than a month after that hearing and several weeks after final briefs were filed—the Tribal Defendants moved for leave to file a sur-reply to the motion for judgment on the pleadings to argue that I lacked jurisdiction because the Tribe did not waive sovereign immunity in the Note. *Id.* I permitted the Tribal Defendants to file that late brief because of the importance of the issue and permitted JW Gaming to file a response to it. Dkt. No. 170.

On January 21, 2020, I ruled on the motions. I struck the Tribal Defendants' Amended Answer and dismissed its newly filed counterclaims. Prior Order 16–19. They had first answered the complaint in 2018 and included no counterclaims. They then sought, without obtaining leave, to amend well outside of the window in which it could have amended as of right. *See id.* 16–17. I explained that, even if the Tribe had sought leave to amend, I would have denied it. *Id.* 19. I applied the factors governing amendment: "Most significantly," I held, "the circumstances here suggest bad faith." *Id.* 17. Specifically, "the Tribe filed the counterclaims in the 2019 Answer in order to avoid an adverse ruling on JW Gaming's pending motion for judgment on the pleadings." *Id.* 17. I also found that there was undue delay and that amendment would be futile because the

counterclaims were time-barred. *Id.* 17–18.

On the breach of contract claim, I granted JW Gaming's motion for judgment on the pleadings and denied the Tribe's motion for summary judgment. The Note provided that "If the Tribe fails to open a casino or other gaming facility within three years (3) of the date listed above, at the outside of this Promissory Note, then this Promissory Note will be immediately due and payable." *Id.* 7 (quoting Promissory Note). It was undisputed that no casino or gaming facility had been constructed and, for the reasons explained in my order, none of the Tribe's alternative interpretations of the contract were correct. *Id.* 7–10, 13–14.

Since that order, the case has proceeded on the other claims. In April 2020, the Tribal Defendants changed their lead counsel, substituting Eduardo G. Roy for previous counsel Rudy Verner. *See* Declaration of Eduardo G. Roy ("Roy Decl.") [Dkt. No. 251 at 16–21] ¶ 4. On November 5, 2020, the Tribal Defendants moved for leave to file a Second Amended Answer and Counterclaims ("SAAC") and for leave to file a motion to reconsider my order granting the motion for judgment on the pleadings. See Tribal Defendants' Motion ("Mot.") [Dkt. No. 251]. On November 9, 2020, JW Gaming filed a motion for entry of judgment on the breach of contract claim and to voluntarily dismiss its remaining claims conditional on that entry of judgment. *See* Plaintiff's Motion for Entry of Judgment ("Judgment Mot.") [Dkt. No. 253].

At the hearing on these motions, I permitted the Tribal Defendants to submit a supplemental brief on the correct amount of interest that has accrued on the Note; their brief only objected on evidentiary grounds to the document that performed the calculations for that interest, and did not provide any figure or calculations of its own. The Tribal Defendants asked for more time to submit that brief and I granted them an extension over JW Gaming's objection. Dkt. No. 270. Both parties have now submitted supplemental briefs on the topic. Dkt. Nos. 267, 274.

LEGAL STANDARD

I. LEAVE TO FILE A MOTION TO RECONSIDER

Civil Local Rule 7-9 governs motions for reconsideration of interlocutory orders prior to "the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case." CIV. L. R. 7-9(a). Under that rule, "any party may make a motion before a

Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order on any ground set forth in Civil L.R. 7-9(b). No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion." *Id.* Under Rule 7-9(b),

> The moving party must specifically show reasonable diligence in bringing the motion and one of the following: (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or (2) The emergence of new material facts or a change of law occurring after the time of such order; or (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Id. 7-9(b).

Even if a motion for leave to file a motion to reconsider does not satisfy Rule 7-9, district courts have the inherent authority to modify interlocutory orders prior to entry of final judgment. *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1996), *as amended* (Jan. 15, 1997). But generally, "[r]econsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law" and any other circumstances warranting reconsideration would be "highly unusual." *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

II. AMENDMENT OF PLEADINGS

Federal Rule of Civil Procedure 15(a) provides that a "party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." FED. R. CIV. P. 15(a)(1). But "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Id.* 15(a)(2). "In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the

proposed amendment." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

III. ENTRY OF JUDGMENT

FRCP 54(b) provides, "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." "Whether there is just reason for delay in the entry of judgment is a matter left to the discretion of the district court." *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979).

DISCUSSION

I. OBJECTIONS AND MOTIONS TO STRIKE

As a preliminary matter, both parties take issue with each other's filings.

First, JW Gaming objects to the Tribal Defendants' inclusion of three declarations in support of their Reply. Dkt. No. 263.[2] Although none would cure the Tribal Defendants' deficient arguments, I agree that they should be struck. *See, e.g.*, *Roe v. Doe*, No. C 09-0682 PJH, 2009 WL 1883752, at *5 (N.D. Cal. June 30, 2009) (explaining that courts may strike new evidence raised for the first time in reply). The first is from Padraic McCoy, an attorney for the Tribal Defendants who worked with both lead counsel. Dkt. No. 259-3. It describes his history litigating this matter with the prior lead counsel. That category of information was discussed in McCoy's declaration filed with the motion. Any details that were not discussed should have been given that the reason these theories were not raised earlier is important to the parties' arguments. The other two declarations are from the Chairwoman and Vice-Chairwoman of the Tribe and describe their reliance on their prior counsel in litigating the case. Dkt. Nos. 259-1, 259-2. Again, those are facts that the Tribal Defendants now use to support the theory advanced in their motion. These declarations do not respond to issues raised for the first time in the Opposition; they could have been and should have been submitted with the motion.

[2] JW Gaming represents that two of the files are corrupted and inaccessible but I am able to access all three on the docket.

Second, the Tribal Defendants object to JW Gaming's Reply in Support of its Motion for Entry of Judgment. Dkt. No. 284. They claim that the Reply includes new arguments that should have been included in the Motion. In JW Gaming's Motion, it included an interest calculation on the breach of contract claim. *See* Judgment Mot. 8 n.10. In their Opposition, the Tribal Defendants objected on evidentiary grounds to the document that performed the mathematical calculations for that interest rate. Opposition to the Judgment Mot. ("Judgment Oppo.") [Dkt. No. 256] 6. In its Reply, JW Gaming argued that those objections were immaterial because the calculation of interest on the note is a question of law, which is the argument the Tribal Defendants object to. I will not strike anything from the Reply. First, the argument was entirely proper in light of the unexpected evidentiary argument in the Opposition. Second, I permitted the Tribal Defendants to file a supplemental brief, so any prejudice to them from the Reply is obviated.

Last, JW Gaming moves to strike an expert declaration attached to the Tribe's supplemental brief. Dkt. No. 275. It argues both that expert testimony is irrelevant to the interpretation of the Note and that the submission of an expert declaration is out of the scope of what I permitted, especially as JW Gaming would have no opportunity to reply to it. I agree that this is an inappropriate use of the leave I gave the Tribe. I gave the Tribe an opportunity to respond to the substantive calculations performed by JW Gaming. This expert declaration goes much further. For instance, the expert opines about how certain contractual clauses would be understood in his field of expertise. Additionally, this expert has never previously been disclosed. It is unfair to foist an untested expert on the other party when that other party will not have an opportunity to respond. At the very least, these are entirely new factual assertions included in a terminal reply that could not reasonably have been anticipated. *See Roe*, 2009 WL 1883752, at *5. Accordingly, the declaration—though not the Tribe's proffered interest calculations—will be struck.[3]

[3] The Tribe argues that I "granted the Tribe additional time to file its supplemental papers, including the desired expert declaration" because although my "Order reference[d] briefing only" the *request* for an extension "was specific regarding [counsel's] desire to obtain a necessary expert declaration." Judgment Supp. 2 & n.3. The order, however, said that I gave the Tribe "an

II. AMENDMENT OF PLEADINGS AND RECONSIDERATION OF JUDGMENT

The Tribal Defendants' motions for leave to amend and file a motion for reconsideration are based on the same fundamental argument: "new evidence" warrants altering the settled issue of the enforceability of the Note. As explained, both parties moved for judgment on this issue. I granted JW Gaming's motion on the pleadings that the Tribe breached the Note. The Tribal Defendants move to bring seven new counterclaims for rescission of the Note based on: (1) intentional misrepresentation, (2) negligent misrepresentation, (3) innocent misrepresentation, (4) concealment, (5) constructive fraud, (6) undue influence, and (7) mistake of fact. Dkt. No. 251-1 at 57–61. All of the counterclaims are based on the Tribal Defendants' purported "new evidence" discussed below. For the reasons that follow, both motions are denied and, even if the motion for leave to file a motion to reconsider had been granted, the motion to reconsider would be denied.

A. Reconsideration is Unwarranted

At the outset, it is important to nail down what precisely the "new evidence" that the Tribal Defendants argue supports reconsideration is because the Tribal Defendants inflate and blur it. The Tribal Defendants point to numerous statements in depositions taken of Tang, who was involved in the joint venture, that they argue were never previously known. This evidence fits into two categories: (1) alleged evidence that the joint venture was an alter ego of J2M Gaming Development, an LLC formed by JW Gaming and others to advance the casino project and (2) alleged evidence of the fraudulent statements and omissions.

The vast majority (fourteen of the Tribal Defendants' eighteen "bullet points," *see* Mot. 8) of the evidence that the Tribal Defendants rely on is merely of the first category—evidence that they contend shows that the joint venture is merely an alter ego of J2M Gaming Development. *See* Mot. 7–9. But that new evidence, even on the Tribal Defendants' account, is no reason to permit the counterclaims. Even if everything the Tribal Defendants allege about this alter ego theory were true, it would still not mean there was evidence of a misrepresentation that warranted

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opportunity to submit a supplemental brief within a week to address any perceived deficiencies in JW Gaming's calculation and to propose its own figure" and that I was extending the time to file a "supplemental brief." Dkt. No. 268. I did not give permission to violate the principles discussed by filing a new expert declaration.

rescission. Put another way, if the Tribal Defendants had the evidence of alter egos that they claim to but not the evidence of any misrepresentations, they would have no counterclaims and no rescission theory. Although these allegations are not entirely irrelevant to the proposed SAAC because the alleged misrepresentations came from these alleged alter egos, the *counterclaims* are based on the allegations that the Tribal Defendants reasonably relied on misrepresentations of material fact and were unaware of omissions of material fact in deciding to agree to the Note. Given the volume and nature of these allegations, it is hard to understand them as anything but padding to make the key "evidence"—the alleged misrepresentations—appear stronger than it is.

The actual counterclaims allege as follows. The alleged misrepresentation is that "the Tribe would be able to open a casino and receive gaming revenues within two years of February 2012." Counterclaims ¶ 46. The Tribal Defendants claim that this representation was false because JW Gaming was or should have been aware that "it was extremely unlikely if not impossible the Tribe would be able to open a casino within two years . . . or even three years . . . due to then existing market conditions." *Id.* ¶ 47. The alleged omission is "the true facts and circumstances surrounding the unavailability of financing and the inability to actually open a casino and start generating revenues within three years." *Id.* ¶ 48. According to the proposed counterclaims, the result is that JW Gaming induced the Tribe to contract knowing that it would not be able to gather sufficient revenue by the time of the maturity date of the Note. In short, the counterclaims depend on the alleged concealment of market conditions.

The Tribal Defendants cannot bring these counterclaims—which, incidentally, appear to be more in the nature of affirmative defenses—years late just because they did not prevail on their earlier motions and have now retained new lead counsel. Faced with that reality, the Tribal Defendants argue that the counterclaims actually stem from the discovery of new evidence, which would be a proper ground for reconsideration. But, as I explain, the Tribal Defendants' attempt to trace these rescission theories to Tang's deposition is not plausible.

I begin with the Tribal Defendants' own account of the "discovery" of new evidence. This narrative is advanced in a declaration filed by the Tribal Defendants' lead counsel, Roy, and repeated in their motion. Roy makes no mention of the alleged misrepresentations (either

affirmative or by omission) in Tang's first deposition on September 24 and 25, 2020. Instead, all of the purported revelations from that deposition concern the corporate structures and the entities involved in the joint venture. *See* Roy Decl. ¶¶ 7–8. It was, according to Roy, only "[f]ollowing these depositions," that he had "privileged discussions" with his clients. *Id.* ¶ 9. And *"[b]ased on those privileged discussions, . . .* [he] started to believe there was reason to think that the Tribe had been defrauded into entering into the Note, or mistakenly signed it." *Id.* ¶ 9 (emphasis added). Even from the start, therefore, any connection between Tang's deposition and these rescission theories is tenuous at best and cut from whole cloth at worst. At this point in the narrative, Tang had not said one word that indicated there was any misrepresentation. At most, crediting this account, something in the Tribal Defendants' "privileged discussions" led to that theory.

The Tribal Defendants then seek to shore up their account by pointing to the second deposition of Tang, on October 8 and 9, 2020. *Id.* ¶ 10. Again, much of that deposition is focused on conversation about alter egos and related issues. *See id.* There is, to be sure, discussion in some sense connected to the rescission theories. But that is no surprise as, by Roy's own admission, the new rescission theories had already entered his mind. More importantly, however, nothing Tang said in that deposition is cognizable "newly discovered evidence" supporting the rescission theories. In their motion, the Tribal Defendants point to several discrete pieces of testimony about the alleged misrepresentations. I address each in turn but note that Tang said at his October 8 deposition that he was not "involved in drafting" the Note at all, Dkt. No. 225-2 Ex. A (Oct. 8 Tang Deposition) at 275:2–4, undercutting the materiality of the Tribal Defendants' alleged reliance on him in the first place.

First, the Tribal Defendants state that "Mr. Tang testified" that he "believed that the casino would be built and generating revenues *within 2–3 years of February 2012*. Mot. 8 (emphasis in original). Again, Tang states he was not involved in the actual negotiation. This aside, Tang actually says, in the portion of his deposition the Tribal Defendants cite, "I *personally* thought that the casino *should* be built in two years after the J2M agreement was signed." Mot. Ex. 3 ("Tang Depos.") [Dkt. No. 251-3] at ECF 43, 214:4–6 (emphasis added).

Second, the Tribal Defendants characterize Tang as stating, "By early 2012, Mr. Tang and

the joint venture were well aware of changed market conditions that would have negatively impacted the Tribe's ability to open a casino, *but these conditions were never specifically disclosed to the Tribe*." Mot. 8 (emphasis in original). This allegation is the heart of the Tribal Defendants' counterclaims. The Tribal Defendants cite eight deposition pages in support of the summary above. It is revealing that they do not point to any specific statements in those eight pages. Looking to the substance of that portion of Tang's deposition, it is clear why. To start, Tang testifies to contrary; he says that these "market changes" *were* communicated to the Tribal Defendants. Tang Depos. at ECF 49, 233:18–25 ("We would tell the tribe every time we meet . . . . So yes, the tribe was fully aware of the change in the market."). Even if that testimony were disregarded, Tang testifies that these alleged changed market conditions—which the Tribal Defendants also do not identify with any specificity in their proposed SAAC—are general notions that financing and bond markets were worse and more uncertain at that time than prior to the 2008 financial crisis. *See, e.g.*, Tang Depos. at ECF 46, 230:25–231:17; 233:8–13.

Third, the Tribal Defendants contend that "[d]espite this knowledge, *it was specifically communicated to the Tribe in late 2011 and early 2012 that a casino would be opened* ***within 1–2 years of February 2012***." Mot. 8 (both emphases in original). And the Tribal Defendants again state that that Tang testified "[t]he joint venture partners discussed among themselves and *informed the Tribe in early 2012 that a casino would be open in* ***less than two years maximum***." *Id.* 9 (both emphases in original). The testimony they cite for both, however, is simply that the projections at the time were that construction could occur within one to two years, depending on the type of structure built. Tang Depos. at ECF 55, 259:3–263:8; ECF 60, 266:12–268:19.

Fourth, the Tribal Defendants characterize Tang as testifying that, "[i]n June of 2012, before the Note was signed, it was known that the Tribe wanted to pay off the JW Gaming loans from casino revenues, and the *Tribe was again specifically told by the J2M joint venture that it would be able to start generating gaming revenues* ***within two years***." Mot. 10 (both emphases in original). Once again, however, Tang's testimony is the same as before: depending on the type of structure constructed, the building process was projected to take either a year or two years. Tang Depos. at ECF 65, 290:2–10.

It is clear from this testimony that there is no "newly discovered evidence" from Tang's depositions that has motivated the rescission theories. Entirely missing from Tang's testimony—as opposed to the Tribal Defendants' characterization of it—is any hint that worsening in markets was somehow concealed. Moreover, the only alleged market conditions referenced were the general downturn in lending markets following the financial crisis. And the remainder of Tang's testimony is merely that building was projected to take one to two years, depending on the type of structure. Indeed, the Tribal Defendants' attempts to obscure what Tang actually said, in at least three ways, reveal the infirmity of the "support." First, the Tribal Defendants almost never directly quote Tang, relying instead on vague summaries that make mountains from molehills. Second, the Tribal Defendants sandwich the alleged operative facts—that is, the facts that actually form the basis of their proposed counterclaims—amid many other alleged alter ego "revelations" that do not support reconsideration. Third, the Tribal Defendants present a narrative of discovering previously unknown information from Tang while slipping in that "privileged conversations with clients" directly led to this recission theory. The Tribal Defendants cannot use that as the basis for reconsideration, however, because such information would have been within their knowledge previously.

What occurred here is plain. The Tribal Defendants long ago moved for judgment on this issue. They lost. Eventually, they removed their lead counsel and hired a new one. That new counsel developed a new theory to try to revive the issue. But because that untimely theory is not a ground for reconsideration, the Tribal Defendants went fishing for such a ground. They now latch onto testimony that they hope to fit into a narrative of fraud. For the reasons explained, this "new evidence" from Tang does not provide the basis for the proposed counterclaims.

The motion for leave to file a motion to reconsider is DENIED. Even if leave had been granted, I would deny the motion to reconsider because there is no new evidence that warrants reopening this issue.

B. Leave to Amend is Denied

The Tribal Defendants' motion for leave to amend is predicated on the same "new evidence" discussed above. For the reasons described, there is no valid reason to grant it in the

first place. The factors governing this decision, moreover, strongly disfavor the Tribal Defendants' gambit. *See Moore*, 885 F.2d at 538.

Most importantly, the Tribal Defendants' motion signals bad faith and would create undue prejudice to JW Gaming. The Tribal Defendants' attempt at amendment is not based on a good-faith discovery of new evidence but, instead, shows a bad-faith attempt to unsettle previous motions that were adjudicated unfavorably. As explained above, the record does not show that the Tribal Defendants seek to introduce their counterclaims based on Tang's depositions. It shows the opposite: they attempted to use Tang's depositions to find evidence for these new theories. Even that "evidence," however, does not adequately support their recission argument for the reasons explained. And there is obvious prejudice to JW Gaming. If I granted the Tribal Defendants' motions, it would undo an issue that was fully and aggressively litigated almost a year ago. If this were the result of genuine newly discovered evidence, the situation might be different. But here, it would be the result of a change in strategy unconnected to the evidence purporting to support it.

To the extent the other factors are relevant in this unusual procedural posture, they do not militate in the Tribal Defendants' favor. The Tribal Defendants repeatedly rely on the argument that they have "not previously moved to amend their answer." Reply 9. It is true that they did not previously "move" to amend; they previously amended without seeking leave to do so. As I explained when I granted a motion to strike that amendment, "the circumstances here suggest bad faith, namely that the Tribe filed the counterclaims in the 2019 Answer in order to avoid an adverse ruling on JW Gaming's pending motion for judgment on the pleadings." Prior Order 17. This is, accordingly, the second time that some of these defendants have attempted to amend in a manner that suggests bad faith.[4]

The delay here is undue because it is not actually based on the discovery of new evidence. If it were, undue delay might be less of a problem. *See United States v. Webb*, 655 F.2d 977 (9th

[4] The Tribal Defendants try to shift blame to their former lead counsel for this previous attempt at amendment. *Both* attempts to amend, however, signal bad faith. And, even if the Tribal Defendants' lead counsel changed, one attorney, Padraic McCoy, served as counsel on the previous motions regarding amendment and is still counsel now; there has been, consequently, at least some continuity in their legal team.

Cir. 1981) (explaining that delay alone "is an insufficient ground for denial of leave to amend"). Here, the Tribal Defendants' strategy was to move for judgment on this issue at an early stage and then aggressively litigate that issue, including by attempting to secure extraordinary mandamus relief related to discovery on it. After that strategy failed, they changed counsel and that new counsel has advanced this new theory.

The futility inquiry does not neatly graft onto this case because it is not a run-of-the-mill attempt at amending deficient pleadings, it is an attempt to escape final judgment using pretextual new evidence. To the extent that the proposed SAAC is predicated on this "new evidence," it is not meritorious for the reasons explained.[5]

Fundamentally, the Tribal Defendants' affirmative argument for being given leave to amend is not based on any newly discovered evidence. Even if there were some modicum of new evidence, the presence of bad faith and prejudice—and the lack of any factors in the their favor—makes denial appropriate. The motion for leave to amend is DENIED.

III. ENTRY OF JUDGMENT

JW Gaming moves to enter judgment on the breach of contract claim. It also consents, conditional on this entry of judgment, to dismiss its other claims with prejudice. The Tribal Defendants' only material counterargument is that they have moved to amend and reconsider. Accordingly, I will enter judgment under Federal Rule of Civil Procedure 54(b). First, the judgment is final as it disposes of the breach of contract claim in its entirety. Second, "there is no just reason for delay." Fed. R. Civ. P. 54(b). The only pending claim that would not be resolved once JW Gaming's remaining claims are dismissed and I enter judgment on this one is a crossclaim between the Tribal Defendants and Tang. Tang moved to dismiss that crossclaim and the Tribal Defendants filed a statement of non-opposition because they have reached a verbal settlement with Tang and are finalizing a formal settlement. There is no reason to wait for those

[5] The SAAC likely also suffers from other problems. Despite sounding in fraud, it does not describe the alleged misrepresentations with particularity. *See* FED. R. CIV. P. 9(b). Nor does it identify how gauzy "changes in market conditions" would have plausibly been material, especially because the underlying testimony talks only about the general nationwide downturn. It also does not attempt to plead that there would be a duty to disclose such widely observable, vague information.

parties to finish that process before entering judgment.[6]

The parties' remaining dispute is over the amount of prejudgment interest that has accrued on the Note. As noted, I permitted the Tribal Defendants to file a supplemental brief on the issue of how much interest was owed because they did not engage with that question in their Opposition. JW Gaming argues that the amount of interest owed is a question of law because it requires interpreting the Note, a contract. *See* Reply in Support of the Judgment Mot. ("Judgment Reply") [Dkt. No. 258] 3–4. The Tribe's supplemental brief also treats the issue as one of contract interpretation. *See* Supplemental Brief in Opposition to Judgment Mot. ("Judgment Supp.") [Dkt. No. 274] 2–4. The parties agree that California law governs this question because the breach claim was brought under California law. *See* Judgment Reply 3–4; Judgment Supp. 2 n.4.

"Interpretation of a contract is a matter of law." *Beck Park Apartments v. U.S. Dep't of Hous. & Urban Dev.*, 695 F.2d 366, 369 (9th Cir. 1982). The correct interpretation is the one that gives effect to the "mutual intention" of the parties. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18, 900 P.2d 619, 627 (1995), *as modified on denial of reh'g* (Oct. 26, 1995) (citing CAL CIV. CODE § 1636). The starting point for this analysis is always the language of contract itself. *Id.* "A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1170 (9th Cir. 2015). "An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable." *Id.* at 1171 (internal quotation marks

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[6] JW Gaming states that it is requesting entry of judgment now, in part, because of the "uncertainty" created by several of my previous decisions. Judgment Mot. 3. It contends that, "[w]hile the Court had previously indicated it could structure a remedy that would allow JW Gaming to recover simultaneously under its contract claim and fraud/RICO claims, the Court has indicated more recently that, at the time of judgment, 'JW Gaming will be required to elect just one remedy'." *Id.* (internal citations omitted). JW Gaming misunderstands my previous orders. In the first order it relies on, I denied the Tribal Defendants' motion for summary judgment. Dkt. No. 165. I explained that "[i]n the event of findings in favor of JW Gaming on the remaining claims, I can structure the remedy to avoid double recovery." *Id.* 5. In the second order, I denied JW Gaming's motion for summary judgment. Dkt. No. 237. I explained that JW Gaming, "cannot recover twice; depending on the outcome of its fraud and RICO claims, JW Gaming will be required to elect just one remedy." *Id.* 3. Far from being inconsistent or creating uncertainty, both holdings make the same point: if JW Gaming's multiple claims would result in double recovery, the remedy will be structured so that it can only recover once.

omitted). "Interpretation of a contract must be fair and reasonable, not leading to absurd conclusions." *ASP Properties Grp., L.P. v. Fard, Inc.*, 133 Cal. App. 4th 1257, 1269 (2005) (internal quotation marks omitted).

The parties first disagree over whether the Note contemplates simple or compound interest—the former would result in a smaller interest figure than the latter. They agree that, under California law, simple interest is the rule and compound interest is the exception. *See, e.g.*, *Westbrook v. Fairchild*, 7 Cal. App. 4th 889, 894–95 (1992); Judgment Reply 5 n.2 (collecting cases); Judgment Supp. 2 (same). Accordingly, "the interest charged is simple interest absent an explicit agreement by the parties to use compound interest." *Fitz Fresh, Inc. v. Mondragon*, No. C-08-02407 RMW, 2008 WL 4811457, at *2 (N.D. Cal. Nov. 5, 2008).

I agree with the Tribe that the Note requires simple interest. The relevant portion of the Note provides, "The principal balance of the Interim Tribal Loan shall bear interest, adjusted as of the first day of each month to a rate equal to the prime rate or reference rate last reported from time to time in the 'Money Rates' section of the Wall Street Journal, plus three (2) percent payable when all principal on the Interim Tribal Loan is payable." *See* Dkt. No. 1-4 at 10–20 ("Note"). The Note contains no explicit agreement to use compound interest. As a result, it cannot be interpreted to impose it.

JW Gaming resists this interpretation by relying on the language that the Note "shall bear interest, adjusted as of the first day of each month to a rate equal to the prime rate or reference rate last reported from time to time in the 'Money Rates' section of the Wall Street Journal." Judgment Reply 5 n.2 (quoting Note at 11). But that language, by its plain meaning, simply establishes what operative interest *rate* will be used and how often that rate will be adjusted. It does not call for compounding the interest—that is, adding the accrued interest to the principal. It certainly does not do so clearly and explicitly as the law requires. And none of JW Gaming's cited cases use that language or similar to impose compounded interest.

Next, the parties disagree over the date from which interest should be calculated. JW Gaming argues that it should be from when the Note was entered into, July 10, 2012. The Tribal Defendants argue that interest should be calculated from three years later, July 10, 2015, the date

by which a casino would have to be instructed to avoid immediate payment. *See* Judgment Supp. 3–4. The Note provides, "if the Tribe fails to open a casino or other gaming facility within three years (3) of the date listed above, at the outset of this Promissory Note, then this Promissory Note will be immediately due and payable." Note at 11. As a case from this District relied on by both parties says,

> California law permits court[s] to award prejudgment interest on contract claims. Cal. Civ. Code § 3287. Where the contract specifies the amount and the date the amount was due, a plaintiff is entitled to prejudgment interest and the interest accrues from the date the money was owed. *Id.* § 3287(a). On the other hand, "unliquidated" contract damages accrue prejudgment interest from the date of the filing of the complaint—at the earliest—and its award is left to the discretion of the court. *Id.* § 3287(b).

Fitz Fresh, 2008 WL 4811457, at *2.

The Tribe's interpretation of the Note twists the plain language and would lead to anomalous results. There is no indication in the plain language of the contract that interest would only begin to accrue when the due date was reached. If the Tribe *had* built the casino—making the three-year date irrelevant—the Tribe would have to pay the "principal and interest" on the Note in quarterly installments equal to 20% of its revenue. Yet under the Tribe's interpretation, no interest would have accrued during the time before the casino opened. In other words, if the project had been opened, JW Gaming would make no money from its loan because only the principal would be paid back. Instead, the Note shows that interest was to operate in the usual way: it would begin to accrue when the Note was entered into. The Tribe passingly argues that, at least, there is an ambiguity in the contract. Judgment Supp. 4 n.7. There is not because the Tribe's interpretation would render the Note incoherent. *See* CAL. CIV. CODE § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992) (holding that if the language of the contract is "clear and explicit, it governs").

JW Gaming calculates that the simple interest owed from July 10, 2012, is $3,121,312.06 on the $5.38 million Note. Dkt. No. 267. The Tribe provided no alternative calculation if I determined that interest accrued from 2012, even though I permitted it to file a supplemental brief and then allowed it to file that brief late, after it saw JW Gaming's alternative calculation.

Accordingly, there is no dispute about this figure and the Tribe has had more than enough opportunities to offer its own.

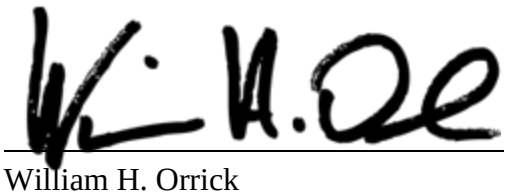
For the reasons discussed above, the motion to enter judgment on the breach of contract claim and to dismiss JW Gaming's other remaining claims is GRANTED.

CONCLUSION

The Tribal Defendants' motions for leave to amend its answer and counterclaims and file a motion for reconsideration are DENIED. JW Gaming's motion for entry of judgment is GRANTED. JW Gaming's other claims are DISMISSED WITH PREJUDICE.[7] Judgment will be entered accordingly.

IT IS SO ORDERED.

Dated: January 14, 2021



William H. Orrick
United States District Judge

[7] Dismissal is appropriate under FRCP 41(a)(2) because it is "at the plaintiff's request" and "on terms that the court considers proper." Indeed, all parties to these claims urge that they be dismissed.