3rd Civil No. C091801

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT, DIVISION ONE

YAVAPAI-APACHE NATION, a federally recognized Indian tribe

Plaintiff, Respondent and Cross-Appellant,

vs.

LA POSTA BAND OF DIEGUENO MISSION INDIANS, a federally recognized Indian tribe

Defendant, Appellant, and Cross-Respondent.

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Superior Court for the County of Sacramento, Case No. 34-2018-00238711-CU-MC-GDS
The Honorable David I. Brown

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INTRODUCTION

On April 27, 2021, the Court ordered simultaneous supplemental briefing on two issues:

> 1. An administrative order from the Yavapai-Apache Nation Tribal Court states: "Where the Civil Code and the Rules of Procedure [of the tribal court] are silent, the Federal Rules of Civil Procedure shall guide advocates and un-represented parties." (LP 162.) Considering this order, should we rely on the Federal Rules of Civil Procedure (and in particular, Rule 54(b) of the Federal Rules of Civil Procedure) to determine whether the tribal court's March 8, 2018 decision was an appealable judgment?
>
> 2. If we conclude that we should rely on Rule 54(b) to determine whether the tribal court's decision was an appealable judgment, and if we conclude that the tribal court's decision was not an appealable judgment under this rule, should that conclusion affect our consideration of whether the tribal court's decision was a "final determination" within the meaning of the parties' agreement titled "Second Amended and Restated Loan Agreement"? (LP 113.)

(4/27/2021 Ltr. Court to Parties ["Letter"].)

The Court's questions focus on the interplay between the March 8, 2018, interlocutory Judgment and Order[1] (the "YAN Judgment"), entered in *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Yavapai-Apache Tribal Court, 2015, No. CV-2015-00023) (the "YAN Court Action") and the parties' loan agreement, the Second Amended and Restated Loan Agreement ("SARLA"). (1 LP 144-159; 1 LP 70-130.)

Defendant-Appellant La Posta Band of Diegueno Mission Indians' ("La Posta's") short answers to the Court's questions are that:

1. Yes, the Court should look to the Federal Rules of Civil Procedure Rule 54 ("Rule 54") and under Rule 54, the Court should conclude that the YAN Judgment is not an appealable judgment;

[1] The YAN Judgment is captioned "Judgment and Order." (1 LP 144)

2. Yes, the Court's conclusion that the YAN Judgment is not appealable under Rule 54 leads to the conclusion that YAN has not obtained a "final determination" as required by the SARLA.

Moreover, even if the Court were to conclude that the YAN Judgment *is an appealable judgment* under Rule 54, the YAN Judgment still does not constitute a final determination under California law. (See 1 LP 112, SARLA § 13.01 (the SARLA shall be construed according to California law.)

Without a "final determination," Plaintiff-Appellee Yavapai-Apache Nation's ("YAN's") claims fail and the Sacramento Court's decision granting YAN summary disposition must be reversed. (See 8 LP 2527-2543; 9 LP 2548.)

RELEVANT FACTS

La Posta will not belabor the Court with any lengthy background and relies fully on the background and arguments supplied in its Appellant's Opening Brief and Reply Brief. However, to answer the Court's questions, a short context is appropriate.

The YAN Judgment

YAN brought three causes of action before the Yavapai-Apache Tribal Court ("YAN Court"): (1) a claim for fraudulent concealment and (2) a claim for negligent misrepresentation, both based on the same facts considered by the California jury in the San Diego Action[2] and contrary to this Court's findings in *La Posta I*,[3] and (3) a claim for a declaration that if there was a finding of fraud then the SARLA allowed YAN to recover *any* judgment, including the San Diego Judgment for $44 million, from La

[2] *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, Super. Ct. San Diego County, 2013, No. 37–2013–00048045–CU–BC–CTL ("San Diego Action,").

[3] *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., June 28, 2017, No. D069556) 2017 WL 2791671, at *3 ("*La Posta I*").

Posta's Revenue Sharing Trust Fund distributions ("RSTF"). (2 LP 374-383; 1 LP 136; 8 LP 2203-2205.)

YAN's theory relies on its self-serving interpretation of the language in SARLA § 13.03(a)—that La Posta "shall be obligated beyond its interest in the Collateral" and YAN "may seek a deficiency judgment" for damages "from and after" a "final determination" of fraud—to mean that if YAN can prove fraud, it can recover the San Diego Judgment from La Posta's trust assets – its RSTF.[4] (*E.g.*, 2 LP 390-391.) YAN's strategy in YAN Court was identical to its first effort in San Diego and its third effort in Sacramento. (2 LP 390-391; 1 LP 53-58.) But YAN was unable to obtain recourse in San Diego and chose to pause, rather than complete, its YAN Court Action in favor of a third suit in Sacramento.

The YAN Court bifurcated the case and held a trial on the first two fraud actions, saving the declaratory action for a separate trial—if YAN could not prove fraud, the declaratory action would be mooted (also similar to the posture in San Diego). (1 LP 144-145.)

On March 8, 2018,[5] after the first portion of the bifurcated trial, the YAN Court entered the YAN Judgment ordering as follows:

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[4] In full, the second sentence of SARLA § 13.03(a) reads: "Notwithstanding the foregoing sentence, [La Posta] shall be obligated beyond its interest in the Collateral, and [YAN] shall be entitled to seek and may seek a deficiency judgment against [La Posta], as follows . . . (iii) from and after the date [La Posta] commits any act of fraud in connection with [YAN], any Obligation or any Loan Document, but only upon final determination of such matter (A) by a court of competent jurisdiction or (b) pursuant to an arbitration proceeding." (1 LP 113.)

[5] The YAN Judgment was entered on March 8, 2018— three years after the San Diego Jury Verdict finding no fraud (2 LP 577-578), just under two years after the YAN Court Action the first portion of the bifurcated bench trial on fraud, and just under a year after the 4th Division issued its opinion confirming that there could be no fraud of any species upon the facts alleged in the San Diego and YAN Court Actions. See *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., June 28, 2017, No. D069556) 2017 WL 2791671, at *3 ("*La Posta I*"). La Posta field *La Posta I* as

> ORDERED the court finds in favor of the plaintiffs Second Cause of Action under the complaint for Negligent Misrepresentation and enters judgment against La Posta and awards damages,
>
> FURTHER ORDERED the court confirms the parties' stipulation as to damages in the amount of $262,081.

(1 LP 158; capitalization in original.) The YAN Judgment does not say that it is a final judgment. Instead, the YAN Court made it clear in the YAN Judgment that there would be a subsequent proceeding on YAN's third cause of action:

- "This matter came on for a bi-furcated bench trial on November 15, 2015 and on November 16, 2016." (1 LP 144);

- "The plaintiffs Third Cause of Action sought a declaration that upon a finding of any act of fraud, the plaintiff may collect the entirety of any judgment based on either an act of negligent misrepresentation or fraudulent concealment as a basis for a breach of the Second Amended Restated Loan Agreement (SARLA). The court reserved such a finding subject to a determination whether the defendant committed any act of fraud under the Plaintiffs First or Second Cause of Action in the complaint." (1 LP 144-145);

- "The court has before it the issue whether La Posta committed any act of fraud. If La Post committed such an act under the SARLA a determination would be required on whether "Excluded Assets" are assets subject to a deficiency judgment." (1 LP 146); and,

- "YAN seeks a finding that La Posta committed an act of fraud and La Posta may be subject to a deficiency judgment for these "Excluded Assets" SARLA, Sections 13.04, 13.03 (a). This issue is not before the court." (1 LP 147.)

Despite the clear language in the YAN Judgment that informed the parties that the second half of the bifurcated trial was forthcoming, the YAN Court never scheduled further proceedings after issuing the YAN Judgment. YAN never asked the YAN Court to continue the proceedings and La Posta did not press YAN to prosecute the remainder of its case. Instead, YAN put the remainder of its YAN Court Action on pause, fully

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supplemental authority with the YAN Court on June 28, 2017, just about a year before the YAN Judgment. (8 LP 2338-2341.)

invested in the theory that this home-court decision meant that YAN could leave the YAN Court Action pending and unresolved[6] (without consequence) and start another lawsuit seeking the same relief in Sacramento, culminating in the present appeal.[7] YAN did this because the CGCC told YAN that needed a California Court order directing the CGCC to pay La Posta's RSTF to YAN. (1 LP 209; 1 LP 275-277.)

La Posta did not put much stock in the self-serving findings of the YAN Judgment — it had no effect on its own. Instead, La Posta fully relied upon *La Posta I* and this Court's explicit finding that the San Diego jury "necessarily would have found La Posta was not liable for negligent misrepresentation," meaning California would be disinclined to recognize an out of state judgment directly contrary to the findings of a California Jury and this Court. *La Posta I* at *10. La Posta reasonably believed that a California state court would be bound by *La Posta I* and refuse to recognize the contrary YAN Judgment. YAN disregarded *La Posta I* and pushed forward in its multi-fora attack on La Posta nonetheless.

For the reasons described below, the YAN Judgment is not appealable, which necessarily means that the YAN Judgment is not a "final determination" under the SARLA, YAN's law and rules, Rule 54, or California authority. As such, the Sacramento court erred granting YAN's motion for summary judgment.

ARGUMENT

I. The Court should rely on Rule 54(b) to find the YAN Judgment was not an appealable judgment.

[6] To La Posta's knowledge, and there is no evidence to suggest otherwise, the YAN Court Action remains open and pending.

[7] Rather than pursue the YAN Court Action to finality then face domestication of a final YAN judgment, YAN sought to avoid the TCCMJA and comity with its Sacramento Action and claiming the suit is a horse of a different color. (1 LP 209; 1 LP 275-277.)

The Court's first question asks whether the Court should rely on Rule 54(b) to determine whether the YAN Judgment was an appealable judgment. All YAN authority is silent on the question of "finality" and "appealability." As such, the Court should look to the Federal Rules of Civil Procedure and rely on Rule 54(b).

Based on the language in the YAN Judgment itself, as well as on YAN's position that a finding of fraud was merely a prerequisite to the relief it sought, La Posta has never considered the YAN Judgment to be "appealable;" it was an interlocutory order in a bifurcated proceeding. (*E.g.* 1 LP 144-147.) Contemporaneous to the entry of the YAN Judgment, La Posta chose not to seek an interlocutory appeal and instead wait for a final judgment following YAN's declaratory action. Meanwhile, YAN argues both finality and appealability exist under the Yavapai-Apache Nation Tribal Court Rules of Civil Procedure ("YAN Court Rules"), and in the alternate, YAN footnotes:

> To the extent The Tribal Court's rules are silent as to whether a bifurcated judgment is final, 'the Federal Rules of Civil Procedure shall guide advocates and un-represented parties' . . . The Federal Rules give court discretion to enter a partial final judgment when bifurcation has been ordered. (Fed. R. Civ. P. R. 54(b); id. Rule 42(b).) That is precisely what the Tribal Court did when it 'enter[ed] judgment against La Posta.' (1 LP 158.) Rule 54(b)'s requirement that a court find no just cause for delay does not, of course, limit the Tribal Court, where the rule is merely a guide.

(Respondent Yavapai-Apache Nation's Brief ("Response"), p. 62 n. 13.) But YAN's footnote supplies an incomplete analysis of Rule 54 and the federal rules are more than merely a "guide." (1 LP 171 ["Any practice or procedure not addressed in these Rules shall be conducted in conformance with the applicable Federal Rule of Civil Procedure unless to do so would produce an unfair or unjust result."].)

As described below, the YAN Court Rules only explain what a "judgment" is and when it is "complete," and no YAN authority clearly identifies when a judgment is "final" or "appealable."

A. The YAN Court Rules are silent as to what constitutes an "appealable" judgment.

As the Letter explains: "[w]here the [YAN] Civil Code and the Rules of Procedure are silent, the Federal Rules of Civil Procedure shall guide advocates and un-represented parties." (1 LP 162.) What is more, the YAN Court Rules themselves require more than guidance—the rules require adherence: "Any practice or procedure not addressed in these Rules *shall be conducted in conformance* with the applicable Federal Rule of Civil Procedure unless to do so would produce an unfair or unjust result." (1 LP 171; emphasis added.)

It is not difficult to review the entirety of the YAN Court Rules, as well as the YAN Appellate Rules, the YAN Law & Order Code, and the YAN Constitution to realize that they are all silent about whether a "Judgment and Order" is appealable or final.[8] No YAN authority addresses the practice or procedure for determining whether a judgment is "appealable" or "final." What is more, the limited references to "appealability" are entirely circular, each referring to a different set of rules or law but none providing any insight.

1. The YAN Court Rules.

There are only a few YAN Court Rules relevant to judgments and orders.

YAN Court Rule 22 states, in pertinent part, that after trial the judge "shall issue a written opinion, including findings of fact, conclusions of law, order and judgment," but

[8] "We interpret court rules in accordance with the cardinal rules of statutory construction, liberally construing them to facilitate the court's mandate to do justice between the parties." *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1321, as modified on denial of reh'g (Oct. 17, 2000). "We accord a challenged rule a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." *Id*. "If possible, we attribute significance to every word, phrase, sentence and part of a rule in pursuit of its underlying purpose, as its various parts must be harmonized by considering them in the context of the rule framework as a whole." *Id*.

also that "[t]he trial judge may, where he or she deems it appropriate, supplement the findings, conclusions and order with a memorandum." (1 LP 193.) The second part of this rule suggests that any judgment and order issued pursuant to Rule 22 is not final because the rule expressly allows the judge, *sua sponte*, to supplement the judgment and order with a memorandum.[9] See, *e.g*., *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper* (9th Cir. 2001) 254 F.3d 882, 885 (explaining the general rule to rescind an interlocutory order: "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient."); *quoting Melancon v. Texaco, Inc*. (5th Cir.1981) 659 F.2d 551, 553.

YAN Court Rule 23 § 1 defines a judgment as "any final order of a trial judge made after a trial from which an appeal is available. No special form of judgment is required." (1 LP 193.) YAN Court Rule 23 § 2 explains that:

> every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief is not demanded in the pleadings. It may be given for or against one or more of several claimants; and it may, if justice so requires, determine the ultimate rights of the parties on each side as between or among themselves.

Id. The rule continues, providing that "[j]udgment may consist of an order of the Court" that awards money damages, directs the surrender of property, directs performance or to

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[9] This aligns with the authority suggesting that "[t]he difference between "interim order" and "final judgment" it turns out is the difference between lightening and lightening bug." *Quest Internat., Inc. v. Icode Corp*. (2004) 19 Cal.Rptr.3d 173, 180, *review granted and opinion superseded sub nom. Quest Intern. v. Icode Corp*. (2005) 23 Cal.Rptr.3d 693. "An 'order' is defined in Code of Civil Procedure section 1003 as any 'direction of a court or judge, made or entered in writing, and not included in a judgment....' Since an application for an order is a motion (Code Civ. Proc., § 1003), another way of defining an order is the court's written ruling on a motion. A judgment on the other hand is the 'final determination of the rights of the parties in an action or proceeding.' (Code Civ. Proc., §§ 577, 1064.) Thus while there may be numerous orders made throughout a proceeding, there is only one judgment." *Passavanti v. Williams* (1990) 225 Cal. App. 3d 1602, 1605.).

stop performance, or grants other appropriate relief. (1 LP 194.) And YAN Court Rule 23 § 5 explains that "[a] judgment is complete and shall be deemed entered for all purposes when it is signed and filed as provided herein." *Id.*

Rule 23 neither suggests criteria for a "final" judgment nor requires that every judgment be deemed "final," even if it awards relief and is entered. While a judgment may be "complete" when signed and filed, that still leaves open the issue of whether it is appealable. Put another way, Rule 23 is silent on the question of finality because the rule does not state that every order that grants relief is a final judgment and does not prohibit non-final orders from also granting relief.

The YAN Judgment was signed and filed, so the most that can be said is that the YAN Judgment was "rendered," "entered," and "complete" under Rule 23 § 5. *Id.* While the YAN Judgment was an order issued "after a trial" awarding money damages, it was a bifurcated trial, and nothing indicated an "appeal [was] available" as provided by Rule 23 § 1. To the contrary, the YAN Judgment suggested that it was not final and there was additional proceedings forthcoming, as explicitly noted by the YAN Court in its order. Other than this limited relevance, none of the above-cited rules speak to finality or appealability.

2. The YAN Appellate Rules, Law & Order Code and Constitution.

YAN Court Rule 32, entitled "APPEALABLE ORDERS," suggests it may be relevant, but reads with little substance: "An appeal may be taken to the Yavapai-Apache Court of Appeals in accordance with the Appellate Rules of the Court? [sic]." (1 LP 200.) But the YAN Appellate Rules merely direct litigants to other sources, explaining that an appeal begins by filing a "Notice of Appeal," and that the "Appellate Court will review the Notice of Appeal, [sic] and determine whether it meets the criteria of review for the Appellate Court as set forth in the Yavapai Apache Nation's Constitution, Law & Order Code, and these Rules." (1 LP 206.) The YAN Appellate Rules do not have "criteria of review."

The Law & Order Code is similarly unhelpful. YAN's Law & Order Code,[10] Chapter Three, governing the Court of Appeals, states in pertinent part that "[t]he Court of Appeals may hear appeals resulting from all final orders or judgments rendered by the Trial Court, appeals of other orders of the Tribal Trial Court subject to interlocutory appeal by law, and such original actions as may be provided by tribal law . . . " (Available at https://yavapai-apache.org/documents/judicial-code/ .) Just as with the YAN Appellate Rules, the Law & Order Code does not have criteria for review and does not elaborate on when an order is "final" or which orders, if any, are "subject to interlocutory appeal by law."

Finally, the YAN Constitution, Art VI § 12 says simply that "[a]ny party, to a civil action, or a defendant in a criminal action, who is dissatisfied with the judgment or verdict may appeal therefrom to the Yavapai-Apache Tribal Court of Appeals." (6 LP 1450.) The phrases "the judgment" and "dissatisfied" are not helpful to understand appealable or finality.

To distill YAN law on the matter, YAN Court Rule 23 explains that while some judgments are final, not all judgments are final, and YAN Court Rule 32 points to YAN Appellate Rules to determine whether a judgment is appealable; YAN Appellate Rule 7 points to the Law & Order Code and the Constitution. The Law & Order Code has no criteria and the Constitution simply requires "dissatisfaction" to appeal. No YAN authority is helpful to understand whether the YAN Judgment is "final" or "appealable," rendering YAN Court Rules silent on the topic, thus triggering the federal rules.

B. The YAN Judge did not treat the YAN Judgment as an appealable judgment.

Alongside YAN's laws and rules, the Court should consider the instructions from the YAN Judge that authored the opinion—his intention is made clear within the YAN Judgment itself.

[10] The "Law & Order" code appears to be titled the "Judicial Code" on YAN's website.

As discussed above, the YAN Judge confirmed that the YAN Judgment was only part of "a bi-furcated bench trial on November 15, 2015 and on November 16, 2016," (1 LP 144), and that "*The court reserved such a finding [on YAN's third cause of action] subject to a determination whether the defendant committed any act of fraud under the Plaintiffs First or Second Cause of Action in the complaint."* (1 LP 144-145; emphasis added). The YAN Judge also explained that the issue at trial was "whether La Posta committed any act of fraud," and that "[i]f La Post [sic] committed such an act under the SARLA a determination would be required on whether 'Excluded Assets' are assets subject to a deficiency judgment," (1 LP 146), but "[t]his issue is not before the court." (1 LP 147.) The YAN Judge's language does not suggest that the YAN Judgment is intended to be "final" or "appealable," and, in fact, strongly implies the opposite.

To summarize the response to the Court's first question, all YAN authority is silent as to what constitutes a "final" and "appealable" judgment. The YAN Judgment gives every indication that the YAN Judgment is not final because there are additional proceedings necessary. Accordingly, if this Court looks to confirm that the YAN Judgment is not "final" or "appealable," it should look to Rule 54.

II. The YAN Judgment is not a "final determination" needed to satisfy SARLA § 13.03(a).

The Court's second question is premised upon the conclusion that Rule 54(b) applies and that the YAN Judgment is not appealable. This is the correct conclusion.

With that conclusion, the YAN Judgment cannot be a "final determination" under SARLA § 13.03(a). Consequently, YAN necessarily cannot meet the requirements of § 13.03(a), and the Sacramento Court erred granting YAN's motion for summary disposition.

It is irrefutable that an appeal of the YAN Judgment would have been an interlocutory appeal—the matter was bifurcated and not concluded.[11] Rule 54(b) allows appeals of interlocutory orders under certain circumstances:

> 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. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54. The "historic rule . . . has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute." (Advisory Committee Notes to Fed. R. Civ. P. 54; citations omitted.) Rule 54(b) created an exception to finality and was originally adopted "in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case." *Id*.

The Supreme Court warns that "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. General Elec. Co.* (1980) 446 U.S. 1, 8. And, the Ninth Circuit has explained that "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of

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[11] See *e.g.*, *Doutherd, v. Montesdeoca, et al.,* (E.D. Cal., May 5, 2021, No. 2:17-CV-02225) 2021 WL 1784917, at *2 (where an order granting summary judgment on all but one claim was interlocutory in nature and not a final judgment); *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, *as modified (May 26, 1994)* ("A judgment that disposes of *fewer* than all of the causes of action framed by the pleadings, however, is necessarily 'interlocutory' [] and not yet final, as to any parties between whom another cause of action remains pending.")

proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co., Inc. v. Archer* (9th Cir. 1981) 655 F.2d 962, 965.

More specifically, "[t]he trial court should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order," that "include a determination whether . . . the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court."[12] *Id*. Similar "legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result, documented by further and specific findings." *Id.*

Considering the backdrop and limits to Rule 54, it is apparent that the YAN Judgment is not appealable.

A. The YAN Judgment is not final or appealable under federal authority.

The Supreme Court has "outlined [two] steps to be followed in making determinations under Rule 54(b)" for appealability of an interlocutory decision. *Curtiss-Wright,* 446 U.S. at 7. Under the first step, there is a two part analysis for a court to determine if it is dealing with a final judgment: (a) "[i]t must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief," and (b) "it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id*.; *quoting Sears, Roebuck & Co. v. Mackey* (1956) 351 U.S.

[12] Also, a district court makes determinations under Rule 54(b) upon a party's efforts to certify the interlocutory order. See *Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc.,* 776 F.2d 1414, 1416 (9th Cir. 1985) (order disposing of fewer than all claims or parties is not appealable absent express determination from district court that there is no just reason for delay under Rule 54(b))." For reasons described below, La Posta never moved to certify the YAN Judgment, so any analysis over appealability begins with the fact that the procedural prerequisites have not been met or even attempted.

427, 436. Under the second step, if there is a "final judgment," "the district court must go on to determine whether there is any just reason for delay. *Id.* at 8.

As an initial matter, the YAN Court did not "expressly determine" the second step was met, as is required under Rule 54(b). The YAN Court's failure to make such an "express" finding did not "end the action as to any of the claims" or render a "final judgment." Rule 54(b). The analysis could end there, however, even a cursory analysis shows that the YAN Judgment is not appealable under any circumstances.

Here, under the first step, the YAN Judgment it is not a "judgment"—it is not a decision upon a cognizable claim for relief because the relief YAN ultimately sought was a declaratory ruling that it was entitled to seize the RSTF.[13] *Curtis-Wright*, 446 U.S. at 8. In the same way, the finding of fraud is not "final" as it serves merely as a stepping stone to YAN's third cause of action and it is not a disposition of a claim—YAN has rejected it as a disposition of a claim and argues strongly that it is only a "condition precedent."[14] Under this first step in the Rule 54 analysis, the YAN Judgment is not a 'final judgment."

Under the second step of the Rule 54 analysis, when deciding whether there are no just reasons to delay, a district court must consider two components: (1) judicial administrative interests and (2) the equities involved. *Curtiss-Wright*, 446 U.S. at 8.

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[13] See, *e.g.*, Response p. 17 ("YAN has never sought to enforce the Tribal Court's money judgment. Why would it, when the Tribal Court judgment is for just over $262,000 while the San Diego judgment is for nearly $49 million? [Citation.] So quite logically, YAN's complaint expressly disclaimed any effort to enforce the Tribal Court judgment and instead sought a declaration concerning enforcement of the San Diego judgment.")

[14] See, *e.g.*, Response pp. 42-43 ("The existence of the Tribal Court judgment's fraud finding is, of course, important as a condition precedent to YAN's contractual right to compensation from La Posta's RSTF payments, which is triggered 'only upon final determination of [fraud] by a court of competent jurisdiction.' [Citation.] But that is simply a fact, like any other fact pleaded in a complaint, and YAN has never sought to enforce the Tribal Court judgment itself. The fact of a fraud finding is no different than any other condition precedent, like 'the plaintiff performed,' 'the oblige failed to pay' or 'the goods were delivered in satisfactory condition.' There is a finding of fraud, now final, from a court to whose jurisdiction the parties contractually consented.")

1. Here, the judicial administrative interest weigh against appealability.

The court must consider judicial administrative interest "to assure that the application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.'" *Curtiss-Wright,* 446 U.S. at 8; *quoting Sears, Roebuck & Co.,* 351 U.S. at 438.

A court may consider several factors: (1) whether certification would result in unnecessary appellate review; (2) whether the claims finally adjudicated were separate, distinct, and independent of any other claims; (3) whether review of the adjudicated claims would be mooted by any future developments in the case; (4) whether an appellate court would have to decide the same issues more than once even if there were subsequent appeals; and (5) whether delay in payment of the judgment would inflict severe financial harm. *Wood v. GCC Bend, LLC* (9th Cir. 2005) 422 F.3d 873, 878 n. 2 (enumeration added); relying on *Curtiss-Wright Corp.,* 446 U.S. at 8. Under these "judicial administrative interest factors," the YAN Judgment is not appealable.

Here, the first two factors go hand-in-hand and weigh against appealability. The YAN Judgment was not a final adjudication of separate, distinct, and independent claims so an appeal would have been an unnecessary review half-way through the bifurcated case. La Posta was not "aggrieved"[15] by the decision on fraud because YAN disclaimed any damages for fraud—it was a "condition precedent" in YAN's strategy to seize La Posta's RSTF to recover for its *breach of contract* damages, *i.e.*, the San Diego Judgment of $44 million. (Response p. 42.) By waiting until after the second part of the bifurcated trial, La Posta avoided an unnecessary appeal because La Posta could have successfully

[15] See, *e.g.*, *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736–737 ("Any 'aggrieved party' may appeal from an adverse judgment . . . One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment . . . Appellant's interest 'must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." [cleaned up].)

shown the SARLA never allows recourse to Excluded Assets, even with a finding of fraud.[16]

Under the third factor, while the future developments in the case, *i.e.*, trial on YAN's third cause of action, would not have "mooted" the review of the fraud decision, La Posta's successful defense to the third cause of action would have assured that the San Diego Judgment remained uncollectible, which weighs against appealability.

Under the fourth factor, the record already shows that appellate courts have had to review the same issue on appeal. By seeking an interlocutory appeal of the YAN Judgment to YAN Appellate Court, La Posta would have asked the YAN Appellate Court to review the same issues already decided in *La Posta I*. The parties would have litigated fraud a fourth time (San Diego, *La Posta I*, YAN Court, and YAN Appellate Court) and the parties would still face another appellate review of the same issues by this Court when YAN sought to domesticate its (then) final judgment. Appeal of the interlocutory YAN Judgment would plainly not have favored judicial administrative interests.

Finally, under the last factor, delay in payment of the San Diego Judgment would not cause harm because the failed casino had no recoverable assets. All YAN was entitled to when the YAN Judgment was issued, at best, was a deficiency judgment of $262,081—an amount YAN has scoffed at.[17] (1 LP 113 [SARLA § 13.03(a) allowing a deficiency judgment; 1 LP 158 [confirming the parties' stipulation of $262,081].) YAN understands that if it ever finds success, it will never recover full damages.[18] For these

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[16] Moreover, as set forth below, La Posta's decision not to seek an interlocutory appeal simply merged the claims and preserved La Posta's right to appeal the judgment after adjudication of YAN's third cause of action related to contract interpretation of the SARLA and determination of YAN's rights, if any, to the RSTF.

[17] See Response p. 17 ("YAN has never sought to enforce the Tribal Court's money judgment. Why would it, when the Tribal Court judgment is for just over $262,000 while the San Diego judgment is for nearly $49 million?")

[18] See, *e.g.*, YAN's Petition for Writ of Supersedeas or Mandate or Other Appropriate Relief, filed August 13, 2020, p. 8 ("This is because the $275,000 paid to La Posta each

reasons, and considering that when the YAN Judgment was issued, YAN had already litigated five years, additional time would not cause harm and this last factor weighs against appealability.

These judicial administrative factors weigh against appealability, especially when considering the practical decision not to appeal.

2. Here, the equities heavily weigh against appealability.

Second, the court must consider the equities involved, which are largely fact specific. *Curtiss-Wright Corp.,* 446 U.S. at 8. Courts should find that "there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal." *Southeast Banking Corp.* (11th Cir 1995) 69 F.3d 1539, 1547 n. 2; see also *Harriscom Svenska AB v. Harris Corp.* (2d Cir. 1991) 947 F.2d 627, 629.

These equity factors weigh against appealability as well because there was no need for La Posta to seek an interlocutory appeal and no harm to YAN when La Posta chose to wait for a final judgment.

Contemporaneous to the entry of the YAN Judgment, as it was La Posta's prerogative to appeal, it did not make sense for La Posta to seek an interlocutory appeal and delay a trial on YAN's third cause of action. In fact, La Posta had no consequences from the fraud ruling—YAN still had an uncollectible judgment and YAN had not pushed to prosecute its case. Had YAN found delay intolerable, it would have pressed its judge initially to issue the YAN Judgment rather than wait 14 months before taking action. (5 LP 1202-1203.) In practice, neither party was treated unjustly (or dissatisfied) by La Posta's decision not to seek an interlocutory appeal.

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quarter does even cover the interest on the prior 2015 judgment, and La Posta has admitted it has no other assets to pay that judgment. Because the RSTF payments, even once properly directed to Yavapai, will not cover even the interest accruing on the underlying judgment, Yavapai cannot and will not ever be made whole even after it prevails on La Posta's appeal.")

Other equity considerations are at play here, too. An interlocutory appeal would have been costly for both parties, so restraint was the prudent choice, particularly for La Posta and its extremely limited resources.

Also, by the time the YAN Judgment issued, *La Posta I* was nearly a year old and had been filed with the YAN Court. From La Posta's 2018 perspective, *La Posta I* had already resolved the question of fraud as far as California was concerned, so the YAN Action itself was futile. Put differently, La Posta relied on *La Posta I* and even though the YAN judge ignored this Court, La Posta knew that if YAN ever came to California with its contrary fraud opinion, *La Posta I* would block recognition. La Posta reasonably believed that that a California Superior Court would consider a California appellate opinion before an out-of-state contrary judgment.

And finally, the YAN Judgment itself only awards $262,081 in damages. While La Posta will forever dispute that it acted fraudulently in any way at any time, the litigation had already cost several hundred thousand dollars—resolving and ending the dispute for $262,081 compared to the time and resources it would expend to appeal in YAN's home court seemed to be a viable option.

B. Due to this Court's decision in *La Posta I*, La Posta did not need to file an interlocutory appeal of the YAN Judgment

Finally, YAN's bait, taken by the Sacramento Court, was that the fraud order must be final because La Posta did not appeal. But that is illogical and severs La Posta's right to a comprehensive appeal upon conclusion of both components of the case.

"[A]n interlocutory appeal is permissive, not mandatory." *Baldwin v. Redwood City* (9th Cir. 1976) 540 F.2d 1360, 1364. It is important to recognize that La Posta had sole discretion over whether to appeal the YAN Judgment. When La Posta chose not to appeal, "the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment." *Id.*

The Sacramento Court held that: "La Posta had 20 days after entry of the Tribal Court Judgment to appeal from the Tribal Court Judgment. La Posta did not appeal from

the Tribal Court Judgment. The Tribal Court Judgment is final." (8 LP 2537; citations omitted.) This is a verbatim quote from YAN's motion for summary judgment. (4 LP 949.)

But that is incorrect—by operation of law, when an interlocutory judgment is not appealed, it merges with the final judgment; a party's rights are not waived by inaction. La Posta's decision not to appeal did not mean the YAN Judgment became final; it simply preserved La Posta's right to appeal a final judgment until after the parties argued their positions on the proper interpretation of the SARLA. Only after a decision on the interpretation of the SARLA would the parties' rights be determined. Choosing to wait to appeal once both parts of the case were final does not and should not prejudice La Posta or deem the YAN Judgment final.

What is actually underway, and should be rejected by this Court, is YAN's maneuvering to cut off La Posta's right to a single appeal following a final judgment in the YAN Court Action by pausing that case and filing another lawsuit in Sacramento. This is the epitome of disfavored forum shopping, piecemeal litigation, and claim splitting.

III. Under the SARLA, without a "final determination," YAN is unable to obtain a deficiency judgment or any other relief under § 13.03.

To answer the Court's second question, if the YAN Judgment is not an appealable judgment under Rule 54(b), it cannot be a "final determination" under the SARLA, and consequently, YAN's claim fails.

Additionally, even if the Court determines that the YAN Judgment is appealable under Rule 54(b), it still cannot be considered a "final determination" under California law and the SARLA is governed by California law. (1 LP 112.) Quite simply, "California is governed by the 'one final judgment' rule which provides interlocutory or

interim orders are not appealable, but are only reviewable on appeal from the final judgment."[19] *Wilson v. Cty. of San Joaquin* (2019) 38 Cal. App. 5th 1, 7 (cleaned up).

Again, the pertinent portion of the SARLA § 13.03(a) contains La Posta's limited waiver of immunity that explains that La Posta is "obligated beyond [La Posta's interests in the Collateral," and YAN may seek a "deficiency" judgment "from and after the date [La Posta] commits any act of fraud in connection with [YAN] . . . but only upon final determination of such matter (A) by a court of competent jurisdiction or (b) pursuant to an arbitration proceeding." (1 LP 113.) According to this provision, YAN must have a "final determination" in order to have any claim that it can recover any damages "beyond the Collateral." (*E.g.*, Response, pp. 20-21.

Under California law, "where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." *Belio v. Panorama Optics, Inc.,* 33 Cal. App. 4th 1096, 1101–02 (1995), as modified (Apr. 25, 1995); *quoting Lyon v. Goss* (1942) 19 Cal.2d 659, 669–670.

Along those lines, "[a] judgment is the final determination of the rights of the parties (Code Civ. Proc., § 577) when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *Dana Point Safe Harbor Collective v. Superior Ct.* (2010) 51 Cal. 4th 1, 5 (cleaned up). Which means that if the YAN Judgment is not "final" under Rule 54, it certainly could not be a "final determination" under California law because it did not terminate the YAN Court Action.

But even more, "[u]nlike jurisdictions that provide for trial courts' selective entry of final judgments on fewer than all claims for relief (see, *e.g.*, Fed. Rules Civ.Proc.,

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[19] "A judgment that disposes of fewer than all of the causes of action framed by the pleadings, however, is necessarily "interlocutory" (Code Civ. Proc., § 904.1, subd. (a)), and not yet final, as to any parties between whom another cause of action remains pending." *Morehart,* 7 Cal.4th at .

rule 54(b), 28 U.S.C.) or for interlocutory appeals in the discretion of the reviewing court (see, *e.g.*, 28 U.S.C. § 1292(b)), *California law provides no case-by-case efficiency exception to the one final judgment rule for appealability*."[20] *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1107; emphasis added. Which means that even where Rule 54 may allow an interlocutory appeal, in California, "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." *Morehart,* 7 Cal.4th at 743–744; *Plaza Tulare v. Tradewell Stores, Inc*., 207 Cal. App. 3d 522, 524 (Cal. Ct. App. 1989) (When a trial is bifurcated, a "verdict in favor of the party seeking to impose liability upon the others cannot provide the basis for a final judgment. Issues remain to be litigated, thus no final determination of the rights of the parties has occurred."); *quoting Lauderdale v. U & I Equip. Co.* (1969) 271 Cal.App.2d 140, 142. "[A] positive verdict of liability in such a trial merely has the same status as a partial verdict or finding and cannot be considered as having disposed of all the issues so as to permit an appeal." *Horton v. Jones* (1972) 26 Cal.App.3d 952, 956.

More simply, "[w]here the trial is bifurcated and the issue of damages remains to be tried, appeal from the interlocutory judgment of liability is premature." *Swaffield v. Universal Esco Corp*. (1969) 271 Cal.App.2d 147, 174. "A contrary conclusion would

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[20] California strongly disfavors interlocutory appeals: 'Those whose rights and obligations depend on [a] judgment are [typically] best served by a single complete and final resolution of the issues presented. A right to an interlocutory appeal permits a party who benefits from delay to frustrate the goals of promptness and certainty of adjudication. The possibility that an order is appealable can produce delay even where no one wants to impede the litigation. If the ruling is appealable, the aggrieved party must appeal or the right to contest it is lost. [Citations.] Thus every exception to the final judgment rule not only forges another weapon for the obstructive litigant but also requires a genuinely aggrieved party to choose between immediate appeal and the permanent loss of possibly meritorious objections." *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal. App. 4th 1174, 1190–91; *quoting Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967.

defeat the purposes for bifurcation and the final judgment rule." *Menchaca v. Farmers Insurance Exchange* (1976) 59 Cal.App.3d 117, 124

This authority guides the interpretation of the SARLA this case. As described above, under Rule 54, the YAN Judgment is not final or appealable. Consequently, because the YAN Judgment is not "final" or "appealable" under Rule 54 it also cannot be a "final determination" under California law because, under *Kurwa* and *Dana Point*, it adjudicated "fewer than all claims for relief" the YAN Judgment did not "terminate the litigation." Under *Wilson*, the YAN Judgment could only have been reviewed on appeal from the true final judgment in the case.

Moreover, even if the YAN Judgment was final under Rule 54 it still would not be a "final determination" under California because, like in *Plaza Tulare, Lauderdale v. U & I Equip. Co., Horton, Swaffeld, Mechaca*, and *Morehart* the YAN Court Action was bifurcated and only the liability portion of the bifurcated proceeding was decided. Under *Belio* and *Lyon*, the Court should look past the caption of the YAN Judgment and to its substance, which, as already explained, directs the parties to anticipate the second part of the bifurcated matter—there is much more "in the nature of judicial action on the part of the court [that] is essential to a final determination of the rights of the parties." *Belio*, 33 Cal. App. 4th at 1101. The fraud was only a condition precedent in YAN's case and had no effect until the parties' rights under the SARLA are adjudicated—this cannot be disputed as it is the very reason YAN filed in Sacramento. (1 LP 54-58.)

The Sacramento Court erred holding "[a] final determination as to YAN's third cause of action is not material to the issues currently before the Court." (8 LP 2539-2540.) A "final determination" is critical in this case because of its importance under the SARLA. The lower court's error was finding that there could be a "final determination" without a conclusion to the YAN Court Action—the YAN Judgment is merely an interlocutory order, unappealable under federal and California authority.

Either way, YAN does not have what it needs to fulfill SARLA § 13.03(a) to obtain a deficiency judgment. All authority reaches this result. Without a final judgment, the Sacramento Court erred granting YAN's motion for summary judgment.

Alternatively, and assuming arguendo, if the Court decides the YAN Judgment is a final judgment, this Court still must decide several aspects of this case. First, whether the YAN Judgment, if deemed final, is entitled to recognition in California and whether that recognition comes via the TCCMJA or comity, because a "final determination" only satisfies contractual requirements, not legal doctrines and statutes. As set forth in La Posta's Opening and Reply Briefs, the YAN Judgment, on its face, is subject to review under the TCCMJA, particularly to the extent YAN assets it is a "final determination."[21]

Next, arguendo, whether a "final determination" impacts the doctrines of res judicata and collateral estoppel when considering the California jury verdict, as upheld by *La Posta I*. This Court was prescient in *La Posta I* when it reasoned that, while it could not stop YAN Court from relitigating and deciding differently than a California jury on the same facts, it certainly had a basis to deny its recognition and prevent domestication of contradictory orders from a foreign court. *La Posta I* at *18. Unfortunately, YAN's piecemeal litigation has brought the parties to this exact scenario, again before this Court.

Then, the Court would need to determine whether YAN is only entitled to a deficiency judgment, as allowed by the limited waiver provision of the SARLA, or whether YAN can seek recourse for its entire San Diego Judgment to collect to breach of contract damages.[22] Additionally, this Court must decide whether "beyond" the

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[21] To the extent YAN has argued ad nauseum that the YAN Judgment is not a money judgment subject to review under the TCCMJA because YAN only seeks recognition of a discrete segment of the YAN Judgment, such a segment cannot reasonably constitute a "final determination." The recognition YAN seeks shows how piecemeal YAN's litigation strategy is, and how the contract interpretation is the essential and final component of this litigation that will make the action final. But while YAN focuses on the presumption that a 'final determination' will open up the RSTF for recourse, the more important proviso within the limited waiver of immunity curtails YAN's enthusiasm—with a "final determination" YAN can only recover a deficiency judgment "from and after" fraud. No reasonable interpretation of SARLA § 13.03(a) can pry open Excluded Assets.

[22] See *Big Valley Band of Pomo Indians v.* Superior Court (2005) 133 Cal.App.4th 1185, 1193 ("Waivers are strictly construed, and there is a strong presumption against them.

Collateral, as used in SARLA § 13.03(a), limits YAN to claw back assets improperly transferred, or authorizes unfettered recourse to Excluded Assets, SARLA § 13.04, to seize the RSTF despite the parties' express agreement to the contrary and controlling federal law. (1 LP 113-114.)

Lastly, this Court must determine whether the declaratory judgment against the CGCC is lawful or whether YAN can only obtain relief against La Posta. As noted in La Posta's opening and reply briefs, the CGCC is not a party to the SARLA, so Code Civ. Proc. § 1060 does not apply to the CGCC. (*E.g.*, Appellant's Reply Brief, p. 44.)

Finally, it cannot escape this Court's attention that there has been subterfuge and sinister practice underway by YAN since 2013. That is, if this Court determines that the YAN Judgment is *not* a final judgment, YAN will simply return to its own court and restart the still-pending YAN Court Action. And given YAN's penchant for cobbling together favorable holdings into new complaints, YAN will likely rely on the Sacramento Opinion and Order interpreting the SARLA to bar La Posta from defending against YAN's third cause of action when YAN resumes the YAN Court Action. That would force La Posta to the YAN Court of Appeals (where it is an extremely remote possibility that it would be provided due process) or waive its right to appeal. Then, YAN will return to California with its newly "finalized" YAN Judgment and file yet another suit against La Posta. When that happens, the parties will inevitably appear again before this Court for a third time on the same contract and the same underlying set of facts.

To prevent this abuse, this Court should recognize *La Posta I* as instructive and dispositive and find that the YAN Judgment is not entitled to recognition in California.

Because a waiver of immunity is altogether voluntary on the part of a tribe, it follows that a tribe may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted" [cleaned up].); see also *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206–207 ("For state court jurisdiction to exist in these matters, the tribe's waiver of immunity must be clearly expressed as to its scope and applicability to disputes, and must be made by a person or entity authorized to do so.")

CONCLUSION

For these reasons, the Court should look to the Federal Rules of Civil Procedure to analyze the YAN Judgment because all of YAN's authority is silent as to "finality" and "appealability." Then, this Court should find that under federal authority, the YAN Judgment is not a "final" and "appealable" judgment and consequently not a "final determination" sufficient to satisfy the SARLA § 13.03(a).

Further, because the parties contracted that the SARLA should be interpreted according to California law, the YAN Judgment would not be deemed a "final determination," and ergo insufficient to satisfy the waiver requirements of SARLA § 13.03(a).

Finally, this Court should make all other findings and decisions necessary to finally end YAN's litigiousness and gamesmanship, and award whatever other relief the Court deems appropriate.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Appellant's Opening Brief is produced using 13-point Roman type and contains approximately 8,949 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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