3rd Civil No. C098204

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 OPENING BRIEF

Appeal from the Superior Court for the County of Sacramento
Case No. 34-2018-00238711-CU-MC-GDS
The Honorable Richard K. Sueyoshi

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Codes

Other Authorities

INTRODUCTION

The Superior Court erred by applying the wrong legal standard to Appellant La Posta Band of Diegueno Mission Indians' ("La Posta") Motion for Antisuit/Preliminary Injunction ("Motion"). With its error, the Superior Court circumvented ruling that this Court's previous decisions necessitated disposition of Appellee Yavapai-Apache Nation's ("YAN") case.[1] Consequently, the error unnecessarily prolonged this decade old dispute and its foregone conclusion by forcing costly, avoidable, and wasteful litigation.

The dispute involves YAN's efforts to unjustly seize La Posta's Revenue Sharing Trust Fund ("RSTF") distributions.[2] This Court has twice opined[3] that YAN cannot meet the enumerated contractual requirements[4] to do so. But the Superior Court has declined to rule according to this Court's holdings.

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[1] See *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., June 28, 2017, No. D069556) 2017 WL 2791671 ("*La Posta I*") (finding there cannot be negligent misrepresentation on the facts alleged); *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians* (Cal. Ct. App., Apr. 6, 2022, No. C091801) 2022 WL 1025893 ("*La Posta II*") (finding there was no "final determination" and that negligent misrepresentation is not fraud).

[2] *La Posta II* explained that Co-Defendant California Gambling Control Commission ("CGCC") administers a special fund called the "Indian Gaming Revenue Sharing Trust Fund" (the Trust Fund) that holds gaming license fees paid by Indian tribes that operate casinos and it distributes them to "Non-Compact Tribes" on a quarterly basis. *La Posta II* at *2; citing *California Valley Miwok Tribe v. California Gambling Control Com.* (2014) 231 Cal.App.4th 885, 889; CA Gov. Code, § 12012.75.)

[3] See *La Posta I* at *10 (finding there cannot be negligent misrepresentation on the facts alleged); see also *La Posta II* at *12 (finding there was no "final determination" and that negligent misrepresentation is not fraud).

[4] The contractual requirements arise from the parties' loan agreement, the Second Amended and Restated Loan Agreement ("SARLA"), § 13.03(a), which is a limited recourse provision and limited waiver of tribal sovereign immunity that, relevant here, only allows YAN recourse for "beyond [] the Collateral" for a "deficiency judgment" for damages "from and after" an act of "fraud" upon a "final determination . . . by a court of competent jurisdiction." The only portion of this carve out that is not disputed is the "court of competent jurisdiction," the parties' choice of forum provision in § 13.03(b) is clear.

After *La Posta II* remanded the matter, a footrace began. YAN believed it could simply bypass the consequences of *La Posta II* by using its own tribal court to obtain a new judgment then return to Sacramento, amend its complaint, and prevail.[5] At the same time, La Posta filed a motion for summary judgment ("MSJ")—based on this Court's holdings in *La Posta II*—that YAN's complaint did not meet any of the contractual requirements necessary for a declaratory ruling.

YAN's tribal court accommodated YAN's requests for an expedited briefing and hearing schedule. However, the soonest hearing date for La Posta's MSJ was six months away. So, in an effort to have its MSJ heard before YAN could upheave the underlying lawsuit, La Posta filed the Motion to enjoin YAN from using its own court to interfere with the Sacramento Action. Unfortunately, the Superior Court denied *ex parte* relief to hear the Motion immediately and ultimately denied the Motion itself. The Superior Court's denial was clearly an error.

The Superior Court erred by imposing a threshold showing of "irreparable injury" for injunctive relief before consideration of the "two traditional interrelated factors." (AA 987; citing *Butt v. State of California* (1992) 4 Cal.4th 668, 678.) But no such threshold requirement is required—irreparable injury is one of many factors courts consider under the common law and California Code of Civil Procedure ("CCP") § 526.

Under the proper legal standard, it is clear that La Posta is highly likely to prevail on the merits of the case both as a matter of law as well as upon the evidence. It is also clear that La Posta is already suffering interim harm from YAN's multiple lawsuits and manipulation. And, if a showing is necessary, irreparable harm exists and more irreparable harm is imminent.

For these reasons, La Posta respectfully requests that this Court reverse the Superior Court's denial of the Motion.

FACTUAL BACKGROUND

[5] Discussed below, YAN's lawsuit was wholly dependent on a 2018 tribal court judgment that *La Posta II* found deficient, so YAN sought to simply swap and replace the deficient judgment with a new (also not yet final) judgment.

The long running history of this dispute is detailed in *La Posta I* and *La Posta II*. Accordingly, only a brief summary of the parties' dispute from 2013 to 2022 is offered below, with the focus on the events following *La Posta II*.

The Litigation[6]

In 2003, the parties worked together to construct a casino on La Posta's reservation. (AA p. 270 ¶ A; *La Posta I*" at *3; *La Posta II* at *2) La Posta had little resources, so YAN guaranteed La Posta's casino construction loan. (AA pp. 270-217; p. 249(G); *La Posta I* at *3.) But after the casino struggled and La Posta faced default, rather than cover the debt, YAN acquired the note and became La Posta's sole lender according to the SARLA. (AA pp. 265-314; *La Posta I* at *3)

Section 13.03(a) of the SARLA is a mutual and reciprocal limited waiver of tribal sovereign immunity that contains a limited recourse provision that only allowed YAN to recover "Obligations" and "Collateral," as those terms are defined in the SARLA, upon default and subsequent breach arising from default. (AA p. 308.) The parties agreed to the limited security interest, *i.e.*, the Obligations and Collateral, after extensive contract negotiations, as part of a bargained for exchange to ensure YAN's success was directly tied to the casino's success. (AA p. 308; see also p. 263 ("These good-faith efforts were

[6] The underlying dispute has involved YAN's three lawsuits. The "San Diego Action," *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, Super. Ct. San Diego County, 2013, No. 37–2013–00048045–CU–BC–CTL, ended with a judgment for contract damages, a jury verdict finding no intentional misrepresentation, and dismissal of a cross-complaint that sought limits to recourse under SARLA § 13.03(a).

The "YAN Court Action," was in the Yavapai-Apache Tribal Court ("YAN Court"), *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, Yavapai-Apache Tribal Court, 2015, No. CV-2015-00023, and ended with a 2018 Judgment and Order finding negligent misrepresentation ("2018 YAN Judgment").

And the "Sacramento Action," the matter below, *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, Super. Ct. Sacramento County, 2016, No. 2016-00189229-CU-IP.

evidenced by [YAN] providing La Posta with a number of significant concessions including . . . removal of La Posta's [RSTF] from the security package").)

There are three specific carve-outs to the limited recourse provision,[7] one of which states that: "[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] . . . *from and after* the date [La Posta] commits any act of *fraud* in connection with [YAN] . . . but only upon *final determination* of such matter. . . ." (AA p. 308 (emphasis added).)

Unfortunately, the casino never earned revenues sufficient to make any payments on the loan and it closed. (AA p. 271(L)-(M).) In 2013, YAN filed the San Diego Action alleging La Posta breached the SARLA based on La Posta's nonpayment and sought to recover $23 million in loan principal. (AA p. 315--319.) However, when the casino failed, there were no funds to pay the Obligations and the Collateral had little value, so there was no money to cover YAN's loss on the loan. Instead of facing the consequences of its business decision to purchase an unsecured note on an overbuilt casino development project, YAN made it clear that it sought any means to pursue the carve outs to the limited recourse provision. (AA p. 323 ¶ 24; see also, e.g., pp. 325-342.) YAN believed that if it could obtain a "final determination" of "fraud," it would have unconstrained recourse to La Posta's unpledged tribal assets, namely La Posta's RSTF, valued at $1.1 million annually. (AA p. 330.) To confirm the contractual limits to recourse under the SARLA, "[i]n its cross-complaint, La Posta sought declaratory relief providing that YAN is not entitled to enforce its judgment against La Posta's RSTF assets." (AA p. 320-325; *La Posta I* at *2.)

[7] SARLA § 13.03(a) states, in relevant part: "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: (i) to the extent of all insurance proceeds received by [La Posta] in respect of the Collateral that are not applied to the reasonable costs of repair or restoration of the Collateral; (ii) to the extent of any Distributions made in violation of the Loan Documents; and (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 . . . ." (AA p. 308 § 13.03(a).)

On the eve of trial in the San Diego Action, YAN put forth a theory of fraud based on a 2009 request by La Posta for a forbearance on the SARLA payments. (AA pp. 341-342.) After bizarre legal maneuvering, the court trifurcated the matter and allowed a bench trial on damages caused by the forbearance and a jury trial on whether La Posta request for the forbearance constituted intentional misrepresentation. (AA p. 419, 485.) The third part of the San Diego Action heard La Posta's cross complaint for a declaratory ruling that the SARLA never allowed recourse to the RSTF. (AA p. 491-492.)

The day the jury trial began, seemingly anticipating a loss, YAN served La Posta with the YAN Court Action, discussed more below.

By the end of 2015, the trifurcated San Diego Action fully concluded with a Judgment in YAN's favor for approximately $44 million (comprised of loan principal and accrued interest) for breach of contract. (AA pp. 493-494.) This amount could not be collected, however, because the casino had long since been closed and the jury found that La Posta did not commit intentional misrepresentation.[8] (AA pp. 484-485.) The Court held La Posta's declaratory relief action moot in light of the jury's verdict. (AA pp. 491-492.) Both parties appealed.

While the San Diego Action was concluding and *La Posta I* was being briefed, the YAN Court Action was underway. (AA pp. 455-464.) The YAN Court Action alleged negligent misrepresentation and concealment on the same facts YAN recycled from the San Diego Action molded into new theories of negligent misrepresentation and concealment.[9] (AA p. 458 ¶ 17; p. 460 ¶ 24.) The YAN Court Action also contained a

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[8] See *La Posta I* *8: "After a brief deliberation, the jury found in La Posta's favor. In the special verdict, the jury answered 'No' to the questions: 'Did [La Posta] make a false representation to [YAN]?' and 'Did La Posta know that the representation was false, or did it make the representation recklessly and without regard for its truth?' The jury answered 'Yes' to the questions: 'Did La Posta intend that YAN rely on the representation?' and 'Did YAN reasonably rely on the representation?' And the jury answered 'No' to the question 'Was YAN's reliance on La Posta's representation a substantial factor in causing harm to YAN?'"

[9] See, e.g., *La Posta I* at *9: "YAN made a very specific offer of proof regarding the alleged fraud it sought to present at the jury trial. In its motion in limine, it identified the alleged

third cause of action where, "the tribal court should declare that YAN could collect any debts that La Posta owes from the Trust Fund distributions" upon a finding of fraud, which was the antithesis of La Posta's mooted cross compliant. (AA pp. 461-462; *La Posta II* at *4.)

The YAN Court Action was bifurcated and in 2016, the YAN Court held a bench trial on the allegations of negligent misrepresentation and concealment. (AA p. 563; *La Posta II* at *4.) If there was a finding against La Posta, the matter was to resume on YAN's declaratory action. (AA p. 564.)

In 2017, this Court issued *La Posta I* which essentially upheld all of the trial court's decisions. *La Posta I* at *18. Notably, *La Posta I* held that "[b]ased on the jury's finding, it necessarily would have found La Posta was not liable for negligent misrepresentation." *La Posta I* at *10.

The day *La Posta I* issued, La Posta filed it with the YAN Court as supplemental authority. (AA pp. 502-505.) YAN opposed the motion. (AA pp. 550-553.) The YAN Court never ruled on the motion, and as discussed next, the YAN Court completely ignored *La Posta I.*

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fraud as La Posta's statement in its October 2009 letter that it was requesting the payment extension to 'allow further time for Casino management to consider implementation of [SDW's findings]' and 'at the time the aforementioned representation was made, La Posta did not intend to consider implementing SDW's findings ....' *At the hearing on the motion, YAN's counsel confirmed that this was the only factual basis for its fraud claim*." (Emphasis added.)

See also *La Posta II* at *1: "In the second suit, YAN sued La Posta in YAN Tribal Court. As in the San Diego action, YAN sought to show that La Posta committed an act of fraud in connection with the parties' agreement. But in this case, as relevant here, YAN alleged that La Posta negligently, not intentionally, misrepresented a material fact—*a claim it based on largely the same set of facts as its earlier intentional misrepresentation claim*. The tribal court ultimately accepted the argument. Without acknowledging the San Diego jury's finding that La Posta did not make any false representation to YAN*, the tribal court reached the opposite conclusion after considering the very same testimony that had been presented to the San Diego jury*." (Emphasis added.)

In March of 2018, nearly two years after a bench trial and a year after *La Posta I* issued, the YAN Court ruled – directly contradicting *La Posta I* – that La Posta *did* commit negligent misrepresentation; its decision was reduced to the "2018 YAN Judgment." (AA pp. 563-578; *La Posta II* at *5)

With the finding of negligent misrepresentation, YAN stopped litigating in the YAN Court[10] and returned to California, initiating its third suit. (*La Posta II* at *4.) On August 14, 2018, YAN sued La Posta in Sacramento, seeking a declaration that it was entitled to collect the San Diego Judgment from La Posta's RSTF—the same cause of action left pending in the YAN Court Action. (LP p. 53-58.) To support the claim, YAN alleged that its 2018 YAN Judgment constituted a "final determination," sufficient to satisfy the carve out in SARLA § 13.03(a). (LP p. 55; p. 56 n. 1; LP 955.) La Posta opposed YAN's requested declaratory relief, but ultimately the Superior Court granted YAN's motion for summary judgment based the 2018 YAN Judgment and YAN's interpretation of the SARLA. (LP p. 2526-2543; LP 2548.) La Posta appealed. (LP 3580; see also, *La Posta II*.)

La Posta II

On April 6, 2022, this Court issued *La Posta II* reversing the Superior Court's grant of summary judgment. (*La Posta II* held that YAN failed to meet the first condition of the

[10] YAN simply left its third cause of action which sought a declaration that the finding of negligent misrepresentation fulfilled the conditions of the carve out in SARLA § 13.03(a), and later even represented to this Court that its third cause of action was abandoned. During oral argument, after this Court asked YAN whether the 2018 YAN Judgment is still open to revision, YAN represented to this Court that the YAN Action was abandoned. (E.g., AA p 1852:9-14.) ("The only question . . . the tribal court [sic] would be a question of a declaration that we didn't seek there because we sought it instead in Sacramento. And it -- it -- it's been abandoned in the four years since then."); see also AA p. 1844:10-18; 1845:6-23.) The abandonment aligned with YAN's position—YAN was trying to convince this Court that it had a "final determination," and suggestion that the 2018 YAN Judgment was open to revision would have eviscerated its "finality" argument. *La Posta II* issued based on the unequivocal representation to this Court that the YAN action was abandoned.

carve out—the 2018 YAN Judgment was not a "final determination" so the conditions in SARLA § 13.03(a) were not met. *La Posta II* at *2. On this point, this Court concluded that:

> no matter our approach for resolving the issue before us, we cannot say that the tribal court's decision is a 'final determination ... by a court of competent jurisdiction.' . . . But perhaps, as YAN argues, tribal law favors a different approach. *And perhaps, as this litigation progresses, YAN will be able to procure tribal records showing that the tribal court's decision should be considered to be a 'final determination.'* But because it has not yet managed to make this showing, we must reverse the judgment in its favor.

La Posta II at *11 (emphasis added).[11] The Superior Court's misinterpretation of the emphasized language is the reason for this appeal. (*Cf.* AA p. 998.) ("YAN's action were a logical response to the Third District's decision.")

La Posta II also correctly predicted that "a clear misunderstanding of state law likely will rise again" when it reasoned that negligent misrepresentation is not fraud:

> La Posta alleged at the trial level that the tribal court's decision "violates California's public policy because it found negligent misrepresentation on the basis of representations about future conduct." But the trial court rejected this argument. It reasoned that although "predictions regarding future events are deemed to be mere opinions which are not actionable," "the representation here is accurately viewed as a promise to perform" and so "may be actionable" as a false promise.
>
> But whether La Posta's representations could have supported a claim for deceit based on a false promise, as the trial court believed, and whether they could have supported a claim for negligent misrepresentation, as the tribal court found, are two different things. An action for deceit based on a false promise, unlike an action based on a negligent misrepresentation, necessarily entails an intentional misrepresentation—namely, a promise to perform that the promisor did not intend to

[11] *La Posta II* also noted that "we find it too late for YAN to seek additional time to develop the evidence in support of its summary judgment motion." *La Posta II* at *11 n 2. It was simply too late for YAN to introduce or create new evidence.

> perform at the time he or she made the promise. For that reason, a false promise can be characterized as simply a type of intentional misrepresentation. But it cannot, as the trial court appeared to believe, be characterized as a type of negligent misrepresentation. As other courts have explained, a negligent false promise is neither a negligent misrepresentation nor an actionable form of deceit at all.

La Posta II at *12 (citations and quotations omitted). The remittitur was issued June 7, 2022.

Competing Lawsuits

Upon remand, YAN made it clear that it intended to return to the YAN Court and resume the YAN Court Action to obtain a "final" judgment. On September 7, 2022, YAN filed a "Request for Status Conference" with the YAN Court. (AA pp. 1148-1150.) YAN explained to the YAN court (*ex parte* and with no notice to La Posta) that *La Posta II* ruled "that declaratory relief in the Sacramento Action was premature due to the [YAN's] surviving claim in this court." (AA p. 1149.) YAN requested a status conference to set a hearing and briefing schedule. (AA p. 1149.)

On October 31, 2022, based on YAN's request, and without notice to La Posta, the YAN Court held a status conference and on November 3, 2022, issued an order setting a briefing schedule for YAN's third cause of action for declaratory relief. (AA pp. 1200-1201.)

In an effort to adhere to *La Posta II* and without regard to YAN's ancillary action in its own court, La Posta filed its MSJ in the Sacramento Action on November 9, 2022. (AA pp. 18-44.) With the MSJ, La Posta argued against each element in the SARLA necessary for YAN to prevail:

- according to *La Posta II*, the 2018 YAN Judgment was not a "final determination;"
- according to *La Posta II*, the 2018 YAN Judgment finding negligent misrepresentation was not a finding of fraud;
- the limited wavier of tribal sovereign immunity does not allow recourse to the RSTF;

- the 2018 YAN Judgment cannot be recognized in California under the Tribal Civil Court Money Judgment Act ("TCCMJA"), CCP § 1731 *et seq*., or by comity;

- claim and issue preclusion bar the Sacramento Action; and

- the Superior Court cannot issue a declaratory ruling against the CGCC under CCP § 1060.

(AA pp. 30-43.) The soonest the MSJ could be heard was May 2023—six months later.

YAN refused to stay the YAN Court Action pending La Posta's MSJ. (AA pp. 749-751.) YAN's actions forced La Posta to file the Motion to attempt to stop YAN from litigating in two fora pending the resolution of the MSJ. (AA pp. 772-795.) La Posta filed the Motion on December 8, 2022, but the Motion could not be heard until February 16, 2023. This delay allowed time for YAN's forum shopping strategy to be fully implemented. La Posta thus sought *ex parte* relief to shorten the time for the Motion to be heard, but the Superior Court denied the *ex parte* application. (AA pp. 768-770.) Without an opportunity to be heard on injunctive relief, the YAN Action proceeded alongside the Sacramento Action and La Posta had no choice but to again defend in both venues.

On November 21, 2022, YAN filed its Motion for Entry of Final Judgment with the YAN Court. (AA pp. 815-827.) On December 8, 2022, La Posta filed its Motion with the Sacramento Court. (AA pp. 771-779.) These were two competing actions underway simultaneously: YAN sought a new order to change its Sacramento pleading; La Posta sought to be heard on YAN's Sacramento pleading.

On December 12, 2022, La Posta filed its opposition with the YAN Court. (AA pp. 918-920.) On December 19, 2022, YAN filed its reply with the YAN Court. (AA pp. 922-929.) On January 26, 2023, the YAN Court heard YAN's motion. (AA p. 880.) La Posta chose to rely on its brief and waived oral argument. (AA p. 880 ¶ 3.) On February 2, 2023, the YAN Court issued the 2023 YAN Judgment awarding YAN the relief it sought and including YAN's proposed order without edit. (AA pp. 879-882.) On February 6, 2023, YAN filed the 2023 YAN Judgment in Sacramento via Request for Judicial Notice. (AA pp. 876-877.)

Coincidentally, the YAN Action concluded at the same time YAN's opposition to La Posta's Motion was due. On February 2, 2023, YAN filed its opposition to La Posta's Motion with the Sacramento Court. (AA pp. 828-850.) On February 9, 2023, La Posta replied and acknowledged that its efforts for an antisuit injunction were likely no longer meaningful as the YAN Court had expedited its process to issue a new "final" judgment. (AA pp. 891-906.) Nonetheless, La Posta's efforts for a preliminary injunction remained viable, and La Posta sought alternate relief:[12]

> the Court could require YAN to consent to stay the YAN Court action; to enjoin YAN from admitting or otherwise supplying any judgment, order, ruling, opinion, mandate, filing, or other document issued by any YAN court, trial or appellate, that originated after 2018; or, the Court should refuse to consider the same, since YAN has already filed its new 'final" judgment.'

(AA p. 903.) On February 16, 2023, the Sacramento Court issued a tentative ruling denying La Posta's motion ("Tentative"). (AA pp. 995-1000.) The Court found no exceptional circumstances to warrant an antisuit injunction. (AA pp. 997-998.) In its reasoning denying the antisuit injunction, the Superior Court made an implicit interpretation of *La Posta II:*

> This Court must point out that when the Third District reversed the order granting summary judgment because the Tribal Court judgment was not final, it specifically states that "perhaps, as this litigation progresses, YAN will be able to procure tribal court records showing that the tribal court's decision should be considered to be a 'final determination.'" YAN sought to do just that when it moved for final judgment in the Tribal Court. Far from being an abuse of the judicial system, YAN's action were [sic] a logical response to the Third District's decision, regardless of what the ultimate outcome of those actions are.

[12] The Superior Court has the power to consider alternate relief as "[t]he trial court ha[s] the authority to fashion an equitable remedy appropriate to the circumstances of this case," and "may create new remedies to deal with novel factual situations." *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 648.

(AA p. 998. (citation omitted).) The Superior Court concluded, "the motion is denied on the basis that La Posta has failed entirely to demonstrate the exceptional circumstances necessary for an antisuit injunction." (AA p. 998.)

The Superior Court also denied equitable relief because "La Posta has not demonstrated any irreparable harm in the event the injunction did not issue which is a threshold requirement." (AA p. 998.) This conclusion was based on California precedent that states:

> If the threshold requirement of irreparable injury is established, then [the court] must examine two interrelated factors to determine whether . . . a preliminary injunction should be [issued]: '(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction.'

(AA p. 999; *quoting Costa Mesa City Employees Assn v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 306 (emphasis added in Tentative).) The Tentative continued, "[g]iven the lack of irreparable harm, the motion is denied under even traditional preliminary injunction standards. The Court need not consider whether La Posta has shown a likelihood of prevailing." (AA p. 999.) On February 28, 2023, La Posta filed its Notice of Appeal. (AA p. 1002.)

On March 15, 2023, YAN filed for leave to amend its complaint because "following the guidance in [*La Posta II*], YAN obtained the final judgment from the Tribal Court [] required by the Court of Appeal." (AA p. 1011:5-8.) YAN sought *ex parte* relief to be heard before La Posta's MSJ because "YAN expects La Posta may argue otherwise—that the Court is confined to considering the state of play that temporarily existed at the specific snapshot in time when the Motion was filed (post-appeal, but pre-Final Tribal Court Judgment) but that is no longer extant." (AA p. 1058:21-24.) La Posta objected to *ex parte* relief in part because "[a]ll aspects of the Motion for Leave are embraced by La Posta's pending appeal" which means the court lacks jurisdiction over matters embraced by the automatic stay in CCP § 916. (AA p. 1041.) The Court denied YAN's *ex parte* application

without prejudice "to appropriate and available arguments made in opposition to the MSJ." (AA p. 1120.) The motion for leave remained scheduled for May 2, 2023. Because of the automatic stay, La Posta did not file an opposition to the motion for leave.

On March 21, 2023, YAN filed its opposition to La Posta's MSJ. (AA p. 1282-1310.) YAN's key argument was that it was able to obtain the new 2023 YAN Judgment that is a "final determination" and ergo defeats the MSJ. (AA p. 1285:13-23.) YAN argued that La Posta's appeal of the 2023 YAN Judgment is of no consequence—based on federal law its judgment became final upon entry.[13] (AA p. 1286:22-15:2.)

YAN also argued that *La Posta II* "did not hold that negligent misrepresentation is not fraud," and that La Posta has overstated this is Court's "off hand comment" and "dicta." (AA p. 1300:1-7.) According to YAN, both intentional misrepresentation and negligent misrepresentation "are considered 'fraud' under established California law." (AA p. 1299:21-24.) Additionally, YAN argued: its interpretation of the SARLA; against formal recognition of the 2023 YAN Judgment; and that the San Diego Action does not preclude the Sacramento Action. (AA p. 1304-1305 §§ V(D)(1)-(3).) On March 27, 2023, La Posta replied. (AA pp. 1322-1334.) On April 4, 2023, *sua sponte*, the Superior Court continued the hearing on the MSJ. (AA p. 1505.)

On April 24, 2023, the Superior Court issued its tentative ruling on La Posta's MSJ, which it adopted after oral argument. (AA pp. 1549-1555.) The Court's ruling was based on its belief that "a party opposing summary judgment is entitled to stop working on the opposition once (s)he has produced admissible evidence demonstrating that a *single fact* presents a triable issue." (AA p. 1553. (emphasis added.) Based on that belief, the Court found that YAN's proffer of the 2023 YAN Judgment created a "triable issue of material

[13] This is contrary to YAN's position in its own court when YAN opposed La Posta's motion to offer *La Posta I* as supplemental authority before the 2018 YAN Judgment issued. In its opposition, YAN argued: "Moreover, the [*La Posta I*] is not even final, and hence cannot have any effect on this Court or any other court . . . The opinion may still be reviewed by the California Supreme Court . . .Thus, the opinion submitted to this Court by La Posta may, in the end, not even be the final decision in this matter by the California appellate court." (AA pp. 825-872.)

fact as to asserted UMF 7,"[14] and based on that single issue contesting one element of YAN's case, the MSJ was denied. (AA p. 1554.) The Superior Court did not consider "La Posta's additional arguments that YAN is foreclosed from resurrecting the Tribal case because it represented to the Court of Appeal that it abandoned the Tribal Court case, and that even if YAN can resurrect the Tribal Court case, there is no basis to support a final judgment based on an 'act of fraud.'" (AA pp. 1554.)

Despite the automatic stay, the Superior Court took no action to continue the May 2 hearing on YAN's motion for leave to amend, so, out of an abundance of caution, on April 28, 2023, La Posta sought *ex parte* relief to continue the hearing. (AA pp. 1564-1576.) YAN opposed, arguing that La Posta's *ex parte* application was "cynical, hypocritical gamesmanship" because La Posta argued its MSJ but sought to prevent YAN's motion for leave. (AA p. 1561.) The Court *sua sponte* continued the May 2 hearing to May 30, 2023, and allowed YAN to file another opposition to La Posta's application for a continuance. (AA pp. 1578-1579; 1582.) The tentative issued on May 26, 2023 in favor of YAN.

ARGUMENT

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[14] La Posta's Separate Statement of Undisputed Fact, YAN's opposition, and La Posta's reply, stated:

> [La Posta's Statement]: YAN has no new evidence to transform its YAN Judgment into a "final determination" because everything that exists was already presented with YAN's motion for summary judgment and its supplemental briefing to the Court of Appeals on this specific issue.
> Ex. 25, 4/27/2021 Ltr. COA to Parties.
>
> [YAN's Opposotion]: Disputed. Since La Posta II, YAN returned to the Yavapai-Apache Tribal Court ("Tribal Court") and obtained a final judgment on all three causes of action.
> Evidence: Kussman Decl., ¶¶ 7-13, Ex. K, [Final Tribal Court Judgment].
>
> [La Posta's Reply]: Response to Dispute: At the time La Posta filed its MSJ, its statement of fact was true and accurate. The newly concocted Tribal Court Judgment is not final, and is on appeal.

(AA p. 1338.)

The Superior Court applied incorrect legal standards in its denial of La Posta's preliminary injunction. Specifically, the Superior Court erred when it required a threshold showing of irreparable injury for injunctive relief. (AA p. 999.) This is simply incorrect as no such threshold showing is required according to controlling law from California's Supreme Court and Third District. And, the Superior Court erred when interpreting *La Posta II* to mean that this Court advised YAN to return to its own court and resume the YAN Court Action to obtain a "final" judgment. (AA p. 998.)

I. Standard of Review

An order denying an injunction is an appealable order. CCP § 904.1, subd. (a)(6); *Ass'n of Deputy Dist. Att'ys for Los Angeles Cnty. v. Gascon* (2022) 79 Cal. App. 5th 503, 521; *Kirk v. Ratner* (2022) 74 Cal.App.5th 1052, 1062. This Court's standard of review is contingent on the reason for denying the injunction. *Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1175–1176 ("[T]he specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination.")

This Court applies a *de novo* standard of review "if the 'likelihood of prevailing on the merits' factor depends upon the construction of a statute or another question of law, rather than evidence to be introduced at trial." *Iloh v. Regents of University of* California (2023) 303 Cal.Rptr.3d 709, 716 n.3; reh'g denied (Feb. 6, 2023). Additionally, "when the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions of law are subject to *de novo* (i.e., independent) review on appeal." *Donahue,* 232 Cal.App.4th at 1175–1176.

De novo review is appropriate here for two reasons. The Superior Court failed to consider the likelihood that La Posta will prevail as a matter of law, as foretold by *La Posta I* and *La Posta II*. The second reason is that the Superior Court erred by not properly applying CCP § 526.

Under a *de novo* review of the "likelihood of prevailing on the merits," this Court can find that La Posta will succeed on the merits as a matter of law and reverse the Superior

Court's denial of injunctive relief. See, e.g., *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 116 ("Because we review the trial court's decision *de novo*, we do not defer to the trial court's ruling or reasons for its ruling. Instead, we decide the matter anew."); *In re George T.* (2004) 33 Cal.4th 620, 634 (with a *de novo* review the "reviewing court makes an original appraisal of all the evidence to decide whether or not it believes the outcome should have been different.) This Court's de novo review will find that La Posta is likely to succeed on the merits of its contract interpretation claims as a matter of law and reverse the Superior Court's denial of injunctive relief.

This Court reviews a trial court's denial of an injunction for abuse of discretion when the injunction does not hinge on a question of law. "Appellate review" of a trial court's decision to issue a preliminary injunction, "is limited to whether the trial court's decision was an abuse of discretion." *Butt v. State of California* (1992) 4 Cal.4th 668, 678. "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason" or "when the court's ruling is so irrational or arbitrary that no reasonable person could agree with it." *Iloh,* 303 Cal.Rptr.3d at 716. (cleaned up). "[A] failure to exercise discretion is an abuse of discretion, and "an abuse of discretion is shown where a Superior Court . . . applies the wrong legal standard." *Riskin v. Downtown Los Angeles Property Owners Association* (2022) 76 Cal.App.5th 438, 445–446, review denied (June 15, 2022).

The Superior Court abused its discretion when it applied the wrong legal standard and imposed a threshold showing of irreparable injury above and beyond the two considerations for injunctive relief. Also, the Superior Court never exercised discretion to consider the "interim harm" and "likelihood of prevailing on the merits" factors, which is an abuse of discretion. Because of the Superior Court's clear abuse of its discretion, this Court should reverse the Superior Court's denial of injunctive relief.

II. The Superior Court erred by imposing a threshold showing of irreparable injury as a prerequisite to injunctive relief.

Neither controlling authority nor statute requires a showing of irreparable injury before a preliminary injunction may issue. The Superior Court erred by imposing such a requirement.

The California Supreme Court clearly articulated the requirements for a preliminary injunction in *Butt v. State of California*:

> In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.

(1992) 4 Cal.4th 668, 677–678; *see also Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 (same).

The *Butt* decision clearly identifies the Superior Court's error. *Butt* explained that a threshold showing of irreparable harm is ***not*** a requirement for injunctive relief:

> the court was not obliged to deny a preliminary injunction simply because plaintiffs failed to demonstrate that 'irreparable' harm to students was unavoidable by other means. The preliminary record properly convinced the court both that plaintiffs had a reasonable probability of success on the merits, and that they would suffer more harm in the meantime if an injunction were denied than the State would suffer if it were granted. This 'mix' of the 'interrelated' relevant factors fully justified the court's decision to grant the injunction.

Id. at 693–694 (citing authority). *Butt* concluded: "No error appears," by granting the preliminary injunction without a showing of irreparable harm. *Id*. Similarly, in *Jamison v. Department of Transportation*, (2016) 4 Cal.App.5th 356, 361-362, this Court did not recognize any threshold showing of irreparable injury, finding that "[t]he trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction."

Ironically, even YAN's cited authority does not support the Superior Court's threshold requirement of irreparable harm. (AA p. 838:6-14; citing *Fleishman v. Sup. Ct. (Salisbury)* (2002) 102 Cal. App. 4th 350, 355; *Integrated Dynamic Sol., Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal. App. 5th 1178, 1183; *Donahue Schriber Realty Grp., Inc. v. Nu Creation Outreach* (2014) 232 Cal. App. 4th 1171, 1178 (finding the second factor—interim harm—considers "the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo.").

The Superior Court drew its threshold irreparable harm requirement from language in *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 306, as modified (Oct. 10, 2012) (AA p. 999.) *Costa Mesa* relies on *White v. Davis* (2003) 30 Cal.4th 528, 561, for this "threshold requirement." *Costa Mesa*. at 305-306. But *White* says no such thing—*White* does not establish irreparable harm as a threshold requirement for a preliminary injunction. According to *White*, "[t]o obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." 30 Cal.4th at 561. (AA pp. 998-999.)

Nowhere in *White* is a threshold requirement of irreparable injury articulated. Instead, White merely suggests that "*ordinarily*," a showing of "*irreparable or interim harm*" is required. *Id*. The remainder of *White* discusses harm in the context of the appropriate balancing test, and ultimately weighs the interim harm and the potential on the merits: "in the case before us we believe it is clear that in light of both the relative balance of harms and the lack of clear authority supporting the merits of plaintiffs' broad claim, the trial court abused its discretion in granting a preliminary injunction." *Id*. at 557. *Costa Mesa* is an anomaly and no reported authority relies on *Costa Mesa's* 'threshold' requirement.

The Superior Court also misinterpreted *Intel Corp. v. Hamidi*, (2003) 30 Cal.4th 1342 or the premise that "'[T]he extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm." (AA p. 999; citing *Intel*, 30 Cal.4th 1342, 1352.) A full and correct reading of *Intel Corp.* shows that "[e]ven in an action for

trespass to real property, in which damage to the property is not an element of the cause of action, 'the extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm." *Id*. at 1352. This is because harm is a requirement for a cause of action for trespass and ties to the factors for injunctive relief in the context of *Intel Corp.*[15] *Intel Corp* does not support any threshold showing irreparable injury here.

The Superior Court's decision is contrary to overwhelming authority in California that does not require a threshold showing of irreparable harm to issue a preliminary injunction. Courts overwhelmingly rely on the two interrelated factors—the likelihood plaintiffs will prevail on the merits and the relative balance of harms—as the requirements for a preliminary injunction, not a threshold showing of irreparable harm. See, e.g., *Iloh*, 87 Cal.App.5th at 716; *Loy v. Kenney* (2022) 85 Cal.App.5th 403, 412, reh'g denied (Dec. 2, 2022); *Association of Deputy District Attorneys for Los Angeles County v. Gascon* (2022) 79 Cal.App.5th 503, 521-522; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; C*ontinental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528; etc.

At least one court has specifically rejected irreparable harm as a threshold requirement for a preliminary injunction. In *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 fn. 5, the court rejected an argument that there are five factors to a

[15] *Intel* is an action based on a trespass (to chattels) to a computer network via unauthorized email, and accordingly (*id*. at 1346-1347), *Intel* focuses on the expectations necessary to enjoin a trespass. To follow the reasoning in *Intel*, it is first necessary that to maintain a cause of action for trespass, and trespass to chattel, there must be an injury: "But while a harmless use or touching of personal property may be a technical trespass, an interference (not amounting to dispossession) is not actionable, under modern California and broader American law, without a showing of harm." *Id*. at 1351–1352. An injunction cannot be maintained without a likelihood of success on the merits, which, when considering a cause of action for trespass to chattel, involves a showing of harm—i.e., no harm, no trespass, no injunction. "A fortiori, to issue an injunction without a showing of likely irreparable injury *in an action for trespass to chattels, in which injury to the personal property or the possessor's interest in it is an element of the action*, would make little legal sense." *Id*. at 1352. *Intel* concluded "that Intel has not presented undisputed facts demonstrating an injury to its personal property, or to its legal interest in that property, that support, under California tort law, an action for trespass to chattels," and found the action could not be maintained as a matter of law. *Id*. at 1360.

preliminary injunction and explained that "[s]everal of these purported requirements" including irreparable injury, "are simply different ways of describing the "interim harm" factor noted above." Additionally, Witkin makes clear that there is no irreparable harm "threshold" factor for obtaining a preliminary injunction: "It is common to speak of the necessity of a showing of threatened 'irreparable injury' as the basis for an injunction," but "[i]t has been suggested that the term adds nothing to the broader concept of inadequacy of the legal remedy, and that both are merely shorthand expressions covering the factors that determine the right to an injunction." (6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, § 254, p. 221; see also 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies § 295.).

The Superior Court erred when it imposed a threshold burden requiring a showing of irreparable injury. The Superior Courts imposition of a fictitious threshold resulted in other errors, namely that the court was self-restrained from determining that, as a matter of law, La Posta is likely to succeed on the merits. The Superior Court's erroneous abuse of its discretion allows this Court to determine anew whether La Posta will prevail on the merits and the relative harm La Posta will suffer if an injunction is not issued. *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 287.

III. Under the proper standard, La Posta is entitled to injunctive relief.

Because the Superior Court failed to consider the appropriate legal standard, it never reached the merits of La Posta's Motion. Under the correct standard, La Posta is entitled to injunctive relief.[16]

The correct standard considers the "mix of interrelated relevant factors" of 'likelihood of prevailing on the merits' and 'interim harm,' keeping in mind that "the greater the plaintiff's showing on one, the less must be shown on the other." *Butt*, 4 Cal.4th

[16] "It is well established that "a court called upon to afford relief historically or analytically equitable in its nature 'has broad powers to fashion a remedy. It may create new remedies to deal with novel factual situations.'" *Id*.; *quoting Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1040.

at 678, 694. Here, there is a strong showing on both factors sufficient to support injunctive relief.

A. La Posta is likely to prevail on the merits.

La Posta I & II make clear that La Posta is extremely likely to succeed on the merits and defeat YAN's efforts for a declaration that it can seize La Posta's tribal assets. Here, the Court takes a de novo review.

When "the likelihood of prevailing on the merits depends upon a question of pure law . . . it can sometimes be determinative over the other factor, for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits." *Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 362 (citing authority). Under *Jamison,* on a *de novo* review this Court may find that La Posta will prevail as a matter of law and effectively end this litigation. *Id.;* see also *id.* at 366-367 *("*Because we conclude plaintiff cannot succeed on the merits of his action, we need not address the balance of harm granting or not granting the injunction would impose on the parties, and we reverse the trial court's order," remanding "further proceedings consistent with this opinion.")

1. There is no "final determination."

La Posta II found that the YAN 2018 Judgment is not a "final determination." YAN's complaint is based entirely on the 2018 Judgment constituting a "final determination" required by the SARLA § 13.03(a) and therefore a key component of YAN's theory for relief. *La Posta II* forecloses that avenue for YAN.

At the time of this filing, YAN's new 2023 YAN Judgment is pending appeal, and therefore is not a "final determination," either. (AA p. 1434-1465.) Despite the appeal of the 2023 YAN Judgment, at the time of this filing, YAN is underway in Sacramento to amend its pleading to incorporate the 2023 YAN Judgment into its allegations.[17] (AA pp. 1008-1031; 1577-1580.) YAN hopes to do so to sidestep the application of *La Posta II*, all

[17] On the day this brief was filed, La Posta prepared for oral argument on a tentative ruling granting YAN's motion for leave to amend.

of which shows that an injunction was imperative to maintain the status quo to allow a conclusion to the underlying lawsuit as pled and unadulterated by any new YAN Court rulings.

2. There is no fraud.

La Posta II explains that negligent misrepresentation is not fraud. As a finding of "fraud" is part of the conditions necessary to invoke the carve out to the limited recourse provision in SARLA § 13.03(a), La Posta is likely to prevail on the merits. *La Posta II* alludes to the body of case law that focuses on *deceit* and its subcategories of *fraud* and *negligent misrepresentation*. These terms are distinct, so precision is necessary to understand the intricacies.

La Posta II relies on *Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, to explain that:

> An action for deceit based on a false promise, unlike an action based on a negligent misrepresentation, necessarily entails an intentional misrepresentation—namely, a promise to perform that the promisor did not intend to perform at the time he or she made the promise. For that reason, a false promise can be characterized as simply a type of intentional misrepresentation. But it cannot . . . be characterized as a type of negligent misrepresentation. As other courts have explained, a negligent false promise is neither a negligent misrepresentation nor an actionable form of deceit at all.

La Posta II at *12 (internal quotations and citations omitted). *La Posta II* is correct in its distinction between deceit, fraud (and false promise[18]), and negligent misrepresentation.

"Negligent misrepresentation is born of the union of negligence and fraud. If negligence is the mother and misrepresentation the father, it more closely resembles its mother." *Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1531. *Ventura* explains that the "essence of [a cause of action for negligent misrepresentation] is

[18] "Promissory fraud or false promise is a subspecies of the action for fraud and deceit." *Rossberg v. Bank of America, N.A*. (2013) 219 Cal.App.4th 1481, 1498, as modified on denial of reh'g (Sept. 26, 2013).

negligence, not fraud," and that "acts of negligence support an action for negligent misrepresentation." *Id.;* citing *Gagne v. Bertran* (1954) 43 Cal.2d 481, 489.

YAN's cause of action for negligent misrepresentation was brought under CCP § 1710,[19] which defines *deceit* and identifies four types of deceit.[20] These types of *deceit* are torts, but the torts are different because they involve fundamentally different state of mind requirements.

"Intentional fraud is actionable because of the knowing intent to induce someone's action to his or her detriment with false representations of fact. 'Fraud is an intentional tort, and the element of fraudulent intent, or intent to deceive, distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation.'" *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1046; quoting 5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 677, p. 127.

Negligent misrepresentation does not require intent or scienter. *Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1476. A "cause of action for negligent misrepresentation requires only a showing of negligence." *Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1348; *Ventura,* 49 Cal.App.4th at 1531. While there are several types of *deceit*, not all *deceit* is *fraud* because fraud requires intent and scienter, which are not part of negligent misrepresentation.

In YAN's opposition to the Motion, YAN takes authority out of context to argue against *La Posta II*'s correct determination that negligent misrepresentation is not fraud, but YAN's analysis is too superficial to be meaningful. YAN cites *Wong v. Stoler* (2015) 237 Cal. App. 4th 1375, 1388, which relies on *Furla v. Jon Douglas Co*. (1998) 65

[19] See (LP 585:26-28 ("YAN sought determinations that La Posta committed either negligent misrepresentation or fraudulent concealment – acts of fraud under California law (Civ. Code, § 1710) – in connection with the YAN or the loan.")

[20] While the language of the CCP speaks for itself, § 1710(1) is commonly referred to as intentional misrepresentation; (2) is commonly referred to as negligent misrepresentation; (3) is commonly referred to as concealment; and (4) is commonly referred to as promissory fraud.

Cal.App.4th 1069, 1077, for the quote that negligent misrepresentation is "actual fraud." (AA p. 838.) However, *Furla* cites CCP § 1572, which defines "actual fraud" in the context of contracts and contract formation. YAN's claims arise under CCP § 1710 (deceit) not § 1572. *See Ventura,* 49 Cal.App. 4th at 1503 (finding an action under CCP § 1710(2) is an action for negligence, not fraud.)

YAN and *Wong* also rely on *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 403, *reh'g denied and opinion modified* (Jan. 5, 1990) for the quote: "The case law, however, is clear that in California negligent misrepresentation is a form of fraud and deceit under §§ 1710[2] and 1572[2]." (AA p. 838.) This quote is inapposite for the same reasons as *Wong—Continental* finds "fraud" under CCP § 1572 and "deceit" under § 1710, and elaborates by quoting several contract cases that intertwine § 1572 and § 1710 and actually touch on the distinction between fraud and deceit.[21] Distinguishing *Continental's* holding, the decision is confined to its interpretation of CCP § 1668, dealing with contracts contrary to policy of law, finding that in that section the term "fraud" includes "negligent misrepresentation," which is inapplicable to the analysis here. *Id*.

Finally, YAN cites *Quintilliani v. Mannerino* (1998) 62 Cal. App. 4th 54, 69, which states that, "[n]egligent misrepresentation is, of course, a species of fraud." (AA p. 839.) But *Quintilliani* is not focused on semantics or the nuances between *deceit* and *fraud*, it is looking to the scope of CCP § 340.6 (considering attorney wrongful acts or omissions, other than for actual fraud.) *Quintilliani* cites CCP §§ 1709 and 1710, which codify *deceit*, then cites to CCP § 340.6 which contains an exception for "actual fraud" which apples to intentional fraud, not negligent misrepresentation. *Id*. *Quintiliani* supports La Posta's position by distinguishing negligent misrepresentation from "actual fraud." *Id*.

No matter the outcome in the resurrected proceeding in YAN Court, YAN will still not have a finding of fraud to satisfy the SARLA—it will only have a specious finding of

[21] *E.g., Continental* relies on *Hale v. George A. Hormel & Co*. (1975) 48 Cal.App.3d 73, 84, which explains that "'scienter' is not an element of every cause of action for deceit." *Continental*, 216 Cal.App..3d at 404.

negligent misrepresentation. This strongly supports La Posta's likelihood of prevailing on the merits.

3. There is no negligent misrepresentation.

La Posta I is binding on the parties under the preclusion doctrines[22] and holds that there can be no negligent misrepresentation on the facts alleged: "Based on the jury's finding, it necessarily would have found La Posta was not liable for negligent misrepresentation." *La Posta I* at 10. The facts tried are YAN's sole factual theory. *La Posta I* at *9. That necessarily makes the YAN Judgment inconsistent with the San Diego jury and *La Posta I*, threatening its likelihood of recognition.

La Posta II recognized that the 2018 YAN Judgment finding negligent misrepresentation is "a claim it based on largely the same set of facts as its earlier intentional misrepresentation claim." *La Posta II* at *1. And found that "[w]ithout acknowledging the San Diego jury's finding that La Posta did not make any false

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[22] *La Posta I* is binding on the parties on multiple theories - law of the case, preclusion, res judicata, and collateral estoppel, all of which were briefed and before this Court as part of *La Posta II* and have also been briefed and are before the trial court as part of La Posta's MSJ. See, e.g., *Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 701–702 ("In a nutshell: The doctrine of law of the case applies to later proceedings in the same case. The doctrines of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a former proceeding." (Citations omitted)); see also, *People v. Barragan*, (2004) 32 Cal. 4th 236, 246 ("Under the law of the case doctrine, when an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout the case's subsequent progress, both in the lower court and upon subsequent appeal . . . Absent an applicable exception, the doctrine requires both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong." (cleaned up).)

Typically, there is a straightforward application of these doctrines, all of which bind the parties to the outcome of their adjudications, but here, things are not as clear because of YAN's manipulation of multiple courts to avoid being bound by all of the unfavorable decisions from California courts, primarily *La Posta I* and *La Posta II*.

representation to YAN, the tribal court reached the opposite conclusion after considering the very same testimony that had been presented to the San Diego jury." *La Posta II* at *1. *La Posta I* thus controls the parties in California. Even if *La Posta II* is incorrect, *La Posta I* puts the YAN Court's decision in direct conflict with a California decision that binds the parties *via* res judicata and collateral estoppel.

Ultimately, YAN pled, and the SARLA requires, that YAN have a final determination finding fraud. (LP pp. 54-55.) No matter the outcome in the resurrected proceeding in YAN Court, YAN will never have a finding of fraud to satisfy the SARLA—it will only have a specious finding of negligent misrepresentation, which directly conflicts with both *La Posta I* and *La Posta II*. YAN chose not to appeal *La Posta I* or *La Posta II.* Consequently, they control the disposition of this dispute. YAN simply cannot prevail on the face of its Sacramento complaint or on the facts underlying its sole theory for relief.

4. There are multiple other bases to defeat YAN's claims.

La Posta's MSJ provides multiple bases showing that YAN's legal theory is incorrect—none of them were considered in the Superior Court's denial, but all of them show a likelihood of success on the merits because YAN's claims fail as a matter of law. (AA pp. 36-44.)

First, the SARLA states: "[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] . . . from and after the date [La Posta] commits any act of fraud in connection with [YAN] . . . but only upon final determination of such matter. . . ." (AA p. 308 § 13.03(a).)

Assuming arguendo that YAN could obtain a "final determination" finding "fraud," which it cannot, YAN still cannot show that the limited waiver of tribal sovereign immunity in the SARLA's nonrecourse provision would allow YAN recourse to Excluded Assets, as defined in the SARLA. (AA pp. 36-40.) Under the carve out, YAN is only entitled to a deficiency judgment from and after any hypothetical finding of fraud. (AA p. 38.) YAN's

breach of contract damages are not a "deficiency" and do not come "from and after" any act of fraud, and La Posta's RSTF is an Excluded Asset. (AA p. 39.)

Also, before the second YAN Judgment can be recognized in California, YAN must seek formal recognition under the TCCMJA, CCP §§ 1710.10-1741, or comity, discussed more below. (AA pp. 40-41.) YAN cannot simply substitute its 2023 "judgement" for the 2018 "judgment." The 2018 judgment is an essential component of YAN's complaint and cause of action—its case hinges on the Court's recognition of the judgment to meet the condition precedents of the SARLA. YAN never pled anything related to the 2023 judgment and, despite YAN's attempts, it is far too late to amend. *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 648 ("It is true that a party cannot recover on a cause of action not pleaded in the complaint.").

Additionally, claim and issue preclusion are impassible barriers obstructing YAN's third suit. (AA pp. 41-43.) It is improper to issue a declaratory judgment against the California Gambling Control Commission ("CGCC") because the CGCC is not a party to the SARLA. (AA pp. 43-44.)

La Posta raised all of the above arguments in its MSJ, and the Superior Court declined to rule on any of them. (AA pp. 1548-1555.) The arguments therefore remain viable. *La Posta II* at *12 ("Because, however, we agree that reversal is appropriate on another ground, we find it unnecessary to address La Posta's other arguments.") The Superior Court never considered any of these arguments because it ruled solely on the existence of the 2023 YAN Judgment creating an issue of fact—the exact scenario La Posta sought to enjoin with the Motion. (AA p. 1554.) These arguments, paired with *La Posta II*, show that La Posta is likely to prevail on the merits of its arguments and therefore weighs in favor of granting an injunction, thus the Superior Court erred.

B. The relative interim harm to La Posta by denying an injunction is greater than harm to YAN, if any, if an injunction is granted.

1. YAN would not be harmed by an injunction.

YAN would not be harmed by an injunction here. YAN chose this forum to bring its third action and relied on its 2018 YAN Judgment as its cornerstone. YAN cannot now feign harm by being compelled to finish the case it started in this forum upon the facts it pled while its home court case is stayed and newly contrived judgments are conjured. Nor can YAN claim harm by being restrained from using its own court to sidestep *La Posta II* and change the nature of the case it pled in Sacramento. Additionally, interest continues to accrue on the San Diego Judgment, so there is no harm to any of YAN's pecuniary interests.

2. La Posta has been harmed, and will continue to be harmed, without an injunction.

On the other hand, La Posta has already been harmed and will continue to incur more harm without injunctive relief. La Posta has been harmed by the costs and burdens of defending in two fora. La Posta has been compelled to defend itself before the YAN Court, and that matter is proceeding on La Posta's appeal of the 2023 YAN Final Judgment. La Posta filed its opening appellate brief on May 26, 2023, and is appealing several errors in the YAN Court Action. Without an injunction, La Posta will need to continue to defend in two separate venues. But with an injunction barring YAN's ability to use the YAN Court or YAN Court rulings, the harm will be mitigated—La Posta can be heard on the case that YAN pled. Being forced to defend in two jurisdictions is a significant financial harm to La Posta as well as a waste of judicial resources. *See, e.g.,* CCP § 526(a)(2), (3), (4), (5), (6), (b)(1).

More concerning, La Posta faces an interim and likely irreparable harm because YAN has created further opportunity to unwind and thereby devalue the binding effect of *La Posta I* & *II* with a new YAN Court judgment.[23] This Court's decisions have meaning

[23] *See Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1184 ("Irreparable harm does not mean injury beyond the possibility of repair or beyond possible compensation in damages. The word "irreparable" is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard." (cleaned up).); see also

and are binding on the lower court and the parties. However, YAN has used its own court to avoid the consequences of this Court's decisions in an attempt to render inconvenient judgments meaningless, and if unchecked, will continue to do so and set an example to others to do the same.

La Posta has been robbed of the benefit of closure this Court's decisions provide. YAN introduced the 2023 YAN Judgment into the underlying case and it proved the sole basis for the Superior Court to deny La Posta's MSJ. Despite YAN's pleading, based solely on the 2018 YAN Judgment, YAN's manipulation through two lawsuits proved adequate to convince the Superior Court to ignore *La Posta II*.[24] If allowed to continue, YAN will manipulate the courts whenever it sees fit to circumvent the substance and results of *La Posta I & II.* La Posta's right to due process has been, and will continue to be, harmed so long as YAN deprives it of its opportunity to fully litigate its defenses in California courts by interfering with a new, precisely crafted YAN Court "judgement" that it has manufactured to meets its needs.

There is also a greater overall harm—allowing YAN to perpetrate endless gamesmanship at La Posta's expense. After YAN's first suit in San Diego did not resolve in YAN's favor, YAN retreated to its own court to gain a tactical advantage. YAN certainly had a home court advantage, especially when its own court patently disregarded *La Posta I* and California authority, and ultimately gave rise to the instant action. The YAN Court

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Costa Mesa, *supra*, 209 Cal.App.4th at p. 305 ("While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, plaintiffs are not required to wait until they have suffered *actual harm* before they apply for an injunction, but may seek relief against the *threatened infringements* of their rights." (cleaned up; emphasis in original).)

[24] Compare to Amended Minute Order, p. 4 ("An issue that is 'within the general area of issues framed by the pleadings' is properly before the court on a summary judgment or summary adjudication motion. *Lennar Northeast Partners v. Buice* (1996) 49 Cal. App. 4th 1576, 1582-1583. The Court cannot consider an unpleaded issue in ruling on motion for summary judgment or adjudication. *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541. The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings. *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 342.")

allowed YAN to walk away from the result of its San Diego case to try its hand in Sacramento. But when that was unsuccessful, without justification or scrutiny, the YAN Court welcomed YAN's return to conclude the defunct and abandoned proceedings. YAN has used its own court when it was unhappy with the outcomes in San Diego, *La Posta I*, and *La Posta II*, to obtain favorable rulings. Unless this Court binds YAN through an injunction, it will continue forum shopping, harming La Posta and undermining the integrity of both California and tribal courts. Accordingly, YAN should be enjoined.

C. La Posta is eligible for injunctive relief under CCP § 526.

The Superior Court also erred by ignoring the circumstances for granting an injunction in CCP § 526.[25] The Legislature codified these circumstances as appropriate for issuing an injunction. La Posta meets several of the circumstances enumerated by the Legislature. Importantly, § 526 does not impose a threshold requirement showing irreparable injury before an injunction may issue. The Superior Court's holding to the contrary is therefore in direct conflict with the intent of the Legislature.

Multiple provisions in CCP § 526 warrant issuing an injunction. Under CCP § 526(a)(2), YAN has forced simultaneous litigation on the same facts and the same cause of action in two courts. Two courts adjudicating the same thing is not only depriving La

[25] CCP § 526 states, in pertinent part: "(a) An injunction may be granted in the following cases . . . .(2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action; (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual; (4) When pecuniary compensation would not afford adequate relief; (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; (7) Where the obligation arises from a trust." And subsection (b) states in part: "An injunction cannot be granted in the following cases: (1) To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of proceedings."

Posta of due process and its day in court to be heard in California, but it is wasteful and the costs of simultaneous litigation is injurious to La Posta.

Under (a)(3), YAN is threatening La Posta's right to defend itself in California action by making every effort to circumvent *La Posta II* using its own court, instead of simply finishing the suit YAN initiated here. YAN's intent is to distinguish from *La Posta II* and devalue its controlling impact and to make a *de facto* amendment to its complaint by injecting the instant suit with a new tribal court judgment after *La Posta II* found in La Posta's favor.[26] If YAN is allowed to swap a new order to replace the YAN Judgment here, La Posta's due process rights are implicated and violated.

Under (a)(4) and (5), compensation will not relieve La Posta's injuries. There is no pecuniary compensation for being forced to litigate and relitigate in two fora—YAN chose to bring its third case in Sacramento, so YAN should be required to conclude this decade of litigation in Sacramento without extraneous ancillary proceedings elsewhere.

Under (a)(6) and (b)(1), a preliminary injunction may issue to stop a multiplicity of judicial proceedings. YAN no doubt created a multiplicity of proceedings to undercut *La Posta I & II*, and now has obtained its desired order from its YAN Court and seeks to substitute it for the 2018 YAN Judgment and proclaim victory. Unless restrained, La Posta will need to continue to defend the same action brought by the same party in two separate courts simultaneously. Indeed, it has already had to file its opening appellate brief in YAN Appellate Court.

Each of the aforementioned provisions justifies La Posta request for injunctive relief. The Superior Court's imposition of a threshold irreparable injury requirement was erroneous and should be reversed.

IV. The Superior Court erred when interpreting *La Posta II* to mean that this Court advised YAN to return to its own court and resume the YAN Court Action to obtain a "final" judgment.

[26] This is reminiscent of May 1, 2015, when YAN did not like its chances with the San Diego jury, YAN filed its second lawsuit in its own court on the eve of the jury trial—essentially acting to undercut the jury before voir dire even began.

La Posta II hypothesized that "perhaps, as this litigation progresses, YAN will be able to procure tribal records showing that the tribal court's decision should be considered to be a 'final determination.'" *La Posta II* at *11. The Superior Court erroneously interpreting that to mean that "YAN sought to do just that when it moved for a final judgment in the Tribal Court . . . YAN's actions were a logical response to the Third District's decision." (AA p. 998.)

La Posta II suggested that records might exist that show the 2018 YAN Judgment is a "final determination." The "logical response" to that speculation is not to resurrect an abandoned lawsuit to obtain a new judgment, then seek to re-do the Sacramento Action.

A. *La Posta II* issued after YAN's admission that the YAN Action was abandoned, so it could not have contemplated a new YAN Court judgment.

This Court had every reason to believe that the YAN Court Action was defunct when it issued *La Posta II*. As noted above, during oral arguments for *La Posta II,* YAN's counsel stated to this Court that the tribal court action had been abandoned.[27] YAN could have told this Court that if it lost, it intended to return to the YAN Court to "finalize" its 2018 YAN Judgment, but instead YAN said the case was "abandoned." This Court issued *La Posta II* based on that express representation. Because of YAN's unambiguous statements to this Court, it is highly unlikely that this Court anticipated that YAN would return to its own court and resume its seven year old lawsuit to obtain a new YAN Court judgment, then return to Sacramento to restart its lawsuit.

The statement in *La Posta II* was more likely theoretical than directional. This Court's characterization related to newly discovered, not newly created, evidence. And this Court referred to "the tribal court's decision," i.e. the 2018 YAN Judgment, as it was the only "tribal court[] decision that existed at the time. It is highly unlikely that this Court intended to legitimize, let alone instruct, YAN's return to the YAN Court and attempt to simply substitute the new judgment for the old judgment.

[27] YAN has since made no effort to clarify its "abandonment" statement, but has acted as if the representation to this Court is of no consequence.

It was not "logical," as the Superior Court believes, for YAN to resume the YAN Action following *La Posta II*—YAN's conduct highlights a clear misrepresentation to this Court. (AA p. 998.) But more, YAN's remedy if it was unhappy with *La Posta II* was to appeal, not to return to its second lawsuit to remedy the errors in its third lawsuit. The Superior Court thus incorrectly interpreted *La Posta II*, to the extreme detriment of La Posta.

B. The Sacramento Court must formally recognize the 2023 YAN Judgment pursuant to substantive California law.

To prevent La Posta from suffering irreparable injury, YAN must be prohibited from introducing the new 2023 YAN Judgment in the underlying action without formal recognition. California requires that a court formally recognize a non-California judgment either by statute, for money judgments, or by comity. See, TCCMJA, CCP §§ 1710.10-1741; see also, e.g., *Manco Contracting Co. (W.L.L.) v. Bezdikian*, (2008) 45 Cal. 4th 192, 198 ("Comity remains the basis for recognizing foreign judgments not covered" by these statutory schemes.); *cf. In re M.M.* (2007) 154 Cal.App.4th 897, 913 ("Because states and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each other's jurisdictions" *(quoting Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805, 807).). The formal recognition process is important because it allows an opportunity to challenge the validity of the out-of-state judgment. *See, e.g.,* CCP § 1710.30; §§ 1715(c), 1716(d), 1718; § 1737; *Hilton v. Guyot* (1895) 159 U.S. 113, 202–203; *In re Stephanie M.* (1994) 7 Cal.4th 295, 314, as modified on denial of reh'g (May 12, 1994). Formal recognition ensures that due process was afforded in the foreign action.

The Legislature enacted the TCCMJA to "establish a new legal framework . . . governing the rules and procedures for seeking recognition of a tribal court money judgment in California state courts." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 406 (2013-2014 Reg. Sess.) as amended January 6, 2014, p. 2; emphasis added.) Under the TCCMJA, a tribal judgment holder "may apply for recognition and entry of a judgment

based on a tribal court money judgment[28] by filing an application in superior court . . . ." TCCMJA, CCP §§ 1731, 1734(a). After an application is filed, a party may object to recognition based on several enumerated bases putting the burden on the applicant to show the tribal judgment is entitled to recognition. § 1737(e).

Alternatively, "[c]omity is based on the belief 'that the laws of a state have no force, *proprio vigore*, beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law.'" *Advanced Bionics Corp. v. Medtronic*, *Inc.* (2002) 29 Cal. 4th 697, 707, *as modified* (Mar. 5, 2003) (quoting *In re Lund's Estate* (1945) 26 Cal. 2d 472, 489; see also *Bird v. Glacier Electric Cooperative, Inc.,* (9th Cir. 2001) 255 F.3d 1136, 1141 ("the comity analysis appropriate for the 'domestic dependent nation' status of Indian nations is not well developed."). California courts look to both common law and the Restatement (Third) of Foreign Relations Law to determine whether to extend comity.[29] See *AO Alfa-Bank v. Yakovlev*, (2018) 21 Cal. App. 5th 189, 214 *as modified on denial of reh'g* (Apr. 3, 2018). The Restatements recognize various grounds on which a court may decline to recognize a foreign judgment. *See* Restatement (Third) § 482; Restatement (Fourth) §§ 483-484.

YAN is making every effort to bypass any formal recognition process to free itself and the Superior Court from the binding effects of *La Posta I & II*. It has introduced the 2023 YAN Judgement in the Sacramento Action via Request for Judicial Notice and has a

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[28] The 2023 YAN Judgment fits the definition of a "tribal court money judgment"—i.e., a written judgment of a tribal court for a specified amount of money ($262,081) that was issued in a civil action that is (according to YAN) final, conclusive, and enforceable by the YAN Court and is duly authenticated in accordance with YAN's laws. See CCP § 1732(g); (LP 1012-1032.)

[29] The Restatement (Fourth) is substantively similar to the Restatement (Third) and will aid the Court here. While not yet formally adopted by California Courts, it was relied upon by the Legislature when it enacted the TCCMJA. (See CCP § 1737 Law Revision Commission Comments.)

pending motion to amend its complaint to plead the substance of the 2023 YAN Judgment. By amending its pleading to allege the substance of the 2023 YAN Judgment, YAN secures an unfair advantage because the trial court is bound to "assume the truth of all well-pleaded facts and accept as true all facts that may be implied or inferred from the facts alleged." *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.* (2006) 140 Cal.App.4th 795, 798. Without being able to challenge recognition, La Posta is harmed. California is harmed, too, if a party can bypass recognition by seeking a declaration instead of enforcement.

The Superior Court erred when it bypassed any analysis mandated by the TCCMJA and comity and informally recognized the 2018 YAN Judgment. YAN must be required to secure formal recognition of the 2023 YAN Judgment before it can be considered by the Superior Court. Formal recognition will allow La Posta a fair opportunity to object. Until then, the Superior Court must not consider the 2023 YAN Judgment as evidence of compliance with the SARLA. La Posta requires such a remedy to ensure its ability to rely on *La Posta I & II*. Thus, to the extent the Superior Court relied on the 2023 YAN Judgment to deny La Posta's Motion, such recognition and reliance was in error.

C. The Superior Court erred by granting judicial notice to the 2023 YAN judgment under Evidence Code § 452(h).

Along with its opposition to La Posta's Motion, YAN sought judicial notice of the new 2023 "final judgment." (AA p. 999.) YAN relied on California Evidence Code § 452(d) and (h) as the bases for judicial notice. Under the Evidence Code § 452,

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451 …
>
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
> …
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

While the new judgment is likely noticeable under Evidence Code § 452(d), it is not recognizable under (h). The comments to § 452 explain that:

> Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter . . . Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings.

The new judgment is simply not the type of "ascertainable and indisputable" information considered in (h). It is not like a treatise, encyclopedia, or almanac and it is not like expert testimony. To the contrary, the new judgment is the subject of appeal because La Posta disputes its findings of fact and conclusions of law, and it may be wholly reversed, making it subject to change as opposed to "indisputable." *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457 ("When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable."). Moreover, notice under Evidence Code § 452(h) is an improper substitute for the substance of a judgment when the party intends to enforce the judgment. For enforcement, the judgment must be recognized either through the TCCMJA or the principles of comity, as discussed above.

The Superior Court's judicial notice under Evidence Code § 452(h) was in error and should be reversed.

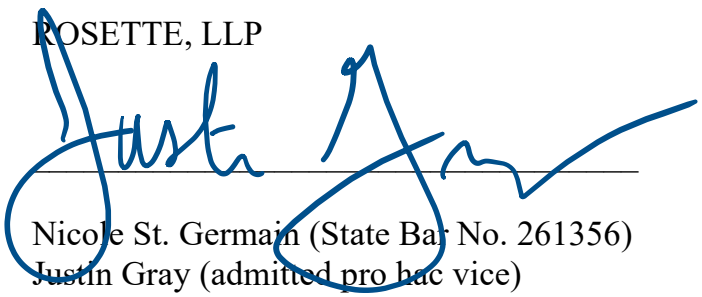
CONCLUSION

For these reasons, La Posta respectfully requests that this Court find that the Superior Court abused its discretion by applying the incorrect legal standard to La Posta's Motion and reverse the denial of the Motion requiring the Court to apply the proper standard.

Further, La Posta respectfully requests that this Court find that La Posta is likely to succeed on the merits because YAN's claims fail as a matter of law, vacate any orders inconsistent with this finding, and remand this matter for further proceedings consistent with the Court's opinion.

Respectfully submitted,

ROSETTE, LLP



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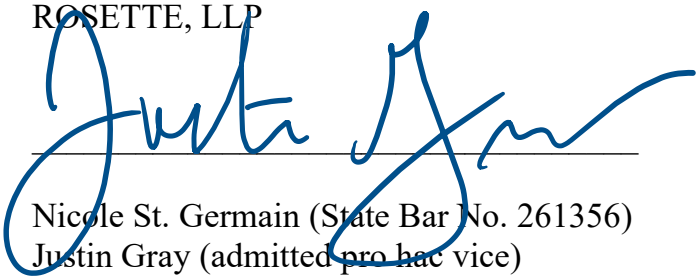
CERTIFICATE OF COMPLIANCE

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 including footnotes and contains approximately 13,743 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.

ROSETTE, LLP



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PROOF OF SERVICE

La Posta Band of Diegueno Mission Indians v. Yavapai-Apache Nation
3rd Appellate Dist. Court of Appeal
Case No C098204

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Kent, State of Michigan. My business address is Cesar Chavez Ave., S.W., Ste. 250, Grand Rapids, Michigan 49503.

On June 13, 2023, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF AND APPELLANT'S APPENDIX, VOLUMES 1-8**, and **CERTIFICATE OF INTERESTED PARTIES** on the interested parties in this action as follows:

BY ELECTRONIC SERVICE: I served the documents on the persons listed in the Service List (below) by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I served the documents to the Honorable Richard Sueyoshi and the California Supreme Court at the addresses listed on the Service List.

/s/ Scott Funke

SERVICE LIST

La Posta Band of Diegueno Mission Indians v. Yavapai-Apache Nation
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