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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

YAVAPAI-APACHE NATION,

Plaintiff, Cross-defendant and
Appellant,

v.

LA POSTA BAND OF DIEGUENO
MISSION INDIANS,

Defendant, Cross-complainant and
Appellant.

D069556

(Super. Ct. No. 37-2013-00048045-
CU-BC-CTL)

APPEALS from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Browne George Ross, Eric M. George and Ira Bibbero, for Plaintiff, Cross-defendant and Appellant Yavapai-Apache Nation.

Rosette, Robert A. Rosette and Justin Gray, for Defendant, Cross-complainant and Appellant La Posta Band of Diegueno Mission Indians.

This appeal arises from a contract dispute between two Indian tribes: Yavapai-Apache Nation (YAN) and La Posta Band of Diegueno Mission Indians (La Posta).

YAN is an Arizona-based tribe with about 2,400 members, and La Posta is a California-based tribe with about 15 adult members. In the parties' contract, La Posta promised to repay more than \$23 million to YAN for funds borrowed to develop a casino that later proved unsuccessful. The parties waived sovereign immunity in their contract.

After La Posta defaulted on the loan, YAN sued La Posta seeking repayment of the principal plus interest. La Posta filed a cross-complaint seeking declaratory relief in the form of an order that YAN was prohibited from enforcing any judgment against La Posta's Revenue-Sharing Trust Fund (RSTF) payments, which are funds distributed by the California Gambling Control Commission to certain California tribes that operate fewer than 350 gaming devices.

Although YAN's breach of contract claim was straightforward (the claimed debt was largely undisputed), the proceedings became procedurally complicated because the parties' litigation energies were not focused on the debt, but instead on the issue with substantial practical monetary implications—whether YAN could attach the RSTF funds to enforce payment of La Posta's debt. This issue was directly raised only in the cross-complaint, but it also implicated the manner in which the complaint was litigated. As discussed in more detail below, the proceedings were also complicated by YAN's filing a parallel action in its own tribal court (the Yavapai-Apache Nation Tribal Court (Tribal Court)).

In the final judgment, the superior court awarded YAN \$48,893,407.97 on its contract claim, and entered judgment against La Posta on its declaratory relief claim based on the court's finding this claim was not ripe. Both parties filed appeals from this

judgment. For the reasons explained, we find no reversible error and affirm the judgment in its entirety.

OVERVIEW

The court heard this matter in three phases: (1) a court trial on YAN's breach of contract claim; (2) a jury trial on YAN's fraud claim; and (3) cross-motions for judgment on the pleadings on La Posta's declaratory relief claim. The court's rulings at each of these phases are at issue in the parties' appeals. We briefly summarize the challenged rulings and our conclusions below.

Breach of Contract Trial

The court held a bench trial on YAN's breach of contract claim asserted in its complaint. By the time of this trial, the parties had stipulated to the validity of the parties' contract and the principal amount La Posta owed on the contract. The only issue for the court's determination was when certain compound interest began to accrue on the debt under the parties' contract (this dispute concerned about \$262,081). This issue was relevant primarily to YAN's potential rights against La Posta's RSTF assets. After the brief trial (which consisted mainly of counsels' arguments and certain documentary exhibits), the court agreed with YAN's interpretation. On appeal, La Posta challenges the court's conclusion. We determine the court properly interpreted the contract and find La Posta's additional procedural challenges to be without merit.

Jury Trial on Fraud

The court held a jury trial on YAN's claim seeking to establish La Posta's liability for intentional misrepresentation. Although YAN did not specifically plead this claim in

the complaint or as a defense to the cross-complaint, the court permitted YAN to assert this claim based on (1) YAN's explanation that it did not learn of the underlying facts until certain late deposition testimony, and (2) YAN's specific description of the facts underlying the alleged fraud and YAN's representation that its claim was strictly limited to these facts.

After a three-day trial on the fraud claim, the jury returned a special verdict in La Posta's favor. The jury's findings included: La Posta did not make a false representation to YAN; La Posta did not know any of its representations were false; La Posta did not make any representation recklessly without regard for its truth; and YAN's reliance on La Posta's representations was not a substantial factor in causing harm to YAN. The jury determination finding in La Posta's favor was included in the final judgment, and is the subject of YAN's cross-appeal.

YAN's sole appellate challenge to the jury verdict is that the court prejudicially erred by refusing to instruct the jury on concealment and negligent misrepresentation theories (in addition to intentional misrepresentation). The argument is without merit. YAN's offer of proof did not support the proposed instructions, and there was no prejudicial error because it is not reasonably probable YAN would have obtained a more favorable judgment if the court had given these additional instructions. There was no substantive difference between YAN's asserted concealment and intentional misrepresentation claims, and the jury's finding that La Posta did not make any false statements necessarily resolves the negligent misrepresentation claim based on the same alleged facts.

Judgment on the Pleadings

In its cross-complaint, La Posta sought declaratory relief providing that YAN is not entitled to enforce its judgment against La Posta's RSTF assets. In its motion for judgment on the pleadings, YAN argued the issue was not ripe because the parties' agreement allowed YAN to enforce a judgment against these assets only if it obtained a fraud judgment against La Posta, and there was no fraud judgment at this time. La Posta opposed this motion and brought its own motion for judgment on the pleadings arguing: (1) the Loan Agreement absolutely prohibited any enforcement against the RSTF assets (even with a finding of fraud), and therefore the matter was ripe and should be decided to preclude further litigation (particularly the Tribal Court action); and (2) alternatively, the jury had decided La Posta did not commit fraud against YAN and thus La Posta was entitled to declaratory relief. The court granted YAN's motion, finding the issue was not ripe, and dismissed the declaratory relief action.

On appeal, La Posta challenges this ruling. We determine the trial court did not abuse its discretion in dismissing La Posta's cross-complaint. This determination, however, does not bar La Posta from seeking relief if and when the issue is ripe, e.g., in a subsequent declaratory relief proceeding and/or in any enforcement proceeding brought in the California courts.

FACTS AND PROCEDURE¹

Background

In 2003, YAN, a successful Arizona casino operator, approached La Posta with the idea of La Posta operating a gaming casino in San Diego County. At the time, La Posta's main source of income was state funds through the RSTF program, under which the Tribe would be paid about \$1.1 million annually pursuant to a compact entered into between California and various tribes. (See *California Valley Miwok Tribe v. California Gambling Control Com.* (2014) 231 Cal.App.4th 885, 888-889.)

La Posta decided to move forward with the casino project with the subjective understanding that it did not intend to place its RSTF benefits at risk. In doing so, La Posta obtained a \$23 million loan from third party lenders. YAN was the guarantor on this loan and was entitled to a share of the profits. Using the borrowed funds, La Posta constructed a casino that opened in 2007. Within one year, the casino began losing money.

By 2009, La Posta was unable to make the payments due on the loan. In response, YAN purchased the loan from the third-party lenders, and in May 2009, YAN and La Posta entered into an amended and restated contract (referred to in this opinion as the

¹ We summarize the facts in the light most favorable to the jury's findings on the fraud claim and to the court's findings on the breach of contract claim. We will discuss additional facts in the Discussion section, including a summary of YAN's evidence presented at the fraud trial for purposes of reviewing the asserted jury instruction error.

Loan Agreement²). In the Loan Agreement, La Posta agreed it owed all of the borrowed principal plus interest, and agreed to repay this amount to YAN by making monthly payments to YAN for 15 years, and then making a balloon payment at the end of that time. The Loan Agreement (48 pages) contained numerous provisions, including those governing principal and interest payments, default consequences, and limitations on recourse against certain assets. Under the contract terms, La Posta was not required to begin making payments until August 2009, and was required to make only simple interest payments for the first two years.

In the summer of 2009, La Posta asked YAN for help to improve its casino business, and YAN recommended that La Posta retain Strategic Development Worldwide (SDW), an experienced Indian gaming consultant. La Posta immediately hired SDW. One of SDW's first suggestions was that La Posta should ask YAN for an extension on its monthly loan payments, and use the deferred funds for advertising and other profit-generating purposes.

Following this suggestion, on October 7, 2009, La Posta's tribal secretary/treasurer (Eric LaChappa) wrote YAN a letter asking for "a four month extension to the initial three month period where La Posta . . . was not required to make principal or interest payments on the Loan" (October 2009 letter). The letter stated: "[T]he additional four months of no principal or interest payments will allow further time for Casino

² This agreement (Exhibit 14) is titled Second Amended And Restated Loan Agreement. Although the parties refer to this document as the "SARLA," for readability purposes we refer to the contract as the "Loan Agreement."

management to consider implementation of the findings of the [SDW]. SDW began its review of the Casino in early September 2009, we look forward to their report in the near future."³

In a January 14, 2010 letter, YAN agreed to this request, and gave La Posta several more months until June 2010 to make its first payment (January 2010 letter). This letter stated that SDW had recently provided an update to YAN's tribal council, and "Based upon SDW's presentation, [YAN], as an investment partner of La Posta, applauds the managerial and operational steps being taken by La Posta to turn the La Posta Casino into a profitable business. [¶] Based upon the committed changes being made at La Posta with the assistance of SDW, we shall grant a payment extension as requested [in the October 2009 letter]."⁴

³ Because this letter is relevant to several appellate issues, we quote it in full: "The purpose of this Letter is to form[ally] request a four month extension to the initial three month period where La Posta, pursuant to the terms of the [Loan Agreement], was not required to make principal or interest payments on the Loan. Since the closing of the Loan, management of the La Posta Casino . . . has been working diligently to leverage the principal and interest relief that it has received to become current on past due balances that have snowballed over time. We believe that we are making headway in this regard, however, despite these efforts the Casino has not been able to fully pay down these outstanding balances. An additional period of similar relief will allow us to continue whittling these obligations down and provide us with the ability to focus on efficiently operating the Casino moving forward, rather than being held back by past due obligations. [¶] In addition to allowing for the continued pay down of past due obligations, the additional four months of no principal or interest payments will allow further time for Casino management to consider implementation of the findings of [SDW]. SDW began its review of the Casino in early September 2009, we look forward to their report in the near future."

⁴ This January 2010 letter continued: "In [the October 2009] letter, Mr. LaChappa requested a four month extension to the initial three month period of no princip[al] or

Although La Posta made efforts to reduce costs and obtain more customers, the casino was ultimately unsuccessful and La Posta never made any payments under the Loan Agreement. La Posta closed the casino in 2012.

YAN's Lawsuit Against La Posta

In May 2013, YAN filed a breach of contract action against La Posta in the San Diego County Superior Court, alleging that La Posta did not make the required payments, and therefore under the Loan Agreement terms, the entire balance along with accrued interest was immediately due and payable (allegedly exceeding \$36 million at that time). YAN did not include any fraud allegations in the complaint.

La Posta answered and filed a cross-complaint, asserting a single cause of action for declaratory relief seeking an order that YAN was not entitled to enforce any part of the judgment against La Posta's RSTF assets. La Posta alleged that under the Loan Agreement terms, YAN's recourse for loan defaults is limited to La Posta's " 'Casino Assets,' " which it alleged included mainly casino-related property and not La Posta's RSTF payments.

In its answer to the cross-complaint, YAN denied the allegations and asserted an affirmative defense that La Posta was barred from recovering the requested relief by its "negligent, intentional or bad faith conduct."

interest payments under the Loan Agreement. Starting Monday, January 18, 2010, the La Posta Casino shall have an additional grace period for making no princi[pal] or interest payments to [YAN]. This grace period will end on Monday, May 3, 2010 and monthly payments as required under the Loan Agreement will resume at that time with the first payment due to [YAN] in June, 2010. In essence, with this new deadline for making payments to [YAN], [YAN] will have granted La Posta an extension of seven months of no payments of principal and interest due under the Loan Agreement."

After the close of discovery, in August 2014, the parties filed a joint trial readiness conference report indicating that YAN intended to amend its complaint to add a fraud cause of action, which YAN asserted was relevant to its recourse rights against La Posta's RSTF assets. YAN claimed that under the Loan Agreement terms, YAN was entitled to enforce a breach of contract judgment against La Posta's RSTF assets if YAN obtained a final judicial determination that La Posta had committed fraud in connection with the Loan Agreement.

In a second joint trial readiness conference report filed in September 2014, the parties disputed whether YAN should be entitled to amend its complaint to add a fraud claim. YAN asked the court for permission to amend its complaint to add the fraud claim based on the June 27, 2014 deposition testimony of James Hill, who served at various times as La Posta's business manager and the casino general manager. As later clarified, YAN relied on the statement in La Posta's October 2009 letter that La Posta "intended to consider implementation of [SDW's] findings" (see *ante*, fn. 3), and Hill's deposition testimony in which Hill was asked about the truth of this statement and Hill responded,

"[n]ot to my recollection."⁵ La Posta objected to allowing an amendment to add a fraud claim, arguing it was untimely, and alternatively if the court permitted an amendment, La Posta should be provided additional time to conduct discovery on this issue and bring dispositive motions on any fraud claim.

At the September 2014 trial readiness conference, the parties presented arguments on whether YAN should be permitted to amend its complaint. After expressing concern regarding the prejudice to La Posta by allowing an amendment after discovery had closed, the court requested that YAN file a motion in limine identifying the specific evidence it sought to present on the fraud issue.

Shortly after, YAN filed the motion in limine seeking leave to present evidence of fraud, arguing this evidence was relevant to YAN's right to attach assets beyond the casino property (which was at issue in the cross-complaint) and/or to amend its own complaint to add the fraud claim. YAN stated that if it was permitted to litigate the fraud claim, the claim would be limited to a single factual matter: whether La Posta was

⁵ Specifically, the cited deposition testimony reads as follows:

"[YAN's counsel:] So let's go back to Exhibit 17 [the October 2009 letter]. This is the letter where Eric LaChappa says at the very bottom, 'In addition to allowing for the continued paydown of past obligations, the additional four months of no principal or interest payments will allow further time for casino management to consider implementation of the findings of the Strategic Development Worldwide.' [¶] Was that true, that in October of 2009, La Posta intended to consider implementation of SDW, or Strategic Development Worldwide's, findings?"

"[Hill:] Not to my recollection. They may have in [tribal] council. That's where [the letter] came from."

untruthful when it stated in its October 2009 letter that it "intended to consider implementing SDW's findings." YAN said it would present evidence that it relied on this statement and it would not have granted the payment extension if it had known La Posta's statement of its intentions was false. YAN said it was not requesting fraud damages, and instead sought only a jury finding on fraud to enable it to enforce its judgment against La Posta's RSTF assets.

La Posta opposed the motion, arguing that it was unfair to permit YAN to litigate the fraud issue as YAN had never presented a proposed first amended complaint detailing the fraud allegations, and had raised the issue after discovery had closed and several months after YAN had purportedly learned of the alleged fraud. La Posta also argued that there was no evidence to support a fraud claim, and YAN suffered no damages from the alleged fraud.

After a hearing, the court granted the motion in limine, concluding that YAN would be allowed to present evidence of fraud at trial and YAN did not need to amend its complaint to litigate this claim at a trial. The court reasoned that La Posta "was not prejudiced because the alleged fraud was expressly defined (i.e., based on the deposition of James Hill regarding consideration of implementation of the findings of the SDW)." Based on YAN's representations, the court made clear its "intention that the fraud issue was limited to that framed by the motion in limine itself—to Mr. Hill's 17-word deposition testimony regarding implementation of the findings of the SDW."

The parties then stipulated that La Posta had breached the Loan Agreement, and the court held a bench trial solely on the issue of the ultimate dollar amount arising from

this breach, reserving the fraud trial for a separate proceeding. As will be discussed below, during this bench trial, the parties stipulated to all issues, and disputed only the manner in which the Loan Agreement required compound interest to be calculated upon a breach of the agreement. This issue was relevant to YAN's contention that the alleged fraud *caused* it to suffer damages in the form of the loss of compound interest during the payment-extension period. At the trial, La Posta argued that YAN did not suffer any loss from the payment extension because, under the Loan Agreement, cumulative interest began to accrue in May 2009 even with the payment extension (so that there would be no difference in the total amount due even if the extension request had not been granted). After the bench trial, the court agreed with YAN's position and adopted YAN's calculation of the damages. This conclusion allowed YAN to move forward with its fraud claim, because it showed YAN sustained at least a minimal level of damages *if* it could prove La Posta committed fraud.

Over La Posta's objections, the court then granted YAN's request for a jury trial on the fraud issue. Before the jury trial began, YAN submitted jury instructions and a jury verdict seeking findings on (1) intentional misrepresentation, (2) concealment, and (3) negligent misrepresentation. La Posta objected to the latter two theories being presented to the jury, asserting that based on the facts identified in YAN's motion in limine, the allegations were limited to an intentional misrepresentation claim, and did not support negligent-misrepresentation or concealment theories. At a hearing on the issue, the court noted YAN had not alleged a fraud claim, so "it's a very convoluted set of circumstances that have just kind of changed as time went on." YAN's counsel responded: "There is

[only] one disputed issue for the jury to consider. [YAN] claims that La Posta committed an act of fraud when it requested an extension to make loan payments [in the October 2009 letter]. [La Posta] denies that claim. That's it."

Several months later, the court ruled that intentional misrepresentation would be the sole theory presented to the jury, and declined to give instructions or special verdict questions on concealment and negligent misrepresentation claims. The court reasoned it had previously ruled that YAN's fraud theory was limited to its factual description in the motion in limine, and this theory encompassed only an intentional misrepresentation claim.

Shortly after, on May 1, 2015, YAN filed a complaint in its Tribal Court against La Posta, alleging concealment and negligent misrepresentation claims based on the same facts alleged in this action (misrepresentation of facts in the October 2009 letter), and seeking declaratory relief regarding its entitlement to La Posta's RSTF assets.

Four days later, the jury trial began in the San Diego County action. As summarized below, the parties' evidence pertained solely to the issue whether La Posta misrepresented the facts in its October 2009 letter regarding La Posta's intent to consider and implement SDW's recommendations for improving the casino's profitability. At the conclusion of the evidence, the court instructed the jury on the intentional misrepresentation claim, and the special verdict form asked the jury to make findings only on this theory. After a brief deliberation, the jury found in La Posta's favor. The jury found La Posta did not make a false representation to YAN; did not make any knowing or reckless misrepresentations; and did not cause any damage to YAN.

After the jury was excused, the court asked counsel whether the cross-complaint was moot as the jury found no fraud and under YAN's prior concessions, YAN could not enforce the judgment against the RSTF payments without a final fraud determination. In response, La Posta's attorney informed the court of YAN's Tribal Court action, and argued that YAN was seeking to litigate the concealment and negligent misrepresentation issues in that court. The parties then decided they would present the issues in La Posta's declaratory relief cross-complaint by filing dispositive motions.

The parties then each filed a motion for judgment on the pleadings, and both parties extensively briefed the issues. After considering these papers and conducting a hearing, the court found the declaratory relief issue was not ripe and any determination would be "advisory." The court thus granted YAN's motion for judgment on the pleadings and denied La Posta's motion, and later denied La Posta's motion for reconsideration.

In the final judgment, the court restated the findings from each of the prior proceedings as follows: (1) the parties stipulated that La Posta had breached the Loan Agreement; (2) the court found YAN suffered damages from the breach in the amount of \$44,470,704.98 as of October 31, 2014; (3) the jury found "La Posta did not commit intentional misrepresentation with respect to YAN"; and (4) the court granted YAN's motion for judgment on the pleadings as to La Posta's cross-complaint for declaratory relief. Based on these findings, the court ordered (1) "Judgment is entered in favor of YAN and against La Posta on YAN's complaint" for \$48,893,407.97, encompassing the

amount owed plus prejudgment interest; and (2) the declaration requested by La Posta in its cross-complaint "shall not issue."

DISCUSSION

In its appeal, La Posta challenges two of the court's findings: (1) the court's interpretation of the Loan Agreement on the issue of when interest compounding began to accrue; and (2) the court's granting YAN's motion for judgment on the pleadings on La Posta's cross-complaint and denying La Posta's motion seeking declaratory relief on the RSTF-assets recourse issue. YAN raises a single issue in its cross-appeal: the court erred in failing to instruct the jury on concealment and negligent-misrepresentation theories.

Logically, it makes most sense for us to begin with the cross-appeal. We will then discuss La Posta's appeal on the compound interest and declaratory relief issues. For the reasons explained below, we find neither party met its burden to show reversible error.

I. *Claimed Instructional Error*

YAN contends the court erred in refusing to instruct the jury on concealment and negligent-misrepresentation theories (in addition to intentional misrepresentation).

A. *Legal Principles*

Upon request, a party is entitled to instructions on every proper legal theory that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*)). "On an appeal claiming jury instructional error, including claims that the court improperly refused an instruction, we view the evidence in the light most favorable to the appellant. In such cases, we assume that the jury might have believed the evidence

upon which the instruction favorable to the appellant was predicated." (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754 (*Alcala*).

The appellant has the burden to show prejudicial error. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347-348; see *Morales v. 22nd District Agricultural Assn.* (2016) 1 Cal.App.5th 504, 525.) " 'A judgment may not be reversed on appeal, even for error involving "misdirection of the jury," unless "after an examination of the entire cause, including the evidence," it appears the error caused a "miscarriage of justice." [Citation.] [Citation.] 'Instructional error in a civil case is prejudicial " [w]here it seems probable' " that the error prejudicially affected the verdict. [Citation.] It is not enough that there may have been a "mere possibility" of prejudice. [Citation.]' " (*Alcala, supra*, 167 Cal.App.4th at p. 755.)

Because the "determination depends heavily on the particular nature of the error, . . . [a]ctual prejudice must be assessed in the context of the [entire] trial record." (*Daum v. Spinecare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) Relevant factors include: "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra*, 8 Cal.4th at pp. 580-581.)

B. *Factual Summary*

At the fraud trial, YAN presented La Posta's October 2009 letter in which La Posta said it would consider implementing SDW's recommendations and the January 2010 letter in which YAN said it agreed to the payment extension based on "the committed changes being made at La Posta." YAN argued La Posta intentionally misrepresented the

facts in its October 2009 letter because it never seriously intended to follow SDW's recommendations and did not do so.

To prove this assertion, YAN called SDW's chief executive officer, who testified that SDW made numerous recommendations to La Posta for improving the casino's profitability—including permanently reducing salaries and operating costs, implementing a business plan, increasing marketing efforts and budget, and improving the exterior design of the casino—but that La Posta did not fully implement any of these recommendations. YAN also presented the deposition testimony of James Hill (La Posta's former business manager and its casino general manager) in which he said "[n]ot to my recollection" in response to the question whether the statement of intent in the October 2009 letter was true. (See fn. 5, *ante*.) YAN also elicited Hill's testimony that his understanding was that SDW made only one primary recommendation—that La Posta increase its marketing budget and advertise the casino to obtain more business. YAN argued this testimony showed that Hill (as the La Posta representative) made no effort to understand SDW's recommendations and never seriously intended to implement the recommendations. YAN also presented the testimony of its chairman, Thomas Beauty, who said that Hill, on behalf of La Posta, agreed to implement SDW's recommendations and that YAN would not have granted the extension if it had known that La Posta did not intend to implement SDW's recommendations. Beauty also testified he had heard many "rumors" that La Posta tribe members and/or employees had high salaries and were driving BMW vehicles.

La Posta countered this evidence by arguing and presenting evidence showing that it intended to, and did, implement numerous SDW's recommendations, and that the casino's failure was caused by factors that it could not change, including the isolated location of the casino, the 2008 recession that substantially reduced the customer base, and the lack of funds to advertise and bring customers into the casino. In his testimony, Hill detailed the numerous steps taken by La Posta in response to SDW's recommendations. Hill also admitted he answered the deposition question that he had no recollection whether it was true that La Posta intended to implement SDW's recommendations (see fn. 5, *ante*), but explained he had used the wrong word and he had intended to say "I don't know" because the October 2009 letter came from La Posta's tribal council of which he was not a member. Hill explained that he "thought I answered [the question] correctly, but the answer 'I don't recall' was not what I meant. It's 'I don't know,' because the rest of my sentence said it came from the council—tribal council." Additionally, YAN's chairman admitted during cross-examination that La Posta did take at least some steps to implement SDW's findings. SDW's chief executive officer also acknowledged that La Posta implemented certain recommendations. He testified that La Posta acted with honest and "good" intentions in responding to SDW's recommendations, but that La Posta did not have the "toolkit" to make the casino a success.

After the jury heard the evidence and arguments, the court instructed the jury on the elements of intentional misrepresentation as follows:

"[YAN] claims that [La Posta] made a false representation that harmed [YAN]. To establish this claim, [YAN] must prove all of the following:

1. That [La Posta] represented to [YAN] that a fact was true;
2. That [La Posta's] representation was false;
3. That [La Posta] knew that the representation was false when it made it, or that [La Posta] made the representation recklessly and without regard for its truth;
4. That [La Posta] intended that [YAN] rely on the representation;
5. That [YAN] reasonably relied on [La Posta's] representation;
6. That [YAN] was harmed; and
7. That [YAN's] reliance on [La Posta's] representation was a substantial factor in causing [YAN's] harm."

Under its prior ruling, the court did not instruct the jury on YAN's proposed negligent misrepresentation and concealment instructions.⁶

⁶ The proposed concealment instruction read: "[YAN] claims that it was harmed because [La Posta] concealed certain information. To establish this claim, [YAN] must prove all of the following: [¶] 1. That [La Posta] disclosed some facts to [YAN] but intentionally failed to disclose other facts, making the disclosure deceptive; [¶] 2. That [YAN] did not know of the concealed facts; [¶] 3. That [La Posta] intended to deceive [YAN] by concealing the facts; [¶] 4. That had the omitted information been disclosed, [YAN] reasonably would have behaved differently; [¶] 5. That [YAN] was harmed; and [¶] 6. That [La Posta's] concealment was a substantial factor in causing [YAN]'s harm." (See CACI No. 1901.)

The proposed negligent misrepresentation instruction read: "[YAN] claims it was harmed because [La Posta] negligently misrepresented a fact. To establish this claim, [YAN] must prove all of the following: [¶] 1. That [La Posta] represented to [YAN] that a fact was true; [¶] 2. That [La Posta's] representation was not true; [¶] 3. That [La Posta] had no reasonable grounds for believing the representation was true when it made the representation; [¶] 4. That [La Posta] intended that [YAN] rely on this representation; [¶] 5. That [YAN] reasonably relied on [La Posta's] representation; [¶] 6. That [YAN] was harmed; and [¶] 7. That [YAN]'s reliance on [La Posta's] representation was a substantial factor in causing [YAN]'s harm." (See CACI No. 1903.)

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?"

C. Analysis

YAN's sole contention is that the court failed to give its proposed concealment and negligent misrepresentation instructions. On our independent review of the entire appellate record, we determine there was no prejudicial error.

First, as discussed above, 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 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. On this record, we agree with the court that YAN's claim encompassed only an intentional misrepresentation theory, and did not include concealment or negligent misrepresentation claims. There was nothing in YAN's offer of

proof suggesting an alleged concealment or that La Posta negligently (as opposed to intentionally) misrepresented the facts.

Additionally, even if the evidence supported the additional instructions, there is no reasonable likelihood the jury would have reached a verdict more favorable to YAN if the court had given the omitted instructions.

On the concealment claim, YAN argues the court should have instructed on this theory because it presented evidence that at the time it wrote the October 2009 letter, La Posta did not subjectively believe "any (or most) of SDW's recommendations [were] worth considering," and that La Posta "**[c]oncealed**" *this* information from YAN. In support, YAN cites to: (1) Hill's "[n]ot to my recollection" deposition testimony regarding the truth of La Posta's statement it intended to consider implementing SDW's recommendations; (2) the evidence showing Hill was primarily focused on implementing SDW's suggestion that La Posta obtain more funds to spend on marketing and advertising; and (3) the evidence showing La Posta did not follow SDW's recommendation for a long-term 10 percent salary reduction (and instead reduced salaries only for three months).

This is the *same* evidence YAN relied on at trial to argue that La Posta made an *intentional misrepresentation* when it said in the October 2009 letter that it intended to consider implementing SDW's recommendations and it later represented it would implement the recommendations. YAN's argument that La Posta made a false representation when it indicated it intended to consider and implement SDW's recommendations is not substantively different from the claim that La Posta concealed

information that it did not intend to seriously consider and implement SDW's recommendation. The jury's verdict shows it rejected YAN's evidence, and found credible La Posta's contrary evidence that La Posta intended to implement SDW's suggestions and took steps to do so. Given that the evidence and factual theories are conceptually the same, it is not reasonably probable the jury would have found La Posta liable for a concealment, but not an intentional misrepresentation.

We reach a similar conclusion on the negligent misrepresentation theory. YAN argues that if it had "been allowed to try negligent misrepresentation, with its lower standard of scienter, YAN could have asked the jury to give more consideration to the fact that La Posta's Tribal Council represented to YAN what La Posta's casino manager (Mr. Hill) was going to do—consider implementing SDW's recommendations—without having a reasonable ground for believing that Mr. Hill truly intended to consider implementing the recommendations."

The jury answered "No" to the first question whether La Posta made a false statement, *and* "No" to the second question whether La Posta made a representation with knowing falsity or conscious disregard for the truth. The only reasonable conclusion from the first answer is that the jury found that YAN did not meet its burden of proof to show that that La Posta made a false statement. Because a false statement is also a predicate to a negligent misrepresentation claim (see *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792), and YAN's negligent misrepresentation claim was based on the same factual assertions as the intentional misrepresentation claim, the court's refusal to instruct on this negligence theory was not prejudicial. Based on the

jury's finding, it necessarily would have found La Posta was not liable for negligent misrepresentation.

We reject YAN's additional contention that La Posta waived its right to challenge the concealment and negligent misrepresentation instructions in the court below by including these instructions in the August and September 2014 trial readiness reports. La Posta did not forfeit its right to challenge the proposed instructions at the fraud trial by referring to these instructions more than six months before the trial began and before the facts were developed.

Two months after the appellate issues were fully briefed in this court, La Posta moved to dismiss YAN's cross-appeal and sought sanctions, asserting the matter is now moot because in November 2016 YAN had a full trial on its concealment and negligent misrepresentation claims in the Tribal Court. YAN opposed this motion on several grounds, including that the Tribal Court has not yet ruled on these claims. We grant the parties' judicial notice requests in connection with this motion, but deny La Posta's motion. The lack of a Tribal Court ruling makes it unclear whether the issue is moot, and there are no grounds for sanctions on the record before us.

III. *Contract Damages*

In its appeal, La Posta contends the court erred in concluding that compound interest on its breach of contract accrued beginning in June 2010 (at the termination of the payment-extension period), rather than in May 2009 or August 2009.⁷

Although this argument appears counterintuitive (a breach of contract defendant generally would not complain that interest compounding starts later, rather than at an earlier time), the argument makes sense when understanding that the court's compound-interest determination was relevant primarily to the issue whether La Posta's alleged fraud (misrepresenting the facts to seek a payment extension) *caused* any damages. If the compound interest was triggered in May or August 2009 regardless of the payment extension, then La Posta's alleged fraud would have had no impact on its ultimate payment obligations and thus caused YAN no damages. Although this issue would seem to be moot based on the jury's finding of *no fraud*, La Posta states it is raising the issue based on its concern that the superior court's finding on compound interest could bar it from challenging the conclusion under the collateral estoppel doctrine in the Tribal Court. Although we question whether this finding would constitute collateral estoppel given that it was arguably not necessary to the court's final judgment (see *Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 498), we address the issue here to ensure La Posta obtains a full and fair opportunity to challenge the court's finding in California courts. For the

⁷ Compounding is the process by which past due amounts are added to the principal obligation, and interest is then calculated based on this larger base amount. (See *Estate of Sharp* (1971) 18 Cal.App.3d 565, 585.)

reasons explained below, we determine the court properly ruled on the contract damages issue.

A. Background Summary

After considerable discussion between the court and counsel at various hearings, the court requested the parties to file briefs on their dispute regarding contract damages. Both parties submitted briefing, with attached exhibits. In the briefs, the parties agreed that La Posta had breached the Loan Agreement by failing to make any required payments, and that La Posta owed principal and interest amounts. The parties also agreed that the sole issue for the court's consideration was when compounding interest began—whether it began after the payment extension deadline (June 2010) (YAN's position) or whether it began earlier, in May 2009 or August 2009 (La Posta's position).

The parties' accounting experts prepared charts of alternative damage calculations depending on which compound-interest trigger date was found to be supported by the contract language. On November 12, 2014, the parties stipulated to three sets of contract damage calculations—one assuming compound interest began to accrue in June 2010; one assuming compound interest began to accrue in May 2009; and one assuming compound interest began to accrue in August 2009.

The next day, on November 13, the court held a hearing. Although the initial purpose of the hearing was to present argument on various issues and to schedule a later trial, the court and parties extensively discussed the compound interest issue and ultimately agreed with the court that the hearing would constitute the bench trial on the

damages issue, and would result in the court's final ruling on YAN's breach of contract claim.

At the hearing, the parties relied on several portions of the Loan Agreement for their arguments, and stipulated that these provisions were unambiguous.

First, Article II, section 2.02, sets forth the required principal and interest payments:

"(a) Commencing on August 1, 2009, and continuing on each Payment Date thereafter through the Maturity Date, Borrower shall make monthly payments of accrued interest at the applicable interest rate stated herein. [¶] (b) Commencing on May 1, 2011, and continuing on each Payment Date thereafter through the Maturity Date, Borrower shall make monthly payments of Restructured Loan principal in the amount which, based on the then outstanding principal amount of the Restructured Loan, shall be sufficient, assuming future equal monthly payments, to fully amortize the then outstanding principal amount of the Restructured Loan over a fifteen (15) year amortization period from the Closing Date, plus interest accrued thereon."⁸

Second, section 2.06 identifies the consequences of a payment default, including the imposition of compound interest:

"For any period beginning on or after the first anniversary of [May 2009], if any installment of principal or interest or any fee or cost or other amount payable under any Loan Document to Lender is not paid when due, or at the option of Lender upon the occurrence and during the continuance of any Event of Default, the [loan] and any such delinquent fees, costs or other amounts, shall thereafter bear interest at a rate which is 2.5% per annum (250 basis points) in excess of the Base Rate, to the fullest extent permitted by applicable Laws *Accrued and unpaid interest on past due amounts (including interest on past due interest) shall be compounded*

⁸ When discussing the Loan Agreement, we shall omit reference to the Article number when the reference is unnecessary to identify the cited section.

monthly, on the last day of each calendar month, to the fullest extent permitted by applicable Laws." (Italics added.)

Third, Article VI(b) provides that a Default event includes:

"Nonpayment of principal of the [loan] when due, or nonpayment of interest upon the [loan] . . . or other obligations under any of the Loan Documents within five days after the same becomes due."

Fourth, section 7.01(a), entitled "Acceleration," provides that if the borrower (La Posta) defaults, all "Obligations" become immediately due and payable:

"If any Default described in Article VI(a) or (b) occurs with respect to Borrower, the Obligations shall immediately become due and payable without any election or action on the part of Lender. If any other Default occurs, the Lender declares all or a portion of the Obligations to be due and payable, whereupon all or a portion of the Obligations (as applicable) shall become immediately due and payable, without presentment, demand, protest or notice of any kind, all of which Borrower hereby expressly waives."

Fifth, "Obligations" are defined in the Loan Agreement to mean:

"all unpaid principal of and accrued and unpaid interest on the Restructured Loan, all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of Borrower to Lender . . . arising from the Loan Documents."

Under these contract provisions, YAN argued that compound interest did not begin to accrue until after the payment-extension period expired in June 2010. YAN asserted that because section 2.06 provides for compound interest only on "past-due amounts," there were no "past-due amounts" until the expiration of the payment extension period in June 2010. YAN thus argued that the June 2010 date triggered the compound interest under the parties' payment extension agreement, but if YAN had not

provided the payment extension, compound interest would have begun with the first missed payment—August 2009.

In countering this argument, La Posta's counsel focused on the facts that: the Loan Agreement required La Posta to begin making payments in August 2009; La Posta did not make payments in August or September 2009; La Posta did not ask for a payment extension until October 2009; and YAN's letter granting the payment extension covered only seven months (October 2009 through May 2010), not including August or September 2009. Based on these facts, La Posta's counsel argued that the compound interest was retroactive to May 2009. La Posta relied on section 7.01(a), the acceleration provision, which provides that upon a default event (see Article VI(a)), the "Obligations" (which La Posta argued encompasses the payment of compound interest) shall become immediately due and payable "without any election or action on the part of Lender." La Posta's counsel argued:

"We have August and September 2009 that are unaccounted for [in the payment-extension agreement]. Beginning in October plus four months using the confirmation in the January letter to go to June. We have two months . . . [August and September] with no payment which were a default which triggered the acceleration. [¶] The acceleration then calls for the obligation to be paid, and the obligation is defined as 'all unpaid principal and unpaid interest,' which necessarily is everything [including compound interest]. The fact that there has never been any payments made then allows the amortization and the compounding to continue very cleanly because there are no deductions at any point for any payments received and once the meter started running . . . it didn't stop."

Under this interpretation, La Posta's counsel argued the missed August and September payments triggered the compound interest calculations retroactive to May 2009.

During the hearing, the court asked counsel whether the court needed to consider extrinsic evidence to resolve the compound interest issue. La Posta's counsel said he wanted to call its accounting expert, Richard Corti. When the court asked counsel to explain the necessity for this testimony, La Posta's counsel responded: "Your Honor, he would supply the court with the accounting standards, principles and accounting practices that exist when interpreting these types of amortization, as opposed to [YAN's counsel's] testimony through these spreadsheets. We believe an attorney testifying is inappropriate. We felt that somebody in the business of doing this should be able to present the explanation about the contracts and how you interpret them." The court said this testimony did not appear to be necessary because the court's role was to determine which party's contract interpretation was correct, and the parties had stipulated to the calculations depending on the court's determination on this issue. When the court asked La Posta's counsel to identify any other evidence relevant to the compound interest calculation, La Posta's counsel referred only to the October 2009 and January 2010 letters.

At the conclusion of the trial, the court asked the parties to submit proposed statements of decision and took the matter under submission.

About six weeks later, on December 30, 2014, the court issued a ruling agreeing with YAN's position on the compound interest issue. In its statement of decision, the court explained its reasoning as follows:

"La Posta requested a 'four month extension to the initial three month period where La Posta . . . was not required to make principal or interest payments in the Loan' [citing to the October 2009 letter],

and YAN agreed La Posta could 'mak[e] no princip[al] or interest payments' from January 18 through May 3, 2010 [citing to the January 2010 letter]. [¶] . . . As the parties agreed that no payments were due during this period, La Posta was not required to make principal or interest payments during the extension, and no 'past due amounts' ever accrued during the period [citing to section 2.06 of the Loan Agreement]. Because interest is compounded only on 'past due amounts,' no interest was compounded during the period."

Based on this conclusion, the court adopted YAN's calculations that as of October 31, 2014, La Posta owed YAN \$44,470,704.98 in principal and interest (with interest compounding beginning in June 2010.) The court also found that if YAN had not granted the extension, compound interest would have started in August 2009, and La Posta would have owed a total of \$44,732,786.63 as of October 31, 2014. The difference between these amounts was \$262,081.65. Based on this finding, the court scheduled the fraud trial (discussed above).

B. *Analysis*

La Posta contends the court erred in interpreting the Loan Agreement to mean interest compounding did not begin until June 2010 under the parties' payment extension agreement.

The court reached its conclusion based on an interpretation of the Loan Agreement and a review of the two payment extension letters. Because this interpretation did not turn on the credibility of extrinsic evidence, we are governed by a de novo review standard. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 556; see *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

On our independent review, we determine the trial court's conclusion was legally correct. In October 2009, La Posta requested a "four month extension to the initial three month period [May 2009 through July 2009], where La Posta . . . was not required to make principal or interest payments on the Loan." In January 2010, YAN agreed to this request, and clarified the extension as follows: "Starting Monday January 18, 2010, [La Posta] shall have an additional grace period for making no princip[al] or interest payment to [YAN]. This grace period will end on Monday May 3, 2010 and monthly payments as required under the Loan Agreement will resume at that time with the first payments due to [YAN] in June, 2010. In essence, with this new deadline for making payments to [YAN], [YAN] will have granted La Posta an extension of seven months of no payments of princip[al] and interest due under the Loan Agreement."

Under these letters, La Posta was not required to make payments during the agreed extension (October 2009 through May 2010), and therefore interest was not compounded during this time. Section 2.06 of the Loan Agreement provides for compounding interest only on "past due amounts." Because no "past due amounts" were owed between October 2009 and May 2010, no compounding was permitted. Although simple interest continued to accrue under section 2.02(a), there was no contractual basis for compounding the interest under section 2.06 until the loan payment was missed in June 2010. Accordingly, the court correctly found that no interest compounding should be calculated until June 2010 when the parties' agreed payment-extension expired.

La Posta contends this conclusion is inconsistent with Section 7.01 of the Loan Agreement, which provides that if a payment default occurs, "the Obligations shall

immediately become due and payable without any election or action on the part of [YAN]." The Loan Agreement defines "Obligations" to include "all unpaid principal of and accrued and unpaid interest on the Restructured Loan." La Posta argues that when it did not pay the August 2009 required monthly payment, all payments became due, which required adding compound interest to the amounts payable from that August 2009 date (or from the contract date in May 2009).

Without deciding whether the Loan Agreement supports this interpretation, the Loan Agreement specifically provides that YAN is entitled to waive any default and the parties could agree to modify any provisions. In this case, although the express extension agreement (as reflected in the October 2009 and January 2010 letters) specifically pertained only to the period October 2009 through May 2010, it is undisputed the parties were fully aware that La Posta had not made the required payments for August and September 2009, and YAN nonetheless did not call the loan due and instead recommended that La Posta work with SDW to improve the casino's profitability. The Loan Agreement provides that the parties "may enter into agreements . . . for the purpose of adding or modifying any provisions to the Loan Documents or changing any manner the rights of Lender or Borrower hereunder *or waiving any Default hereunder.*" (Italics added.) Under the circumstances, the only reasonable conclusion is that the parties retroactively included August and September 2009 in the payment-extension deadline, and thus those defaults were waived until June 2010 for purposes of calculating compound interest. Because the record supports that all defaults were waived until June

2010, compound interest did not begin to accrue until June 2010 under section 2.06 of the Loan Agreement.

La Posta argues that nothing in the parties' correspondence "demonstrates that the parties intended for interest to stop accruing and compounding during the forbearance." La Posta is correct that *simple interest* continued to accrue under the parties' October 2009 and January 2010 letters. In the letters, the parties merely extended the time that the monthly payments were due to pay this accrued interest. But a manifestation of the parties' intent regarding *compound interest* was not necessary to determine the compound interest accrual date. Under the explicit terms of the Loan Agreement, interest is compounded only on "past due amounts." In this case, it was not until June 2010 that payments were required, but were not paid.

La Posta contends the court erred in finding that YAN suffered another form of damages, i.e., that "La Posta would have had moneys available to pay to YAN" if YAN had not granted the payment extension. However, the court's order does not reflect that the court made this determination. The court's order states that "In addition to the foregoing basis for YAN's fraud-damage contention, YAN also advances the basis that, absent the extension, La Posta would have had moneys available to pay to YAN." Viewed in context, the court was merely identifying one of YAN's arguments. There is nothing in the court's order showing the court agreed with this argument, or made a factual finding that it was true.

We also reject La Posta's contention the court erred in excluding La Posta's proposed expert testimony. When the court asked La Posta's counsel whether it wished

to call any witnesses on the compound-interest issue, La Posta's counsel identified accountant Corti, but asserted the relevance of the evidence only by referring to calculations and amortization schedules. The court declined to allow this testimony, finding the parties had stipulated that the contract terms were unambiguous and it was the court's function, and not an expert's role, to interpret the contract.

The court did not err in this evidentiary ruling. Generally, expert opinion on legal issues, such as the interpretation of a contract, is inadmissible. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1401; *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 51; *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179-1180.) This rule applies here because the parties stipulated the relevant portions of the contract were unambiguous, and the parties' specific dispute (concerning when compounding interest began under the contract language) did not involve technical words or other topics beyond the court's legal expertise. The only issue was to interpret the contract's meaning in light of the undisputed factual circumstances. The court did not abuse its discretion in concluding that testimony by La Posta's accountant would not provide helpful, relevant, or material evidence on this legal issue. La Posta's expert was properly excluded.

We reject La Posta's related argument that the court erred in not considering its expert's chart of the principal and interest (simple and compound) amounts owed by La Posta. The record shows the court did consider this chart, as well as the chart prepared by YAN's accounting expert. The issue before the court was not whether each expert's calculations were correct (the parties stipulated that both were accurate depending on which party's contract interpretation was correct), but which theory was the proper one

under the Loan Agreement terms. Once the court made that legal decision, the parties stipulated to the applicable chart.

Additionally, to the extent La Posta is contending the court erred in conducting the trial on November 13 (apparently initially scheduled as a hearing on the issue of a jury trial request on the fraud claim), rather than a previously scheduled November 24 trial date, the record shows that La Posta's counsel consented to this procedure. At the November 13 trial, the court repeatedly asked counsel whether there was any additional evidence the parties intended to present, and both parties agreed that the court could determine the issue based on the documentary record and counsels' arguments made at the hearing. By agreeing to this procedure, La Posta waived its right to raise the issue on appeal.

We reach a similar conclusion with respect to La Posta's contention that the court erred by failing to reduce the award based on YAN's alleged failure to mitigate its damages. Although this issue was discussed in La Posta's trial brief, La Posta's counsel never raised the issue at the hearing, nor did it ask to present evidence showing a failure to mitigate damages. When the court asked counsel whether there was any additional evidence or arguments relevant to the breach of contract issue, the parties agreed the court could determine the issue on the documentary record and the legal issue was limited to the compounding interest determination.

In support of its failure-to-mitigate argument in its appellate brief, La Posta discusses facts without providing any supporting record citations. These facts were not

before the court when it reached its conclusions on the contract damages amount. On this record, La Posta has forfeited its right to raise the mitigation issue on appeal.

IV. *Declaratory Relief Claim*

La Posta contends the court erred in dismissing its declaratory relief claim.

A. *Background*

In its cross-complaint, La Posta asserted a single cause of action for declaratory relief that YAN's recovery of contract damages was limited to "Casino assets" (generally defined to mean property associated with present and future casino operations), and that YAN shall have no right to any recourse against La Posta's RSTF assets. La Posta alleged YAN had engaged in acts indicating its intent to attach the RSTF payments "in contravention of the terms of" the Loan Agreement.

In September 2015, La Posta moved for judgment on the pleadings on this declaratory relief claim. La Posta argued that section 13.04 of the Loan Agreement absolutely prohibited any recourse to the RSTF assets (even if YAN could establish it committed fraud).

YAN opposed the motion and brought its own motion for judgment on the pleadings. YAN argued that the plain terms of the Loan Agreement permits recourse to RSTF assets if a court or arbitrator makes a "final determination" that La Posta committed " 'fraud' " (quoting section 13.03(a) of the Loan Agreement), but that La Posta's declaratory relief claim was "not ripe . . . since, as of today, the condition precedent to YAN's right to La Posta's RSTF payments has not been satisfied and YAN does not have any right to attach La Posta's RSTF payments." YAN said it "does not

presently contend that it is entitled to La Posta's RSTF payments as recourse for a judgment Therefore, there is no actual controversy. [¶] . . . A determination by this Court of YAN's rights should some hypothetical [fraud] judgment be obtained in the future amounts to an advisory opinion, which is not within the Court's jurisdiction to offer."

La Posta countered these arguments by presenting YAN's May 2015 Tribal Court complaint in which YAN asserted negligent representation and concealment claims (based on the identical factual allegations presented at the fraud jury trial), and also sought declaratory relief in the form of an order that it was entitled to enforce its breach of contract judgment against La Posta's RSTF assets once it obtained a fraud determination. La Posta argued that "By shopping its second complaint back in its own [Tribal Court] in an effort to circumvent the verdict that satisfied what YAN believes to be a condition precedent, YAN has attempted to establish fraud in a different jurisdiction, immediately reigniting the controversy over La Posta's ability to protect its RSTF distributions. . . . [¶] . . . [¶] Since July 8, 2013, there has been a dispute over whether La Posta pledged its RSTF distributions as recourse to YAN, which has lingered in the background through two of the three trials in this trifurcated matter. . . . Adjudication of La Posta's cross-complaint is necessary so the parties can rely on the Court's decision as a guide for any wrongful attempts by YAN to seize La Posta's RSTF distributions" La Posta also presented a Tribal Court order denying La Posta's motion to dismiss YAN's complaint "under the doctrine of claim and issue preclusion."

After considering the parties' papers and conducting a hearing, the court granted YAN's motion for judgment on the pleadings, and denied La Posta's motion. The court stated it "agrees with YAN that there is no 'actual controversy' at this time. Specifically, the Court notes YAN's judicial admission in its own motion for judgment on the pleadings that [YAN] does not presently contend that it is entitled to La Posta's RSTF payments as recourse for a judgment. . . . [¶] Whether or not YAN may obtain some 'future judgment' and seek RSTF monies is not ripe and the court's determination of that issue, at this time, would only be advisory."

La Posta challenges this finding.

B. *Legal Principles*

Code of Civil Procedure section 1060 provides that "in cases of actual controversy" a court "may make a binding declaration" of a litigant's rights or duties. (See *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 646 (*Meyer*).) Code of Civil Procedure section 1061 states that a "court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (See *Meyer*, at p. 647.)

" "[D]eclaratory relief is appropriate only where there is an actual controversy, not simply an abstract or academic dispute." [Citations.] [Citation.] "The "actual controversy" language in Code of Civil Procedure section 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties. [Citation.] For a probable future controversy to constitute an "actual controversy," however, the probable future controversy must be ripe. [Citations.] A "controversy is 'ripe' when it has reached,

but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." [Citation.] [¶] Whether a claim presents an "actual controversy" within the meaning of Code of Civil Procedure section 1060 is a question of law that we review de novo.' [Citation.]" (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606, italics omitted; see *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 539.)

C. Analysis

In its cross-complaint, La Posta sought an order that YAN had no recourse rights against La Posta's RSTF assets. YAN has now conceded it has no current right to enforce its judgment against La Posta's RSTF assets. This concession shows there is no controversy regarding the RSTF assets at this time.

La Posta contends declaratory relief is nonetheless appropriate and necessary because the Tribal Court proceedings have triggered a dispute regarding the scope of YAN's rights to attach the RSTF assets. We agree that YAN's action in filing claims in the Tribal Court shows the existence of a *possible* future controversy regarding the RSTF assets *if* YAN obtains a final determination of fraud in that forum. But to determine whether a hypothetical fraud determination in the Tribal Court would permit YAN to enforce the judgment against the RSTF assets, it is critical to understand the precise nature of any such "fraud" finding. Questions could arise, for example, as to whether any fraud judgment arising from the Tribal Court proceedings would or should be given effect in the face of the California jury's factual determination (embodied in the current final judgment) that La Posta did not commit fraud. Issues could also arise regarding

whether a "negligent misrepresentation" or "concealment" finding from the Tribal Court constitutes "fraud" within the meaning of the Loan Agreement, and/or whether a particular "fraud" finding would allow recourse to all or only a portion of the RSTF assets. These and other enforcement issues would depend not only on an interpretation of the Loan Agreement, but also on the specific nature of any fraud judgment. Under these circumstances, we agree with YAN that a current judicial determination in the California courts would be advisory because it would not be based on a specific factual or legal scenario.

We recognize La Posta's contention that YAN is barred from recourse against the RSTF assets *under any circumstance* (even with a fraud finding) does not depend on the Tribal Court proceedings and could be decided in the current posture of the case, regardless of a later fraud finding. However, because that contract interpretation issue is only one part of the larger argument on the recourse/enforcement matter, it was reasonable for the court to find that declaratory relief—even on this narrow issue—was not appropriate at this time. If declaratory relief will not necessarily end the disputes between the parties, a court may deny declaratory relief even if the plaintiff has satisfied the elements of declaratory relief on a portion of the claim. (See *Meyer, supra*, 45 Cal.4th at p. 647.)

We also find unavailing La Posta's contention that YAN should be barred from opposing declaratory relief in this action because YAN brought a declaratory relief claim seeking the same form of relief in the Tribal Court. In its Tribal Court declaratory relief claim, YAN alleged:

"An actual controversy has arisen and now exists between YAN and La Posta. ¶ . . . ¶ . . . YAN contends that, based on the plain language of the [Loan Agreement], if either this Court or the Superior Court makes a final determination that La Posta committed any act of fraud . . . , YAN shall be entitled to satisfy the entirety of any money judgment . . . from the RSTF. ¶ . . . La Posta contends that, even were this Court or the Superior Court to make a final determination that La Posta committed any act of fraud . . . , YAN is not entitled to satisfy any part of any money judgment . . . from those payments La Posta is otherwise entitled to receive from the RSTF ¶ . . . YAN therefore desires a judicial determination of the parties' respective rights and duties with respect to those payments La Posta is otherwise entitled to receive from the RSTF in the event either this Court or the Superior Court makes a final determination that La Posta committed any act of fraud ¶ . . . Such a judicial determination is necessary and appropriate at this time in order that YAN may ascertain its rights and duties with respect to those payments La Posta is entitled to receive from the RSTF."

This claim is not necessarily inconsistent with YAN's position in this case. YAN's argument here is that the matter is not ripe because there has been no fraud finding and it is prohibited from seeking recourse from the RSTF assets unless and until it obtains a final fraud judgment. YAN's position in the Tribal Court is that if the Tribal Court finds that La Posta committed concealment or negligent misrepresentation, the issue *then* becomes ripe and a court will need to resolve the parties' contract interpretation disputes regarding the scope of recourse based on any such finding.

In reaching our conclusion that the issue is not ripe, we do not intend to suggest that the Tribal Court would be an appropriate or the most appropriate jurisdiction to decide the scope of YAN's enforcement rights. If the Tribal Court reaches a factual conclusion regarding fraud that is inconsistent with the final judgment in this case, the question regarding the impact of such a determination in a California enforcement

proceeding would seem to be one in which a California court may have a substantial interest and the jurisdiction to decide independently. To the extent La Posta is requesting this court to address whether the final judgment before us should serve as collateral estoppel or res judicata in any current Tribal Court proceedings, we decline to do so.

DISPOSITION

Judgment affirmed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.