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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., a Nevada Corporation, and JAMES ACRES, an individual,

Plaintiff,

v.

LESTER MARSTON, an individual; ARLA RAMSEY, an individual; THOMAS FRANK, an individual; ANITA HUFF, an individual; RAPPORT AND MARSTON, an association of attorneys; DAVID RAPPORT, an individual; COOPER DAMARSE, an individual; DARCY VAUGHN; an individual; KOSTAN LATHOURIS, an individual; BOUTIN JONES INC., a California corporation; MICHAEL CHASE, an individual; DANIEL STOUDER, an individual; AMY O'NEILL, an individual; JANSSEN MALLOY LLP, an association of attorneys; MEGAN YARNALL, an individual; AMELIA BURROUGHS, an individual, and DOES 1-20, inclusive,

Defendants.

Case No. 3:19-cv-05418-WHO

SPECIALLY APPEARING DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF THEIR RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Complaint Filed: August 28, 2019

Hearing Date: February 26, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick

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I. INTRODUCTION

Specially Appearing Defendants Boutin Jones Inc., Daniel Stouder, Amy O'Neill, and Michael Chase (collectively "Boutin Jones Defendants") submit this Rule 12(b)(1) motion to dismiss Plaintiffs Acres Bonusing, Inc. ("ABI") and James Acres' ("Acres") Complaint for lack of subject matter jurisdiction and this Rule 12(b)(6) motion to dismiss the Complaint for failure to state a cause of action for which relief can be granted. ABI and Acres are referred to collectively herein as "Plaintiffs."

The Boutin Jones Defendants' Rule 12(b)(1) motion should be granted because this Court has no subject matter jurisdiction over the Boutin Jones Defendants because they maintain sovereign immunity for their legal representation of Blue Lake Casino in Tribal Court and in the subsequent federal actions brought against Blue Lake Casino by Acres seeking to enjoin the Tribal Court's jurisdiction over Acres. *Great W. Casinos v. Moranga Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1423-24.

Alternatively, the Boutin Jones Defendants' Rule 12(b)(6) motion should be granted because ABI's state law claims are all barred by the one-year statute of limitations applicable to actions against attorneys arising out of their performance of professional services under California Code of Civil Procedure § 340.6. Further Plaintiffs' RICO claim fails to state a claim for which relief can be granted because Plaintiffs have not alleged, and cannot allege, wrongful conduct on the part of the Boutin Jones Defendants arising to the level of a "pattern of racketeering activity" under the RICO statute.

II. STATEMENT OF FACTS

The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. (Compl. ¶ 9.) Blue Lake Casino and Hotel ("Blue Lake Casino") is owned and operated by the Tribe. (Compl. ¶ 12.) The Tribal Court of the Blue Lake Rancheria is an appropriately established judicial arm of the Tribe. (Compl. ¶ 11.) The verified Complaint admits that Blue Lake Rancheria is a sovereign nation. (Compl. ¶ 150(c).)

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James Acres was the owner of Acres Bonusing, Inc. ("ABI"), a Nevada gaming company. (Compl. ¶¶ 7-8.) In 2010, Blue Lake Casino and Acres negotiated an agreement whereby Blue Lake Casino would lease an iSlot gaming system ("iSlot System") from ABI. The iSlot System is a server-based gaming system that would allow casino patrons to participate in casino gaming from handheld devices while at Blue Lake Casino.

In 2015, a dispute arose between Blue Lake Casino and Acres and ABI regarding the return of a $250,000 advance deposit paid to ABI by Blue Lake Casino. Blue Lake Casino retained Boutin Jones to represent it in this dispute. In January 2016, Boutin Jones, on behalf of Blue Lake Casino, filed a complaint against ABI for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and money had and received, and against Acres personally for fraudulent inducement in the Tribal Court of the Tribe Blue Lake Rancheria, *Blue Lake Casino and Hotel v. Acres Bonusing, Inc. et al.*, Tribal Court Case No. C-15-1215LJM ("Underlying Complaint"). (Compl. ¶ 5, Exh. 1.) This action and the two related federal actions filed by Acres are referred to collectively as the "Underlying Action."

Boutin Jones, and Boutin Jones attorneys Daniel Stouder, Amy O'Neill, and Michael Chase ("Boutin Jones Defendants") represented Blue Lake Casino in the Underlying Action until February 2017 when Boutin Jones substituted out of the case. (Compl. ¶23-26, 111.) Defendant Janssen Malloy LLP, and Janssen Malloy attorneys Megan Yarnall and Amelia Burroughs ("Janssen Malloy Defendants") substituted into the case to serve as Blue Lake Casino's counsel at this time. (Compl. ¶¶ 27-29, 111.)

The entirety of the factual allegations of wrongful conduct alleged against the Boutin Jones Defendants in the verified Complaint can be classified as: (1) actions taken by Boutin Jones Defendants in representing Blue Lake Casino in its pre-litigation dispute with Plaintiffs; (2) actions taken by Boutin Jones Defendants in representing Blue Lake Casino in the Tribal Court action against Plaintiffs, including causing pleadings, motions, and other documents to be filed with the Tribal Court and served on Plaintiffs in that action; appearing on behalf of Blue Lake Casino at hearings in the Tribal Court action; and, making statements at those hearings in the course of their representation of Blue Lake Casino; (3) actions taken by the Boutin Jones Defendants in

representing Blue Lake Casino in the related federal court actions filed against Blue Lake Casino by Acres, including causing pleadings, motions, and other documents to be filed with the federal court and served on Acres in those action; appearing on behalf of Blue Lake Casino at hearings in the federal actions; and, making statements at those hearings in the course of their representation of Blue Lake Casino; and (4) the Boutin Jones Defendants' representation of the Tribe and/or Blue Lake Casino on other, unrelated matters. (Compl. ¶¶ 1, 4-5, 23-26, 32, 34, 41, 48-50, 52, 72-74, 81, 90-92, 98(b)-(c), 110-111, 115-116, 121, 136, 148-150, 156-157, 199, 202, 205, 208(a).)

Nowhere in the verified Complaint do Plaintiffs allege facts that plausibly support a conclusion that the Boutin Jones Defendants were ever acting in any capacity other than as agents of the Tribe and/or Blue Lake Casino, or that any of their alleged tortious conduct occurred outside the purview of their roles as attorneys for the Tribe and/or Blue Lake Casino, nor can Plaintiffs allege such facts.

In July 2017, motion for summary judgment was granted in favor of Acres on the cause of action for fraudulent inducement. (Compl. ¶ 5, Exh. 2.) On August 31, 2017, *Blue Lake v. ABI* was dismissed in its entirety. (Compl. ¶ 5, Exh. 3.) Acres then filed a complaint on July 13, 2018 in Sacramento County Superior Court, *Acres v. Marston, et al.*, Case No. 2018-34-00236929 alleging the same state law causes of action ABI alleges in the instant complaint against the same defendants named in the instant Complaint. All defendants in the state court action successfully brought motions to quash service of summons and complaint based on the defense of sovereign immunity, and Acres is currently appealing that ruling. (Compl. ¶ 32.) The Boutin Jones Defendants' also filed an anti-SLAPP motion in the state court action, nearly identical to the anti-SLAPP motion filed concurrently herewith, which was deemed moot because the state court first determined that it did not have jurisdiction to hear Acres' claims. (Compl. ¶ 32.)

ABI and Acres then filed the instant Complaint on August 28, 2019 against the Boutin Jones Defendants, the Janssen Malloy Defendants, several Blue Lake Casino employees, several Tribal Court employees, and various judges of the Tribal Court including Judge Marston, who presided over *Blue Lake v. ABI* until he recused himself in January 2017. (Compl. ¶¶ 6, 13-29.)

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In the instant Complaint, ABI alleges causes of action for malicious prosecution, aiding and abetting malicious prosecution, conspiracy to commit malicious prosecution, aiding and abetting breach of fiduciary duty, and aiding and abetting constructive fraud against the Boutin Jones Defendants. Also in the instant Complaint, ABI and Acres allege a RICO cause of action against the Boutin Jones Defendants under 18 U.S.C. § 1964(c). Specifically, ABI's first cause of action alleges malicious prosecution against Boutin Jones, Daniel Stouder, and Amy O'Neill (collectively the "Malicious Prosecution Defendants"); ABI's second and third causes of action allege aiding and abetting malicious prosecution and conspiracy to commit malicious prosecution, respectively, against Michael Chase; and ABI's fifth and seventh causes of action allege aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud, respectively, against the Boutin Jones Defendants.

The Complaint does not allege that the Boutin Jones Defendants ever represented ABI or Acres, nor can Plaintiffs allege such facts.

III. APPLICABLE LEGAL STANDARDS

A. RULE 12(b)(1) MOTION TO DISMISS

A motion to dismiss on tribal sovereign immunity grounds is brought under Rule 12(b)(1). See *Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104, 1110 (issue of tribunal sovereign immunity is quasi-jurisdictional and should be asserted in Rule 12(b)(1) motion). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court normally considers the Rule 12(b)(1) motion first. Doing so prevents a court without subject matter jurisdiction from prematurely dismissing a case with prejudice. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.* (2007) 549 U.S. 422, 430-431.

Although defendant is usually the moving party on a Rule 12(b)(1) motion, *plaintiff* is the party who invoked the court's jurisdiction. Accordingly, plaintiff bears the burden of establishing federal subject matter jurisdiction. In effect, the court presumes *lack* of jurisdiction until plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America* (1994) 511 U.S. 375, 376-378; *In re Wilshire Courtyard* (9th Cir. 2013) 729 F.3d 1279, 1284.

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A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint (together with documents attached to the complaint and any judicially noticed facts) fails to establish grounds for federal subject matter jurisdiction as required by Rule 8(a)(1)—i.e., lack of federal jurisdiction appears from the "face of the complaint." *Warren v. Fox Family Worldwide, Inc.* (9th Cir. 2003) 328 F.3d 1136, 1139. The court need not accept as true legal conclusions, legal conclusions couched as factual allegations, or inferences unsupported by the facts set out in the complaint. *Lacano Investments, LLC v. Balash* (9th Cir. 2014) 765 F.3d 1068, 1071-1072 (legal conclusions disregarded even if cast as factual allegations).

B. RULE 12(b)(6) MOTION TO DISMISS

A pleading is deficient and may be dismissed under Rule 12(b)(6) if a plaintiff fails "to state a claim upon which relief can be granted." A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 555; *Ashcroft v. Iqbal* (2009) 556 U.S. 662. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* If a claim sets forth facts that are "merely consistent with" defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* Allegations of wrongdoing will be deemed "implausible" if there are "obvious alternative explanation[s]" for the facts alleged indicating lawful conduct, not the unlawful conduct urged by plaintiff. *Id.* at 682.

Material properly submitted with the complaint (i.e., exhibits under Rule 10(c)) may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* (9th Cir. 1990) 896 F.2d 1542, 1555. Thus, documents attached to the complaint and incorporated therein by reference are treated as part of the complaint when ruling on a Rule 12(b)(6) motion. *In re NVIDIA Corp. Secur. Litig.* (9th Cir. 2014) 768 F.3d 1046, 1051. When a district court relies on material from outside the pleadings, the court converts the motion to dismiss into a motion for summary judgment. *Arpin v. Santa Clara Valley Transp.*

Agency (9th Cir. 2001) 261 F.3d 912, 925. For purposes of a Rule 12(b)(6) motion, however, the court can "augment" the facts and inferences from the body of the complaint with "data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Coto Settlement v. Eisenberg* (9th Cir. 2010) 593 F.3d 1031, 1038.

Under Federal Rule of Civil Procedure 9(b), a party must "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba–Geigy Corp. USA* (9th Cir. 2003) 317 F.3d 1097, 1106 (internal quotation marks omitted). However, "Rule 9(b) requires only that the circumstances of fraud be stated with particularity; other facts may be pleaded generally, or in accordance with Rule 8." *United States ex rel. Lee v. Corinthian Colls.* (9th Cir. 2011) 655 F.3d 984, 992. In deciding a motion to dismiss for failure to state a claim, the court accepts all of the factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles* (9th Cir. 1987) 828 F.2d 556, 561. But the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.* (9th Cir. 2008) 536 F.3d 1049, 1055.

When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff a chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice, unless it is clear that to do so would be futile. However, a plaintiff should be denied leave to amend a complaint if it is clear that the complaint cannot be cured by the allegation of different facts. *Ebner v. Fresh, Inc.* (9th Cir. 2016) 838 F.3d 958, 963.

Where the facts and dates alleged in the complaint indicate the claim is barred by the statute of limitations, a motion to dismiss for failure to state a claim lies. The complaint fails to state a claim because the action is time-barred. *Von Saher v. Norton Simon Museum of Art at Pasadena* (9th Cir. 2010) 592 F.3d 954, 969.

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IV. LEGAL ARGUMENTS

A. THIS COURT HAS NO JURISDICTION OVER THE BOUTIN JONES DEFENDANTS BECAUSE THEY MAINTAIN SOVEREIGN IMMUNITY FOR THEIR ACTIONS AS AGENTS OF THE TRIBE IN THEIR REPRESENTATION OF BLUE LAKE CASINO IN THE UNDERLYING ACTION

Indian tribes have long been recognized as possessing common law immunity from suit enjoyed by sovereign powers. *Turner v. U.S.* (1919) 248 U.S. 354, 358. Absent congressional authorization, "Indian nations are exempt from suit." *U.S. v. U.S. Fidelity and Guaranty Co.* (1940) 309 U.S. 506, 512. Any waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *U.S. v. Testan* (1976) 424 U.S. 392, 399.

Judicial recognition of a tribe's immunity from suit is not discretionary with a Court. Rather, absent an effective waiver, the assertion of sovereign immunity by a federally-recognized Indian tribe deprives the Court of jurisdiction to adjudicate the claim:

> "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. . . . 'Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.'"

People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians (9th Cir. 1979) 595 F.2d 1153, 1155 (internal citation omitted).

Such immunity is jurisdictional in nature and applies "irrespective of the merits of the claim asserted against the tribe." *Rehner v. Rice* (9th Cir. 1982) 675 F.2d 1340, 1351. Tribal immunity applies to commercial activities of the tribe, including a casino if it is an arm of the tribe. *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388-389; *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 636-642.

Sovereign immunity extends not only to the tribe itself, but also to those agents acting on the tribe's behalf. Federal courts have expressly recognized that attorneys acting in their official capacity on behalf of the tribe and within the scope of their authority are protected by tribal immunity. *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83, 85. "Further, at least in our federal circuit, an official need not be a member of the tribe in order to share in its sovereign immunity." *Trudgeon*

v. Fantasy Springs Casino (1999) 71 Cal.App.4th 632, 643; *see also U.S. v. Oregon* (9th Cir. 1981) 657 F.2d 1009, 1012; *Snow v. Quinalt Indian Nation* (9th Cir. 1983) 709 F.2d 1319, 1321.

A California case on point, which bases its rationale for its holding on federal case law, is *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407. In that action, Great Western Casinos claimed that it entered into a gaming contract with the tribe and the tribe, through its individual members and general counsel, conducted a fraudulent scheme to cancel the contract and cheat Great Western Casinos out of potential profits. *Id.* at 1413. The tribe and its general counsel moved to dismiss on grounds of sovereign immunity; the court found that the tribe had not waived its sovereign immunity and that the court lacked subject matter jurisdiction over the defendants. *Id.* at pp. 1414, 1417.

With respect to the tribe's attorney, the court stated:

> The non-Indian law firm and general counsel are similarly immune from suit for actions taken or opinions given in rendering legal services to the tribe. Here the complaint acknowledges defendants Alexander & Karshmer and Barbara E. Karshmer, Inc., legal counsel for the tribe, were "at all times herein mentioned retained by and representing the Morongo Band." The complaint further alleges "the Morongo Band did, on April 18, 1995, acting through the Tribal Council and Karshmer, terminate the Management Agreement, in violation and in breach thereof, on the ground that GWC's former principals violated the law—for possession of illegal gaming devices. [¶] Plaintiff is informed and believes and thereon alleges that Karshmer counseled and advised the Morongo Band and its members to carry out their fraudulent misconduct as alleged [the allegedly false and fabricated charges GWC management violated the law]."
>
> In providing legal representation—even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract—counsel were similarly immune from liability for those professional services. (See *Davis v. Littell, supra,* 398 F.2d 83, 85 [attorney who advised tribal council regarding the competence and integrity of an employee is immune from liability for defamation under the executive privilege].) The rationale behind barring claims against legal counsel based on their advice to the Indian tribe which contracted for their services regarding gaming enterprises was aptly explained in *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536. There the federal appellate court rejected claims general counsel could be liable in tort for allegedly making a management company appear unsuitable as manager for the tribe's gaming operations during the licensing process. (88 F.3d at p. 540.) The court explained, "[t]ribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised. The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. Some causes of action could

> have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party." (*Gaming Corp. of America v. Dorsey & Whitney, supra*, 88 F.3d at p. 550.)

Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1423–1424.

Here, just as in *Great W. Casinos*, the Boutin Jones Defendants, as attorneys for Blue Lake Casino and by extension the Tribe, are immune from liability based on acts done in the course of representing Blue Lake Casino in its dispute with Plaintiffs. Plaintiffs' verified Complaint has alleged that Blue Lake Rancheria is a sovereign Tribe and that Blue Lake Casino is an arm of the Tribe. Plaintiffs also allege that the Underlying Complaint was filed in Blue Lake Tribal Court and that Acres filed the subsequent federal actions in an attempt to enjoin the Blue Lake Tribal Court from exercising jurisdiction over him and ABI with respect to Blue Lake Casino's claims against them. Plaintiffs also allege that the Boutin Jones Defendants represented Blue Lake Casino in the Underlying Action. Further, the allegations of the verified Complaint establish that any alleged wrongful conduct by the Boutin Jones Defendants was done on behalf of Blue Lake Casino through the course of their representation of Blue Lake Casino.

Further, the verified Complaint is completely devoid of factual allegations that the alleged acts of the Boutin Jones Defendants were not done on Blue Lake Casino's behalf, or within the scope of authority granted to the Boutin Jones Defendants by Blue Lake Casino. Any such allegations would directly contradict Plaintiffs own admissions. Plaintiffs' argument that the Boutin Jones Defendants were not sued in their official capacities as agents for Blue Lake Casino, but in their individual capacities, is therefore also contradictory to the Plaintiffs' admissions in the verified Complaint. Even so, Plaintiffs' characterization of the Boutin Jones Defendants' agency does not control. The Court "must not simply rely on the characterization in the complaint" but rather determine "whether the remedy sought is truly against the sovereign." *Lewis v. Clarke* (2017) 137 S.Ct. 1285, 1290-1291. As stated above, non-member attorneys acting in their official capacity on behalf of the tribe and within the scope of their authority are protected by tribal immunity. *Littell, supra*, 398 F.2nd at 85. If this were not the case, suits against a tribe's attorneys would interfere with the tribe's ability to obtain legal counsel and impinge upon the tribe's activities even

in matters where the tribe is not a party. *Great Western Casinos, supra*, 74 Cal.App.4th at 1423-1424; *Littell, supra,* 398 F.2d at 85. Thus, any action against Blue Lake Casino's attorneys acting on Blue Lake Casino's behalf would ultimately negatively affect the operation of the Tribe as a sovereign Indian Tribe.

Moreover, as explained in *Great W. Casinos* and *Littell*, the Boutin Jones Defendants' actions taken on behalf of Blue Lake Casino are still protected by the Tribe's sovereign immunity regardless of Plaintiffs' characterization of those actions as "wrongful" or "tortious." *See Great Western Casinos, supra*, 74 Cal.App.4th at 1423-1424; *Littell, supra,* 398 F.2d at 85.

For the foregoing reasons, the Boutin Jones Defendants' Rule 12(b)(1) motion to dismiss Plaintiffs' Complaint in its entirety based on sovereign immunity should be granted without leave to amend.

B. ABI AND ACRES HAVE FAILED TO STATE A RICO CLAIM AGAINST THE BOUTIN JONES DEFENDANTS BECAUSE PLAINTIFFS CANNOT ALLEGE THE REQUISITE PREDICATE ACTS TO SHOW A PATTERN OF RACKETEERING ACTIVITY

Section 1964(c) of RICO, 18 U.S.C. §§ 1961–1968, provides a private right of action to any person injured in its business or property by reason of a violation of the activities prohibited by section 1962. To establish a RICO claim under section 1964(c), a plaintiff must show: (1) a violation of 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962. To establish whether a defendant violated section 1962, a plaintiff must prove that each defendant participated: in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity which (5) the proximately harmed the victim. *See Eclectic Properties E., LLC v. Marcus & Millichap Co.* (9th Cir. 2014) 751 F.3d 990, 997.

"Racketeering activity" is defined to include any "act" indictable under various specified federal statutes, including the mail and wire fraud statutes and the obstruction of justice statute. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include offenses indictable under 18 U.S.C. §§ 1341 (relating to mail fraud), 1343 (relating to wire fraud), and 1503 (relating to

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obstruction of justice)). A "pattern of racketeering activity" is defined by the statute as "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1691(5).

As a threshold matter, Plaintiffs do not allege any wrongful conduct by Mr. Chase that amounts to a "pattern of racketeering activity" under the RICO Statute. The Complaint merely alleges that Mr. Chase appeared one time on behalf of Blue Lake Casino in the federal action filed against it by Acres, and made a comment during that proceeding relating to his alleged knowledge of the "whole Rapport & Marston thing." This allegation does not amount to two instances of wire fraud, mail fraud, or obstruction of justice, nor can Plaintiffs allege two predicate acts against Mr. Chase. Therefore, Plaintiffs' RICO claim against Mr. Chase must be dismissed without leave to amend.

With respect to the remaining Boutin Jones Defendants, ABI and Acres have also failed to adequately allege a pattern of racketeering activity. Acres and ABI purport to allege various predicate acts of mail fraud, wire fraud, and obstruction of justice allegedly committed by the Boutin Jones Defendants. All of the alleged predicate acts concern litigation activities taken by the Boutin Jones Defendants during the Underlying Action. Specifically, ABI and Acres allege that:

- "During 2016 and 2017, dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via postal-mail." (Compl. ¶ 202);
- "During 2016 and 2017, dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via email." (Compl. ¶ 205);
- "This conduct includes, but is not limited to: a. Attorneys from Rapport & Martson ghostwriting papers filed by Boutin Jones. . . ." (Compl. ¶ 208.)

These "patterns of racketeering activity" alleged by ABI and Acres are merely allegations of litigation activity undertaken by the Boutin Jones Defendants in representing their client, Blue Lake Casino, in tribal court as well as in defending Blue Lake Casino in actions brought against it by Acres in federal court. The filing of papers with a court by attorneys on behalf of their client in relation to ongoing litigation is not an *indictable* offense under 18 U.S.C. 1961(1), and these allegations are **at worst potential** violations of the rules of professional responsibility. Therefore,

ABI and Acres have not alleged the requisite predicate *criminal acts* under RICO and accordingly have not met the pleading standard of Rule 12(b)(6). ABI and Acres are required to plead their RICO claim with specificity, as the RICO claim is based on the defendants' "extrinsic fraud to manufacture a tribal court judgment against ABI." (Compl. ¶ 200.) The remainder of the allegations in Plaintiffs' RICO cause of action are conclusory, and based on unwarranted factual conclusions or unjustified inferences and should be disregarded. The Boutin Jones Defendants' motion to dismiss should be granted without leave to amend because ABI and Acres cannot allege any conduct by the Boutin Jones Defendants that does not amount to litigation activity on behalf of its client, Blue Lake Casino, in the Underlying Action.

Further, though the Ninth Circuit has not spoken directly on the issue of whether such alleged litigation activity can serve as RICO predicate acts, the Second Circuit in *Kim v. Kimm* (2d Cir. 2018) 884 F.3d 98 recently addressed this issue as a matter of first impression, and cited similar decisions in the First Circuit, Fifth Circuit, Tenth Circuit, and Eleventh Circuit, to hold that "allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act."

In *Kim v. Kimm*, a restaurant owner brought a RICO action against parties who had previously brought a trademark infringement action against him, alleging that the infringement litigation had been fraudulent and violated the RICO Act. The defendants (including attorney defendants) in that action filed a motion to dismiss for failure to state a claim, and the trial court granted the defendants' motion without leave to amend, finding that Kim had not alleged predicate acts constituting a pattern of racketeering activity. The court found that most of the alleged predicate acts concerned litigation activity in the infringement action—specifically, the preparing, signing, and filing of declarations by parties who were defendants in the RICO action—and reasoned that well-established precedent and sound public policy preclude such litigation activities from forming the basis for predicate acts under RICO. *Kim v. Kimm* (2d Cir. 2018) 884 F.3d 98, 102. The Second Circuit affirmed the trial court's ruling for "substantially the reasons set forth by the district court." *Id.* at 104.

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The Second Circuit held:

> Although we have not spoken directly on the issue, other courts have held that "[i]n the absence of corruption," such litigation activity "cannot act as a predicate offense for a civil-RICO claim." *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016); *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087–88 (11th Cir. 2004) (deciding that the "alleged conspiracy to extort money through the filing of malicious lawsuits" were not predicate acts of extortion or mail fraud under RICO); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) (deciding that meritless litigation is not a predicate act of extortion under RICO); *Gabovitch v. Shear*, 70 F.3d 1252 (table), 1995 WL 697319, at *2, 1995 U.S. App. LEXIS 32856 (1st Cir. 1995) (per curiam) (concluding that "proffering false affidavits and testimony to [a] state court" does not constitute a predicate act of extortion or mail fraud); *see also Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F.Supp.2d 153, 171–72 (E.D.N.Y. 2010) (collecting cases from district courts in the Second Circuit deciding "that the litigation activities alleged in [the complaint before the court] cannot properly form the basis for RICO predicate acts"). We agree with the reasoning of these opinions and conclude that allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act.
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> As the district court explained, there are compelling policy arguments supporting this rule. First, "[i]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action," which "would inundate the federal courts with procedurally complex RICO pleadings." Dist. Ct. Op. at 10–11, Appellant App'x at 266–67; *see also* Nora F. Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 696 (2017) (permitting RICO suits based on prior litigation activities would "engender wasteful satellite litigation"). Furthermore, "permitting such claims would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them." Dist. Ct. Op. at 11, Appellant App'x at 267; *see also Gabovitch*, 1995 WL 697319, at *3, 1995 U.S. App. LEXIS 32856 ("In essence, simply by alleging that defendants' litigation stance in the state court case was 'fraudulent,' plaintiff is insisting upon a right to relitigate that entire case in federal court .... The RICO statute obviously was not meant to endorse any such occurrence."). Moreover, endorsing this interpretation of RICO "would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts" because "any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability." Dist. Ct. Op. at 11, Appellant App'x at 267 (quoting *Curtis & Assocs.*, 758 F.Supp.2d at 173); *see also Engel v. CBS, Inc.*, 182 F.3d 124, 129 (2d Cir. 1999) (noting the "strong public policy of open access to the courts for all parties and [the need] to avoid ad infinitum [litigation] with each party claiming that the opponent's previous action was malicious and meritless" (internal quotation marks and citations omitted) (second brackets in original)).

Kim v. Kimm (2d Cir. 2018) 884 F.3d 98, 104.

This Court should adopt the reasoning utilized in *Kim* because such a holding would protect petitioning activity that is not advancing the operations of a criminal enterprise, would not allow baseless RICO claims to chill the legitimate exercise of petitioning activity, and would not create a

tool for disgruntled litigants to institute retaliatory lawsuits. Because the Boutin Jones Defendants' litigation activity is the basis for liability under Plaintiffs' RICO claim, Plaintiffs have failed to allege the requisite predicate acts as a matter of law and the Boutin Jones Defendants' motion should be granted without leave to amend.

C. ABI CANNOT STATE A CAUSE OF ACTION FOR WHICH RELIEF CAN BE GRANTED WITH RESPECT TO ITS PENDENT STATE LAW CLAIMS

1. All of ABI's Pendent State Law Claims Are Barred By the 1-Year Statute of Limitations Which Applies to Actions Against Attorneys Where the Alleged Wrongful Conduct Arises In the Performance of Professional Services

ABI cannot prevail on its pendent state law claims for malicious prosecution, aiding and abetting malicious prosecution, conspiracy to commit malicious prosecution, aiding and abetting breach of fiduciary duty, or aiding and abetting constructive fraud against the Boutin Jones Defendants because they are barred as a matter of law by the one-year statute of limitations that applies to actions against attorneys. Under California Code of Civ. Proc. §340.6, "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, **arising in the performance of professional services** shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . . ." *Id.*

a. CCP 340.6 Applies to ABI's First, Second, and Third Claims Relating to Malicious Prosecution

ABI's claim for malicious prosecution necessarily arises from Boutin Jones, Mr. Stouder, and Ms. O'Neill's performance of professional services to their client in the Underlying Action. *See Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 ("every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding.") The California Court of Appeal has clearly held that "consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." *Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799. Further, California case law clearly establishes that the statute of limitations applicable to ABI's aiding and abetting and conspiracy to commit malicious

prosecution claims is the same as the underlying tort to which a defendant is alleged to have aided and abetted or conspired to commit, which is the § 340.6 one-year statute of limitations applicable to claims for malicious prosecution brought against attorneys because the claim necessarily arises from the attorney's performance of professional services. *Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478–1479, *as modified (May 27, 2014)* ("The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort."); *Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673 (holding the applicable statute of limitations for conspiracy is determined by the nature of the action in which the conspiracy is alleged). Therefore the one-year statute of limitations applies to ABI's first, second, and third causes of action.

b. CCP 340.6 Applies to ABI's Fifth Claim for Aiding and Abetting Breach of Fiduciary Duty and Seventh Claim for Aiding and Abetting Constructive Fraud

All the alleged wrongful conduct of the Boutin Jones Defendants that underpins ABI's claims for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud against the Boutin Jones Defendants was conduct done in the course of providing professional services representing Blue Lake Casino in the Underlying Action. In *Graham-Sult v. Clainos* (9th Cir. 2014) 756 F.3d 724, the Ninth Circuit, applying California law, held that a non-client's claim for aiding and abetting breach of fiduciary duty against an attorney was barred by the one-year statute of limitations found in § 340.6, where plaintiff's whole claim arose from the attorney defendants' performance of professional services representing their client who was the executor of an estate to which plaintiff was a beneficiary. ABI does not allege one single act that was done outside the course of the Boutin Jones Defendants' performance of professional services to its client Blue Lake Casino, therefore the one-year statute of limitations found in § 340.6 applies to ABI's fifth and seventh causes of action.

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c. ABI Did Not File the Instant Complaint Against the Boutin Jones Defendants Before the 1-Year Statute of Limitations Applicable to Its Claims Had Run

Section 340.6 requires that ABI's claims against the Boutin Jones Defendants "be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . . ." *Id.*

ABI's *verified* Complaint alleges that "[f]rom January 2016 through July 2017, Blue Lake Rancheria ('Blue Lake') and its confederates sued Acres Bonusing, Inc. . . . within Blue Lake's trial court. Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned, on conjured claims of fraud and breach of contract." (Compl. ¶ 1.) ABI also alleges that it received Judge Marston's billing records in January 2017 (Compl. ¶ 33); that Judge Marston recused himself from presiding over *Blue Lake v. ABI* on January 10, 2017 (Compl. ¶ 109); that Acres and ABI presented evidence in early February 2017 that allegedly showed that a single author had created documents filed by Judge Marston and Boutin Jones in *Acres v. Blue Lake I* and *Acres v. Blue Lake II* (Compl. ¶ 110); and that the Boutin Jones Defendants withdrew from representation of its client in the Underlying Litigation in February 2017 (Compl. ¶ 111). Further, ABI alleges that *Blue Lake v. ABI* was dismissed in its entirety on August 31, 2017. (Compl. ¶ 5.) Thus, ABI discovered or should have discovered all alleged wrongful conduct that comprises its state law claims against the Boutin Jones Defendants as early as January 2016, but **no later than August 31, 2017**. Thus, ABI would have had to file its instant Complaint by August 31, 2018 **at the latest** to be considered timely. ABI filed its Complaint on August 28, 2019, and ABI's state law claims against the Boutin Jones Defendants are therefore barred by the one-year statute of limitations.

Further, ABI has not and cannot allege any facts that would toll the statute of limitations in the instant case. As alleged in ABI's verified Complaint, it suffered actual injury when *Blue Lake v. ABI* was instituted against it by the Boutin Jones Defendants in January 2016, specifically alleging that "[t]hroughout the pendency of *Blue Lake v. ABI*, ABI's business was harmed because of the stress placed on Mr. Acres by defendants' tortious conduct." (Compl. ¶ 59.) Further, the Complaint

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does not allege that Boutin Jones Defendants ever represented ABI, nor can ABI allege that the Boutin Jones Defendants ever represented it.

Therefore, because the statute of limitations ran on all of ABI's state law claims **at the latest** on August 31, 2018—one year before ABI filed its instant Complaint—ABI's state law claims against the Boutin Jones Defendants are barred as a matter of law. Accordingly, there is no evidence that ABI can present to meet its burden on the second prong of the anti-SLAPP statute and the Boutin Jones Defendants' motion must be granted.

2. ABI's Fifth Claim for Aiding and Abetting Breach of Fiduciary Duty and Seventh Claim for Aiding and Abetting Constructive Fraud Are Also Barred As a Matter of Law By the Litigation Privilege

In addition to all of ABI's claims being barred by the one-year statute of limitations as a matter of law, ABI also cannot show a probability of prevailing on its claims for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud because these claims are barred by the litigation privilege found in California Civil Code § 47(b). The litigation privilege applies to any communication "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that ha[s] some connection or logical relation to the action." *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 271. This privilege also extends to statements made outside of judicial proceedings; and "statements made to (and information concealed from)" the plaintiff and the court related to the action. *Graham-Sult*, 756 F.3d at 742. Defendants are immunized "from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution." *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333. "Any doubt about whether the privilege applies is resolved in favor of applying it." *Contreras*, 5 Cal.App.5th at 415.

ABI does not allege any conduct by the Boutin Jones Defendants that was not a communication made in connection with a judicial proceeding. The broad scope of the litigation privilege protects the Boutin Jones Defendants from liability based on (1) preparing, filing, and serving documents in the Underlying Action; (2) drafting and sending a demand letter to ABI and communicating with ABI about the Underlying Action; and, (3) making statements in judicial proceedings in the Underlying Action. Further, the litigation privilege protects the Boutin Jones

Defendants from liability based on information allegedly concealed from ABI related to the Underlying Action. *See Graham-Sult*, 756 F.3d at 742. Accordingly, ABI's claims for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud are barred by the litigation privilege as a matter of law. ABI cannot show a probability of prevailing on these claims, and the Boutin Jones Defendants' anti-SLAPP motion to strike these claims must be granted.

V. CONCLUSION

For the foregoing reasons, the Boutin Jones Defendants respectfully request that this Court grant their Rule 12(b)(1) Motion to Dismiss Plaintiffs' Complaint in its entirety based on the defense of sovereign immunity, without leave to amend. Alternatively, the Boutin Jones Defendants respectfully request that this Court grant their Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint in its entirety without leave to amend for failure to state a claim upon which relief can be granted; or, if the entire Complaint is not subject to dismissal, the Boutin Jones Defendants request that this Court dismiss each individual cause of action for which Plaintiffs have failed to state a claim for which relief can be granted, without leave to amend.

DATED: December 31, 2019

LERCH STURMER LLP

By /s/
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DECLARATION OF SERVICE

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within cause; I am employed in the City and County of San Francisco, California and my business address is One Sansome Street, Ste. 2060, San Francisco, California 94104. My electronic service address is rvernola@lerchsturmer.com. On this date, I served the following documents:

SPECIALLY APPEARING DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF THEIR RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

on the parties identified below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

____: By First Class Mail -- I placed the sealed envelope(s), with first class postage thereon, for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

___: By Overnight Courier -- I caused each such envelope to be given to an overnight mail service at San Francisco, California, to be hand delivered to the office of the addressee(s) on the next business day.

____: By Personal Service – I caused each such envelope to be given to a messenger at San Francisco, California, to be hand delivered to the office of the addressee(s) on this date.

___: Facsimile -- (Only where permitted. Must consult CCP §1012.5 and California Rules of Court 2001-2011. Also consult FRCP Rule 5(e). Not currently authorized in N.D.CA.)

√ : By E-mail -- I electronically served each party at the email addresses shown on this declaration.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on December 31, 2019 at San Francisco, California.

Rosemarie Vernola
(type/print name)

(signature)

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