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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., et al.,

Plaintiff,

v.

LESTER MARSTON, et al.,

Defendants.

Case No.: 3:19-cv-5418-WHO

PLAINTIFFS' OPPOSITION TO JANSSEN MALLOY'S MOTION TO DISMISS AT DOCKET 33

Date: April 15, 2020
Time: 2pm
Judge: William H. Orrick

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Table of Contents

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Table of Authorities

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I. Introduction

In late 2015 Blue Lake Rancheria ("Blue Lake") sued Plaintiffs, Acres Bonusing, Inc. ("ABI") and James Acres ("Acres"), individually, in Blue Lake's tribal court. The case was styled as, *Blue Lake Casino & Hotel v. Acres Bonusing, Inc.* ("*Blue Lake v. ABI"*).

Defendant, Judge Lester Marston ("Judge Marston") originally presided over *Blue Lake v. ABI* even though he was Blue Lake's attorney at the time. After Acres uncovered what Judge Marston had previously denied, and that Marston was, indeed, Blue Lake's attorney Judge Marston finally stepped down. Soon thereafter the Honorable Justice James Lambden replaced Judge Marston and granted Acres summary judgment, finding the cause of action against Acres had been "conjured." Blue Lake then, virtually immediately, voluntarily dismissed ABI.

ABI and Acres bring causes of action for RICO, Wrongful Use of Civil Proceedings, and Breach of Fiduciary Duty against three defendant factions: 1) the Rapport & Marston/Blue Lake faction; 2) the Boutin Jones faction; and 3) the Janssen Malloy faction.

This paper opposes the Janssen Malloy faction's Motion to Dismiss at docket 33. The Janssen Malloy faction consists of Defendants, Janssen Malloy, Megan Yarnall, and Amelia Burroughs. For the remainder of this Opposition "Defendants" shall refer to the Janssen Malloy faction as a whole.

Defendants move the Court under Rule 12(b)(1) to find Blue Lake's sovereign immunity bars suit against them. The Court should deny the motion because Defendants are sued as **individuals** and no judgment against them could bind Blue Lake.

Defendants also move the Court to dismiss the RICO and wrongful use causes of action under Rule 12(b)(6) arguing 1) the Verified Complaint fails to state a RICO cause of action because, in the absence of corruption, litigation activity by attorneys cannot form the basis of a RICO claim; and 2) the wrongful use cause is barred by a special statute of limitations governing

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claims against attorneys providing professional services. The Court should deny the motion because the Verified Complaint plausibly alleges Defendants participated in the corruption of adjudicative proceedings in *Blue Lake v. ABI.*

II. Factual Background

A full factual history is available in the Verified Complaint. This factual background briefly frames the facts necessary for deciding Defendants' Motion to Dismiss at docket 33. This factual background draws on the Verified Complaint, defense declarations, and papers filed in *Acres v. Blue Lake II*.

A. The iSlot Agreement

Blue Lake and ABI entered into the iSlot Agreement in July 2010. Blue Lake paid ABI $250,000.00 for iSlot. In October 2010 Blue Lake used iSlot to serve 56 Las Vegas style slot machines to its patrons. In 2011 Blue Lake increased this to 88 Las Vegas style slot machines. The iSlot Agreement expired in 2012. Dkt. 1, ¶¶44, 47.

While Acres was the employee-owner of ABI he was not a party to the iSlot Agreement. Id., ¶53.

B. Blue Lake v. ABI

In 2016 Blue Lake sued ABI and Acres, alleging Acres fraudulently induced Blue Lake into entering the iSlot Agreement and ABI breached the iSlot Agreement. The Verified Complaint sought $249,250, plus interest, punitive damages, exemplary damages, and attorney fees. Dkt. 1-1, pp 7-10.[1]

[1] All page number references for federal court filings refer to the ECF page number.

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Blue Lake Tribal Court rules required all filings be served by email and postal mail. Dozens of such filings were made during the course of *Blue Lake v. ABI*. Dkt. 1, ¶¶202, 205.

Judge Marston originally presided over *Blue Lake v. ABI.* Dkt. 1, ¶40. Judge Marston employed associate attorneys from his law-firm Rapport & Marston as his law-clerks in the action. Judge Marston, his firm, and law-clerks were all secretly working as attorneys for Blue Lake while *Blue Lake v. ABI* was underway. Id., ¶¶124-128.

After Acres submitted evidence to this Court in *Acres v. Blue Lake II* that Judge Marston was Blue Lake's attorney, Judge Marston recused himself from *Blue Lake v. ABI.* Id., ¶¶102-104.

After Acres submitted evidence to this Court in *Acres v. Blue Lake II* that documents filed by Judge Marston and Boutin Jones in *Blue Lake v. ABI* and *Acres v. Blue Lake I&II* shared a common author, Defendants replaced Boutin Jones as Blue Lake's attorneys. Id., ¶¶110-111.

Judge Marston was replaced by the Honorable Justice James Lambden. Justice Lambden found Blue Lake had attempted to "conjure a personal warranty" by Acres and dismissed Acres on summary judgment. Id., ¶53. Justice Lambden noted Defendants "misstated the evidence" in pursuit of the conjured cause of action against Acres. Id., ¶117. ABI then demanded a Bill of Particulars from Blue Lake, whereupon Blue Lake voluntarily dismissed *Blue Lake v. ABI* with prejudice. Id., ¶113.

III. Defendants Do Not Enjoy Sovereign Immunity Because they are Not Sovereigns.

Defendants argue under Rule 12(b)(1) Blue Lake's sovereign immunity bars suit against them. Defendants are simply wrong. Because no judgment against Defendants could bind Blue Lake, controlling Supreme Court authority requires this Court find Defendants are not protected by Blue Lake's sovereign immunity. *See JW Gaming v. James,* 3:18-cv-02669-WHO, Dkt. 55, pp5-6 (N.D. Cal. Oct. 5, 2018).

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A. Defendants are Not Protected by Blue Lake's Sovereign Immunity Because No Judgment Against Defendants Would Bind Blue Lake.

Controlling Supreme Court authority holds sovereign immunity is not available to tribal employees who are sued in their individual capacities. *Lewis v. Clarke,* 137 S. Ct. 1285 (2017).

Prior to *Lewis,* courts sometimes analyzed whether a tribal employee was acting within the scope of their employment in order to determine whether the employee was protected by the tribe's sovereign immunity. For instance, in *Lewis* itself, Connecticut's Supreme Court found because Clarke was acting within the scope of his tribal employment, he shared in his tribal employer's sovereign immunity from suit. But Justice Sotomayor was explicit in rejecting this type of analysis: "That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Id.*, 1288.

Justice Sotomayor was also explicit in describing how to determine whether a party shares in sovereign immunity: "The critical inquiry is who may be legally bound by the court's adverse judgment." *Id.*, 1292-1293.

This "who-may-be-bound" test is the same test used in determining whether an individual state or federal employee may share in their state or federal employer's sovereign immunity. The "who-may-be-bound" test is applied in a tribal government context because the protection afforded by tribal sovereign immunity is "no broader than the protection offered by state or federal sovereign immunity." *Id.*, 1291-1292.

The "who-may-be-bound" test was developed in the Ninth Circuit even before *Lewis* to determine whether an individual could share in a tribe's sovereign immunity from suit. For instance, tribal paramedics sued as individuals were not protected by their tribal employer's sovereign immunity because "a remedy would operate against [the paramedics], not the tribe."

Maxwell v. County of San Diego, 708 F.3d 1075, 1087 (9th Cir. 2013). And when a tribal police chief was sued in his individual capacity for battery and false imprisonment the result was "pretty much foreordained." Sovereign immunity was not available because recovery would run against the police chief and not the tribe. *Pistor v. Garcia*, 791 F.3d 1104, 1108-1109 (9th Cir. 2015).

Under *Lewis,* to determine whether a defendant shares Blue Lake's sovereign immunity from suit, we look only to whether Blue Lake would be bound by a judgment against that defendant.

Here, *ABI v. Marston* does not sue Blue Lake or any Blue Lake entity. The only remedies *ABI v. Marston* seeks are from the individual and law-firm defendants, and only those individuals and law-firms could be legally bound by any judgment. Because no judgment could require action by Blue Lake, Defendants cannot share in Blue Lake's sovereign immunity.

B. Janssen Malloy Does Not Qualify as an "Arm of the Tribe" Under the Explicit Test Articulated in *White v. University of California* and Therefore Cannot Share in Blue Lake's Sovereign Immunity.

An entity may share in a tribe's sovereign immunity from suit where the entity qualifies as an "arm of the tribe." In determining if an entity is "an arm of the tribe," courts apply a five-factor test that considers: 1) The method of the entity's creation; 2) The purpose of the entity; 3) The structure, management and control of the entity; 4) Whether the tribe intends to share its immunity with the entity; and 5) The financial relationship between the tribe and the entity. *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014).

Janssen Malloy is a California law-firm. Dkt. 1, ¶27. Janssen Malloy offers no argument or evidence to explain how it satisfies any of the five *White* factors, and any attempt to do so would be absurd. Because Janssen Malloy is clearly not an arm of the Blue Lake Rancheria, it cannot share in Blue Lake's sovereign immunity from suit.

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C. *Davis* and *Great Western Casinos* Do Not Cloak Defendants with Blue Lake's Sovereign Immunity Because the Cases Fail to Apply *Lewis'* "Who-May-Be-Bound" Test.

Defendants rely on two cases to support their argument they share in Blue Lake's sovereign immunity from suit. The cases, however, are inapposite as they are decades old and do not apply *Lewis'* "who-may-be-bound" test. Dkt. 33, pp15-21.

1) *Davis v. Littell* does Not Address Sovereign Immunity and Foreshadows *Lewis.*

The older of the cases, *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), does not support Defendants' argument (it does not even apply) because it does not address sovereign immunity. The question in *Davis* was whether a tribal executive officer "was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties." *Id.*, 83. The *Davis* court held tribal governmental officials are entitled to the same privileges and immunities as their state and federal counterparts. *Id.*, 85.

Davis does not support a finding Defendants share in Blue Lake's sovereign immunity from suit. The words "sovereign immunity" do not appear anywhere in *Davis.* Instead *Davis* teaches that in determining whether a tribal official is protected by an immunity or privilege we apply the same test as for a similarly situated state or federal official. This is in line with *Lewis'* holding the "who-may-be-bound" test should determine whether a tribal official enjoys sovereign immunity because it is the same test used to determine whether a state or federal official enjoys sovereign immunity.

Under *Davis,* Defendants are not entitled to share in Blue Lake's sovereign immunity from suit because similarly situated California and United States employees would not be entitled to share in California's or the United States' sovereign immunity from suit.

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2) *Great Western Casino* is Overruled by *Lewis* Because it Analyzed Sovereign Immunity in Terms of Whether an Officer Acted Within the Scope of Their Employment, a Test Disavowed by *Lewis*.

Great Western Casinos had a contract to manage Morongo's casino. After the tribal government terminated the contract, Great Western Casinos sued the tribe, its elected officials, and outside legal counsel for damages. *Great Western Casinos v. Morongo Band* 74 Cal.App.4th 1407 (Cal.Ct.App 1999). The *Great Western Casinos* court found the tribal officials were protected by Morongo's sovereign immunity because "sovereign immunity does extend to tribal officials when they act in their official capacity and within the scope of their authority." *Id.*, 1421. The court then proceeded to determine the outside legal counsel were also protected by Morongo's sovereign immunity because they were acting as tribal officials within the scope of their employment. *Id.*, 1423-1424.

The *Great Western* Court did not apply the "who-may-be-bound" test in determining whether defendants shared in Morongo's sovereign immunity from suit. Instead, the court only considered whether defendants acted within the scope of their tribal employment.

Justice Sotomayor could not have been more clear, destroying any application *Great Western Casinos* may have previously had to this case: Tribal employees are not entitled to sovereign immunity merely because they act within the scope of their employment. *Lewis*, 1288. Instead, "[t]he critical inquiry is who may be legally bound by the court's adverse judgment." *Id.*, 1292-1293.

Great Western Casinos would need to be decided differently post-*Lewis*. Instead of extending sovereign immunity to defendants because they acted within the scope of their employment, the court would need to evaluate whether the tribe would be bound by an adverse judgment. Where judgment against a defendant would not bind the tribe, sovereign immunity would not be available. *JW Gaming*, Dkt. 55, pp5-6.

Because *Great Western Casinos* used a test expressly rejected by the Supreme Court in *Lewis,* and failed to use the "who-may-be-bound" test required by *Lewis, Great Western Casinos* cannot be used to find today's Defendants are entitled to sovereign immunity.

D. Whether Defendants' Share in Blue Lake's Sovereign Immunity is a Different Question than Whether Communications Between Blue Lake and Defendants are Protected by the Attorney-Client Privilege.

Defendants suggest sovereign immunity must bar suit against them, lest their communications with Blue Lake be exposed in litigation. The communications would become exposed as Defendants would "necessarily be required" to disclose information protected by attorney-client privilege, and non-party Blue Lake would have no opportunity to protect the confidentiality of its legal discussions. Dkt. 33, p18.

Defendants' suggestion is without merit because Defendants conflate sovereign immunity with attorney-client privilege. The two doctrines are entirely separate. It is indisputable this Court can find Defendants' communications with Blue Lake are protected by attorney-client privilege, even if this Court finds Defendants are not entitled to share Blue Lake's sovereign immunity. Indeed, the Hon. Judge Illman recently found attorney-client privilege protected communications between a tribe and its attorneys, even though the tribe itself had previously waived its sovereign immunity. *JW Gaming v James*, 3:18-cv-02669, Dkts. 169, 182.

Finally, Defendants express concern non-party Blue Lake would not have the opportunity to protect its interest in maintaining the attorney-client privilege. But if Blue Lake feels its privacy interests are being threatened, it may intervene to protect them. Because Blue Lake's tribal attorney is a party to this action, it is reasonable to assume he will alert Blue Lake should it be in Blue Lake's interest to intervene. Dkt. 32-6, ¶4.

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E. *ABI v. Marston* Does Not Require This Court to Assert Control of the Tribal Court.

Defendants suggest that by hearing *ABI v. Marston* this Court would necessarily assert control of the tribal court. Dkt. 33, p20. The suggestion seems more like an invocation of the "intra-tribal dispute doctrine" ("the Doctrine") than an argument individual Defendants should share in Blue Lake's sovereign immunity.

Evaluated as an invocation of the Doctrine, Defendants' suggestion is without merit because invoking the Doctrine requires more than "mere suggestion." Invoking the Doctrine requires a case "present a genuine and non-frivolous question of tribal law." *JW Gaming*, Dkt. 55, p7.

Plaintiffs ask this Court to resolve causes of action for RICO and wrongful use of civil proceedings against Defendants. While it is true some of the conduct in these causes of action plays out against a tribal court backdrop, the conduct in *ABI v. Marston* is no more uniquely "tribal" than the themes in *Hamlet* are uniquely "Danish."

In resolving the causes of action Plaintiffs do not ask this Court to "assert control" of the tribal court. Plaintiffs only ask this Court to review the record developed by the tribal court in *Blue Lake v. ABI.* Fundamentally, this Court is free to "examine a developed record" from a tribal court. *Miccosukee v. Cypress*, 814 F.3d 1202, 1210 (11th Cir. 2015).

F. Recent Supreme Court Precedent Makes Doubtful Sovereign Immunity Precludes Recovery by Private Tort Victims of a Commercial Enterprise.

Sovereign immunity from suit for tribal commercial enterprises is a controversial doctrine. The Supreme Court has noted the doctrine "developed almost by accident" and that the "wisdom of perpetuating the doctrine may be doubted." *Kiowa Tribe of Okla. v. Manufacturing Technologies*, 523 U.S. 751, 752 (1998).

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The Supreme Court recently revisited the doctrine in *Michigan v. Bay Mills Indian Cmty.* 134 S. Ct. 2024 (2014). In *Bay Mills* the State of Michigan sued Bay Mills to enjoin Bay Mills' illegal off-reservation casino. The Supreme Court held in a five-four decision sovereign immunity precluded the suit because Michigan could prevent operation of the casino by bringing action against individual tribal employees and officers. *Id.*, 2035. However four dissenting justices would have overturned *Kiowa* outright because "the inequities engendered by unwarranted tribal immunity have multiplied." *Id.*, 2045. And even the majority opinion made clear sovereign immunity might not preclude suit by tort victims who had no other way to obtain relief. *Id.*, 2036 fn. 8.

In a letter to the Court, co-defendants explain Blue Lake "was fully apprised as to who was performing what work on its behalf." Dkt. 34, p6. If this is true, Blue Lake willfully committed vicious intentional torts against ABI and Acres. These intentional torts involved off-reservation conduct and caused off-reservation harm. Dkt. 1, *passim.* These torts were instigated by a Blue Lake commercial enterprise. Significantly, Acres, personally, never entered into an agreement with Blue Lake or its casino. Id., ¶¶52-53.

If Defendants are immune from suit, then Acres and ABI have no way to obtain relief for Blue Lake's intentional torts against them. This outcome is contrary to the logic of *Bay Mills.*

Read in the light of *Bay Mills, Lewis'* exposure of individual tribal employees and officers to liability in civil tort is necessary to preserve Blue Lake's sovereign immunity. Blue Lake cannot enjoy sovereign immunity from suit unless individuals who commit torts on its behalf are exposed to individual liability.

IV. The Verified Complaint States RICO Predicates Against Defendants Because it Plausibly Pleads Corrupt Conduct by Defendants in *Blue Lake v. ABI.*

Defendants argue under Rule 12(b)(6) Plaintiffs fail to state a valid RICO cause of action.

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In resolving a motion under Rule 12(b)(6) the Court must accept all allegations in the Verified Complaint as true and draw all reasonable inferences in favor of Plaintiffs. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Dismissal on a 12(b)(6) motion is "especially disfavored" where a complaint presents novel facts or legal theories. *McGary v. City of Portland,* 386 F.3d 1259, 1270 (9th Cir. 2004).

Defendants argue Plaintiffs fail to state a RICO cause of action because, "absent corruption," ordinary litigation activity cannot supply the necessary predicates for RICO. Dkt. 33, pp23-25. Defendants mount no other challenge against the sufficiency of the RICO cause of action.

Defendants argument is a red-herring because corrupt litigation activity can supply civil-RICO predicates and the Verified Complaint plausibly alleges corrupt litigation activity.

A. Corrupt Litigation Activity Can Give Rise to RICO Predicates.

Corrupt litigation activity gives rise to RICO predicates in criminal actions. *U.S. v. Frega,* 179 F.3d 793 (9th Cir. 1999).

Corrupt litigation activity also gives rise to RICO predicates in civil actions. *Chevron v Donziger* 833 F.3d 74 (2nd Cir. 2016).

Donziger was an American attorney who used corrupt litigation tactics to fabricate a judgment against Chevron in a foreign court, then sought to enforce that judgment against Chevron in courts around the world, including American courts. *Id.,* 82-85. The work to fabricate and enforce the corrupt foreign judgment involved, among other acts giving rise to RICO predicates: 1) the subornation of judges and court-appointed neutral experts; 2) ghostwriting orders and reports for judges and court-appointed neutral experts; and 3) filing false declarations intended to mislead district courts of the United States. *Id.,* 131-135.

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Donziger argued because his wrongful acts were part of his litigation against Chevron, his acts could not give rise to RICO predicates. But the District Court, however, found "corruption of an adjudicative process" ***are*** "wrongful means" which give rise to RICO predicates (emphasis added). *Chevron v. Donziger,* 974 F. Supp. 2d 362, 581 (S.D.N.Y. 2014), *affirmed at* 833 F.3d 131-135.

B. Corrupt Litigation Activity by Defendants in *Blue Lake v. ABI* is Plausible.

Judge Marston, his law clerks, and his law firm were working as attorneys for Blue Lake the whole time Judge Marston presided over *Blue Lake v. ABI.* Dkt. 1, ¶¶124-128.

Defendants were aware Judge Marston and his law clerks were working as attorneys for Blue Lake while Judge Marston presided over *Blue Lake v. ABI* because Defendants became attorneys in *Blue Lake v. ABI* at the conclusion of *Acres v. Blue Lake II.* Id., ¶111.

Justice Lambden noted Defendants "misstate[d] the evidence" in an "attempt to find direct evidence" to support the "conjured" cause of action against Acres. Id., ¶¶53, 117.

Given Rapport & Marston, Boutin Jones, and Blue Lake all engaged in corrupt litigation activity in *Blue Lake v. ABI*, it is plausible Defendants' "misstatement of evidence" is evidence Defendants also engaged in corrupt litigation activity.

C. The Verified Complaint Plausibly Alleges Defendants' Purpose in *Blue Lake v. ABI* was to Obtain Money by False Pretenses.

Defendants' purpose in *Blue Lake v. ABI* was to obtain money. Id., ¶44.

Defendants sought to obtain this money through the false pretense of what Justice Lambden found was a "conjured" cause of action [Fraud] against Acres. Justice Lambden found Defendants "misstated the evidence" in pursuit of this conjured claim. Id., ¶¶53, 117.

Because Defendants dismissed *Blue Lake v. ABI* rather than supply a Bill of Particulars to substantiate the causes of action against ABI, this Court can reasonably infer Defendants knew the causes of action against ABI in *Blue Lake v. ABI* were false pretenses. Id., ¶113.

Finally, it is always assumed California attorneys and law-firms will not act to corrupt adjudicative processes in which they are involved. From the Verified Complaint this Court can plausibly find Justice Lambden thwarted Defendants' attempt obtain money through the false pretense Defendants were not acting to corrupt the adjudicative process in *Blue Lake v. ABI*.

D. At Least Two Mail Fraud Predicates are Plausibly Alleged Against Each Defendant.

The elements of mail fraud are: "1) a scheme to defraud, and 2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. United States* 347 US 1, 8 (1954). Where a defendant participates in a scheme to defraud, they need not physically use the mails themselves. If use of the mails to execute the fraud "can reasonably be foreseen" then the defendant has committed mail fraud. For instance, in furtherance of a scheme to defraud, Pereira induced a wealthy widow to write him a check. Because it was reasonably foreseeable the bank at which Pereira cashed the check would mail the check to the widow's issuing bank Pereira was guilty of mail fraud. *Id.*

Defendants' participation in *Blue Lake v. ABI* was part of Defendants' scheme to defraud ABI and Acres. Blue Lake Tribal Court rules require all filings be made by postal mail, and dozens of filings were made by mail in *Blue Lake v. ABI*. Dkt. 1, ¶202. Because this use of the mails was a reasonably foreseeable part of Defendants' scheme to defraud, dozens of mail fraud predicates have been alleged against Defendants under *Pereira.*

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E. At Least Two Wire Fraud Predicates are Plausibly Alleged Against Each Defendant.

Because the mail and wire fraud statutes share the same language and serve the same purpose, "the wire fraud statute is read in light of the case law on mail fraud." *U.S. v. Manarite* 44 F.3d 1407, 1412 fn.5 (9th Cir. 1995).

Blue Lake Tribal Court rules require litigants serve filings via email, in addition to postal mail. Dozens of email filings were made in *Blue Lake v. ABI.* Dkt. 1, ¶205. Because this use of the wires was a reasonably foreseeable part of Defendants' scheme to defraud, dozens of wire fraud predicates have been alleged against each Defendant under *Pereira.*

V. California's One-Year Statute of Limitations for Actions Against Attorneys Providing Professional Services Does Not Bar Actions Against Attorneys Who Corrupt Adjudicative Processes or Breach General Civil Obligations.

Defendants argue under Rule 12(b)(6) ABI's state-law causes of action are barred by the one-year statute of limitations imposed by California Code of Civil Procedure 340.6(a). That statute provides actions against attorneys for "a wrongful act or omission … arising in the performance of professional services shall be commenced within one year after the plaintiff discovers . . . the wrongful act or omission." CCP 340.6(a).

In resolving a motion under Rule 12(b)(6) this Court must accept all allegations in the complaint as true and draw all reasonable inferences in Plaintiffs' favor. *Usher*, 561. Dismissal on a 12(b)(6) motion is "especially disfavored" where a complaint presents novel facts or legal theories. *McGary*, 1270. Where a 12(b)(6) motion argues a cause of action is time-barred dismissal is appropriate only if "it appears beyond a doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc., v. U.S.* 68 F.3d 1204, 1207 (9th Cir. 1995).

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ABI brings its state-law cause of action more than one-year after it became aware of Defendants' wrongful acts. Resolution of Defendants' statute of limitations argument therefore turns on whether 340.6(a) applies to the conduct described in the Verified Complaint.

The California Supreme Court recently held 340.6(a) only applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation … in the course of providing professional services." *Lee v. Hanley*, 61 Cal.4th 1225, 1229 (Cal. 2015). California's Supreme Court explained that 340.6(a) is limited to protecting "services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys." *Id.*, 1236. Furthermore, 340.6(a) does not apply where an attorney simultaneously violates a professional obligation along with "some generally applicable nonprofessional obligation." *Id.*, 1238.

The facts and procedural history in *Lee* are instructive. Lee retained Hanley to act as her attorney and advanced Hanley $120,000.00. After the matter settled Hanley provided Lee an invoice indicating a remaining credit balance of around $45,000.00. When Lee requested a refund of the remaining balance, Hanley refused, claiming no balance remained. Lee terminated her attorney-client agreement with Hanley and demanded the return of her money. Hanley again refused, and more than a year later, Lee sued Hanley. Hanley demurred, arguing the one-year statute of limitations in 340.6(a) barred Lee's claim. *Id.*, 1230.

California's Supreme Court overruled Hanley's demurrer because whether 340.6(a) barred Lee's conversion cause of action turned on precisely why Hanley refused to return Lee's money. If, for instance, Hanley kept the funds because of an accounting error or unconscionable fee agreement, Hanley might have failed in professional obligation and 340.6(a) might apply to bar the action. If, however, Hanley simply "decided to keep [Lee's money] for no good reason"

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then 340.6(a) would not apply, because everyone shares a general civil obligation to refrain from "the wrongful exercise of dominion over the property of another." *Id.*, 1240.

Lee is controlling and directly on-point authority for the question of whether 340.6(a) sets the statute of limitations for the state-law cause of action against Defendants. Because of *Lee,* this Court cannot find at this stage ABI's wrongful use of civil proceedings cause of action will necessarily depend on proof Defendants violated uniquely professional obligations without also violating general civil obligations. Therefore, this Court cannot find 340.6(a) time-bars ABI's wrongful use of civil proceedings cause of action.

A. California's Supreme Court has Declined to Determine Whether 340.6(a) Applies to Wrongful Use of Civil Proceedings and the Courts of Appeal are Split on the Issue.

Defendants rely on *Connelly v. Bornstein* 33 Cal.App.5th 783 (Cal.Ct. App. Dist. 1 2019) for their argument the "California Court of Appeal has clearly held … 340.6(a) applies to [wrongful use of civil proceedings] claims against attorneys." Dkt. 33, pp26-27.

But there is no single "California Court of Appeal." Instead there are six California Courts of Appeal. *Connelly* itself discusses conflicting holdings from those courts of appeal as to whether 340.6(a) applies to causes of action for wrongful use of civil proceedings. *See Connelly, 789-793*, comparing *Yee v Cheung*, 220 Cal.App.4th 184 (Cal. Ct. App. Dist. 4 2013) [finding 340.6(a) applies to wrongful use causes of action] against *Roger Cleveland v. Crane* 223 Cal.App.4th 660 (Cal. Ct. App. Dist. 2 2014) [declining to apply 340.6(a) to wrongful use causes of action to avoid absurd results].

Connelly also makes clear the California Supreme Court has not resolved this split. See *Connelly*, 793 discussing *Parrish v. Watkins*, 3 Cal.5th 767, 775 (Cal. 2017) [declining to reach whether 340.6(a) applies to wrongful use causes of action].

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Indeed, it seems possible no blanket rule regarding the application of 340.6(a) to wrongful use causes of action can be derived from *Lee,* because *Lee's* core holding is that whether 340.6(a) applies to a cause of action depends on the nature of conduct alleged and proven, and not on how the cause of action is styled. *Lee,* 1236.

Here, because California authority is split on whether the statute of limitations for wrongful use of civil proceedings causes of action against attorneys is one-year or two-years, this Court cannot determine with certainty which statute of limitations applies. This Court cannot grant a 12(b)(6) motion where the "legal issues are not sufficiently clear to permit [it] to determine with certainty" which statute of limitations applies. *Supermail,* 1207.

B. This Court Cannot Find Beyond Doubt Defendants' Conduct was Limited to the Provision of Uniquely Professional Services.

Under *Lee,* the statute of limitations in 340.6(a) only applies to causes of action which rely on proof attorneys violated uniquely professional obligations without also violating general civil obligations. *Lee,* 1238. Therefore, this Court may only find 340.6(a) bars the wrongful use cause of action against Defendants if it finds "beyond a doubt" Defendants only violated uniquely professional obligations without also violating general civil obligations. *Supermail,* 1207.

This Court cannot find beyond a doubt Defendants' conduct was limited to the provision of uniquely professional services. It is indisputable Blue Lake employed its attorney Judge Marston to preside over *Blue Lake v. ABI.* Blue Lake and its attorneys from Rapport & Marston and Boutin Jones worked to conceal this fact. Combined with Justice Lambden's finding Defendants "misstated the evidence" in pursuit of a conjured claim against Acres, this Court cannot find beyond a doubt ABI will be unable to prove Defendants went beyond the bounds of providing professional services to Blue Lake during *Blue Lake v. ABI.*

Indeed, because it is axiomatic participating in a RICO enterprise is not a professional service, if this Court declined to dismiss Defendants from the RICO cause of action, it must also decline to find the wrongful use cause of action is time-barred by 340.6(a).

VI. Conclusion

The Verified Complaint alleges Defendants partook in a sprawling and sordid scheme to obtain money by means of false pretenses from ABI and Acres. Defendants move to dismiss arguing they cannot be called to account for their misconduct because a tribe paid them for their part in the scheme, and because they were just lawyers doing what lawyers do.

Lewis v. Clarke established that where no remedy is sought against a tribal sovereign, tribal employees are not protected by sovereign immunity. Under *Lewis,* sovereign immunity is unavailable to Defendants in *ABI v. Marston,* just as sovereign immunity is unavailable to federal officers in *Bivens* actions, or state employees in 42 USC 1983 actions.

Defendants' 12(b)(6) arguments are all predicated on the assertion the Verified Complaint fails to allege anything other than that they were attorneys providing professional services to their clients. But the plausible, detailed, and Verified Complaint alleges corrupt litigation conduct far outside the bounds of professionalism. The audacity of the scheme to defraud alleged in *Blue Lake v. ABI* precludes dismissal on a 12(b)(6) motion under *McGary.*

Employment by a tribal sovereign does not relieve us of our duties to our state or federal sovereigns – or to each other. ABI and Acres ask this Court to deny Defendants' motion, and order Defendants to answer the Verified Complaint within fourteen days.

To whatever extent Defendants' motion cannot be denied, Plaintiffs' request leave to amend.

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