No. 20-15959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRES BONUSING, INC., et al.,

Plaintiffs-Appellants,

v.

LESTER MARSTON, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-05481-WHO
Hon. William H. Orrick, Judge

APPELLEES BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER AND AMY O'NEILL'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellees Boutin Jones Inc., Michael Chase, Daniel Stouder and Amy O'Neill have no entities to disclose under Federal Rule of Appellate Procedure 26.1.

Date: September 24, 2020

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JURISDICTIONAL STATEMENT

The District Court possessed jurisdiction over Plaintiffs' eighth cause of action (RICO) per 18 USC § 1964(c) and supplemental jurisdiction over Plaintiffs' other causes of action per 28 USC § 1367. This jurisdiction was subject to Defendants' defense of sovereign immunity. Similarly, this Court has jurisdiction over this matter based on 28 USC § 1291.

INTRODUCTION

This action stems from a contractual dispute between Appellants Acres Bonusing, Inc. ("ABI") and James Acres ("Acres") and Blue Lake Casino & Hotel ("Blue Lake Casino") in Blue Lake Rancheria Tribal Court. Appellants brought causes of action against Blue Lake Casino's attorneys, including Boutin Jones[1] for wrongful use of civil proceedings, breach of fiduciary duty, fraud, and a Racketeer Influenced and Corrupt Organizations ("RICO") violation, which were dismissed on the basis of sovereign immunity. Appellants appeal that dismissal. ABI and Acres disingenuously assert, as if it were an immutable proposition of black letter law, that sovereign immunity can never apply if the only tort remedy sought is money damages against an individual tortfeasor. ABI and Acres' invocation of

[1] Appellants bring this action against Boutin Jones in its capacity as a corporation and against Boutin Jones attorneys Michael Chase, Daniel Stouder, and Amy O'Neill individually. These Appellees are referred to collectively as "Boutin Jones" throughout this brief.

their oft-repeated mantra that where liability is sought only against individuals and not against the tribe, sovereign immunity does not apply, reflects a purposefully distorted reading of the applicable case law.

ABI and Acres' appeal fails because sovereign immunity does not rest or fail exclusively on the nature of the defendant or who is paying the judgment. Where, as here, a tribe's right to select and instruct counsel, and control its tribal court and the functions of its appointed judicial officers is at stake, long-standing federal precedent recognizes that attorneys acting as agents of a tribe enjoy sovereign immunity notwithstanding that the remedy sought to be imposed is nominally against the attorneys in their individual capacity. ABI and Acres repeated characterization of the RICO cause of action as a "necessarily individual" claim provides no supporting legal authority to overcome the ramification of their claims on the sovereign interests of the Blue Lake Rancheria.

ABI and Acres' reliance on a selective reading of the holdings in garden variety tort cases, which, for example, reject sovereign immunity where a tribal agent negligently operated an automobile, do not speak to the central issue in this case. These same cases recognize that sovereign immunity will apply in cases against an individual defendant who is an agent of the tribe, where such a judgment against the tribe's attorneys would directly undermine the tribe's ability to retain and direct its legal counsel as well as impact the tribe's decisions regarding the

proper scope and functioning of its tribal court and its appointed judicial officers. Judge Orrick's decision granting the attorney defendants' motions to dismiss based on sovereign immunity is consistent with existing case law. Judge Orrick correctly recognized that the ramification of allowing claims against attorneys who are tribal agents to proceed against them in their individual capacity would operate to destroy the tribal autonomy that sovereign immunity aims to protect.

Appellants do not cite any legal authority for their blanket statement that sovereign immunity is precluded when the remedy sought is only against an individual tribal agent. This is unsurprising because no such authority exists. The law is abundantly clear with regard to when sovereign immunity is afforded to agents and employees of a tribe. When a judgment against a tribe's attorney may have the effect of negatively impacting a tribe's operations and administration, monetarily or not, sovereign immunity will be applied. The fact that an individual attorney is sued rather than the tribe itself is not dispositive of its application.

ISSUES PRESENTED

Whether sovereign immunity may apply where a judgement will operate against a tribe, irrespective of whether a defendant is sued in an individual capacity.

Whether sovereign immunity may apply even where racketeering activity is alleged.

Whether the District Court erred in denying Defendants' anti-SLAPP motion as moot.

Whether Appellants' claims for Wrongful Use of Civil Proceedings under California state law are barred by California's applicable one year statute of limitations.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In the underlying contractual dispute, Blue Lake Casino was represented by Boutin Jones, and later by the law firm Janssen Malloy ("Attorney Defendants"). In 2010, Blue Lake Casino and Acres negotiated an agreement whereby the casino would lease an iSlot gaming system from ABI. In 2015, a dispute arose between Blue Lake, Acres, and ABI concerning the return of a $250,000 deposit Blue Lake had paid to ABI. At this point, Blue Lake retained Boutin Jones and brought a complaint against ABI for contract-based claims and against Acres personally for fraudulent inducement. Blue Lake Casino and Hotel v. Acres Bonusing, Inc. et al, Tribal Court Case No. C-15-1215LJM. Janssen Malloy substituted in for Boutin Jones as Blue Lake's counsel in 2017. In July of that year, the tribal court granted a motion for summary judgment in favor of Acres on the cause of action for fraudulent inducement and the action was dismissed in its entirety a month later. ER 019-020, ¶ 5.

Following this dispute, Acres 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 brought in the federal court action that underlies this appeal. All defendants brought successful motions to quash service of summons and complaint based on the defense of sovereign immunity, which Acres now appeals. Boutin Jones also filed an anti-SLAPP motion in the state court action which, as was the case in the District Court, was deemed moot because the state court found it did not have jurisdiction over Acres' claims. ER 025, ¶ 32.

Appellants then brought a complaint in the Northern District Court of California against Attorney Defendants Daniel Stouder, Amy O'Neill, and Michael Chase (Boutin Jones) and Megan Yarnall and Amelia Burroughs (Janssen Malloy), as well as the Blue Lake Tribal Court Chief Judge Lester Marston, Court Clerk Anita Huff, two elected Tribal officials, Arla Ramsey and Thomas Frank, and the law firm Rapport and Marston ("Blue Lake Defendants") alleging wrongful use of civil proceedings, breach of fiduciary duty, constructive fraud, and RICO. ER 018. ABI and Acres claims are based on Boutin Jones' actions taken in representing Blue Lake in the Tribal action and related federal court actions, including causing pleadings, motions, and other documents to be filed and served on Plaintiffs and speaking at related hearings. ER 109, 023-029, 033, 036, 038-039, 041-043, 046-

049, 056-057 ¶¶ 1, 4-5, 23-26, 32, 34, 41, 48-50, 52, 72-74, 81, 90-92, 98(b)-(c), 110-111, l 15-116, 121, 136, 148-150, 156-157, 199, 202, 205, 208(a). These actions are understood generally to constitute typical duties required to be performed by lawyers in the course of their representation of their clients. Appellants contend that in this instance they were undertaken for the purpose of abusing the civil court system, fraud, breach of contract, and racketeering.

Boutin Jones moved to dismiss the action based on sovereign immunity per Federal Rule of Civil Procedure 12(b)(1) and/or for failure to state a claim under Rule 12(b)(6). Judge William Orrick granted Defendants' motions to dismiss these claims based on the defense of sovereign immunity. He denied Defendants' anti-SLAPP motion as moot given the Complaint was dismissed. ER 002. Appellants now appeal the District Court's decision as to each of the aforementioned causes of action.

STATUTORY, REGULATORY AND CONSTITUTIONAL AUTHORITIES

All applicable statutes, regulations, and constitutional authorities are contained in the addendum included with the Answering Brief filed on behalf of Appellees David Rapport, et al.

STANDARDS OF REVIEW

The District Court's decision whether there is subject matter jurisdiction is reviewed de novo. *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir.

2016). The District Court's factual findings on jurisdictional issues are reviewed for clear error. *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 n.9 (9th Cir. 2017).

SUMMARY OF THE ARGUMENT

Agents acting at the direction of a tribe are entitled to sovereign immunity when their actions will affect that Tribe as the real party in interest. The tribe must be considered the real party in interest in a matter where a judgment will impact tribal operations – which is especially true when the acts at issue involve the tribe's retention and instruction of legal counsel to represent the tribe's interest in litigation before a tribal judge. This is the case here. Sovereign immunity must be afforded to the Boutin Jones Defendants-Appellees in order to preserve the Tribe's ability to effectively govern itself and to seek legal recourse for damage to the Tribe's interest in its Tribal courts. "Effects" are not limited to a monetary payout by individual Defendants, as Appellants would have it. Appellants' attempts to circumvent the basic tenets of sovereign immunity are overreaching and unsupported.

Boutin Jones' actions in representing the Tribe do not constitute racketeering activity. The actions Appellants describe are those undertaken in the normal practice of providing legal counsel and zealous representation of a client. However, even if Boutin Jones' actions arguably could be characterized as

constituting racketeering activity, Appellants' attempt to shoehorn these actions into a racketeering claim and then circumvent sovereign immunity is meritless.

Finding a lack of jurisdiction based on sovereign immunity renders Defendant-Appellees' Anti-SLAPP motion moot. As such the District Court's decision to deny the Anti-SLAPP motion was correct.

Given the aforementioned points, this Court should affirm the District Court's decision to grant Boutin Jones' motion to dismiss.

ARGUMENT

I. SOVEREIGN IMMUNITY MAY APPLY WHERE A JUDGEMENT WILL OPERATE AGAINST THE TRIBE, IRRESPECTIVE OF WHETHER A DEFENDANT IS SUED IN AN INDIVIDUAL CAPACITY

A. Sovereign Immunity Must Be Explicitly Waived

As a threshold matter, sovereign immunity will not be waived absent explicit congressional authority. "Tribal sovereignty … is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1408 (1999). *Maxwell v. Cty. of San Diego*, 697 F.3d 941, 954 (9th Cir. 2012)

Though Appellants claim there is no evidence Blue Lake wishes to share its sovereign immunity with Appellees beyond hiring Boutin Jones as its attorneys,

such evidence is not necessary (Opening Brief at 39). Sovereign immunity is automatically afforded to the Boutin Jones Defendants by operation of law. There is no statute or waiver by the Tribe indicating otherwise.

B. Sovereign Immunity May Be Afforded To Individuals When A Tribe Is Determined To Be The Real Party In Interest

Appellants rely on several cases to support their contention that sovereign immunity is inapplicable to any of the subject causes of action, because they are brought against Appellees in their individual capacities, not against the Tribe. Appellants ignore the case law that explicitly acknowledges that there are instances in which an imposition of liability against agents of the tribe will have a negative effect on the tribe's interests, and in such cases sovereign immunity applies even where the suit is against an agent sued as an individual. There is a more nuanced, over-arching rule that overrides the consideration of a defendant's status as a party sued in an individual capacity: "courts look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1286-87 (2017).

It is true that an employee acting within the scope of his employment at the time a tort was committed is not, *on its own,* sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. *Id*. at 1288 [emphasis added]. However, sovereign immunity will bar a suit when the remedy sought is truly

against the sovereign. *Id*. at 1290. In this case, Boutin Jones was acting at the behest of the Tribe engaging in standard litigation activities in Tribal Court to protect the Tribe's interests. Denying Boutin Jones sovereign immunity would have a chilling effect on the Tribe's ability to secure private counsel to represent the Tribe's interests, because legal professionals would be wary of undertaking such representation without the security of sovereign immunity.

The facts in this matter are analogous to those in *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407 (1999). Also emanating from a contractual dispute, the Plaintiff brought suit against the Tribe's private attorney and her law firm for claims of fraud, abuse of process, and RICO. *Id*. at 1414. The court explained:

> "As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents … In performing their function counsel must be free to express legal opinions and give advice unimpeded by fear their relationship with the tribe will be exposed to examination and potential liability for the advice and opinions given. Refusing to recognize an extension of a tribe's sovereign immunity to cover general counsel's advice to the tribe could not only jeopardize the tribe's interests but could also adversely influence counsel's representation of the tribe in the future."

Great W. Casinos, 74 Cal. App. 4th at 1423–24 citing *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968). Not affording Boutin Jones sovereign immunity for its

representation of the Tribe would run contrary to the purpose of sovereign immunity – to allow the Tribe to "enjo[y] sufficient independent status and control over its own laws and internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control." *Id*. at 1424, citing *Littell*, 398 F.2d 83 at 84.

In *Maxwell v. County of San Diego*, this Court concisely explained the difference between "official" and "individual" capacity claims:

> "The general bar against official-capacity claims ... does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities.... (emphasis in original). Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe."

Maxwell v. Cty. of San Diego, 697 F.3d 941, 954 (9th Cir. 2012)[2] citing *Native Am. Distrib. Co. v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). The Boutin Jones Defendants authority to represent the Tribe in the underlying matter stems exclusively from power granted by the Tribe to its

[2] *Maxwell v. Cty. of San Diego*, 697 F.3d 941, 954 (9th Cir. 2012) was withdrawn and superseded on denial of rehearing by *Maxwell v. Cty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013). The opinions share the same pertinent language and because Appellants cite to the former in their Table of Authorities, this brief does as well for the sake of consistency.

agents. Boutin Jones did not undertake any individual acts for its individual benefit. Boutin Jones acted exclusively as an arm of the Tribe carrying out the Tribe's autonomous decision to pursue a remedy against Appellants arising out of their breach of the iSlot business deal. As noted in the district court's opinion below, Appellants do not allege that Attorney Defendants acted outside of the scope of this authority. ER 008. They are sued because of actions taken in their official capacities as the Tribe's counsel, not due to anything undertaken in their individual capacities or on their own behalf.

Appellants cling to seemingly favorable language from *Maxwell*, in particular that "suits over plainly unlawful conduct are individual capacity suits by definition and cannot be barred by sovereign immunity, including specifically tribal sovereign immunity." (Opening Brief at 21, citing *Maxwell* 697 F.3d at 954). However, *Maxwell* specifically makes clear that sovereign immunity is available where "the judgment sought would expend itself on the public treasury or domain, or *interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.*" *Maxwell*, 697 F.3d at 953 [emphasis added]. Thus, *Maxwell* does not stand for the hardline proposition Appellants misguidedly embrace. Importantly, *Maxwell* acknowledges that this is not a black or white issue. While such individual capacity suits may not always operate against the sovereign, this will not necessarily be the case in every

suit. *Id*.[3] Here, a judgment would most certainly operate against the Tribe as the sovereign. Attorney defendants were acting within the scope of their employment to litigate on behalf of the Tribe in a Tribal court consistent with Tribal authority. A judgment against the Tribe's attorneys would result in severe difficulty maintaining the independence of Tribal judicial functions in tribal court and the ability to engage legal counsel to act at the Tribe's direction.

C. Naming Individual Defendants and Demanding Money Judgments from Individuals Does Not Automatically Extinguish Sovereign Immunity

Appellants point to case law in which individuals were named rather than sovereign entities, arguing that because damages would come from Defendants' own pockets, rather than the tribal treasury, they cannot be afforded sovereign immunity (Opening Brief at 35, citing *Maxwell* 697 F.3d at 1089).[4]

The fact that an individual is subject to a lawsuit is only one of the criteria courts evaluate in determining appropriate application of sovereign immunity. Appellants attempt to argue the District Court erred in its application of two of this

[3] See *Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015) ("… it remains 'the general rule that individual officers are liable when sued in their individual capacities' … So long as any remedy will operate against the officers individually, and not against the sovereign").

[4] Here, Appellants have referenced both the superseded version of *Maxwell* and the latest version. The cited language may be found at: *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013).

Court's tribal sovereign immunity cases because they each sought remedies through the device of a suit against tribal employees. Here, Acres and ABI "disclaim seeking a remedy from Blue Lake" (Opening Brief at 33). Nevertheless, this distinction does not negate the applicability of sovereign immunity to Boutin Jones.

In *Cook v. AVI Casino Enterprises*, this Court found the plaintiff sued the defendant in name but actually sought recovery from the Tribe – the plaintiff could not "circumvent tribal immunity through a 'mere pleading device.'" 548 F.3d 718, 727 (9th Cir. 2008) citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70–71 (1989). Appellants attempt to distinguish *Cook* from the case at bar in that they "nam[e] Appellees as defendants because ABI seeks a money judgment which will bind Appellees as the sole parties responsible for payment. This responsibility for the judgment makes Appellees the real parties in interest" (Opening Brief at 35).

This simple unsupported assertion completely ignores the breadth of the Tribe's potential "interest." Simply because Appellants intend in this action to obtain a money judgment against the Attorney Defendants and not the Tribe itself does not mean the action does not affect the Tribe's interest. To allow litigants to bring actions against agents of the Tribe, particularly private counsel over litigation conduct undertaken in Tribal court, can significantly impact the Tribe's future selection of counsel and counsel's willingness to represent the Tribe in Tribal court

proceedings. These are not effects that will literally drain the Tribe's treasury, but a suit such as this will have a definite impact on the Tribe's operations, its relationship with its outside legal counsel, and the autonomy and functioning of its Tribal court.

In *Hardin v. White Mountain Apache Tribe*, a resident brought suit against the Tribe after being forcibly removed from the reservation for his conviction in federal court for concealment of stolen federal property. 779 F.2d 476, 478 (9th Cir. 1985). This Court held that "… tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. Because all the individual defendants here were acting within the scope of their *delegated authority*, Hardin's suit against them is also barred by the Tribe's sovereign immunity." *Id*. at 478-79, citing *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981) [emphasis added]. Here, Appellees were at all times acting within the scope of the authority delegated to them by Blue Lake to handle the Tribe's lawsuit in Tribal court against ABI and Acres. As such, they are afforded sovereign immunity. As the *Maxwell* opinion explained: "*Hardin* was in reality an official capacity suit, barred by sovereign immunity, because the alternative, to [h]old[ ] the defendants liable for their legislative functions[,] would . . . have attacked the very core of tribal sovereignty." *Maxwell*, 697 F.3d 941, 954. To allow Appellants to bring suit against Attorney Defendants in this matter

would be to attack how the Tribe operates and what its attorneys and judges are empowered to do for the Tribe.

D. The Boutin Jones Defendants Were Acting as an Arm of the Tribe

This Court's decision in *Cook* affirmed the decision to apply sovereign immunity because the defendants in that case were "arms of the tribe." *Cook*, 548 F.3d at 726. The tribal corporation at issue there was "wholly owned and managed by the Tribe." *Id*. Similarly, the services rendered by Boutin Jones to the Tribe throughout this litigation have been at the direction of the Tribe for the benefit of the Tribe.

This Court delineated five factors in determining whether entities are arms of a tribe: 1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities. *White v. Univ. of California*, 765 F.3d 1010, 1025 (9th Cir. 2014) citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

Appellants contend that because the Attorney Defendant law firms were not created by the Tribe, there is no evidence they are controlled by Blue Lake, and because there is no evidence of Blue Lake's intent to share its sovereign immunity

with them, they are not arms of the Tribe (Opening Brief at 40-41). Appellants' surface level analysis misses the mark. That Boutin Jones was not created by Blue Lake is not dispositive in determining its status as an arm of the Tribe. To that end, while an outside, private law firm is not controlled by the Tribe in the general sense, its actions taken on behalf of the Tribe in lawsuits filed on the Tribe's behalf are dictated exclusively by the Tribe's instructions, objectives, and goals.

Appellants further argue that the record is mute as to whether Blue Lake intended to share its sovereign immunity with Attorney Defendants (Opening Brief at 41). However, as noted previously, absent Congressional authority stating otherwise, a tribe must clearly waive sovereign immunity. It need not be explicitly granted upon a tribe's agent for that agent to be protected by it. *Great W. Casinos*, 74 Cal. App. 4th at 1408. Further, Appellees do not challenge Appellants' contention that the financial relationship between Blue Lake and the Attorney Defendants is "presumptively that of a client paying attorneys for services" (Opening Brief at 41). The Tribe pays for its attorneys' services and in turn, its attorneys work at its direction toward its goals. The attorneys do not work for the Tribe in their individual capacities on their own volition for their own benefit. As such, given that attorneys have no personal interest in the outcome of the Tribe's litigation, attorneys can only be "arms of the tribe" and must be afforded sovereign immunity.

II. APPELLEES' CONDUCT DID NOT CONSTITUTE RACKETEERING ACTIVITY. EVEN IF IT DID, IT WOULD NOT BAR SOVEREIGN IMMUNITY

Appellants contend that Attorney Defendants actions in representing the Tribe constitute racketeering activity, and thus brought the RICO cause of action. They allege that Attorney Defendants engaged in mail fraud, wire fraud, and obstruction of justice throughout the course of their representation of Blue Lake, based on their use of the mail system to serve proofs of service and other case-related materials. ER 042, 056-057, ¶¶ 115-116, 202-208.

Other jurisdictions have directly addressed this issue. In *Kim v. Kimm*, a restaurant owner brought a RICO action against parties who had previously brought a trademark infringement claim against him. Specifically, the plaintiff alleged that the defendants committed obstruction of justice, mail fraud, and wire fraud by preparing, signing, and filing various pleadings. 884 F.3d 98, 103 (2d Cir. 2018). The court held that where "a plaintiff alleges that a defendant engaged in a single frivolous, fraudulent, or baseless lawsuit, such litigation activity alone cannot constitute a viable RICO predicate act. *Id*. at 105.[5]

[5] See also *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087–88 (11th Cir. 2004) ("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) (meritless litigation is not a predicate act of extortion under RICO).

Appellants' allegations that Boutin Jones' actions constituted racketeering activity is similarly unsupported. The law is clear that mailing and serving required pleadings in connection with one lawsuit is not enough to establish a predicate RICO cause of action. Appellants have alleged no other conduct on Boutin Jones' part that could constitute racketeering activity. As such, their RICO claim fails.

Even if Appellants did allege predicate acts constituting a pattern of racketeering activity, such conduct would not remove Attorney Defendants from under the mantle of sovereign immunity. In *Great Western Casinos*, the court explained that in providing legal representation, even when advising, counseling, and conspiring with the tribe to wrongfully terminate a management contract, counsel is immune from liability for those professional services. 74 Cal. App. 4th at 1423 citing *Littell*, 398 F.2d at 85. Tribes have a "'[right] to look beyond its own membership for capable legal officers, and to contract for their services' … In performing their function counsel must be free to express legal opinions and give advice unimpeded by fear their relationship with the tribe will be exposed to examination and potential liability for the advice and opinions given." *Id*. Thus, even if Attorney Defendants' conduct *did* constitute racketeering activity, it would not remove them from the protection of sovereign immunity.

As the District Court's decision notes, what Appellees describe are the normal functions of an attorney for a client. ER 008; ER 036-038, 041-042. ¶¶ 82, 90, 110, 115-116. It is clear that all of these actions were undertaken within the scope of the authority extended by the Tribe, Boutin Jones' client. Therefore, although Appellants plead that each Defendant was acting in their individual capacity, the conduct itself makes evident that Boutin Jones was at all times acting in a representative capacity on behalf of the Tribe. The facts simply belie the notion that Boutin Jones' acts were "plainly unlawful" given the relatively benign nature of their conduct. Despite Appellants' contentions otherwise, even a RICO suit against an agent alleging they acted in an individual capacity can still be subject to sovereign immunity where the judgment would "interfere with the public administration" or the "effect of judgment would be to restrain the sovereign from acting." *Maxwell*, 697 F.3d at 953.

III. THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANTS' ANTI-SLAPP MOTION AS MOOT

A case becomes moot when litigants' rights are no longer affected by the action. *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996). Federal courts may only resolve actual controversies admitting of specific relief, otherwise they are considered moot. *Cammermeyer v. Perry*, 97 F.3d 1235, 1237 (9th Cir. 1996).

Boutin Jones' Anti-SLAPP motion was served concurrently with its Motion to Dismiss. When the Motion to Dismiss was granted on the grounds of sovereign

immunity (ER 002), reaching the merits of the Anti-SLAPP motion was unnecessary, and thus the court properly deemed it moot. The issue that remains on appeal is that of sovereign immunity. The parties' rights are no longer affected by the outcome of the Anti-SLAPP motion. To litigate both the Motion to Dismiss and the Anti-SLAPP motion now would be an inefficient and redundant use of both this Court and the parties' time and resources. There is no point, and in fact it is not lawful, to resolve a matter when the issues underlying it are no longer in dispute.

IV. APPELLANTS' CLAIMS FOR WRONGFUL USE OF CIVIL PROCEEDINGS UNDER CALIFORNIA LAW ARE BARRED BY CALIFORNIA'S APPLICABLE ONE YEAR STATUTE OF LIMITATIONS

Given the District's Court's decision that the anti-SLAPP motion was moot, it did not have occasion to address Boutin Jones' statute of limitations defense. Should this Court determine that the anti-SLAPP motion was not moot, it is ripe for this Court to determine that appellants' claims are barred by the statute of limitations. California Code of Civil Procedure § 340.6 dictates that "an 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." California's one year statute of limitations applies to claims against lawyers arising from professional services rendered, including claims of malicious prosecution. *Connelly v. Bornstein*, 33 Cal. App. 5th 783, 799 (2019). This Court

is obligated to apply the statute of limitations to Appellants' state law claims against Boutin Jones because they arise out of the performance of professional services and suit was not filed within one year of the dismissal of the underlying action.

ABI alleged that Boutin Jones' litigation of *Blue Lake v. ABI* in the tribal court was wrongful conduct because it subjected ABI to a corrupt process. ABI additionally alleged that in January 2016 its business was harmed due to the resultant stress of the tribal court action on its principal Acres. ER 030, ¶ 58. Acres filed *Acres v. Blue Lake I* in the Northern District Court in March 2016, seeking due process he claimed he was being denied in tribal court. After this action was dismissed, he filed *Blue Lake II* seeking similar relief.

ABI makes further claims that Judge Marston's billing records were obtained in January 2017, which allegedly revealed Marston's conduct evidencing corruption of the adjudicative process. ER 025, ¶ 33. Judge Marston's alleged bias was purportedly known by Boutin Jones, based on their alleged "significant history of collaboration" with David Rapport and Marston dating back to 2011. ER 033, ¶ 74. Boutin Jones' representation of the Tribe ended when it substituted out of the underlying litigation in February 2017. ER 041, ¶ 111. That action was dismissed entirely in August 2017. ER 019-020, ¶ 5.

The record clearly indicates that ABI had "discovered" Boutin Jones' allegedly tortious conduct as early as January 2016 and no later than January 2017. After the underlying action was dismissed in August 2017, ABI had until August 2018 to bring claims of wrongful use of civil proceedings against Boutin Jones. It did not files its complaint in this matter until August 28, 2019 – well beyond the one year termination of the underlying action. ER 018. ABI's state law claims for malicious prosecution against Boutin Jones are therefore barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, the judgment of the Northern District Court should be affirmed.

Date: September 24, 2020

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STATEMENT OF RELATED CASES

This party is unaware of any others cases in this Court that are deemed related to this case pursuant to Circuit Rule 28-2.6.

Date: September 24, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure because this brief contains **5274** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(i).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14 point font.

Dated: September 24, 2020

LERCH STURMER LLP

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Attorneys for Appellees Boutin Jones Inc., Michael Chase, Daniel Stouder, and Amy O'Neill

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I electronically filed the foregoing **APPELLEES BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER AND AMY O'NEILL'S ANSWERING BRIEF** with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury, under the law of the State of California, that the foregoing is true and correct and that this declaration was executed on September 24, 2020 at Pleasant Hill, California.

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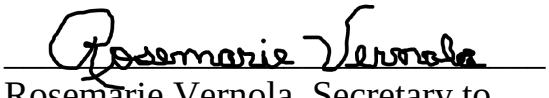
LERCH STURMER LLP



Rosemarie Vernola, Secretary to
Jerome N. Lerch
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