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Attorneys for Specially Appearing Defendants,
 JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Acres Bonusing, Inc., a Nevada
 Corporation, and James Acres, an
 individual;

Plaintiffs,

vs.

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; Ashley
 Burrell, an individual; Cooper
 Demarse, an individual; Darcy
 Vaugh, an individual; Kostan
 Lathouris, an individual; Boutin
 Jones, Inc., a California Corporation;
 Michael Chase, an individual; Daniel
 Stouder, an individual; Amy O'Neil,
 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

**NOTICE OF MOTION AND MOTION
 OF DEFENDANTS JANSSEN
 MALLOY LLP, MEGAN YARNALL
 AND AMELIA BURROUGHS TO
 DISMISS THE COMPLAINT OF
 PLAINTIFFS JAMES ACRES AND
 ACRES BONUSING, INC. UNDER
 FRCP 12(b)(1) AND UNDER FRCP
 12(b)(6); MEMORANDUM OF
 POINTS AND AUTHORITIES**

[FRCP Rule 12(b)(1), 12(b)(6).]

Date: May 18, 2022

Time: 2:00 p.m.

Ctrm: Courtroom 2, 17th Floor

Assigned: Judge William H. Orrick

**[Filed Concurrently with [Proposed]
 Order.]**

Trial Date: None.

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 NOTICE IS HEREBY GIVEN that on **May 18, 2022**, at 2:00 p.m., or as soon
3 thereafter as counsel may be heard in Courtroom 2 of the above-entitled court located at
4 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, CA 94102,
5 Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA
6 BURROUGHS (“Defendants”) will move the Court for an Order dismissing all claims
7 against them in the Complaint of Plaintiffs JAMES ACRES and his company ACRES
8 BONUSING, INC. (“Plaintiffs”) under:

9 FRCP Rule 12(b)(1): The Court lacks subject matter jurisdiction based on the bar
10 of personal prosecutorial immunity as the allegations of Plaintiffs’ Verified Complaint
11 all pertain to litigation activity in Defendants’ role as attorneys for Blue Lake Rancheria
12 - a sovereign Indian tribe - in a matter before the Tribal Court.

13 FRCP Rule 12(b)(6): (1) Plaintiffs are unable to state a claim under the
14 Racketeer Influenced and Corrupt Organizations (RICO) Act against attorneys Yarnall
15 and Burroughs and their law firm of Janssen Malloy because the pursuit of a lawsuit
16 (the only allegations against these Defendants) does not constitute the required
17 predicate acts (a pattern of racketeering activity) to support a RICO claim; and (2)
18 Plaintiffs’ California state law claim for Wrongful Use of Civil Proceedings (Malicious
19 Prosecution) is barred by the one-year statute of limitations - applicable to attorneys –
20 of California Code of Civil Procedure Section 340.6.

21 This motion is made following the meet and confer of counsel, which took place
22 during a conference call (conducted by ZOOM) with counsel for all of the parties on
23 March 15, 2022. Counsel for the parties were unable to reach an agreement concerning
24 the matters raised in this motion requiring that it go forward.

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1 This motion will be based upon this Notice, the attached Memorandum of Points
2 and Authorities, Plaintiffs' Verified Complaint, the records and papers on file, and upon
3 such other oral and documentary evidence as may be presented at the hearing on this
4 matter.

5 DATED: March 24, 2022

BERMAN, BERMAN & BERMAN, LLP
SCHNIEDER & LOWARY, LLP

6
7 By: _____/S/
HOWARD SMITH
8 Attorneys for
Specially Appearing Defendants,
9 JANSSEN MALLOY LLP, MEGAN
YARNALL and AMELIA BURROUGHS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In cases pending in both the California Superior Court (Sacramento Superior Court Case No. 34-2018-00236829) and this Federal District Court, Plaintiffs JAMES ACRES and his company ACRES BONUSING, INC. bring suit against Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS (“Janssen Malloy”) solely for Defendants’ litigation activity in the continued pursuit of a case on behalf of the Blue Lake Rancheria tribe against Acres and ABI in Tribal Court. (“Blue Lake v. ABI.”). Plaintiffs’ claims against Janssen Malloy are without merit because as opined by the Court of Appeal in the California case – relying upon federal authority - prosecutorial immunity is available as an absolute bar to the claims against these Defendants. (*Acres v. Marston*, 72 Cal.App.5th 417, 447-449 (2021).)

On July 13, 2018, Acres (as the only Plaintiff) – through attorney Ronald Blumberg - filed an action in Sacramento Superior Court against 17 Defendants, with seven Causes of Action alleging certain Defendants conspired to control the outcome of Blue Lake v. ABI. However, there were no allegations for conspiracy or aiding and abetting against Janssen Malloy. Instead, Janssen Malloy was only named to the Cause of Action for Wrongful Use of Civil Proceedings – Malicious Prosecution.

On February 11, 2019, the Sacramento Superior Court granted several Motions to Quash finding the claims against all of the Defendants were barred by tribal sovereign immunity. Acres filed an appeal of this ruling.

On August 28, 2019, two Plaintiffs (Acres and ABI) filed a second action – again with attorney Blumberg - in this Court against the same 17 Defendants arising out of Blue Lake v. ABI. To get a second bite at the apple, they included both Acres and ABI with an ill-advised Cause of Action under the federal RICO statute. The federal case was based upon the same specific allegations that certain Defendants engaged in a conspiracy to control the outcome of the underlying case – Blue Lake v. ABI. Again, there were no allegations for conspiracy or aiding and abetting against Janssen Malloy.

1 On April 15, 2020, the District Court granted the Motions to Dismiss finding the
 2 claims against all of the Defendants were barred by tribal sovereign immunity. Acres
 3 filed an appeal of this ruling.

4 On November 5, 2021, the Ninth Circuit Court of Appeals issued its ruling.
 5 (*Acres Bonusing, Inc. v. Marston*, 17 F.4th 901 (9th Cir. 2021).) The Court reversed
 6 finding tribal sovereign immunity did apply to the attorney Defendants, which included
 7 Boutin Jones, Inc. and Janssen Malloy. (*Id.*, at pp. 910-914.) In finding sovereign
 8 immunity did not apply, the Court was clear that “Defendants may still avail themselves
 9 of personal immunity defenses.” (*Id.*, at p. 914.) The Court did find that judicial
 10 immunity barred the claims against several Defendants, which included the Judge from
 11 the Tribal Court, Judge Lester Marston. (*Id.*, at pp. 915-916.)

12 On November 18, 2021, the California Court of Appeal for the Third Appellate
 13 District ruled on the appeal of the Motions to Quash. (*Acres v. Marston, supra*, 72
 14 Cal.App.5th at p. 417.) The Court of Appeal also reversed finding tribal sovereign
 15 immunity did apply to Boutin Jones and Janssen Malloy. (*Id.*, at pp. 432-439.)

16 The Court of Appeal found judicial immunity and personal immunities, which
 17 included prosecutorial immunity barred the claims against certain Defendants, which
 18 again included Judge Marston. (*Id.*, at pp. 440-445.) In making this ruling, relying
 19 upon federal authority, the Court of Appeal was clear prosecutorial immunity could
 20 apply to private law firms for legal work on civil matters on behalf of governmental
 21 immunities. (*Id.*, at pp. 448-449.) The Court of Appeal did not rule on the application
 22 of any personal immunities as to Boutin Jones and Janssen Malloy. (*Id.*, at pp. 425,
 23 428, 439, 445.) To the contrary, the Court of Appeal expressly left this issue open as to
 24 Janssen Malloy: “In sum, although respondents may ultimately prevail on a claim of
 25 personal immunity, we decline to find that they are entitled to sovereign immunity.”
 26 (*Acres v. Marston, supra*, 72 Cal.App.5th at p. 439.)

27 Accordingly, as invited by the Ninth Circuit Court of Appeals, Janssen Malloy
 28 bring this Motion to Dismiss to avail themselves of a personal immunity defense:

1 prosecutorial immunity. (*Acres Bonusing, Inc. v. Marston, supra*, 17 F.4th at p. 914.)
 2 It is for this reason, this District Court here was charged with allowing Defendants to
 3 bring Motions to Dismiss which addressed the application of this personal immunity:
 4 “On remand, the district court can consider these and other arguments that the
 5 remaining defendants may advance, including whether defendants are otherwise
 6 immune from suit on grounds the district court has yet to address.” (*Id.*, at p. 917.)

7 The Motion to Dismiss should be granted under Federal Rule of Civil Procedure
 8 Rule 12(b)(1) because this Court has no subject matter jurisdiction over Janssen Malloy
 9 (and its attorneys) because they are entitled to personal prosecutorial immunity given
 10 that the allegations in the Complaint all pertain to litigation activity in their role as
 11 attorneys for the Blue Lake tribe for the underlying case - Blue Lake v. ABI.

12 Alternatively, this motion should be granted under Rule 12(b)(6) because: (1)
 13 Plaintiffs are unable to state a RICO claim against Janssen Malloy because a recent
 14 decision from the Ninth Circuit Court of Appeals - *United States v. Koziol*, 993 F.3d
 15 1160, 1174 (9th Cir. 2021) - has made clear the pursuit of a lawsuit (the only allegations
 16 against Janssen Malloy) does not constitute the requisite predicate acts to show a pattern
 17 of racketeering activity (requiring the action be remanded to California Superior Court);
 18 and (2) Plaintiffs’ California state law claim for Wrongful Use of Civil Proceedings
 19 (Malicious Prosecution) is barred by the one-year statute of limitations - applicable to
 20 attorneys – California Code of Civil Procedure Section 340.6.

21 Based upon the foregoing, the Court should grant this motion with Defendants
 22 Janssen Malloy, Megan Yarnall and Amelia Burroughs dismissed from the action.

23 **II. THE FACTUAL ALLEGATIONS OF THE COMPLAINT**

24 As Plaintiffs’ Complaint notes, the Blue Lake Rancheria (“Blue Lake”) is a
 25 federally-recognized Indian tribe in Humboldt County, California, and is organized
 26 under the Constitution of the Blue Lake Rancheria. (Verified Complaint, at ¶.9.) Blue
 27 Lake Casino and Hotel (“BLCH”) is a tribal entity wholly owned by Blue Lake and an
 28 arm of the tribe. (VC, at ¶.9.) The Blue Lake Tribal Court is an appropriately

1 established judicial arm of the tribe. (VC, at ¶¶.11, 38.) The Complaint admits that Blue
 2 Lake is a sovereign nation. (VC, at ¶.150(c).)

3 The Complaint alleges an action was filed by BLCH against Plaintiffs by Boutin
 4 Jones in Blue Lake's Tribal Court - Blue Lake v. ABI. (VC, at ¶¶.1, 4, 22; Complaint
 5 in Blue Lake v. ABI: Exhibit "1" to Verified Complaint.) In February of 2017, Janssen
 6 Malloy, LLP, through its attorneys Megan Yarnall and Amelia Burroughs, replaced
 7 Boutin Jones as attorneys for the Blue Lake tribe in Blue Lake v. ABI. (VC, at ¶¶.27-
 8 29.) The Complaint goes on to allege that, while representing BLCH in Tribal Court in
 9 Blue Lake v. ABI, attorneys Yarnall and Burroughs misstated the evidence "on Blue
 10 Lake's behalf." (VC, at ¶¶.15, 27-29, 117.) On August 31, 2017, a Judgment of
 11 Dismissal in favor of Plaintiffs was entered in Blue Lake v. ABI. (VC, at ¶¶.5, 111;
 12 Judgment of Dismissal in Blue Lake v. ABI: Exhibit "3" to Complaint.)

13 On August 28, 2019, Plaintiffs filed this action against Janssen Malloy, Yarnall
 14 and Burroughs for "Wrongful Use of Civil Proceedings" and RICO for the continued
 15 pursuit of Blue Lake v. ABI in the Tribal Court. (VC, at ¶¶.135-141, 199-202.)

16 Other than conclusory allegations in the first claim for "Wrongful Use of Civil
 17 Proceedings," there are literally no other charging allegations against Janssen Malloy in
 18 the Complaint. (VC, at ¶¶.134-144.) Specifically, there is no claim Defendants acted in
 19 any capacity other than as agents for Blue Lake or BLCH or that any of their allegedly
 20 tortious actions occurred outside of Tribal Court.

21 Plaintiffs admit the existence of the pending action in California state Court: "32.
 22 In July 2018 Mr. Acres sued the above-named defendants in Acres v. Marston et al
 23 [Sacramento Superior Court Case No. 2018-34-00236929] on causes of action
 24 substantially similar to the causes one through seven below." (VC, at ¶.32, fns. 5, 6.)
 25 This action also includes an additional claim under RICO. (VC, at ¶¶.197-208.)

26 The RICO claim is based upon the same allegations/evidence as the other seven
 27 claims – the pursuit of the underlying action in and/or the use of the tribal court. (VC,
 28 at ¶¶.1, 11, 197-208.) This is revealed by the specific verified allegations supporting

the eighth claim for “Operating or Managing a Racketeering Enterprise under 18 USC Section 1964(c):”

*. The eighth claim includes all of the general allegations, which were re-alleged in full (VC, at ¶¶.1-133, 197);

*. Each Defendant engaged in conduct to obtain money by false pretenses, which included: (a) Wrongful use of civil proceedings in Blue Lake v. ABI; (b) Working to ensure that the judicial power in Blue Lake v. ABI would be exercised for attorneys working for Blue Lake; (c) Working to conceal that the judicial power in Blue Lake v. ABI was being exercised for attorneys working for Blue Lake; and (d) Falsely representing that the Blue Lake tribal court was an impartial tribunal (VC, at ¶.199);

*. Defendants intended to manufacture an enforceable tribal court judgment in Blue Lake v. ABI against Plaintiffs (VC, at ¶.200);

*. Filings in the Blue Lake Court in Blue Lake v. ABI were used by the litigants to further the scheme against Plaintiffs (VC, at ¶¶.201-202, 205, 207);

*. “Several Defendants” (which do not include Janssen Malloy, Yarnall and Burroughs), undertook to influence, obstruct, impede the due administration of justice of a Court of the United States, through conduct which included: (a) Attorneys from Rapport & Marston ghostwriting papers filed by Boutin Jones which were intended to convince the district court that Judge Marston was a neutral decision-maker; and (b) Attorney DeMarse of Boutin Jones drafting and Judge Marston filing, a false declaration with the district court (VC, at ¶.208); and

*. Plaintiffs were harmed by Defendants’ scheme by being compelled to defend themselves against the tribal court action. (VC, at ¶¶.209-210.)

III. THE TWO GROUNDS FOR THIS MOTION TO DISMISS - FRCP 12(b)

A. Prosecutorial Immunity Asserted Through a Motion - FRCP 12(b)(1)

A Plaintiff bears the burden of establishing federal subject matter jurisdiction and in effect, the Court presumes lack of jurisdiction until Plaintiff proves otherwise. (*In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013). A Rule 12(b)(1)

1 Motion to Dismiss for lack of subject matter jurisdiction may be made on the basis that
 2 the Complaint (together with documents attached to the complaint and any judicially
 3 noticed facts) fails to establish grounds for federal subject matter jurisdiction as
 4 required by Rule 8(a)(1)—i.e., lack of federal jurisdiction appears from the “face of the
 5 complaint.” (*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
 6 2003). The Court need not accept as true legal conclusions, legal conclusions couched
 7 as factual allegations, or inferences unsupported by the facts set out in the Complaint.
 8 (*Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071-1072 (9th Cir. 2014)
 9 [Legal conclusions disregarded even if cast as factual allegations.].)

10 As shown above, once Defendants have challenged subject matter jurisdiction, the
 11 burden shifts to Plaintiffs to prove the necessary jurisdictional criteria are met by
 12 competent evidence. Here, Plaintiffs’ own verified Complaint shows no such evidence
 13 exists to prove jurisdiction – requiring that this motion be granted.

14 **B. The Standard to Challenge a Complaint Based Upon the Failure to**
 15 **State a Claim through a Motion to Dismiss under FRCP 12(b)(6)**

16 A pleading may be dismissed under FRCP 12(b)(6) if a Plaintiff fails to state a
 17 claim upon which relief can be granted. (*Bell Atlantic Corp. v. Twombly*, 550 U.S.
 18 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).) “A claim has facial
 19 plausibility when the Plaintiff pleads factual content that allows the court to draw the
 20 reasonable inference that the defendant is liable for the misconduct alleged.” (*Ashcroft*
 21 *v. Iqbal*, *supra*, 556 U.S. at p. 678 [citing to *Bell Atlantic Corp. v. Twombly*, *supra*,
 22 550 U.S. at p. 556.]) “The plausibility standard is not akin to a ‘probability
 23 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
 24 unlawfully.” (*Ibid.*) If a claim sets forth facts that are “merely consistent with” with
 25 Defendant’s liability, it “stops short of the line between possibility and plausibility of
 26 ‘entitlement to relief.’” (*Ibid.*) Allegations of wrongdoing will be deemed
 27 “implausible” if there are “obvious alternative explanation[s]” for the facts alleged
 28 indicating lawful conduct, not the unlawful conduct urged by Plaintiff. (*Ibid.*)

Material properly submitted with the Complaint (exhibits under Rule 10(c)) may be considered as part of the Complaint for purposes of a FRCP 12(b)(6) motion. (*Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1990).) Thus, documents attached to a Complaint and incorporated therein by reference are treated as part of the Complaint when ruling on a FRCP 12(b)(6) motion. (*In re NVIDIA Corp. Secur. Litig.* 768 F.3d 1046, 1051 (9th Cir. 2014).) Accordingly, when ruling on a FRCP 12(b)(6) motion, 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* 593 F.3d 1031, 1038 (9th Cir. 2010).)

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. (*Van Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).) Under these circumstances, the Complaint would fail to state a claim because the action was time-barred. (*Ibid.*)

IV. THE COURT HAS NO JURISDICTION OVER DEFENDANTS BECAUSE THEY HAVE PROSECUTORIAL IMMUNITY FOR THEIR PURSUIT OF THE UNDERLYING CASE IN THE TRIBAL COURT

In finding that sovereign immunity did not apply to Janssen Malloy for their prior representation of Blue Lake, the Ninth Circuit Court of Appeals was clear these Defendants could later assert other immunities: “On remand, the district court can consider these and other arguments that the remaining defendants may advance, including whether defendants are otherwise immune from suit on grounds the district court has yet to address.” (*Acres Bonusing, Inc. v. Marston, supra*, 17 F.4th at p. 917.) As found by the California Court of Appeal, such immunity would include prosecutorial immunity. (*Acres v. Marston, supra*, 72 Cal.App.5th at pp. 447-449.)

Specifically, the Court of Appeal concluded Marston, Rapport and others were entitled to prosecutorial immunity for their work for Blue Lake. (*Id.*, at p. 447.) In

1 reaching this conclusion, the Court was clear prosecutorial immunity applied to civil
2 litigators from private law firms acting on behalf of governmental entities, relying upon
3 federal authority, which included the United States Supreme Court decision of *Filarisky*
4 *v. Delia* 566 U.S. 377, 390 (2012). (*Ibid.*)

5 The California Court of Appeal reasoned:

6 “Fourth, Acres contends we should not extend
7 immunity to ‘civil litigators from private law firms acting on
8 behalf of a for-profit commercial enterprise.’ Acres's
9 contention appears to include two components: (1) only a
10 tribe's in-house counsel can assert immunity, and (2) a tribe's
11 counsel can only assert immunity in suits involving
12 traditional governmental matters (as opposed to ‘for-profit
13 commercial’ matters). We find neither argument persuasive.
14 To start, we reject Acres's suggestion that only a tribe's in-
15 house counsel can assert immunity. As the Supreme Court
16 explained in *Filarisky*, a case involving the immunity of a
17 private attorney who a city had hired for an investigation,
18 ‘[a]ffording immunity not only to public employees but also
19 to others acting on behalf of the government’ is consistent
20 with historical practices and ‘serves to ‘ensure that talented
21 candidates [are] not deterred by the threat of damages suits
22 from entering public service.’ (*Filarisky, supra*, 566 U.S. at
23 p. 390; *see also id.* at p. 387; *Davis, supra*, 398 F.2d at 85
24 [‘That a tribe finds it necessary to look beyond its own
25 membership for capable legal officers, and to contract for
26 their services, should not deprive it of the advantages of the
27 rule of privilege otherwise available to it’].)”

28 (*Acres v. Marston, supra*, 72 Cal.App.5th at p. 449.)

1 The Court of Appeal did not rule on any personal immunities as to Janssen
 2 Malloy. (*Id.*, at pp. 425, 428, 439, 445.) Instead, the Court of Appeal expressly left this
 3 issue open as to Janssen Malloy: “In sum, although respondents may ultimately prevail
 4 on a claim of personal immunity, we decline to find that they are entitled to sovereign
 5 immunity.” (*Acres v. Marston, supra*, 72 Cal.App.5th at p. 439.)

6 The Wrongful Use of Civil Proceedings against Janssen Malloy (the only
 7 allegations against these Defendants) are premised solely upon the firm and its
 8 attorneys’ litigation efforts in replacing Boutin Jones and continuing the Blue Lake v.
 9 ABI suit on behalf of Blue Lake before the tribal court. (VC, at ¶¶27-29, 138-139.)
 10 The Complaint is devoid of any factual allegations Janssen Malloy engaged in any
 11 activity other than the pursuit of the case for Blue Lake before the Tribal Court.

12 Because the claims in the Complaint are all based upon Janssen Malloy’s
 13 litigation activity in the course of their representation of Blue Lake before the tribal
 14 court, the firm and its attorneys are entitled to prosecutorial immunity.

15 **V. THE NINTH CIRCUIT COURT OF APPEALS HAS CONFIRMED THE**
 16 **PURSUIT OF A LAWSUIT DOES NOT CONSTITUTE THE REQUISITE**
 17 **PREDICATE ACTS TO SHOW A PATTERN OF RACKETEERING**
 18 **ACTIVITY TO SUPPORT A RICO CLAIM**

19 18 U.S.C. Section 1964(c) of the Racketeer Influenced and Corrupt
 20 Organizations Act (RICO), provides a private right of action to any person injured in its
 21 business or property by reason of a violation of the activities prohibited by Section
 22 1962. To establish a RICO claim under Section 1964(c), a Plaintiff must show: (1) a
 23 violation of Section 1962; (2) An injury to business or property; and (3) That the injury
 24 was caused by the violation of Section 1962. To establish whether a Defendant violated
 25 Section 1962, a Plaintiff must prove that each Defendant participated in: (1) The
 26 conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of
 27 racketeering activity which (5) the proximately harmed the victim. (*Eclectic Properties*
 28 *E., LLC v. Marrns & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014).)

“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. Section 1961(1) [Defining “racketeering activity” to include offenses indictable under Section 1341 [Relating to mail fraud]; Section 1343 [Relating to wire fraud], and Section 1503 [Relating to 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. (Section 1962.)

Plaintiffs do not allege any wrongful conduct by the Defendant attorneys that amounts to a “pattern of racketeering activity” under the RICO Statute. Instead, the Complaint merely alleges Janssen Malloy through its attorneys Megan Yarnall and Amelia Burroughs, replaced Boutin Jones as attorneys for Blue Lake in Blue Lake v. ABI and continued the action in Tribal Court “on Blue Lake’s behalf.” (Verified Complaint, at ¶¶.15, 27-29, 117.) All of the alleged acts concern litigation activities during the underlying action. Specifically, Plaintiffs 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.” (VC, at ¶.202); and

*. “During 2016 and 2017, dozens of filings were made in Blue Lake v. ABI with proofs of service indicating they were served via email.” (VC, at ¶.202).

These so-called “patterns of racketeering activity” are merely allegations of litigation activity undertaken by Defendants in representing their client, the Blue Lake tribe in Tribal Court. Plaintiffs have not alleged the requisite predicate criminal acts under the RICO statute and accordingly have not met the pleading standard of Rule 12(b)(6). Plaintiffs 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.” (VC, at ¶.200.) The remainder of the allegations in Plaintiffs’ RICO claim are conclusory and based on unwarranted factual conclusions or unjustified inferences and should be disregarded. (VC, at ¶¶.203-207.)

1 Since the last time this action was before the District Court, the Ninth Circuit
2 Court of Appeals in *United States v. Koziol, supra*, 993 F.3d at pp. 1160, 1174 has
3 confirmed that litigation and/or the pursuit of a lawsuit does not constitute the requisite
4 predicate acts to show a pattern of racketeering activity to support a RICO claim:

5 “Perhaps recognizing that our decision in *First Pacific*
6 *Bancorp* does not support his argument, Koziol relies
7 primarily on cases from other circuits to argue that threats of
8 sham litigation can never constitute ‘wrongful’ conduct
9 under the Hobbs Act. Koziol cites *Kim v. Kimm*, 884 F.3d
10 98, 104-05 (2d Cir. 2018); *Snow Ingredients, Inc. v.*
11 *SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016); *Deck v.*
12 *Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir.
13 2003); *United States v. Pendergraft*, 297 F.3d 1198, 1205-08
14 (11th Cir. 2002); *Vemco, Inc. v. Camardella*, 23 F.3d 129,
15 134 (6th Cir. 1994); and *I.S. Joseph Co.*, 751 F.2d at 267-68.

16 Setting aside *Pendergraft* momentarily, all these cases
17 involve civil RICO claims and parties involved in business
18 disputes who had been or were at that time involved in
19 litigation apart from the civil RICO suit. *See Kim*, 884 F.3d
20 at 100-01; *Snow*, 833 F.3d at 518-20; *Deck*, 349 F.3d at
21 1256, 1258; *Vemco*, 23 F.3d at 132-33; *I.S. Joseph Co.*, 751
22 F.2d at 266-67. There are significant differences between
23 these cases, dealing with civil RICO claims, and the criminal
24 charges at issue in this case. As the Supreme Court has
25 explained: ‘The creation of a private right of action raises
26 issues beyond the mere consideration whether underlying
27 primary conduct should be allowed or not, entailing, for
28 example, a decision to permit enforcement without the check

1 imposed by prosecutorial discretion.’ *RJR Nabisco, Inc. v.*
2 *Eur. Cmty.*, 579 U.S. 325, 136 S. Ct. 2090, 2106, 195 L. Ed.
3 2d 476 (2016) (citation omitted).

4 Indeed, in these cases the courts concluded that RICO
5 does not authorize suits by private parties asserting claims
6 against business or litigation adversaries, based on litigation
7 activities, and seeking treble damages, costs, and attorneys’
8 fees. *See Kim*, 884 F.3d at 104 (‘[I]f litigation activity were
9 adequate to state a claim under RICO, every unsuccessful
10 lawsuit could spawn a retaliatory action,’ which ‘would
11 inundate the federal courts with procedurally complex RICO
12 pleadings.’ (citations omitted)); *Snow*, 833 F.3d at 525
13 (explaining that litigation tactics cannot be a predicate for a
14 civil RICO claim); *Deck*, 349 F.3d at 1258 (‘[R]ecognizing
15 abusive litigation as a form of extortion would subject almost
16 any unsuccessful lawsuit to a colorable extortion (and often a
17 RICO) claim.’); *see also Vemco, Inc.*, 23 F.3d at 134; *I.S.*
18 *Joseph Co.*, 751 F.2d at 267.

19 In rejecting RICO liability based on litigation
20 activities, these courts expressed policy concerns relating to
21 ensuring access to the courts, promoting finality, and
22 avoiding collateral litigation. *See Kim*, 884 F.3d at 104
23 (explaining that permitting RICO suits based on prior
24 litigation activities would ‘engender wasteful satellite
25 litigation,’ ‘erode the principles undergirding the doctrines of
26 res judicata and collateral estoppel,’ and ‘chill litigants and
27 lawyers and frustrate the well-established public policy goal
28 of maintaining open access to the courts’ because

1 ‘pleading[s] and correspondence in an unsuccessful lawsuit
 2 could lead to drastic RICO liability’ (citations omitted)); *see*
 3 *also Snow*, 833 F.3d at 525; *Deck*, 349 F.3d at 1258; *I.S.*
 4 *Joseph Co.*, 751 F.2d at 267.”
 5 (*United States v. Koziol, supra*, 993 F.3d at p. 1174.)

6 Because litigation activity (the only allegations against Janssen Malloy) may not
 7 form the basis for liability under the RICO claim, Plaintiffs are unable to allege the
 8 requisite predicate acts as a matter of law.

9 **VI. THE CLAIM UNDER CALIFORNIA STATE LAW FOR WRONGFUL**
 10 **USE OF CIVIL PROCEEDINGS (MALICIOUS PROSECUTION) IS**
 11 **BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS**

12 Plaintiff ACRES BONUSING, INC. cannot prevail on its state law claim for
 13 Malicious Prosecution against attorneys Janssen Malloy (and its attorneys Yarnall and
 14 Burroughs) because the claim is barred by the one-year statute of limitations that
 15 applies to actions against attorneys. Under California Code of Civil Procedure Section
 16 340.6, “[a]n action against an attorney for a wrongful act or omission, other than for
 17 actual fraud, arising in the performance of professional services shall be commenced
 18 within one year after the plaintiff discovers, or through the use of reasonable diligence
 19 should have discovered, the facts constituting the wrongful act or omission. . .”

20 ABI's claim for Malicious Prosecution necessarily arises from Defendant
 21 attorneys' performance of professional services to their client in the Underlying Action.
 22 (See *Daniels v. Robbins*, 182 Cal.App.4th 204, 215 (2010) [“[E]very claim of malicious
 23 prosecution is a cause of action arising from protected activity because every such claim
 24 necessarily depends upon written and oral statements in a prior judicial proceeding.”].)
 25 The California Court of Appeal has clearly held that “consistent with *Lee [v. Hanley]* 61
 26 Cal.4th 1225 (2015)] section 340.6(a) applies to malicious prosecution claims against
 27 attorneys who performed professional services in the underlying litigation.” (*Connelly*
 28 *v. Bomstein*, 33 Cal.App.5th 783, 799 (2019).)

1 The Complaint alleges: “From January 2016 through July 2017, Blue Lake
 2 Rancheria ('Blue Lake') and its confederates sued Acres Bonusing, Inc. . . within Blue
 3 Lake's trial court.” (Verified Complaint, at ¶.1.) “Blue Lake and its confederates
 4 sought ruinous judgments, within a court they controlled, before a judge they suborned,
 5 on conjured claims of fraud and breach of contract.” (VC, at ¶.1.) On August 31, 2017,
 6 a Judgment of Dismissal in favor of Plaintiffs was entered in Blue Lake v. ABI. (VC, at
 7 ¶¶.5, 111; Judgment of Dismissal in Blue Lake v. ABI: Exhibit “3” to Complaint.)

8 Thus, ABI was legally required to file the Complaint in this action by August 31,
 9 2018 – within one-year of the termination of the underlying action on August 31, 2017 -
 10 for the claim for Malicious Prosecution to have been timely. (*Babb v. Superior Court*, 3
 11 Cal.3d 841, 846 (1971) [On a Cause of Action for Malicious Prosecution, the period of
 12 limitations begins to run on the date that the proceedings in the prior action were
 13 terminated.].) ABI filed its Complaint on August 28, 2019, and ABI's state law claim
 14 for Malicious Prosecution against the attorney Defendants which accrued on August 31,
 15 2017 is, therefore, barred by the one-year statute of limitations.

16 In a concession the one-year statute of limitations in California Code of Civil
 17 Procedure Section 340.6 would bar the claim for Wrongful Use of Civil Proceedings
 18 (Malicious Prosecution), Janssen Malloy anticipate Plaintiffs will argue for a two-year
 19 statute of limitations. This argument is contrary to the controlling California authority:

20 *. In *Vafi v. McCloskey*, 193 Cal.App.4th 874, 883 (2011), the California
 21 Court of Appeal found the one-year statute of limitations of Section 340.6 barred the
 22 claim for malicious prosecution against the attorney Defendants

23 *. *Vafi* was followed by *Yee v. Cheung*, 220 Cal.App.4th 184, 193-197
 24 (2013), where the Court of Appeal again found the one-year statute of limitations of
 25 barred the claims for Malicious Prosecution against the Defendant attorneys.

26 *. In *Roger Cleveland Golf Company, Inc. v. Krane & Smith*, 225
 27 Cal.App.4th 660, 680-683 (2014), the Court of Appeal declined to follow *Vafi* and *Yee*
 28 finding that the two-year statute of limitations should be applied.

*. The California Supreme Court in *Lee v. Haney* 61 Cal.4th 1225, 1239 (2015) found the one-year statute applied to a Cause of Action for Breach of Contracting, stating that the one-year statute should be applied to claims arising out of an attorney's breach of duty. Although *Lee v. Haney* did not address a claim for Malicious Prosecution, in applying the one-year statute, the Court expressly disapproved the decision in *Roger Cleveland Golf Company, Inc.* (*Id.*, at p. 1239.)

*. In *Connelly v. Bornstein, supra*, 33 Cal.App.5th at p. 799, the Court of Appeal reviewed the relevant authority and based upon *Lee v. Haney*, found the one-year statute of limitations applied to claim for Malicious Prosecution. Most importantly, the Court in *Connelly* also based its decision on the California Supreme Court case in *Flores v. Presbyterian Intercommunity Hospital*, 63 Cal.4th 75, 84 (2016) that was decided after *Lee* and broadly construed the statute of limitations for claims of medical malpractice. (*Connelly v. Bornstein, supra*, 33 Cal.App.5th at pp. 795-796.)

*. In *Garcia v. Rosenberg*, 42 Cal.App.5th 1050, 1059-1060 (2019), relying upon the decision in *Connelly*, the Court of Appeal found that claims for Malicious Prosecution brought against an attorney are governed by the one-year statute of limitations set forth in Section 340.6.

VII. CONCLUSION

Based upon the foregoing, Defendants JANSSEN MALLOY LLP, MEGAN YARNALL, and AMELIA BURROUGHS request the Court grant their Motion to Dismiss the Complaint of Plaintiffs ACRES BONUSING and JAMES ACRES with Defendants dismissed from the action.

DATED: March 24, 2022

BERMAN BERMAN BERMAN
SCHNIEDER & LOWARY, LLP

By: /S/
 HOWARD SMITH
 Attorneys for
 Specially Appearing Defendants,
 JANSSEN MALLOY, LLP, MEGAN
 YARNALL and AMELIA
 BURROUGHS

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 Los Angeles, California and my business address is 11900 West Olympic Blvd., Suite 600, Los Angeles, California 90064. My electronic service address is vtowles@b3law.com.

On this date, I served the following documents:

NOTICE OF MOTION AND MOTION OF DEFENDANTS JANSSEN MALLOY LLP, MEGAL YARNALL AND AMELIA BURROUGHS TO DISMISS THE COMPLAINT OF PLAINTIFFS JAMES ACRES AND ACRES BONUSING, INC. UNDER FRCP 12(b)(1) AND UNDER FRCP 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES

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:

SEE ATTACHED SERVICE LIST

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.


By 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.)

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

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 March 25, 2022 at Los Angeles, California.

Vicki Towles
Name


Signature

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