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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

vs.

Lester Marston, *et al.*,

Defendants.

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

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION TO DISMISS [F.R.Civ.P. 12(b)
 (6)], OR IN THE ALTERNATIVE, FOR A
 MORE DEFINITE STATEMENT
 [F.R.Civ.P 12(e)]**

Complaint Filed: August 28, 2019
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 Time: 2:00 p.m.
 Judge: Hon. William H. Orrick

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INTRODUCTION

Plaintiffs James Acres ("Acres"), an individual, and Acres Bonusing, Inc. ("ABI"), a Nevada Corporation,¹ sued ten lawyers;² three law firms³ with which those lawyers are in some way associated; Blue Lake Rancheria⁴ Tribal Court Chief Judge Lester Marston ("Judge Marston"); Blue Lake Rancheria Tribal Court Clerk Anita Huff ("Clerk Huff"); Blue Lake Rancheria elected Vice Chair/Tribal Administrator/Tribal Associate Judge/Blue Lake Casino & Hotel ("Casino") CEO Arla Ramsey ("Ramsey"); and former Tribal Casino executive/Tribal government Economic Development Director Thomas Frank ("Frank"). Plaintiffs seek compensatory damages of \$4,000,000, punitive damages, treble damages to be proven at trial, and disgorgement of compensation received from the Blue Lake Rancheria and/or related persons and entities for legal and other services rendered by Defendants and personnel of the Blue Lake Rancheria's Tribal Court in connection with the Tribe's lawsuit (*Blue Lake v. ABI*) to recover what the Tribe paid to ABI for a server-based tablet gaming system that failed to perform as Acres had represented it would.

By this motion, Defendants Rapport and "R&M" seek an order dismissing the Complaint and the entire action as against them on the ground that they possess prosecutorial immunity against Plaintiffs' claims, and Plaintiff ABI's claims based on California law are time-barred, thus precluding Plaintiffs from stating any claim upon which relief may be granted against these Defendants; Defendants Rapport, "R&M", Ramsey and Frank seek an order dismissing Plaintiffs' Eighth Claim (RICO) for failure to state a claim upon which relief can be granted; and in the alternative, these

¹ The Complaint, ¶¶ 7, 8, identifies ABI as a Nevada corporation, and James Acres as ABI's owner and employee.

² Defendants David Rapport, Ashley Burrell, Cooper DeMarse, Darcy Vaughn, Kostan Lathouris, Michael Chase, Daniel Stouder, Amy O'Neill, Megan Yarnell, and Amelia Burroughs.

³ Boutin Jones, Inc., Janssen Malloy, LLP, and "Rapport and Marston, an association of attorneys." In this Memorandum, "Rapport and Marston" or "R&M" appears in quotation marks because "R&M" is an association of sole practitioners and as such had no legal relationship with either the Tribe or the Casino; rather, defendants David Rapport and Lester Marston each had separate contractual relationships directly with the Tribe. Rapport Declaration, ECF Doc. # 32-6.

⁴ The Rancheria ("Tribe") is a federally-recognized Indian Tribe for which the federal government holds title to land in Humboldt County in trust as Indian country. Complaint, ¶ 9.

1 Defendants seek an order pursuant to F.R.Civ.P. 12(e) requiring Plaintiff ABI to file a more definite
2 statement of the allegations and claims against said Defendants.

3 STANDARD FOR RESOLVING A MOTION TO DISMISS

4 Under Federal Rule of Civil Procedure 8(a), a pleading must contain "a short and plain
5 statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S.
6 662 (2009). The complaint must "give the defendant fair notice of what the claim is and the grounds
7 upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations
8 omitted).

9 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.
10 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Court is bound to give the plaintiff the benefit of every
11 reasonable inference to be drawn from the "well-pleaded" allegations of the complaint, *see Retail*
12 *Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6, (1963). A plaintiff need not allege
13 "specific facts 'beyond those necessary to state a claim and the grounds showing entitlement to
14 relief[,]" *see Twombly*, 550 U.S. at 570, and "A claim has facial plausibility when the plaintiff pleads
15 factual content that allows the court to draw the reasonable inference that the defendant is liable for
16 the misconduct alleged." *Iqbal*, 556 U.S. at 678.

17 However, the Court "need not assume the truth of legal conclusions cast in the form of
18 factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).
19 While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned,
20 the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient
21 if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of
22 action." *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. ("Threadbare recitals of the elements of a
23 cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is
24 inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the
25 defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen.*
26 *Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

27 PLAINTIFFS' CLAIMS AGAINST THESE DEFENDANTS

28 Plaintiff ABI alleges seven purported claims for relief, all of which arise under California law

1 and rely on the same general allegations of purported facts. Plaintiff Acres joins ABI in asserting an
 2 eighth claim for civil damages under 18 U.S.C. § 1964 ("RICO"), also based on the same general
 3 allegations of purported facts as alleged in support of ABI's first seven claims. Defendants Rapport
 4 and "Rapport & Marston" are named in the Second, Third, Fifth, Seventh and Eight Claims.
 5 Defendants Ramsey and Frank are named in the First, Fifth, Seventh and Eighth Claims.

6 Plaintiffs' claims relevant to these Defendants are as follows:

7 First Claim: Defendants Ramsey and Frank wrongfully brought or maintained a lawsuit
 8 against ABI;

9 Second Claim: Defendants Rapport and "R&M" somehow allegedly aided and abetted the
 10 Blue Lake Rancheria's ("Tribe's") "wrongful use of civil proceedings" in connection with *Blue Lake*
 11 *v. ABI*, *Acres v. Blue Lake I* and *Acres v. Blue Lake II* federal lawsuits;

12 Third Claim: Defendants "R&M" and Rapport somehow allegedly conspired with the Tribe,⁵
 13 Tribal Court personnel and the Tribe's other outside counsel to commit the tort of wrongful use of
 14 civil proceedings in *Blue Lake v. ABI*;

15 Fifth Claim: Defendants Rapport, "R&M," Ramsey and Frank somehow allegedly aided and
 16 abetted Defendant Judge Marston's alleged breach of his purported fiduciary duty to ABI;

17 Seventh Claim: Defendants Rapport, "R&M," Ramsey and Frank somehow allegedly aided
 18 and abetted Judge Marston's purported constructive fraud;

19 Eighth Claim: Based on all of the same general allegations as alleged in ABI's state-law
 20 claims, Defendants Rapport, "R&M," Ramsey and Frank somehow operated or managed the Tribal
 21 Court as a racketeering enterprise, entitling Plaintiffs to relief in the form of treble money damages
 22 under 18 U.S.C. § 1964(c) ("RICO") and to, "[d]isgorgement of all compensation received by
 23 defendants from Blue Lake, Blue Lake Casino, Ms. Ramsey, and any related entity, after a date to be
 24 determined at trial, but in no event later than August 1, 2015."

25 Plaintiffs concede, as they must, that ABI's claims are virtually identical to the seven causes
 26 of action Acres asserted against these same Defendants in the California Superior Court action

27
 28 ⁵ The Casino has no legal identity separate from the Tribe itself. Ramsey Declaration, ECF Doc. #32-5, ¶ 5.

entitled *Acres v. Marston*. (Complaint, ¶ 32).⁶

MATERIAL FACTUAL ALLEGATIONS

The Complaint's 42 pages and 211 paragraphs contain a mix of facts, invective and Plaintiffs' beliefs, legal conclusions and speculation, but for the purpose of this motion to dismiss, almost no facts directly relevant to the claims asserted against these moving Defendants. The relevant facts are:

1. The Complaint does not allege any interactions between Plaintiffs and the moving Defendants relative to the Blue Lake Rancheria's lawsuit against Plaintiffs in the Blue Lake Tribal Court;

2. Defendant "R&M," is an association of sole practitioners, "exact form unknown" (Complaint, ¶17), with whom former Defendants Judge Marston and Tribal Court law clerks/associate judges Vaughn, Burrell, DeMarse and Lathouris are associated in some manner, but which the Complaint does not allege had any role in initiating or representing the Tribe in prosecuting *Blue Lake v. ABI*;

3. Defendant Rapport has served as the Tribe's legal counsel since 1983 (Complaint, ¶18), but is not alleged to have had any role in initiating or prosecuting *Blue Lake v. ABI*, and is alleged only to have assisted the Tribe's other legal counsel in defending against *Acres v. Blue Lake I and II* by "ghost writing" some legal memoranda filed in those actions. (Complaint, ¶ 208);

4. In January, 2016, the Tribe, dba the Blue Lake Casino and Hotel,⁷ filed suit against Plaintiffs in the Tribal Court, seeking damages for breach of contract, tortious breach of the covenant of good faith and fair dealing, money had and received, unjust enrichment, and specifically against Acres, fraudulent inducement. (Complaint, ¶¶ 53, 54, 67.)

5. Acres filed two federal district court lawsuits, *Acres v. Blue Lake I* and *Acres v. Blue Lake II*, seeking to halt the Tribal Court proceedings against Plaintiffs, asserting, *inter alia*, lack of

⁶ The only material differences between Acres' Superior Court action and this action are that ABI was not a party to the former, and Plaintiffs assert a RICO claim that Acres, who owns and controls ABI, chose not to assert in the Superior Court.

⁷ Under IGRA, at § 2710(b)(2)(A), and § 6.2 of the Tribe's Class III gaming compact with the State of California, only the Tribe may have a proprietary interest in gaming conducted on the Tribe's Indian lands.

jurisdiction and bias, but both actions had been dismissed by February 24, 2017. Complaint, ¶¶ 67, 76.

6. Defendant Ramsey

... was the CEO of Blue Lake Casino during *Blue Lake v. ABI*. Ms. Ramsey also served as Blue Lake's Tribal Administrator, as a judge of Blue Lake's Tribal Court, and as the vice-chair of Blue Lake Business Council. In her role as Tribal Administrator, Ms. Ramsey was responsible for the day to day business affairs of the tribal government, and supervised the work of the tribal court clerk. On information and belief, Ms. Ramsey is a resident of Humboldt County, California, and is named as a defendant in her individual capacity.

Complaint, ¶13.

7. The Complaint does not allege that Ramsey was a party in *Blue Lake v. ABI*, nor does it allege what role—if any—Ramsey played, and in what capacity, in the Tribe's decision to file *Blue Lake v. ABI*; in the establishment and operation of the Blue Lake Tribal Court (other than that she serves as an Associate Judge of that Court); or in defending against Acres' two district court lawsuits seeking to halt the Tribal Court proceedings in *Blue Lake v. ABI*.

8. Defendant Frank verified discovery responses and executed declarations in litigation between Plaintiffs and the Blue Lake Rancheria, and resides in Newcastle, Wyoming. Complaint, ¶¶ 14, 122.

9. Defendant Frank may have been copied on an August 17, 2015 letter from Defendant Stouder demanding that ABI pay money to Blue Lake to avoid further legal action. Complaint, ¶ 48.

10. At all relevant times, Defendants Ramsey and Frank conducted a substantial portion of their affairs within the State of California. Complaint, ¶ 190.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST DEFENDANTS RAPPORT AND "RAPPORT & MARSTON" ARE BARRED BY THE DOCTRINE OF ISSUE PRECLUSION.

Plaintiff ABI's first seven claims for relief, and Plaintiffs' general factual allegations common to all of their claims, mirror the purported causes of action and factual allegations asserted by Plaintiff Acres in his separate Superior Court lawsuit, from which Defendants Rapport and "R&M" have been dismissed based on their prosecutorial immunity. Under the doctrine of issue preclusion,

1 also referred to as collateral estoppel, Plaintiffs may not relitigate the issue of these Defendants'
2 prosecutorial immunity in this action.

3 The doctrine of issue preclusion generally refers to the effect of a prior judgment in
4 foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid
5 court determination essential to the prior judgment, whether or not the issue arises on the same or a
6 different claim. *New Hampshire v. Maine*, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 1814 (2001),
7 citing Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); *see also*, D. Shapiro, Civil
8 Procedure: Preclusion in Civil Actions 32, 46 (2001).

9 Under 28 U.S.C. § 1738, federal courts must give the same preclusive effect to state court
10 judgments as would be afforded those judgments by courts of that state. *Marrese v. Am. Acad. of*
11 *Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). In California, collateral estoppel applies to
12 preclude relitigation of an issue when the following elements are satisfied: (1) after final adjudication
13 (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted
14 against one who was a party in the first suit or one in privity with that party. *DKN Holdings LLC v.*
15 *Faerber*, 61 Cal.4th 813, 825 (2015); *see also Murphy v. Murphy*, 164 Cal.App.4th 376, 398-99
16 (2008). That doctrine applies in this case.

17 Final Adjudication of an Identical Issue. In Acres' Superior Court action, Defendants
18 Rapport and "R&M" asserted in support of their motion to quash service and dismiss the action that
19 in their role as the Tribe's attorneys, prosecutorial immunity shields them against Acres' action for
20 money damages. The Superior Court based dismissal on its determination that the Tribe—not the
21 individual defendants—was the real party in interest, and thus that Defendants were cloaked with the
22 Tribe's sovereign immunity, and, alternatively, on the ground that the Tribe's legal counsel, including
23 Defendants Rapport and "R&M" possessed prosecutorial immunity that precluded Acres' action from
24 proceeding against them. The Superior Court's determination of prosecutorial immunity was
25 affirmed on appeal, and the California Supreme Court denied Acres' Petition for Review. In short,
26 there was a final adjudication in State court that Rapport and "R&M" were entitled to the
27 prosecutorial immunity.

28 Defendants Rapport and "R&M" are making the same argument for prosecutorial immunity

1 in this Court. Their argument is raised in response to the very same facts and claims that were
 2 alleged by Plaintiffs in the State court (with the exception of the addition of an eighth claim under
 3 RICO, which was not alleged in State court but which rests on the same factual allegations). Thus,
 4 the first two elements of collateral estoppel are satisfied.

5 Actually Litigated and Necessarily Decided. The Superior Court's decision that these
 6 Defendants possessed prosecutorial immunity rested on a comprehensive analysis of the principles
 7 underlying the doctrine, and was the alternative basis for its ruling in Defendants' favor. If there
 8 was any question about the issue having been actually litigated and necessarily decided, it was
 9 dispelled by the California Court of Appeals, which ruled for Defendants solely on the basis of
 10 prosecutorial immunity. *See Murphy*, 164 Cal.App.4th at 400 ("When an issue is properly raised, by
 11 the pleadings or otherwise, and is submitted for determination, and is determined, the issue is
 12 actually litigated. Whether an issue was 'necessarily decided' has been interpreted to mean that the
 13 issue was not entirely unnecessary to the judgment in the prior proceeding.") [citations and
 14 quotations omitted].

15 Privity. The final factor of issue preclusion also is satisfied, in that Defendants Rapport and
 16 "Rapport & Marston" seek to apply the doctrine against both Plaintiff Acres and his company, ABI.
 17 There can be no doubt that Acres and ABI were and are in privity: Acres created ABI, is ABI's sole
 18 owner and employee, and thus totally controls ABI. Complaint, ¶9; Order Granting Motion to
 19 Dismiss, ECF Doc. # 65, at pp. 4-5, fn. 9. ABI's and Acres' interests are completely aligned, in that
 20 the facts and claims alleged by Acres in the Superior Court are virtually identical to the facts and first
 21 seven claims for relief alleged by ABI in this action, and by both Acres and ABI in their eighth
 22 claim. Complaint, ¶ 197.

23 Plaintiffs may contend that because Acres did not assert a RICO cause of action in his
 24 Superior Court action, they are not precluded from relitigating that issue in this action. Plaintiffs
 25 would be wrong, because the prosecutorial immunity that shields Defendants Rapport and "R&M"
 26 from Plaintiff ABI's first seven claims is equally applicable to Plaintiffs' joint RICO claim, given that
 27 Plaintiffs have not alleged that Defendants Rapport and "R&M" engaged in any activities other than
 28 serving as the Tribe's legal counsel. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 410 (1976); *Malley*

1 *v. Briggs*, 475 U.S. 335, 341-43 (1986); *see also Swallow v. Torngren*, 789 F. App'x 610, 611 (9th
2 Cir. 2020) (Deputy A.G. absolutely immune from civil RICO claim because duties were
3 prosecutorial in nature and closely related to advocacy duties).

4 In sum, the California courts finally and necessarily determined that Defendants Rapport and
5 "R&M" are entitled to prosecutorial immunity from Acres' claims. Because a California court would
6 hold that Acres and his alter-ego ABI are precluded from relitigating the issue, 28 U.S.C. § 1738, the
7 Full Faith and Credit statute, precludes them from doing so in this Court. Accordingly, this Court
8 should grant these Defendants' Motion to Dismiss. *See Parsons Steel, Inc. v. First Alabama State*
9 *Bank*, 474 U.S. 518, 519 (1986).

10 **II. ALL OF ABL'S STATE LAW CLAIMS AGAINST DEFENDANTS RAPPORT AND**
11 **"R&M" ARE BARRED BY C.C.P. § 340.6.**

12 Plaintiffs' claims against Rapport and "R&M" also are time-barred under California Civil
13 Procedure Code section 340.6, which provides in relevant part:

14 An action against an attorney for a wrongful act or omission, other
15 than for actual fraud, arising in the performance of professional
16 services shall be commenced within one year after the plaintiff
17 discovers, or through the use of reasonable diligence should have
18 discovered, the facts constituting the wrongful act or omission, or four
19 years from the date of the wrongful act or omission, whichever occurs
20 first.

21 Section 340.6(a) applies to malicious prosecution claims against attorneys who performed
22 professional services in the underlying litigation. *See Connelly v. Bomstein*, 33 Cal.App.5th 783,799
23 (2019).

24 According to the Complaint, the only specific conduct pertaining to either Plaintiff of which
25 Defendant Rapport is accused consisted of: (1) consulting with Judge Marston on March 4, 2016,
26 about how "he"⁸ was going to respond to Acres' first federal court lawsuit ("*Acres v. Blue Lake I*")
27 (Complaint, ¶ 68); (2) conferring with Judge Marston on March 29, 2016 "regarding the status of the

28 ⁸ The Complaint is ambiguous about whether "he" is intended to refer to Judge Marston or Defendant Rapport.

1 filing of the Tribe's brief in federal court" (Complaint, ¶ 70);⁹ Defendant Rapport's 2018 declaration
 2 in Plaintiff Acres' State court action that he and Mr. DeMarse had provided drafts of court filings that
 3 Boutin Jones attorneys used to obtain dismissals of *Acres v. Blue Lake I* and *Acres v. Blue Lake II*
 4 (Complaint, ¶¶ 73, 98(c)); and somehow coordinating—without more specificity as to how or
 5 when—with attorney Chase in their respective firms' alleged despicable conduct toward Plaintiffs
 6 (Complaint, ¶75).

7 Plaintiff Acres, and through him, ABI, knew from Judge Marston's billing records obtained
 8 through discovery in *Acres v. Blue Lake II*¹⁰ by early 2017 that Defendant Rapport, and thus,
 9 according to Plaintiffs, "R&M", had a role in assisting in defending against that action. Complaint,
 10 ¶107. Plaintiff ABI imputes Defendant Rapport's actions to Defendant "R&M". Plaintiffs' Complaint
 11 alleges that the Tribal Court dismissed *Blue Lake v. ABI* on August 31, 2017, and that the Tribe
 12 voluntarily dismissed its action against Plaintiff ABI a few weeks later. ¶ 113.

13 To avoid being time-barred by § 340.6's one-year statute of limitations, Plaintiffs needed to
 14 have filed this action by August 31, 2018, but they filed it on August 28, 2019—nearly a year *after*
 15 that deadline. Thus, Plaintiffs' seven state-law claims are time-barred under § 340.6. *See, e.g.*,
 16 *Graham-Sllit v. Claillos*, 756 F.3d 724 (9th Cir. 2014) (under California law, § 340.6 applied to a
 17 claim of a non-client beneficiary of an estate against an attorney for breach of fiduciary duty); *see*
 18 *also Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 673 (1988) (the applicable statute of limitations for
 19 conspiracy is determined by the nature of the action in which the conspiracy is alleged).¹¹

20 **III. ABL'S STATE-LAW CLAIMS AGAINST DEFENDANTS RAPPORT AND "R&M"** 21 **ARE BARRED BY THE LITIGATION PRIVILEGE.**

22 All of ABI's claims against the Moving Defendants involve communications made for and in
 23 the course of litigation, whether in *Acres v. Blue Lake I and II* or the Tribal Court, and thus Plaintiffs
 24

25 ⁹ Assuming that this even pertained to *Acres v. Blue Lake I*.

26 ¹⁰ Case 3:16-cv-05391-WHO, Doc. 50, p. 1. The Court is requested to take judicial notice of its own order in
 27 that action.

28 ¹¹ Defendants Rapport and "R&M" do not concede that Plaintiffs have alleged or could allege any claims
 against either of them even in the absence of the bar erected by C.C.P. § 340.6.

1 cannot state a claim for relief against Moving Defendants because these claims are barred by the
2 litigation privilege found in California Civil Code § 47(b).

3 The litigation privilege applies to any communication, "(1) made in judicial or quasi-judicial
4 proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the
5 litigation; and (4) that ha[s] some connection or logical relation to the action." *Mansell v. Otto*, 108
6 Cal.AppAth 265, 271 (2003). This privilege also extends to statements made outside of judicial
7 proceedings; and "statements made to (and information concealed from)" the plaintiff and the court
8 related to the action. *Graham-SuIt*, 756 F.3d at 742. Defendants are immunized "from virtually any
9 tort liability (including claims for fraud), with the sole exception of causes of action for malicious 14
10 prosecution." *Olsell v. Harbisoll*, 191 Cal.App.4th 325, 333 (2010). "Any doubt about whether the
11 privilege applies is resolved in favor of applying it." *Contreras v. Dowling*, 5 Cal.App.5th 394, 415
12 (1st. Dist. 2016).

13 ABI does not allege any conduct by these Defendants that was not a communication made in
14 connection with judicial proceedings. No statute or decisional law precludes or makes actionable a
15 lawyer's provision of assistance to another lawyer's successful advocacy in litigation—exactly and
16 only what Defendants Rapport and "R&M" are alleged to have done in connection with *Acres v. Blue*
17 *Lake I and II*. Neither does any statute or decisional law make actionable the decision to retain legal
18 counsel (Complaint, Doc. #1, ¶ 111), or to facilitate communication between a lawyer and client.

19 **IV. PLAINTIFFS' EIGHTH CLAIM FAILS TO STATE A CLAIM UPON WHICH**
20 **RELIEF CAN BE GRANTD UNDER RICO.**

21 Plaintiffs' Complaint, asserting a uniform set of legal theories against all defendants, based
22 upon an alleged mass fraudulent scheme including both defendants and non-parties, fails to meet the
23 basic pleading requirements under Rule 12(b)(6), much less the heightened standard of that applies
24 to RICO claims, requiring dismissal of the Eighth Claim, and with that dismissal loss of the Court's
25 original jurisdiction.

26 **A. Plaintiffs' Complaint Fails to State a Civil RICO Claim.**

27 The complexity of the RICO statute demands precision in pleading claims thereunder. *See*
28 *e.g., Connecticut Nat'l Bank v. Rytman*, 694 A.2d 1246, 1255 (Conn. 1997). Plaintiffs' Complaint

1 does not allege (at all, much less with the requisite precision) that Moving Defendants engaged in
2 conduct that could lead to liability under the RICO statute.

3 RICO complaints are strictly scrutinized because "the mere assertion of a RICO claim . . . has
4 an almost inevitable stigmatizing effect on those named as defendants. In fairness to innocent parties,
5 courts should strive to flush out frivolous RICO allegations at an early stage of the litigation."
6 *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990); *Wagh v. Metris Direct Servs., Inc.*, 348
7 F.3d 1102, 1108 (9th Cir. 2003) (Courts "should [] strive to flush out frivolous RICO allegations at
8 an early state of the litigation") (overruled on other grounds, *Odom v. Microsoft Corp.*, 486 F.3d 541,
9 551 (9th Cir. 2007)).

10 In the First Circuit's formulation: "The complaint must be anchored in a bed of facts, not
11 allowed to float freely on a sea of bombast. . . 'despite the highly deferential reading which we
12 accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic
13 circumlocutions, unsubstantiated conclusions, or outright vituperation'." *Miranda v. Ponce Fed.*
14 *Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (citations omitted); *see also, Glenn v. First Nat'l Bank in*
15 *Grand Junction*, 868 F.2d 368 (10th Cir. 1989) ("The law recognizes a significant difference
16 between notice pleading and 'shotgun' pleading").

17 **(i) Plaintiffs Fail to Adequately Allege that Moving Defendants Conducted**
18 **or are Part of an Enterprise to Support a RICO Claim.**

19 To state a claim for civil damages under RICO, Plaintiffs must allege that Moving
20 Defendants "engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering
21 activity and (5) caused injury to plaintiff's business or property." *Chaset v. Fleer/Skybox Int'l, LP*,
22 300 F.3d 1083, 1086 (9th Cir. 2002). For the purposes of a civil RICO count, an "enterprise" is
23 defined to include "any individual, partnership, corporation, association, or other legal entity, and
24 any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).
25 An "association-in-fact enterprise[,] is 'a group of persons associated together for a common purpose
26 of engaging in a course of conduct.'" *Boyle v. United States*, 556 U.S. 938, 946, 129 S. Ct. 2237
27 (2009) (citation omitted).

28 The existence of a RICO enterprise may be shown where (i) there is ongoing organization

1 with decision-making framework for a controlling group; (ii) various associates function as
 2 continuing unit; and, (iii) the enterprise exists separate and apart from the pattern of racketeering
 3 activity. *United States v Sanders*, 928 F.2d 940, 943-944 (10th Cir. 1991).

4 Importantly, allegations that "only demonstrate that the parties 'are associated in a manner
 5 directly related to their own primary business activities'" fail to demonstrate a common purpose,
 6 much less a fraudulent purpose. *Shaw v. Nissan N. Am., Inc.*, 220 F. Supp. 3d 1046, 1057 (C.D. Cal.
 7 2016) quoting *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods.*
 8 *Liab. Litig.*, 826 F. Supp. 2d 1180, 1202 (C.D. Cal. 2011)). "[R]outine business contracts between
 9 entities ... cannot rise to the level of a RICO enterprise unless there is evidence of involvement of
 10 the different associates in some misconduct based upon these agreements." *Nordberg v. Trilegiant*
 11 *Corp.*, 445 F. Supp. 2d 1082, 1092 (N.D. Cal. 2006) (citing *River City Markets, Inc. v. Fleming*
 12 *Foods West, Inc.*, 960 F.2d 1458, 1461-62 (9th Cir. 1992)).

13 Furthermore, "[i]n order [for a defendant] to 'participate, directly or indirectly, in the conduct
 14 of such enterprise's affairs,' one must have some part in directing those affairs." *Reves v. Ernst &*
 15 *Young*, 507 U.S. 170, 179, 113 S. Ct. 1163 (1993). "Simply performing services for the enterprise"
 16 or failing to stop illegal activity¹² do not constitute "conduct" giving rise to RICO liability. *Walter v.*
 17 *Drayson*, 538 F.3d 1244, 1248-1249 (9th Cir. 2008).

18 Here, Plaintiffs baldly allege that Moving Defendants part of a RICO enterprise, without
 19 addressing the necessary facts to support such a conclusion. That is, they do not allege facts to
 20 establish Moving Party is part of "[an] ongoing organization with decision-making framework for a
 21 controlling group", or that "various associates function as continuing unit", or that the alleged
 22 enterprise "exists separate and apart from the pattern of racketeering activity." *Contra, United States*
 23 *v Sanders*, 928 F.2d 940 (10th Cir. 1991) at 943-944 ("... courts have differed in their views of how
 24 separate and distinct the existence of the enterprise must be from the underlying pattern of
 25 racketeering, ...").

26
 27 ¹² Moving Defendants do not concede that any illegal activity occurred in connection with the litigation of *Blue*
 28 *Lake v. ABI*, *Acres v. Blue Lake I*, or *Acres v. Blue Lake II*. To the contrary, there was no illegal activity connected with
 the litigation of those disputes.

Defendant Frank was an employee of the Tribe at a senior executive level. Defendant Ramsey was simultaneously the Vice Chairperson of the Tribe and a high-level executive employee. Defendant Rapport was the long-time general legal counsel for the Tribe under a contract directly between the Tribe and him. However, the Complaint is utterly devoid of any allegation that any of the Moving Defendants, much less all of them, engaged in any criminal conduct at all—much less criminal conduct listed in RICO and directed as part of a criminal enterprise. Reduced to its essence, Plaintiffs' claims rest on the belief/assumption that the Blue Lake Tribal Court did not observe standards of judicial ethics that Mr. Acres believes were appropriate. However, even if true (which is disputed), this is not sufficient to establish the existence of a racketeering enterprise and would not suffice to support the imposition of liability on every person associated with the Court.

(ii) Plaintiffs Fail to Adequately Allege Even a Single Predicate Act of Racketeering Activity, Much Less a Pattern of Racketeering Activity.

A "predicate act" under RICO refers to racketeering activity, which in turn is any violation listed in 18 U.S.C. § 1961(1). *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005). "The Ninth Circuit has held that allegations of predicate acts under RICO must comply with Rule 9(b)'s specificity requirements." *Hill v Opus Corp.*, 841 F. Supp. 2d 1070, 1088 (C.D. Cal. 2011). "Rule 9(b) requires that a plaintiff allege the time, place, and manner of each predicate act, the nature of the scheme involved, and the role of each defendant in the scheme." *Hill*, 841 F. Supp. 2d at 1088 (citing *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991)).

Plaintiffs' sole basis for alleging a RICO violation was that the Tribal Court required documents to be served by U.S. Mail (Complaint, ECF Doc. #1, ¶202), or via e-mail (Complaint, ¶205). Under Plaintiffs' theory, every claim for malicious prosecution action would constitute a RICO claim, a proposition that the federal courts have rejected as absurd. The Second Circuit has expressly ruled that "that allegations of frivolous, fraudulent, or baseless litigation activities-without more-cannot constitute a RICO predicate act." *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018). The *Kim* court then went on to list multiple cases in which various courts rejected the argument that litigation—even baseless or dishonest litigation—could serve as the basis for a RICO claim. These

cases included: *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087-88 (11th Cir. 2004) (deciding that the "alleged conspiracy to extort money through the filing of malicious lawsuits" were not predicate acts of extortion or mail fraud under RICO); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) (deciding that meritless litigation is not a predicate act of extortion under RICO); *Gabovitch v. Shear*, 70 F.3d 1252 (table), 1995 WL 697319, at *2, 1995 U.S. App. LEXIS 32856 (1st Cir. 1995) (per curiam) (concluding that "proffering false affidavits and testimony to [a] state court" does not constitute a predicate act of extortion or mail fraud); *see also Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F.Supp.2d 153, 171-72 (E.D.N.Y. 2010) (collecting cases from district courts in the Second Circuit deciding "that the litigation activities alleged in [the complaint before the court] cannot properly form the basis for RICO predicate acts").¹³

While the 9th Circuit has not ruled on the issue directly, it has expressed "doubts" about whether "allegations of litigation misconduct could act as predicate offenses for a civil RICO claim." *Kamal v. County of Los Angeles*, (C.D. Cal., May 2, 2019, No. CV 17-1986-RGK (DFM)) 2019 WL 2502433, at *10, report and recommendation adopted (C.D. Cal., June 17, 2019, No. CV1701986RGKDFM) 2019 WL 2501478.

Because the Complaint fails to allege even one predicate act that would give rise to RICO liability, it must be dismissed. In that event, Moving Defendants urge that this Court decline to exercise supplemental jurisdiction—particularly in light of Acres' pending lawsuit in California state court, where the same factual allegations are at issue.

(iii) Plaintiffs Fail to Adequately Allege the Requisite Causation.

"[A] plaintiff must plead that defendants' violation was both the 'but for' and proximate cause of a concrete financial injury." *Hill v Opus Corp.*, 841 F. Supp. 2d 1070, 1088 (C.D. Cal. 2011) (citing *Resolution Trust Co. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999)); *see also Hemi Grp.*,

¹³ *See also, I.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265, 267-268 (8th Cir.1984) ("If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary."); *U.S. v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) ("Serving a motion by mail is an ordinary litigation practice. A number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and all have rejected that possibility.... [T]hese courts have rejected this mail-fraud theory on policy grounds, recognizing that such charges are merely artfully pleaded claims for malicious prosecution."). *Carroll v. United States Equities Corp.*, No. 1:18-CV-667 (TJM/CFH), 2019 U.S. Dist. LEXIS 162631, at *31 n.7 (N.D.N.Y. Sep. 24, 2019).

1 *LLC v. City of New York*, 559 U.S. 1 (2010) (citation omitted). "When a Court evaluates a RICO
 2 claim for proximate causation, the central question it must ask is whether the alleged violation led
 3 directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461, 126 S. Ct.
 4 1991 (2006).

5 In fact, "a RICO plaintiff 'only has standing if, and can only recover to the extent that, he has
 6 been injured in his business or property by [reason of] the conduct constituting the violation.'" *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d at 1087 (citing *Holmes v. Securities Investor Prot. Corp.*,
 7 503 U.S. 258, 279 (1992) (alteration in original)).
 8

9 Indeed, Plaintiffs' factual allegations relative to their own lawsuit, as opposed to lawsuits
 10 involving others, have no connection to any alleged "racketeering" acts. At most, Plaintiffs have
 11 alleged that some combination of defendants may have engaged in conduct that violated what
 12 Plaintiffs contend are the appropriate rules of judicial ethics. It is notable that Judge Marston's
 13 alleged conflicts of interest or the other defendants' purported knowledge of those conflicts have no
 14 apparent relationship to the Tribe's lawsuit against Plaintiffs or any damage they claim to have
 15 suffered. Thus, the alleged RICO conduct cannot be the proximate cause of Plaintiffs' claimed harm,
 16 and Plaintiffs both lack standing for and insufficiently have alleged this essential element of a RICO
 17 claim.

18 Finally, Plaintiffs' attempt to conjure a claim that Moving Defendants - or anyone else
 19 connected with this dispute—committed multiple violations of 18 U.S.C. § 1503¹⁴ as the predicate
 20 acts constituting a pattern of racketeering activity (Complaint, Doc. #1, ¶ 208), also fails, because
 21 Plaintiffs have not alleged, and in good faith cannot allege, that Moving Defendants committed any
 22

23 ¹⁴ "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavored to
 24 influence, intimidate or impede any grand juror, or officer in or of any court of the United States, or officer who may be
 25 serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate,
 26 in the discharge of his duty, or injures any such grand or petit juror in his person or property on account or other
 27 committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on
 28 account of an verdict or indictment assented to by him, or on account of his being or having been such a juror, or injures
 any sch officer, magistrate judge, or other committing magistrate in his person or property on account of performance of
 his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs,
 or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as
 provided in subsection (b). ..."

1 of the acts proscribed by that statute. Simply put, Plaintiffs have not alleged that the Blue Lake tribal
 2 court is a court of the United States within the meaning of § 1503, or that the Moving Defendants did
 3 any of the acts proscribed by that statute in connection with *Acres v. Blue Lake I or II*.

4 **V. PLAINTIFFS' COMPLAINT IS SO VAGUE AND AMBIGUOUS AS TO WARRANT**
 5 **ORDERING PLAINTIFFS TO FILE A MORE DEFINITE STATEMENT.**

6 F.R.Civ.P. 8(a)(2) requires the complaint to set forth "a short and plain statement of the claim
 7 showing that the pleader is entitled to relief." Defendants Ramsey and Frank seek an order requiring
 8 Plaintiffs to file a more definite statement of the claims asserted against them because despite its
 9 length, Plaintiffs' Complaint provides little or no basis upon which Defendants Ramsey and Frank
 10 can ascertain the basis upon which Plaintiffs contend that they owed any obligation(s) to Plaintiffs,
 11 what Defendants Ramsey and Frank, respectively, are alleged to have done or failed to do relative to
 12 Plaintiffs, how such alleged action or inaction damaged Plaintiffs, and the capacity in which each
 13 allegedly acted or failed to act to Plaintiffs' detriment.

14 Plaintiffs do not—and cannot in good faith—allege that either Ramsey or Frank was a party
 15 in *Blue Lake v. ABI*, nor do they allege what role—if any—either Ramsey or Frank played, and in
 16 what capacity, in the Tribe's decision to file *Blue Lake v. ABI*; in the establishment and operation of
 17 the Blue Lake Tribal Court; or in defending against *Acres v. Blue Lake I and/or II*, Acres' two
 18 unsuccessful district court lawsuits seeking to halt the Tribal Court proceedings in *Blue Lake v. ABI*.

19 These deficiencies alone should warrant requiring Plaintiffs to file a more definite statement.
 20 However, given that ABI's claim is these Defendants aided and abetted the commission of
 21 constructive fraud, and that other defendants conspired in the wrongful use of civil proceedings, the
 22 Complaint is subject to the higher standard of evidentiary pleading that F.R.Civ.P. 9(b) requires in
 23 such actions.

24 In the Ninth Circuit, conspiracy claims are subject to a heightened pleading standard (i.e., a
 25 more demanding standard than is set forth in Fed. R. Civ. P. 8(a)(2)). *See Harris v. Roderick*, 126
 26 F.3d 1189, 1195 (9th Cir. 1997). A plaintiff may meet the heightened pleading standard by
 27 specifically alleging "which defendants conspired, how they conspired and how the conspiracy led to
 28 a deprivation of his constitutional rights...." *Id.* at 1196. "[V]ague conclusory allegations" are

insufficient to meet this pleading standard. *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978); *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992) (requiring conspiracy complaint to "allege specific facts to support the existence of a conspiracy among the defendants").

Although the First, Fifth, Seventh and Eighth Claims allege that Defendants Ramsey and Frank somehow participated in the various wrongs asserted by Plaintiffs, those Claims say nothing about what Defendants Ramsey and/or actually did or failed to do, or how their respective specific acts or failures to act damaged either Plaintiff.

The Complaint does not allege the existence and/or nature of any legal duty that Defendants Ramsey and/or Frank purportedly owed to either Plaintiff, the capacity in which any such duty was owed, and/or how a such a duty was breached to Plaintiffs' injury. In the absence of such allegations, neither Defendant Ramsey nor Defendant Frank can in good faith respond to Plaintiffs' verified allegations that s/he breached any duty to Plaintiffs or otherwise injured Plaintiffs, or determine whether they may assert any specific immunities and/or privileges.¹⁵

Requiring Plaintiffs to amend their Complaint to more specifically allege facts pertaining to their purported claims against Defendants Ramsey and Frank not only would enable these Defendants to respond in good faith to the Complaint's allegations against them, but also would clarify and simplify Plaintiffs' claims and factual allegations relating to all of the remaining Defendants, thus reducing the need for discovery and facilitating the narrowing of the issues that will be essential to the prompt adjudication of the respective parties' claims and defenses.

CONCLUSION

For all of the foregoing reasons, the Court should grant the motion of Defendants Rapport and "Rapport & Marston" to dismiss the Complaint and the entire action against them based on

¹⁵ For example, as an elected member of the Blue Lake Rancheria's Tribal Council, Defendant Ramsey may possess official immunity for the Tribe's legislative acts. *See, e.g., Hardin v. White Mtn. Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). *Lewis v. Clarke*, 581 U.S. ___, 137 S.Ct. 1285 (2017), did not foreclose such immunity, nor did the Ninth Circuit's decision that reversed this Court's dismissal based on tribal sovereign immunity. Defendant Frank possesses absolute immunity for executing declarations and verifications in judicial proceedings. *See Briscoe v. Lahue*, 341 U.S., 325, 376 (1983); *see also Moore v. Conliffe*, 7 Cal.4th 634, 640-643(1994), and also may be able to assert attorney-client privilege regarding communications with the Tribe's legal counsel. *See In re Grand Jury*, 2021 U.S. App. LEXIS 39178 (9th Cir. 2021).

1 Plaintiffs' incurable failure to state a claim upon which any claim can be granted against these
2 Defendants. In the alternative, to the extent that the Court is not prepared to dismiss Plaintiffs'
3 Complaint against Defendants Ramsey and Frank, the Court should order Plaintiffs to file a more
4 definite statement of the facts and claims alleged specifically against those Defendants.

5
6 Dated: March 25, 2022

FORMAN AND ASSOCIATES

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