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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

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| ACRES BONUSING, INC., a Nevada Corporation, and JAMES ACRES, an individual,<br><br>Plaintiff,<br><br>v.<br><br>LESTER MARSTON, an individual; ARLA RAMSEY, an individual; THOMAS FRANK, an individual; ANITA HUFF, an individual; RAPPORT AND MARSTON, an association of attorneys; DAVID RAPPORT, an individual; COOPER DAMARSE, an individual; DARCY VAUGHN; an individual; KOSTAN LATHOURIS, an individual; BOUTIN JONES INC., a California corporation; MICHAEL CHASE, an individual; DANIEL STOUDER, an individual; AMY O'NEILL, an individual; JANSSEN MALLOY LLP, an association of attorneys; MEGAN YARNALL, an individual; AMELIA BURROUGHS, an individual, and DOES 1-20, inclusive,<br><br>Defendants. | Case No. 3:19-cv-05418-WHO<br><br>**DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S REPLY TO PLAINTIFFS' OPPOSITION TO RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' COMPLAINT**<br><br>Complaint Filed: August 28, 2019<br><br>Hearing Date: May 18, 2022<br>Time: 2:00 p.m.<br>Judge: Hon. William H. Orrick |

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## I. INTRODUCTION

In their opposition, Plaintiffs contend that the Boutin Jones attorney defendants are not entitled to personal immunity, cannot state a RICO claim, are not entitled to the litigation privilege as to any of the claims in the Complaint, and that none of the claims in the Complaint are time-barred by the one-year statute of limitations set forth in 340.6(b). Plaintiffs are wrong in every respect.

Following the analytical framework set forth in the California Court of Appeal's recent opinion in related litigation and the Ninth Circuit's opinion in this litigation, it is clear that the Boutin Jones attorney defendants are entitled to absolute personal immunity as attorneys engaged by a sovereign tribe and so are immune from civil liability in connection with actions they have taken in the course of their representation of that sovereign entity. In addition, the allegations in the Complaint pertaining to the Boutin Jones attorneys – i.e. "[a]ttorneys from Rapport & Marston ghostwr[ote] papers filed by Boutin Jones which were intended to convince the district court that Judge Marston was a neutral decision-maker" (Compl. ¶ 208) – pertain to typical commercial litigation activity and cannot constitute predicate acts giving rise to RICO liability, given that courts have concluded that complaints arising from the submission of allegedly fraudulent declarations standing alone are not sufficient to state a RICO claim.

As to the litigation privilege, the aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud claims are barred because Plaintiffs do not allege any conduct by the Boutin Jones Defendants that was not a communication made in connection with a judicial proceeding. In addition, the one-year statute of limitations precludes relief because the allegations giving rise to each of the state law claims set forth in the Complaint require Plaintiffs to also necessarily prove that the Boutin Jones attorneys violated a professional obligation.

Accordingly, because the claims in the complaint are all barred by the personal immunity of the defendants, the state law claims are all barred by the one-year statute of limitations, and because Plaintiffs have also failed to state a RICO claim, and aiding and abetting breach of fiduciary duty and constructive fraud claims are barred by the litigation privilege, the Court should dismiss the Complaint without leave to amend.

## II. ARGUMENT

### A. Immunity Precludes All of Plaintiffs' Claims in the Complaint

Plaintiffs' primary contention regarding immunity is that Defendants rely on the *Acres* state court opinion, and that federal prosecutorial immunity – which plaintiffs contend is applicable in this case – is somehow distinct from state prosecutorial immunity, which Plaintiffs contend is broader (Opp. at 13). Plaintiffs' contention is contrary to existing law.

Plaintiffs cite to *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 756 (1997), which distinguishes between federal law governing immunity from actions under section 1983 (judicially created) and California law regarding governmental immunity (governed by statute and focusing on the nature of the alleged tort rather than the nature of the governmental duties – i.e. the California Tort Claims Act, which provides immunity for malicious prosecution but imposes liability for false arrest and imprisonment). Contrary to the distinction in *Asgari* between federal qualified immunity under Section 1983 and California qualified immunity principles, here, the Boutin Jones attorneys are entitled to absolute immunity, not qualified immunity, which is governed by federal law as set forth in in the Supreme Court's opinion in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) and the Ninth Circuit's decision in *Acres* which remanded to this Court for further proceedings.

Plaintiffs argue in the Opposition that federal prosecutorial immunity is focused on protecting the judicial phase of the criminal process and cannot be stretched to protect attorneys in civil litigation representing a for-profit commercial enterprise (Opp. at 13). In particular, Plaintiffs cite Supreme Court caselaw for the proposition that absolute immunity does not extend to: (1) a prosecutor giving legal advice to the police, (2) a prosecutor's investigatory conduct, (3) a prosecutor making false statements of fact in an affidavit, and (4) Attorney General's national-security conduct (Opp. at 14, citing *Burns v. Reed*, 500 U.S. 478, 492-96 (1991), *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), *Kalina v. Fletcher*, 522 U.S. 118 (1997), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). All of the cases Plaintiffs cite are distinguishable.

Contrary to Plaintiffs' contentions, the state court of appeal applied federal immunity law – and not California state law regarding immunity – in *Acres v. Marston* (2021) 72 Cal.App.5th 417, 447. The Court in *Acres* expressly reasoned that immunity for non-governmental employees was

necessary for the conduct of public business, and cited the Supreme Court's opinion in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) and the Ninth Circuit opinion in *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), which rely upon federal – not state – sovereign immunity principles. In particular, the California Court of Appeal relied in *Acres* on the conclusion in *Davis*, that a general counsel employed by a Tribe was entitled to assert absolute privilege as to defamation. *See Davis*, 398 F.2d at 85-85 (stating that the issue at stake was, "[w]hether an Arizona state court would or should honor privilege bestowed by a foreign sovereign in a suit brought by an Arizona citizen" and that "[t]he question really addresses itself not to the merits of the rule, but to the extent to which Arizona state courts would accord comity to an Indian tribe geographically located within the state boundaries").

Based upon federal law, in *Acres*, the California Court of Appeal rejected the contention that no respondent could enjoy prosecutorial immunity on the ground that the underlying litigation was civil and not criminal, and further rejected the contention that the Court "should not extend immunity to civil litigators from private law firms acting on behalf of a for-profit commercial enterprise. *Acres*, 72 Cal.App.5th at 449. [1] The Court also expressly rejected the contentions that: "(1) only a tribe's in-house counsel can assert immunity, and (2) a tribe's counsel can only assert immunity in suits involving traditional governmental matters (as opposed to 'for-profit commercial' matters)." *See id.*

*Acres* therefore allowed for absolute immunity for civil litigators acting on behalf of a tribe – in accord with *Butz v. Economou*, 438 U.S. 478, 508-12 (1978) (characterizing the functions of a prosecutor as requiring absolute immunity rather than qualified immunity) – and in contrast to the cases that Plaintiffs cite in the Opposition which limit immunity for attorneys performing functions further afield from the judicial branch such as: (1) giving legal advice to the police (*Burns*), (2) a prosecutor's investigatory conduct (*Buckley*), (3) prosecutor's statements of fact in an affidavit

[1] In the Court of Appeal's opinion, the Court in *Acres* expressly concluded that: "Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris are all entitled to absolute immunity for their alleged legal work on behalf of the Casino." The Court did not reach a conclusion as to the Boutin Jones attorneys because neither the Boutin Jones nor Janssen Malloy defendants had raised the defense of prosecutorial immunity at that time. *See Acres*, 72 Cal.App.5th at 447.

(*Kalina*), and (4) national-security issues (*Mitchell*). None of those limitations apply to the conduct of the Boutin Jones' defendants.

The analysis of the California Court of Appeal in *Acres* aligns with the Supreme Court's analysis in *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 857 (2019), in which the Court stated that "absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks" and "[t]o decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of the 'functional' considerations discussed above," citing, *e.g.*, *Burns*, 500 U.S. at 486 (collecting cases applying "functional approach" to immunity). The Boutin Jones defendants engaged in no such tasks.

The Ninth Circuit's opinions in *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 914 (9th Cir. 2021) also laid out an analytical framework for this court to follow on remand as to immunity, contrary to Plaintiffs' contentions that federal law is not clear as to absolute immunity for civil attorneys litigating on behalf of tribes. The Ninth Circuit's opinion in *Acres Bonusing, Inc.*, expressly cited the California Court of Appeal opinion in *Great Western Casinos, Inc., v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, for the proposition that it was not improper to grant immunity to non-Indian counsel and an outside law firm advising the tribe. The Ninth Circuit explained that:

> *Great Western* is less clear about its basis for granting immunity to the non-Indian counsel and outside law firm advising the tribe . . . To the extent *Great Western* held that these lawyers were entitled to a personal immunity defense (essentially as quasi-executive officers), that conclusion would not on its own contravene *Lewis.* But to the extent *Great Western* extended tribal sovereign immunity to the individual defendants merely because they were sued for conduct within the scope of their employment for the tribe, that conclusion would be at odds with *Lewis* and not one we could follow. *See* 137 S. Ct. at 1288.

*See Acres Bonusing, Inc.*, 17 F.4th at 914. The factual allegations of wrongful conduct alleged against the Boutin Jones attorneys in the Complaint all pertain to actions undertaken as quasi-executive officer in their representation of Blue Lake Casino in civil litigation: (1) actions by Boutin Jones attorneys in the pre-litigation dispute with Plaintiffs regarding the iSlot software; (2) actions by Boutin Jones attorneys in the tribal court action against Plaintiffs, including as to filing

and serving pleadings, motions, and other documents and appearing at hearings; (3) actions by the Boutin Jones attorneys in the related federal court actions, including as to filing and serving pleadings, motions, and other documents and appearing at hearings, and (4) representation of the tribe and/or Blue Lake Casino on other unrelated matters (Compl. ¶¶ 1, 4-5, 23-26, 32, 34, 41, 48-50, 52, 72-74, 81, 90-92, 98(b)-(c), 110-111, 115-116, 136, 148-150, 156-157, 199, 202, 205, 208(a)). Because the claims in the Complaint are all based upon the Boutin Jones attorneys' litigation activity in their capacity as attorneys for a tribal entity, in the course of their representation of Blue Lake Casino in its civil dispute with Plaintiffs, the Boutin Jones attorneys are entitled to a personal immunity defense. *See Acres*, 17 F.4th at 914; *Great Western Casinos, Inc.*, 74 Cal.App.4th at 1424.

**B. Plaintiffs Have Failed to State a RICO Claim**

Plaintiffs contend that the Boutin Jones attorneys used their positions as attorneys to operate or manage the Blue Lake Tribal Court as a scheme to obtain money by false pretenses, alleging that Boutin Jones and its attorneys Chase, Stouder, and O'Neil were attorneys for Blue Lake Casino who brought and maintained *Blue Lake Casino v. ABI*, suborned the tribal court, and worked to conceal that subornation. Compl. ¶¶ 23-26, 34, 41, 72, 74-76, 81, 90-92, 98, 110" (Opp. at 9).

As to the alleged predicate acts in the Complaint, Plaintiffs maintain that "*Blue Lake Casino v. ABI* was a scheme to defraud," and argue that "the Ninth Circuit has squarely held conducting the affairs of a court system through a pattern racketeering activity for the purposes of obtaining an 'unfair advantage' in litigation can sustain a RICO conviction," citing *United States v. Frega*, 179 F.3d 793, 797-798 (9th Cir. 1999) – a criminal, rather than civil action. Plaintiffs also rely on *Chevron v. Donzinger*, 833 F.3d 74 (2d Cir. 2016). Plaintiffs do correctly state that the Ninth Circuit has not precluded all RICO actions based upon litigation activity (Opp. at 10-11), however, the Ninth Circuit has relied upon caselaw establishing that a single frivolous, fraudulent, or baseless lawsuit standing alone cannot constitute a viable RICO predicate act. *See United States v. Koziol*, 993 F.3d 1160, 1174 (9th Cir. 2021), citing *Kim* v. *Kimm*, 884 F.3d 98, 104 (2d Cir. 2018).

The Ninth Circuit in *Koziol* concluded broadly that litigation activity does not constitute a predicate act for purposes of stating a civil RICO claim, in the context of comparing sham litigation

for purposes of Hobbs Act liability, explaining that: "Indeed, in these cases the courts concluded that RICO does not authorize suits by private parties asserting claims against business or litigation adversaries, based on litigation activities, and seeking treble damages, costs, and attorneys' fees," citing *Kim* v. *Kimm*, 884 F.3d 98, 104 (2d Cir. 2018) ("'[I]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action,' which 'would inundate the federal courts with procedurally complex RICO pleadings'" (citations omitted)); *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016) (explaining that litigation tactics cannot be a predicate for a civil RICO claim); and *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) ("[R]ecognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim.") . . ." *See Koziol*, 993 F.3d at 1174.

In *Kim*, the Plaintiff maintained that the underlying lawsuit was nothing more than a scheme designed to "extort $2 million" from him, and alleged that the defendants completed false paperwork to pose as the owners of a trademark, licensed the trademark to a third-party, and then sued Kim for violating the licensing agreement, and Kim claimed that these false trademark documents were intended to mislead the district court and therefore were predicate acts of obstruction of justice, mail fraud, and wire fraud that constituted a pattern of racketeering activity. *See Kim*, 884 F.3d at 101. The alleged predicate acts of obstruction of justice, mail fraud, and wire fraud included preparing, signing and electronically filing four declarations with knowledge that they contained fraudulent representations intended to persuade the court to find in favor of a party. *See id*. at 103.

Notwithstanding the statements in *Koziol* and *Kim* that a freestanding civil action involving fraud does not give to RICO liability, Plaintiffs rely upon *Frega* and *Donzinger* in which the civil litigation at issue was part of larger corrupt scheme. *Frega*, in contrast to *Kim*, involved a criminal RICO action including "numerous bribes paid by a San Diego attorney, to three then Superior Court judges" and the Ninth Circuit stated "[o]ver a period of twelve years, Frega, together with . . . the owner of a San Diego car dealership, purportedly gave more than $100,000 in payments and benefits—ranging from automobiles, car repairs, money orders, an apartment, health club

memberships, and a queen-sized bed—to the judges or members of their families." *See Frega*, 179 F.3d at 798. *Frega* and *Donzinger* are clear distinguishable from the scant facts alleged about the Boutin Jones defendants in Acres' Complaint.

Plaintiffs also point to *Chevron v. Donzinger*, 833 F.3d 74 (2d Cir. 2016) as supporting their position that litigation activity related to *Blue Lake v. ABI* can form the basis for RICO liability. However, in *Donzinger*, the Court found RICO liability based upon a scheme involving secret payments to industry experts, and the extortion and coercion of a judge in a foreign nation. *See id.* at 84 (describing the scheme as involving the Lago Agrio Plaintiffs ("LAP Representatives") procuring a judgment by making secret payments to industry experts who would submit pro-LAPs opinions to the court while pretending to be neutral; announcing multi-billion-dollar remediation cost estimates while knowing them to be without scientific basis; persuading an expert to sign blank pages that were submitted to the court with unauthorized opinions; employing extortion to coerce an Ecuadorian judge to curtail inspections of alleged contamination; coercing a judge to appoint an expert who was bribed to submit a report written by the LAPs).

The RICO allegations in the instant complaint are similar in nature to those at issue in *Kim* which the Ninth Circuit relied upon in *Koziol*. Plaintiffs argue in the Opposition that the conduct in furtherance of the alleged RICO scheme included: 1) suborning a judge and 2) filing a false declaration to conceal the scheme from a District Court of the United States (Opp. at 10). As to the Boutin Jones attorneys, the alleged predicate acts concern litigation activities in the underlying action, including the allegations that, "dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via postal-mail" (Compl. ¶ 202); that "dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via email" (Compl. ¶ 205); and that "[a]ttorneys from Rapport & Marston ghostwr[ote] papers filed by Boutin Jones which were intended to convince the district court that Judge Marston was a neutral decision-maker" (Compl. ¶ 208). Nothing but Acres' conclusory allegations links Boutin Jones' conduct with an attempt to suborn a judge or corrupt the Tribal Court.

This basis for this RICO action – alleged fraud in underlying civil litigation with an alleged intent to utilize improper means to achieve a favorable outcome in the litigation – falls under the

general rule set forth in *Koziol* and *Kim* that allegedly fraudulent conduct in a civil action, standing alone, does not give rise to RICO liability. *See Kim*, 884 F.3d at 104 ("allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act"). Here, the Plaintiffs allege that defendants obstructed justice when they attempted to conceal their alleged corruption of Blue Lake Tribal Court by filing Judge Marston's allegedly misleading declaration in federal court, Compl., ¶¶99-101, alleging that this declaration was one of many filings made by defendants in order to deliberately conceal their subornation of the Blue Lake Tribal Court, Compl. ¶¶70-73, 75-76, 208; *see also* Dkt. 32-6 ¶¶6-10 (Rapport Decl.).

In particular the Complaint alleges "[d]uring *Acres v. Blue Lake I* and *Acres v. Blue Lake II* several defendants undertook conduct to corruptly influence, obstruct, or impede the due administration of justice in a court of the United States . . ." and "[t]his conduct includes, but is not limited to . . . [a]ttorneys from Rapport & Marston ghostwriting papers filed by Boutin Jones which were intended in part to convince the district court that Judge Marston was a neutral decision-maker . . ." (Compl. ¶ 208).[2] Accordingly, the alleged RICO predicates that form the basis of the RICO claim involve statements in a declaration in collateral federal court litigation regarding possible alleged conflicts of interest involving Judge Marston presiding over related cases (alleged obstruction of justice), and filings via postal mail and email (alleged mail and wire fraud). The allegations as set forth in the Complaint pertain to routine commercial litigation and, as a matter of law, simply do not constitute predicate acts under the RICO statute. *See Kim*, 884 F.3d at 104

[2] The Complaint further alleges that Judge Marston submitted a declaration in *Acres v. Blue Lake II* which was allegedly inaccurate to correct for the federal court's record numerous misrepresentations made by Mr. Acres … regarding Judge Marston's working relationship with Blue Lake, which directly attack[ed Judge Marston's] personal integrity,"" (Compl. ¶ 99), the declaration stated (1) he did not act on behalf of Blue Lake in any capacity other than as the Chief Judge, (2) Blue Lake does not compensate him for any services other than the services he provides under his judicial services contract, and (3) he is not Blue Lake's attorney and does not represent Blue Lake (Compl. ¶ 100). The Complaint contrasts the declaration with the allegations that court records and the billing records reveal: (1) Judge Marston was Blue Lake's attorney in Blue Lake v. Shiomoto, (2) Judge Marston billed Blue Lake for his work as its attorney in the Shiomoto matter; including when (3) Judge Marston performed his final proofing of the answers to requests for admission before the declaration denying his attorney-client relationship with Blue Lake (Compl. ¶ 101). **The Boutin Jones defendants had no involvement with the drafting or filing of Judge Marston's declaration.**

("allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act").[3]

Contrary to any suggestion in Plaintiffs' Opposition, the Boutin Jones defendants clearly argued that Plaintiffs failed to allege obstruction of justice as an adequate predicate act under the RICO statute. In particular, the Boutin Jones defendants expressly cited in the motion to dismiss to Plaintiffs' obstruction of justice allegations in Plaintiffs' complaint (Mot. at 12, citing Compl. ¶ 208 (citing the obstruction of justice statute at 18 U.S.C. 1503 and substantive allegations regarding alleged obstruction) and argued in the motion to dismiss that the "scheme and the alleged predicate acts all arise from litigation activities and so cannot give rise to RICO liability" (Mot. at 12).

Finally, Plaintiffs argue that the Complaint alleges dozens of predicate acts and a common purpose (to obtain an unfair litigation advantage over their opponents by corrupting the tribal court and concealing that corruption) (Opp. at 12). Given that the allegations in the Complaint do not constitute predicate acts under RICO because they pertain to routine commercial litigation activity, they also cannot constitute a pattern of racketeering activity.[4]

### C. The Litigation Privilege Precludes the Claims For Aiding and Abetting Breach of Fiduciary Duty and Constructive Fraud

As set forth in the motion to dismiss, ABI has also failed to state a claim for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud because these claims are also barred by the litigation privilege set forth in California Civil Code § 47(b). The litigation privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by

[3] Plaintiffs argue that dismissal on a motion to dismiss is especially disfavored to the extent that the Ninth Circuit has never expressly considered the extent to which allegations of "corrupt litigation" can give rise to RICO liability (Opp. at 11). However, the allegations in the Complaint do not pertain to generalized corruption – and instead involve limited alleged conflicts of interest as to specific parties (*not* Boutin Jones or its attorneys) and specific cases involving only Judge Marston, and as to a RICO liability, the Ninth Circuit in *Koziol* squarely adopted the Second Circuit's approach in *Kim* that allegations of fraud in the context of litigation do not give rise to RICO liability without additional factors. Such factors are lacking and cannot be inferred from the Complaint.

[4] Likewise, the Court should dismiss the RICO claim without leave to amend based on failure to allege RICO predicate acts without the need to reach whether Plaintiffs have alleged causation (Opp. at 12).

litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 271.[5]

Plaintiffs contend that the subject matter in the underlying civil proceedings was: 1) whether ABI met its obligations under the iSlot Agreement, and 2) whether ABI or Acres fraudulently induced Blue Lake Casino into entering the iSlot Agreement such that none of the defendants' alleged conduct in suborning Judge Marston or the Blue Lake Tribal Court has any reasonable relevancy to the subject matter of the tribal court action and is not protected by California's litigation privilege (Opp. at 22). Given the breadth of the privilege (*i.e.*, communication that has some connection or logical relation to the action) and given that courts have concluded that communications involving fraud, misrepresentation and concealment fall within the litigation privilege, Plaintiffs claims regarding breach of fiduciary duty and constructive fraud are precluded. *See, e.g., Graham-Sult v. Clainos*, 756 F.3d 724, 742 (9th Cir. 2014) ("Given its broad scope, the litigation privilege protects the Greene Defendants from liability based on (1) filings made in the probate court; and (2) statements made to (and information concealed from) both Plaintiffs and the probate court related to the probating of the estate"). Likewise, in *Home Insurance Company v. Zurich Insurance Company* (2002) 96 Cal.App.4th 17, 27, the Court explained that "[g]enerally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud," citing *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 634, and concluded that "[t]he fraud alleged in the first amended complaint, misrepresentation of insurance policy limits, is not extrinsic fraud" and "[i]t did not prevent Pinasco and Main from presenting their case against Canfield in court." Accordingly, the Court concluded that "[t]he alleged misrepresentation about the available policy limits was the basis for all of Home's claims, either as the act of fraud or as grounds to invalidate the release . . . and [b]ecause the alleged misrepresentation was absolutely privileged and did not constitute extrinsic fraud, the court did not err in sustaining the demurrer without leave to amend and dismissing the lawsuit." *See id*. at 28.

[5] Plaintiffs rely generally on *Silberg v. Anderson* (1990) 50 Cal.3d 205, 220, but the Court there sets forth the same standard as in *Mansell*.

ABI does not allege any conduct by the Boutin Jones attorneys that was not a communication made in connection with a judicial proceeding, and allegations that the Boutin attorneys somehow "suborned" the Court (*i.e.*, *induced* the court to commit an unlawful act – through the alleged mail fraud, wire fraud and obstruction of justice by means of not objecting to Judge Marston's filing of an allegedly false declaration) constitute intrinsic fraud and fall within the scope of the litigation privilege. The broad scope of the litigation privilege therefore precludes the claims regarding breach of fiduciary duty and constructive fraud. *See id*.

**D. All of the Claims Set forth in the Complaint are Barred by CCP Section 340.6(a)**

Plaintiffs contend that the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive fraud, and aiding and abetting constructive fraud are not barred by the one-year statute of limitations set forth in CCP Section 340.6(a), arguing broadly that suborning a court or a judge is not a professional service and that all Californians share a generally applicable non-professional obligation to avoid corrupting courts and judges (Opp. at 23).

In particular, Plaintiffs contends that whether 340.6(a) bars a claim turns on "whether the attorney-defendants only violated a professional obligation without simultaneously violating some generally applicable non-professional obligation" (Opp. at 23). However, this is a misreading of *Lee v. Hanley,* (2015) 61 Cal.4th 1225 and California law governing Section 340.6(a). The California Supreme Court in *Lee* clearly stated that "the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." *Lee*, 61 Cal.4th at 1238. Accordingly, Plaintiffs' assumption that Section 340.6(a) is not implicated if the actions in question also violate a generally non-applicable obligation is simply inaccurate.

Indeed, in *Lee*, the Court gave the example of garden variety theft which does not require proof that an attorney has violated a professional obligation (*i.e*., stealing money from a client's purse), as opposed to a fee violation which necessarily violates a professional obligation, and which may also violate other obligations, yet still is barred by Section 340.6(a). *See id*. at 1237.

*Lee* establishes that "the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally

applicable nonprofessional obligation" – not whether the alleged malpractice or breach of fiduciary duty or other tortious activity constituted a professional service. *See id*. at 1238.

The Complaint alleges as to the aiding and abetting breach of fiduciary duty claim that defendants knew that Judge Marston was breaching his fiduciary duty to Plaintiffs, yet aided in the breach of fiduciary duty (Compl. ¶¶ 173, 176). As to breach of fiduciary duty, courts have been clear that "[t]he [one-year] statute applies to an action for malpractice as well as breach of fiduciary duty arising out of the performance of an attorney's professional duties, but it does not apply to actions for fraud." *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121, citing *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 223.[6] *See also Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881 ("action by a former client against his attorney for breach of fiduciary duty was subject to the statute of limitations under section 340.6 rather than the statute applicable to breach of fiduciary duty claims generally"); *Graham-Sult v. Clainos* 756 F.3d 724, 747 (9th Cir. 2014).

As to the substantive allegations, the Complaint alleges that Boutin Jones and Rapport and Marston have been associated as counsel for Blue Lake in *Blue Lake v. Lanier* and that Rapport had referred another legal matter to Boutin Jones (Compl. ¶ 74). The Complaint further alleges that in *Acres v. Blue Lake I*, Boutin Jones attorneys filed a motion to dismiss in federal court on behalf of Blue Lake Casino after Judge Marston reviewed and revised the motion (Compl. ¶¶ 72-73). Accordingly, the aiding and abetting breach of fiduciary claim is premised upon the allegation that Judge Marston had a fiduciary duty to Plaintiffs as an independent impartial judge, which he breached allegedly with the aid of Boutin Jones attorneys, who were allegedly supporting Marston and Rapport's interests as lawyers (in Marston's case, rather than as an impartial judge) due to their own conflicts of interest – including Boutin Jones' previous receipt of $200,000 in referred business from Rapport (who was allegedly affiliated with Rapport and Marston)(Compl. ¶ 74.b). .

[6] The applicable statute of limitations as to the aiding and abetting breach of fiduciary duty claim is keyed to the substantive tort of breach of fiduciary duty, and so this claim is also time-barred, along with underlying substantive claim. *See American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478–1479; *see also Maheu v. CBS, Inc.* (1998) 201 Cal.App.3d 662, 673.

Because this claim is not necessarily premised upon fraud, and because the claim necessarily depends upon proof that the Boutin Jones attorneys violated a professional obligation (*i.e.*, Rule 1.7(b) (A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests)),[7] the claim falls squarely within Section 340.6(b) and is time-barred.

Likewise, the claim for aiding and abetting constructive fraud is also time-barred and does not fall within the exception for actual fraud set forth in section 340.6 for the one-year time bar. *See, e.g., Quintilliani v. Manerino* (1998) 62 Cal.App.4th 54, 69 (concluding "that the exception for actual fraud in section 340.6 was intended to apply to intentional fraud, not constructive fraud resulting from negligent misrepresentation" and that "[c]onstructive fraud may result from a breach of fiduciary duty, regardless of intent or motive, and the Legislature intended to only except instances of actual fraud on grounds that acts of actual fraud should not be treated as legal malpractice (citations omitted)"). In particular, the constructive fraud claim is dependent upon the allegation in the Complaint that "[a] fiduciary relationship existed between Judge Marston and ABI upon which ABI justifiably relied to its detriment," that "[t]his fiduciary relationship was created when Judge Marston became ABI's presiding judge in Blue Lake v. ABI," and "[p]ursuant to said duty, Judge Marston owed ABI a duty to disclose all material information Judge Marston knew or could reasonably obtain regarding Judge Marston's relationship with Blue Lake, Blue Lake Casino, Ms. Ramsey, and any related parties" (Compl. ¶ 180). In addition, the Complaint alleges that "[t]he Marston Fraud Abettors each knew Judge Marston was committing constructive fraud against ABI because each of the Marston Fraud Abettors knew of a substantial portion of Judge Marston's conduct described in the sixth cause of action" (Compl. ¶ 192). Therefore, as with the breach of fiduciary duty claims, the constructive fraud claims are dependent upon violation of the conflict of

[7] In addition, California Rule of Professional Conduct 3.3(a) also independently requires candor to the tribunal including that a lawyer shall not offer evidence that the lawyer knows to be false. *See* also *Levine v. Berschneider* (2020) 56 Cal.App.5th 916, 921.

interest rules set forth by California Rule of Professional Conduct 1.7(b), and are not contingent upon fraud, and so are barred by the one-year statute of limitation set forth by Section 340.6(a).

Finally, as to the wrongful use of civil proceedings claims, Plaintiffs contend that if "the attorney-defendants pursued the tribal court action because they failed in their professional obligation to understand the tribal court action was legally meritless, then 340.6(a) might operate to bar the causes of action" (Opp. at 24). Plaintiffs have misstated the standard here, which would preclude any malicious prosecution claims from the reach of Section 340.6(a), given that malicious prosecution requires intent. Instead, courts have clearly stated that malicious prosecution claims are barred by Section 340.6(a). *See, e.g.*, *Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 (concluding that the one-year statute of limitations under § 340.6 applied to bar a malicious prosecution action against a landlord and her counsel and stating that "consistent with Lee, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation"); *see also Garcia v. Rosenberg* (2019) 42 Cal.App.5th 1050, 1060 (stating that subsequent to *Lee* "in *Connelly*, the court concluded an attorney who engages in malicious prosecution violates the obligation, embodied in the Rules of Professional Conduct, to not bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person" (citing *Connelly*, 33 Cal.App.5th at 794 (other internal citations and quotations omitted)).

The Complaint alleges as to the wrongful use of civil proceedings claim that the defendants "wrongfully brought or maintained a lawsuit against ABI" (Compl. ¶ 135); "were each materially involved in bringing or continuing *Blue Lake v. ABI*, which included several causes of action against ABI" (Compl. ¶ 136); that the defendants "could not have reasonably believed there were reasonable grounds to bring or maintain *Blue Lake v. ABI* against ABI" (Compl. ¶ 138); and that the defendants "brought or continued the *Blue Lake v. ABI* claim against ABI for reasons other than succeeding on the merits of the claim" (Compl. ¶ 139). Accordingly, the wrongful use claims require demonstrating a violation of the Rules of Professional Conduct and are barred by Section 340.6. *See Garcia*, 42 Cal.App.5th at 1060.

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### E. The Court Should Dismiss the Complaint Without Leave to Amend

Dismissal without leave to amend is proper when amendment would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 65 F.3d 1034, 1041 (9th Cir. 2011). Here, there is no technical pleading deficiency which Plaintiffs can fix to remedy the Complaint. To the contrary, all claims are barred by absolute immunity, which arises as a result of the functional roles of the Boutin Jones attorney defendants. Similarly, all state law claims are time-barred, and there are other independent barriers precluding relief, including the litigation privilege, and the absence of facts establishing a viable RICO claim. Accordingly, the Court should dismiss the Complaint without leave to amend.

## III. CONCLUSION

For the foregoing reasons, the Boutin Jones Defendants respectfully request that this Court grant the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) without leave to amend or alternatively dismiss each claim for which Plaintiffs have failed to state a claim for which relief can be granted, without leave to amend.

DATED: May 3, 2022

LERCH STURMER LLP

By /s/
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David Lerch, Esq.
Attorneys for Defendants BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER, and AMY O'NEILL

**DECLARATION OF SERVICE**

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

**DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S REPLY TO PLAINTIFFS' OPPOSITION TO RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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

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

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

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

**SEE ATTACHED SERVICE LIST**

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

EXECUTED on May 3, 2022 at Pleasant Hill, California.

Rosemarie Vernola
(type/print name)

Rosemarie Vernola
(signature)

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