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

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

Plaintiffs,

v.

LESTER MARSTON, et al.

Defendants.

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

**DEFENDANTS ARLA RAMSEY
AND THOMAS FRANK'S
REPLY IN SUPPORT OF RULE
12(B)(1) AND 12(B)(6) MOTION
TO DISMISS PLAINTIFFS'
FIRST AMENDED
COMPLAINT**

Complaint Filed: August 28, 2019

Hearing Date: September 28, 2022

Time: 2:00 p.m.

Judge: Hon. William H. Orrick

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I. INTRODUCTION

This Court has a platter of viable options it can choose from to dismiss James Acres (“Mr. Acres”) and Acres Bonusing, Inc.’s (“ABI”) [collectively, “Acres”] First Amended Complaint against Arla Ramsey (“Ms. Ramsey”) and Thomas Frank (“Mr. Frank”) [collectively, the “Defendants”], the last two remaining defendants in this saga. This Court tasked Acres with amending their complaint to “flesh out” their RICO cause of action. They responded by falsely asserting in their First Amended Complaint (“FAC”) that the Defendants’ alleged approval of Judge Lester Marston’s (“Judge Marston”) compensation for serving dual roles as Blue Lake Rancheria’s attorney and a Blue Lake Tribal Court judge were intended as bribes.

The Defendants asserted several applicable personal immunities under both federal and California law in their Motion to Dismiss, and argue that Acres’ FAC fails to state sufficient facts to support their four claims. Acres’ Opposition offers nothing that should dissuade the Court from granting the Defendants’ motion. They twist themselves in logic knots with their arguments. For example, they argue that the Defendants do not enjoy personal immunities under California law (despite prior holdings in this matter to the contrary) because states cannot regulate tribal officials, yet their entire RICO claim hinges on application of state-law bribery statutes under the California Penal Code. The Defendants urge the Court to grant their Motion to Dismiss without leave to amend.

II. ARGUMENT

A. Executive immunity shields both Ms. Ramsey and Mr. Frank from Acres’ suit, regardless of whether absolute or qualified immunity is the appropriate standard.

1. Ms. Ramsey is an executive of a federally-recognized tribe, and enjoys absolute executive immunity as a result.

Acres oddly argues that Ms. Ramsey cannot assert absolute executive immunity because the United States Supreme Court held that state executive

officials are not entitled to absolute immunity, yet concedes that certain federal executives enjoy absolute immunity. Acres' Opposition, p. 16.¹

As explained in Defendants' Motion to Dismiss, Blue Lake Rancheria is a federally-recognized Indian Tribe, organized as a sovereign nation under its own Constitution. First Amended Complaint ["FAC"], ¶9. Blue Lake Casino is the Tribe's primary business operation, profits from which go into the Tribe's general treasury. *See id.*, ¶¶12, 38. Ms. Ramsey is sued in her capacities as Tribal Administrator and Casino CEO. *Id.*, ¶13. As Tribal Administrator, she oversaw the Tribe and its elected Business Council's business operations. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ["MOPA"], p. 10. As Casino CEO, she served in an executive oversight role for the tribal government, above day-to-day management. *Id.*

Defendants acknowledge there is no legal authority explicitly stating that a tribal CEO enjoys absolute executive immunity, but the legal principles supporting federal executive immunity are no less applicable to tribal executives like Ms. Ramsey. Absolute immunity of executive officials from suit is justified when a suit poses a great danger of deflecting officials from the performance of their duties. *Forrester v. White*, 484 U.S. 219, 224 (1988). Here, Acres sue Ms. Ramsey because she allegedly approved payment of Judge Marston's legal bills and compensation as a Blue Lake Tribal Court judge. Permitting a California citizen to sue the executive of a sovereign tribal nation for exercising his or her official duties on behalf of the tribal government jeopardizes his or her ability to manage the Tribe's business, and justifies invoking absolute executive immunity.

2. Both Ms. Ramsey and Mr. Frank enjoy qualified immunity from Acres' suit as high-level tribal executives because their actions did not violate any law applicable to Blue Lake Rancheria.

¹ Acres' argument, comparing state executives to tribal executives, is particularly ironic viewed in context of their concurrent argument that Ms. Ramsey and Mr. Frank are not entitled to discretionary act immunity under California law because state law has no jurisdiction over federally-recognized tribes. *See id.*, pp. 10-11.

Acres argue that qualified immunity should not be available to tribal executives because it would afford greater protection to tribal officials than the protection afforded to similarly-situated state officials, and qualified immunity is inapplicable regardless, because the Defendants' alleged bribery of Judge Marston violated clear established law. *See Acres' Opposition*, pp. 9-10.

As explained below, however, Acres, offer no legal authority or persuasive argument why qualified immunity is inapplicable to tribal officials, and Ms. Ramsey's approval of Judge Marston's legal bills and compensation do not defeat that immunity. Additionally, Acres' bribery allegations concern only Ms. Ramsey and have nothing to do with Mr. Frank's verification of Blue Lake Casino's discovery responses and declarations in *Blue Lake v. ABI*.

a. As government officials, tribal officials enjoy qualified immunity from suit.

Like absolute executive immunity, case law has never precisely answered whether qualified immunity applies to tribal executives, but existing case law and the underlying principles of qualified immunity support its application. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known for administrative, legislative, or executive functions." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), internal quotes omitted. A tribal executive is unquestionably a government official. Acres even allege that Ms. Ramsey "was responsible for the day to day business affairs of the tribal government," and Mr. Frank was the "Director of Business Development for Blue Lake Rancheria." FAC, ¶¶13-14.

Additionally, the California Third District Court of Appeal - in this matter - seemingly applied qualified immunity to tribal officials in dicta. "Although tribal officials sued in their individual capacities cannot seek protection under the tribe's sovereign immunity, they may nonetheless be immune from suit under the distinct

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defense of official (or personal) immunity.” *Acres v. Marston*, 72 Cal.App.5th 417, 431 (2021). Outside of certain legislators, judges, prosecutors, and executives, “government officials are generally entitled only to qualified immunity....” *Id.*, at p. 432, internal citations omitted. This summary of common law personal immunity arose in the context of tribal officials in this case. *See id.* Although *Acres* was decided on other grounds, its discussion of absolute and qualified immunity in the context of tribal officials involved in this matter suggest that qualified immunity would apply to the Defendants. Like the parallel Ninth Circuit case, the California appellate court expressly left open the possibility that “Ramsey may be entitled to another form of personal immunity in this action.” *Id.*, at p. 445, citing *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 916.

Acres oddly argue that qualified immunity should not apply because federally-recognized tribes cannot be liable for alleged Constitutional rights violations because tribes are not bound by the U.S. Constitution, citing *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009). *Acres’* Opposition, p. 9. *Acres* further argue that “[g]iven this marked distinction between state actors and tribal actors there is no reason to assume the qualified immunity doctrine can be applied in tribal contexts without significant modification.” *Id.*, at p. 10. *Acres’* perceived distinction is irrelevant.

First, unlike *Bressi*, *Acres* do not allege that the Defendants violated their Constitutional rights. Their concerns regarding additional qualified immunity protection for tribal executives are irrelevant to the facts of this case. Second, the mere fact that tribal executives could theoretically enjoy a greater degree of qualified immunity protection than their state executive counterparts does not alone justify depriving tribal actors of qualified immunity. The United States Supreme Court held that qualified immunity potentially applies to all government officials. *Pearson, supra*, 555 U.S. at 231. There is no legitimate reason for excluding tribal officials from that protection.

b. Paying Judge Marston’s legal bills and compensation did not violate a clearly established statutory or constitutional right.

Assuming the Defendants are entitled to qualified immunity, Acres contend that qualified immunity does not apply because “Plaintiffs allege corrupt payments were made to Judge Marston for the purpose of obtaining an unfair litigation advantage, and in violation of California bribery laws,” Acres’ Opposition, p. 10, citing *U.S. v. Frega*, 179 F.3d 793 (9th Cir. 1999) [*“Frega”*].² Acres is incorrect.

It is irrelevant for purposes of qualified immunity whether Ms. Ramsey subjectively intended to influence Judge Marston by paying his legal bills and compensation. A government official’s state of mind is generally not a factor in determining whether qualified immunity applies. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989). Isolating Ms. Ramsey’s predicate acts from her subjective intent, her approval of Judge Marston’s invoices for allegedly serving as Blue Lake Casino’s attorney while simultaneously approving his compensation as a Blue Lake Tribal Court judge violated no existing law or regulation applicable to Blue Lake Rancheria. Acres’ false allegations regarding Ms. Ramsey’s subjective intent in allegedly approving those payments is irrelevant where she was exercising her discretion to select Blue Lake’s legal counsel and compensate Blue Lake Tribal Court judges. Acres may object to the way Blue Lake’s executives manage the Tribe, but they lack the authority to dictate their discretion through litigation.

c. Acres’ false bribery allegations are wholly unrelated to Mr. Frank.

Acres based their arguments against applying qualified immunity solely on their false bribery allegations. However, their substantive bribery allegations only concern Ms. Ramsey, and not Mr. Frank. Acres allege in their FAC that Mr. Frank: (a) was copied on a demand letter to the plaintiffs in *Blue Lake v. ABI*; (b) executed

² *Frega* did not involve a private suit for damages under RICO; it was a federal criminal prosecution. See *Frega*, *supra*, 179 F.3d at 798.

Blue Lake Casino's discovery responses in *Blue Lake v. ABI*, and gave several sworn declarations under penalty of perjury; and (c) [in conclusory fashion] arranged to bring *Blue Lake v. ABI* before the Blue Lake Tribal Court. FAC, ¶¶48, 122, 194. Acres' false bribery allegations do not involve Mr. Frank in any way.

B. Discretionary act immunity applies to tribal officials under California and federal law, shielding Ms. Ramsey and Mr. Frank from Acres' claims regarding Judge Marston's compensation.

Discretionary act immunity is derived from common-law principles, similar to other common law immunities acknowledged by the Ninth Circuit and California Third District Court of Appeal in this matter. The Defendants' decision to compensate Judge Marston in dual roles as Blue Lake's attorney and judge was a high-level policy decision coordinating the executive and judicial spheres of Blue Lake Rancheria tribal government that violated no laws applicable to Blue Lake.

1. Discretionary act immunity, derived from California common law, is applicable to tribal officials like Ms. Ramsey and Mr. Frank.

California discretionary act immunity, immunizing government officials from challenges to the exercise of their authority, arises from common law and predates the California Legislature's enactment of the Tort Claims Act. *Caldwell v. Montoya*, 10 Cal.4th 972, 979 (1995) (citations omitted). It remains valid today. *See id.*

Acres mistakenly presume California common law immunities do not apply to tribal officials. "Each state has defined and redefined its own immunity law as an expression of state sovereignty.... State-law cannot define the immunities available to tribal actors." Acres' Opposition, p. 11. Acres ignore the published California Third District Court of Appeal decision in this matter applying California common law immunities to tribal officials. In *Acres*, the California appellate court found that Judge Marston, his law clerks, and court staff were absolutely immune from Mr. Acres' suit under California judicial immunity. *Acres*,

supra, 72 Cal.App.5th at pp. 441-442. Additionally, this Court recently held in this case that defendants David Rapport and Rapport & Marston, as the Tribe's attorneys, were shielded by California Civil Code section 47(b)'s litigation privilege. *See* Dkt. 89, pp. 13-14. Acres cite authority purportedly holding that states cannot regulate tribal governments, but are incorrect that tribal officials cannot enjoy the same common law immunities afforded to other government officials under California law.

2. Defendants' approval of Judge Marston's alleged dual roles as the Tribe's legal counsel and judge is a policy-level decision, invoking discretionary act immunity.

Acres offer several unpersuasive arguments why discretionary act immunity is inapplicable to their allegations against the Defendants. First, they state – without any legal authority and contrary to their own FAC allegations – that “[c]asinos are not coordinate branches of government entrusted to make basic policy decisions [and] [c]asino executives cannot, therefore, be protected by discretionary act immunity.” Acres’ Opposition, p. 13. Second, they contend that the decision to utilize Judge Marston as Blue Lake Casino’s legal counsel while simultaneously serving as a Blue Lake Tribal Court judge (which they falsely characterize as pursuing a meritless lawsuit and judicial bribery) is not a policy-based decision because the Defendants have not met their burden of showing that a conscious balancing of the risks and advantages of the decision took place. *Id.* Acres misstate their own allegations and misapprehend the law.

Acres’ claim that casino executives cannot be protected by discretionary act immunity both ignores their own allegations regarding the Defendants’ respective roles within the Blue Lake Rancheria government and Blue Lake Casino’s governmental function within the Tribe. Acres respectively sued Ms. Ramsey as Blue Lake Rancheria’s Tribal Administrator and Mr. Frank as its Director of Business Development, along with their roles as Blue Lake Casino executives. FAC, ¶¶14-15. All of these positions are executive, governmental roles within Blue

1 Lake Rancheria. *See* Declaration of Arla Ramsey, ¶¶3-8.

2 Additionally, Acres' claim that casinos are not coordinate branches of
3 government conflates tribal casinos with ordinary, private casinos. As required by
4 the Indian Gaming Regulatory Act, the Blue Lake Casino is an extension of Blue
5 Lake Rancheria government. *See* 25 U.S.C.A. § 2710(b)(2)(A). Acres even
6 acknowledge in their FAC that all of Blue Lake Casino's profits go to the Tribe's
7 general treasury. FAC, ¶¶12, 38.

8 Acres are incorrect that a party invoking discretionary act immunity must
9 affirmatively show that the Defendants consciously balanced the risks and
10 advantages of approving Judge Marston's dual roles for the Tribe. The party
11 invoking discretionary act immunity does not need to demonstrate that a "strictly
12 careful, thorough, formal, or correct evaluation" occurred in the official's exercise
13 of discretion. *Caldwell, supra*, 10 Cal.4th at 983. The official's exercise of
14 discretion, including weighing risks and advantages of the decision, may be
15 implied from the official's role and duties. *See Roseville Cmty. Hosp. v. State of*
16 *California*, 74 Cal.App.3d 583, 590 (1977). Both the high-ranking nature of the
17 Defendants' positions within tribal government, and the nature of their alleged
18 decision to approve Judge Marston's dual roles in the Tribe's executive and
19 judicial spheres of government imply that they considered the relative risks and
20 advantages of their decision. Acres' factual analogy to *Johnson v. State*, 69 Cal.2d
21 782 (1968) [involving the decision to place a paroled teen in foster care without
22 warning the foster parents of the teen's violent past] is easily distinguishable from
23 this case, as the Defendants owed no duty warn Acres that they allegedly paid
24 Judge Marston to serve in dual legal roles. *See* Acres' Opposition, pp. 13-14.

25 **3. Defendants properly asserted their discretionary immunity under**
26 **federal law.**

27 The Defendants argue in their motion that they are protected by federal
28 discretionary act immunity. Specifically, they cite in their introductory table of

personal immunities, “Discretionary act immunity under California common law and federal common law.” *Infra*, pp. 13-16.” MOPA, p. 2. Acres contend that Defendants waived any claim of federal discretionary act immunity by failing to develop their argument with argument or authority. Not so.

Defendants argue in the introductory paragraphs to their personal immunity arguments that “The immunities afforded to executives, judicial officers, legislators, and litigants under federal and California law should be equally available to similar officials in tribal governments.” *Id.*, pp. 8-9. The Defendants specifically identified pages thirteen through sixteen of their motion as the legal basis for their assertion of federal discretionary act immunity because the legal analysis related to California discretionary act immunity mirrors federal discretionary act immunity. *See* 28 U.S.C. § 2680(a); *Lam v. United States*, 979 F.3d 665, 672 (9th Cir. 2020).

C. Acres’ substantive allegations against Mr. Frank exclusively relate to his involvement with discovery and motions in *ABI v. Blue Lake*, thereby triggering the litigation privilege for most of their claims.

Acres named Mr. Frank in this case only because he verified written discovery and executed a supporting declaration. *See* FAC, 122. Acres argue that California Civil Code section 47(b)’s litigation privilege does not apply because those pleadings somehow had no relevancy to the subject matter of the action. Acres’ Opposition, p. 15. Acres’ bribery allegations have nothing to do with Mr. Frank, and relate only to his alleged passive involvement with *Blue Lake v. ABI*.

D. Ms. Ramsey’s and Mr. Frank’s various personal immunities aside, Acres’ claims against them fail on their merits.

As discussed above, the Defendants’ personal immunities shield them from Acres’ claims. Additionally, Acres offer no persuasive legal authority or argument why their RICO claim, their wrongful use of civil proceedings claim, and two aiding and abetting claims should proceed on their merits.

1. Acres do not allege sufficient facts to state a viable RICO claim

1 **against the Defendants.**

2 Acres pivot their predicate act theory supporting their RICO claim in their
3 FAC from mail and wire fraud to state-law bribery under California Penal Code
4 sections 92 & 93. *See* Acres’ Opposition, pp. 7, 20-21. Acres’ state-law bribery
5 theory, however, is equally unavailing to sustain a RICO claim for several reasons
6 because tribal officials are generally immune from state regulations, Acres do not
7 allege facts demonstrating prohibited RICO activities, and litigation activity cannot
8 form the factual basis of a RICO claim.

9 **a. As Acres concede, tribal officials are generally not subject**
10 **to California regulations.**

11 Acres pin their RICO claim to their state-law bribery theory. They contend
12 that Defendants’ alleged approval of payments for Judge Marston’s dual legal and
13 judicial services constituted bribery in violation of California Penal Code sections
14 92 & 93, which “are both forms of racketeering under 18 USC 1961(1)(A).” Acres’
15 Opposition, p. 7, citing FAC, ¶¶195-206. Acres’ ostensible predicate act theory
16 under the Travel Act is another unavailing mail fraud concept derived from its
17 bribery theory. *See* FAC, ¶207 (“[i]t is a violation of the Travel Act to use the mail
18 to violate the bribery laws of California within California.”).

19 Acres’ claim fails as a matter of law because the Defendants, as tribal
20 officials, cannot be charged for state-law bribery, particularly in an internal tribal
21 matter. “[R]acketeering activity” is partially-defined as “any act or threat
22 involving... bribery..., which is **chargeable** under State law and punishable by
23 imprisonment for more than one year....” 18 U.S.C.A. § 1961(1), emphasis added.
24 Acres’ claim fails because the Defendants cannot be charged for violating
25 California Penal Code sections 92 & 93 for compensating a tribal judge.

26 Acres again point to *Frega, supra*, 179 F.3d 793 as an example of an upheld
27 RICO conviction based on a state-law judicial bribery case. *Frega*, however, is
28 easily distinguishable; the defendant in that case was an attorney and ordinary

1 citizen who bribed state court judges, and thus was subject to the California Penal
 2 Code, whereas the Defendants are sued in their capacities as Blue Lake Rancheria
 3 tribal officials carrying out their official duties.

4 As Acres acknowledge in their Opposition, “states generally lack the power
 5 to regulate tribes; tribal sovereignty is dependent on, and subordinate to, only the
 6 Federal Government, not the States,” and that same principle applies to state
 7 regulation of tribal officials. Acres’ Opposition, p. 11, quoting *Chicken Ranch*
 8 *Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1031 (9th Cir. 2022).
 9 Acres cannot have it both ways; they cannot argue that the Defendants do not
 10 enjoy California personal immunities because states cannot regulate tribal officials
 11 while also arguing that they can be liable for violating California bribery laws in
 12 the Tribe’s internal affairs. The Defendants are sheltered from California bribery
 13 laws by their official immunity in the conduct of the Tribe’s internal affairs.

14 **b. Acres do not allege facts demonstrating that Ms. Ramsey or**
 15 **Mr. Frank engaged in prohibited racketeering activities to**
 16 **support a RICO claim.**

17 Assuming, *arguendo*, that California bribery laws can serve as the predicate
 18 acts for a racketeering claim, Acres’ argument fails nevertheless because they do
 19 not allege facts showing that the Defendants engaged in an enterprise affecting
 20 interstate or foreign commerce.

21 18 U.S.C.A. § 1962 lists chargeable prohibited activities under RICO.
 22 Subsection (c) prohibits individuals employed or associated with an enterprise
 23 from engaging in racketeering activity affecting interstate or foreign commerce.

24 Acres allege in their FAC that the Blue Lake Tribal Court was an enterprise
 25 “[affecting] interstate commerce because Blue Lake Tribal Court purchases goods
 26 and services in interstate commerce, and because Blue Lake Tribal Court issues
 27 orders and judgments which affect interstate commerce.” FAC, ¶192. Acres’
 28 allegation is a legal conclusion, devoid of facts, that this Court must ignore. See
Lacano Investments, LLC v. Balash, 765 F.3d 1068, 1071-1072 (9th Cir. 2014).

1 The Blue Lake-related cases alleged in Acres' FAC involving Judge
 2 Marston do not affect interstate commerce because they either only affect Blue
 3 Lake Rancheria and its members or are non-commercial in nature. *Blue Lake v.*
 4 *ABI* involved Acres' casino gaming software to be used only at Blue Lake Casino.
 5 See FAC, ¶44. *Blue Lake Rancheria v. Shiimoto* was a non-commercial action to
 6 compel the California Department of Motor Vehicles to issue a driver's license.
 7 See FAC, ¶35. *Acres v. Blue Lake* and *Acres v. Blue Lake II* are derivative of *Blue*
 8 *Lake v. ABI*. See FAC, ¶4. Acres allege *Ramsey v. McKay* was a non-commercial
 9 family law matter. See FAC, ¶131.³

10 Acres allege no other categories of prohibited RICO activities under 18
 11 U.S.C.A. § 1962. Legal conclusions aside, Acres have not alleged facts supporting
 12 prohibited activities to sustain a RICO claim against the Defendants.

13 **c. Acres' bribery allegations solely relate to litigation**
 14 **activities, which cannot serve as the factual basis for a**
 15 **RICO claim under *Koziol*.**

16 Acres sue the Defendants because they allegedly approved payment of Judge
 17 Marston's compensation in dual legal roles as Blue Lake Casino's attorney and as
 18 a Blue Lake Tribal Court judge, all litigation-related conduct. In *United States v.*
 19 *Koziol*, 993 F.3d 1160, 1174 (9th Cir. 2021) [*"Koziol"*], the Ninth Circuit
 20 considered the defendant's attempt to analogize his criminal liability under the
 21 Hobbs Act to civil RICO liability. See *Koziol, supra*, 993 F.3d at 1173-1174. As
 22 Acres correctly note, *Koziol* did not rest on civil RICO liability. However, the
 23 Ninth Circuit addressed and endorsed a line of cases the defendant cited,
 24 specifically *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018), holding that litigation
 25 activity cannot serve as the basis for a RICO claim because (like here) "every
 26 unsuccessful lawsuit could spawn a retaliatory action, which would inundate the
 27 federal courts with procedurally complex RICO pleadings." *Koziol, supra*, 993

28 ³ *Ramsey v. McKay* involved ejection of a squatter from the home of June Ramsey,
 not Defendant, Arla Ramsey.

1 F.3d at 1174, quoting *Kim, supra*, 884 F.3d at 104. Although civil RICO was not
 2 germane to the facts of *Koziol*, the Ninth Circuit endorsed the view of its brethren
 3 circuits precluding litigation activity as a RICO predicate.

4 The predicate acts alleged in Acres' FAC, stripped of Acres' false
 5 mischaracterizations, concern the dual payment of Judge Marston's legal bills as
 6 attorney and salary as a judge. Acres prevailed in *Blue Lake v. ABI* and now seeks
 7 revenge against the last remaining individuals conceivably related to *Blue Lake v.*
 8 *ABI* following this Court's dismissal of all the other myriad defendants. This is the
 9 retaliatory litigation foreseen and precluded in *Kim* and other similar cases, and
 10 likewise by the Ninth Circuit in *Koziol*. Acres' bribery allegations against the
 11 Defendants cannot support a RICO claim as a matter of law.

12 **2. Acres ask this Court to make unreasonable leaps of inference to**
 13 **substantiate their wrongful use of civil proceedings claim.**

14 The Defendants argue that Acres cannot satisfy three of the five necessary
 15 elements of their wrongful use of civil proceedings claim. MOPA, pp. 18-20.
 16 Acres respond with various excerpts from declarations, pleadings, and orders from
 17 *Blue Lake v. ABI*, essentially asking this Court to infer from those excerpts that the
 18 Defendants were the puppet masters behind that litigation, and that there was a
 19 nefarious purpose for suing Acres in that action other than recovery of the
 20 \$250,000 the Tribe paid ABI for a gaming system that failed to work as promised.
 21 Acres have not met their pleading burden.

22 For example, Acres cite Ms. Ramsey's signature on the attorney substitution
 23 form and Mr. Frank's declaration that he acted as liaison between the Blue Lake
 24 Business Council and its attorneys to show that they were instrumental in setting
 25 the case in motion and causing it to proceed. Acres' Opposition, pp. 17-18. Neither
 26 document proves that the Defendants were responsible for initiating or maintaining
 27 *Blue Lake v. ABI*. They also cite to Judge James Lambden's order finding that Blue
 28 Lake Casino could not establish the reasonable reliance element of its fraud claim

1 against Mr. Acres as their evidence that no reasonable person would have believed
 2 there was grounds to bring the lawsuit. *Id.*, p. 18. They then cite to the same
 3 passage from Judge Lambden’s order as proof that Blue Lake Casino brought *Blue*
 4 *Lake v. ABI* for a purpose other than prevailing in the case. *Id.*, p. 19. Acres’
 5 arguments are speculative, unreasonable, unpersuasive, and do not salvage their
 6 inadequate wrongful use of civil proceedings claim.

7 **3. The Defendants cannot aid and abet breaches of a fiduciary duty**
 8 **where no underlying duty exists.**

9 The Defendants argue that Acres’ two aiding and abetting causes of action,
 10 respectively for breach of fiduciary duty and constructive fraud by Judge Marston,
 11 fail as a matter of law because Judge Marston, and other judges like him, do not
 12 have a fiduciary relationship with the general public that appear as litigants before
 13 them. MOPA, pp. 20-23. Defendants further point out that *United States v. Holzer*,
 14 816 F.2d 304, 307 (7th Cir. 1987) [*“Holzer”*], cited in Acres’ FAC, does not
 15 support the premise that judges can be sued for damages for breach of fiduciary
 16 duty to the general public, and was subsequently vacated by the United States
 17 Supreme Court, which, along with the Seventh Circuit Court of Appeals, declined
 18 to endorse the same premise. *See id.*

19 Acres acknowledge that *Holzer* was vacated, but argue that it is persuasive
 20 legal authority because it was cited by a Pennsylvania district court in *U.S. v.*
 21 *Holck*, 398 F.Supp.2d 338, 349, fn. 3 (E.D. Pa. 2005). The *Holck* court cited
 22 *Holzer* to factually contrast bribes to judges and loans to judges. See *Holck, supra*,
 23 398 F.Supp.2d at 349. *Holck* did not cite *Holzer* for the premise that judges can be
 24 civilly liable for breach a fiduciary duty to litigants, because *Holzer* never made
 25 that determination, and no such duty exists. Acres’ aiding and abetting causes of
 26 action against the Defendants are without merit and should be dismissed.

27 **E. The Court should not indulge another amendment to Acres’ complaint.**

28 Acres argue that they should be given another opportunity to amend their

complaint because this Court only instructed them to flesh out their RICO cause of action, implying that they have not been given an opportunity to amend their three other state law claims. Nothing in this Court's June 3, 2022 Order granting Defendants' motion to dismiss precluded Acres from amending any deficiencies in their state-other law causes of action. *See* Dkt. 89. Acres also do not explain how further amendment would help. "A plaintiff may not in substance say 'trust me,' and thereby gain a license for further amendment when prior opportunity to amend has been given." *Salameh v. Tarsadia Hotel*, 726 F3d 1124, 1133 (9th Cir. 2013).

This Court should not indulge a second amendment to their complaint. Acres has had two chances and over three years to state a viable claim, but failed to do so. It prejudices the Defendants to be dragged through litigation while Acres tries to manufacture a viable legal theory that does not exist. In fact, there is no end in sight for this litigation as Acres threatened this Court with an appeal if this motion is granted. Acres' Opposition, p. 15, fn. 4.

III. CONCLUSION

This Court gifted Acres the chance to amend their complaint to flesh out their RICO claim against Ms. Ramsey and Mr. Frank, the last remaining defendants in this saga, sued in their capacities as Blue Lake Rancheria tribal officials and Blue Lake Casino executives. Their FAC fails to overcome the Defendants' various personal immunities shielding them from this suit, and additionally fails to flesh out their RICO claim by falsely mischaracterizing payment of Judge Marston's compensation as bribery. The Defendants urge this Court to dismiss this case without leave to amend.

Dated: September 14, 2022

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By: /s/ Casey C. Shaw
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Casey C. Shaw
Attorneys for Defendants
Arla Ramsey and Thomas Frank

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022 a true and correct copy of the DEFENDANTS ARLA RAMSEY AND THOMAS FRANK'S REPLY IN SUPPORT OF RULE 12(B)(1) AND 12(B)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT was e-filed with the Clerk of the Court by using the CM/ECF system, which effectuated service upon all counsel of record.

/s/ Casey C. Shaw
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