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13 and AMY O'NEILL

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

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

19 Plaintiff,

20 v.

21 LESTER MARSTON, an individual; ARLA
22 RAMSEY, an individual; THOMAS
23 FRANK, an individual; ANITA HUFF, an
24 individual; RAPPORT AND MARSTON,
25 an association of attorneys; DAVID
26 RAPPORT, an individual; COOPER
27 DAMARSE, an individual; DARCY
28 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,

Defendants.

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

) **SPECIALLY APPEARING**
) **DEFENDANTS BOUTIN JONES INC.,**
) **MICHAEL CHASE, DANIEL STOUDER**
) **& AMY O'NEILL'S ANTI-SLAPP**
) **MOTION TO STRIKE ABI's PENDENT**
) **STATE LAW CLAIMS**

) Complaint Filed: August 28, 2019

) Hearing Date: February 26, 2020
) Time: 2:00 p.m.

) Judge: Hon. William H. Orrick

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I. INTRODUCTION

Specially Appearing Defendants Boutin Jones Inc., Daniel Stouder, Amy O'Neill, and Michael Chase (collectively "Boutin Jones Defendants") submit this anti-SLAPP¹ special motion to strike Plaintiff Acres Bonusing, Inc.'s ("Plaintiff" or "ABI") pendent state law claims against the Boutin Jones Defendants. ABI seeks to recover compensatory and punitive damages for wrongful use of civil proceedings (malicious prosecution), aiding and abetting malicious prosecution, conspiracy to commit malicious prosecution, aiding and abetting breach of fiduciary duty, and aiding and abetting constructive fraud from the Boutin Jones Defendants, arising out of the Boutin Jones Defendants' representation of ABI's litigation adversary, Blue Lake Casino, in an underlying lawsuit filed by Blue Lake Casino against ABI.

By this motion, the Boutin Jones Defendants have met their burden to show that ABI's Complaint arises out of the Boutin Jones Defendants' constitutionally protected petitioning activity. ABI cannot meet its burden of establishing a probability of prevailing on the merits of its claims against the Boutin Jones Defendants because (1) all of its claims are barred by the one-year statute of limitations found in California Code of Civil Procedure § 340.6 applicable to actions against attorneys arising out of the performance of professional services; (2) its claims for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud are barred by the litigation privilege found in California Civil Code § 47(b); and (3) it cannot show a probability of prevailing on any of its pendent state law claims.

Further, this Court has no subject matter jurisdiction over the Boutin Jones Defendants because they maintain sovereign immunity for their legal representation of Blue Lake Casino in Tribal Court. *Great W. Casinos v. Moranga Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1423-24. The application of sovereign immunity will be addressed in a separate joinder in a Motion to Dismiss filed by Janssen Malloy LLP, Megan Yarnall, and Amelia Burroughs, which will be heard concurrently with this anti-SLAPP motion.

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¹ "SLAPP": Strategic Lawsuit Against Public Participation, Code Civ. Proc. § 425.16.

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II. STATEMENT OF FACTS

The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt County. (Compl. ¶ 9.) Blue Lake Casino and Hotel (“Blue Lake Casino”) is owned and operated by the Tribe. (Compl. ¶ 12.) James Acres was the owner of Acres Bonusing, Inc. (“ABI”), a Nevada gaming company. (Compl. ¶¶ 7-8.) In 2010, Blue Lake Casino and Acres negotiated an agreement whereby Blue Lake Casino would lease an iSlot gaming system (“iSlot System”) from ABI. (Stouder Decl. ¶ 5.) The iSlot System is a server-based gaming system that would allow casino patrons to participate in casino gaming from handheld devices while at Blue Lake Casino. (Id.)

In the final negotiations, Defendant Thomas Frank and Steve Salatti (both representatives of Blue Lake Casino) met with Acres on July 6, 2010. (Stouder Decl. ¶ 12, Exh. G, 6/23/17 Frank Decl. ¶ 2.) At that meeting, Mr. Frank expressed concerns about the need for Blue Lake Casino to provide a \$250,000 advanced deposit for the iSlot System; that he was not certain whether the iSlot System was worth the \$250,000 upfront cost; that he was concerned about paying \$250,000 for the iSlot System because it was not fully developed and was an unproven system; and that he was concerned about paying the \$250,000 deposit because he was uncertain whether the iSlot System would be profitable. (Id. at ¶ 3.) The iSlot Agreement provided that ABI would develop, maintain, and upgrade the iSlot System. (Stouder Decl. ¶ 5, Exh. A, iSlot Agreement; Stouder Decl. ¶ 12, Exh. F, 8/11/16 Frank Decl. ¶ 4.) Acres stated to Frank that the royalty repayment scheme contemplated in the agreement would repay the entire \$250,000 advanced deposit by way of reduced lease fees, and that the iSlot System would be profitable. (Id. at ¶¶ 4-5.) It was self-evident that the iSlot System would have to work in order to be profitable. Based on these representations by Acres, Blue Lake Casino entered into the iSlot Agreement with ABI on July 7, 2010 (“iSlot Agreement”). (Stouder Decl. ¶ 12, Exh. F, 8/11/16 Frank Decl. ¶ 3; ¶ 12, Exh. G, 6/23/17 Frank Decl., ¶ 6.) Without these representations from Acres, Blue Lake Casino would not have entered into the iSlot Agreement at all. (Stouder Decl. ¶ 12, Exh. G, 6/23/17 Frank Decl. ¶ 6.)

The iSlot Agreement provided that Blue Lake Casino would lease the iSlot System from ABI; pay ABI the “advanced deposit against royalties of \$250,000”; and, pay ABI a monthly lease-fee for the iSlot System and that “one half of each month’s lease fee shall be applied against the

1 advanced deposit until it is extinguished.” (Stouder Decl. ¶ 5, Exh. A, iSlot Agreement.) The initial
2 term of the iSlot Agreement was two years from the date of installment.

3 Blue Lake Casino installed 88 iSlot System gaming devices in its casino. (Stouder Decl. ¶
4 12, Exh. G, 6/23/17 Frank Decl. ¶ 10.) Based on Blue Lake Casino’s approximations, each device
5 would only need to generate a theoretical net win of approximately \$23,148 per year to recoup the
6 advanced deposit in the two-year term. Based on Frank’s experience, Frank believed that it was not
7 unreasonable that a successful gaming device similar to those used in the iSlot System would
8 exceed \$24,000 per year during the initial two-year term and that the \$250,000 advanced deposit
9 could be recouped through the royalty repayment scheme during the initial contract term. (Id.)

10 In reality, the iSlot System was a complete failure and generated virtually no revenue.
11 (Stouder Decl. ¶ 6, Exh. G, 6/23/17 Frank Decl. ¶ 11.) The iSlot System suffered from technical
12 problems that impeded its operation and only \$750 of the \$250,000 advanced deposit was ever
13 recouped by Blue Lake Casino under the royalty repayment scheme. (Id.) Acres terminated the
14 iSlot Agreement in October of 2012 before Blue Lake Casino recovered the advance deposit. (Id.)

15 In June 2012 emails between Acres and Blue Lake Casino, Acres noted that he knew Blue
16 Lake Casino was not sending ABI monthly participation reports because the iSlot System was not
17 generating any revenue by stating, “You haven’t been able to send me a participation report so I
18 can bill you! Which I’m not too worried about it, because it’s not real money.” (Stouder Decl. ¶ 13,
19 Exh. H, Acres Emails at pg. 1.) Acres also reiterated his understanding that the advanced deposits
20 he required generally and of Blue Lake Casino were treated as an “advance against royalties.” (Id.)
21 This is an understanding that Acres has since expressly contradicted in his declarations filed in the
22 Underlying Action where he stated that, despite the contract language, there is no provision for the
23 repayment of the \$250,000 deposit. (Sturmer Decl. ¶ 4, Exh. B, 5/12/17 Acres Decl. ¶ 9.)

24 Acres stated in response to Blue Lake Casino’s request regarding the “redeployment of [the]
25 currently existing broken [iSlot S]ystem”:

26 “I think at this time we’re not willing to extend ourselves on the V1.0 architecture
27 [the version of the iSlot System Blue Lake Casino leased from ABI] without a
28 significant deposit. . . . ¶ At this point I’d add . . . to continue building the user base
on the V1.0 system, we need a significant deposit. ¶ We’re really in a place where
everyone on our team chooses what NOT to do each day. There’s all sorts of

1 opportunities we don't have time to chase. To reallocate any resources from our
2 V2.0 development, or our Dispatch tools, we'd really need some cash to drive that."
(Stouder Decl. ¶ 13, Exh. H, Acres Emails at pg. 2.)

3 On January 12, 2016, Boutin Jones filed a complaint against Acres and ABI on behalf of
4 Blue Lake Casino in the Tribal Court of the Tribe Blue Lake Rancheria, *Blue Lake Casino and*
5 *Hotel v. Acres Bonusing, Inc. et al.*, Tribal Court Case No. C-15-1215LJM ("Underlying
6 Complaint"). (Stouder Decl. ¶ 8, Exh. D, Underlying Complaint.) This action and the related
7 federal actions filed by Acres are referred to collectively as the "Underlying Action." The
8 Underlying Complaint alleged causes of action for breach of contract, tortious breach of implied
9 covenant of good faith and fair dealing, unjust enrichment, and money had and received against
10 ABI. (Stouder Decl. ¶ 8, Exh. D, Underlying Compl.)

11 The Underlying Complaint specifically alleged that, Blue Lake Casino and ABI entered into
12 an agreement whereby ABI would develop gaming software that Blue Lake Casino could use at its
13 casino; during the term of the agreement, ABI would service, support, maintain, and upgrade the
14 iSlot System; Blue Lake Casino paid ABI a \$250,000 deposit required by the agreement which was
15 intended to be paid back through the royalty repayment scheme in the agreement; Blue Lake Casino
16 met all conditions for its performance under the agreement; ABI failed and refused to provide
17 upgrades and improvements to the iSlot System sufficient to make the system successful as
18 provided for in the agreement; ABI instead dedicated its time and attention to a different system
19 which was not useable by Blue Lake Casino; ABI's failure to perform under the agreement
20 prohibited Blue Lake Casino from recouping the advance deposit as contemplated in the agreement;
21 Blue Lake Casino only recovered approximately \$750 of the \$250,000 deposit over the life of the
22 agreement; ABI terminated the agreement; and ABI refused to return the deposit. (Stouder Decl. ¶
23 8, Exh. D, Underlying Compl.) The Underlying Complaint also alleged that, at the time the iSlot
24 Agreement was entered into, Acres, as an agent of ABI, and ABI knew that the iSlot System would
25 fail and that the deposit amount would never be recouped through the royalty repayment scheme
26 because the iSlot System could never satisfactorily perform; Acres did not intend for ABI to
27 provide the upgrades and did not intend that the advanced deposit would be repaid to Blue Lake
28 Casino at the time he made the representations; Acres intended that Blue Lake Casino rely on his

1 representations; Blue Lake Casino reasonably relied on these representations, and would not have
2 entered into the iSlot Agreement absent those representations; and, ABI's conduct was a substantial
3 factor in causing Blue Lake Casino's harm. (Stouder Decl. ¶ 8, Exh. D, Underlying Compl.) At the
4 time the Boutin Jones Defendants filed the Underlying Complaint, and throughout the time that the
5 Boutin Jones Defendants maintained the Underlying Action against, the Boutin Jones Defendants
6 had knowledge of the facts described above.

7 The Chief Judge of the Tribal Court, the Honorable Lester Marston, presided over the
8 Underlying Action until he voluntarily recused himself in December of 2016. (Stouder Decl. ¶ 21,
9 Exh. K, Recusal Order.) Acres and ABI had alleged that Judge Marston had a conflict of interest
10 that precluded him from presiding over the case. (Id.) Justice James Lambden was then selected to
11 preside over the Underlying Action. (Stouder Decl. ¶ 26, Exh. L, Appointment Order.)

12 In February 2017, Boutin Jones substituted out as counsel for Blue Lake Casino and was
13 replaced by Janssen Malloy. (Stouder Decl. ¶ 9, Exh. E, Substn. of Counsel.) After February 2017,
14 the Boutin Jones Defendants had no further involvement in the lawsuit. (Stouder Decl. ¶ 9.) On
15 August 31, 2017, Justice Lambden dismissed *Blue Lake v. ABI* in its entirety. (Compl. ¶ 5.)

16 Acres then filed a complaint on July 13, 2018 in Sacramento County Superior Court, *Acres*
17 *v. Marston, et al.*, Case No. 2018-34-00236929 alleging the same state law causes of action ABI
18 alleges in the instant complaint against the same defendants named in the instant Complaint. All
19 defendants in the state court action successfully brought motions to quash service of summons and
20 complaint based on the defense of sovereign immunity, and Acres is currently appealing that ruling.
21 (Compl. ¶ 32.) The Boutin Jones Defendants' also filed an anti-SLAPP motion in the state court
22 action, nearly identical to the instant anti-SLAPP motion, which was deemed moot because the
23 state court first determined that it did not have jurisdiction to hear Acres' claims. (Compl. ¶ 32.)

24 On August 28, 2019, ABI filed the instant action against the Boutin Jones Defendants,
25 Judge Marston, and others. (Compl. ¶¶ 13-29.) ABI's first cause of action alleges malicious
26 prosecution against Boutin Jones, Daniel Stouder, and Amy O'Neill (collectively the "Malicious
27 Prosecution Defendants"). ABI's second and third causes of action allege aiding and abetting and
28 conspiracy to commit malicious prosecution, respectively, against Michael Chase. ABI's fifth and

seventh causes of action allege aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud, respectively, against the Boutin Jones Defendants. ABI's allegations against the Boutin Jones Defendants arise solely from their representation of Blue Lake Casino in the Underlying Action. (Compl. ¶¶ 23-26, 34, 41, 48-50, 52, 72, 74, 81, 90-92, 98, 110-111, 115-116.)

III. APPLICABLE LEGAL STANDARDS

A. CALIFORNIA'S ANTI-SLAPP STATUTE APPLIES TO ABI'S PENDENT STATE LAW CLAIMS

The anti-SLAPP statute applies to pendent state law claims in federal question cases. *In re Bah* (B.A.P. 9th Cir. 2005) 321 B.R. 41, 46. The Ninth Circuit in *In re Bah* held that the "application of the anti-SLAPP statute to pendent state law claims is appropriate. [Citation.] Important substantive state interests—the protection of citizens' constitutional rights of freedom of speech and petition for the redress of grievances—are furthered by the anti-SLAPP statute and application of the statute to state law claims would not undermine federal interests. [Citation.]" *Id.* Here, ABI's first, second, third, fifth, and seventh causes of action are pendent state law claims and therefore the anti-SLAPP statute is applicable to bar each of those claims.

B. TWO-STEP ANTI-SLAPP PROCEDURE AND STANDARD

California Code of Civil Procedure §425.16, provides for the expeditious resolution of "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." *Sipple v. Found. for Nat. Progress* (1999) 71 Cal.App.4th 225, 235. "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." *Hansen v. Dep't of Corr. and Rehab.* (2008) 171 Cal.App.4th 1637, 1643. First, the court decides whether the defendant has made a prima facie showing that the challenged claim arises from activity protected by § 425.16. *Equilon Enter. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. "A defendant's burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights." *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112. If the court determines that

1 a defendant has made such a showing, the second step requires the court to determine whether the
 2 defendant has demonstrated the merit of the claim by establishing a probability of prevailing on the
 3 claim. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*). The plaintiff must do this with
 4 admissible evidence. *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.

5 **IV. LEGAL ARGUMENTS**

6 **A. ABI'S CLAIMS ARISE FROM PROTECTED PETITIONING ACTIVITY**

7 "In deciding whether the 'arising from' requirement is met, a court considers the pleadings,
 8 and supporting and opposing affidavits stating the facts upon which the liability or defense is
 9 based." *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 408 (*Contreras*) (internal citations
 10 omitted). "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of
 11 action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and
 12 whether that activity constitutes protected speech or petitioning." *Navellier*, 29 Cal.4th at 92.
 13 Protected petitioning activity under § 425.16 includes any written or oral statement or writing made
 14 before, or in connection with an issue under consideration or review in a judicial proceeding. Code
 15 Civ. Proc. § 425.16(e)(1)-(2). Communicative conduct made in litigation, or in connection with
 16 litigation, is also protected by section 425.16(e). *See Bergstein v. Stroock & Stroock & Lavan*
 17 *LLP* (2015) 236 Cal.App.4th 793, 803.

18 ABI's first cause of action alleges malicious prosecution against Boutin Jones, Mr. Stouder,
 19 and Ms. O'Neill ("Malicious Prosecution Defendants") arising out of their representation of Blue
 20 Lake Casino in the Underlying Action. "The plain language of the anti-SLAPP statute dictates that
 21 every claim of malicious prosecution is a cause of action arising from protected activity because
 22 every such claim necessarily depends upon written and oral statements in a prior judicial
 23 proceeding." *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 (*Daniels*). Therefore, ABI's
 24 claim against the Malicious Prosecution Defendants is a cause of action that necessarily pertains to
 25 their written and oral statements made in the course of judicial proceedings and the Malicious
 26 Prosecution Defendants have satisfied the first prong of the anti-SLAPP inquiry on this claim.

27 ABI's second and third causes of action allege aiding and abetting malicious prosecution
 28 and conspiracy to commit malicious prosecution, respectively, against Michael Chase. These

1 claims contain only conclusory allegations that Chase “aided and abetted” and “co-operated with”
2 other defendants in bringing, maintaining, and “managing” the Underlying Action. These
3 allegations are merely the definitional components of ABI’s causes of action and do not form the
4 *activity* that gives rise to Chase’s asserted liability. *See Navellier*, 29 Cal.4th at 92. Rather, Chase’s
5 asserted liability for aiding and abetting and conspiracy arises *solely* out of his appearance at one
6 court hearing wherein he is alleged to have stated that he had personal knowledge of “the whole
7 Rapport and Marston thing.” (Compl. ¶¶ 24, 74-75.) As this statement was made in the course of a
8 judicial proceedings in connection with an issue under consideration therein, ABI’s second and
9 third claims alleged against Chase “arise out of” protected petitioning activity, satisfying the first
10 prong of the anti-SLAPP inquiry.

11 ABI’s fifth and seventh causes of action allege aiding and abetting breach of fiduciary duty
12 and aiding and abetting constructive fraud against the Boutin Jones Defendants. ABI alleges that
13 the wrongful conduct giving rise to liability on these claims is the Boutin Jones Defendants’
14 knowledge of Judge Marston’s activities in the Underlying Action which form the basis for ABI’s
15 claims of breach of fiduciary duty and constructive fraud against Judge Marston; and that the
16 Boutin Jones Defendants’ actions in conducting litigation on behalf of their client in the Underlying
17 Action amount to aiding Judge Marston in carrying out his alleged breach of fiduciary duty and
18 constructive fraud. The allegations of wrongful conduct against the Boutin Jones Defendants
19 necessarily arise out of their litigation activity in the Underlying Action, and the Boutin Jones
20 Defendants therefore have satisfied the first prong of the anti-SLAPP inquiry on ABI’s fifth and
21 seventh causes of action.

22 ABI further attempts to characterize Boutin Jones Defendants’ conduct as illegal as a matter
23 of law in order to exempt its claims from the scope of § 425.16. However, the narrow illegality
24 exception to the anti-SLAPP statute does not apply here because the Boutin Jones Defendants have
25 not conceded, and the evidence does not conclusively establish, that their conduct was illegal as a
26 matter of law. *See Flatley v. Mauro* (2006) 39 Cal.4th 299, 320. Accordingly, because all of ABI’s
27 claims alleged against the Boutin Jones Defendants arise out of protected petitioning activity and

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1 the illegality exception does not apply, the burden shifts to ABI to establish a probability of
2 prevailing on each of the elements of each cause of action.

3 **B. ABI CANNOT MEET ITS BURDEN OF SHOWING THE PROBABILITY OF**
4 **PREVAILING ON ANY OF ITS PENDENT STATE LAW CLAIMS**

5 **1. All of ABI's Pendent State Law Claims Are Barred By the One-Year Statute of**
6 **Limitations Which Applies to Actions Against Attorneys Where the Alleged**
7 **Wrongful Conduct Arises In the Performance of Professional Services**

8 ABI cannot prevail on its pendent state law claims for malicious prosecution, aiding and
9 abetting malicious prosecution, conspiracy to commit malicious prosecution, aiding and abetting
10 breach of fiduciary duty, or aiding and abetting constructive fraud against the Boutin Jones
11 Defendants because they are barred as a matter of law by the one-year statute of limitations that
12 applies to actions against attorneys. Under California Code of Civ. Proc. §340.6, “[a]n action
13 against an attorney for a wrongful act or omission, other than for actual fraud, **arising in the**
14 **performance of professional services** shall be commenced within one year after the plaintiff
15 discovers, or through the use of reasonable diligence should have discovered, the facts constituting
16 the wrongful act or omission” *Id.*

17 **a. CCP 340.6 Applies to ABI's First, Second, and Third Claims Relating to**
18 **Malicious Prosecution**

19 As discussed *infra*, ABI's claims for malicious prosecution, aiding and abetting malicious
20 prosecution, and conspiracy to commit malicious prosecution necessarily arises from the Boutin
21 Jones Defendants' performance of professional services to their client Blue Lake Casino in the
22 Underlying Action. The California Court of Appeal has clearly held that “consistent with *Lee*,
23 section 340.6(a) applies to malicious prosecution claims against attorneys who performed
24 professional services in the underlying litigation.” *Connelly v. Bornstein* (2019) 33 Cal.App.5th
25 783, 799. Further, California case law clearly establishes that the statute of limitations applicable to
26 ABI's aiding and abetting and conspiracy to commit malicious prosecution claims is the same as
27 the underlying tort to which a defendant is alleged to have aided and abetted or conspired to
28 commit, which is the § 340.6 one-year statute of limitations applicable to claims for malicious
prosecution brought against attorneys because the claim necessarily arises from the attorney's

1 performance of professional services. *Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225
 2 Cal.App.4th 1451, 1478–1479, *as modified* (May 27, 2014) (“The statute of limitations for a cause
 3 of action for aiding and abetting a tort generally is the same as the underlying tort.”); *Maheu v.*
 4 *CBS, Inc.* (1988) 201 Cal.App.3d 662, 673 (holding the applicable statute of limitations for
 5 conspiracy is determined by the nature of the action in which the conspiracy is alleged). Therefore
 6 the one-year statute of limitations applies to ABI’s first, second, and third causes of action.

7 **b. CCP 340.6 Applies to ABI’s Fifth Claim for Aiding and Abetting Breach of**
 8 **Fiduciary Duty and Seventh Claim for Aiding and Abetting Constructive**
 9 **Fraud**

10 All the alleged wrongful conduct of the Boutin Jones Defendants that underpins ABI’s
 11 claims for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud
 12 against the Boutin Jones Defendants was conduct done in the course of providing professional
 13 services representing Blue Lake Casino in the Underlying Action. In *Graham-Sult v. Clainos* (9th
 14 Cir. 2014) 756 F.3d 724, the Ninth Circuit, applying California law, held that a non-client’s claim
 15 for aiding and abetting breach of fiduciary duty against an attorney was barred by the one-year
 16 statute of limitations found in § 340.6, where plaintiff’s whole claim arose from the attorney
 17 defendants’ performance of professional services representing their client who was the executor of
 18 an estate to which plaintiff was a beneficiary. ABI does not allege one single act that was done
 19 outside the course of the Boutin Jones Defendants’ performance of professional services to its
 20 client Blue Lake Casino, therefore the one-year statute of limitations found in § 340.6 applies to
 21 ABI’s fifth and seventh causes of action.

22 **c. ABI Did Not File the Instant Complaint Against the Boutin Jones Defendants**
 23 **Before the 1-Year Statute of Limitations Applicable to Its Claims Had Run**

24 Section 340.6 requires that ABI’s claims against the Boutin Jones Defendants “be
 25 commenced within one year after the plaintiff discovers, or through the use of reasonable diligence
 26 should have discovered, the facts constituting the wrongful act or omission” *Id.*

27 ABI’s *verified* Complaint alleges that “[f]rom January 2016 through July 2017, Blue Lake
 28 Rancheria (‘Blue Lake’) and its confederates sued Acres Bonusing, Inc. . . . within Blue Lake’s trial
 court. Blue Lake and its confederates sought ruinous judgments, within a court they controlled,

1 before a judge they suborned, on conjured claims of fraud and breach of contract.” (Compl. ¶ 1.)
2 ABI also alleges that it received Judge Marston’s billing records in January 2017 (Compl. ¶ 33);
3 that Judge Marston recused himself from presiding over *Blue Lake v. ABI* on January 10, 2017
4 (Compl. ¶ 109); that Acres and ABI presented evidence in early February 2017 that allegedly
5 showed that a single author had created documents filed by Judge Marston and Boutin Jones in
6 *Acres v. Blue Lake I* and *Acres v. Blue Lake II* (Compl. ¶ 110); and that the Boutin Jones
7 Defendants withdrew from representation of its client in the Underlying Litigation in February
8 2017 (Compl. ¶ 111). Further, ABI alleges that *Blue Lake v. ABI* was dismissed in its entirety on
9 August 31, 2017. (Compl. ¶ 5.) Thus, ABI discovered or should have discovered all alleged
10 wrongful conduct that comprises its state law claims against the Boutin Jones Defendants as early
11 as January 2016, but **no later than August 31, 2017**. Thus, ABI would have had to file its instant
12 Complaint by August 31, 2018 **at the latest** to be considered timely. ABI filed its Complaint on
13 August 28, 2019, and ABI’s state law claims against the Boutin Jones Defendants are therefore
14 barred by the one-year statute of limitations.

15 Further, ABI has not and cannot allege any facts that would toll the statute of limitations in
16 the instant case. As alleged in ABI’s verified Complaint, it suffered actual injury when *Blue Lake v.*
17 *ABI* was instituted against it by the Boutin Jones Defendants in January 2016, specifically alleging
18 that “[t]hroughout the pendency of *Blue Lake v. ABI*, ABI’s business was harmed because of the
19 stress placed on Mr. Acres by defendants’ tortious conduct.” (Compl. ¶ 59.) Further, the Complaint
20 does not allege that Boutin Jones Defendants ever represented ABI, nor can ABI allege that the
21 Boutin Jones Defendants ever represented it.

22 Therefore, because the statute of limitations ran on all of ABI’s state law claims **at the**
23 **latest** on August 31, 2018—one year before ABI filed its instant Complaint—ABI’s state law
24 claims against the Boutin Jones Defendants are barred as a matter of law. Accordingly, there is no
25 evidence that ABI can present to meet its burden on the second prong of the anti-SLAPP statute and
26 the Boutin Jones Defendants’ motion must be granted.

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1 **2. ABI’s Fifth Claim for Aiding and Abetting Breach of Fiduciary Duty and**
2 **Seventh Claim for Aiding and Abetting Constructive Fraud Are Also Barred**
3 **As a Matter of Law By the Litigation Privilege**

4 In addition to all of ABI’s claims being barred by the one-year statute of limitations as a
5 matter of law, ABI also cannot show a probability of prevailing on its claims for aiding and
6 abetting breach of fiduciary duty and aiding and abetting constructive fraud because these claims
7 are barred by the litigation privilege found in California Civil Code § 47(b). The litigation privilege
8 applies to any communication “(1) made in judicial or quasi-judicial proceedings; (2) by litigants or
9 other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that ha[s]
10 some connection or logical relation to the action.” *Mansell v. Otto* (2003) 108 Cal.App.4th 265,
11 271. This privilege also extends to statements made outside of judicial proceedings; and
12 “statements made to (and information concealed from)” the plaintiff and the court related to the
13 action. *Graham-Sult*, 756 F.3d at 742. Defendants are immunized “from virtually any tort liability
14 (including claims for fraud), with the sole exception of causes of action for malicious
15 prosecution.” *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333. “Any doubt about whether the
16 privilege applies is resolved in favor of applying it.” *Contreras*, 5 Cal.App.5th at 415.

17 ABI does not allege any conduct by the Boutin Jones Defendants that was not a
18 communication made in connection with a judicial proceeding. The broad scope of the litigation
19 privilege protects the Boutin Jones Defendants from liability based on (1) preparing, filing, and
20 serving documents in the Underlying Action; (2) drafting and sending a demand letter to ABI and
21 communicating with ABI about the Underlying Action; and, (3) making statements in judicial
22 proceedings in the Underlying Action. Further, the litigation privilege protects the Boutin Jones
23 Defendants from liability based on information allegedly concealed from ABI related to the
24 Underlying Action. *See Graham-Sult*, 756 F.3d at 742. Accordingly, ABI’s claims for aiding and
25 abetting breach of fiduciary duty and aiding and abetting constructive fraud are barred by the
26 litigation privilege as a matter of law. ABI cannot show a probability of prevailing on these claims,
27 and the Boutin Jones Defendants’ anti-SLAPP motion to strike these claims must be granted.

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1 **3. ABI Cannot Show a Probability of Prevailing On Any of Its Pendent State Law**
2 **Claims**

3 **a. ABI Cannot Meet Its Burden to Show Probability of Prevailing On Its First**
4 **Claim for Malicious Prosecution**

5 To establish a claim for malicious prosecution claim, ABI must prove that the prior action
6 was initiated or maintained: (1) by the defendants and was pursued to a legal termination in his
7 favor; (2) without probable cause; and, (3) with malice. *Sheldon Appel Co. v. Albert &*
8 *Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*); see *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970.
9 At the anti-SLAPP stage, ABI must show a probability of prevailing on each individual element
10 of the malicious prosecution action by showing that the factual allegations can be substantiated by
11 admissible evidence. See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728. ABI cannot
12 meet its burden with respect to the elements of probable cause or malice.

13 **i. Each Claim Alleged Against ABI In the Underlying Action Was Maintained**
14 **With Probable Cause**

15 The existence of probable cause is always an issue of law for the court to decide. *Sheldon*
16 *Appel*, 47 Cal.3d at 868, 877-82. “[P]robable cause is determined objectively, . . . i.e., probable
17 cause exists if ‘any reasonable attorney would have thought the claim tenable.’ [Citation.]” *Wilson*
18 *v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817; and, *Zamos*, 32 Cal.4th 958. Under the
19 “rather lenient” probable cause standard:

20 “[a] litigant or attorney who possesses **competent evidence to substantiate a**
21 **legally cognizable claim** for relief does not act tortiously by bringing the claim,
22 even if also aware of evidence that will weigh against the claim.”

23 *Wilson*, 28 Cal.4th at 822, citing *Sheldon Appel*, 47 Cal.3d at 885 (fn. and citation omitted)
24 (emphasis added). “[S]o long as the evidence known to the defendant could support
25 an *objectively reasonable* suspicion—regardless of whether the defendant actually possessed
26 such a suspicion—the defendant is not liable for malicious prosecution.” *Roberts v. McAfee,*
27 *Inc.* (9th Cir. 2011) 660 F.3d 1156, 1164 (citing *Sheldon Appel*, 47 Cal.3d at 886).

28 The Underlying Complaint filed by Boutin Jones contained four claims against ABI: (1)
breach of contract; (2) tortious breach of the covenant of good faith and fair dealing; (3) unjust
enrichment; and (4) money had and received. (Stouder Decl. ¶ 8, Exh. D, Underlying Compl. ¶¶ 13-

1 32.) The Underlying Complaint also alleged fraudulent inducement against Acres personally as the
2 principle of ABI; this cause of action is not at issue in ABI's instant Complaint.

3 To prevail on a claim for breach of contract, the plaintiff must prove the contract, the
4 plaintiff's performance of the contract, the defendant's breach, and the resulting damage to the
5 plaintiff. *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186. To prove a claim for breach of
6 the implied covenant of good faith and fair dealing, the plaintiff must also show that the defendant
7 unfairly interfered with plaintiff's right to receive the benefits under the contract. *Guz v. Bechtel*
8 *National, Inc.* (2000) 24 Cal.4th 317, 349. To prevail on a claim for unjust enrichment, the plaintiff
9 must establish receipt of a benefit and unjust retention of the benefit at the expense of another.
10 *Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769. Additionally, to prove a claim for
11 money had and received, a plaintiff must show that the defendant received money that was intended
12 to be used for the benefit of the plaintiff, the money was not used for the plaintiff's benefit, and that
13 the defendant has not given the money to the plaintiff. CACI No. 370; *English & Sons, Inc. v.*
14 *Straw Hat Restaurants, Inc.* (N.D. Cal. 2016) 176 F.Supp.3d 904, 926 (applying California law).

15 The claims alleged against ABI in the Underlying Complaint are legally tenable on their
16 face. (See Stouder Decl. ¶ 8, Exh. D, Underlying Compl. ¶¶ 13-32.) Further, at all times in the
17 Underlying Action, the Boutin Jones Defendants possessed evidence to substantiate legally
18 cognizable claims for breach of contract, breach of the covenant of good faith and fair dealing,
19 unjust enrichment, and money had and received. The Boutin Jones Defendants relied on Mr. Frank,
20 an experienced casino executive, who stated that he was duped by ABI's principle and employee,
21 Acres, and that Blue Lake Casino would not have entered into the iSlot Agreement but for Acres'
22 representations, and that Acres intended the reliance by Blue Lake Casino for the benefit of ABI.
23 (See Stouder Decl. ¶ 12, Exh. F, 8/11/16 Frank Decl.; ¶ 12, Exh. G, 6/23/17 Frank Decl.; Sturmer
24 Decl. ¶ 3, Exh. A, 4/28/17 Acres Decl. ¶¶ 4-6; Sturmer Decl. ¶ 4, Exh. B, 5/12/17 Acres Decl. ¶ 8;
25 Stouder Decl. ¶ 13, Exh. H, Acres Emails); see also *Daniels*, 182 Cal.App.4th at 223 ("In general, a
26 lawyer is entitled to rely on information provided by the client."). The Boutin Jones Defendants
27 also knew that Blue Lake Casino paid ABI \$250,000; that Blue Lake Casino had only recouped
28 approximately \$750 of the \$250,000 deposit; that ABI did not continue to improve the iSlot

1 System, as explicitly provided for in the iSlot Agreement; and that ABI had not returned any
2 amount of the deposit to Blue Lake Casino. (*See* Compl. ¶ 44; Stouder Decl. ¶¶ 6, 13, Exh. H,
3 Acres Emails.) Further, ABI did not produce any verifiable facts in the time that the Boutin Jones
4 Defendants represented Blue Lake Casino, or ever, in the Underlying Action that disproved Blue
5 Lake Casino’s allegations. *See Daniels*, 182 Cal.App.4th at 223; *cf. Arcaro v. Silva & Silva Enters.*
6 *Corp.* (1999) 77 Cal.App.4th 152, 156–57 (adversary provided *verifiable facts* disproving
7 allegations made in demand letter).

8 Because competent evidence existed to support a reasonable suspicion that Blue Lake
9 Casino could maintain its causes of action against ABI, ABI cannot meet its burden to show that **no**
10 **reasonable attorney** would have thought the claim tenable on the facts known to the Malicious
11 Prosecution Defendants as a matter of law.

12 **ii. The Underlying Action Was Not Maintained with Malice**

13 Malice is usually a question of fact for the jury to determine. *Sheldon Appel*, 47 Cal.3d at
14 874. However, **the absence of any affirmative evidence of malice on the part of the malicious**
15 **prosecution defendant precludes a successful malicious prosecution action as a matter of law.**
16 *Daniels*, 182 Cal.App.4th at 227, fn. 7 (emphasis added). The malice element is a distinct
17 requirement from the probable cause element which relates to the underlying plaintiff and his or her
18 lawyers’ *subjective intent or purpose* in initiating or continuing the prior action. *Id.* at 224, 226; *see*
19 *also Zamos*, 32 Cal.4th at 969. The Malicious Prosecution Defendants’ motion must be granted
20 because there is a complete lack of any affirmative evidence of malice which precludes a malicious
21 prosecution action as a matter of law. *See id.*

22 Not only is there no evidence of malice, ABI does not even allege (and cannot allege) *any*
23 *specific conduct* of malice against ABI by the Malicious Prosecution Defendants for which
24 evidence could be introduced to support such an allegations. ABI’s “malice” allegations against the
25 Boutin Jones Defendants are limited to the repetitive and conclusory allegation that all of the
26 Boutin Jones Defendants’ alleged conduct was “rife with malice” (Compl. ¶¶ 132, 144, 152, 159,
27 175, 194); and the conclusory allegation that the Malicious Prosecution Defendants continued the
28 Underlying Action “for reasons other than succeeding on the merits of the claim.” (Compl. ¶ 139.)

1 Acres alleges no facts as to what these other reasons might be, as none exist. The Malicious
 2 Prosecution Defendants did not maintain the action for reasons other than succeeding on the merits
 3 of the claims or with any improper motive; the Malicious Prosecution Defendants sought only to
 4 vindicate Blue Lake Casino's rights through the maintenance of the Underlying Complaint.
 5 (Stouder Decl. ¶¶ 14-20; O'Neill Decl. ¶¶ 7-12.) Malice may be proven by inferences drawn from
 6 circumstantial evidence only if the "inferences must be reasonably deducible from the evidence,
 7 and not such as are derived from speculation, conjecture, imagination, or guesswork." *Joseph E.*
 8 *DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161. The allegations of malice in this case are
 9 solely the product of ABI's speculation and conjecture.

10 ABI's sole allegation of malice in the Complaint alleges the improper purpose for which the
 11 action **against Acres** was brought by **Blue Lake Casino**; it does not allege any improper purpose
 12 for which the action **against ABI** was brought by the **Malicious Prosecution Defendants**. The
 13 Complaint alleges that "[d]espite Mr. Acres not being a party to the iSlot Agreement, Blue Lake
 14 [Casino] nevertheless sued him individually in *Blue Lake v. ABI*" and that "Justice Lambden's
 15 Order stated **Blue Lake Casino's** inclusion of Mr. Acres in *Blue Lake v. ABI* was an 'attempt[] to
 16 conjure a personal warranty' by Mr. Acres to supplement its action against ABI." (Compl. ¶ 53
 17 (emphasis added).) This allegation of malice, even if admissible, is **against Blue Lake Casino**, not
 18 the Malicious Prosecution Defendants. **A client's improper motive cannot be imputed to its**
 19 **attorney.** *See Daniels*, 182 Cal.App.4th at 221. Acres cannot present admissible evidence to
 20 substantiate any allegation of malice because the Malicious Prosecution Defendants did not
 21 maintain the action against ABI for any purpose, including the alleged purpose of conjuring a
 22 personal warranty against Acres. (Stouder Decl. ¶¶ 14-20; O'Neill Decl. ¶¶ 7-12.) Accordingly, the
 23 Malicious Prosecution Defendants' evidence supporting this motion necessarily defeats any attempt
 24 by Plaintiff to establish evidentiary support for the claim.

25 **b. ABI Cannot Meet Its Burden to Show Probability of Prevailing On Second**
 26 **Claim for Aiding And Abetting Malicious Prosecution Or Third Claim for**
 27 **Conspiracy To Commit Malicious Prosecution**

28 To establish a claim of aiding and abetting against Mr. Chase, ABI must first prove that it
 was subjected to harm resulting from malicious prosecution by Defendants Ramsey, Frank, Boutin

1 Jones, Stouder, O’Neill, Janssen Malloy LLP, Burroughs, and Yarnall (collectively the “Wrongful
2 Use Defendants”). *See* CACI 3610 – Aiding and Abetting. Similarly, Plaintiff must first be able to
3 establish the underlying tort of malicious prosecution before liability for conspiracy to commit the
4 tort can be imposed. *See* CACI 3600 – Conspiracy. Plaintiff cannot establish a claim for malicious
5 prosecution against the Wrongful Use Defendants because all the claims brought against ABI in the
6 Underlying Action were brought and maintained with probable cause and were not brought with
7 malice, as discussed *infra*.

8 Even if the prior action was initiated and maintained without probable cause (it was not), to
9 hold Mr. Chase liable as an aider and abettor, ABI must prove all of the following: (1) that Chase
10 knew that malicious prosecution was being committed by the Wrongful Use Defendants; (2) that
11 Chase gave substantial assistance or encouragement to the Wrongful Use Defendants; and (3) that
12 Chase’s conduct was a substantial factor in causing harm to ABI. *Id.* California courts have long
13 held that liability for aiding and abetting depends on **proof the defendant intentionally**
14 **participated with knowledge of the object to be attained.** *Upasani v. State Farm General Ins.*
15 *Co.* (2014) 227 Cal.App.4th 509, 519. To defeat this anti-SLAPP motion, ABI must establish a
16 probability of prevailing by showing that the factual allegations supporting each individual element
17 of the aiding and abetting claim can be substantiated by admissible evidence. *See Jarrow Formulas,*
18 *31 Cal.4th 728.* ABI cannot meet this burden.

19 Mr. Chase did not know or believe that malicious prosecution was being committed (it was
20 not) by the Wrongful Use Defendants. (Chase Decl. ¶¶ 9-11.) Chase only desired to vindicate his
21 client’s rights by attending two hearings in related federal court actions filed against Blue Lake
22 Casino and the Tribe filed by Acres. (Chase Decl. ¶¶ 6-7.) Likewise, Chase did not give substantial
23 assistance to the Wrongful Use Defendants. In the year that the Malicious Prosecution Defendants
24 maintained the Underlying Action against ABI, Chase attended only two hearings on behalf of Blue
25 Lake Casino in the related federal court actions filed against Blue Lake Casino by Acres. (Chase
26 Decl. ¶ 7.) Further, Chase did not assist Defendants Janssen Malloy LLP, Ms. Burroughs, and Ms.
27 Yarnall (“Janssen Malloy Defendants”) in any way in maintaining the Underlying Action for an

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1 improper purpose, or provide any assistance whatsoever to the Janssen Malloy Defendants in
2 maintaining the Underlying Action. (Chase Decl. ¶ 12.)

3 ABI has not alleged any facts and cannot present admissible evidence to establish that
4 Chase knew that malicious prosecution was being committed, nor can it allege any other conduct
5 on Chase's part to constitute the provision of substantial assistance to the Wrongful Use
6 Defendants.

7 Further, to the extent that ABI alleges Chase is liable for aiding and abetting malicious
8 prosecution for assisting **Judge Marston** in maintaining or managing the Underlying Action
9 against Acres, these allegations, even if true (they are not), cannot form the basis of liability against
10 Chase under ABI's theory of aiding and abetting malicious prosecution because Judge Marston is
11 not a defendant named in ABI's claim for malicious prosecution and Judge Marston did not bring
12 or maintain a cause of action against ABI. *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th
13 1138, 1146 (“[T]he defendant must have acted to **aid the primary tortfeasor** with knowledge of
14 the object to be attained.”)

15 Similarly, even if the prior action was initiated and maintained without probable cause (it
16 was not), to hold Chase liable as a co-conspirator ABI would also have to establish: (1) the
17 formation and operation of the conspiracy; (2) wrongful conduct in furtherance of the conspiracy;
18 and (3) damages arising from the wrongful conduct. *AREI II Cases* (2013) 216 Cal.App.4th 1004.

19 “[C]onspiracies cannot be established by suspicions. There must be some evidence. Mere
20 association does not make a conspiracy. There must be evidence of some participation or interest in
21 the commission of the offense.” *Id.* (internal citations omitted). The only fact alleged to support
22 ABI's contention that Chase was part of a conspiracy is Chase's alleged statement at a court
23 hearing in the related federal court action filed against Blue Lake Casino by Acres that Chase had
24 personal knowledge of “the whole Rapport and Marston thing.” This allegation cannot support the
25 inference that Chase and others came to a mutual understanding to accomplish a common unlawful
26 plan. *See Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333. Unless there is a meeting of
27 the minds, mere knowledge of alleged wrongful conduct or the independent acts of two or more
28 wrongdoers is not a conspiracy. *Id.* “This rule derives from the principle that a person is generally

1 under no duty to take affirmative action to aid or protect others.” *Kidron v. Movie Acquisition Corp.*
2 (1995) 40 Cal.App.4th 1571, 1583.

3 ABI cannot produce evidence that Chase came to a mutual understanding with any of the
4 Wrongful Use Defendants to accomplish a common unlawful plan (Chase Decl. ¶ 13.) Chase did
5 not intend for ABI to be the subject of a malicious prosecution. (Chase Decl. ¶ 14.) Chase only
6 desired to vindicate his client’s rights by appearing on Blue Lake Casino and the Tribe’s behalf in
7 the federal actions filed by Acres. (Chase Decl. ¶ 6.) ABI cannot meet its burden to show a
8 probability of prevailing on its claim for conspiracy.

9 Further, as stated above, ABI did not allege a claim for malicious prosecution against Judge
10 Marston and any alleged conspiracy with Judge Marston therefore cannot form the basis of a
11 liability against Chase.

12 In addition to the arguments set forth above, to the extent that ABI attempts to hold Chase
13 liable for aiding and abetting malicious prosecution or conspiracy arising out of the alleged
14 malicious prosecution by Blue Lake Casino employee Defendants Ms. Ramsey and Mr. Frank,
15 ABI’s claim is barred by California Civ. Code § 1714.10. Section 1714.10 states that no cause of
16 action against an attorney for a civil conspiracy with his or her client arising from any attempt to
17 contest or compromise a claim or dispute, and based on attorney’s representation of client, may be
18 asserted unless the pleading requirements of § 1714.10 are satisfied. Aiding and abetting and
19 conspiracy are treated the same with respect to claims of conspiracy between an attorney and its
20 client under Civ. Code §1714.10. *Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749, *mod.*
21 (*Feb. 10, 1992*). Therefore, the claims against Chase for aiding and abetting Ms. Ramsey or Mr.
22 Frank, or conspiring with them, in committing malicious prosecution, while they were acting in
23 their official capacity as employees on behalf of Chase’s client Blue Lake Casino (Compl. ¶¶12-
24 13), are clearly barred by § 1714.10.

25 **c. ABI Cannot Meet Its Burden to Show Probability of Prevailing On Its Fifth**
26 **Claim for Aiding and Abetting Breach of Fiduciary Duty or Its Seventh Claim**
27 **for Aiding and Abetting Constructive Fraud**

28 To be held liable as an aider and abettor, a defendant must have knowledge and intent; a
defendant can be held liable on the basis of acting in concert only if he or she knew that a tort had

1 been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort.*
2 *Casey*, 127 Cal.App.4th at 1146. ABI merely alleges that the Boutin Jones Defendants knew Judge
3 Marston was acting in ways constituting breach of fiduciary duty and constructive fraud toward
4 ABI. “Mere knowledge that a tort is being committed and the failure to prevent it does not
5 constitute aiding and abetting. As a general rule, one owes no duty to control the conduct of
6 another.” *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 (internal
7 citations omitted). Chase’s alleged statement that he had knowledge of the “whole Rapport and
8 Marston thing” does not support an inference that Chase or the other Boutin Jones Defendants had
9 knowledge of any alleged wrongful conduct. Even so, mere knowledge does not constitute aiding
10 and abetting.

11 The Boutin Jones Defendants did not commit any act with the intent of facilitating any
12 alleged wrongful conduct of Judge Marston. (Stouder Decl. ¶ 25; O’Neill Decl. ¶ 15; Chase Decl. ¶
13 16.) ABI does not allege any specific acts of the Boutin Jones Defendants that support the claim
14 that the Boutin Jones Defendants offered *substantial assistance* to Judge Marston. ABI’s bare
15 allegation that the Boutin Jones Defendants knew that Judge Marston’s conduct was tortious does
16 not support an inference that the Boutin Jones Defendants *acted with intent* to facilitate the
17 commission of those torts. ABI cannot show a probability of prevailing on his aiding and abetting
18 breach of fiduciary duty and aiding and abetting constructive fraud claims.

19 V. CONCLUSION

20 For the foregoing reasons, the Specially Appearing Boutin Jones Defendants respectfully
21 request that this Court grant their motion to strike each of ABI’s pendent law claims pursuant to
22 Code Civ. Proc. § 425.16. If the Boutin Jones Defendants prevail on this Anti-SLAPP Motion, they

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1 will request a mandatory award of their attorneys' fees and costs pursuant to § 425.16(c)(1)
2 following hearing on this Motion.

3 DATED: December 31, 2019

LERCH STURMER LLP

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5 By _____ /s/ _____

6 Jerome N. Lerch, Esq.
7 Debra Steel Sturmer, Esq.
8 Nicole A. Deterding, Esq.
9 Attorneys for Defendants BOUTIN JONES
10 INC., MICHAEL CHASE, DANIEL
11 STOUDEr, and AMY O'NEILL
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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:

**SPECIALY APPEARING DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE,
DANIEL STOUDEUR & AMY O'NEILL'S ANTI-SLAPP MOTION TO STRIKE
ABI'S PENDENT STATE LAW CLAIMS**

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 Personal Service -- I caused each such envelope to be given to a messenger at San Francisco, California, to be hand delivered to the office of the addressee(s) on this date.

___: Facsimile -- (Only where permitted. Must consult CCP §1012.5 and California Rules of Court 2001-2011. Also consult FRCP Rule 5(e). Not currently authorized in N.D.CA.)

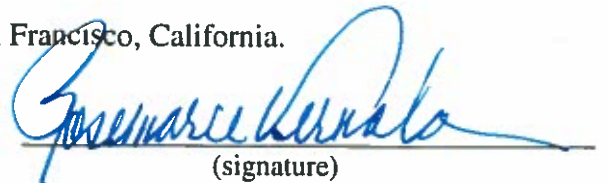
: By E-mail -- I electronically served each party at the email addresses shown on this declaration.

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 December 31, 2019 at San Francisco, California.

Rosemarie Vernola
(type/print name)



(signature)

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