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7
 8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

| | | | |
|--|---|----------------------------|---|
| 11 Acres Bonusing, Inc., a Nevada | } | CASE NO: 3:19-CV-05418-WHO | |
| 12 Corporation, and, James Acres, an | | } | NOTICE OF SPECIAL MOTION AND SPECIAL MOTION OF DEFENDANTS JANSSEN MALLOY LLP, MEGAN YARNALL AND AMELIA BURROUGHS TO STRIKE THE CALIFORNIA STATE COURT SLAPP CLAIM FOR "WRONGFUL USE OF CIVIL PROCEEDINGS" OF PLAINTIFF ACRES BONUSING, INC.; MEMORANDUM OF POINTS AND AUTHORITIES <i>[California Code of Civil Procedure Section 425.16.]</i> Date: February 26, 2020 Time: 2:00 p.m. Ctrm: Courtroom 2, 17th Floor Assigned: Judge William H. Orrick [Filed concurrently with: (1) Declaration of Megan Yarnall with Exhibits; (2) Declaration of Howard Smith with Exhibit; and (3) [Proposed] Order.] Trial Date: None |
| 13 Plaintiffs, | | | |
| 14 vs. | | | |
| 15 Lester Marston, an individual; Arla | | | |
| 16 Ramsey, an individual; Thomas Frank, | | | |
| 17 an individual; Anita Huff, an | | | |
| 18 individual; Rapport and Marston, an | | | |
| 19 association of attorneys; David | | | |
| 20 Rapport, an individual; Ashley | | | |
| 21 Burrell, an individual; Cooper | | | |
| 22 Demarse, an individual; Darcy Vaugh, | | | |
| 23 an individual; Kostan Lathouris, an | | | |
| 24 individual; Boutin Jones, Inc., a | | | |
| 25 California Corporation; Michael | | | |
| 26 Chase, an individual; Daniel Stouder, | | | |
| 27 an individual; Amy O'Neil, an | | | |
| 28 individual; Janssen Malloy LLP, an | | | |
| association of attorneys; Megan | | | |
| Yarnall, an individual; Amelia | | | |
| Burroughs, an individual, and DOES | | | |
| 1-20, inclusive, | | | |
| Defendants. | | | |

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 NOTICE IS HEREBY GIVEN that on February 26, 2020 at 2:00 p.m. , or as
 3 soon thereafter as counsel may be heard in Courtroom 2 of the above-entitled court
 4 located at 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, CA
 5 94102, Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA
 6 BURROUGHS (“Defendants”) will move under California Code of Civil Procedure
 7 Section 425.16 to Strike the California state SLAPP claim for Wrongful Use of Civil
 8 Proceedings (Malicious Prosecution) of Plaintiff ACRES BONUSING, INC.
 9 (“Plaintiff”), as the claim is based upon protected petitioning activity and Plaintiff is
 10 unable to establish a probability of success on the claim against Defendants.

11 The claim for Wrongful Use of Civil Proceedings is based upon Defendants’
 12 representation of their client, the Blue Lake Casino and Hotel (owned and operated by
 13 the Blue Lake Rancheria Indian Tribe) in a prior action filed in the Blue Lake
 14 Rancheria’s tribal court. This claim falls under Section 425.16 since it is based upon
 15 petitioning activity – the pursuit of a civil action.

16 Plaintiff is unable to meet its burden of presenting admissible evidence to
 17 establish a probability of success on the claim. Plaintiff’s First Claim for “Wrongful Use
 18 of Civil Proceedings” (Malicious Prosecution) must fail as: (1) The California state law
 19 claim for Wrongful Use of Civil Proceedings (Malicious Prosecution) is barred by the
 20 one-year statute of limitations - applicable to attorneys – California Code of Civil
 21 Procedure Section 340.6; (2) Plaintiff is unable to show the prior action lacked
 22 reasonable grounds - the action was based upon specific evidence; and (3) Plaintiff is
 23 unable to show the prior action was pursued with malice or for any purpose other than
 24 succeeding on the merits of the claim.

25 Further, the Court does not have subject matter jurisdiction over the claim against
 26 Defendants, as they maintain sovereign immunity because any such claim is based upon
 27 Defendants’ representation as counsel for the Blue Lake Rancheria in the prior action
 28 filed in the Blue Lake Rancheria’s tribal court. (*Great W. Casinos v. Moranga Band of*

1 *Mission Indians* 74 Cal.App.4th 1407, 1423-1424 (1999) citing to *Davis v. Littell* 398
 2 F.2d 83, 85 (9th Cir. 1968).) The application of sovereign tribal immunity has been
 3 presented addressed in a separate Motion to Dismiss under FRCP 12(b)(1), which will
 4 be filed concurrently with this Anti-SLAPP Motion.

5 This motion is made following the meet and confer of counsel, as reflected in the
 6 parties' stipulation [Dkt. #27] filed on November 15, 2019, upon which the Court
 7 entered an order on November 18, 2019. [Dkt. #28.] Counsel for the parties were unable
 8 to reach an agreement concerning the matters raised in this motion requiring that it go
 9 forward. As requested by counsel for the parties, the Court's order set the hearing on
 10 this motion for February 26, 2020. [Dkt. #28.]

11 This motion will be based upon this Notice, the attached Memorandum of Points
 12 and Authorities, the concurrently filed declaration of Megan Yarnall with exhibits, the
 13 currently filed declaration of Howard Smith with exhibit, the records and papers on file,
 14 and upon such other oral and documentary evidence as may be presented at the hearing
 15 on this matter.

16 DATED: January 3, 2020

BERMAN, BERMAN & BERMAN, LLP
 SCINIEDER & LOWARY, LLP

17
 18 By: /S/
 HOWARD SMITH
 Attorneys for
 Specially Appearing Defendants,
 JANSSEN MALLOY LLP, MEGAN
 19 YARNALL and AMELIA BURROUGHS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff ACRES BONUSING, INC. (“Plaintiff”) action for “Wrongful Use of Civil Proceedings” emphasizes the very purpose behind California Code of Civil Procedure Section 425.16 (“the Anti-SLAPP Statute”): To encourage parties to use the legal process without fear of being subject to later retaliatory actions if they do not prevail in the prior lawsuit. Here, JANSSEN MALLOY LLP (“Janssen Malloy”) and its attorneys MEGAN YARNALL (“Yarnall”) and AMELIA BURROUGHS (“Burroughs”) (collectively “Defendants”) represented their client, the Blue Lake Casino and Hotel (“Blue Lake Casino”) - owned and operated by the Blue Lake Rancheria – in a prior action filed in the Tribal Court for the Blue Lake Rancheria (“Tribal Court”). Plaintiff’s single claim under California state law against Defendants for Wrongful Use of Civil Proceedings (Malicious Prosecution) falls under the Anti-SLAPP Statute – Section 425.16 - as the claim is based upon petitioning activity – the pursuit of a prior civil action in the Tribal Court.

Plaintiff is unable to meet its burden of presenting admissible evidence to establish a probability of success on its claim against Defendants. Plaintiff’s claim for Wrongful Use of Civil Proceedings (Malicious Prosecution - CACI 1501) must fail as: (1) This California claim for is barred by the one-year statute of limitations - applicable to attorneys – California Code of Civil Procedure Section 340.6; (2) Plaintiff is unable to show the prior action lacked reasonable grounds - the action was based upon specific evidence; and (2) Plaintiff is unable to show the prior action was pursued with malice or for any purpose other than succeeding on the merits of the claim.

Further, the Court does not have subject matter jurisdiction over the claim against Defendants, as they maintain sovereign immunity because any such claim is based upon Defendants’ representation as counsel for the Blue Lake Rancheria in the prior action filed in the Blue Lake Rancheria’s tribal court. (*Great W. Casinos v. Moranga Band of Mission Indians* 74 Cal.App.4th 1407, 1423-1424 (1999) citing to *Davis v. Littell* 398

1 F.2d 83, 85 (9th Cir. 1968).) The application of sovereign tribal immunity has been
 2 presented addressed in a separate Motion to Dismiss under FRCP 12(b)(1), which will
 3 be filed concurrently with this Anti-SLAPP Motion.

4 Based upon the foregoing, the Court should grant this Special Motion to Strike the
 5 SLAPP claim for Wrongful Use of Civil Proceedings (Malicious Prosecution).

6 **II. FACTUAL BACKGROUND – WITH SUPPORTING EVIDENCE**

7 The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt
 8 County, California. (Declaration of Howard Smith (“Smith Dec.”), at ¶.2, Exhibit “A:”
 9 Verified Complaint (“VC”), at ¶.9.) The Tribe owns and operates the Blue Lake Casino
 10 and Hotel. (Megan Yarnall (“Yarnall Dec.”), at ¶.15, Exhibit “14,” at ¶.1, pp.1-2.)

11 In June 2010, James Acres owned and was the president of Acres Bonusing, Inc.
 12 (“Acres Bonusing”), a gaming company based in Nevada. (Yarnall Dec., at ¶.3, Exhibit
 13 “2,” at pp.9, 13.) In 2010, negotiations began between Acres and Blue Lake Casino for
 14 the casino to lease an iSlot gaming system from Acres Bonusing. (Yarnall Dec., at ¶.16,
 15 Exhibit “15,” at ¶.3, p.2.) The iSlot System was a server-based gaming system that
 16 would allow casino patrons to participate in casino gaming on handheld devices such as
 17 iPads. (Yarnall Dec., at ¶.16, Exhibit “15,” at pp.4-5.)

18 Acres visited and stayed at the Blue Lake Rancheria on July 6 and 7, 2010 to
 19 complete negotiations of the iSlot Agreement between Blue Lake Casino and Acres
 20 Bonusing. (Yarnall Dec., at ¶.16, Exhibit “15,” at ¶.3, p.2.) During this visit, Defendant
 21 Tom Frank (“Frank”) and Steve Salatti (both representatives of the Tribe) met with
 22 Acres. (Yarnall Dec., at ¶.15, Exhibit “14,” at ¶.2, p.2.) Frank expressed concerns to
 23 Acres about the need for the tribe to provide a \$250,000 advanced deposit for the iSlot
 24 System. (Yarnall Dec., at ¶.15, Exhibit “14,” at ¶.3, p.2.) Acres assured Frank that the
 25 advanced deposit would be “repaid” by way of the royalty repayment plan provided in
 26 the parties’ agreement for the system through reduced monthly lease fees. (Yarnall Dec.,
 27 at ¶.15, Exhibit “14,” at ¶.4, p.2.) Acres also assured Frank that the iSlot System would
 28 be profitable for the Blue Lake Casino. (Yarnall Dec., at ¶.15, Exhibit “14,” at ¶.5, p.2.)

1 Based on Acres' representation, on July 7, 2010, Blue Lake Casino entered into an
 2 agreement with Acres Bonusing for the iSlot System. (Yarnall Dec., at ¶¶.15, 16, Exhibit
 3 "14," at ¶.7, p.3, Exhibit "15," at pp.4-11.) Under the agreement, Blue Lake Casino
 4 would lease the iSlot System from Acres Bonusing. (Yarnall Dec., at ¶.16, Exhibit "15,"
 5 at pp.4-11.) As part of the Agreement, the tribe would also pay Acres Bonusing the
 6 "advanced deposit against royalties of \$250,000." (Yarnall Dec., a ¶.16, Exhibit "15," at
 7 p.7.) The Agreement also provided that Blue Lake Casino would pay Acres Bonusing a
 8 monthly lease-fee for the iSlot System, and that "one half of each month's lease fee shall
 9 be applied against the advanced deposit until it was extinguished." (Yarnall Dec., a ¶.16,
 10 Exhibit "15," at p.6.) The initial term of the agreement was two years from installment
 11 of the iSlot system. (Yarnall Dec., at ¶.16, Exhibit "15," at p.6.)

12 Ultimately, the iSlot System was a complete failure at Blue Lake Casino. (Yarnall
 13 Dec., at ¶.15, Exhibit "14," at ¶.11, pp.3-4.) It generated virtually no revenue and was
 14 plagued by technical problems that prevented it from operating properly. (Yarnall Dec.,
 15 at ¶.15, Exhibit "14," at ¶.11, pp.3-4.) Blue Lake Casino expended significant time and
 16 resources in its efforts to implement and use the iSlot System at its casino, but
 17 unfortunately the system did not generate nearly enough money to recoup the \$250,000
 18 deposit paid by the casino to Acres Bonusing. (Yarnall Dec., at ¶.15, at Exhibit "14," at
 19 ¶¶.8, 11, at pp.3-4.)

20 In or about December 2015, Blue Lake Casino through the law firm of Boutin
 21 Jones, Inc., filed suit against Acres and Acres Bonusing in Tribal Court, Blue Lake
 22 Casino and Hotel v. Acres, et al., Tribal Court Case No. C-15-1215LJM ("the Tribal
 23 Court Action"). (Yarnall Dec., at ¶.3, Exhibit "2," at ¶.22, p.7.) In July 2016, Acres and
 24 Acres Bonusing filed answers to the Complaint in the Tribal Court Action and also filed
 25 Motions for Judgment on the Pleadings in the Tribal Court challenging the Tribal Court's
 26 jurisdiction. (Yarnall Dec., at ¶¶.4, 5, Exhibit "3," at pp.1-15.)

27 In September 2016, the Tribal Court ordered a brief period of limited discovery on
 28 the topic of the Tribal Court's personal and subject matter jurisdiction over Acres and

1 Acres Bonusing and ordered all parties to file simultaneous Cross-Motions for Summary
2 Judgment on these jurisdictional issues. (Yarnall Dec., at ¶.6, Exhibit “4,” at pp.3-4.) At
3 that time, the Tribal Court also denied both Motions for Judgment on the Pleadings
4 without prejudice. (Yarnall Dec., at ¶.6, Exhibit “4,” at pp.1-3.)

5 The Chief Judge of the Tribal Court, the Honorable Lester Marston, presided over
6 the Tribal Court Action until he voluntarily recused himself in December 2016. (Yarnall
7 Dec., at ¶.7, Exhibit “5,” at pp.1-4.) Prior to his recusal, Acres alleged that Judge
8 Marston had a conflict of interest. (Yarnall Dec., at ¶.7, Exhibit “5,” at pp.3-4.)

9 Justice James Lambden (“Justice Lambden”), retired from the California Court of
10 Appeal, was selected to preside over the Tribal Court Action. (Yarnall Dec., at ¶.8,
11 Exhibit “6,” at pp.1-2.)

12 In February 2017, Blue Lake Casino filed a Notice of Appearance to advise the
13 Tribal Court that Janssen Malloy, LLP by attorneys Megan Yarnall and Amelia
14 Burroughs, substituted for Boutin Jones Inc., by attorneys Daniel Stouder and Amy
15 O’Neill as counsel for the Tribe. (Yarnall Dec., at ¶.8, Exhibit “6,” at pp.1-2.) The
16 Tribal Court file stamped the Notice of Appearance and Substitution of Counsel on
17 March 1, 2017. (Yarnall Dec., at ¶.9, Exhibit “7,” at p.1.) Prior to February 2017,
18 Defendants had no involvement in the Tribal Court Action or either of the two related
19 Federal Court cases filed by Acres. (Yarnall Dec., at ¶.17.)

20 In March 2017, the Tribal Court ordered that on or before April 28, 2017, the
21 parties were to file simultaneous dispositive motions concerning the issue of the
22 jurisdiction of the Tribal Court. (Yarnall Dec., at ¶.10, Exhibit “8,” at pp.1-2.)

23 On June 2, 2017, the Tribal Court heard argument on various motions including
24 the parties’ motions concerning the issue of the jurisdiction of the Tribal Court. (Yarnall
25 Dec., at ¶.11, Exhibit “9,” at pp.1-3.) In its Order, the Tribal Court elected to consider
26 certain motion(s) filed by Acres as a Motion for Summary Adjudication of the Fifth
27 Cause of Action of the Complaint and set an additional briefing schedule with a new
28 hearing date set for June 30, 2017. (Yarnall Dec., at ¶.11, Exhibit “9,” at p.1.)

1 On June 23, 2017, Janssen Malloy, on behalf of Blue Lake Casino, filed
 2 Opposition papers to Acres' Motion for Summary Judgment. (Yarnall Dec., at ¶¶.12, 15,
 3 Exhibit "10," at pp.1-43. Exhibit "14," at pp.1-4.)

4 On June 30, 2017, the Tribal Court heard argument on Acres' Motion for
 5 Summary Judgment. (Yarnall Dec., at ¶.13, Exhibit "11," at pp.1-28.) On July 18,
 6 2017, the Tribal Court issued an order determining that the Tribal Court had jurisdiction
 7 over both Acres and Acres Bonusing and granted Summary Judgment in their favor and
 8 dismissed them from the case. (Yarnall Dec., at ¶.13, Exhibit "11," at pp.11, 18.)

9 On or about August 7, 2017, counsel for the Tribe and Acres Bonusing signed a
 10 Stipulation and Request for Dismissal for the entire Tribal Court Action. (Yarnall Dec.,
 11 at ¶.14, Exhibit "12," at pp.1-2.) On or about August 21, 2017, Justice Lambden signed
 12 and filed the Request for Dismissal. (Yarnall Dec., at ¶.14, Exhibit "12," at pp.1-2.) On
 13 or about August 31, 2017, Justice Lambden signed a Judgment of Dismissal for the
 14 Tribal Court Action. (Yarnall Dec., at ¶.14, Exhibit "13," at p.1.)

15 **III. THE ALLEGATIONS OF PLAINTIFF'S VERIFIED COMPLAINT FOR**
 16 **WRONGFUL USE OF CIVIL PROCEEDINGS AGAINST DEFENDANTS**

17 Plaintiff has filed this action against Defendants, Tribal Court Chief Judge Lester
 18 Marston, and others. (Smith Dec., at ¶.2, Exhibit "A:" Verified Complaint, at ¶¶.13-29.)
 19 Plaintiff's allegations against Defendants arise solely from their representation of the
 20 Tribe in the Tribal Court Action. (VC, at ¶¶.1, 5, 27-29, 37, 111, 113-118, 134-145.)

21 Plaintiff's California state claim for "Wrongful Use of Civil Proceedings" against
 22 Defendants is based upon two allegations of wrongful conduct before the Tribal Court:

23 I. When Justice Lambden dismissed the Tribal Court Action by granting the
 24 Motion for Summary Judgment, "his order noted papers filed by Janssen Malloy, Ms.
 25 Burroughs, and Ms. Yarnall on Blue Lake's behalf 'misstate[d] the evidence' in an
 26 attempt... to find direct evidence' to establish the scienter element of the [Tribal Court
 27 Action] against Mr. Acres." (VC, at ¶.117.)

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2. Defendants “could not have reasonably believed there were reasonable grounds to bring or maintain [the Tribal Court Action] against Mr. Acres, because... the claim against Mr. Acres required Blue Lake Casino to prove its allegation that Mr. Acres represented the advance deposit paid by Blue Lake to [Acres Bonusing] was to be repaid by way of an alleged ‘royalty repayment scheme’ Justice Lambden’s Order found Blue Lake ‘could not have reasonably believed there was a ‘scheme’ that was inconsistent with the express language of the Agreement between Blue Lake and [Acres Bonusing].” (VC, at ¶.138.)

Indeed, in addition to these two allegations, the entirety of Plaintiff’s specific allegations against Defendants include that:

- *. Beginning in February 2017, Defendants represented Blue Lake Casino (VC, at ¶.111);
- *. Defendants “vigorously prosecuted” the Action (VC, at ¶¶.113-114);
- *. Defendants “prepared and filed” many documents, including Proofs of Service and declarations, in the Tribal Court Action which listed counsel’s California State Bar numbers (VC, at ¶¶.115, 116); and
- *. Yarnall “drove approximately 1,000 miles on California State highways to attend ... hearings” in the Tribal Court Action (VC, at ¶.118)

In other words, Plaintiff alleges that Defendants acted as counsel for the Blue Lake Casino in the Tribal Court Action before the Tribal Court.

On August 31, 2017, a Judgment of Dismissal in favor of Plaintiff was entered in *Blue Lake v. Acres*. (VC, at ¶.5; Judgment of Dismissal in *Blue Lake v. Acres*: Exhibit “3” to Verified Complaint.)

IV. THE ANTI-SLAPP STATUTE – CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

While Code of Civil Procedure 425.16 is unavailable against federal claims filed in federal court, Section 425.16 may be used against pendent (supplemental) state law claims in federal court. (*Newsham v. Lockheed Missiles & Space Company, Inc.* 190

1 F.3d 963, 972 (9th Cir. 1999); *Globetrotter Software, Inc. v. Elan Computer Group,*
 2 *Inc.* 63 F.Supp.2d 1127, 1129-1130 (N.D. Cal. 1999).) When ruling on an Anti-SLAPP
 3 Motion, federal Courts follow the decisions of the California Supreme and other
 4 appellate Courts. (*Hilton v. Hallmark Cards* 580 F.3d 874, 881 (9th Cir. 2009).)

5 “A cause of action against a person arising from any act of that person in
 6 furtherance of the person’s right of petition or free speech under the United States or
 7 California Constitution in connection with a public issue shall be subject to a special
 8 motion to strike, unless the court determines that the plaintiff has established that there is
 9 a probability that the plaintiff will prevail on the claim.” (Code of Civil Procedure
 10 Section 425.16(b)(1).)

11 Section 425.16, the Anti-SLAPP Statute, protects acts “in furtherance of a
 12 person’s right of petition or free speech” which includes, without limitation, statements
 13 and writings made in connection with or during a judicial proceeding. (Code of Civil
 14 Procedure Section 425.16(c)(1).) It is well settled that the filing of a lawsuit is an
 15 exercise of a party’s constitutional right to petition for grievances because a claim for
 16 relief filed in court are “indisputably a statement or writing made before a judicial
 17 proceeding.” (*Navellier v. Sletten* 29 Cal.4th 82, 90 (2002); *Briggs v. Eden Council for*
 18 *Hope & Opportunity* 19 Cal.4th 1106, 1115 (1999).) Pleadings, statements, or other
 19 writings “in connection with” civil litigation are covered by the Anti-SLAPP Statute,
 20 and it need not be shown that the litigated matter is of public interest. (*Briggs v. Eden*
 21 *Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.)

22 Application of the Anti-SLAPP Statute involves a two-step process. “First, the
 23 court decides whether the defendant has made a threshold showing that the challenged
 24 cause of action is one arising from protected activity.” (*Navellier v. Sletten, supra*, 29
 25 Cal.4th at p. 88.) In evaluating this prong of the statute, the Court considers “the
 26 pleadings, and supporting and opposing affidavits stating the facts upon which the
 27 liability or defense is based.” (Code of Civil Procedure Section 425.16(b)(2).)

28 ///

1 “If the court finds that such a showing has been made, it must then determine
 2 whether the plaintiff has demonstrated a probability of prevailing on the claim.”
 3 (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.) “Plaintiff must establish that the
 4 Complaint is both legally sufficient and supported by a sufficient prima facie showing of
 5 facts to sustain a favorable judgment against the Defendant.” (*Premier Med. Mgmt.*
 6 *Systems, Inc. v. California Ins. Guar. Ass’n*, 136 Cal.App.4th 464, 476 (2006).) The
 7 Plaintiff is required to produce evidence that would be admissible at trial supporting a
 8 judgment in his or her favor. (*Chavez v. Mendoza* 94 Cal.App.4th 1083, 1087 (2001).)

9 The probability of prevailing is tested by the same standard governing a Motion
 10 for Summary Judgment, non-suit, or directed verdict. In opposing an Anti-SLAPP
 11 motion, it is the Plaintiff’s burden to present admissible evidence that would support a
 12 judgment in her or her favor. (*Taus v. Loftus* 40 Cal.4th 683, 714 (2007); *Bergman v.*
 13 *Drum* 129 Cal.App.4th 11, 18 (2005).)

14 **V. PLAINTIFF’S CLAIM FOR WRONGFUL USE OF CIVIL**
 15 **PROCEEDINGS ARISES FROM PROTECTED PETITIONING**
 16 **ACTIVITY**

17 Plaintiff’s Complaint includes a claim against these moving Defendants for
 18 “Wrongful Use of Civil Proceedings” (Malicious Prosecution - CACI 1501.) Such a
 19 claim has been traditionally looked on as “disfavored.” (*Babb v. Superior Court* 3
 20 Cal.3d 841, 847 (1971).) It is “well established” that the Anti-SLAPP Statute applies to
 21 such a claim. (*Johnson v. Ralphs Grocery Co.* 204 Cal.App.4th 1097, 1103 (2012).)

22 An action for Malicious Prosecution based upon a party’s or attorney’s
 23 statements or writings in connection with or in an earlier judicial proceeding is subject to
 24 being stricken as a SLAPP Suit: “[B]y its terms, section 425.16 potentially may apply to
 25 every malicious prosecution action, because every such action arises from an underlying
 26 lawsuit, or petition to the judicial branch.” (*Jarrow Formulas, Inc. v. LaMarche* 31
 27 Cal.4th 728, 734-735 (2003); *Dickens v. Provident Life & Acc. Ins. Co.* 117
 28 Cal.App.4th 705, 713 (2004); *Chavez v. Mendoza, supra*, 94 Cal.App.4th at p. 1087

1 [Anti-SLAPP Statute protected attorneys from Malicious Prosecution action brought
2 against them by parties whom they had sued on behalf of a client.].)

3 In an attempt to avoid the Anti-SLAPP Statute, Plaintiff alleges: “This Cause of
4 Action [for Wrongful Use of Civil Proceedings] does not arise from an act in furtherance
5 of any person’s right of petition or free speech under the United States Constitution or
6 the California Constitution in connection with a public issue. This cause of action
7 encompasses conduct that was illegal as a matter of law under 18 USC 666.” (Smith
8 Dec., at ¶.2, Exhibit “A:” Verified Complaint, at ¶.145.) But simply saying it does not
9 make it so. Contrary to this allegation, the Courts have consistently found that litigation
10 conduct (which is all that is alleged against Defendants) is not illegal as a matter of law,
11 thereby requiring the application of the statute. (*Cabral v. Martins* 177 Cal.App.4th
12 471, 477, 480-481 (2009).)

13 Based upon the above rules, Plaintiff’s claim for Wrongful Use of Civil
14 Proceedings (Malicious Prosecution) is subject to the protection of the statute as it is
15 based on petitioning activity – the pursuit of the Tribal Court Action.

16 **VI. PLAINTIFF CANNOT ESTABLISH A PROBABILITY OF SUCCESS**
17 **BECAUSE THE CLAIM FOR WRONGFUL USE OF CIVIL**
18 **PROCEEDINGS/MALICIOUS PROSECUTION IS BARRED BY THE**
19 **ONE-YEAR STATUTE OF LIMITATIONS OF CALIFORNIA CODE OF**
20 **CIVIL PROCEDURE SECTION 340.6**

21 Plaintiff ACRES BONUSING, INC. (“ABI”) cannot prevail on the claim for
22 Malicious Prosecution against attorneys Megan Yarnall and Amelia Burroughs (and
23 their law firm) because the claim is barred by the one-year statute of limitations that
24 applies to actions against attorneys. Under California Code of Civil Procedure Section
25 340.6, “[a]n action against an attorney for a wrongful act or omission, other than for
26 actual fraud, arising in the performance of professional services shall be commenced
27 within one year after the plaintiff discovers, or through the use of reasonable diligence
28 should have discovered, the facts constituting the wrongful act or omission. . .”

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

10 ABI's Verified Complaint alleges: “From January 2016 through July 2017, Blue
 11 Lake Rancheria ('Blue Lake') and its confederates sued Acres Bonusing, Inc. ... within
 12 Blue Lake's trial court. (Smith Dec., at ¶.2, Exhibit “A.” Verified Complaint, at ¶.1.)
 13 Blue Lake and its confederates sought ruinous judgments, within a court they controlled,
 14 before a judge they suborned, on conjured claims.” (VC, at ¶.1.) On August 31, 2017, a
 15 Judgment of Dismissal in favor of ABI and James Acres was entered in *Blue Lake v.*
 16 *Acres*. (Yarnall Dec., at ¶.14, Exhibit “13,” at p.1, VC, at ¶.5; Judgment of Dismissal in
 17 *Blue Lake v. Acres*: Exhibit “3” to Verified Complaint.)

18 Thus, ABI was legally required to file the Complaint in this action by August 31, 2018
 19 – within one-year of the termination of the underlying action on August 31, 2017 - for
 20 the claim for Malicious Prosecution to have been timely. (*Babb v. Superior Court*,
 21 *supra*, 3 Cal.3d at p. 846 [On a Cause of Action for Malicious Prosecution, the period of
 22 limitations begins to run on the date that the proceedings in the prior action were
 23 terminated.].) ABI filed its Complaint on August 28, 2019, and ABI's state law claim
 24 for Malicious Prosecution against the attorney Defendants which accrued on August 31,
 25 2017 is, therefore, barred by the one-year statute of limitations.

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**VII. PLAINTIFF CANNOT MEET ITS BURDEN OF ESTABLISHING A
PROBABILITY OF SUCCESS FOR ITS CLAIM OF WRONGFUL USE
OF CIVIL PROCEEDINGS THROUGH THE PRESENTATION OF
ADMISSIBLE EVIDENCE**

Plaintiff the burden to establish through admissible evidence a probability of success on its claim for Wrongful Use of Civil Proceedings (Malicious Prosecution - CACI 1501). In order to prove a claim for Malicious Prosecution, Plaintiff must prove all of the following: (1) That the Defendant was actively involved in bringing or continuing the lawsuit; (2) The prior action was brought without probable cause; (3) The prior action was initiated with malice or for a purpose other than succeeding on the merits of the claim; (4) The prior action was pursued to a legal termination in the Plaintiff's favor; and (5) Resulting damages sustained by the Plaintiff. (*Sheldon Appel Co. v. Albert & Olier* 47 Cal.3d 863, 871 (1989); CACI 1501.)

While Defendants only address certain elements of the claim in this motion, Plaintiff is required to address each and every element of the claim in opposition to this motion. (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.) Plaintiff is unable to meet its burden of demonstrating a probability of success.

A. Probable Cause Existed to Pursue the Tribal Court Action

The test to determine whether probable cause existed to bring a claim is as follows: The claims were not objectively untenable because the prior suit was not one that all reasonable lawyers would have agreed lacked merit. (*Paulus v. Bob Lynch Ford, Inc.* 139 Cal.App.4th 659, 680 (2006).) Plaintiff is unable to meet this standard.

1. Defendants Did Not Misstate the Evidence

Plaintiff alleges Defendants wrongfully used the proceeding in the Tribal Court by "misstating the evidence" in an "attempt... to find direct evidence" to establish the scienter element of the Tribal Court Action. (Smith Dec., at ¶.2, Exhibit "A:" Verified Complaint, at ¶.117.) Plaintiff is wrong.

As stated in Blue Lake Casino's opposition to the Motion for Summary Judgment:

“Though [Blue Lake Casino] was reasonable in its decision to rely on Acres’ representation regarding the advance deposit [i.e. that the royalty repayment provisions in Agreement would repay the \$250,000 advance deposit by way of reduced monthly lease fees], it is now clear that Acres did not believe that the iSlot system would generate enough revenue to repay the advance deposit. Acres has stated that it is unreasonable to believe that the iSlot system could generate \$3,333,333, and that the primary purpose of the iSlot System was not revenue. (Memo Supporting James Acres’ Unenumerated 12(b) Motion to Dismiss for Lack of jurisdiction, pg.15; Declaration of James Acres Supporting ABI’s Unenumerated 12(b) motion, dated April 28, 2017, ¶.8.) He has even stated that, despite the language of the Agreement, there is no provision for the repayment of the \$250,000 advanced deposit. (Declaration of James Acres Supporting his Opposition to Blue Lake’s April 28 Motion on the Propriety of Tribal Jurisdiction, dated May 12, 2017, ¶.8.)”

(Yarnall Dec., at ¶.11, Exhibit “9,” at p.5 line 22 through p.6, line 5.)

“[I]n fact, Acres did not believe that the Agreement provided for repayment of the advance deposit and did not believe it was reasonable to believe that the iSlot System would generate enough money for [Blue Lake Casino] to recoup its \$250,000 advance deposit.”

(Yarnall Dec., at ¶.12, Exhibit “10,” at p.8, lines 1-6.)

1 In other words, Blue Lake Casino, via Defendants, argued Plaintiff stated the iSlot
 2 System would generate sufficient revenue to repay the \$250,000 advance deposit (as
 3 evidenced in the declaration of Thomas Frank) but James Acres later, via his own sworn
 4 declaration, contradicted this earlier statement. (Yarnall Dec., at ¶.12, Exhibit “10,” at
 5 pp.2-6.) Defendants’ arguments are supported by evidence – namely sworn declarations
 6 of Frank and James Acres himself. (Yarnall Dec., at ¶.12, 15, Exhibit “10,” at pp.38-42,
 7 Exhibit “14,” at pp.1-4.) Accordingly, Defendants did not misrepresent the evidence
 8 presented via Blue Lake Casino’s Opposition to the Motion for Summary Judgment.

9 **2. Defendants Had a Reasonable Basis to Continue the Action**

10 Plaintiff alleges Defendants wrongfully used the underlying civil proceeding
 11 because they could not have reasonably believed there were reasonable grounds to
 12 pursue the Tribal Court Action against it. Specifically, Plaintiff alleges that, despite
 13 Defendants’ contentions that there was an alleged “royalty repayment scheme,” Justice
 14 Lambden’s Order found Blue Lake Casino “could not have reasonably believed there
 15 was a ‘scheme’ given the express language of the parties’ agreement.” (Smith Dec., at
 16 ¶.2, Exhibit “A:” Verified Complaint, at ¶.138.) Again, Plaintiff is wrong.

17 As stated in Justice Lambden’s Order:

18 “Assuming the facts in the light most favorable to
 19 [Blue Lake Casino] and also assuming that the narrowly
 20 framed ‘assurance’ by Acres was delivered precisely as
 21 described precisely as described by [Thomas] Frank,
 22 reasonable minds can come to only one conclusion: A person
 23 with knowledge, experience and education possessed by
 24 Thomas Frank could not have reasonably relied on what was
 25 essentially an opinion offered by Acres regarding the future
 26 gaming behavior of third party customers. He could not
 27 reasonably have believed there was a ‘scheme’ that was
 28 inconsistent with the *express* language of the Agreement. He

needed only to invoke his own knowledge and experience, read the Agreement and do the math, to discern that Acres' assurance of profitability was a chimera The alleged false representation was essentially a salesman's opinion that the iSlot System would be 'profitable' based on a prediction of future customer behavior."

(Yarnall Dec., at ¶.13, Exhibit "11," at p.17, lines 13-19, p.18, lines 1-3.)

Plaintiff's allegations contort Justice Lambden's findings and misstate what Blue Lake Casino needed to prove to prevail on a claim for Fraudulent Inducement. To prevail on a claim for Fraudulent Inducement, the Plaintiff must demonstrate that Defendant made a false representation to Plaintiff; that Defendant intended for Plaintiff to rely on the false representation; that Plaintiff did, in fact, reasonably rely on Defendant's false representation; that Plaintiff was harmed; and that Plaintiff's reliance on Defendant's false representation was a substantial factor in causing Plaintiff's harm. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567; CACI 1900.)

Consistent with the elements for a Cause of Action for Fraudulent Inducement, Blue Lake Casino alleged, that to induce the casino to enter the agreement, James Acres represented to the casino (through Thomas Frank) that the iSlot System would generate sufficient revenue to repay the entire \$250,000 advance deposit in the form of reduced fees. (Yarnall Dec., at ¶.3, Exhibit "2," at ¶¶.7, 34, p.2, lines 20-26, p.6, lines 15-17.) Blue Lake Casino did not allege that there was some other extra-contractual 'scheme' – instead it alleged that James Acres assured Frank the system would, in essence, be profitable enough to repay the advance deposit per the terms of the agreement. (Yarnall Dec., at ¶.3, Exhibit "2," at ¶¶.7, 34, p.2, lines 20-26, p.6, lines 15-17.) Blue Lake Casino supported this allegation in its argument opposing the Motion for Summary Judgment and with a declaration by Frank. (Yarnall Dec., at ¶¶.12, 15, Exhibit "10," at pp.2-6, Exhibit "14," at ¶¶.2-5, pp.2-3.)

Contrary to Plaintiff's argument, Justice Lambden did not conclude that the iSlot

1 lease agreement contained no provision for the royalty repayment. (Yarnall Dec., at ¶.13,
 2 Exhibit “11,” at pp.4-5.) Indeed, the iSlot Agreement states that “[Blue Lake Casino]
 3 shall pay Acres Bonusing an advanced deposit against royalties of \$250,000.” (Yarnall
 4 Dec., at ¶.16, Exhibit “15,” at p.7.) “Once the iSlot System is installed one-half of each
 5 month’s lease fee shall be applied against the advanced deposit until it is extinguished.”
 6 (Yarnall Dec., at ¶.16, Exhibit “15,” at p.7.) Nor did Justice Lambden determine that
 7 James Acres did not tell Frank that the iSlot System would generate sufficient revenue to
 8 repay the entire \$250,000 advance deposit by way of reduced lease fees. (Yarnall Dec.,
 9 at ¶.13, Exhibit “11,” at pp.17-18.) Instead, Justice Lambden assumed James Acres
 10 made such a statement, precisely as described in Frank’s declaration, but determined the
 11 statement was merely sales puffery Frank could not have reasonably relied upon to enter
 12 into the agreement. (Yarnall Dec., at ¶.13, Exhibit “11,” at pp.17-18.)

13 Whatever the Court’s ultimate ruling, the fact the Court had evidence to consider
 14 on the Motion for Summary Judgment proves evidence existed showing probable cause
 15 to pursue the claim for Fraudulent Inducement. (*Wilson v. Parker, Covert & Chidester*
 16 28 Cal.4th 811, 817, 824 (2002).)

17 **B. There was No Malice in the Pursuit of the Tribal Court Action**

18 To prove malice, Plaintiff is required to show the prior action was continued by
 19 these Defendants for an improper purpose. (*Silas v. Arden* 213 Cal.App.4th 75, 90-
 20 91(2012); CACI 1501.) For this reason, the presence of malice must include proof of a
 21 subjective intent to deliberately misuse the legal system for personal gain at the expense
 22 of the wrongfully sued Defendant. (*Ibid.*) Plaintiff is unable to meet this standard.

23 Defendants had a demonstrable good faith belief in the merits of the Tribal Court
 24 Action as the evidence submitted in opposition to the Motion for Summary Judgment
 25 was sufficient to support the Cause of Action for Fraud in the Inducement. (Yarnall
 26 Dec., at ¶.12, Exhibit “10,” at pp.3-6.) Blue Lake Casino’s claim that James Acres
 27 made, and Blue Lake Casino relied upon, representations regarding the viability and
 28 profitability of the iSlot System was supported by evidence. (Yarnall Dec., at ¶.14,

1 Exhibit “13,” at ¶¶.2-5, pp.2-3.) The fact Defendants had a good faith belief in the
 2 merits of the Tribal Court Action based upon specific evidence establishes the action
 3 was not brought for an improper purpose negating any possibility of malice in the
 4 pursuit of the action before the Tribal Court. (*Cole v. Patricia A. Meyer & Associates,*
 5 *APC* 206 Cal.App.4th 1095, 1114 (2012).)

6 **VIII. CONCLUSION**

7 Based upon the foregoing, Defendants JANSSEN MALLOY LLP, MEGAN
 8 YARNALL, and AMELIA BURROUGHS respectfully request that the Court grant their
 9 Special Motion to Strike the California state SLAPP claim for Wrongful Use of Civil
 10 Proceedings of Plaintiff ACRES BONUSING, INC under Code of Civil Procedure
 11 Section 425.16.

12 DATED: January 3, 2020

BERMAN BERMAN BERMAN
 SCHNIEDER & LOWARY, LLP

13
 14 By: /S/
 HOWARD SMITH
 Attorneys for
 Specially Appearing Defendants,
 JANSSEN MALLOY, LLP, MEGAN
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