

Stephanie Berman Schneider, Esq. - SBN 168519  
 Howard Smith, Esq. - SBN 166571  
 BERMAN BERMAN BERMAN  
 SCHNEIDER & LOWARY, LLP  
 11900 West Olympic Blvd, Suite 600  
 Los Angeles, California 90064-1151  
 Telephone: (310) 447-9000  
 Facsimile: (310) 447-9011

Attorneys for Specially Appearing Defendants,  
 JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS

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

Acres Bonusing, Inc., a Nevada  
 Corporation, and, James Acres, an  
 individual;

Plaintiffs,

vs.

Lester Marston, an individual; Arla  
 Ramsey, an individual; Thomas Frank,  
 an individual; Anita Huff, an  
 individual; Rapport and Marston, an  
 association of attorneys; David  
 Rapport, an individual; Ashley  
 Burrell, an individual; Cooper  
 Demarse, an individual; Darcy Vaughn,  
 an individual; Kostan Lathouris, an  
 individual; Boutin Jones, Inc., a  
 California Corporation; Michael  
 Chase, an individual; Daniel Stouder,  
 an individual; Amy O'Neil, 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

**NOTICE OF MOTION AND MOTION  
 OF DEFENDANTS JANSSEN  
 MALLOY LLP, MEGAN YARNALL  
 AND AMELIA BURROUGHS TO  
 DISMISS THE VERIFIED  
 COMPLAINT OF PLAINTIFFS  
 ACRES BONUSING, INC. AND  
 JAMES ACRES BASED UPON  
 SOVEREIGN IMMUNITY UNDER  
 FRCP 12(b)(1) AND/OR FOR  
 FAILURE TO STATE A CLAIM  
 UNDER FRCP 12(b)(6);  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

[FRCP Rule 12(b)(1), 12(b)(6).]

Date: February 26, 2020  
 Time: 2:00 p.m.  
 Court: Courtroom 2, 17th Floor

Assigned: Judge William H. Orrick

**[Filed concurrently with [Proposed]  
 Order.]**

Trial Date: None.

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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 soon  
 3 thereafter as counsel may be heard in Courtroom 2 of the above-entitled court located at  
 4 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, CA 94102,  
 5 Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA  
 6 BURROUGHS (“Defendants”) will move the Court for an Order dismissing all claims  
 7 against them in the Verified Complaint of Plaintiffs JAMES ACRES and his company  
 8 ACRES BONUSING, INC. (“Plaintiffs”) under:

9 FRCP Rule 12(b)(1): The Court lacks subject matter jurisdiction based on  
 10 sovereign tribal immunity as Plaintiffs’ Verified Complaint admits that the attorney and  
 11 law firm Defendants were acting as agents of the Blue Lake Rancheria, a sovereign tribe  
 12 thereby infringing on the sovereignty of the Tribal Court. The issue presented in this  
 13 motion has already been addressed by the state Court in California – the Sacramento  
 14 Superior Court - when the Court granted Defendants’ Motion to Quash/Dismiss the  
 15 claim against Defendants based upon sovereignty of the Tribal Court. (James Acres, etc.  
 16 vs. Lester Marston, etc. et. al., Sacramento Superior Court Case No. 34-2018-00236829  
 17 – Exhibit “A.”) The granting of this motion is currently on appeal before the California  
 18 Court of Appeal, for the Third Appellate District. (Appellate Case No. C089344.)

19 FRCP Rule 12(b)(6): (1) Plaintiffs have failed to state a claim under the  
 20 Racketeer Influenced and Corrupt Organizations (RICO) Act against attorneys Yarnall  
 21 and Burroughs and their law firm of Janssen Malloy because they cannot allege the  
 22 requisite predicate acts to show a pattern of racketeering activity, as the only act alleged  
 23 against these Defendants, the pursuit of a lawsuit does not constitute the required  
 24 predicate acts; and (2) Plaintiffs’ California state law claim for Wrongful Use of Civil  
 25 Proceedings (Malicious Prosecution) is barred by the one-year statute of limitations -  
 26 applicable to attorneys – California Code of Civil Procedure Section 340.6.

27 This motion is made following the meet and confer of counsel, as reflected in the  
 28 parties’ stipulation [Dkt. #27] filed on November 15, 2019, upon which the Court

1 entered an order on November 18, 2019. [Dkt. #28.] Counsel for the parties were unable  
2 to reach an agreement concerning the matters raised in this motion requiring that it go  
3 forward. As requested by counsel for the parties, the Court's order set the hearing on  
4 this motion for February 26, 2020. [Dkt. #28.]

5 This motion will be based upon this Notice, the attached Memorandum of Points  
6 and Authorities, Plaintiffs' Verified Complaint, the ruling of the Sacramento Superior  
7 Court granting Defendants' Motion to Quash/Dismiss - Exhibit "A" to this motion, the  
8 records and papers on file, and upon such other oral and documentary evidence as may  
9 be presented at the hearing on this matter.

10 DATED: January 3, 2020

BERMAN, BERMAN & BERMAN, LLP  
SCHNIEDER & LOWARY, LLP

By:                     /S/                      
                     HOWARD SMITH  
                     Attorneys for  
                     Specially Appearing Defendants,  
                     JANSSEN MALLOY LLP, MEGAN  
                     YARNALL and AMELIA BURROUGHS

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This federal action represents Plaintiffs JAMES ACRES and ACRES BONUSING, INC. (“Plaintiffs”) second attempt to re-litigate a prior action, Blue Lake Rancheria (a sovereign tribe) previously brought in Tribal Court. Plaintiffs’ claims against Defendants JANSSEN MALLOY LLP (“Janssen Malloy”) against its attorneys MEGAN YARNALL (“Yarnall”) and AMELIA BURROUGHS (“Burroughs”) (collectively “Defendants”) arise out of those attorneys’ representation of the Blue Lake Rancheria in Tribal Court. This motion is brought under two grounds:

FRCP Rule 12(b)(1): The Court lacks subject matter jurisdiction based on sovereign tribal immunity: On February 11, 2019, the California Superior Court, granted the Motion to Quash/Dismiss the claims against Defendants based upon sovereignty of the Tribal Court. (James Acres, etc. vs. Lester Marston, etc. et. al., Sacramento Superior Court Case No. 34-2018-00236829 – Ruling attached as Exhibit “A” to this motion.) The granting of this motion is on appeal before the California Court of Appeal for the Third Appellate District. (Appellate Case No. C089344.) Plaintiffs readily admit the existence of the prior action, with the Court having granted Defendants’ Motion to Quash/Dismiss. (Verified Complaint (“VC”), at ¶.32.)

Concurrently with the pending appeal, Plaintiffs have filed this new action in federal court, which is virtually identical to the action in California State Court. The only difference, the inclusion of a “new” Plaintiff on these claims – ACRES BONUSING, INC. – attempting to split the claims by including a claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act, based upon the same facts. This Court should rule in the same manner as the California state Court by dismissing the claims based upon the sovereignty of the Tribal Court.

As in the California action, in another attempt to plead around sovereign immunity, Plaintiffs named Defendants – counsel for Blue Lake Rancheria - rather than the tribe. However, controlling authority holds that, absent a showing the attorneys



acted outside the scope of their authority, which Plaintiffs' Verified Complaint concedes they did not, they are covered by the sovereign tribal immunity of Blue Lake Rancheria. Further, this action, by calling into question conduct which, unquestionably, all occurred before the Tribal Court, interferes with the judicial sovereignty of the tribe.

FRCP Rule 12(b)(6): (1) Plaintiffs have failed to state a RICO claim against attorneys Yarnall and Burroughs and Janssen Malloy because they cannot allege the requisite predicate acts to show a pattern of racketeering activity, as the only act alleged against these Defendants, the pursuit of a lawsuit does not constitute the required predicate acts; and (2) Plaintiffs' California state law claim for Wrongful Use of Civil Proceedings (Malicious Prosecution) is barred by the one-year statute of limitations - applicable to attorneys - California Code of Civil Procedure Section 340.6.

Based upon the foregoing, the Court should grant this motion, at which time Defendants should be dismissed from the action.

## **II. STATEMENT OF FACTS**

As Plaintiffs' Complaint notes, the Blue Lake Rancheria ("Blue Lake") is a federally-recognized Indian tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. (Verified Complaint, at ¶.9.) Blue Lake Casino and Hotel ("BLCIH") is a tribal entity wholly owned by Blue Lake and an arm of the tribe. (VC, at ¶.9.) The Blue Lake Tribal Court is an appropriately established judicial arm of the tribe. (VC, at ¶¶.11, 38.) The Complaint admits that Blue Lake is a sovereign nation. (VC, at ¶.150(c).)

The Complaint alleges an action was filed by BLCIH against Plaintiffs by Boutin Jones in Blue Lake's Tribal Court ("*Blue Lake v. Acres*.") (VC, at ¶¶.1, 4, 22; Complaint in *Blue Lake v. Acres*: Exhibit "1" to Verified Complaint.) In February of 2017, Janssen Malloy, LLP, through its attorneys Megan Yarnall and Amelia Burroughs, replaced Boutin Jones as attorneys for Blue Lake in *Blue Lake v. Acres*. (VC, at ¶¶.27-29.) The Complaint goes on to allege that, while representing BLCIH in Tribal Court in *Blue Lake v. Acres*, attorneys Yarnall and Burroughs misstated the evidence "on Blue

1 Lake's behalf." (VC, at ¶¶.15, 27-29, 117.) On August 31, 2017, a Judgment of  
 2 Dismissal in favor of Plaintiffs was entered in *Blue Lake v. Acres*. (VC, at ¶.5;  
 3 Judgment of Dismissal in *Blue Lake v. Acres*: Exhibit "3" to Verified Complaint.)

4 On August 28, 2019, Plaintiffs filed this action against Janssen Malloy, Yarnall  
 5 and Burroughs for "Wrongful Use of Civil Proceedings" and a RICO claim based upon  
 6 the pursuit of *Blue Lake v. Acres* in the tribal court. (VC, at ¶¶.135-141, 199-202.)

7 Other than conclusory allegations in the first claim for "Wrongful Use of Civil  
 8 Proceedings," there are literally no other charging allegations against Yarnall, Burroughs  
 9 or Janssen Malloy in the entire Complaint. (VC, at ¶¶.134-144.) Specifically, there is no  
 10 claim Defendants acted in any capacity other than as agents for Blue Lake or BLCH or  
 11 that any of their allegedly tortious actions occurred outside of Tribal Court.

12 Plaintiffs admit a prior action on the same allegations/evidence remains pending:  
 13 "32. In July 2018 Mr. Acres used the above named defendants in Acres v. Marston et al  
 14 [Sacramento Superior Court Case No. 2018-34-00236929] on causes of action  
 15 substantially similar to the causes one through seven below." (VC, at ¶.32, fns. 5, 6.)  
 16 This action also includes an additional claim under RICO. (VC, at ¶¶.197-208.)

17 Contrary to Plaintiffs' assertion, the RICO claim is based upon the same  
 18 allegations/evidence as the other seven claims – the pursuit of the underlying action in  
 19 and/or the use of the tribal court. (VC, at ¶¶.1, 11, 197-208.) This is revealed by the  
 20 specific verified allegations supporting the eighth claim for "Operating or Managing a  
 21 Racketeering Enterprise under 18 USC Section 1964(c):"

22 \*. The eighth claim includes all of the general allegations, which were re-  
 23 alleged in full (VC, at ¶¶.1-133, 197);

24 \*. Each Defendant engaged in conduct to obtain money by means of false  
 25 pretenses, which included: (a) Wrongful use of civil proceedings in *Blue Lake v. ABI*;  
 26 (b) Working to ensure that the judicial power in *Blue Lake v. ABI* would be exercised for  
 27 attorneys working for Blue Lake; (c) Working to conceal that the judicial power in Blue  
 28 Lake v. ABI was being exercised for attorneys working for Blue Lake; and (d) Falsely

1 representing that the Blue Lake tribal court was an impartial tribunal (VC, at ¶.199);

2 \*. Defendants intended to manufacture an enforceable tribal court judgment in  
3 *Blue Lake v. ABI* against Plaintiffs (VC, at ¶.200);

4 \*. Filings in the Blue Lake Court in *Blue Lake v. ABI* were used by the  
5 litigants to further the scheme against Plaintiffs (VC, at ¶¶.201-202, 205, 207);

6 \*. “Several Defendants” (which do not appear to include Janssen Malloy,  
7 Yarnall and Burroughs), undertook to influence, obstruct, impede the due administration  
8 of justice of a Court of the United States, through conduct which included: (a) Attorneys  
9 from Rapport & Marston ghostwriting papers filed by Boutin Jones which were intended  
10 to convince the district court that Judge Marston was a neutral decision-maker; and (b)  
11 Attorney DeMarse of Boutin Jones drafting and Judge Marston filing, a false declaration  
12 with the district court (VC, at ¶.208); and

13 \*. Plaintiffs were harmed by Defendants’ scheme by being compelled to  
14 defend themselves against the tribal court action. (VC, at ¶¶.209-210.)

### 15 **III. THE TWO GROUNDS FOR THIS MOTION TO DISMISS - FRCP 12(b)**

#### 16 **A. The Challenge to a Complaint Based upon Tribal Immunity is Made** 17 **Through a Motion to Dismiss under FRCP 12(b)(1)**

18 A Motion to Dismiss for tribal sovereign immunity is brought under FRCP  
19 12(b)(1) for lack of subject matter jurisdiction. (See *Pistor v. Garcia* 791 F.3d 1104,  
20 1110 (9<sup>th</sup> Cir. 2015) [Issue of tribal sovereign immunity is quasi-jurisdictional to be  
21 asserted in a 12(b)(1) motion.]; *Lewis v. Norton* 424 F.3d 959, 961 (9<sup>th</sup> Cir. 2005).)

22 The Court in *Pistor v. Garcia* opined that the rule should be applied as follows:

23 “In the context of a Rule 12(b)(1) motion to dismiss on  
24 the basis of tribal sovereign immunity, ‘the party asserting  
25 subject matter jurisdiction has the burden of proving its  
26 existence,’ i.e. that immunity does not bar the suit. (*Miller v.*  
27 *Wright*, 705 F.3d 919, 923 (9<sup>th</sup> Cir. 2013) (quoting *Robinson*  
28 *v. United States* 586 F.3d 683, 685 (9<sup>th</sup> Cir. 2009). When a

1 district court is presented with a challenge to its subject  
2 matter jurisdiction, '[n]o presumptive truthfulness attaches to  
3 [a] plaintiff's allegations.' (*Robinson v. United States, supra*,  
4 586 F.3d at p. 685 (quoting *Augustine v. United States* 704  
5 F.2d 1074, 1077 (9<sup>th</sup> Cir. 1983). In resolving such a motion,  
6 '[a] district court may 'hear evidence regarding jurisdiction'  
7 and 'resolv[e] factual disputes where necessary.'" (*Robinson v.*  
8 *United States, supra*, 586 F.3d at p. 685 (quoting *Augustine*  
9 *v. United States, supra*, 704 F.2d at p. 1077.)

10 Given these established principles, the district court  
11 was incorrect to conclude that '[e]ven if [the tribal  
12 defendants] are entitled to tribal immunity from suit . . . it  
13 would be inappropriate . . . to dismiss the claims against them  
14 for lack of [subject matter] jurisdiction.' To the contrary, as  
15 the tribal defendants invoked sovereign immunity in an  
16 appropriate manner and at an appropriate stage, i.e. in a Rule  
17 12(b)(1) motion to dismiss, if they were entitled to tribal  
18 immunity from suit, the district court would lack jurisdiction  
19 over the claims against them and would be required to  
20 dismiss them from the litigation. (See *Leeson v.*  
21 *Transamerica Disability Income Plan* 671 f.3d 969, 975, fn.  
22 12 (9<sup>th</sup> Cir. 2012).)"

23 (*Pistor v. Garcia, supra*, 791 F.3d at p. 1110.)

24 As shown above, once Defendants have challenged subject matter jurisdiction, the  
25 burden shifts to Plaintiffs to prove the necessary jurisdictional criteria are met by  
26 competent evidence. Here, Plaintiffs' own verified Complaint shows no such evidence  
27 exists to prove jurisdiction – requiring that this motion be granted.

28 ///

**B. The Standard to Challenge a Complaint Based Upon the Failure to State a Claim through a Motion to Dismiss under FRCP 12(b)(6)**

A pleading is deficient and may be dismissed under FRCP 12(b)(6) if a Plaintiff fails to state a claim upon which relief can be granted. (*Bell Atlantic Corp. v. Twombly* 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal* 662, 678 (2009).) “A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” (*Ashcroft v. Iqbal, supra*, 556 U.S. at p. 678 [citing to *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at p. 556.]) “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” (*Ibid.*) If a claim sets forth facts that are “merely consistent with” with Defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” (*Ibid.*) Allegations of wrongdoing will be deemed “implausible” if there are “obvious alternative explanation[s]” for the facts alleged indicating lawful conduct, not the unlawful conduct urged by Plaintiff. (*Ashcroft v. Iqbal, supra*, 556 U.S. at p. 682.)

Material properly submitted with the Complaint (exhibits under Rule 10(c)) may be considered as part of the Complaint for purposes of a FRCP 12(b)(6) motion. (*Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* 896 F.2d 1542, 1555 (9<sup>th</sup> Cir. 1990).) Thus documents attached to a Complaint and incorporated therein by reference are treated as part of the Complaint when ruling on a FRCP 12(b)(6) motion. (*In re NVIDIA Corp. Secur. Litig.* 768 F.3d 1046, 1051 (9<sup>th</sup> Cir. 2014).) Accordingly, when ruling on a FRCP 12(b)(6) motion, the Court can “augment the facts and inferences from the body of the Complaint with “data points gleaned from documents incorporated by reference into the Complaint, matters of public record, and facts susceptible to judicial notice.” (*Coto Settlement v. Eisenberg* 593 F.3d 1031, 1038 (9<sup>th</sup> Cir. 2010).)

Where the facts and dates alleged in the Complaint indicate the claim is barred by the statute of limitations, a Motion to Dismiss for failure to state a claim lies. (*Van Saher v. Norton Simon Museum of Art at Pasadena* (592 F.3d 954, 969 (9<sup>th</sup> Cir.

2010).) Under these circumstances, the Complaint would fail to state a claim because the action was time-barred. (*Ibid.*)

**IV. THE COURT HAS NO JURISDICTION OVER THE MOVING DEFENDANTS BECAUSE THEY MAINTAIN SOVEREIGN IMMUNITY FOR THEIR ACTIONS AS AGENTS OF THE TRIBE BEFORE THE TRIBAL COURT**

Indian tribes have long been recognized as possessing common law immunity from suit enjoyed by sovereign powers. (*Turner v. United States* 248 U.S. 354, 358 (1919).) Absent congressional authorization, “Indian nations are exempt from suit.” (*United States v. United States Fidelity and Guaranty Co.* 309 U.S. 506, 512 (1940).) Any waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (*United States v. Testan* 424 US 392, 399 (1976).)

Judicial recognition of a tribe’s immunity from suit is not discretionary. (*People of the State of California v. Quechan Tribe of Indians* 595 F.2d 1153, 1155 (9th Cir. 1979).) Rather, absent a waiver, the assertion of sovereign immunity by a federally-recognized Indian tribe deprives the Court of jurisdiction to adjudicate the claim:

“Sovereign immunity involves a right which courts have no choice in the absence of a waiver but to recognize. It is not a remedy, as suggested by California’s argument, the application of which is within the discretion of the court...consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.”

(*Id.*, at p. 1155.)

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1 Such immunity is jurisdictional in nature and applies “irrespective of the merits  
 2 of the claim asserted against the tribe.” (*Rehner v. Rice* 675 F.2d 1340, 1351 (9<sup>th</sup> Cir.  
 3 1982).) Tribal immunity applies to commercial activities of the tribe, including a casino  
 4 if it is an arm of the tribe. (*Cook v. Avi Casino Enterprises, Inc.* 548 F.3d 718, 726-727  
 5 (9<sup>th</sup> Cir. 2006); *Allen v. Gold County Casino* 464 F.3d 1044, 1046-1047 (9<sup>th</sup> Cir.  
 6 2006).) Such immunity has been applied in an action against a tribe for Malicious  
 7 Prosecution, even when the prior action by the tribe was filed in state Court. (*Beecher*  
 8 *v. Mohegan Tribe of Indians* 918 A.2d 880, 884-886 (Sup. Ct. Conn. 2007).)

9 Further, tribes have a “strong interest in protecting [their] ability to adjudicate  
 10 matters brought to them within their own court system.” (*Ford Motor Co. v.*  
 11 *Todocheene* 258 Fed. Supp.2d 1038, 1057 (D.Ct Ariz. 2002).) State Courts “have no  
 12 authority to limit, modify or control the tribal court or vice versa.” (*Teague v. Band of*  
 13 *Chippewa Indians* 665 N.W. 2d 899, 907 (Sup. Ct. Wisc. 2003).)

14 Sovereign immunity extends not simply to the tribe itself, but also to those agents  
 15 acting on the tribe’s behalf. “It is settled that tribal immunity extends to individual tribal  
 16 officials acting in their representative capacity. . . . Further, at least in our federal circuit,  
 17 an official need not be a member of the tribe in order to share in its sovereign  
 18 immunity.” (*United States v. Oregon* 657 F.2d 1009, 1012 (9<sup>th</sup> Cir. 1981); *Snow v.*  
 19 *Quinalt Indian Nation* 709 F.2d 1319, 1321 (9<sup>th</sup> Cir. 1983).) Federal Courts have  
 20 expressly recognized that attorneys acting in their official capacity on behalf of the tribe  
 21 and within the scope of their authority are protected by tribal immunity. (*Davis v.*  
 22 *Littell* 398 F.2d 83, 85 (9<sup>th</sup> Cir. 1968).)

23 In the California State action, in granting the Motion to Quash/Dismiss, the Court  
 24 relied upon a California case – which interpreted federal law – *Great W. Casinos, Inc.*  
 25 *v. Morongo Band of Mission Indians* 74 Cal.App.4th 1407 (1999). In that action,  
 26 Great Western Casinos (“GWC”) claimed that the tribe entered into a gaming contract  
 27 with GWC and once it saw the potential profit, the tribe, through its individual members  
 28 and general counsel, conducted a fraudulent scheme to cancel the management contract

1 and cheat GWC out of the potential profits. (*Id.*, at p. 1413.) The tribe and its general  
2 counsel moved to dismiss on grounds of sovereign immunity. (*Id.*, at p. 1414.) The  
3 Court found that the tribe had not waived its sovereign immunity and that the Court  
4 lacked subject matter jurisdiction over the Defendants. (*Id.*, at p. 1417.)

5 As to the tribe's attorney the Court went on to indicate:

6 "The non-Indian law firm and general counsel are similarly  
7 immune from suit for actions taken or opinions given in  
8 rendering legal services to the tribe. Here the complaint  
9 acknowledges defendants Alexander & Karshmer and  
10 Barbara E. Karshmer, Inc., legal counsel for the tribe, were  
11 'at all times herein mentioned retained by and representing  
12 the Morongo Band.' The complaint further alleges 'the  
13 Morongo Band did, on April 18, 1995, acting through the  
14 Tribal Council and Karshmer, terminate the Management  
15 Agreement, in violation and in breach thereof, on the ground  
16 that GWC's former principals violated the law - - for  
17 possession of illegal gaming devices. [P]laintiff is informed  
18 and believes and thereon alleges that Karshmer counseled and  
19 advised the Morongo Band and its members to carry out their  
20 fraudulent misconduct as alleged [the allegedly false and  
21 fabricated charges GWC management violated the law].'

22 In providing legal representation - - even advising, counseling  
23 and conspiring with the tribe to wrongfully terminate the  
24 management contract - - counsel were similarly immune from  
25 liability for those professional services. (*See Davis v. Littell,*  
26 *supra*, 398 F.2d 83, 85 [attorney who advised tribal council  
27 regarding the competence and integrity of an employee is  
28 immune from liability for defamation under the executive



1 privilege].) The rationale behind barring claims against legal  
2 counsel based on their advice to the Indian tribe which  
3 contracted for their services regarding gaming enterprises was  
4 aptly explained in ***Gaming Corp. of America v. Dorsey &***  
5 ***Whitney*** (8th Cir. 1996) 88 F.3d 536. There the federal  
6 appellate court rejected claims general counsel could be liable  
7 in tort for allegedly making a management company appear  
8 unsuitable as manager for the tribe's gaming operations  
9 during the licensing process. (88 F.3d at p. 540.) The court  
10 explained, '[t]ribes need to be able to hire agents, including  
11 counsel, to assist in the process of regulating gaming. As any  
12 government with aspects of sovereignty, a tribe must be able  
13 to expect loyalty and candor from its agents. If the tribe's  
14 relationship with its attorney, or attorney advice to it, could  
15 be explored in litigation in an unrestricted fashion, its ability  
16 to receive the candid advice essential to a thorough licensing  
17 process would be compromised. The purpose of Congress in  
18 requiring background checks could be thwarted if retained  
19 counsel were inhibited in discussing with the tribe what is  
20 learned during licensing investigations, for example. Some  
21 causes of action could have a direct effect on the tribe's  
22 efforts to conduct its licensing process even where the tribe is  
23 not a party. (***Gaming Corp. of America v. Dorsey &***  
24 ***Whitney, supra***, 88 F.3d at p. 550.)"

25 (***Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra***, 74, Cal.App.4th  
26 at pp. 1423-1425.)

27 The analysis from ***Great W. Casinos*** regarding the extension of tribal sovereign  
28 immunity to the tribe's legal counsel was relied upon by the United States District Court

1 for the Southern District of New York in *Catskill Dev. LLC v. Park Place Entm't Corp.*  
2 206 F.R.D. 78, 91 (U.S.D.C. S.D.N.Y. 2002).) In that case, the district court addressed  
3 in part whether a tribe's non-member attorneys were protected by the tribe's sovereign  
4 immunity against subpoenas issued to the attorneys demanding information about the  
5 tribe's business and the attorneys' work on behalf of the tribe in a civil action where  
6 neither the tribe nor the attorneys' were parties.

7 The District Court held that the attorneys were entitled to sovereign immunity  
8 against the subpoenas, reasoning as follows: "As a general proposition, a tribe's  
9 attorney, when acting as a representative of the tribe and within the scope of his  
10 authority, is cloaked in the immunity of the tribe as a tribal official is cloaked in that  
11 immunity. (*Id.*, at p. 91.)

12 Here, just as in *Great W. Casinos*, and the federal cases it relies upon, as well as  
13 the federal case which followed its analysis, the tribe must be able to retain attorneys to  
14 represent it in Tribal Court and expect that these attorneys can give candid advice  
15 without concern that their discussions and advice would be explored in litigation. This is  
16 especially true where, as here, the Plaintiffs have intentionally elected not to sue Blue  
17 Lake so that its former counsel will, necessarily, be required to disclose information  
18 protected by the attorney-client in response to any discovery propounded by Plaintiffs,  
19 leaving Defendants without an adequate opportunity to defend themselves.

20 Further, by claiming Defendants "wrongfully" pursued an action in Tribal Court,  
21 Plaintiffs are using this Court as an instrument to control what conduct is permissible or  
22 impermissible in Tribal Court. The Tribal Court alone should be the only Court to  
23 determine whether any actions before it were a "wrongful use" of its Court.

24 Although not appearing in the Complaint, and contrary to their own admissions,  
25 Plaintiffs may try to argue that the actions of counsel were not within the scope of their  
26 agency. Plaintiffs would be wrong. "If the actions of an officer do not conflict with the  
27 terms of his valid statutory authority, then they are actions of the sovereign, whether or  
28 not they are tortious under general law." (*Larson v. Domestic Foreign Commerce Corp.*

1 337 U.S. 682, 685 (1948).) "Official action is not ultra vires or invalid if based on an  
 2 incorrect decision s to law or fact, if the officer making the decision was empowered to  
 3 do so." (*Wyoming v. U.S.* 279 F.3d 1214, 1229-1230 (10<sup>th</sup> Cir. 2002).) "Moreover, the  
 4 mere allegation that an officer acted wrongfully does not establish that the officer, in  
 5 committing the alleged wrong, was not exercising the powers delegated to him by the  
 6 sovereign. (*Ibid.*) If the officer is exercising such powers, the suit is in fact against the  
 7 sovereign and may not proceed unless the sovereign consented." (*Ibid.*)

8 Here, Plaintiffs have admitted Blue Lake Rancheria is a sovereign tribe. (VC, at  
 9 ¶¶.11, 38, 150(c).) They have admitted BLCH is an arm of the tribe. (VC, at ¶.9.) They  
 10 have admitted that the underlying action was filed in Tribal Court. (VC, at ¶¶.1, 4, 22.)  
 11 Plaintiffs have admitted Defendants' actions were on behalf of Blue Lake, their actions  
 12 on behalf of Blue Lake were undertaken in Tribal Court and there is nothing to indicate  
 13 their acts were outside the scope of that agency. (VC, at ¶¶.134-144.) The fact they have  
 14 purposefully not named Blue Lake does not allow them to circumvent the sovereign  
 15 immunity issue. Under the verified facts, sovereign immunity applies.

16 Plaintiffs will no doubt argue that, because Defendants are sued in their  
 17 "individual capacity" that sovereign immunity does not apply, relying on the recent case  
 18 of *Lewis v. Clarke* 137 S. Ct. 1285 (2017). However, even a cursory reading of *Lewis*  
 19 shows it is inapplicable here. In *Lewis*, a limousine driver, while transporting casino  
 20 patrons to their homes, rear-ended a passenger car. (*Id.*, at p. 1290.) The driver argued  
 21 that, because the tribe had voluntarily agreed to indemnify him, tribal sovereignty should  
 22 apply. (*Id.*, at pp. 1290-1291.)

23 The accident occurred on Interstate 95, a state highway in Connecticut. (*Id.*, at p.  
 24 1290.) The Court indicated that, because this was a simple tort action regarding conduct  
 25 which occurred on state lands and a judgement against the driver would not disturb the  
 26 tribe's sovereignty, sovereign immunity did not apply. (*Id.*, at p. 1292.) In doing so, it  
 27 cautioned "courts should look to whether the sovereign is the real party in interest to  
 28 determine whether sovereign immunity bars the suit." (*Lewis v. Clarke, supra*, 137 S.

1 Ct. at pp. 1290-1291.) “In making this assessment, courts may not simply rely on the  
 2 characterization in the complaint but rather must determine in the first instance whether  
 3 the remedy sought is truly against the sovereign.” (*Ibid.*) “Similarly, lawsuits brought  
 4 against employees in their official capacity represent only another way of pleading an  
 5 action against an entity of which an officer is an agent and they may also be barred by  
 6 sovereign immunity.” (*Id.*, at pp. 1290-1291.)

7 Here, this action directly impinges on Blue Lake’s sovereignty. When advising the  
 8 tribe on legal matters the attorney acts as its officer. (*Davis v. Littell, supra*, 398 F 2d at  
 9 p. 85.) As in *Great Casino’s*, a tribe must be able to rely on the candid advice of its  
 10 counsel without fear that such advice will be explored in litigation. (*Great Casino’s*,  
 11 *supra*, 74 Cal. App 4th at p. 1434.) Under such circumstances “some causes of action”  
 12 directly impinge on the tribe’s sovereignty “even where the tribe is not a party.” (*Ibid.*)

13 Further, the claimed actions of Defendants which purport to have injured  
 14 Plaintiffs all occurred before the Tribal Court. If this Court were to wade in and decide  
 15 what actions are or are not permissible in Tribal Court it necessarily asserts control of  
 16 that Court. Is this Court, as Plaintiffs contend, supposed to rule on what pleadings are  
 17 appropriate in Tribal Court or how an action in Tribal Court must be plead? (VC, at ¶¶.1,  
 18 10.) Is it to determine when, in Tribal Court, an attorney has misused the Tribal Court’s  
 19 judicial process (VC, at ¶¶.134-144) or whether the Tribal Court correctly followed its  
 20 own procedures? (VC, at ¶¶.60-63.)

21 Under these circumstances, it would be more appropriate for the Tribal Court to  
 22 determine what procedures should have been followed or what actions were an abuse of  
 23 its procedures. Necessarily, as Janssen Malloy and its attorneys were acting as officers of  
 24 the tribe or because this action seeks to determine what is appropriate before the Tribal  
 25 Court and thus seeks to control the Tribal Court processes, it infringes on the tribe’s  
 26 sovereignty and this Motion to Dismiss should be granted.

27 Plaintiffs may also try to reply upon *J.W. Gaming Dev., LLC v. James* 2018 U.S.  
 28 Dist. LEXIS 172773, \*9, 2018 WL 4853222 (N.D. Cal. October 5, 2018) In *J.W.*

1 **Gaming**, J.W. Gaming sued a Native American tribe and an investment group in federal  
 2 court after losing nearly \$5.4 million in a casino project. As to the “sovereign immunity”  
 3 aspect of the case, the issue was limited to the court opining that the tribe’s employees  
 4 were not subject to tribal immunity because the “suit is against the Tribal Defendants in  
 5 their individual capacities and that the Tribe is not the real party in interest.” One vital  
 6 aspect of the court’s reasoning was whether the tribal employees’ respective employment  
 7 contracts could create the legal nexus towards said tribal immunity.

8 *J.W. Gaming* is inapplicable because the decision addressed tribal employees  
 9 entering into contracts with outside vendors. Here, in contrast, this case concerns an  
 10 attorney representing a tribe before a tribal Court.

11 **V. PLAINTIFFS HAVE FAILED TO STATE A RICO CLAIM AGAINST**  
 12 **DEFENDANTS BECAUSE THE PURSUIT OF A LAWSUIT DOES NOT**  
 13 **CONSTITUTE THE REQUISITE PREDICATE ACTS TO SHOW A**  
 14 **PATTERN OF RACKETEERING ACTIVITY**

15 Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act,  
 16 provides a private right of action to any person injured in its business or property by  
 17 reason of a violation of the activities prohibited by Section 1962. To establish a RICO  
 18 claim under section 1964(c), a Plaintiff must show: (1) a violation of 18 U.S.C. Section  
 19 1962; (2) An injury to business or property; and (3) That the injury was caused by the  
 20 violation of Section 1962. To establish whether a Defendant violated Section 1962, a  
 21 Plaintiff must prove that each Defendant participated in: (1) The conduct of (2) an  
 22 enterprise that affects interstate commerce (3) through a pattern (4) of racketeering  
 23 activity which (5) the proximately harmed the victim. (*Eclectic Properties E., LLC v.*  
 24 *Marrns & Millichap Co.* 751 F.3d 990, 997 (9th Cir. 2014).)

25 “Racketeering activity” is defined to include any “act” indictable under various  
 26 specified federal statutes, including the mail and wire fraud statutes and the obstruction  
 27 of justice statute. (See 26 18 U.S.C. Section 1961(1) |Defining “racketeering activity” to  
 28 include offenses indictable under 27 U.S.C. Section 1341 |Relating to mail fraud|;

1 Section 1343 [Relating to wire fraud], and Section 1503 [Relating to obstruction of  
2 justice.].) A “pattern of racketeering activity” is defined by the statute as “at least two  
3 acts of racketeering activity” within a ten-year period. (18 U.S.C. Section 1962.)

4 First, Plaintiffs do not allege any wrongful conduct by the Defendant attorneys  
5 that amounts to a “pattern of racketeering activity” under the RICO Statute. Instead, the  
6 Complaint merely alleges Janssen Malloy, LLP, through its attorneys Megan Yarnall and  
7 Amelia Burroughs, replaced Boutin Jones as attorneys for Blue Lake in *Blue Lake v.*  
8 *Acres* and pursued the action in Tribal Court “on Blue Lake’s behalf.” (Verified  
9 Complaint, at ¶¶.15, 27-29, 117.) All of the alleged acts concern litigation activities  
10 during the underlying action. Specifically, Plaintiffs allege that:

11 \*. “During 2016 and 2017, dozens of filings were made in *Blue Lake v. Acres*,  
12 with proofs of service indicating that the filings were served via postal-mail.” (VC, at  
13 ¶.202); and

14 \*. “During 2016 and 2017, dozens of filings were made in *Blue Lake v. Acres*,  
15 with proofs of service indicating that the filings were served via email.” (VC, at ¶.202).

16 These so-called “patterns of racketeering activity” are merely allegations of  
17 litigation activity undertaken by Defendants in representing their client, Blue Lake  
18 Casino in tribal court. Plaintiffs have not alleged the requisite predicate criminal acts  
19 under the RICO statute and accordingly have not met the pleading standard of Rule  
20 12(b)(6). Plaintiffs are required to plead their RICO claim with specificity, as the RICO  
21 claim is based on the defendants’ “extrinsic fraud to manufacture a tribal court  
22 judgment.” (VC, at ¶.200.) The remainder of the allegations in Plaintiffs’ RICO claim  
23 are conclusory, and based on unwarranted factual conclusions or unjustified inferences  
24 and should be disregarded. (VC, at ¶¶.203-207.)

25 The Second Circuit in *Kim v. Kimm* 884 F.3d 98 (2d Cir. 2018) recently  
26 addressed the issue of whether alleged litigation activity can serve as RICO predicate  
27 acts and cited similar decisions in the First Circuit, Fifth Circuit, Tenth Circuit, and  
28 Eleventh Circuit, to hold that “allegations of frivolous, fraudulent, or baseless litigation



1 activities-without more-cannot constitute a RICO predicate act.”

2 In **Kim v. Kimm**, a restaurant owner brought a RICO action against parties who  
 3 had previously brought a trademark infringement action against him, alleging that the  
 4 infringement litigation had been fraudulent and violated the RICO Act. The defendants  
 5 (including attorney defendants) in that action filed a motion to dismiss for failure to state  
 6 a claim, and the trial court granted the defendants' motion without leave to amend,  
 7 finding that Kim had not alleged predicate acts constituting a pattern of racketeering  
 8 activity. The court found that most of the alleged predicate acts concerned litigation  
 9 activity in the infringement action-specifically, the preparing, signing, and filing of  
 10 declarations by parties who were defendants in the RICO action-and reasoned that well-  
 11 established precedent and sound public policy preclude such litigation activities from  
 12 forming the basis for predicate acts under RICO. (**Kim v. Kimm, supra**, 884 F.3d at p.  
 13 102.) The Second Circuit affirmed the trial court's ruling for “substantially the reasons  
 14 set forth by the district court.” (*Id.* at p. 104.)

15 The Second Circuit held:

16 “Although we have not spoken directly on the issue, other  
 17 courts have held that “[i]n the absence of corruption,” such  
 18 litigation activity “cannot act as a predicate offense for a  
 19 civil-RICO claim.” **Snow Ingredients, Inc. v. SnowWizard,**  
 20 **Inc.**, 833 F.3d 512, 525 (5th Cir. 2016); **Raney v. Allstate**  
 21 **Ins. Co.**, 370 F.3d 1086, 1087-88 (11th Cir. 2004) (deciding  
 22 that the “alleged conspiracy to extort money through the  
 23 filing of malicious lawsuits” were not predicate acts of  
 24 extortion or mail fraud under RICO); **Deck v. Engineered**  
 25 **Laminates**, 349 F.3d 1253, 1258 (10th Cir. 2003) (deciding  
 26 that meritless litigation is not a predicate act of extortion  
 27 under RICO); **Gabovitch v. Shear**, 70 F.3d 1252, 1995 WL  
 28 697319, at \*2, 1995 U.S. App. LEXIS 32856 (1st Cir. 1995)

1 (per curiam) (concluding that “proffering false affidavits and  
2 testimony to [a] state court” does not constitute a predicate act  
3 of extortion or mail fraud); *see also Curtis & Assocs., P.C. v.*  
4 *law Offices of David M. Buslzman, Esq.*, 758 F.Supp.2d  
5 153, 171-72 (E.D.N.Y. 2010) (collecting cases from district  
6 courts in the Second Circuit deciding “that the litigation  
7 activities alleged in [the complaint] cannot properly form the  
8 basis for RICO predicate acts”). We agree with the reasoning  
9 of these opinions and conclude that allegations of frivolous,  
10 fraudulent, or baseless litigation activities without more  
11 cannot constitute a RICO predicate act.

12 As the district court explained, there are compelling  
13 policy arguments supporting this rule. First, “[i]f litigation  
14 activity were adequate to state a claim under RICO, every  
15 unsuccessful lawsuit could spawn a retaliatory action,” which  
16 “would inundate the federal courts with procedurally complex  
17 RICO pleadings.” Dist. Ct. Op. at 10-11, Appellant App'x at  
18 266-67; *see also* Nora F. Engstrom, *Retaliatory RICO and the*  
19 *Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639,  
20 696(2017) (permitting RICO suits based on prior litigation  
21 activities would “engender wasteful satellite litigation”).  
22 Furthermore, “permitting such claims would erode the  
23 principles undergirding the doctrines of res judicata and  
24 collateral estoppel, as such claims frequently call into  
25 question the validity of documents presented in the  
26 underlying litigation as well as the judicial decisions that  
27 relied upon them.” Dist. Ct. Op. at 11, Appellant App'x at  
28 267; *see also Gabovirch*, 1995 WL 697319, at \*3, 1995 U.S.



1 App. LEXIS 32856 (“In essence, simply by alleging that  
2 defendants' litigation stance in the state court case was  
3 'fraudulent,' plaintiff is insisting upon a right to relitigate that  
4 entire case in federal court .... The RICO statute obviously  
5 was not meant to endorse any such occurrence.”). Moreover,  
6 endorsing this interpretation of RICO “would chill litigants  
7 and lawyers and frustrate the well-established public policy  
8 goal of maintaining open access to the courts” because “any  
9 litigant's or attorney's pleading and correspondence in an  
10 unsuccessful lawsuit could lead to drastic RICO liability.”  
11 Dist. Ct. Op. at 11, Appellant App'x at 267 (quoting *Curtis &*  
12 *Assocs.*, 758 F.Supp.2d at 173); *see also Engel v. CBS, Inc.*,  
13 182 F.3d 124, 129 (2d Cir. 1999) (noting the “strong public  
14 policy of open access to the courts for all parties and [the  
15 need] to avoid ad infinitum [litigation] with each party  
16 claiming that the opponent's previous action was malicious  
17 and meritless” (internal quotation marks and citations  
18 omitted) (second brackets in original) ).

19 (*Kim v. Kimm, supra*, 884 F.3d at p. 104.)

20 This Court here should adopt the reasoning in *Kim* because such a holding would  
21 protect litigation activity that is not advancing the operations of a criminal enterprise,  
22 would not allow a baseless RICO claim to chill the legitimate exercise of litigation  
23 activity, and would not create a tool for disgruntled litigants to institute retaliatory  
24 lawsuits. Because Defendants' litigation activity may not form the basis for liability  
25 under the RICO claim, Plaintiffs have failed to allege the requisite predicate acts as a  
26 matter of law.

27 ///

28 ///

VI. THE CLAIM UNDER CALIFORNIA STATE LAW FOR WRONGFUL  
USE OF CIVIL PROCEEDINGS (MALICIOUS PROSECUTION) IS  
BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS

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

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

ABI's Verified Complaint alleges: “From January 2016 through July 2017, Blue Lake Rancheria ('Blue Lake') and its confederates sued Acres Bonusing, Inc. ... within Blue Lake's trial court. (Verified Complaint, at ¶.1.) Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned, on conjured claims of fraud and breach of contract.” (VC, at ¶.1.) On August 31, 2017, a Judgment of Dismissal in favor of Plaintiffs was entered in *Blue Lake v. Acres*. (VC, at ¶.5; Judgment of Dismissal in *Blue Lake v. Acres*: Exhibit “3” to Verified Complaint.)

Thus, ABI was legally required to file the Complaint in this action by August 31, 2018 – within one-year of the termination of the underlying action on August 31, 2017 – for the claim for Malicious Prosecution to have been timely. (*Babb v. Superior Court* 3 Cal.3d 841, 846 (1971) [On a Cause of Action for Malicious Prosecution, the period of limitations begins to run on the date that the proceedings in the prior action were terminated.].) ABI filed its Complaint on August 28, 2019, and ABI's state law claim for Malicious Prosecution against the attorney Defendants which accrued on August 31, 2017 is, therefore, barred by the one-year statute of limitations.

## VII. CONCLUSION

Based upon the foregoing, Defendants JANSSEN MALLOY LLP, MEGAN YARNALL, and AMELIA BURROUGHS request the Court grant their Motion to Dismiss the Complaint of Plaintiffs ACRES BONUSING and JAMES ACRES based Upon: (1) Sovereign tribal immunity; (2) The failure to state a federal claim for Operating or Managing a Racketeering Enterprise (RICO) (the Eighth Claim); and/or (3) The failure to state a California state law claim for Wrongful Use of Civil Proceedings (Malicious Prosecution) (the First Claim).

DATED: January 3, 2020

BERMAN BERMAN BERMAN  
SCHNIEDER & LOWARY, LLP

By:                     /S/                      
                    HOWARD SMITH  
                    Attorneys for  
                    Specially Appearing Defendants,  
                    JANSSEN MALLOY, LLP, MEGAN  
                    YARNALL and AMELIA  
                    BURROUGHS