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 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
 Action Filed: August 28, 2019

**OPPOSITION OF DEFENDANTS
 JANSSEN MALLOY LLP, MEGAN
 YARNALL AND AMELIA
 BURROUGHS TO MOTION FOR
 SANCTIONS UNDER FEDERAL
 RULE OF CIVIL PROCEDURE RULE
 11 TO STRIKE DEFENDANTS' ANTI-
 SLAPP MOTION BROOUGH UNDER
 CALIFORNIA CODE OF CIVIL
 PROCEDURE SECTION 425.16;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

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

Assigned: Judge William H. Orrick

Trial Date: None

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

By its very terms, the California legislature enacted California Code of Civil Procedure Section 425.16 (“the Anti-SLAPP Statute”) to provide for an early method to conclude cases based upon petition activity, which includes claims based upon prior litigation. (*Braun v. Chronicle Publishing Co.* 52 Cal.App.4th 1036, 1042 (1997).) (Section 425.16(i).) Plaintiff ACRES BONUSING, INC. has brought a Cause of Action under California law against Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS for Wrongful use of Legal Proceedings – Malicious Prosecution. It is well settled that claims for Malicious Prosecution are entitled to protection under the Statute. (*Jarrow Formulas, Inc. v. LaMarche* 31 Cal.4th 728, 734-735 (2003).)

In a second ill-conceived attempt to avoid the statute, Plaintiff has brought a Motion for Sanctions under Federal Rule of Civil Procedure Rule 11 seeking to strike Defendants’ Anti-SLAPP Motion arguing the Anti-SLAPP Statute does not apply to the Cause of Action for Malicious Prosecution because the prior action was brought in tribal court. This attempt fails for several reasons.

First, under the controlling authority, litigation in the tribal court is entitled to the protection of the Anti-SLAPP Statute. Moreover, if Plaintiff is able to show Defendants’ Anti-SLAPP Motion was brought in bad faith, its remedy is to prevail on the motion and then seek attorneys’ fees and costs under Section 425.19(c) – not to bring a Motion for Sanctions.

The Court in the prior action - Superior Court for the County of Sacramento - already rejected this argument. In response to the Anti-SLAPP Motions brought against the Cause of Action for Wrongful use of Legal Proceedings (Malicious Prosecution) filed in the California Superior Court, Plaintiff JAMES ACRES filed a Motion to Strike the Anti-SLAPP Motions under California Code of Civil Procedure Section 128.7. The trial court denied the motion finding the Anti-SLAPP motions were neither frivolous nor

1 objectively unreasonable. (Exhibit "A" hereto: June 11, 2019, minute order denying the
2 Motion to Strike under Section 128.7, at p.2, ¶.2.)

3 **II. THE CONTROLLING AUTHORITY COMPELS THE CONCLUSION**
4 **THAT LITIGATION IN A TRIBAL COURT IS ENTITLED TO**
5 **PROTECTION UNDER THE ANTI-SLAAP STATUTE – CALIFORNIA**
6 **CODE OF CIVIL PROCEDURE SECTION 425.16**

7 **A. Plaintiff's Argument**

8 Plaintiff contends that the Anti-SLAPP Statute does not apply to this claim,
9 making a variety of contradictory assertions that are unsupported by law and in cases
10 some are directly contrary to well-established authority. In addressing these assertions,
11 the Legislature has specifically instructed that the anti-SLAPP statute "shall be construed
12 broadly." (California Code of Civil Procedure Section 425.16(a).) Any doubts should
13 therefore be resolved in favor of applying the statute.

14 **B. Blue Lake Rancheria is "Person" Entitled to the Protection of the**
15 **Statute**

16 Plaintiff's argument that Defendants are not entitled to the protection of the Anti-
17 SLAPP Statute because the firm's previous client - Blue Lake Rancheria - is not a
18 natural person runs directly contrary to well-established law. (This argument concedes
19 that Defendants' pending Motion to Dismiss should be granted because actions
20 undertaken on behalf of the tribe are subject to sovereign immunity.) While the statute
21 uses the term "person," Courts have interpreted that term to include a corporation.
22 (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* 99 Cal.App.4th 1179, 1188
23 (2002); *see also Daniell v. Riverside Partners I.L.P.* 206 Cal.App.4th 1292, 1302
24 (2012) ["We therefore conclude that when an entity that has acquired the assets of
25 another entity is sued . . . and when the predecessor entity could have invoked the SLAPP
26 Act, the successor entity can invoke the SLAPP Act, too."].) Further, "the word 'person'
27 as used in Section 425.16(b), must be read to include a governmental entity." (*Bradbury*
28 *v. Superior Court* 49 Cal.App.4th 1108, 1114 (1996).) Indeed, the California Supreme

1 Court has expressly held that "the statutory remedy afforded by section 425.16 extends
 2 to statements and writings of governmental entities and public officials on matters of
 3 public interest and concern that would fall within the scope of the statute if such
 4 statements were made by a private individual or entity." (*Vargas v. City of Salinas* 46
 5 Cal.4th 1, 17 (2009).) In its literal reading of the statute, Plaintiff has neither addressed
 6 this case law nor made any effort to distinguish it. Blue Lake Rancheria is a "person"
 7 under the meaning of the statute and the tribe is entitled to its protections, as are its
 8 officials, employees and agents and retained counsel – Janssen Malloy and its attorneys.

9 **C. Tribal Court is a Proceeding Authorized by Law to Which the Anti-**
 10 **SLAPP Statute Applies**

11 Plaintiff's second argument is that the Anti-SLAPP Statute does not apply because
 12 there is no Constitutional right of petition in tribal court and thus statements in that
 13 proceeding are not "act[s] ... in furtherance of the person's right of petition or free speech
 14 under the United States Constitution or the California Constitution." (California Code of
 15 Civil Procedure Section 425.16.) This argument also fails.

16 Preliminarily, Plaintiff appears to confuse the doctrine of governmental immunity
 17 with the right to petition under the Constitution. In fact, the Indian Civil Rights Act of
 18 1968 (ICRA), 25 U.S.C. Sections 1301-1304, imposes many of the protections of the
 19 U.S. Constitution on Indian tribes. That specifically includes the right "to petition for
 20 redress of grievances." (25 U.S.C. Section 1302(a)(1).) As noted in the dissenting
 21 opinion in *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978): "The declared purpose
 22 of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U.S. C. §§ 1301-1341, is 'to
 23 insure that the American Indian is afforded the broad constitutional rights secured to
 24 other Americans.'" (*Santa Clara Pueblo v. Martinez* 436 U.S. 49, 72-73 (1978), citing
 25 S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967).) Plaintiff's bare statement that there is
 26 no constitutional right of petition in tribal courts is therefore dubious.

27 Plaintiff's argument also ignores the Anti-SLAPP Statute's own definitions. The
 28 statute defines an "act in furtherance of a person's right of petition or free speech under

1 the United States or California Constitution in connection with a public issue" to
 2 include: (1) "any written or oral statement or writing made before a legislative,
 3 executive, or judicial proceeding, or any other official proceeding authorized by law"
 4 and (2) any written or oral statement or writing made in connection with an issue under
 5 consideration or review by a legislative, executive, or judicial body, or any other official
 6 proceeding authorized by law." (California Code of Civil Procedure Section 415.16(c).)
 7 *Vargas v. City of Salinas, supra*, 46 Cal.4th at p. 17 makes clear the Anti-SLAPP
 8 definitions of protected activity apply whether the participation is constitutionally
 9 protected or not, since the decision acknowledges that while a government is not a
 10 person protected by the First Amendment, it nevertheless is entitled to file an Anti-
 11 SLAPP Motion, if it engages in protected activity as defined in Section 425.16(c).

12 Section 425.16(c) has been read to include proceedings authorized by law outside
 13 of the traditional context of Courts. For example, a hospital peer review committee has
 14 been deemed to be "an official proceeding authorized by law" under Section
 15 425.16(c)(2) because that procedure is required under Business and Professions Code
 16 Section 805. (*Kibler v. Northern Inyo County Local Hospital Dist.* 39 Cal.4th 192, 199
 17 (2006).) Likewise, in *Mallard v. Progressive Choice Ins. Co.* 188 Cal.App.4th 531,
 18 538-542 (2010), the Court found that the Anti-SLAPP Statute applied to subpoenas
 19 served in an automobile contractual arbitration. Similarly, in *United Tactical Sys., LLC*
 20 *v. Real Action Paintball, Inc.* 143 F.Supp.3d 982, 997-998 (N.D. Cal. 2015), the Court
 21 found conduct from Indiana litigation was protected under the Anti-SLAPP Statute.

22 Tribal courts are both judicial proceedings and proceedings authorized by United
 23 States law. Numerous federal laws authorize tribal courts to exercise authority over both
 24 tribal members and non-Indians. For example, the Indian Civil Rights Act authorizes
 25 tribal courts to impose a \$500 fine and up to six months in prison. The 2013
 26 reauthorization of Violence Against Women Act allowed tribes to prosecute non-Indians
 27 who commit acts of violence against Indians with whom they are in a relationship. (42
 28 U.S.C. Sections 1301, et seq.; Violence Against Women Reauthorization Act of 2013,

1 113 P.L. 4, 127 Stat. 54, 121.) Further, federal law mandates that the states give full
 2 faith and credit to tribal court custody orders involving Indian children (25 U.S.C.
 3 Section 1911(d)), protection orders (18 U.S.C. Section 2265); child support orders (28
 4 U.S.C. Section 1738 B); and child custody orders. (Family Code Section 3404.)

5 California law also recognizes the validity of tribal court proceedings. (*See, e.g.,*
 6 Code of Civil Procedure Sections 1730, et seq. [Authorizing the Superior Court to
 7 enforce tribal court civil money judgments if certain criteria are satisfied.]; Welfare &
 8 Institutions Code Section 224.5 [Requiring full faith and cred it to tribal court child
 9 custody orders.].)

10 Moreover, there is a "long-standing federal policy supporting the development of
 11 tribal courts" for the purpose of encouraging tribal self-government/determination."
 12 (*Penn v. United States* 335 F.3d 786, 789 (8th Cir. 2003).) This policy is the basis for
 13 according tribal court judges "the same absolute judicial immunity that shields state and
 14 federal court judges." (*Ibid.*) This policy is best served by according tribal courts the
 15 same protection of the Anti-SLAPP Statute that is afforded to state courts.

16 **D. Tribal Court Is Not the Equivalent of a Foreign Nation's Courts.**

17 Plaintiff's reliance on *Guessous v. Chrome Hearts, LLC* 179 Cal.App.4th 1177
 18 (2009) is misplaced. *Guessous* held that "petitioning activity undertaken in a foreign
 19 county is not protected by the anti-SLAPP statute." (*Id.*, at p. 186.) This was based on
 20 the lack of any Constitutional right to petition in the courts of France, where the
 21 underlying litigation took place. A Native American tribe is not equivalent to a foreign
 22 government. This has been well established law in the United States since the 1830s,
 23 beginning with *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831). "For nearly two
 24 centuries now, we have recognized Indian tribes as 'distinct, independent political
 25 communities,' [Citation] . . . We have frequently noted, however, that the 'sovereignty
 26 that the Indian tribes retain is of a unique and limited character.'" (*Plains Commerce*
 27 *Bank v. Long Family Land & Cattle Co.* 554 U.S. 316, 327 (2008).) "Indian tribes do
 28 retain elements of "quasi-sovereign" authority after ceding their lands to the United

1 States and announcing their dependence on the Federal Government. . . . As the Court of
 2 Appeals recognized, Indian tribes are prohibited from exercising both those powers of
 3 autonomous states..." (*Oliphant v. Suquamish Indian Tribe* 435 U.S. 191, 208-209
 4 (1978).) "Upon incorporation into the territory of the United States, the Indian tribes
 5 thereby come under the territorial sovereignty of the United States and their exercise of
 6 separate power is constrained so as not to conflict with the interests of this overriding
 7 sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are]
 8 necessarily diminished.' [Citation]." (*Ibid.* citations omitted.)

9 As discussed at length above, tribal courts are not treated as Courts of a foreign
 10 nation for purposes of multiple federal statutes. Further, any decision of the Blue Lake
 11 Tribal Court regarding jurisdiction would have been reviewable by the District Court
 12 after tribal court remedies were exhausted, a limitation that would certainly not apply to
 13 the courts of a foreign nation. There is simply no basis for treating tribal courts, whose
 14 authority ultimately is subordinate to the federal government, as equivalent to courts in
 15 independent foreign countries.

16 **E. The Court in the Prior California Action Rejected This Argument.**

17 The Court in the prior action - Superior Court for the County of Sacramento -
 18 already rejected this argument. In response to the Anti-SLAPP Motions brought against
 19 the Cause of Action for Wrongful use of Legal Proceedings (Malicious Prosecution)
 20 filed in the California Superior Court, Plaintiff JAMES ACRISS filed a Motion to Strike
 21 the Anti-SLAPP Motions under California Code of Civil Procedure Section 128.7. The
 22 trial court denied the motion finding the Anti-SLAPP motions were neither frivolous nor
 23 objectively unreasonable. (Exhibit "A" hereto: June 11, 2019, minute order denying the
 24 Motion to Strike under Section 128.7, at p.2, ¶.2.)

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1 **III. PLAINTIFF'S REMEDY FOR THE FILING OF A BAD FAITH ANTI-**
 2 **SLAPP MOTION IS TO SEEK THE RECOVERY OF ITS**
 3 **ATTORNEYS' FEES AND COSTS UNDER CALIFORNIA CODE OF**
 4 **CIVIL PROCEDURE SECTION 425.169(c)**

5 Under Section 425.16(c)(1) if the Plaintiff is able to show that a Defendant's
 6 filing of an Anti-SLAPP Motion was frivolous or was solely intended to cause
 7 unnecessary delay, then his/her/its remedy is to seek an award of reasonable attorneys'
 8 fees and costs pursuant to California Code of Civil Procedure Section 125 as sanctions
 9 after having prevailed on the motion. (*Ketchum v. Moses* 24 Cal.4th 1122, 1131 (2001);
 10 *Kleveland v. Siegel & Wolensky, LLP* 215 Cal.App.4th 534, 554-556 (2013).)

11 Based upon the above authority, Plaintiff must first prevail on the pending Anti-
 12 SLAPP Motion. If it is then able to show the motion was brought in bad faith, its
 13 remedy is to seek attorneys' fees and costs under Section 425.19(c)(1). Accordingly, the
 14 provisions of the Anti-SLAPP Statute preclude Plaintiff from pursuing the instant
 15 Motion for Sanctions.

16 **VIII. CONCLUSION**

17 Based upon the foregoing, Defendants JANSSEN MALLOY LLP, MEGAN
 18 YARNALL, and AMELIA BURROUGHS respectfully request that the Court deny the
 19 Motion of Plaintiff ACRES BONUSING, INC Federal Rule of Civil Procedure Rule 11
 20 to strike Defendants' Anti-SLAPP Motion.

21 DATED: January 31, 2020

BERMAN BERMAN BERMAN
 SCHNEIDER & LOWARY, LLP

22
 23 By: /S/
 24 HOWARD SMITH
 Attorneys for
 25 Specially Appearing Defendants,
 JANSSEN MALLOY, LLP, MEGAN
 26 YARNALL and AMELIA
 BURROUGHS

EXHIBIT “A”

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 02/11/2019

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: A. Contreras

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2018-00236829-CU-PO-GDS** CASE INIT.DATE: 07/13/2018

CASE TITLE: **Acres vs. Marston**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Sanctions - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Sanctions (James Acres)) taken under submission on 2/5/2019

TENTATIVE RULING

Plaintiff James Acres motion for sanctions pursuant to CCP § 128.7 is denied.

Plaintiff seeks sanctions against all of the various Defendants as a result of their multiple motions to strike pursuant to CCP § 425.16 and certain Defendants' motion to strike pursuant to Civil Code § 1714.10.

The Boutin Jones' Inc., et al.'s joinder in the other Defendant groups' oppositions is granted.

An attorney who files a pleading with the court certifies that the pleading has merit "to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." (CCP § 128.7(b).) The attorney certifies that "[t]he allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." (CCP § 128.7(b)(3).) The certification is measure under an objective standard. "A claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.'" (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440 [citations omitted].) Violation of this standard subjects and attorney to sanctions which are sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. (CCP § 128.7(b)(3).) Sanctions are warranted by "signing, filing, submitting, or later advocating" a meritless pleading. (CCP § 128.7(b).) Sanctions are warranted only if the moving party meets its burden of proving that the opposing party's action or tactic was totally and completely without merit, measured by the objective "reasonable attorney" standard, or motivated solely by an intention to harass or cause unnecessary delay, measured by a subjective standard. (See *Weisman v. Bower* (1987) 193 Cal. App.3d 1231, 1236.) Sanctions should be awarded only in the clearest of cases, to penalize the most egregious misconduct. (See *Optical Surplus, Inc. v. Superior Court* (1991) 228 Cal. App. 3d 776, 784.)

DATE: 02/11/2019

MINUTE ORDER

DEPT: 53

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Calendar No.

CASE TITLE: Acres vs. Marston

CASE NO: 34-2018-00236829-CU-PO-GDS

~~"Because our adversary system requires that attorneys and litigants be provided substantial breathing room to develop and assert factual and legal arguments, sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous. Courts must carefully consider the circumstances before awarding sanctions." (Peake, supra, 227 Cal.App.4th at 448.)~~ Section 128.7 "must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution." (Guillemin v. Stein (2002) 104 Cal.App.4th 156, 167-168.)

The motion must be denied. Plaintiff's arguments as to why the subject motions are frivolous are essentially premised on the arguments he raised in opposition to the special motions to strike pursuant to CCP § 425.16 and the motion to strike pursuant to Civil Code § 1714.10. Those motions were mooted by the fact that the Court granted the Defendants' motions to quash. In any event, as can be seen from the Court's extensive rulings on the motions to quash the issues involved in this action are complex. The Court will not undertake an exhaustive analysis of the numerous issues raised in the motions to strike other than to say that the arguments raised by Defendants in support of the motions were not frivolous. Under no circumstances could the Court find that the Defendants' various motions were objectively unreasonable. Again the subject conduct must be measured by an objective standard and "[a] claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.'" (Peake, supra, 227 Cal.App.4th at 440 [citations omitted].) This is not the case here.

The motion is denied in its entirety.

Given the above, the Court need not rule on the objections to Plaintiff's declaration.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 2/5/2019, the Court now rules as follows:

SUBMITTED MATTER RULING:

The Court affirmed the tentative ruling.

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DATE: 02/11/2019

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