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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 DOI'S
 1-20, inclusive,

Defendants.

CASE NO: 3:19-CV-05418-WHO

**REPLY OF DEFENDANTS JANSSEN
 MALLOY LLP, MEGAN YARNALL
 AND AMELIA BURROUGHS TO
 OPPOSITION TO MOTION OF 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.
 Ctrm: Courtroom 2, 17th Floor

Assigned: Judge William H. Orrick

Trial Date: None.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs ACRES BONUSING, INC. and JAMES ACRES' ("Plaintiffs") opposition to the Motion of Defendants JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS ("Janssen Malloy") to Dismiss is remarkable not for what it includes, but what it omits. Significantly, Plaintiffs' opposition failed to address the ruling of the California Superior Court - for the County of Sacramento - having 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 – Exhibit "A" – Ruling.) (Motion, at p.1, lines 11-15.) Plaintiffs also ignore the controlling authority cited in Janssen Malloy's moving papers.

Based upon Plaintiffs' failure to address the prior ruling and controlling authority, the Court should grant this motion, at which time Defendants should be dismissed.

II. DEFENDANTS ARE STILL PROTECTED BY BLUE LAKE'S SOVEREIGN IMMUNITY EVEN THOUGH ANY JUDGMENT IN THIS ACTION WOULD NOT BIND THE INDIAN TRIBE

Plaintiffs attempt to characterize their Complaint as one against Janssen Malloy in their individual capacities as they are only seeking relief from them as individuals. (Opposition, at p.9, lines 2-22, p.10, lines 6-9.) Plaintiffs believe that by leaving out the sovereign, this Court must ignore the substance of their pleadings, however, a review of the pleadings makes it evident Plaintiffs' Complaint is an attack against Blue Lake Casino and the Tribe, and its agents, namely its attorneys, as a result of Blue Lake Casino's suit against Plaintiff. (Verified Complaint ("VC"), at ¶¶ 1, 4, 5, 22, 27-29.) The assertion that any judgment here would not "bind" the Tribe does not control the analysis, as the Court "must not simply rely on the characterization in the complaint" but rather determine "whether the remedy sought is truly against the sovereign." (*Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1290-1291.)

1 In **Brown v. Garcia** (2017) 17 Cal.App.5th 1198, 1198, the Court looked to Ninth
 2 Circuit authorities and observed that "sovereign immunity will nonetheless apply in
 3 appropriate circumstances even though the complaint names and seeks damages only
 4 from individual defendants." (*Id.*, at p. 1205 citing **Pistor v. Garcia** (9th Cir. 2015) 79
 5 F.3d 1104, 1113.) **Brown** further explained that: "In any suit against tribal officers, we
 6 must be sensitive to whether the judgment sought would expend itself on the public
 7 treasury or domain, or interfere with the public administration, or if the effect of the
 8 judgment would be to restrain the [sovereign] from acting, or to compel it to act."
 9 (**Brown v. Garcia, supra**, 17 Cal.App.5th at p. 1205 [citations omitted].)

10 Plaintiffs' argument is based upon allegations Judge Marston wrongfully assigned
 11 the case to himself despite various conflicts of interest; and that the Boutin Jones
 12 attorneys wrongfully prosecuted the action in Tribal Court, and aided and abetted
 13 various alleged wrongful acts of Judge Marston in the prosecution of the action against
 14 him. (VC, at ¶¶.52-105.) However, these allegations do not apply to Janssen Malloy
 15 because the firm never represented the Tribe before Judge Marston. (VC, at ¶¶.111.)

16 Moreover, as explained in **Brown**, failing to extend the Tribe's immunity to
 17 Janssen Malloy would compel the state court to determine what actions are permissible
 18 in Tribal Court; whether the Tribal Court has followed its own procedures in Tribal
 19 Court; and whether an attorney in Tribal Court has misused the Tribal Court's judicial
 20 process. This would be an impermissible impingement on the Tribe's sovereignty.

21 The Tribe's counsel, in performing their functions for the Tribe, such as
 22 representing the Tribe in tribal court, must be free to express legal opinions and give
 23 advice unimpeded by fear their relationship with the Tribe will be exposed to
 24 examination and potential liability for the advices and opinions given. (*See Great W.*
 25 **Casinos, Inc. v. Morongo Band of Mission Indians** (1999) 74 Cal.App.4th 1407, 1423-
 26 1424.) Refusing to recognize an extension of the Tribe's sovereign immunity to cover
 27 Janssen Malloy's advice to the Tribe would jeopardize the Tribe's interests by creating
 28 the possibility the Tribe's rationale for pursuing its action against Plaintiff, would be

1 subject to scrutiny by outside authorities. (*Ibid.*; *Davis v. Littell* (9th Cir. 1968) 398 F.2d
 2 83, 85.) Such interference in the Tribe's sovereignty would also undoubtedly adversely
 3 influence counsel's representation of the Tribe in the future.

4 Plaintiffs argue that the United States Supreme Court decision in *Lewis v. Clarke*,
 5 *supra*, 137 S. Ct. at p. 1285, supports the conclusion that sovereign immunity should not
 6 be extended to Janssen Malloy. (Opposition, at p.9, lines 10-14.) This argue ignores the
 7 key consideration in *Lewis v. Clarke* - the distinction between individual - and official -
 8 capacity suits, stating that: "The identity of the real party in interest dictates what
 9 immunities may be available." (*Id.* at p. 1292.) Janssen Malloy in an official-capacity
 10 action may assert sovereign immunity. (*Ibid.*) In *Lewis*, a tribal employee was sued for
 11 negligence when he allegedly caused a motor-vehicle accident on an interstate highway
 12 not on tribal lands. (*Id.* at p. 1291.) The employee was shuttling customers for the Tribe.
 13 (*Ibid.*) The tribe argued that sovereign immunity barred the suit because the driver was
 14 a tribal employee driving on tribal business and because the Tribe's decision to
 15 indemnify its employees meant that a judgment would affect the Tribe's finances. (*Lewis*
 16 *v. Clarke, supra*, 137 S. Ct. at p. 1291.)

17 Acknowledging the distinction between "personal capacity claims" and "official
 18 capacity claims" the United States Supreme Court found the case to be "a negligence
 19 action arising from a tort committed by [the employee] on an interstate highway within
 20 the State of Connecticut." (*Ibid.*) "The suit [was] brought against a tribal employee
 21 operating a vehicle within the scope of his employment but on state lands, and the
 22 judgment [would] not operate against the Tribe." (*Ibid.*) Based upon those specific
 23 facts, *Lewis* found that the suit was not against the employee in his official capacity.
 24 (*Id.*, at pp. 1291-1292.) To the contrary, *Lewis* held that the case was simply a suit
 25 against the employee to recover for his personal actions, which would not require action
 26 by the sovereign or disturb the sovereign's property. (*Id.*, at pp. 1292-1293.)

27 The facts of *Lewis* are very different from this case. The Tribe employee in *Lewis*
 28 did not claim to be an "official" of the Tribe, whereas Janssen Malloy were acting as the

1 Tribe's fiduciary agent as the Tribe's legal representative before the Tribal Court. (AA, at
 2 pp.11-33.) The tort alleged in *Lewis* involved a simple vehicle accident that occurred on
 3 a state highway, whereas the torts alleged against Defendants all occurred in/before the
 4 Tribal Court action and the Defendants' representation of the Tribe in that action.

5 Further, the action against the employee in *Lewis* would not require that the Tribe
 6 or Tribe officials be summoned as witnesses or necessary parties, whereas the action
 7 against Janssen Malloy directly interferes with the Tribe's prosecutorial efforts and could
 8 invade the attorney-client privilege between the Tribe and the law firm regarding the
 9 action before the Tribal Court.

10 The employee in *Lewis* was acting within the scope of his employment, but he
 11 was not acting in an official capacity at the time of the accident. (*Lewis v. Clarke, supra*,
 12 137 S. Ct. at pp. 1291-1292.) In *Lewis*, the tribe's responsibility and involvement began
 13 and ended with the indemnification of the employee. (*Id.*, at pp. 1293-1292.) Here,
 14 Janssen Malloy were acting in their official capacity as the official legal representatives
 15 of the Tribe in the Tribal Court. (VC, at ¶¶.27-29, 111, 134-139.) Any act of Defendants
 16 in representing the Tribe would be considered an act of the Tribe; and any action against
 17 Defendants for those acts should be considered an action against the Tribe.

18 Moreover, there are major factual differences between *Lewis* and this case, and
 19 *Lewis*, *Great W Casinos*, and *Brown* all support the conclusion the Tribe's sovereign
 20 immunity should extend to Janssen Malloy as officials of the Tribe acting in their
 21 official capacity. As stated above, non-member attorneys acting in their official capacity
 22 on behalf of the Tribe and within the scope of their authority are protected by tribal
 23 immunity. (*Davis v. Littell, supra*, 398 F.2d at p. 85.)

24 III. *LEWIS v. CLARKE* DID NOT OVERRULE THE DECISIONS IN *DAVIS* 25 *AND GREAT WESTERN CASINOS*

26 Plaintiffs also argue *Davis* and *Great Western Casinos* were overruled by *Lewis*
 27 *v. Clarke* because *Great Western Casinos* applied the scope of employment test,
 28 disavowed in *Davis*. (Opposition, at p.11, lines 6-25, p.12, line 1 through p.13, line 3.)

1 This argument is merit.

2 Sovereign immunity extends not only to the Tribe, but also to those agents acting
 3 on the Tribe's behalf. (*Davis v. Littell, supra*, 398 F.2d at p. 85; *Great W Casinos, Inc.*
 4 *v. Morongo Band of Mission Indians, supra*, 74 Cal.App.4th at pp. 1423-1424.) Courts
 5 have recognized that attorneys acting in their official capacity on behalf of the Tribe and
 6 within the scope of their authority are protected by tribal immunity. (*Ibid.*) “Further, at
 7 least in our federal circuit, an official need not be a member of the tribe in order to share
 8 in its sovereign immunity.” (*Trudgeon v. Fantasy Springs Casino, supra*, 71
 9 Cal.App.4th at p. 643; *see also U.S. v. Oregon* (9th Cir. 1981) 657 F.2d 1009, 1012;
 10 *Snow v. Quinalt Indian Nation* (9th Cir. 1983) 709 F.2d 1319, 1321.)

11 In *Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74
 12 Cal.App.4th at p. 1407, the Court held tribal sovereign immunity extended to the Tribe's
 13 outside legal counsel (characterized as “non-Indian law firm and general counsel”) to
 14 protect the tribe's interests and ensure adequate legal counsel for the Tribe. (*Id.*, at pp.
 15 1423-1424.) In the case, Plaintiff Great Western Casinos filed suit against the Tribe, the
 16 tribal council, tribal council members, the Tribe's general counsel, an attorney and her
 17 private law firm regarding the Tribe's cancellation of a contract. (*Id.*, at pp. 1410-1415.)
 18 Great Western Casinos alleged it entered into a gaming contract with the Tribe, through
 19 its individual members and general counsel, who engaged in a scheme to cancel the
 20 contract and cheat Great Western Casinos out of potential profits. (*Id.* at p. 1413.) The
 21 trial court granted the Motion to Quash and dismissed the action given sovereign
 22 immunity. (*Id.*, at pp. 1414-1415.)

23 The Court affirmed, finding the non-Indian law firm were protected by tribal
 24 sovereign immunity for their actions taken or opinions given in rendering related
 25 legal services to the Tribe to the same extent of immunity entitled to the Tribe, tribal
 26 council, and Tribe members. (*Great W. Casinos, Inc. v. Morongo Band of Mission*
 27 *Indians, supra*, 74 Cal.App.4th at pp. 1423-1424.)

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1 **IV. PLAINTIFFS' ARGUMENT DIRECTED TO WHETHER THE COURT**
 2 **HERE WOULD NEED TO ASSERT CONTROL OVER THE TRIBAL**
 3 **COURT IS MISPLACED**

4 Relying upon *JW Gaming Dev., LLC v. James*, 2018 U.S. Dist. LEXIS 172773,
 5 2018 WL 4853222 (N.D. Cal. October 5, 2018) Plaintiffs argue that sovereign immunity
 6 does not apply here because the Court would not need to assert control over the tribal
 7 court. (Opp., at p.14, lines 2-10.) This argument is misplaced.

8 The Plaintiff J.W. Gaming was suing in federal court a Native American tribe and
 9 an investment group after losing nearly \$5.4 million in a casino project. As to the
 10 "sovereign immunity" aspect of the case, the issue was limited to the court opining that
 11 the tribe's employees were not able to enjoy the tribal immunity because the "suit is
 12 against the Tribal Defendants in their individual capacities and that the Tribe is not the
 13 real party in interest." (*Id.*, at p. *9.) One vital aspect of the court's reasoning was
 14 whether the tribal employees' respective employment contracts could create the legal
 15 nexus towards said tribal immunity.

16 The case at bar concerns attorneys representing a tribe before a tribunal and not
 17 tribal employees entering into contracts with outside vendors. Plaintiffs' assertion that
 18 the *J.W. Gaming* opinion addresses "tribal attorneys" is patently false and demonstrably
 19 untrue. (Opposition, at p.14, lines 11-15.)

20 **V. NO RECENT DECISION FROM THE SUPREME COURT CASTS**
 21 **DOUBT UPON THE APPLICATION OF SOVEREIGN IMMUNITY**

22 Realizing that the controlling law is against them, Plaintiffs are left arguing that
 23 "recent" precedent of the United States Supreme cast doubt on whether sovereign
 24 immunity precludes recovery by private tort victims of a commercial enterprise.
 25 (Opposition, at p.14, line 20 through p.15, line 10.) This argument is without merit.

26 Plaintiffs assert the Supreme Court recently revisited the doctrine in *Michigan v.*
 27 *Bay Mills Indian Cmty.* 134 S. Ct. 2024, 2035 (2014), where the State of Michigan sued
 28 Bay Mills to enjoin Bay Mills' illegal off-reservation casino. (Opposition, at p.15, lines

1 1-10.) However, Plaintiffs concede “the Supreme Court held in a five-four decision
2 sovereign immunity precluded the suit.” (Opposition, at p.15, lines 3-6.)

3 **VI. THE RELEVANT AUTHORITY – WHICH ADDRESSED THE ISSUE –**
4 **FOUND LITIGATION ACTIVITY MAY NOT SUPPORT A RICO CLAIM**

5 As shown in Defendants’ moving papers, the Second Circuit in *Kim v. Kimm* 884
6 F.3d 98, 104 (2nd Cir. 2018) addressed the issue of whether litigation activity could
7 support a RICO claim and cited similar decisions in the First, Fifth, Tenth and Eleventh
8 Circuits to hold that allegations of frivolous, fraudulent or baseless litigation activity
9 could not support a RICO claim. (Motion, at pp.15-18.)

10 Ignoring *Kim v. Kimm*, Plaintiffs cite to *Chevron Donziger* 974 F.Supp.2d 382,
11 581 (S.D.N.Y. 2014) for the proposition that the “District Court, however, found
12 ‘corruption of adjudicative process’ are ‘wrongful means’ which give raise to RICO
13 predicates. (Opposition, at p.17, lines 1-5.) Not only is this the ruling of a District
14 Court, but the Court there did not approve a claim under RICO based upon civil
15 litigation, but instead only found that corruption of an adjudicative process removes any
16 shield as protected petitioning activity entitled to protection under the first amendment.
17 (*Id.*, at pp. 580-581.)

18 **VII. THE ONE-YEAR STATUTE OF LIMITATIONS SET FORTH IN**
19 **CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.6 BARS**
20 **THE CLAIM FOR WRONGFUL USE OF CIVIL PROCEEDINGS**
21 **(MALICIOUS PROSECUTION)**

22 In a concession the application of the one-year statute of limitations set forth in
23 California Code of Civil Procedure Section 340.6 would bar the claim for Wrongful Use
24 of Civil Proceedings (Malicious Prosecution) would against the attorney Defendants,
25 Plaintiffs argue that a two-year statute of limitations should apply. (Opposition, at
26 pp.19-23.) Plaintiffs’ argument is without merit because it misinterprets the controlling
27 California authority.

28 The cases which have addressed Section 340.6 are as follows:

1 *. In *Vafi v. McCloskey* 193 Cal.App.4th 874, 883 (2011), the California Court
2 of Appeal found the one-year statute of limitations barred the claim for malicious
3 prosecution against the attorney Defendants

4 *. *Vafi* was followed by *Yee v. Cheung* 220 Cal.App.4th 184, 193-197, where
5 the Court of Appeal again found the one-year statute of limitations barred the claims for
6 Malicious Prosecution against the Defendant attorneys.

7 *. In *Roger Cleveland Golf Company, Inc. v. Krane & Smith* 225
8 Cal.App.4th 225 Cal.App.4th 660, 680-683 (2014), the Court of Appeal declined to
9 follow *Vafi* and *Yee* finding that the two-year statute of limitations should be applied.

10 *. The California Supreme Court in *Lee v. Haney* 61 Cal.4th 1225, 1239
11 (2015) found the one-year statute applied to a Cause of Action for Breach of
12 Contracting, stating that the one-year statute should be applied to claims arising out of an
13 attorney's breach of duty. Although *Lee v. Haney* did not address a claim for Malicious
14 Prosecution, in applying the one-year statute, the Court expressly disapproved the
15 decision in *Roger Cleveland Golf Company, Inc. (Id., at p. 1239.)*

16 *. While the California Supreme Court granted review in *Parrish v. Latham*
17 *& Watkins* 3 Cal.5th 767, 773-775 (2017) to address whether the one-year statute of
18 limitations barred the claim for Malicious Prosecution, the Court ultimately ruled for the
19 Defendant on another issue and never reached the issue of the statute of limitations.

20 Most recently in *Connelly v. Bornstein* 33 Cal.App.5th 783, 799 (2019), the Court
21 of Appeal reviewed the relevant authority and based upon *Lee v. Haney*, found the one-
22 year statute of limitations applied to claim for Malicious Prosecution. Most importantly,
23 the Court in *Connelly* also based its decision on the recent California Supreme Court
24 case in *Flores v. Presbyterian Intercommunity Hospital* 63 Cal.4th 75, 84 (2016) that
25 was decided after *Lee* and broadly construed the statute of limitations for claims of
26 medical malpractice. (*Connelly v. Bornstein, supra*, 33 Cal.App.5th at pp. 795-796.)

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1 **VIII. CONCLUSION**

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

9 DATED: February 24, 2020

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