

1 Jerome N. Lerch, Esq. (CSB #48194)
2 Debra Steel Sturmer, Esq. (CSB #105276)
3 Nicole A. Deterding (CSB #305412)
4 LERCH STURMER LLP
5 One Sansome Street, Ste. 2060
6 San Francisco, California 94104
7 Telephone: (415) 217-6341
8 jlerch@lerchsturmer.com
9 dsturmer@lerchsturmer.com
10 ndeterding@lerchsturmer.com

11 Attorneys for Defendants BOUTIN JONES INC.,
12 MICHAEL CHASE, DANIEL STOUDE,
13 and AMY O'NEILL

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

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

19 Plaintiff,

20 v.

21 LESTER MARSTON, an individual; ARLA
22 RAMSEY, an individual; THOMAS
23 FRANK, an individual; ANITA HUFF, an
24 individual; RAPPORT AND MARSTON, an
25 association of attorneys; DAVID RAPPORT,
26 an individual; COOPER DAMARSE, an
27 individual; DARCY VAUGHN; an
28 individual; KOSTAN LATHOURIS, an
individual; BOUTIN JONES INC., a
California corporation; MICHAEL CHASE,
an individual; DANIEL STOUDE, an
individual; AMY O'NEILL, an individual;
JANSSEN MALLOY LLP, an association of
attorneys; MEGAN YARNALL, an
individual; AMELIA BURROUGHS, an
individual, and DOES 1-20, inclusive,

Defendants.

) Case No. 3:19-cv-05418-WHO
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) **SPECIALLY APPEARING**
) **DEFENDANTS BOUTIN JONES INC.,**
) **MICHAEL CHASE, DANIEL STOUDE**
) **& AMY O'NEILL'S REPLY TO**
) **PLAINTIFFS' OPPOSITION TO THEIR**
) **RULE 12(b)(1) AND RULE 12(b)(6)**
) **MOTION TO DISMISS PLAINTIFFS'**
) **COMPLAINT**

) Complaint Filed: August 28, 2019

) Hearing Date: April 15, 2020

) Time: 2:00 p.m.

) Judge: Hon. William H. Orrick

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1 **I. INTRODUCTION**

2 Plaintiffs Acres Bonusing, Inc. (“ABI”) and James Acres’ (“Acres”) have not provided any
3 legal authority for the proposition that attorneys representing an Indian tribe client in legal
4 proceedings are *not* entitled to share in the sovereign immunity of that Indian tribe. Here, the
5 sovereign immunity of the Boutin Jones Defendants’ client Blue Lake Casino extends to the Boutin
6 Jones Defendants because all acts of the Boutin Jones Defendants were done in their roles as
7 fiduciary agents of the tribe, acting on behalf of *and* binding their tribal client in litigation with
8 Plaintiffs.

9 The Boutin Jones Defendants’ Rule 12(b)(1) motion should be granted because this Court
10 has no subject matter jurisdiction over them. The Boutin Jones Defendants maintain sovereign
11 immunity for their legal representation of Blue Lake Casino in Tribal Court and in the subsequent
12 federal actions brought against Blue Lake Casino by Acres seeking to enjoin the Tribal Court’s
13 jurisdiction over Acres and ABI. *Great W. Casinos v. Moranga Band of Mission Indians* (1999) 74
14 Cal.App.4th 1407, 1423-24.

15 Alternatively, the Boutin Jones Defendants’ Rule 12(b)(6) motion should be granted
16 because ABI’s state law claims are all barred by the one-year statute of limitations applicable to
17 actions against attorneys arising out of their performance of professional services under California
18 Code of Civil Procedure § 340.6. Further Plaintiffs’ RICO claim fails to state a claim for which
19 relief can be granted because Plaintiffs have not alleged, and cannot allege, wrongful conduct on the
20 part of the Boutin Jones Defendants arising to the level of a “pattern of racketeering activity” under
21 the RICO statute.

22 **II. PLAINTIFFS OFFER NO LEGAL AUTHORITY FOR THE PROPOSITION THAT**
23 **ATTORNEYS REPRESENTING AN INDIAN TRIBE IN COURT PROCEEDINGS**
24 **ARE NOT ENTITLED TO THE SAME SOVEREIGN IMMUNITY AS THEIR**
25 **CLIENT**

26 Plaintiffs argue that *Lewis v. Clarke* (2017) 137 S. Ct. 1285 overrules *Great W. Casinos,*
27 *Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, which held that the Indian
28 tribe’s sovereign immunity extends to the tribe’s outside legal counsel because the attorneys were
acting as tribal officials within the scope of their employment. Plaintiffs are incorrect.

1 Plaintiffs conflate the analysis in *Lewis* and *J.W. Gaming*¹, which applies to *employees* of
2 Indian tribes who are not representatives of the tribe, with the analysis in *Great W. Casinos* and
3 *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83, which applies to non-member attorneys acting in their
4 official capacity on behalf of the tribe and within the scope of their authority. These two lines of
5 cases involve factually distinct circumstances which result in different holdings.

6 *Lewis* and *J.W. Gaming* involve claims against *employees* of a tribe, performing normal
7 duties for which the tribe may be vicariously liable through the theory of respondeat superior, but
8 for which the tribe is not directly responsible. *Lewis* involves an employee bus driver of a tribe that
9 gets in an accident off Indian land while driving a bus for the tribe. *J.W. Gaming*, which is now
10 under appeal, does not involve attorneys of the tribe, but rather involves whether tribal employees'
11 respective employment contracts could create a legal nexus for extending tribal immunity.

12 *Great W. Casinos* and *Littell* involve claims against attorneys representing the tribe,
13 performing activities *on behalf of* the tribe and *binding on* the tribe in litigation. In those cases, the
14 courts held that because the acts of an attorney on behalf of his or her client *are* the acts of the
15 client, sovereign immunity extends to a tribe's outside legal counsel. This is because actions
16 brought against a tribe's attorneys by third parties arising out of the attorneys' representation of the
17 tribe impinges on the tribe's operations and its ability to seek legal advice and counsel.

18 Here, the Boutin Jones Defendants are not *employees* of the tribe; the Boutin Jones
19 Defendants are legal fiduciary agents of the tribe authorized to act on the tribe's behalf and bind the
20 tribe. Thus, the Boutin Jones Defendants' argument, and *Great W. Casinos* and *Littell*, are
21 consistent with the holding in *Lewis*, which applies sovereign immunity when "the remedy sought is
22 truly against the sovereign." *Lewis v. Clarke* (2017) 137 S.Ct. 1285, 1290-1291. Non-member tribal
23 attorneys acting in their official capacity on behalf of the tribe and within the scope of their
24 authority are protected by tribal immunity. *Littell, supra*, 398 F.2nd at 85. If this were not the case,
25 suits against a tribe's attorneys would interfere with the tribe's ability to obtain legal counsel and
26 impinge upon the tribe's activities even in matters where the tribe is not a party. *Great Western*

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28 ¹ This decision has been appealed. Full cite: *JW Gaming Dev., LLC v. James* (N.D. Cal. October 5, 2018) 2018 U.S.
Dist. LEXIS 172773.

1 *Casinos, supra*, 74 Cal.App.4th at 1423-1424; *Littell, supra*, 398 F.2d at 85. Thus, any action
2 against Blue Lake Casino's attorneys acting on Blue Lake Casino's behalf would ultimately
3 negatively affect the operation of the Tribe as a sovereign Indian Tribe.

4 **III. PLAINTIFFS' RICO CLAIM IS BASED ON CONCLUSORY ALLEGATIONS,**
5 **UNWARRANTED DEDUCTIONS OF FACT, AND UNREASONABLE**
6 **INFERENCES AND DOES NOT ALLEGE REQUISITE**
7 **PREDICATE ACTS TO STATE A RICO CLAIM**

8 Much of the "factual" allegations of the Complaint are conclusory allegations, unwarranted
9 deductions of fact, and unreasonable inferences, and this Court is not required to accept them as
10 true for the purposes of the Rule 12(b)(6) motion. All of the remaining factual allegations in
11 Plaintiffs' Complaint merely amount to professional services performed by the Boutin Jones
12 Defendants on behalf of Blue Lake Casino in the litigation against Plaintiffs. Certainly, none of
13 these factual allegations amount to an "indictable offense" that qualifies as predicate act under the
14 RICO statute.

15 A pleading is deficient and may be dismissed under Rule 12(b)(6) if a plaintiff fails "to state
16 a claim upon which relief can be granted." A complaint must contain "enough facts to state a claim
17 to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544,
18 555; *Ashcroft v. Iqbal* (2009) 556 U.S. 662. "A claim has facial plausibility when the plaintiff
19 pleads factual content that allows the court to draw the reasonable inference that the defendant is
20 liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The
21 plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer
22 possibility that a defendant has acted unlawfully." *Id.* If a claim sets forth facts that are "merely
23 consistent with" defendant's liability, it "stops short of the line between possibility and plausibility
24 of 'entitlement to relief.'" *Id.* **Allegations of wrongdoing will be deemed "implausible" if there**
25 **are "obvious alternative explanation[s]" for the facts alleged indicating lawful conduct, not**
26 **the unlawful conduct urged by plaintiff.** *Id.* at 682. Further, the court is not required to accept as
27 true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
28 inferences." *In re Gilead Scis. Sec. Litig.* (9th Cir. 2008) 536 F.3d 1049, 1055. Further, Plaintiffs

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1 are required to plead their RICO claim with specificity, as the RICO claim is based on the various
2 defendants' "extrinsic fraud to manufacture a tribal court judgment against ABI." (Compl. ¶ 200.)

3 The allegation that the Boutin Jones Defendants filed and mailed pleadings does not support
4 a reasonable inference that the Boutin Jones Defendants performed those litigation activities with
5 the intent to obtain money from Plaintiffs under false pretenses, to defraud Plaintiffs, or to obstruct
6 justice. An **obvious alternative explanation** for the Boutin Jones Defendants filing and serving
7 pleadings on Plaintiffs through the mail is that the Boutin Jones Defendants were simply
8 representing their client in litigation against Plaintiffs.

9 The allegation that Amy O'Neill attended a hearing and made statements on behalf of Blue
10 Lake Casino in that hearing do not support a reasonable inference that Amy O'Neill or Boutin Jones
11 performed those litigation activities with the intent to obtain money from Plaintiffs under false
12 pretenses, to defraud Plaintiffs, or to obstruct justice. An **obvious alternative explanation** for Amy
13 O'Neill attending a hearing and making statements in that court hearing is that Amy O'Neill was
14 simply representing her firm's client in litigation against Plaintiffs.

15 The allegation that Michael Chase attended one hearing and stated in the court proceeding
16 that he had knowledge of "the whole Rapport & Marston thing"² does not support a reasonable
17 inference that Michael Chase was conspiring with Judge Marston and his staff to obtain money
18 from Plaintiffs under false pretenses, to defraud Plaintiffs, or to obstruct justice. An **obvious**
19 **alternative explanation** is that Michael Chase was simply representing his firm's client in
20 litigation against Plaintiffs.

21 The allegation that Boutin Jones received the assistance of Mr. Rapport in drafting pleadings
22 does not support a reasonable inference that "[o]ne of the purposes of these documents was to
23 mislead this Court into believing proceedings in the tribal court were fair." (Plaintiffs' Opp. to
24 MTD, Docket 43, 17:22-23.) There is absolutely no factual basis for this allegation and it is simply
25 conjecture. An **obvious alternative explanation** is that Boutin Jones worked with Mr. Rapport on
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28 ² Plaintiffs incorrectly argue that Michael Chase "admitted personal knowledge as to the structure and workings of Rapport & Marston." (Plaintiffs' Opp. to MTD, Docket 43, 17:12-13.) Michael Chase made no such admission; this is another such unreasonable inference made by Plaintiffs. 5

1 tribal law issues as Mr. Rapport is a tribal law attorney, and Boutin Jones' client was a tribal client
2 and the litigation was in tribal court.

3 Moreover, Plaintiffs cannot show that the wrongful acts alleged in the Complaint amount to
4 predicate acts required to state a claim under the RICO statute. Plaintiffs rely on *Chevron*
5 *Corporation v. Donziger* (2d Cir. 2016) 833 F.3d 74 to support the conclusion that each of the
6 pleadings filed by the Boutin Jones Defendants was an independent "obstruction of justice predicate
7 act." In *Donziger*, the attorney there manufactured a **multi-billion dollar judgment** against
8 Chevron and promised the judge \$500,000 of any judgement that was obtained. The facts in this
9 case are clearly distinguishable. Here, there are no factual allegations that support a **reasonable**
10 **inference** that the tribal court judge and the Blue Lake Casino attorneys were each trying to
11 influence the tribal court litigation for a wrongful intent or purpose. Here, unlike in *Donziger*,
12 Plaintiffs have suffered no adverse judgment; neither Judge Marston nor the Boutin Jones
13 Defendants were promised a part of any judgment awarded against Plaintiffs; and the **obvious**
14 **alternative explanation** for all of the acts alleged by the Plaintiffs is that the Boutin Jones
15 Defendants were simply representing their client.

16 The filing of papers with a court by attorneys on behalf of their client in relation to ongoing
17 litigation is not an *indictable* offense under 18 U.S.C. 1961(1). Therefore, ABI and Acres have not
18 alleged the requisite predicate *criminal acts* under RICO and accordingly have not met the pleading
19 standard of Rule 12(b)(6).

20 **IV. ABI'S PENDENT STATE LAW CLAIMS FAIL BECAUSE THEY ARE BARRED**
21 **BY THE 1-YEAR STATUTE OF LIMITATIONS FOUND IN CCP § 340.6**

22 ABI's entire opposition to the Boutin Jones Defendants' Motion to Dismiss is based on the
23 underlying contention that the Boutin Jones Defendants acted with some improper purpose, which
24 is not supported by the facts alleged in the Complaint that are not speculative or conjuncture. The
25 simple fact is that the Boutin Jones Defendants represented their client in a lawsuit against Plaintiffs
26 and now ABI is alleging that the Boutin Jones Defendants' performance of professional services to
27 their client was some grand scheme to obtain money from ABI by false pretenses, without any other
28 evidence to support that inference. ABI does not allege one single act that was done outside the

1 course of the Boutin Jones Defendants' performance of professional services to its client Blue Lake
2 Casino, therefore the one-year statute of limitations found in § 340.6 applies to ABI's pendent state
3 law claims.

4 ABI argues that it alleges non-professional conduct of the Boutin Jones Defendants, which
5 includes "secret and illicit co-ordination with Judge Marston throughout *Blue Lake v. ABI*."
6 (Plaintiffs' Opp. to MTD, Docket 43, 25:18-26.) These alleged "facts" are conjecture and should be
7 disregarded. There are simply no facts alleged that support a reasonable inference that the Boutin
8 Jones Defendants coordinated in any way with Judge Marston. ABI also argues that these
9 allegations are "not just plausible—they are for the most part admitted." This argument is nowhere
10 near the truth and is an attempt by Plaintiffs to mislead the Court. On the contrary, the Boutin Jones
11 Defendants have submitted declarations under penalty of perjury that they did not act with an
12 improper purpose at any time in the litigation against and by Plaintiffs.

13 ABI further argues that the one-year statute of limitations does not apply to the claims
14 against Michael Chase because Chase allegedly conspired with non-attorneys Frank and Ramsey.
15 ABI is wrong. The statute of limitations for conspiracy to commit malicious prosecution as it
16 applies to Mr. Chase is one year, because the statute of limitations for malicious prosecution as it
17 applies to Mr. Chase is one year under CCP § 340.6. Mr. Chase is not denied the protections of the
18 CCP § 340.6 just because ABI alleges that some of his co-conspirators are not attorneys.

19 Therefore, ABI cannot prevail on its pendent state law claims for malicious prosecution,
20 aiding and abetting malicious prosecution, conspiracy to commit malicious prosecution, aiding and
21 abetting breach of fiduciary duty, or aiding and abetting constructive fraud against the Boutin Jones
22 Defendants because they are barred as a matter of law by the one-year statute of limitations that
23 applies to actions against attorneys.

24 **V. CONCLUSION**

25 For the reasons stated in the Boutin Jones Defendants moving papers and the foregoing
26 reasons, the Boutin Jones Defendants respectfully request that this Court grant their Rule 12(b)(1)
27 Motion to Dismiss Plaintiffs' Complaint in its entirety based on the defense of sovereign immunity,
28 without leave to amend. Alternatively, the Boutin Jones Defendants respectfully request that this

1 Court grant their Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint in its entirety without leave
2 to amend for failure to state a claim upon which relief can be granted; or, if the entire Complaint is
3 not subject to dismissal, the Boutin Jones Defendants request that this Court dismiss each individual
4 cause of action for which Plaintiffs have failed to state a claim for which relief can be granted,
5 without leave to amend.

6 DATED: February 25, 2020

LERCH STURMER LLP

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By _____ /s/ _____
Jerome N. Lerch, Esq.
Debra Steel Sturmer, Esq.
Nicole A. Deterding, Esq.
Attorneys for Defendants BOUTIN JONES
INC., MICHAEL CHASE, DANIEL
STOUDER, and AMY O'NEILL

DECLARATION OF SERVICE

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within cause; I am employed in the City and County of San Francisco, California and my business address is One Sansome Street, Ste. 2060, San Francisco, California 94104. My electronic service address is rvernola@lerchsturmer.com. On this date, I served the following documents:

SPECIALLY APPEARING DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDEUR & AMY O'NEILL'S REPLY TO PLAINTIFFS' OPPOSITION TO THEIR RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

on the parties identified below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

 : **By First Class Mail** -- I placed the sealed envelope(s), with first class postage thereon, for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

 : **By Overnight Courier** -- I caused each such envelope to be given to an overnight mail service at San Francisco, California, to be hand delivered to the office of the addressee(s) on the next business day.

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

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

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

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on February 25, 2020 at San Francisco, California.

Rosemarie Vernola

(type/print name)



(signature)

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SERVICE LIST

James Acres
1106 2nd, #123
Encinitas, CA 92024
Tel: 541-760-7503
James Acres james@kosumi.com
In Pro Per
Plaintiff

Howard J. Smith, Esq.
Berman, Berman, Berman,
Schneider & Lowary LLP
11900 W. Olympic Boulevard, Ste. 600
Los Angeles, CA 90064
Tel: 310-447-9000
Email: hjsmith@b3law.com
Attorneys for Defendants Janssen Malloy LLP,
Megan Yarnall and Amelia Burroughs

George Forman, Esq.
Forman & Associates
4340 Redwood Highway, Ste. E352
San Rafael, CA 94903
Tel: 415-491-2310
Email: george@gformanlaw.com
Attorneys for Defendants Arla Ramsey, Anita
Huff, Thomas Frank, Lester Marston, Rapport
and Marston, David Rapport, Darcy Vaughn,
Ashley Burrell, Cooper DeMarse and Kostan
Lathouris

Allison L. Jones, Esq.
Sylvia Durazo, Assistant to Allison Jones
Gordon, Reese, Scully, Mansukhani LLP
101 W. Broadway, Ste. 2000
San Diego, CA 92101
Tel: 619-696-6700
Email: ajones@grsm.com
sdurazo@grsm.com
Attorneys for Defendants Lester Marston,
Darcy Vaughn, Ashley Burrell and Cooper
DeMarse

Ronald H. Blumberg, Esq.
Alyssa L. Eisenberg, Esq.
Blumberg Law Group LLP
137 North Acacia Avenue
Solana Beach, CA 92075
Tel: 858-509-0600
Email: rhb@blumberglawgroup.com
ale@blumberglawgroup.com
USE: service@blumberglawgroup.com
Attorneys for Plaintiff Acres Bonusing, Inc.