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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., et al.,

Plaintiff,

v.

LESTER MARSTON, et al.,

Defendants.

Case No.: 3:19-cv-5418-WHO

**PLAINTIFFS' OPPOSITION TO DEFENDANT,
BOUTIN JONES' ANTI-SLAPP MOTION**

Date: April 15, 2020

Time: 2:00 p.m.

Judge: The Honorable
William H. Orrick

Table of Contents

I.	INTRODUCTION	5
II.	A Brief History of Class III Gaming Licenses in California	5
III.	FACTUAL BACKGROUND.....	7
A.	The iSlot Agreement Between Blue Lake and ABI.....	7
B.	<i>Blue Lake v. ABI</i>	8
C.	Boutin Jones Considers <i>Blue Lake v. ABI</i> and <i>Acres v. Blue Lake I&II</i> to be a Single “Underlying Action”	9
D.	The Long-Standing Collaboration Between Boutin Jones and Rapport & Marston. 10	
IV.	STANDARDS FOR DECIDING ANTI-SLAPP MOTIONS IN FEDERAL COURT	10
V.	DEFENDANTS CANNOT SURVIVE PRONG-ONE BECAUSE DEFENDANTS CANNOT SHOW <i>BLUE LAKE V. ABI</i> WAS A PETITIONING ACT PROTECTED BY THE UNITED STATES OR CALIFORNIA CONSTITUTIONS USING A 12(B)(6) STANDARD.....	11
A.	Tribal Court Petitioning is Not Protected Petitioning.....	12
1)	Tribes are not parties to the United States Constitution.	12
2)	The United States Constitution does not guarantee petitioning rights in tribal court.	12
3)	Tribes are not subject to state constitutions.	12
4)	California’s anti-SLAPP statute does not protect petitioning tribal governments.	12
B.	The Petitioner in <i>Blue Lake v. ABI</i> was Blue Lake, and Blue Lake Does Not Have Petitioning Rights Under the United States or California Constitutions.	13
C.	<i>Blue Lake v. ABI</i> Involved Conduct That Was Illegal as a Matter of Law.	13
D.	Suborning a Judge is Not a Protected Petitioning Act.	14
VI.	ON PRONG-TWO DEFENDANTS CANNOT ESTABLISH THE ONE-YEAR STATUTE OF LIMITATIONS OR THE LITIGATION PRIVILEGE BARS ANY CAUSES OF ACTION	14
VII.	Using A Summary Judgment Standard, Defendants Cannot Show ABI’s Wrongful Use Causes of Action Are Devoid Of Merit.	15
A.	Defendants Can Only Lose On Summary Judgment Because No Discovery Has Taken Place.	16

B.	Defendants Lacked Reasonable Grounds to Pursue the Common Counts in <i>Blue Lake v. ABI</i> Because It Was Undisputed the Advance Deposit Was Used for Blue Lake’s Benefit.....	16
C.	No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Retaining the Advance Deposit Because ABI Delivered iSlot and the Advance Deposit Was Refundable “if and only if” ABI Failed to Deliver iSlot.....	17
D.	No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Offering to Upgrade Blue Lake From iSlot v1.0 to iSlot v2.0.	18
E.	No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Refusing to Provide iSlot v1.0 to a Louisiana Casino Without a Deposit.	19
F.	No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Refusing to Return the Non-Refundable Advance Deposit to Blue Lake After Blue Lake Forfeited the Right to Use iSlot By Failing to Make Timely Revenue Sharing Payments.	19
G.	Defendants Lacked Reasonable Grounds to Bring the Tortious Breach Cause of Action Because They Rely on Allegations That Fail to Describe Tortious Conduct.	20
H.	<i>Blue Lake v. ABI</i> was Rife with Malice.	21
I.	The Remaining Elements of Wrongful Use are Undisputed.....	21
J.	Chase Aided and Abetted in the Conspiracy to Commit Wrongful Use of Civil Proceedings Against ABI.....	22
VIII.	USING A SUMMARY JUDGMENT STANDARD DEFENDANTS CANNOT PROVE THEY DID NOT AID AND ABET JUDGE MARSTON IN BREACHING HIS FIDUCIARY DUTIES OR CONSTRUCTIVE FRAUD	22
IX.	CONCLUSION.....	23

Table of Authorities

Cases

<i>Cachil Dehe Band of Wintun Indians v. California</i> 618 F.3d 1066 (9 th Cir. 2010).....	6, 7
<i>Cole v. Patricia Meyer & Associates</i> , 206 Cal.App.4 th 1095 (2012).....	21
<i>Colorado River Indian Tribes v. NIGC</i> 466 F.3d 134 (D.C. Cir. 2006).....	6, 18
<i>Flatley v. Mauro</i> , 39 Cal.4 th 299 (Cal. 2006).....	13, 14
<i>Guessous v. Chrome Hearts</i> 179 Cal.App.4 th 1177 (2009)	12
<i>Kiowa Tribe of Okla. v. Manufacturing Technologies</i> 523 U.S. 751 (1998).....	12
<i>McElyea v. Babbitt</i> 833 F.2d 196 (9 th Cir. 1987).....	15
<i>McGary v. City of Portland</i> , 386 F.3d 1259 (9 th Cir. 2004)	11
<i>Murphy v. Royal</i> , 875 F.3d 896 (10 th Cir. 2017).....	12, 13
<i>Navellier v. Sletten</i> 29 Cal.4 th 82 (2002).....	11, 14
<i>Nibbi Brothers, Inc. v Home Federal Sav. Loan Assn</i> 205 Cal.App.3d 1415 (1988).....	21
<i>People ex rel. Owen v. Miami Nation</i> 2 Cal.5 th 222 (2016).....	12
<i>Planned Parenthood v. Center for Medical Progress</i> 890 F.3d 828 (9 th Cir. 2018).	11, 15, 16
<i>Santa Clara Pueblo v. Martinez</i> 436 U.S. 49 (1978).....	12
<i>Sheldon Appel v. Albert Olikier</i> 47 Cal.3d 863 (1989)	15
<i>U.S. v. Salinas</i> 522 US 52 (1997)	13
<i>Usher v. City of Los Angeles</i> , 828 F.2d 556 (9 th Cir. 1987).....	11

Statutes

18 USC 666.....	13, 14
California Code of Civil Procedure 425.16	10

I. INTRODUCTION

In late 2015 Blue Lake Rancheria ("Blue Lake") sued Plaintiffs, Acres Bonusing, Inc. ("ABI") and James Acres ("Acres"), individually, in Blue Lake's tribal court. The case was styled as *Blue Lake Casino & Hotel v. Acres Bonusing, Inc.* ("*Blue Lake v. ABI*").

Defendant, Judge Lester Marston ("Judge Marston") originally presided over *Blue Lake v. ABI* even though he was Blue Lake's attorney at the time. After Acres uncovered what Judge Marston had previously denied (that Marston was, indeed, Blue Lake's attorney), Judge Marston finally stepped down. Soon thereafter the Honorable Justice James Lambden replaced Judge Marston and granted Acres summary judgment, finding the cause of action against Acres had been "conjured." Blue Lake then, virtually immediately, voluntarily dismissed ABI.

ABI and Acres bring causes of action for RICO, Wrongful Use of Civil Proceedings, and Breach of Fiduciary Duty against three defendant factions: 1) the Rapport & Marston/Blue Lake faction; 2) the Boutin Jones faction; and 3) the Janssen Malloy faction.

This memorandum opposes the Boutin Jones faction's anti-SLAPP motion at docket 30. The Boutin Jones faction consists of Defendants, Boutin Jones, Michael Chase, Daniel Stouder and Amy O'Neill. For the remainder of this Opposition, "Defendants" shall refer to the Boutin Jones faction as a whole.

II. A Brief History of Class III Gaming Licenses in California

Understanding the mechanics and history of how Class III gaming licenses have been apportioned to Indian Casinos in California will be helpful in understanding *Blue Lake v. ABI*.

The Indian Gaming Regulatory Act ("IGRA") created a statutory framework to regulate Indian Gaming. As part of that framework IGRA established the National Indian Gaming Commission ("NIGC"). The IGRA also defined three classes of gaming: Class I gaming

1 consists of traditional forms of gaming associated with traditional tribal ceremonies. Class II
 2 gaming consists of bingo and certain card games. Class III gaming consists of all gaming which
 3 is not Class I or Class II. [*Colorado River Indian Tribes v. NIGC* 466 F.3d 134, 135 \(D.C. Cir.](#)
 4 [2006\).](#)

5 Tribes have exclusive jurisdiction over Class I gaming. Tribes share jurisdiction over
 6 Class II gaming with the NIGC. Class III gaming is governed by tribal-state compacts between a
 7 tribe and its surrounding state. [Id., 135-136.](#) The NIGC has no role in regulating Class III
 8 gaming. [Id., 140.](#)

9 In 1999 California entered into Class III compacts with various tribes in California,
 10 including Blue Lake. The compacts were substantively identical and set a cap on the total
 11 number of Class III gaming devices which could be operated by tribes in California. To enforce
 12 this cap, California administered a pool of Class III gaming licenses, and a tribe wishing to
 13 conduct Class III gaming needed to obtain one of these licenses if it wished to operate more than
 14 350 Class III gaming devices. [*Cachil Dehe Band of Wintun Indians v. California* 618 F.3d 1066](#)
 15 [\(9th Cir. 2010\)](#) (generally known as “*Colusa II*”).

16 Under Blue Lake’s compact with California, when Blue Lake drew licenses from the
 17 license pool it was obliged to make a non-refundable pre-payment of \$1,250.00 per license
 18 drawn. Any license not put into commercial operation within one-year of being drawn would be
 19 returned to the pool. RJN at Dkt. 55-1, p5.¹

20 A dispute arose in the District of Eastern California between California and the Colusa
 21 tribe about how many licenses were available in the license pool. In a nutshell, California argued

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¹ All page number references for federal court filings refer to the ECF page number.

32,000 licenses were available whereas Colusa argued 56,000 were available. The District Court instead found 42,700 licenses were available. Colusa II, 1073-1075. As a result, California administered a Class III license draw in October 2009 resulting in 1,878 new Class III licenses being issued. Id., 1072. In August 2010 the court of appeal found the license pool contained 40,201 licenses, leaving the October 2009 license draw untroubled. Id., 1084.

III. FACTUAL BACKGROUND

A full factual history is available in the Verified Complaint. This factual background briefly frames the facts necessary for deciding Defendants' anti-SLAPP Motion. This factual background draws on the Verified Complaint, Defendant declarations, and ABI's RJN.

A. The iSlot Agreement Between Blue Lake and ABI.

In October 2009 Blue Lake purchased forty Class III gaming licenses for use at its casinos. RJN at Dkt. 55-2, pp2, 4; 55-3, p17. In July 2010 Blue Lake entered into the iSlot Agreement with ABI ("the iSlot Agreement"). iSlot was a novel Class III gaming platform using iPads as slot machines. Under the iSlot Agreement it was explicit Talo, Inc. ("TAL") manufactured iSlot, and that ABI was TAL's distributor.² Dkt. 1-1, pp12-16.

Blue Lake paid ABI an Advance Deposit ("the Advance Deposit") which the parties agreed would be refundable, but only if ABI failed to deliver iSlot by October 1, 2010. Blue Lake also agreed to pay ABI 15% of iSlot revenue. Half of Blue Lake's payments to ABI would be applied against the Advance Deposit till the Advance Deposit was extinguished. Dkt. 1-1, p15. An explicit term of the iSlot Agreement provided Blue Lake would lose the right to use

² While it is not relevant to this motion, TAL was a company principally controlled by Acres' father. This was common knowledge to everyone involved in the iSlot project. TAL subsequently changed its name to Acres 4, and this name sometimes appears in Defendants' exhibits.

iSlot if it failed to make timely revenue sharing payments. *Id.*, p14. Blue Lake failed to make revenue sharing payments to ABI. Dkt. 30-5, p6 ¶13; pp21, 71 [Stouder Decl.].

ABI delivered iSlot on time. Blue Lake initially used iSlot to serve fifty-four Class III gaming devices. In October 2011, Blue Lake increased this to eighty-eight Class III gaming devices. Dkt. 1, ¶44. Over the life of the iSlot Agreement, ABI provided Blue Lake with twelve iSlot software updates, and grew iSlot’s library from two to eleven unique game themes. ABI used the Advanced Deposit for Blue Lake’s benefit. Dkt. 31-2, pp215-216 [Yarnall Decl., *Blue Lake v. ABI* Undisputed Facts 131-132, 136]. Blue Lake never complained about anything associated with iSlot, the iSlot Agreement, Acres or ABI prior to initiating *Blue Lake v. ABI*.

B. *Blue Lake v. ABI*

In 2016 Defendants filed *Blue Lake v. ABI*. Blue Lake sued ABI alleging breach of contract and tortious breach of contract arising from the iSlot Agreement. Blue Lake also sued ABI for money had and received and unjust enrichment (the “Common Counts”). Blue Lake also sued Acres for fraudulent inducement. The complaint sought \$249,250.00, plus interest, punitive damages, exemplary damages, and attorney’s fees. Dkt. 1-1, pp 7-10.

Judge Marston originally presided over *Blue Lake v. ABI*. Dkt. 1, ¶40. Judge Marston employed associate attorneys from his law-firm, Rapport & Marston as his law-clerks in the action. Unbeknownst to ABI, Judge Marston, his firm and law-clerks were all also working as attorneys for Blue Lake while *Blue Lake v. ABI* was underway. *Id.*, ¶¶124-128.

Judge Marston presided over a single hearing in *Blue Lake v. ABI*. That hearing included Acres’ motion to disqualify Judge Marston. The hearing was held in a windowless conference room of Blue Lake’s hotel-casino. Of the seven people at the hearing, Acres was the only person not employed by Blue Lake. Three of Blue Lake’s employees carried firearms and engaged in

1 conduct that caused Acres to feel physically threatened throughout the hearing. O’Neill
 2 witnessed the threatening conduct. Id., ¶¶80-82.

3 One of the matters heard at the hearing was Acres’ motion to disqualify Judge Marston.
 4 At the hearing, Judge Marston denied having an attorney-client relationship with Blue Lake and
 5 O’Neill stated there were “no valid reasons” Judge Marston should disqualify himself. Id., ¶¶89-
 6 90.

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 8 After Acres submitted evidence to this Court in *Acres v. Blue Lake II* that Judge Marston
 9 was Blue Lake’s attorney, Judge Marston recused himself from *Blue Lake v. ABI*. Id., ¶¶102-104.

10 Judge Marston was replaced by the Honorable Justice James Lambden. Justice Lambden
 11 found Blue Lake had attempted to “conjure a personal warranty” by Acres and dismissed Acres
 12 on summary judgment. Id., ¶53. ABI then demanded a Bill of Particulars from Blue Lake,
 13 whereupon Blue Lake, unwilling to comply, voluntarily dismissed *Blue Lake v. ABI* with
 14 prejudice. Id., ¶113.

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 16 **C. Boutin Jones Considers *Blue Lake v. ABI* and *Acres v. Blue Lake I&II***
 17 **to be a Single “Underlying Action”**

18 Intuiting the adjudicative proceedings in *Blue Lake v. ABI* were corrupt, Acres brought
 19 two prior actions before this Court – *Acres v. Blue Lake I & II*. Dkt. 25. The tribal court hearing
 20 described above occurred during the time between *Acres v. Blue Lake I & II*.

21 Boutin Jones initially represented Blue Lake in *Acres v. Blue Lake I & II*. After Acres
 22 brought evidence in *Acres v. Blue Lake II* papers filed by Boutin Jones and Judge Marston shared
 23 a common author, Boutin Jones withdrew from both actions. Id., ¶¶110-111. Boutin Jones was
 24 replaced in both actions by Janssen Malloy.

25 In the present motion to dismiss, the Boutin Jones Defendants define *Blue Lake v. ABI*
 26 and *Acres v. Blue Lake I & II* as a single, “Underlying Action.” Dkt. 29-1, p7.
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D. The Long-Standing Collaboration Between Boutin Jones and Rapport & Marston.

Boutin Jones and Rapport & Marston have long collaborated together on behalf of clients. This collaboration includes representing Blue Lake in *Blue Lake v. Lanier*, a dispute with the state of California worth tens of millions of dollars. Boutin Jones and Rapport & Marston have been associated together as counsel for Blue Lake in *Lanier* continuously since June 2011. Judge Marston billed Blue Lake for work as an attorney in *Lanier*. Dkt 1, ¶¶74, 98.

One of the few allegations in the Verified Complaint made on information and belief is that Chase and Rapport “worked together to co-ordinate the despicable conduct of their respective firms towards ABI and [] Acres.” [?] Id., ¶75.

Rapport declares he and DeMarse ghostwrote papers for Boutin Jones in *Acres v. Blue Lake I & II*. Dkt. 32-6, ¶¶7-10 [Rapport Decl.]. Whoever ghostwrote the papers filed by Boutin Jones in *Acres v. Blue Lake I & II* also wrote papers filed in *Blue Lake v. ABI*. Dkt. 1, ¶110.

Chase denies he “came to a mutual understanding ... to accomplish a common unlawful plan” with most of his co-defendants. Chase does not, however, deny he “came to a mutual understanding ... to accomplish a common unlawful plan” with Rapport or DeMarse. Dkt. 30-3, ¶13 [Chase Decl.].

At oral argument in *Acres v. Blue Lake II*, Chase claimed to have personal knowledge of the inner workings of Rapport & Marston. Dkt. 1, ¶74.

IV. STANDARDS FOR DECIDING ANTI-SLAPP MOTIONS IN FEDERAL COURT

California’s anti-SLAPP statute subjects causes of action arising from petitioning acts under “the United States Constitution or California Constitution” to special motions to strike.

[California Code of Civil Procedure 425.16\(b\)\(1\)](#) (the “anti-SLAPP Statute”).

Special motions to strike under the anti-SLAPP Statute are resolved using a two-prong test. In the first prong (“Prong-One”), the moving party must show the complained of activity arose from a lawful exercise of petitioning or speech rights under the United States or California constitutions. [*Navellier v. Sletten* 29 Cal.4th 82, 88-89 \(2002\).](#)

The question of how to reconcile California’s anti-SLAPP Statute with the Federal Rules has been “hotly disputed.” The dispute is now ended. Where an anti-SLAPP motion challenges only the legal sufficiency of a cause of action a 12(b)(6) standard is applied. Where an anti-SLAPP motion attacks the factual sufficiency of a cause of action a summary judgment standard is applied, and discovery must be allowed before the motion can be granted. [*Planned Parenthood v. Center for Medical Progress* 890 F.3d 828, 833-835 \(9th Cir. 2018\).](#)

V. DEFENDANTS CANNOT SURVIVE PRONG-ONE BECAUSE DEFENDANTS CANNOT SHOW *BLUE LAKE V. ABI* WAS A PETITIONING ACT PROTECTED BY THE UNITED STATES OR CALIFORNIA CONSTITUTIONS USING A 12(B)(6) STANDARD

Defendants assert without argument or authority pursuing a lawsuit in a tribal court on behalf of a tribe is petitioning activity protected by the anti-SLAPP Statute. Because Defendants do not argue from evidence a 12(b)(6) standard applies. [*Planned Parenthood*, 834.](#)

In resolving an assertion under Rule 12(b)(6) the Court must accept all allegations in the complaint as true and draw all reasonable inferences in favor of Plaintiffs. [*Usher v. City of Los Angeles*, 828 F.2d 556, 561 \(9th Cir. 1987\).](#) Dismissal on a 12(b)(6) motion is “especially disfavored” where a complaint presents novel facts or legal theories. [*McGary v. City of Portland*, 386 F.3d 1259, 1270 \(9th Cir. 2004\).](#)

Defendants cannot prevail on Prong-One. Not only does no authority support their novel legal theory that tribal court lawsuits are protected petitioning activity, but ample authority actually contradicts it.

A. Tribal Court Petitioning is Not Protected Petitioning.

1) Tribes are not parties to the United States Constitution.

Tribes were not at the Constitutional Convention and are not parties to the United States Constitution. [*Kiowa Tribe of Okla. v. Manufacturing Technologies* 523 U.S. 751, 756 \(1998\)](#). Instead of having rights and responsibilities as parties to the United States Constitution, tribes are subject to the plenary authority of Congress. [*Santa Clara Pueblo v. Martinez* 436 U.S. 49, 56 \(1978\)](#).

2) The United States Constitution does not guarantee petitioning rights in tribal court.

Congress has “plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.” [*Santa Clara, 56*](#). In the past, Congress has wielded its plenary authority over tribes to abolish tribal courts through statute. See [*Murphy v. Royal*, 875 F.3d 896, 934 \(10th Cir. 2017\)](#) [Congress abolished Creek tribal courts with the Curtis Act of 1898].

Congressional power to limit, modify or eliminate tribal courts through statute is proof Defendants’ assertion of a Constitutional right to petition tribal governments in tribal courts is frivolous. Congress cannot eliminate Constitutional rights through mere statute.

3) Tribes are not subject to state constitutions.

It is an elementary tenant of Indian law that tribes are not subject to state constitutions. [*People ex rel. Owen v. Miami Nation* 2 Cal.5th 222, 233 \(2016\)](#).

4) California’s anti-SLAPP statute does not protect petitioning tribal governments.

To give this context, petitioning the French government in a French court is not protected by the anti-SLAPP Statute because neither the United States nor the California Constitutions provide a right to petition foreign governments. [*Guessous v. Chrome Hearts* 179 Cal.App.4th 1177, 1185 \(2009\)](#).

Likewise, and uniquely apposite, petitioning a tribal government in a tribal court is not protected by the anti-SLAPP Statute because neither the United States nor the California Constitutions provides a right to petition a tribal government.

B. The Petitioner in *Blue Lake v. ABI* was Blue Lake, and Blue Lake Does Not Have Petitioning Rights Under the United States or California Constitutions.

Blue Lake was the plaintiff in *Blue Lake v. ABI*. Congress' plenary authority over tribes includes the power to modify or eliminate tribal rights. [Murphy, 918](#). Congress' power to modify or eliminate Blue Lake's rights is proof Blue Lake has no Constitutionally protected petitioning rights because Congress lacks authority to eliminate Constitutional rights.

C. *Blue Lake v. ABI* Involved Conduct That Was Illegal as a Matter of Law.

The anti-SLAPP Statute does not protect conduct that is illegal as a matter of law. [Flatley v. Mauro, 39 Cal.4th 299, 317 \(Cal. 2006\)](#). Even if, hypothetically, petitioning acts in Blue Lake tribal court could be protected petitioning acts, *Blue Lake v. ABI* was not protected because Blue Lake's conduct was illegal as a matter of law under [18 USC 666](#).

Where a tribe receives more than \$10,000.00 in federal grants during a year, 18 USC 666(a)(2) makes it a crime to: 1) corruptly; 2) give anything of value; 3) to reward an agent of a tribal government in connection with any business, transaction or series of transactions; 4) involving anything valued at \$5,000.00 or more. These elements are to be construed broadly. [U.S. v. Salinas 522 US 52, 55-61 \(1997\)](#).

Blue Lake received more than \$10,000.00 in federal grants while *Blue Lake v. ABI* was underway. Dkt. 1, ¶9. *Blue Lake v. ABI* was a suit for \$249,250.00, so it involved something valued at more than \$5,000.00. Blue Lake paid Judge Marston to be its judge in *Blue Lake v. ABI* while it paid him to be its attorney in other matters. These payments were "rewards." Both Judge Marston's attorney work and judge work were billed on the same invoices, making them

part of a single series of transactions. Dkt. 1, ¶33, [see example at ¶78]. The payments were indisputably corrupt because they caused Judge Marston to be disqualified from presiding over *Blue Lake v. ABI*. Dkt 32-4, ¶25 [Marston Decl. discussing his “disqualification” from *Blue Lake v. ABI*.]

Defendants argue *Flatley*’s illegal as a matter of law exception does not apply because Defendants’ have not admitted their conduct was illegal. Dkt. 30-1, p13. Defendants miss the point. Blue Lake was the petitioner and Blue Lake’s petitioning conduct was illegal under 18 USC 666.

D. Suborning a Judge is Not a Protected Petitioning Act.

The Prong-One test of the anti-SLAPP Statute is applied independently to each cause of action. [Navellier, 88-89 \(2002\)](#). The Fifth and Seventh Causes of Action in the Verified Complaint seek to hold Defendants responsible for their part in suborning Blue Lake’s tribal court. Defendants argue, in essence, that because suborning a judge presiding over your lawsuit is something you do in a lawsuit, suborning a judge is protected petitioning activity. Dkt. 30-1, p13. Not so.

The express purpose of the anti-SLAPP statute is to ensure public petitioning is not “chilled through abuse of the judicial process.” [CCP 425.16\(a\)](#). Suborning a judge is the ultimate abuse of the judicial process. California’s legislature did not intend for the anti-SLAPP statute to defeat allegations, verified and supported by evidence, that a party suborned a judge.

VI. ON PRONG-TWO DEFENDANTS CANNOT ESTABLISH THE ONE-YEAR STATUTE OF LIMITATIONS OR THE LITIGATION PRIVILEGE BARS ANY CAUSES OF ACTION

Defendants argue California’s special one-year statute-of-limitations for causes of action against attorneys providing professional services or California’s litigation privilege bar relief on

1 ABI's state-law causes of action. Because defendants bring no evidence to support their
 2 assertion, this Court evaluates Defendants' assertion using a 12(b)(6) standard. Planned
 3 Parenthood, 834.

4 Defendants' arguments are entirely duplicative of the arguments made on their 12(b)(6)
 5 motion. Dkt. 29-1, pp19-23 [section IV-C]. Defendants' 12(b)(6) motion has been fully briefed.
 6 Dkt. 43, pp20-28 [Opposition]; Dkt. 48, pp4-7 [Reply]. Because the same standard applies on
 7 both motions, ABI adopts by reference its previous argument on these issues at Dkt 43, pp20-28
 8 [sections V-VI].
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 11 **VII. Using A Summary Judgment Standard, Defendants Cannot Show ABI's Wrongful**
 12 **Use Causes of Action Are Devoid Of Merit.**

13 Defendants rely on fact declarations to argue ABI cannot show a probability of success on
 14 the merits for its state-law causes of action. Dkt. 30-1, pp18-25 [citing declarations by Stouder,
 15 Chase, and O'Neil]. A summary judgment standard applies if the Court reaches these
 16 arguments. Planned Parenthood, 834. ABI may rely upon the Verified Complaint as evidence
 17 on summary judgment. McElyea v. Babbitt 833 F.2d 196, 197 (9th Cir. 1987).

18 Most of Defendants' challenges go to whether Defendants had reasonable grounds to
 19 bring or maintain *Blue Lake v. ABI*. Whether there were reasonable grounds to pursue a cause of
 20 action is ultimately a question of law for this Court. However, before making its legal
 21 determination, this Court must allow any questions of fact informing the decision of whether
 22 reasonable grounds existed to be resolved by the jury. Sheldon Appel v. Albert Olier 47 Cal.3d
 23 863, 881 (1989).
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A. Defendants Can Only Lose On Summary Judgment Because No Discovery Has Taken Place.

This Court cannot grant Defendants summary judgment on the merits without allowing ABI the chance to conduct discovery. Planned Parenthood, 834. Significantly, there is a discovery dispute pending that would develop evidence relevant to this motion. Dkts. 35-36. Notwithstanding this procedural bar preventing the Court from granting Defendants summary judgment on the merits, ABI argues the evidence at hand is sufficient to deny Defendants summary judgment without requiring further discovery.

B. Defendants Lacked Reasonable Grounds to Pursue the Common Counts in *Blue Lake v. ABI* Because It Was Undisputed the Advance Deposit Was Used for Blue Lake's Benefit.

Defendants concede the Common Counts in *Blue Lake v. ABI* required proof ABI did not use the Advance Deposit for Blue Lake's benefit. Dkt. 30-1, pp19. Defendants never had reasonable grounds to pursue the Common Counts because Defendants always possessed conclusive evidence the Advance Deposit was used for Blue Lake's benefit.

Stouder declares his understanding of the facts underlying *Blue Lake v. ABI* at the time he filed the case are reflected in Frank's June 2017 Declaration in *Blue Lake v. ABI*. Dkt. 30-5, ¶12 [Stouder Decl.]. Frank's June 2017 Declaration establishes:

- 1) iSlot was "not yet fully developed" as of July 6, 2010. Dkt. 30-5, p66 ¶¶2-3.
- 2) Blue Lake "constructed an entire bar and lounge area" for the "implementation and use" of iSlot. Id., pp67 ¶8.
- 3) In October 2010 Blue Lake used iSlot to provide 56 gaming devices. Id., p67, ¶9.
- 4) In September 2011 Blue Lake increased iSlot to 88 gaming devices. Id., p67, ¶9.

Stouder attached the iSlot Agreement to the Complaint in *Blue Lake v. ABI*, and it stated the purpose of the Advanced Deposit was "to cover localization costs." Id., p44.

From these facts this Court can only conclude ABI used the Advanced Deposit for Blue Lake's benefit. ABI "localized" iSlot for Blue Lake's "implementation and use" in its custom-built "bar and lounge area." Blue Lake derived so much benefit from its use of iSlot that, after using iSlot for a year, Blue Lake added 32 new iSlot devices – an increase of almost 60%.

As *Blue Lake v. ABI* progressed evidence ABI used the Advanced Deposit for Blue Lake's benefit only increased. As just one example, in order to support its argument for jurisdiction over Acres and ABI, Blue Lake brought declarations from Pollard to show ABI employees travelled to Blue Lake on multiple occasions "to assist with iSlot System Operations." RJN at Dkt. 55-4, pp2-3.

Defendants cannot deny ABI used the Advance Deposit for Blue Lake's benefit. Indeed, it was undisputed on summary judgment in *Blue Lake v. ABI* that "[s]ubstantially all of the money paid to ABI by Blue Lake was used for iSlot Development." Dkt. 31-2, p216, ¶136 [Yarnall Decl., *Blue Lake v. ABI* Undisputed Fact 136].

C. No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Retaining the Advance Deposit Because ABI Delivered iSlot and the Advance Deposit Was Refundable "if and only if" ABI Failed to Deliver iSlot.

The iSlot Agreement was attached to the Complaint in *Blue Lake v. ABI*. The iSlot Agreement provided the Advance Deposit was refundable "if, and only if" ABI did not deliver iSlot by October 1, 2010. Dkt. 1-1, p15. Justice Lambden found this was "an express and strict limitation" on the circumstances under which ABI was bound to return the Advance Deposit. Dkt. 1-2, pp17-18. There is no other reasonable interpretation for the "if, and only if" language in the iSlot Agreement.

Defendants always knew ABI made timely delivery of iSlot. Indeed, in pre-litigation correspondence Defendants stated the iSlot "software was developed and the iSlot system was installed and maintained on more than 20 devices throughout the period of the Agreement." Dkt.

30-5, p22. Because ABI made timely delivery of iSlot, and because the only circumstance under which ABI was bound to return the Advance Deposit was if it failed to make timely delivery, it was objectively unreasonable for Defendants to pursue the breach of contract cause of action against ABI.

This Court can find the Breach of Contract Cause of Action in *Blue Lake v. ABI* was objectively unreasonable at all times.

D. No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Offering to Upgrade Blue Lake From iSlot v1.0 to iSlot v2.0.

While attorneys can rely on their clients to supply the initial facts to support litigation, it is axiomatic an attorney cannot rely upon a client's application of law to those facts. The Complaint in *Blue Lake v. ABI* alleged ABI breached the iSlot Agreement because ABI developed an improved "iSlot v2.0" that Blue Lake could not use because iSlot v2.0 was not "formally approved and authorized by the [IGRA] or the [NIGC]" and because Blue Lake told ABI use of such an unauthorized system could place Blue Lake's "entire casino and gaming operations at risk." Dkt. 1-1, ¶¶10, 17.

Blue Lake's legal conclusion that use of iSlot v2.0 could put its casino at risk was unwarranted because the NIGC has no role in approving Class III gaming devices. [*Colorado River Indian Tribes*, 140](#). As attorneys, Defendants were not entitled to rely upon Blue Lake's legal conclusions, particularly because they were patently wrong.

ABI was entitled to keep the Advance Deposit because it delivered iSlot to Blue Lake by October 1, 2010. But even if, for the sake of the argument, ABI was not entitled to keep the Advance Deposit, it was unreasonable for Defendants to believe ABI breached the iSlot Agreement by failing to obtain approval for iSlot from the NIGC because the NIGC has no role in regulating Class III gaming.

E. No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Refusing to Provide iSlot v1.0 to a Louisiana Casino Without a Deposit.

In his declaration, Stouder attempts to show ABI failed to honor its obligations to Blue Lake by quoting from emails in 2012 from Acres to Pollard, a Blue Lake executive. In the emails, Acres stated development resources could not be diverted from iSlot v2.0 back to iSlot v1.0 without a significant deposit. Stouder casts Acres' emails as being "in response to Blue Lake Casino's request that Acres resolve issues Blue Lake Casino was having with the iSlot System." Dkt. 30-5, ¶13[see Dkt. 30-5 pp71-73 for Stouder's reproduction of the emails].

Stouder's characterization of the Acres emails is misleading. Blue Lake desired to sub-distribute iSlot, itself. Dkt. 1, ¶45. The emails exhibited by Stouder show Blue Lake attempted to distribute iSlot to Coushatta, a gaming tribe in Louisiana, and that Blue Lake insisted iSlot v1.0 and not iSlot v2.0 be provided to Coushatta. In the emails, Acres informs Blue Lake iSlot v1.0 was no longer being offered without a significant deposit. Dkt. 30-5 pp71-73. Acres also indicated he was willing to discuss "no deposit deals" once iSlot v2.0 was ready. *Id.*, p72.

Defendants build their pyramid of unreasonable allegations past the point of absurdity. This Court cannot reasonably find ABI breached the iSlot Agreement because ABI refused to allow Blue Lake to sub-distribute iSlot to new customers on terms dictated by Blue Lake.

F. No Reasonable Attorney Could Believe ABI Breached the iSlot Agreement By Refusing to Return the Non-Refundable Advance Deposit to Blue Lake After Blue Lake Forfeited the Right to Use iSlot By Failing to Make Timely Revenue Sharing Payments.

An express provision of the iSlot Agreement was Blue Lake would enjoy the right to use iSlot for two years from the date of installation "so long as [Blue Lake] remains current in all payments." These payments included a "monthly lease fee" that was to be paid on a monthly basis. Dkt 1-1, p14.

1 Stouder declaration shows Blue Lake refused to share iSlot accounting data with ABI,
 2 and that this deprived ABI of its ability to bill Blue Lake. Dkt. 30-5, pp5-6, ¶13; p71. From
 3 Stouder’s own declaration, it is clear Blue Lake lost the right to use iSlot because Blue Lake
 4 breached the iSlot Agreement by failing to “remain current in all payments.”

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 6 This Court can conclude it was unreasonable for Defendants to sue ABI for breach of
 7 contract because Defendants knew Blue Lake lost all rights under the contract because of its own
 8 prior breach.

9 **G. Defendants Lacked Reasonable Grounds to Bring the Tortious Breach Cause of**
 10 **Action Because They Rely on Allegations That Fail to Describe Tortious Conduct.**

11 Defendants argue they had reasonable grounds to bring the tortious breach cause of
 12 action because Defendants relied on Frank’s statements he was duped by Acres into entering the
 13 iSlot Agreement. Dkt. 30-1, p19 lines 19-23. Frank states he told Acres he was concerned iSlot
 14 was not worth the initial \$250,000.00 investment required of Blue Lake because iSlot was
 15 unfinished and unproven, and he was concerned iSlot would not be profitable. Frank then states
 16 Acres assured Frank iSlot would be profitable enough to repay Blue Lake’s Advance Deposit by
 17 way of reduced lease fees. Frank states he was thereby convinced iSlot would be profitable
 18 enough to repay the Advance Deposit through reduced lease fees, and that Blue Lake only
 19 entered the iSlot Agreement because Frank was thereby convinced. Dkt. 30-5 pp65-68 [Frank’s
 20 *Blue Lake v. ABI* summary judgment declaration].

21
 22 Justice Lambden found even if everything happened as Frank described, “it could only
 23 have been Acres’ opinion that [Blue Lake] would profit from the conduct of customers rather
 24 than an actionable misstatement of the facts regarding the performance of the iSlot System.”
 25 Dkt. 1-2, p19. No reasonable attorney could find otherwise because of the general rule that
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statements as to future actions by third parties are deemed non-actionable opinions. *Id.*, p17 [citing [*Nibbi Brothers, Inc. v Home Federal Sav. Loan Assn* 205 Cal.App.3d 1415, 1423 \(1988\)](#)].

Frank's allegation amounts to the proposition that Acres guaranteed he could transform Blue Lake's \$250,000.00 Advance Deposit into \$3,300,000.00 in revenue within two years. Dkt. 1-1, pp16-17. The alleged guarantee was unreasonable on its face, and unactionable opinion besides. This Court can find Defendants never had reasonable grounds to pursue the tortious breach cause of action.

H. *Blue Lake v. ABI* was Rife with Malice.

In actions for wrongful use of civil proceedings the malice element is satisfied by "attitudes that range from open hostility to indifference." [*Cole v. Patricia Meyer & Associates*, 206 Cal.App.4th 1095, 1113 \(2012\)](#).

Defendants pursued *Blue Lake v. ABI* even though they knew Judge Marston was Blue Lake's attorney. Defendants allowed attorneys from Judge Marston's law firm to ghostwrite papers they filed in the "Underlying Action." Chase does not deny he came to a mutual understanding with Rapport or DeMarse to accomplish a common unlawful plan. Defendants began *Blue Lake v. ABI* with a five-day summons and continued *Blue Lake v. ABI* after O'Neill witnessed Judge Marston lie from the bench while subjecting Acres to physical intimidation. Defendants did all of this in pursuit of causes of action that were unreasonable on their face.

A jury could reasonably conclude Defendants acted for some reason other than obtaining a judgment on the merits against ABI.

I. The Remaining Elements of Wrongful Use are Undisputed.

Defendants brought or maintained *Blue Lake v. ABI*. Dkt. 1, ¶¶23-26. *Blue Lake v. ABI* ended in ABI's favor. *Id.* ¶113. ABI was harmed by *Blue Lake v. ABI*. *Id.*, passim.

J. Chase Aided and Abetted in the Conspiracy to Commit Wrongful Use of Civil Proceedings Against ABI.

The Verified Complaint alleges Chase and Rapport coordinated the despicable conduct of their respective firms towards ABI. Dkt. 1, ¶75. Rapport admits he served as a conduit for illicit communication between his firm and Chase's. Dkt. 32-6, ¶¶7-10 [Rapport Decl.]. Chase conspicuously fails to deny coming to a mutual understanding to accomplish a common unlawful plan with Rapport or DeMarse. Dkt. 30-3, ¶13 [Chase Decl.]. These facts combined with the facts recited above more than suffice to show the Second and Third Causes of Action for Aiding and Abetting and Conspiring in Wrongful Use of Civil Proceedings present triable issues of material fact.

VIII. USING A SUMMARY JUDGMENT STANDARD DEFENDANTS CANNOT PROVE THEY DID NOT AID AND ABET JUDGE MARSTON IN BREACHING HIS FIDUCIARY DUTIES OR CONSTRUCTIVE FRAUD

Aiding and Abetting "applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act."

Here, Judge Marston presided over *Blue Lake v. ABI* even though Blue Lake was paying him to be its lawyer. Blue Lake pursued *Blue Lake v. ABI* even though it knew the case was being pursued before a judge Blue Lake itself had corrupted in its favor. Dkt. 36, p4 [Blue Lake Defendant's discovery dispute statement, "Blue Lake was fully apprised as to who was performing what work on its behalf, and how much it was being charged"]. The purpose of these acts was to wrongfully obtain money from ABI in *Blue Lake v. ABI*.

Boutin Jones knew Judge Marston was Blue Lake's attorney, because Boutin Jones and Rapport & Marston worked together as attorneys for Blue Lake in *Blue Lake v. Lanier* continuously since 2011. It is undisputed Chase worked with Rapport to coordinate the despicable conduct of their firms towards ABI. It is clear from the Verified Complaint this despicable conduct

1 includes the suborning of Judge Marston and Blue Lake’s tribal court. Rapport admits part of the
2 coordination included Rapport & Marston ghostwriting papers for Boutin Jones to file in what
3 Boutin Jones considered to be a single, “Underlying Action” against ABI and Acres.

4 Boutin Jones attempts to defend itself by arguing “mere knowledge that a tort is being
5 committed and the failure to prevent it does not constitute aiding and abetting.” Dkt. 30-1, p25.
6 It is true if one sees a man robbing a bank and does nothing to stop him, one is nothing more than
7 an innocent bystander. But if one sees a man rob a bank, notices the man is overburdened, and for
8 a fee helps the man cart those stolen bags of money out to a getaway car, one becomes an aider
9 and abettor. On this record, a reasonable jury could find Defendants’ conduct crossed the line
10 from mere innocent bystanding into culpable aiding and abetting.

11 IX. CONCLUSION

12 Defendants bring an anti-SLAPP motion to dismiss ABI’s Verified Complaint.

13 Defendants argue they enjoyed a constitutional right to sue ABI in Blue Lake tribal court,
14 where ABI was utterly bereft of the protection of the state or federal constitutions. Defendants’
15 argument is devoid of legal merit. Defendants’ argument offends the dignity of the United States
16 and California because it would compel those sovereigns to vouchsafe a third sovereign’s right to
17 violate the constitutional rights afforded their very own citizens. In effect, Defendants want to
18 enjoy the constitutional rights they withheld from ABI when ABI was at their mercy in tribal
19 court. Defendants’ argument must be rejected and their motion denied.

20 Should this Court be unable to deny Defendants’ anti-SLAPP motion out of hand, the
21 unprecedented audacity of Defendants’ conduct precludes dismissal using a 12(b)(6) standard,
22 and the lack of opportunity to conduct discovery precludes granting Defendants summary
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1 judgment. Even without these procedural bars, Defendants' own declarations are damning self-
2 indictments.

3 ABI asks this Court to deny the anti-SLAPP motion in its entirety and order Defendants
4 to answer the Verified Complaint within fourteen days. To the extent the motion cannot be
5 denied, ABI asks this Court for leave to amend.
6

7 **BLUMBERG LAW GROUP LLP**

8 Dated: March 18, 2020

/s/ Ronald H. Blumberg

Ronald H. Blumberg

Attorneys for Plaintiff, Acres Bonusing, Inc.

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