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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

**REPLY OF DEFENDANTS JANSSEN
 MALLOY LLP, MEGAN YARNALL
 AND AMELIA BURROUGHS TO
 OPPOSITION OF PLAINTIFF ACRES
 BONUSING, INC. TO SPECIAL
 (ANTI-SLAPP) MOTION TO STRIKE
 THE CALIFORNIA STATE COURT
 SLAPP CLAIM FOR "WRONGFUL
 USE OF CIVIL PROCEEDINGS;"
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

*[California Code of Civil Procedure
 Section 425.16.]*

Date: April 15, 2020
 Time: 2:00 p.m.
 Ctrm: Courtroom 2, 17th Floor

Assigned: Judge William H. Orrick

Trial Date: None

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFF’S MULTIPLE OPPOSITIONS TO DEFENDANTS’ ANTI-SLAPP MOTIONS FAIL TO POINT TO ANY ALLEGATIONS OF CONDUCT BY JANSSEN MALLOY, YARNALL AND BURROUGHS

The claim of Plaintiff ACRES BONUSING, INC. (“Plaintiff”) against Defendants JANSSEN MALLOY LLP (“Janssen Malloy”) and its attorneys MEGAN YARNALL (“Yarnall”) and AMELIA BURROUGHS (“Burroughs”) (collectively “Defendants”) as challenged on the instant Special (Anti-SLAPP) Motion under California Code of Civil Procedure Section 425.16 is limited as follows: (1) Plaintiff only maintains a single Cause of action for “Wrongful Use of Civil Proceedings” (Malicious Prosecution) against Defendants; (2) Defendants never represented their client, the Blue Lake Casino and Hotel (“Blue Lake Casino”) before the Tribal Court for the Blue Lake Rancheria (“Tribal Court”) when Defendant Lester Marston served as the tribal judge.

Instead, Defendants represented Blue Lake Casino after Judge Marston had recused himself. This is an important distinction - ignored by Plaintiff in its opposition – as the operative Complaint neither includes a Causes of Action for Conspiracy nor any allegations of “collaboration” between Janssen Malloy and Rapport & Marston. In fact, Plaintiff’s multiple oppositions fail to even point to any allegations at all against Janssen Malloy, Yarnall and Burroughs. (Opposition to Bountin Jones’ Anti-SLAPP Motion, at p.10, lines 1-20; Opposition to Rapport & Marston’s Anti-SLAPP Motion, at pp.5-7; Opposition to Janssen Malloy’s Anti-SLAPP Motion, at p.4, lines 1-27.)

Based upon the foregoing, the Court should grant Defendants Special Motion to Strike the SLAPP claim for Wrongful Use of Civil Proceedings (Malicious Prosecution).

II. PLAINTIFF HAS FAILED TO REFUTE THAT THE STATUTE APPLIES TO THE CLAIM FOR WRONGFUL USE OF CIVIL PROCEEDINGS

As shown in Defendants’ moving papers, the Anti-SLAPP Statute of California Code of Civil Procedure Section 425.16 fully applies to the claim for Wrongful Use of Civil Proceedings (Motion, at pp.8-9.) Plaintiff has failed to refute this showing.

1 **A. Plaintiff’s Narrow Interpretation of Section 425.16 – Focusing upon**
 2 **the California or the U.S. Constitutions - is Incorrect Based the**
 3 **Language of the Statute**

4 Plaintiff’s tortured reading of Section 425.16 asserts the “activity in Tribal Court
 5 is not protected by the Anti-SLAPP Statute because no provision of the California or the
 6 U.S. Constitutions includes petitioning in a tribal court.” (Opposition to Boutin Jones’
 7 Anti-SLAPP Motion, at pp.12-13.) With respect to tethering protected petitioning
 8 activity to the U.S. or California Constitution, the language of the Anti-SLAPP statute
 9 includes in pertinent part:

10 “(e) As used in this section, “act in furtherance of a person’s
 11 right of petition or free speech under the United States or
 12 California Constitution in connection with a public issue”
 13 includes: (1) any written or oral statement or writing made
 14 before a legislative, executive, or judicial proceeding, or any
 15 other official proceeding authorized by law, (2) any written
 16 or oral statement or writing made in connection with an
 17 issue under consideration or review by a legislative,
 18 executive, or judicial body, or any other official proceeding
 authorized by law, (3) any written or oral statement or
 writing made in a place open to the public or a public forum
 in connection with an issue of public interest, or (4) any
 other conduct in furtherance of the exercise of the
 constitutional right of petition or the constitutional right of
 free speech in connection with a public issue or an issue of
 public interest.” (*Emphasis added.*)

19 There cannot be any logical legal argument that the offending conduct by
 20 attorneys in the legal proceedings in a Tribal Court for a federally-recognized tribe does
 21 not qualify as protected petitioning activity under Section 425.16. Moreover, the
 22 categories enumerated in Code of Civil Procedure Section 425.16(e), are not all
 23 inclusive. The enumeration of acts protected is preceded by the word “includes,” which
 24 implies that other unmentioned acts are also protected under the statute. (*Averill v.*
 25 *Superior Court* 42 Cal.App.4th 1170, 1173-1176 (1996).)

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B. Section 425.16 Addresses the Public Interest, Even When Based Upon Private Conduct

Plaintiff contends the legal proceedings in the Tribal Court are not prescribed in the Constitution and therefore barred from applying Section 425.16. (Opposition to Boutin Jones' Anti-SLAPP Motion, at p.13, line 4-10.) The specific language of Section 425.16(e) makes Plaintiff's error clear, as does the body of case law interpreting this code section. The definition of "public interest" within the meaning of the anti-SLAPP statute, Section 425.16, has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* 106 Cal.App.4th 1219, 1232-1234 (2003).) Even statements made in a newspaper article and at a parents' meeting about a college football coach's termination constituted speech in connection with a public issue or a matter of public interest within the meaning of Section 425.16(e). (*McGarry v. University of San Diego* 154 Cal.App.4th 97, 109-111 (2007).) As to legislative intent, "the legislature did not intend to exclude political literature on candidate qualifications from the political works denoted in Section 425.16(d)(2), given the legislature's goal of reaffirming the anti-SLAPP law as a protector of free speech rights through the enactment of Section 425.17." (*Major v. Silna* 134 Cal.App.4th 1485, 1490-1497 (2005).)

C. The Underlying Tribal Court Litigation Qualifies as an Official Proceeding Under Section 425.16

Official proceedings wherein Courts have applied Section 425.16 include: (1) Board of Podiatric Medicine hearings (*Carver v. Bonds* 135 Cal.App.4th 328, 342-344 (2005).); (2) Subpoenas issued in contractual arbitration of automobile insurer (*Mallard v. Progressive Choice Ins. Co.* 188 Cal.App.4th 531, 538-542 (2010).); and (3) Affidavits submitted to a foreign court (Zimbabwe) (*Summerfield v. Randolph* 201 Cal.App.4th 127, 135-137 (2011).) The Tribal Court action which forms the basis of

1 this lawsuit, which Plaintiff contends was resolved in favor James Acres by his Motion
 2 for Summary Judgment under California Code of Civil Procedure Section 437c being
 3 granted “on the merits,” falls squarely within the meaning of an “official proceeding.”

4 Plaintiff’s action requires this Court to accept the above premise – that the
 5 resolution of the Tribal Court action was in Plaintiff’s favor, “on the merits,” per its
 6 motion under Section 437c, and, therefore, a basis for recovery in this lawsuit. It is
 7 axiomatic in entertaining that logic that the trier of fact accept the Tribal Court’s ruling
 8 and having evidentiary value in this proceeding, therefore, validating and acknowledging
 9 the authority of that Tribal Court. If the Tribal Court lawsuit Plaintiff contends James
 10 Acres prevailed in “on the merits,” does not qualify as an “official proceeding,” then
 11 Plaintiff has no claim for Wrongful Use of Civil Proceedings.

12 **D. The Claims of Illegal Conduct Asserted in Plaintiff’s Opposition Are**
 13 **Not Directed Against Janssen Malloy, Yarnall and Burroughs**

14 Plaintiff contends “Blue Lake’s conduct was illegal,” and, therefore, the
 15 petitioning activity in the Tribal Court action is not entitled to Anti-SLAPP protection.
 16 (Opposition to Bountin Jones’ Anti-SLAPP Motion, at pp.13-14.) There are numerous
 17 problems with this argument.

18 First, Plaintiff is again using Defendants and the Blue Lake tribe interchangeably
 19 for its argument. The Blue Lake tribe is not a party to this action, yet Plaintiff dedicates
 20 multiple pages to complain about Blue Lake and its relationship with Judge Marston.

21 Moreover, the Complaint neither includes a Causes of Action for Conspiracy nor
 22 allegations of any collaboration between Janssen Malloy and Rapport & Marston. In
 23 fact, Plaintiff’s multiple oppositions fail to even point to any allegations against Janssen
 24 Malloy, Yarnall and Burroughs. (Opposition to Bountin Jones’ Anti-SLAPP Motion, at
 25 p.10, lines 1-20; Opposition to Rapport & Marston’s Anti-SLAPP Motion, at pp.5-7;
 26 Opposition to Janssen Malloy’s Anti-SLAPP Motion, at p.4, lines 1-27.) The same is
 27 true for the documents included in Plaintiff’s Request for Judicial, which fail to even
 28 mention Janssen Malloy or any of its attorneys.

1 **III. PLAINTIFF'S OWN VERIFIED COMPLAINT SHOWS THE CLAIM**
 2 **FOR WRONGFUL USE OF CIVIL PROCEEDINGS/MALICIOUS**
 3 **PROSECUTION IS BARRED BY THE ONE-YEAR STATUTE OF**
 4 **LIMITATIONS OF CODE OF CIVIL PROCEDURE SECTION 340.6**

5 As shown in Defendants' moving papers, the claim for Wrongful Use of Civil
 6 Proceedings/Malicious Prosecution is barred by the one-year statute of limitations of
 7 California Code of Civil Procedure Section 340.6. (Motion, at pp.9-10.) Plaintiff offers
 8 little opposition on this point

9 First, Plaintiff argues: "Because defendants (sic) bring no evidence to support
 10 their assertion, this Court evaluates Defendants' assertion using a 12(b)(6) standard."
 11 (Opposition to Janssen Malloy's Anti-SLAPP Motion, at p.5, lines 12-13.) This
 12 argument is incorrect as the bar of the one-year statute of limitations is based not only
 13 upon the declaration of Megan Yarnall, but Plaintiff's own Verified Complaint with
 14 attached exhibits. (Motion, at p.10, lines 10-17.) Plaintiff seeks to use this same
 15 Verified Complaint to support its opposition. (Opposition to Bountin Jones' Anti-
 16 SLAPP Motion, at p.7, lines 8-11.)

17 Turning to the merits of the bar of the statute of limitations, Plaintiff argues:
 18 "Should this Court reach Defendants' statute of limitations argument on Prong-Two it
 19 cannot find the one-year statute of limitations applies using a 12(b)(6) standard because
 20 California is split on the issue. (Opposition to Janssen Malloy's Anti-SLAPP Motion, at
 21 p.5, lines 21-24.) Again, this argument is without merit.

22 As shown in Defendants' moving papers, the law is not split. (Motion, at pp.9-
 23 10.) Further, in their Reply to the Opposition to the Motion to Dismiss, Defendants also
 24 showed the law is not split, but supports the application of the one-year statute of
 25 limitations to a claim for Malicious Prosecution. (Reply to Opposition to Motion to
 26 Dismiss, at pp.7-8.) Plaintiff had the opportunity to address this authority in its
 27 opposition to this motion, but failed to do so leaving the authority undisputed.

28 The undisputed authority, which addressed Section 340.6 is 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 (2013),
 5 where the Court of Appeal again found the one-year statute of limitations barred the
 6 claims for Malicious Prosecution against the Defendant attorneys.

7 *. In *Roger Cleveland Golf Company, Inc. v. Krane & Smith* 225
 8 Cal.App.4th 660, 680-683 (2014), the Court of Appeal declined to follow *Vafi* and *Yee*
 9 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 a claim for Malicious Prosecution. Most
 23 importantly, the Court in *Connelly* based its decision on the recent California Supreme
 24 Court case in *Flores v. Presbyterian Intercommunity Hospital* 63 Cal.4th 75, 84 (2016)
 25 that 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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**IV. PLAINTIFF MADE NO EFFORT ON ITS BURDEN OF ESTABLISHING
A PROBABILITY OF SUCCESS ON ITS CLAIM OF WRONGFUL USE
OF CIVIL PROCEEDINGS AGAINST JANSSEN MALLOY**

In its moving papers, Janssen Malloy, Yarnall and Burroughs, devoted five pages to addressing the substantive merits of the Cause of Action for Wrongful Use of Civil Proceedings/Malicious Prosecution in the continuation of the Tribal Court action against James Acres and Acres Bonusing, Inc. (“ABI”). (Motion, at pp.11-16.) This included the element of probable cause: (1) Defendants did not misstate the evidence; and (2) Defendants had a reasonable basis to continue the Tribal Court action. (Motion, at p.11, line 18 through p.15, line 16.) This also included the element of malice. (Motion, at p.15, line 17 through p.16, line 5.)

Notwithstanding Defendants’ detailed argument (based upon specific evidence), Plaintiff simply argues “whether Defendants had reasonable grounds to pursue the Fraud Cause of Action against Acres has nothing to do with whether they had reasonable grounds to pursue the other causes of action against ABI.” (Opposition to Janssen Malloy’s Anti-SLAPP Motion, at p.6, lines 3-8.) Plaintiff never explains its argument, which in any event is wrong for numerous reasons:

*. Defendants addressed the entire action against both Acres and ABI. (Motion, at pp.2-5);

*. Plaintiff concedes Acres and ABI are one in the same, as the Verified Complaint sets forth that Acres was a key employee of ABI. (Verified Complaint, at ¶¶.58-59); and

*. The argument ignores the element of malice, leaving it undisputed.

Plaintiff’s argument regarding Motions for Summary Judgment is also equally misplaced. (Opposition to Janssen Malloy’s Anti-SLAPP Motion, at pp.6-7.) Specifically, Plaintiff argues Defendants “seem to rely on state-court procedural rules which require ABI to justify each element of its cause of action. Dkt. 31, 17. But state-court procedural rules do not control anti-SLAPP motion in federal court, and this

1 motion is resolved as any other motion for summary judgment. Planned Parenthood, at
 2 834.” (Opposition to Janssen Malloy’s Anti-SLAPP Motion, at p.6, lines 15-19.) This
 3 argument fails for multiple reasons.

4 First, Defendants do not cite to any procedural rules, but simply state that in order
 5 to successfully oppose the Anti-SLAPP Motion, Plaintiff must prove every element of
 6 the Cause of Action. (Motion, at p.11, lines 14-17.) This assertion is consistent with
 7 ***Planned Parenthood v. Center for Medical Progress*** 890 F.3d 828 (9th Cir. 2018).

8 Plaintiff cites ***Planned Parenthood*** for the proposition that the District Court
 9 could never rule on the merits of an Anti-SLAPP because as with a Motion for Summary
 10 Judgment, the Plaintiff must be allowed to conduct discovery. (Opposition to Janssen
 11 Malloy’s Anti-SLAPP Motion, at p.6, lines 15-19.) This is an overbroad and
 12 unsupported reading of ***Planned Parenthood***.

13 The holding of ***Planned Parenthood*** is simply that there is no discovery stay
 14 when an Anti-SLAPP Motion is filed in federal court. (*Id.*, at pp. 833-834.) Here,
 15 Plaintiff has neither served the Janssen Malloy, Yarnall and Burroughs with any
 16 discovery nor set forth what evidence it hopes to obtain in any proposed discovery. In
 17 order to defeat a Motion for Summary Judgment in federal court for lack of discovery,
 18 the Plaintiff must articulate the specific evidence it will obtain through discovery.
 19 (***Century Sur. Co. v. Prince*** 782 Fed. Appex. 553, 557 (2019).) Having failed to make
 20 this showing, the Court here may properly consider and grant the instant Anti-SLAPP
 21 Motion.

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1 **V. CONCLUSION**

2 Based upon the foregoing, Defendants JANSSEN MALLOY LLP, MEGAN
3 YARNALL, and AMELIA BURROUGHS respectfully request that the Court grant their
4 Special Motion to Strike the California state SLAPP claim for Wrongful Use of Civil
5 Proceedings of Plaintiff ACRES BONUSING, INC under Code of Civil Procedure
6 Section 425.16.

7 DATED: March 25, 2020

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8
9 By: /S/
HOWARD SMITH
Attorneys for
Specially Appearing Defendants,
10 JANSSEN MALLOY, LLP, MEGAN
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12 BURROUGHS
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