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 MICHAEL CHASE, DANIEL STOUDER,  
 and AMY O'NEILL

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

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

Plaintiff,

v.

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;  
 COOPER DAMARSE, 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'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

) **SPECIALLY APPEARING**  
 ) **DEFENDANTS BOUTIN JONES INC.,**  
 ) **MICHAEL CHASE, DANIEL**  
 ) **STOUDER AND AMY O'NEILL'S**  
 ) **REPLY TO ACRES BONUSING**  
 ) **INC.'S OPPOSITION TO ANTI-**  
 ) **SLAPP MOTION TO STRIKE**  
 ) **BROUGHT PURSUANT TO CAL.**  
 ) **CODE OF CIV. PROC. § 425.16**

) 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 **COMES NOW** Specially Appearing Defendants BOUTIN JONES INC., MICHAEL  
 2 CHASE, DANIEL STOUDEY, AND AMY O'NEILL (collectively "the Boutin Jones defendants")  
 3 and hereby submit their Reply to Acres Bonusing Inc.'s Opposition to their Motion to Strike the  
 4 Complaint under California Code of Civil Procedure Section 425.16:

5 **I. INTRODUCTION**

6 The California legislature passed Code of Civil Procedure §425.16 specifically to allow for  
 7 the expeditious resolution of baseless claims arising from petitioning activity. California's anti-  
 8 SLAPP statute applies to pendent state law claims brought in federal question cases. *In re Bah*  
 9 (B.A.P. 9<sup>th</sup> Cir. 2005) 321 B.R. 41, 46.

10 It is beyond dispute that Acres Bonusing Inc.'s ("ABI")'s Verified Complaint bases all of its  
 11 pendent state court claims against the Boutin Jones defendants on petitioning activity undertaken by  
 12 Boutin Jones and its lawyers on behalf of its client, the Blue Lake Tribe ("Blue Lake"), including  
 13 petitioning activity taking place in response to two federal district court actions brought by James  
 14 Acres in an effort to divest the Blue Lake Tribal Court of jurisdiction.

15 Boutin Jones is a California law firm engaged in petitioning activity on behalf of a client,  
 16 and is therefore entitled to the anti-SLAPP statute's broad protection of any written or oral  
 17 statement or writing made before, or in connection with an issue under consideration or review in a  
 18 judicial proceeding. Code Civ. Proc. § 425.16 (e) (1)-(2). ABI attempts to avoid the application of  
 19 the anti-SLAPP statute by arguing – without any factual or legal support – that Boutin Jones was  
 20 engaged in illegal activity. As will be discussed below, the four facts which form the basis for  
 21 ABI's claims of aiding and abetting and conspiracy liability do not involve any illegal conduct.  
 22 Boutin Jones denies any illegality and the conduct alleged is not illegal as a matter of law.  
 23 Therefore, the illegality exception to prong one has not been met, and this Court must find that  
 24 Boutin Jones was engaged in protected petitioning activity.

25 Boutin Jones' lengthy supporting evidentiary declarations submitted with its moving papers  
 26 met Boutin Jones' burden under the second prong of the anti-SLAPP statute by showing that ABI  
 27 has no probability of prevailing on any of its pendent state law claims. The sworn testimony of  
 28 Michael Chase, Daniel Stouder, and Amy O'Neill carried Boutin Jones' burden under prong two of

1 the anti-SLAPP statute, thereby shifting the burden of proof to ABI to show a probability of  
2 prevailing on the merits. This ABI has failed to do.

3 Boutin Jones' declarations set forth in detail the specific evidentiary facts known to Boutin  
4 Jones which provided probable cause to bring the original tribal court action against ABI. The  
5 burden then shifted to ABI to produce evidence that any reasonable attorney would agree that the  
6 suit against ABI arising from the breach of the iSlot agreement was totally without merit. ABI  
7 failed to meet this burden.

8 Furthermore, Boutin Jones' declarations establish the absence of any malice animating their  
9 conduct in prosecution of the tribal court action against ABI. ABI has proffered no facts from which  
10 even a hint of malice on the part of the Boutin Jones defendants can be inferred.

11 Boutin Jones has also established the probability of prevailing on the remaining state law  
12 claims for aiding and abetting and conspiracy. The scant facts about Boutin Jones conduct alleged  
13 in ABI's Complaint fail to establish either the Boutin Jones defendants' knowledge of Judge  
14 Marston's alleged bias against ABI or an intent on the part of the Boutin Jones defendants to offer  
15 substantial assistance to Judge Marston to deprive ABI of a fair tribal court proceeding. ABI  
16 contends that the Boutin Jones defendants coordinated this alleged "despicable conduct" with  
17 attorney David Rapport. This Court should not accept as true allegations, such as ABI's, that are  
18 merely conclusory, unwarranted deductions of fact or unreasonable inferences. *In re Gilead* 536 F.  
19 3d 1049, 1055. ABI's contentions are not supported by any credible evidence of either "despicable  
20 conduct" on the part of Boutin Jones or coordination with Judge Marston, David Rapport or anyone  
21 else to deprive ABI of due process.

22 The federal court is obligated to apply California's one year statute of limitations to claims  
23 against lawyers arising from their provision of professional services, including claims of malicious  
24 prosecution. *Connelly v. Bornstein* (2019) 33 Cal. App. 5<sup>th</sup> 783, 799. ABI alleged that it suffered  
25 actual injury in January 2016, when Boutin Jones instituted *Blue Lake v. ABI* in tribal court and  
26 subjected ABI to the allegedly corrupt process. ABI further alleges that in January 2016 its  
27 business was harmed because of the stress on its principal, James Acres, resulting from the tortious  
28 conduct of defendants in instituting and prosecuting the tribal court action. (Complaint, ¶59) Boutin

Jones' representation of Blue Lake ended in February 2017 (Verified Complaint, ¶111). Favorable termination occurred on August 31, 2017 when the tribal court action was dismissed in its entirety. (Complaint, ¶5) ABI had no grounds to toll the statute. ABI had to file suit against Boutin Jones no later than August 31, 2018. However, ABI inexplicably waited until August 2019 to sue.

ABI argues that the one year statute of limitations does not apply because Boutin Jones is sued for "corruption" and "illegal conduct" and not for the rendering of professional services. To the contrary, all of the claims that ABI asserts against the Boutin Jones defendants, which ABI labels "corruption of the adjudicative process," involve the alleged breach of a professional obligation imposed on California attorneys under the State Bar Act provision against the corruption of the judicial process. *See* Business & Professions Code § 6068 (g). Accordingly, to be timely, ABI must have brought suit against the Boutin Jones defendants no later than August 31, 2018.

Finally, the litigation privilege found in California Civil Code Section 47 precludes ABI from establishing that it has a probability of prevailing on its aiding and abetting/conspiracy claims. The litigation privilege is absolute, and ABI has brought forward no conduct by the Boutin Jones defendants that did not involve activity taking place in the underlying litigation.

## **II. THE BOUTIN JONES DEFENDANTS HAVE MET PRONG ONE OF THE ANTI-SLAPP STATUTE**

Code of Civil Procedure §425.16 (e) defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with public issue" which is subject to a motion to strike to include "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." In referencing "any other official proceeding authorized by law," the Legislature did not limit the proceeding to one authorized under the federal or state constitutions. ABI cannot selectively read the broad scope out of the anti-SLAPP statute and ignore the command of the statute that it "*shall be broadly construed.*" Code Civ. Proc. §425.16(a).

Boutin Jones' burden on prong one of the anti-SLAPP statute is not an onerous one – only a prima facie showing of petitioning activity is required. *Optional Capital, Inc. v. Akin Gump*

1 *Strauss, Hauer & Feld LLP* (2017) 18 Cal. App. 5<sup>th</sup> 95. 112. Boutin Jones has met its burden under  
 2 prong one. It is beyond dispute that each of the few facts alleged by ABI about the Boutin Jones  
 3 defendants pertain to petitioning activities undertaken on behalf of their client, Blue Lakes, in an  
 4 official judicial proceeding.

5 The *facts* before the Court regarding Boutin Jones’ alleged substantial assistance in the so-  
 6 called “corruption of the adjudicative process” are limited to the following:

- 7 1. Amy O’Neill stated at a hearing in Tribal Court that she knew of “no valid reason Judge  
 8 Marston should recuse himself;”
- 9 2. Michael Chase stated at a court hearing that he “knows all about Rapport and Marston;”
- 10 3. Boutin Jones collaborated with David Rapport on legal work on various matters for Blue  
 11 Lake, including work that was performed by a contract attorney hired by Mr. Rapport who  
 12 had special expertise in tribal law; and,
- 13 4. Boutin Jones was counsel of record in an unrelated matter in which Judge Marston acted in  
 14 the capacity of an attorney for the Blue Lake tribe.

15 ABI tries to skirt the anti-SLAPP statute based on the narrow exception for illegal activity.  
 16 *See Flatley v. Mouro* (2006) 39 Cal. 4<sup>th</sup> 299. There is no evidence before this Court that the Boutin  
 17 Jones defendants engaged in any illegal conduct. ABI’s *theory* is that Boutin Jones “sought to  
 18 obtain money through the false pretense that they were not acting to corrupt the adjudicative  
 19 process....” [Doc. 48, ABI Opposition, 18:16-19] The Boutin Jones defendants did not exchange  
 20 anything of value in an effort to “suborn” Judge Marston. 18 U.S.C. § 666 (c) provides that this  
 21 section does not apply to “expenses paid or reimbursed, in the usual course of business.” The  
 22 payments Boutin Jones received for its legal services were made in the usual course of the Tribe’s  
 23 business in payment for legal services rendered on its behalf, and not as part of an exchange  
 24 prohibited by 18 U.S.C. § 666 (c). Therefore, there is no legal basis for ABI’s argument that the  
 25 motion to strike must be denied because of criminal conduct.

26 If ABI is allowed to proceed with this lawsuit, it will chill the petitioning rights of Boutin  
 27 Jones, its client and future clients. The California legislature has mandated that this statute be  
 28 interpreted broadly, precisely to avoid the kind of abuse of the judicial process attempted by ABI.

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**III. THE BOUTIN JONES DEFENDANTS HAVE MET PRONG  
TWO OF THE ANTI-SLAPP STATUTE**

Boutin Jones has submitted undisputed evidence which establishes that ABI does not have a probability of prevailing on any of its state law claims. Having met its obligation under prong two of the statute, the burden shifted to ABI to produce admissible evidence supporting a probability of prevailing on its claims.

The declarations submitted by the Boutin Jones defendants contain detailed facts which establish that *any reasonable attorney* would have believed probable cause existed to support the filing of Blue Lake’s Complaint against ABI and Acres. The “misuse of the judicial process” claim (hereafter, the “malicious prosecution claim”) fails under prong two, because ABI has failed to produce evidence that *no reasonable attorney* would have filed Blue Lake’s lawsuit.

ABI hinges its probability of prevailing on the merits of the malicious prosecution cause of action on the argument that Michael Chase did not deny that he came to an alleged “mutual understanding to accomplish a common unlawful plan with Rapport.” That argument carries no weight whatsoever given Mr. Chase’s specific testimony that:

1. He did not bring or maintain the action against ABI in bad faith or with ulterior motive;
2. He brought the action against ABI solely to succeed on the merits on behalf of Boutin Jones’ client;

These two statements – alone or taken together – are a sufficient denial by Mr. Chase that he had knowledge of and was a participant in any supposed “unlawful plan.”

There is no evidence before this Court to support a finding that the Boutin Jones defendants acted with malice. ABI conflates Boutin Jones’ actions taken on behalf of its client to advance its position in litigation with the *alleged* intent of its client, Blue Lake, to “corrupt the adjudicative process” by allowing Judge Marston to preside over the tribal court action. Even if that was Blue Lake’s intent (and it was not), a client’s alleged animus does not suffice to establish malice on the part of the Boutin Jones defendants.

ABI has produced no evidence of malice whatsoever on the part of any of the Boutin Jones defendants. Malice requires evidence of animus, and animus towards ABI is not demonstrated by



any of the facts about Boutin Jones defendants' alleged conduct set out in ABI's Complaint. Collaboration with another lawyer with expertise in the subject matter does not demonstrate malice. Knowledge that Judge Marston shared an office with Mr. Rapport does not show malice. If neutral facts like these suffice to meet the requirement of malice, it will certainly have a chilling effect on the zealous advocacy that all lawyers owe to their clients.

ABI has not produced evidence to show that it has a probability of prevailing on its aiding and abetting and conspiracy claims. Aiding and abetting require proof that the Boutin Jones defendants rendered substantial assistance to Judge Marston to achieve "corruption of the adjudicative process." Professional collaboration between Boutin Jones and attorney Rapport does not evidence aiding and abetting. The evidence establishes that the reason for the collaboration was to allow Boutin Jones to have the benefit of David Rapport's expertise on tribal law. Boutin Jones knowledge that Rapport & Marston share office space and utilize letterhead in that name does not suffice to show any encouragement, let alone the "substantial encouragement" required for aiding and abetting the "corruption of the adjudicative process." There is absolutely evidence that Boutin Jones had any communications with Judge Marston outside of the tribal court litigation.

Looking at the evidence in the light most favorable to Plaintiff, this Court should determine as a matter of law that Boutin Jones' alleged assistance was neither substantial nor in knowing support of an effort to deprive ABI of due process in the tribal court action, which leads to the inescapable conclusion that ABI cannot prevail on the merits.

**IV. BOUTIN JONES' CONDUCT REFLECTS A PROFESSIONAL OBLIGATION  
IMPOSED ON ATTORNEYS THAT WARRANTS THE APPLICATION  
OF THE ONE YEAR STATUTE OF LIMITATIONS**

Code of Civil Procedure § 340.6 mandates that "an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services, shall be commenced within one year." The one year statute of limitations applies to malicious prosecution claims against lawyers. *Connelly v. Bornstein* (2019) 33 Cal. App. 3d 783, 799. The one year statute of limitations bars all of ABI's state law claims against the Boutin Jones defendants as a matter of law because they arise out of the performance of professional services and suit was not filed within one year of the dismissal of the underlying action.

1           ABI alleged Boutin Jones institution of *Blue Lake v. ABI* in tribal court was wrongful  
 2           conduct because it subjected ABI to an allegedly corrupt process. ABI further alleges that *in*  
 3           *January 2016* its business was harmed because of the stress on its principal, James Acres, resulting  
 4           from the tortious conduct of defendants in instituting and prosecuting the tribal court action.  
 5           (Complaint, ¶59) ABI pleads that in response to an order Judge Marston issued regarding ABI's  
 6           alleged "flouting of tribal court rules," that Acres was compelled to file *Acres v. Blue Lake I* in the  
 7           Northern District of California *in March 2016*, in order to seek the due process that he was being  
 8           denied in tribal court. After *Blue Lakes I* was dismissed, later in 2016 Acres filed the *Blue Lake II*  
 9           action, which sought similar relief from the tribal court proceedings.

10           ABI further alleges that he obtained Judge Marston's billing records *in January 2017*, which  
 11           revealed additional conduct of Judge Marston representing Blue Lake in other matters that ABI  
 12           claims evidences "corruption of the adjudicative process." Judge Marston's allegedly bias was  
 13           purportedly known by Boutin Jones' attorneys, based on their "long history of collaboration" with  
 14           David Rapport dating back to 2011.

15           Boutin Jones' representation of Blue Lake ended when it substituted out of the underlying  
 16           litigation in February 2017. (Complaint, ¶111) Favorable termination occurred on August 31, 2017  
 17           when the tribal court action was dismissed in its entirety. (Complaint, ¶5)

18           Based on the foregoing allegations of ABI's Verified Complaint, it is clear that ABI had  
 19           "discovered" Boutin Jones' allegedly tortious conduct as early as January 2016 and no later than  
 20           January 2017. ABI sustained alleged "actual injury" purportedly caused by Boutin Jones alleged  
 21           collaboration in the "corruption of the adjudicative process" beginning in January 2016, after  
 22           Boutin Jones instituted suit in tribal court and when Judge Marston refused to recuse himself.  
 23           These actions allegedly compelled Acres to file suit in Federal court in 2016. Boutin Jones ceased  
 24           its representation in February 2017, and the tribal court action was dismissed in its entirety on  
 25           August 31, 2017.

26           ABI's causes of action against the Boutin Jones defendants accrued no later than August 31,  
 27           2017 and the statute of limitations expired on August 31, 2018. ABI has produced no evidence of

28           ///

1 any basis to toll the statute of limitations. ABI filed its Complaint in this matter on August 31,  
2 2019, when it was clearly time-barred.

3 ABI's only argument in opposition to the statute of limitations defense is that Boutin Jones  
4 is not being sued for acts or omissions arising in the performance of professional services. ABI's  
5 argument reflects a gross mischaracterization of California law.

6 In determining when a lawyer is engaged in professional services for purposes of the  
7 application of the one year statute of limitations under Code of Civil Procedure Section 340.06, the  
8 California Supreme Court in *Lee v. Hanley* (2015) 61 Cal. 4<sup>th</sup> 1225, 1238, provides the following  
9 explanation of the scope of "professional services:"

10 *"The obligations that an attorney has by virtue of being an attorney are varied and often*  
11 *overlap with obligations that all persons subject to California's laws have. For example,*  
12 *everyone has an obligation not to sexually batter others (Citation omitted), but attorneys also*  
13 *have a professional obligation not to so in the particular context of an attorney-client*  
14 *relationship (see Cal. Rules of Prof. Conduct, rule 3-120). For purposes of section 340.6(a)*  
15 *the question is not simply whether a claim alleges misconduct that entails the violation of a*  
16 *professional obligation. Rather, the question is whether the claim, in order to succeed,*  
17 *necessarily depends on proof that an attorney violates a professional obligation as opposed*  
18 *to some generally applicable nonprofessional obligation."* [Italics added]

19 ABI cannot seriously contend that its claims against the Boutin Jones defendants – which  
20 ABI characterizes as "corrupting the adjudicative process" – do not depend on proof of violation of  
21 a professional obligation imposed on attorneys. Boutin Jones sole reason for being involved in the  
22 underlying "adjudicative process" was to zealously advocate for the rights of the Blue Lake Tribe.  
23 California's State Bar Act, Business & Professions Code §6068 (g), sets forth the professional  
24 obligation of California attorneys: "Not to encourage either the commencement of an action or  
25 proceeding from any corrupt motive of passion or interest." The gravamen of all of ABI's claims is  
26 that Boutin Jones acted with the alleged intent of "corrupting the adjudicative process." *ABI's*  
27 *allegations therefore directly implicate the precise obligation imposed on attorneys as a*  
28 *professional obligation under Section 6068(g) of the State Bar Act, rendering the one-year statute*  
*of limitations applicable to all of ABI's state law claims.*

There is no evidence from which it can be inferred that any of the Boutin Jones defendants  
committed an unlawful act unrelated to the rendering of legal services or violated any "general civil

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obligations.” All of Boutin Jones’ obligations arise solely from their ethical obligations as attorneys and their actions were all undertaken as part of their representation of the Tribe.

Based on the allegations of ABI’s Complaint, this Court should conclude as a matter of law that the statute of limitations commenced running no later than August 31, 2017 when the tribal court action was dismissed and ended on August 31, 2018. Although it could have joined in James Acres’ state court action, ABI preferred to have a second bite at the apple in federal court. ABI has not argued that the statute of limitations was tolled such that this Complaint filed on August 31, 2019 could be considered timely. For these reasons, the one year statute of limitations applies and ABI’s claims against the Boutin Jones’ defendants are time barred.

**V. THE LITIGATION PRIVILEGE IS A BAR TO STATE LAW CLAIMS  
OTHER THAN MALICIOUS PROSECUTION**

The Boutin Jones defendants have asserted that the litigation privilege defense afforded by California Civil Code § 47(b) bars ABI’s state law claims for breach of fiduciary duty and constructive fraud. It is axiomatic that under California law, the Boutin Jones defendants are immune from “virtually any tort liability (including claims for fraud), with the sole exception of claims for malicious prosecution” because all of their alleged conduct occurred in judicial proceedings. *Olsen v. Harbison* (2010) 191 Cal. App. 4<sup>th</sup> 325, 333. In fact, “[a]ny doubt about whether the privilege applies is resolved in favor of applying it.” *Contreras v. Dowling* (2016) 5 Cal. App. 5<sup>th</sup> 394, 415.

ABI contends that the Boutin Jones defendants engaged in litigation activity with the alleged intent of “corruption of the adjudicative process.” The allegations of ABI’s Verified Complaint itself establish that the litigation privilege applies to the aiding and abetting and conspiracy claims.

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**VI. CONCLUSION**

For the foregoing reasons, the Boutin Jones defendants respectfully request that this Court grant their Motion to Strike the Complaint.

DATED: March 26, 2020

LERCH STURMER LLP

By                     /s/                    

Jerome N. Lerch, Esq.

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Attorneys for Specially Appearing Defendants

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