

No. 20-15959

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ACRES BONUSING, INC., et al.,

*Plaintiffs and Appellants,*

v.

LESTER MARSTON, et al.,

*Defendants and Appellees.*

On Appeal from the United States District Court  
for the Northern District of California  
No. 3:19-cv-05481-WHO  
Hon. William H. Orrick, Judge

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APPELLEES/DEFENDANTS  
JANSSEN MALLOY LLP, MEGAN YARNALL  
AND AMELIA BURROUGHS'  
ANSWERING BRIEF

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### CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant JANSSEN MALLOY LLP states that it is neither owned by a parent corporation nor a publicly held corporation which owns 10% or more of its stock.

DATED: September 16, 2020

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### STATEMENT OF JURISDICTION

The District Court had jurisdiction over the Eighth Cause of Action under the Racketeer Influenced and Corrupt Organizations (RICO) Act under 18 U.S.C. Section 1964(c) and supplemental jurisdiction over the other Causes of Action under 28 U.S.C. Section 1367.

### INTRODUCTION

This appeal results from the District Court having granted a Motion to Dismiss under FRCP Rule 12(b)(1) against the Plaintiffs JAMES ACRES and ACRES BONUSING, INC. ("Plaintiffs"): The claims against Defendants JANSSEN MALLOY LLP ("Janssen Malloy") and its attorneys MEGAN YARNALL ("Yarnall") and AMELIA BURROUGHS ("Burroughs") (collectively "Defendants") arise out of those attorneys' representation of the (a sovereign tribe) previously brought in Tribal Court – based upon sovereign immunity.

This is the second judicial finding on this specific issue. On February 11, 2019, the California Superior Court, granted the Motion to Quash/Dismiss the claims against Defendants based upon sovereignty of the Tribal Court. (James Acres, etc. vs. Lester Marston, etc. et. al., Sacramento Superior Court Case No. 34-2018-00236829.) (Excerpts of the Record ("ER"), at pp. 7-12.) The granting of this motion is on appeal before the California Court of Appeal for the Third Appellate District. (ER, at p. 12.) Plaintiffs readily admit the existence of the prior action, with the Court having granted Defendants' Motion to Quash/Dismiss. (ER, at p. 25.)

///



Concurrently with the pending appeal in the California state Court, Plaintiffs filed this second action in federal court attempting to split the claims by including a “new” Plaintiff (ACRES BONUSING, INC.) and “new” claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act, based upon the same facts.

As in the California action, this action represents another attempt to plead around sovereign immunity, Plaintiffs named Defendants – counsel for Blue Lake Rancheria – rather than the tribe. However, absent a showing the attorneys acted outside the scope of their authority, which Plaintiffs’ Verified Complaint concedes they did not, they are covered by the sovereign tribal immunity of Blue Lake Rancheria. Further, this action, by calling into question conduct which, unquestionably, all occurred before the Tribal Court, this action is an official capacity suit because it interferes with the judicial sovereignty of the tribe.

In the event this Court finds tribal immunity is not available to bar this entire action, the judgement in favor of Defendants should be affirmed given Plaintiffs failure to state a claim. In the District Court below, Defendants also moved under FRCP Rule 12(b)(6): (1) Plaintiffs failed to state a RICO claim against Janssen Malloy and attorneys Yarnall and Burroughs because they cannot allege the requisite predicate acts to show a pattern of racketeering activity, as the only act alleged against these Defendants, the pursuit of a lawsuit does not constitute the required predicate acts; and (2) Plaintiffs’ California state law claim for Wrongful Use of Civil Proceedings (Malicious Prosecution) is barred by the one-year statute of limitations – applicable to attorneys – California Code of Civil Procedure Section 340.6. (ER, at pp. 2, 148.) Additionally, the

Opening Brief concedes that Defendants were not part of a criminal enterprise -- and not subject to a RICO claim -- because they never represented the Blue Lake Tribe in any proceeding before the purportedly conflicted Judge -- Co-Defendant Lester Marston -- the basis of the RICO claim. (Appellants' Open Brief ("AOB"), at pp.9, 15-17, 23, 31-32.)

Based upon the foregoing, the Court should affirm the dismissal of this action.

### **ISSUES PRESENTED**

1. The District Court had no jurisdiction over the law firm of Janssen Malloy and its attorneys because they maintain sovereign immunity as agents of Blue Lake Casino in their representation of the tribe before the Tribal Court.

2. Plaintiffs are unable to state a RICO claim against Janssen Malloy and its attorney because the pursuit of a lawsuit does not constitute the requisite predicate acts to show a pattern of racketeering activity.

3. The claim under California state law for Wrongful Use of Civil Proceedings (Malicious Prosecution) is barred by the one-year statute of limitations in California Code of Civil Procedure Section 340.6.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

#### **A. Plaintiffs' Verified Complaint**

As Plaintiffs' Complaint notes, the Blue Lake Rancheria ("Blue Lake") is a federally-recognized Indian tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. (ER, at p. 20.) Blue Lake Casino and Hotel ("BLCCH") is a tribal entity wholly owned by Blue Lake and an arm of the tribe. (ER, at

p. 20.) The Blue Lake Tribal Court is an appropriately established judicial arm of the tribe. (ER, at pp. 20-21, 26.) The Complaint admits that Blue Lake is a sovereign nation. (ER, at p. 48.)

The Complaint alleges an action was filed by BLCH against Plaintiffs by Boutin Jones in Blue Lake's Tribal Court ("*Blue Lake v. Acres.*") (ER, at pp. 19, 23, 63.) In February of 2017, Janssen Malloy, LLP, through its attorneys Megan Yarnall and Amelia Burroughs, replaced Boutin Jones as attorneys for Blue Lake in *Blue Lake v. Acres.* (ER, at p. 24.) The Complaint goes on to allege that, while representing BLCH in Tribal Court in *Blue Lake v. Acres*, attorneys Yarnall and Burroughs misstated the evidence "on Blue Lake's behalf." (ER, at pp. 21, 23-24, 42.) On August 31, 2017, a Judgment of Dismissal in favor of Plaintiffs was entered in *Blue Lake v. Acres.* (ER, at pp. 19-20, 101.)

On August 28, 2019, Plaintiffs filed this action against Janssen Malloy, Yarnall and Burroughs for "Wrongful Use of Civil Proceedings" and a RICO claim based upon the pursuit of *Blue Lake v. Acres* in the Tribal Court. (ER, at pp. 46-47, 56-57.)

Other than conclusory allegations in the first claim for "Wrongful Use of Civil Proceedings," there are literally no other charging allegations against Janssen Malloy, Yarnall or Burroughs in the entire Complaint. (ER, at pp. 46-47.) Specifically, there is no claim Defendants acted in any capacity other than as agents for Blue Lake or BLCH or that any of their allegedly tortious actions occurred outside of Tribal Court.

Plaintiffs admit a prior action on the same allegations/evidence remains pending: "32. In July 2018 Mr. Acres used the above named defendants in Acres v. Marston et al [Sacramento Superior Court Case

No. 2018-34-00236929] on causes of action substantially similar to the causes one through seven below.” (ER, at p. 25.) This action also includes an additional claim under RICO. (ER, at pp. 39-57.)

The RICO claim is based upon the same allegations/evidence as the other seven claims – the pursuit of the underlying action in and/or the use of the Tribal Court. (ER, at pp. 19, 20-21, 56-56.) This is revealed by the verified allegations supporting the eighth claim for “Operating or Managing a Racketeering Enterprise under 18 USC Section 1964(c):”

\*. The Eighth Cause of Action includes all of the general allegations, which were re-alleged in full (ER, at pp. 19-46, 56);

\*. Each Defendant engaged in conduct to obtain money by means of false pretenses, which included: (a) Wrongful use of civil proceedings in *Blue Lake v. ABI*; (b) Working to ensure that the judicial power in *Blue Lake v. ABI* would be exercised for attorneys working for Blue Lake; (c) Working to conceal that the judicial power in *Blue Lake v. ABI* was being exercised for attorneys working for Blue Lake; and (d) Falsely representing that the Blue Lake Tribal Court was an impartial tribunal (ER, at p. 56);

\*. Defendants intended to manufacture an enforceable Tribal Court judgment in *Blue Lake v. ABI* against Plaintiffs (ER, at p. 56);

\*. Filings in the Blue Lake Court in *Blue Lake v. ABI* were used by the litigants to further the scheme against Plaintiffs (ER, at pp. 56-57, 40);

\*. “Several Defendants” (which do not include Janssen Malloy, Yarnall and Burroughs), undertook to influence, obstruct, impede the due administration of justice of a Court of the United States, through conduct

which included: (a) Attorneys from Rapport & Marston ghostwriting papers filed by Boutin Jones which were intended to convince the district court that Judge Marston was a neutral decision-maker; and (b) Attorney DeMarse of Boutin Jones drafting and Judge Marston filing, a false declaration with the district court (ER, at p. 57); and

\*. Plaintiffs were harmed by Defendants' scheme - being compelled to defend themselves against the action. (ER, at p. 58.)

**B. Plaintiffs Appeal from Janssen Malloy's Successful Motion to Dismiss Based Upon Sovereign Immunity**

Defendants moved to Dismiss Plaintiffs' Verified Complaint based upon sovereign immunity under FRCP 12(b)(1) and/or Failure to State a Claim under FRCP 12(b)(6). (ER, at pp. 2-14). The District Court granted the motion under 12(b)(1) stating:

“Looking beyond the façade of a facially-pleaded individual-capacity lawsuit, I find that “entertaining [this] suit would require the court to adjudicate the propriety of the manner in which tribal officials carried out an inherently tribal function.” *Brown*, 17 Cal. App. 5th at 1207. Attorney Defendants persuasively raise these concerns: “If the court were to wade in and decide what actions are or are not permissible in Tribal Court it necessarily asserts control of that Court. Is this Court, as Plaintiffs contends, supposed to rule on what pleadings are appropriate in Tribal

Court or how an action in Tribal Court must be plead[ed]? . . . Is it to determine when, in Tribal Court, an attorney has misused the Tribal Court's judicial process . . . or whether the Tribal Court correctly followed its own procedures?" Janssen Malloy MTD 13.

As the Sacramento County Superior Court found, "[t]hese are not insignificant or immaterial questions in the malicious prosecution action, since the case involves alleged malicious prosecution *only in the Tribal Court.*" *Acres v. Marston*, 2019 WL 8400826, at \*12 (emphasis in original). Just as entertaining the suit in *Brown* would require the court to question an inherently tribal function, entertaining this suit would require me to question the judicial function of the Blue Lake Rancheria Tribal Court. The real party in interest here is the Tribe itself. For these reasons, Attorney Defendants' motion to dismiss on grounds of tribal sovereign immunity is GRANTED."

(ER, at pp. 10-11.) (*Emphasis in Original.*)

Defendants also filed a Special (Anti-SLAPP) Motion under California Code of Civil Procedure Section 425.16 to Strike the Complaint because Plaintiffs' entire Complaint arose out of Defendants'

representation of Blue Lake Casino in/before the Tribal Court - protected petitioning activity. (ER at pp. 2, 148.) Because the District Court granted the motion to dismiss on the basis of sovereign immunity, it did not need to address the argument Plaintiffs had failed to state a claim and denied the anti-SLAPP motion as moot. (ER, at pp. 2, 14, 148.)

**C. Plaintiffs' Complaint Established Janssen Malloy's Conduct was Performed in the Course of Their Representation of their Client Blue Lake Casino Before the Tribal Court**

The entirety of the allegations of wrongful conduct alleged against Janssen Malloy in Plaintiffs' Complaint can be classified as: Actions taken by Janssen Malloy in representing Blue Lake Casino for the continuance of the Tribal Court action, including causing pleadings, motions, and other documents to be filed with the Tribal Court and served on Plaintiffs in that action, and appearing on behalf of Blue Lake Casino at hearings in the Tribal Court action (ER, at pp. 19-20, 56-58.)

**D. There are No Allegations Janssen Malloy acted in any Capacity other than their Official Capacity as Counsel for the Tribe**

The Verified Complaint does not allege facts that Janssen Malloy was not acting as legal counsel for Blue Lake Casino at all relevant times. (ER, at pp. 19-46.) Nowhere in the Complaint do Plaintiffs allege facts that support the conclusion the firm and its attorneys were not acting within the scope of their authority given to them by Blue Lake Casino at all relevant times. (ER, at pp. 19-46.) Nowhere in the Complaint, does Plaintiffs allege facts that support the conclusion Janssen Malloy was ever acting in their own self-interests. (ER, at pp. 19-46.)

Moreover, any allegation Janssen Malloy was not acting as the

Casino's counsel before the Tribal Court would contradict Plaintiffs' own allegations in their Verified Complaint. (ER, at pp. 19-20.)

**E. Plaintiffs/Appellants Admit Janssen Malloy was Not Part of the Alleged Criminal Enterprise**

The Appellants' Opening Brief even concedes Defendants were not part of a criminal enterprise – and not subject to a RICO claim – because they never represented the Tribe in any proceeding before Judge Marston – the basis of the RICO claim. (AOB, at pp.9, 15-17, 23, 31-32.)

**STANDARD OF REVIEW**

Dismissal for sovereign immunity is subject to de novo review. (*Linneen v. Gila River Indian Cmty.* 276 F.3d 489, 492 (9th Cir. 2002).)

**LEGAL DISCUSSION**

**I. THE DISTRICT COURT CORRECTLY FOUND IT HAD NO JURISDICTION OVER JANSSEN MALLOY AND ITS ATTORNEYS BECAUSE THEY MAINTAIN SOVEREIGN IMMUNITY AS AGENTS OF BLUE LAKE CASINO IN THEIR REPRESENTATION OF THE TRIBE BEFORE THE TRIBAL COURT**

**A. Plaintiffs' Action is Barred by Sovereign Immunity**

Indian tribes have long been recognized as possessing common law immunity from suit enjoyed by sovereign powers. (*Turner v. United States* 248 U.S. 354, 358 (1919).) Absent congressional authorization, "Indian nations are exempt from suit." (*United States v. United States Fidelity and Guaranty Co.* 309 U.S. 506, 512 (1940).) A waiver of sovereign immunity must be unequivocally expressed. (*United States v. Testan* 424 US 392, 399 (1976).)



Judicial recognition of a tribe's immunity from suit is not discretionary. (*People of the State of California v. Quechan Tribe of Indians* 595 F.2d 1153, 1155 (9th Cir. 1979).) Rather, absent a waiver, the assertion of sovereign immunity by a federally-recognized Indian tribe deprives the Court of jurisdiction to adjudicate the claim:

“Sovereign immunity involves a right which courts have no choice in the absence of a waiver but to recognize. It is not a remedy, as suggested by California’s argument, the application of which is within the discretion of the court...consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.”

(*Id.*, at p. 1155.)

Such immunity is jurisdictional in nature and applies “irrespective of the merits of the claim asserted against the tribe.” (*Rehner v. Rice* 675 F.2d 1340, 1351 (9<sup>th</sup> Cir. 1982).) Tribal immunity applies to commercial activities of the tribe, including a casino if it is an arm of the tribe. (*Cook v. Avi Casino Enterprises, Inc.* 548 F.3d 718, 726-727 (9<sup>th</sup> Cir. 2006); *Allen v. Gold County Casino* 464 F.3d 1044, 1046-1047 (9<sup>th</sup> Cir. 2006).) Such immunity has been applied in an action against a tribe for Malicious Prosecution, even when the prior action by the tribe was filed

in state Court. (*Beecher v. Mohegan Tribe of Indians* 918 A.2d 880, 884-886 (Sup. Ct. Conn. 2007).)

Further, tribes have a “strong interest in protecting [their] ability to adjudicate matters brought to them within their own court system.” (*Ford Motor Co. v. Todocheene* 258 Fed. Supp.2d 1038, 1057 (D.Ct. Ariz. 2002).) State Courts “have no authority to limit, modify or control the tribal court or vice versa.” (*Teague v. Band of Chippewa Indians* 665 N.W. 2d 899, 907 (Sup. Ct. Wisc. 2003).)

Sovereign immunity extends not simply to the tribe itself, but also to those agents acting on the tribe’s behalf. “It is settled that tribal immunity extends to individual tribal officials acting in their representative capacity. . . . Further, at least in our federal circuit, an official need not be a member of the tribe in order to share in its sovereign immunity.” (*United States v. Oregon* 657 F.2d 1009, 1012 (9th Cir. 1981); *Snow v. Quinalt Indian Nation* 709 F.2d 1319, 1321 (9th Cir. 1983).) Federal Courts have expressly recognized that attorneys acting in their official capacity on behalf of the tribe and within the scope of their authority are protected by tribal immunity. (*Davis v. Littell* 398 F.2d 83, 85 (9th Cir. 1968).)

In both the District Court below (ER, at pp. 7-10) and in the California State action (in granting the Motion to Quash/Dismiss), the Courts relied upon a California case – which interpreted federal law – *Great W. Casinos, Inc. v. Morongo Band of Mission Indians* 74 Cal.App.4th 1407 (1999). Strangely, this case is completely ignored by the Appellants and not even mentioned in their opening brief.

In *Great W. Casinos, Inc.*, Great Western Casinos (“GWC”) claimed that the tribe entered into a gaming contract with GWC and once it saw the potential profit, the tribe, through its individual members and general counsel, conducted a fraudulent scheme to cancel the management contract and cheat GWC out of the potential profits. (*Id.*, at p. 1413.) The tribe and its general counsel moved to dismiss on grounds of sovereign immunity. (*Id.*, at p. 1414.) The Court found that the tribe had not waived its sovereign immunity and that the Court lacked subject matter jurisdiction over the Defendants. (*Id.*, at p. 1417.)

As to the tribe’s attorney the Court went on to indicate:

“The non-Indian law firm and general counsel are similarly immune from suit for actions taken or opinions given in rendering legal services to the tribe. Here the complaint acknowledges defendants Alexander & Karshmer and Barbara E. Karshmer, Inc., legal counsel for the tribe, were ‘at all times herein mentioned retained by and representing the Morongo Band.’ The complaint further alleges ‘the Morongo Band did, on April 18, 1995, acting through the Tribal Council and Karshmer, terminate the Management Agreement, in violation and in breach thereof, on the ground that GWC’s former principals violated the law - - for possession of illegal gaming devices. [P]laintiff is informed and

believes and thereon alleges that Karshmer counseled and advised the Morongo Band and its members to carry out their fraudulent misconduct as alleged [the allegedly false and fabricated charges GWC management violated the law].’

In providing legal representation - - even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract - - counsel were similarly immune from liability for those professional services. (See *Davis v. Littell*, *supra*, 398 F.2d 83, 85 [attorney who advised tribal council regarding the competence and integrity of an employee is immune from liability for defamation under the executive privilege].) The rationale behind barring claims against legal counsel based on their advice to the Indian tribe which contracted for their services regarding gaming enterprises was aptly explained in *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536. There the federal appellate court rejected claims general counsel could be liable in tort for allegedly making a management company appear unsuitable as manager for the tribe's gaming operations

during the licensing process. (88 F.3d at p. 540.) The court explained, “[t]ribes need to be able to hire agents, including counsel, to assist in the process of regulating gaming. As any government with aspects of sovereignty, a tribe must be able to expect loyalty and candor from its agents. If the tribe's relationship with its attorney, or attorney advice to it, could be explored in litigation in an unrestricted fashion, its ability to receive the candid advice essential to a thorough licensing process would be compromised. The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. Some causes of action could have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party. (*Gaming Corp. of America v. Dorsey & Whitney, supra*, 88 F.3d at p. 550.)”

(*Great W. Casinos, Inc. v. Morongo Band of Mission Indians, supra*, 74, Cal.App.4th at pp. 1423-1425.)

Relying upon *Great W. Casinos*, the District Court properly applied *Maxwell v. County of San Diego* 708 F.3d 1075, 1089 (9th Cir. 2013), *Cook v. AVI Casino Enterprises, Inc., supra*, 548 F.3d at p. 727

and *Hardin v. White Mountain Apache Tribe* 779 F.2d 476, 478 (9th Cir. 1985) to prevent exactly what Plaintiffs are attempting to do here – artfully plead around application of sovereign immunity. (ER 9-11.)

The analysis from *Great W. Casinos* regarding the extension of tribal sovereign immunity to the tribe’s legal counsel was relied upon by the United States District Court for the Southern District of New York in *Catskill Dev. LLC v. Park Place Entm’t Corp.* 206 F.R.D. 78, 91 (U.S.D.C. S.D.N.Y. 2002).) In that case, the Court addressed whether a tribe’s attorneys were protected by the tribe’s sovereign immunity against subpoenas issued to the attorneys demanding information about the tribe’s business and the attorneys’ work for the tribe in a civil action where neither the tribe nor the attorneys’ were parties.

The District Court held that the attorneys were entitled to sovereign immunity against the subpoenas, reasoning as follows: “As a general proposition, a tribe’s attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe as a tribal official is cloaked in that immunity. (*Id.*, at p. 91.)

Here, just as in *Great W. Casinos*, and the federal cases it relies upon, as well as the federal case which followed its analysis, the tribe must be able to retain attorneys to represent it in Tribal Court and expect that these attorneys can give candid advice without concern that their discussions and advice would be explored in litigation. This is especially true where, as here, the Plaintiffs have intentionally elected not to sue Blue Lake so that its former counsel will, necessarily, be required to disclose information protected by the attorney-client in response to any discovery propounded by Plaintiffs, leaving Defendants without an

adequate opportunity to defend themselves.

Further, by claiming Defendants “wrongfully” pursued an action in Tribal Court, Plaintiffs are using this Court as an instrument to control what conduct is permissible or impermissible in Tribal Court. The Tribal Court alone should be the only Court to determine whether any actions before it were a “wrongful use” of its Court.

#### **B. Lewis v. Clarke**

Plaintiffs have repeatedly argued that because Defendants are sued in their “individual capacity” that sovereign immunity does not apply, relying on the recent case of *Lewis v. Clarke* 137 S. Ct. 1285 (2017). (AB, at pp. 26-32.) However, even a cursory reading of *Lewis* shows it is inapplicable here. In *Lewis*, a limousine driver, while transporting casino patrons to their homes, rear-ended a passenger car. (*Id.*, at p. 1290.) The driver argued that, because the tribe had voluntarily agreed to indemnify him, tribal sovereignty should apply. (*Id.*, at pp. 1290-1291.)

The accident occurred on Interstate 95, a state highway in Connecticut. (*Id.*, at p. 1290.) The Court indicated that, because this was a simple tort action regarding conduct which occurred on state lands and a judgement against the driver would not disturb the tribe’s sovereignty, sovereign immunity did not apply. (*Id.*, at p. 1292.) In doing so, it cautioned “courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit.” (*Lewis v. Clarke, supra*, 137 S. Ct. at pp. 1290-1291.) “In making this assessment, courts may not simply rely on the characterization in the complaint but rather must determine in the first instance whether the remedy sought is truly against the sovereign.” (*Ibid.*) “Similarly,

lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent and they may also be barred by sovereign immunity.” (*Id.*, at pp. 1290-1291.)

The facts of *Lewis* are very different from this case. The Tribe employee in *Lewis* did not claim to be an "official" of the Tribe, whereas Janssen Malloy were acting as the Tribe's fiduciary agent as the Tribe's legal representative before the Tribal Court. (ER, at pp.19-46.) The tort alleged in *Lewis* involved a simple vehicle accident that occurred on a state highway, whereas the torts alleged against Defendants all occurred in/before the Tribal Court action and the Defendants' representation of the Tribe in that action.

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

The employee in *Lewis* was acting within the scope of his employment, but he was not acting in an official capacity at the time of the accident. (*Lewis v. Clarke, supra*, 137 S. Ct. at pp. 1291-1292.) In *Lewis*, the tribe's responsibility and involvement began and ended with the indemnification of the employee. (*Id.*, at pp. 1293-1292.) Here, Janssen Malloy were acting in their official capacity as the official legal representatives of the Tribe in the Tribal Court. (ER, at pp. 24, 41, 46.) Any act of Defendants in representing the Tribe would be considered an



act of the Tribe; and any action against Defendants for those acts should be considered an action against the Tribe.

**C. The Instant Action is an Official Capacity Suit**

Plaintiffs also fail to discuss one of the other cases relied upon by the District Court – *Brown v. Garcia* 17 Cal.App.5th 1198 (2017). (ER, at pp. 10-11.) This is a significant omission as the appellate Court in *Brown* directly rejected the argument the Plaintiffs seek to make here: While a Complaint might seek relief from individual Defendants, the action will be subject to tribal sovereign immunity, when it seeks to hold the Defendants liable for legislative functions as tribal officials, thereby in reality being an official capacity suit. (*Id.*, at p. 1207.) The Court reasoned that cases applying a remedy-focused general rule were distinguishable because they involved garden variety torts unrelated to tribal governance and administration. (*Ibid.*)

Here, as in *Brown*, Plaintiffs’ action is an official capacity suit because it impinges on Blue Lake’s sovereignty because when advising the tribe on legal matters the attorney acts as its officer. (*Davis v. Littell, supra*, 398 F 2d at p. 85.) As in *Great Casino’s*, a tribe must be able to rely on counsel’s advice without fear the advice will be explored in litigation. (*Great Casino’s, supra*, 74 Cal. App 4th at p. 1434.) Under such circumstances “some causes of action” directly impinge on the tribe’s sovereignty “even where the tribe is not a party.” (*Ibid.*)

Further, the claimed actions of Janssen Malloy which purport to have injured Plaintiffs all occurred before the Tribal Court. If the Court were to wade in and decide what actions are or are not permissible in Tribal Court it necessarily asserts control of that Court. Is the Court, as

Plaintiffs contend, supposed to rule on what pleadings are appropriate in Tribal Court or how an action in Tribal Court must be plead? (ER, at pp. 19, 20.) Is it to determine when, in Tribal Court, an attorney has misused the Tribal Court's judicial process (ER, at pp. 46-47) or whether the Tribal Court correctly followed its own procedures? (ER, at pp. 30-31.)

Under these circumstances, it would be more appropriate for the Tribal Court to determine what procedures should have been followed or what actions were an abuse of its procedures. Necessarily, as Janssen Malloy and its attorneys were acting as officers of the tribe or because this action seeks to determine what is appropriate before the Tribal Court and thus seeks to control the Tribal Court processes, it infringes on the tribe's sovereignty and this Motion to Dismiss should be granted.

**II. PLAINTIFFS HAVE FAILED TO STATE A RICO CLAIM AGAINST DEFENDANTS BECAUSE THE PURSUIT OF A LAWSUIT DOES NOT CONSTITUTE THE REQUISITE PREDICATE ACTS TO SHOW A PATTERN OF RACKETEERING ACTIVITY**

18 U.S.C. Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, provides a private right of action to any person injured in its business or property by reason of a violation of the activities prohibited by Section 1962. To establish a RICO claim under Section 1964(c), a Plaintiff must show: (1) a violation of 18 U.S.C. Section 1962; (2) An injury to business or property; and (3) That the injury was caused by the violation of Section 1962. To establish whether a Defendant violated Section 1962, a Plaintiff must prove that each Defendant participated in: (1) The conduct of (2) an enterprise that affects interstate

commerce (3) through a pattern (4) of racketeering activity which (5) proximately harmed the victim. (*Eclectic Properties E., LLC v. Marrns & Millichap Co.* 751 F.3d 990, 997 (9th Cir. 2014).)

“Racketeering activity” is defined to include any “act” indictable under various specified federal statutes, including the mail and wire fraud statutes and the obstruction of justice statute. (See 18 U.S.C. Section 1961(1) [Defining “racketeering activity” to include offenses indictable under 27 U.S.C. Section 1341 [Relating to mail fraud]; Section 1343 [Relating to wire fraud], and Section 1503 [Relating to obstruction of justice.].) A “pattern of racketeering activity” is defined by the statute as “at least two acts of racketeering activity” within a ten-year period. (18 U.S.C. Section 1962.)

First, Plaintiffs do not allege any wrongful conduct by the Defendants that amounts to a “pattern of racketeering activity” under the RICO Statute. Instead, the Complaint merely alleges Janssen Malloy, LLP, through its attorneys Yarnall and Burroughs, replaced Boutin Jones as attorneys for Blue Lake in *Blue Lake v. Acres* and pursued the action in Tribal Court “on Blue Lake’s behalf.” (ER, at pp. 19-20, 24, 42.) All of the alleged acts concern litigation activities during the underlying action. Specifically, Plaintiffs allege that:

\*. “During 2016 and 2017, dozens of filings were made in *Blue Lake v. Acres*, with proofs of service indicating that the filings were served via postal-mail.” (ER, at pp. 56-57); and

\*. “During 2016 and 2017, dozens of filings were made in *Blue Lake v. Acres*, with proofs of service indicating that the filings were served via email.” (ER, at pp. 56-57).

These so-called “patterns of racketeering activity” are merely allegations of litigation activity undertaken by Defendants in representing their client, Blue Lake Casino in Tribal Court. Plaintiffs have not alleged the requisite predicate criminal acts under the RICO statute and accordingly have not met the pleading standard of Rule 12(b)(6). Plaintiffs are required to plead their RICO claim with specificity, as the RICO claim is based on the defendants’ “extrinsic fraud to manufacture a tribal court judgment.” (ER, at p. 56.) The remainder of the allegations in the RICO claim are conclusory and based on unwarranted factual conclusions or unjustified inferences. (ER, at p. 57.)

In fact, the Opening Brief concedes Defendants were not part of any criminal enterprise because they never represented the Blue Lake Tribe in any proceeding before Judge Marston – the basis of the RICO claim. (AOB, at pp.9, 15-17, 23, 31-32.)

The Second Circuit in *Kim v. Kimm* 884 F.3d 98, 104 (2d Cir. 2018) recently addressed the issue of whether alleged litigation activity can serve as RICO predicate acts and cited similar decisions in the First Circuit, Fifth Circuit, Tenth Circuit, and Eleventh Circuit, to hold that “allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act.”

In *Kim v. Kimm*, a restaurant owner brought a RICO action against parties who had previously brought a trademark infringement action against him, alleging that the infringement litigation had been fraudulent and violated the RICO Act. The Defendants (including attorney Defendants) in that action filed a motion to dismiss for failure to state a claim, and the trial court granted the defendants’ motion without leave to

amend, finding that Kim had not alleged predicate acts constituting a pattern of racketeering activity. The court found that most of the alleged predicate acts concerned litigation activity in the infringement action—specifically, the preparing, signing, and filing of declarations by parties who were defendants in the RICO action—and reasoned that well-established precedent and sound public policy preclude such litigation activities from forming the basis for predicate acts under RICO. (*Kim v. Kimm, supra*, 884 F.3d at p. 102.) The Second Circuit affirmed the ruling granting the motion for “substantially the reasons set forth by the district court.” (*Id.* at p. 104.)

The Second Circuit held:

“Although we have not spoken directly on the issue, other courts have held that “[i]n the absence of corruption,” such litigation activity “cannot act as a predicate offense for a civil-RICO claim.” *Snow Ingredients, Inc. v. SnowWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016); *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087-88 (11th Cir. 2004) (deciding that the “alleged conspiracy to extort money through the filing of malicious lawsuits” were not predicate acts of extortion or mail fraud under RICO); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) (deciding that meritless litigation is not a predicate act of extortion under RICO);

*Gabovitch v. Shear*, 70 F.3d 1252, 1995 WL 697319, at \*2, 1995 U.S. App. LEXIS 32856 (1st Cir. 1995) (per curiam) (concluding that “proffering false affidavits and testimony to [a] state court” does not constitute a predicate act of extortion or mail fraud); *see also Curtis & Assocs., P.C. v. law Offices of David M. Buszman, Esq.*, 758 F.Supp.2d 153, 171-72 (E.D.N.Y. 2010) (collecting cases from district courts in the Second Circuit deciding “that the litigation activities alleged in [the complaint] cannot properly form the basis for RICO predicate acts”). We agree with the reasoning of these opinions and conclude that allegations of frivolous, fraudulent, or baseless litigation activities without more cannot constitute a RICO predicate act.

As the district court explained, there are compelling policy arguments supporting this rule. First, “[i]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action,” which “would inundate the federal courts with procedurally complex RICO pleadings.” Dist. Ct. Op. at 10-11, Appellant App’x at 266-67; *see also* Nora F. Engstrom,

*Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 696 (2017) (permitting RICO suits based on prior litigation activities would “engender wasteful satellite litigation”). Furthermore, “permitting such claims would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them.” Dist. Ct. Op. at 11, Appellant App'x at 267; *see also Gabovirch*, 1995 WL 697319, at \*3, 1995 U.S. App. LEXIS 32856 (“In essence, simply by alleging that defendants' litigation stance in the state court case was 'fraudulent,' plaintiff is insisting upon a right to relitigate that entire case in federal court .... The RICO statute obviously was not meant to endorse any such occurrence.”). Moreover, endorsing this interpretation of RICO “would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts” because “any litigant's or attorney's pleading and correspondence in an

unsuccessful lawsuit could lead to drastic RICO liability.” Dist. Ct. Op. at 11, Appellant App'x at 267 (quoting *Curtis & Assocs.*, 758 F.Supp.2d at 173); *see also Engel v. CBS, Inc.*, 182 F.3d 124, 129 (2d Cir. 1999) (noting the “strong public policy of open access to the courts for all parties and [the need] to avoid ad infinitum [litigation] with each party claiming that the opponent's previous action was malicious and meritless” (internal quotation marks and citations omitted) (second brackets in original) ).

(*Kim v. Kimm, supra*, 884 F.3d at p. 104.)

This Court should adopt the reasoning in *Kim* because such a holding would protect litigation activity that is not advancing the operations of a criminal enterprise, would not allow a baseless RICO claim to chill the legitimate exercise of litigation activity, and would not create a tool for disgruntled litigants to institute retaliatory lawsuits. Because Defendants' litigation activity may not form the basis for liability under the RICO claim, Plaintiffs have failed to allege the requisite predicate acts as a matter of law.

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III. THE CLAIM UNDER CALIFORNIA STATE LAW FOR  
WRONGFUL USE OF CIVIL PROCEEDINGS  
(MALICIOUS PROSECUTION) IS BARRED BY THE  
APPLICABLE ONE-YEAR STATUTE OF LIMITATIONS

Plaintiff ACRES BONUSING, INC. cannot prevail on its pendent state law claim for Malicious Prosecution against attorneys Megan Yarnall and Amelia Burroughs and their law firm of Janssen Malloy because the claim is barred by the one-year statute of limitations that applies to actions against attorneys. Under California Code of Civil Procedure Section 340.6, “[a]n 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 after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission. . .”

ABI's claim for Malicious Prosecution necessarily arises from Defendant attorneys' performance of professional services to their client in the Underlying Action. (See *Daniels v. Robbins* 182 Cal.App.4th 204, 215 (2010) “[E]very claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding.”.) The California Court of Appeal has clearly held that “consistent with *Lee [v. Hanley]* 61 Cal.4<sup>th</sup> 1225 (2015)] section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation.” (*Connelly v. Bomstein* 33 Cal.App.5th 783, 799 (2019).)

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ABI's Verified Complaint alleges: "From January 2016 through July 2017, Blue Lake Rancheria ('Blue Lake') and its confederates sued Acres Bonusing, Inc. ... within Blue Lake's trial court. (ER, at p. 19.) Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned, on conjured claims of fraud and breach of contract." (ER, at p. 19.) On August 31, 2017, a Judgment of Dismissal in favor of Plaintiffs was entered in *Blue Lake v. Acres*. (ER, at pp. 19-20, 101.)

Thus, ABI was legally required to file the Complaint in this action by August 31, 2018 -- within one-year of the termination of the underlying action on August 31, 2017 - for the claim for Malicious Prosecution to have been timely. (*Babb v. Superior Court* 3 Cal.3d 841, 846 (1971) [On a Cause of Action for Malicious Prosecution, the period of limitations begins to run on the date that the proceedings in the prior action were terminated.].) ABI filed its Complaint on August 28, 2019, and ABI's state law claim for Malicious Prosecution against the attorney Defendants which accrued on August 31, 2017 is, therefore, barred by the one-year statute of limitations.

### CONCLUSION

For the foregoing reasons, Defendants/Appellees JANSSEN MALLOY LLP, MEGAN YARNALL and AMELIA BURROUGHS respectfully request that this Court affirm the decision of the District Court granting Defendants' Motion to Dismiss Plaintiffs/Appellants' Complaint based on tribal sovereign immunity. In the event this Court finds tribal immunity is not available, the judgement in favor of Defendants should be affirmed given Plaintiffs cannot state a RICO claim

against these Defendants and the California State claim for Malicious Prosecution is time barred by the one-year statute of limitations set forth in California Code of Civil Procedure Section 340.6.

DATED: September 16, 2020

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### CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I  
certify that:

This brief complies with the type-volume limitation of Federal  
Rule of Appellate Procedure because this brief contains 6,553 words,  
excluding the parts of the brief exempted by Federal Rule of Appellate  
Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule  
of Appellate Procedure and the type style requirements of Federal Rule of  
Appellate Procedure 32(a)(6) because this brief has been prepared in a  
proportionately spaced typeface using Microsoft Word Times New  
Roman 14-point font.

DATED: September 16, 2020

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YARNALL and AMELIA  
BURROUGHS



# **ADDENDUM**

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**18 U.S.C. Section 1962:** (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the

conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

**18 U.S.C. Section 1961(1):** "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers),



section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons).<sup>[1]</sup> sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in

counterfeit labels for phono records, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such

section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

**18 U.S.C. Section 1964(c):** Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

**27 U.S.C. Section 1341:** Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or

deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

**27 U.S.C. Section 1343:** (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
- (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) The District of Columbia shall be considered to be a State; and

(2) Any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**27 U.S.C. Section 1503: (a) PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY**

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action

under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

**(b) APPLICATION FOR CERTIFICATE OF IDENTITY; APPEAL**

If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

**(c) APPLICATION FOR ADMISSION TO UNITED STATES UNDER  
CERTIFICATE OF IDENTITY; REVISION OF DETERMINATION**

A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally denied admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States.

**28 U.S.C. Section 1367:** (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims

by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) The claim raises a novel or complex issue of State law,
- (2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) The district court has dismissed all claims over which it has original jurisdiction, or
- (4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

**FRCP 12(b)(1), (6):** (b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive



pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

.....

(6) failure to state a claim upon which relief can be granted;

**California Code of Civil Procedure Section 340.6:** (a) 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 after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish the plaintiff's factual innocence for an underlying criminal charge as an element of the plaintiff's claim, the action shall be commenced within two years after the plaintiff achieves post conviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish the plaintiff's factual innocence, the time for commencement of legal action shall not exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury.

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when those facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

(4) The plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence legal action.

(5) A dispute between the lawyer and client concerning fees, costs, or both is pending resolution under Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code. As used in this paragraph, "pending" means from the date a request for arbitration is filed until 30 days after receipt of notice of the award of the arbitrators, or receipt of notice that the arbitration is otherwise terminated, whichever occurs first.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

**California Code of Civil Procedure Section 425.16:** (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259 , 11130 , 11130.3 , 54960 , or 54960.1 of the Government Code . Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259 , or Section 11130.5 or 54960.5, of the Government Code .

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, (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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

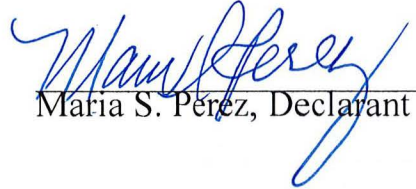
(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

### CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020,, I electronically filed the foregoing **APPELLEES/DEFENDANTS JANSSEN MALLOY LLP, MEGAN YARNALL AND AMELIA BURROUGHS' ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the state of California, that the foregoing is true and correct and that this declaration was executed on September 21, 2020, at Los Angeles, California.

  
Maria S. Perez, Declarant