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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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VERONICA BRILL; KASEY LYN MILLS;
MARC GOONE; NAVROOP SHERGILL;
JASON SCOTT; AZAAN NAGRA; ELI
JAMES; PHUONG PHAN; JEFFREY
SLUZINSKI; HARLAN KARNOFSKY;
NATHAN PELKEY; MATTHEW ALLEN
HOLTZCLAW; JON TUROVITZ; ROBERT
YOUNG; BLAKE ALEXANDER KRAFT;
JAMAN YONN BURTON; MICHAEL
ROJAS; HAWNLAY SWEN; THOMAS
MORRIS III; PAUL LOPEZ; ROLANDO
CAO; BENJAMIN JACKSON; HUNG SAM;
COREY CASPERS; ADAM DUONG;
DUSTIN MCCARTHY; CHOU VINCE
XIONG; BRIAN OLSON; CAMERON
SMITH; JORDAN DIAMOND; ARONN
SOLIS; ALISHA DANIELS-DUCKWORTH;
CHRISTIAN SOTO VASQUEZ; ANDREW
HERNANDEZ; DARRELL STEED; ARISH
S. NAT; KYLE KITAGAWA; BRIAN
MICHAEL RAASCH; ZEEV MALKIN;
DAVID CRITTENTON; PATRICK
LAFFEY; PARAS SINGH; FIRAS
BOURI; IDRIS M. YONISI; JOSHUA
WHITESELL; DAVID DUARTE; HARUN
UNAI BEGIC; BRAD KRAFT; TAYLOR
CARROLL; ELIAS ABOUFARES; TYLER
DENSEN; ANDREW LOK; JAKE
ROSENSTIEL; ANTHONY AJLOUNY;
HECTOR MARTIN; DALE MENGHE;
SCOTT SCHLEIN; AUGUSTE SHASTRY;
NICHOLAS COLVIN; JASON MARKWITH;
BRIAN WATSON; SHANE GONZALES;

No. 2:19-cv-02027 WBS AC

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTIONS TO
DISMISS

1 KATHERINE STAHL; MIKE NELSON;
2 BRANDON STEADMAN; BRYANT MILLER;
3 HONG MOON; MATTHEW GOUGE;
4 NICHOLAUS WOODERSON; CARLOS
5 WELCH; ARIEL REID; DAN MAYER;
6 ANTHONY GIGLINI; RYAN JACONETTI;
7 ARIEL CRIS MANIPULA; TRENTON
8 SIDENER; JAMES JOHN O'CONNOR;
9 PATRICK VANG; MARCUS DAVIS; ADAM
10 COHEN; DERICK COLE; AARON
11 MCCORMACK; BRENNEN ALEXANDER
12 COOK; MICHAEL PHONESAVANH
13 RASPHONE; BENJAMIN TENG; SCOTT
14 SORENSON; ANTHONY HUGENBERG; and
15 BILLY JOE MESSIMER,

16 Plaintiffs,

17 v.

18 MICHAEL L. POSTLE; KING'S
19 CASINO, LLC D/B/A STONES
20 GAMBLING HALL; JUSTIN F.
21 KURAITIS; JOHN DOES 1-10; and
22 JANE DOES 1-10,

23 Defendants.

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25 Before the court are motions to dismiss brought by
26 defendants King's Casino, LLC ("King's Casino") (Docket No. 45),
27 Justin F. Kuraitis, (Docket No. 46), and Michael Postle (Docket
28 No. 50).

29 I. Background

30 King's Casino operates Stones Gambling Hall ("Stones")
31 in Citrus Heights, California. (First Am. Compl. ("FAC") ¶¶ 97,
32 104 (Docket No. 40).) Starting in January 2018, Stones publicly
33 broadcasted "live" poker games played at its casino several
34 nights a week through a program called "Stones Live Poker". (Id.
35 ¶¶ 110, 116.) Like most poker games, participants began Stones
36 Live Poker by paying Stones a small fee, called "the rake," to

1 organize and run the game. (Id. ¶¶ 105, 185.) Unlike most poker
2 games, however, the poker table was surrounded by video cameras
3 and contained cards that were imbedded with radio-frequency
4 identification capabilities that made it possible to transmit the
5 composition of each player's hand and identity to a control room.
6 (Id. ¶¶ 105-06.) Stones combined the film from the cameras with
7 the information from the card sensors to provide viewers with an
8 omniscient view of the game. (Id. ¶ 107.) While characterized
9 as "live," the feeds are often delayed by fifteen to thirty
10 minutes to prevent cheating. (Id. ¶ 108.) Justin Kuraitis, a
11 mid-level employee of Stones, directed the series. (Id. ¶ 115.)

12 Michael Postle frequently played in the Stones Live
13 Poker games and quickly became known for his success. (Id. ¶¶
14 116-18, 120.) From July 18, 2018 to September 29, 2019, Postle
15 allegedly recorded net winnings in more than 94% of the games in
16 which he played. (Id. ¶ 120.) According to the FAC, Postle
17 became an "in-house celebrity." (Id. ¶ 4.) Stones created
18 graphics of Postle depicted as a "deity-like individual imbued
19 with omniscient powers" and allegedly compensated him to host his
20 own poker show, 'Postle and Pals!'. (Id. ¶¶ 118, 173-74.)
21 Kuraitis told other players that Postle's skill was simply "on a
22 different level." (Id. ¶ 164.)

23 Not everyone agreed. Plaintiff Veronica Brill took her
24 concerns that Postle was cheating to Kuraitis on March 20, 2019.
25 (Id. ¶ 159.) She claimed Postle was using a concealed cell phone
26 to communicate with at least one unnamed confederate while
27 playing the game. (Id. ¶¶ 127-28.) This John (or Jane) Doe
28 would allegedly furnish him with information about the cards of

1 his competitors, and he would play his hand accordingly. (Id.)
2 Kuraitis responded by insisting the game was “one hundred percent
3 secure.” (Id. ¶ 160.) After publicly tweeting out her
4 allegations against Postle, Stones tweeted that it had “conducted
5 a full investigation & found no evidence that any cheating []
6 occurred.” (Id. ¶ 166.)

7 Brill, unsatisfied, and with over eighty other
8 plaintiffs, followed with this action against defendants.
9 Plaintiffs allege six causes of action against King’s Casino,
10 three against Kuraitis, and five against Postle himself. (See
11 generally FAC.) Each defendant submitted its own motion to
12 dismiss, although both Postle and Kuraitis joined King’s motion.

13 II. Standard

14 On a Rule 12(b)(6) motion, the inquiry before the court
15 is whether, accepting the allegations in the complaint as true
16 and drawing all reasonable inferences in the plaintiffs’ favor,
17 the plaintiffs have stated a claim to relief that is plausible on
18 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “A
19 claim has facial plausibility when the plaintiff pleads factual
20 content that allows the court to draw the reasonable inference
21 that the defendant is liable for the misconduct alleged.” Id. A
22 complaint that offers mere “labels and conclusions” will not
23 survive a motion to dismiss. Id. (citations and quotations
24 omitted).

25 Normally, pleadings are subject to Federal Rule of
26 Civil Procedure 8. Rule 8(a) provides that: “[a] pleading that
27 states a claim for relief must contain: (1) a short and plain
28 statement of the grounds for the court’s jurisdiction . . . (2) a

1 short and plain statement of the claim showing that the pleader
2 is entitled to relief; and (3) a demand for the relief sought.”
3 Fed. R. Civ. P. 8(a). However, for claims involving fraud,
4 plaintiffs must satisfy the pleading requirements of Federal Rule
5 of Civil Procedure 9(b). Rule 9(b) requires parties to “state
6 with particularity the circumstances constituting fraud or
7 mistake.” Fed. R. Civ. P. 9(b). To successfully plead fraud
8 under Rule 9(b), “a pleading must identify the who, what, when,
9 where, and how of the misconduct charged, as well as what is
10 false or misleading about the purportedly fraudulent statement,
11 and why it is false.” Davidson v. Kimberly-Clark Corp., 889 F.3d
12 956, 964 (9th Cir. 2018) (internal citation omitted).

13 III. Discussion

14 A. King’s Motion to Dismiss

15 King’s Casino moves to dismiss all six causes of action
16 alleged against its property, Stones: negligent misrepresentation
17 (Claim 3), negligence (Claim 6), constructive fraud (Claim 7),
18 fraud (Claim 8), libel per se against plaintiff Veronica Brill
19 (Claim 9), and violation of California’s Consumer Legal Remedies
20 Act (“CLRA”), Cal. Civ. Code § 1750, et seq. (Claim 10). (King’s
21 Mot. at 5.) At the outset, King’s Casino argues plaintiffs’
22 claims for negligent misrepresentation, negligence, constructive
23 fraud, fraud, and the CLRA are not cognizable under California
24 law because California public policy bars judicial intervention
25 in gambling disputes, in part because the asserted damages are
26 inherently speculative. (King’s Mot. at 7.) In opposition,
27 plaintiffs argue California courts have “regularly recognize[d]
28 the justiciability of gaming-centric disputes” and seek to

1 recover their gambling losses (including money lost to Postle and
2 loss of opportunity) and the rake, paid to Stones before each
3 hand. (Pls.' Opp'n to King's Mot. at 12-13, 15-25 (Docket No.
4 56); FAC ¶¶ 184-87, 236, 252, 260, 266.)

5 In their briefs and at oral argument, both sides
6 substantially relied on the California Court of Appeal's decision
7 in Kelly v. First Astri Corp. 72 Cal. App. 4th 462 (4th Dist.
8 1999), review denied, No. S080081 (Cal. Sept. 1, 1999). In
9 Kelly, three blackjack players sued a casino, the casino's
10 manager, and one of the casino's employees for intentional
11 misrepresentation, fraudulent concealment, conversion, money had
12 and received, negligence, negligent supervision, and civil
13 conspiracy following the discovery of a marked card scheme at the
14 casino. Id. at 468. The court upheld the trial court's grant of
15 summary judgment to defendants because plaintiffs' action to
16 recover his gambling losses were barred "under California's
17 strong and long-standing public policy against judicial
18 resolution of civil claims arising out of lawful or unlawful
19 gambling." Id. at 466.

20 While the Kelly court recognized California's "public
21 attitudes about gambling" had shifted substantially since the
22 Supreme Court of California refused to recognize a cause of
23 action on moral grounds, see id. at 489, it held that the "public
24 acceptance of some forms of gambling" did little to create an
25 independent cause of action to recover gambling losses absent
26 legislative action to "enact[] a statute permitting the use of
27 the process of the courts in California to resolve . . . gambling
28 loss claims." Id. at 489. Today, the California state

1 legislature still has not created a statutory right to permit
2 individuals to recover their gambling losses, although other
3 states have done so. See, e.g., Illinois Loss Recovery Act, 720
4 ILCS 5/28-8, et seq.

5 King's Casino argues that California's public policy
6 against recovery of gambling losses and gambling debts should be
7 sufficient to foreclose plaintiffs' claims here, but even if it
8 is not, the speculative nature of the damages should be. (King's
9 Mot. at 5-7.) Relying principally on Vu v. California Commerce
10 Club, Inc., 58 Cal. App. 4th 229 (2d Dist. 1997), defendant
11 argues that California courts have found "winning or losing at
12 card games is inherently the product of other factors, namely
13 individual skill and fortune or luck. It simply cannot be said
14 with reasonable certainty that the intervention of cheating such
15 as here alleged was the cause of a losing hand." (King's Mot. at
16 5-6 (quoting Vu, 58 Cal. App. 4th at 233).) The Vu court's
17 finding is consistent with Kelly's bar on recovering gambling
18 losses. However, neither court fully addresses whether
19 California's public policy sweeps broadly enough to preclude
20 damages that can be proved with reasonable certainty.

21 Plaintiffs seek, in part, to recover the rake -- the
22 fixed collection rate Stones collected before each poker hand.
23 (See FAC ¶¶ 184-87, 236, 252, 260, 266, 275-276, 278.) The rake
24 represents a cognizable measure of economic harm that is in no
25 way tied to the ultimate outcome of a particular hand of poker.
26 Unlike damage claims predicated on lost opportunities, the rake
27 is not "speculative," or the product of chance. These amount to
28 "recovery of the monies paid to administer the games fairly."

1 (Pls.' Opp'n to King's Mot. at 13.)

2 It does not appear that California's public policy
3 barring judicial intervention to recover gambling losses sweeps
4 so broadly as to include the concrete, identifiable damages
5 represented by the rake. Accordingly, to the extent that "an
6 appreciable portion of the damages sought by Plaintiffs" are not
7 reliant on gambling losses and are instead predicated on the rake
8 alone, (Pls.' Reply to King's at 10; FAC ¶¶ 184-93), the court
9 proceeds to consider whether plaintiffs' claims are sufficient to
10 withstand King's Casino's motion to dismiss.

11 1. Fraud

12 Plaintiffs Veronica Brill and Kasey Mills¹ allege a
13 fraud claim against Stones. (Id. ¶¶ 261-67.) In California, the
14 elements of fraud are: "(a) a misrepresentation (false
15 representation, concealment, or nondisclosure); (b) knowledge of
16 falsity (or scienter); (c) intent to defraud, i.e., to induce
17 reliance; (d) justifiable reliance; and (e) resulting damage."
18 Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996).

19 Allegations of fraud must conform to Rule 9(b)'s
20 strictures. Fed. R. Civ. P. 9(b). Brill and Mills allege that
21 defendant Kuraitis defrauded them while acting for himself and on
22 behalf of Stones on March 20, 2019 when he claimed Postle was not
23 cheating when they confronted him at the casino. (FAC ¶¶ 159,
24 164, 262, 267.) However, Brill and Mills fail to particularly
25 plead the damages they suffered as a result of this alleged

26 ¹ Marc Goone also originally pursued a claim against
27 Stone for fraud in the FAC, though that claim was voluntarily
28 dismissed. (FAC ¶ 262; Pls.' Opp. to King's Mot. at 33 n.11.)

1 fraud.

2 Specifically, Brill and Mills do not allege what days
3 they played poker at Stones Live Casino after they were
4 defrauded.² They do not allege the cost of the rake during each
5 game, let alone what they contributed individually.³ Instead,
6 they offer nothing more than a general allegation that the rake
7 amounted to "tens of thousands of dollars during the life of Mr.
8 Postle's scheme." (FAC ¶ 186.) This general allegation is not
9 sufficient to satisfy Rule 9(b)'s rigorous demands. However,
10 plaintiffs have represented to the court that they are prepared
11 to "identify the rake paid over to Stones in the [] subject poker
12 games." (Pls.' Opp'n to King's at 54.) Accordingly, plaintiffs'
13 fraud claims must be dismissed with leave to amend to afford
14 plaintiffs an opportunity to meet Rule 9(b)'s particularity
15 requirement.

16 2. Constructive Fraud

17 The elements for constructive fraud are similar to
18 fraud, although it requires "(1) a fiduciary or confidential
19 relationship; (2) nondisclosure (breach of fiduciary duty); (3)
20 intent to deceive, and (4) reliance and resulting injury
21 (causation)." Prakashpalan v. Engstrom, Lipscomb & Lack, 223

22 _____
23 ² The court notes that while plaintiffs alleged a number
24 of dates in connection with their RICO claim against Mr. Postle,
25 they do not offer the same particularly to support their fraud
26 claim. (FAC ¶ 205.) The court also notes a vast majority of the
27 games (see id. ¶ 205(i) - (xliv)) also occurred before Brill and
28 Mills purportedly approached Kuraitis in March 2019.

³ For the reasons described above, the court will only
consider plaintiffs' claims for damages "equal to monies paid to
Stones as and for the rake." (FAC ¶ 226.)

1 Cal. App. 4th 1105, 1131 (2d Dist. 2014). Notably, constructive
2 fraud is “applicable only to a fiduciary or confidential
3 relationship.” Id. (internal citations and quotations omitted).

4 “Before a person can be charged with a fiduciary
5 obligation, he must either knowingly undertake to act on behalf
6 and for the benefit of another, or must enter into a relationship
7 which imposes that undertaking as a matter of law.” City of Hope
8 Nat’l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 386 (2008)
9 (internal citations and modifications omitted). Here, while
10 plaintiffs allege that Stones “had a legal duty to monitor the
11 Stones Live Poker game for cheating” and Stones breached this
12 duty by “concealing from the Plaintiffs allegations of cheating
13 and fraud on the part of Mr. Postle,” they fail to allege any
14 fiduciary obligation to support a constructive fraud claim. (See
15 FAC ¶¶ 255, 257.)

16 Plaintiffs claim they were particularly vulnerable to
17 Stone’s exploitation, and this vulnerability gives rise to a
18 fiduciary relationship. (Pls.’ Opp’n to King’s Mot. at 39-41.)
19 But as the California Supreme Court articulated in City of Hope,
20 vulnerability, standing alone, does not necessarily create
21 fiduciary obligations unless “one party’s vulnerability is so
22 substantial as to give rise to equitable concerns underlying the
23 protection afforded by the law governing fiduciaries.” 43 Cal.
24 4th at 345. For this reason, “[v]ulnerability ‘usually arises
25 from advanced age, youth, lack of education, weakness of mind,
26 grief, sickness, or some other incapacity’ that preexists -- as
27 opposed to arising from -- the transaction at issue.” Alvarado
28 Orthopedic Res., L.P. v. Linvatec Corp., No. 11-CV-246 IEG (RBB),

1 2011 WL 3703192, at *4 (S.D. Cal. Aug. 23, 2011) (citing TMX
2 Funding, Inc. v. Impero Techs., Inc., No. 5:10-cv-00202, 2010 WL
3 4774791, at *6 (N.D. Cal. Nov. 16, 2010) (quoting Richelle L. v.
4 Roman Catholic Archbishop, 106 Cal. App. 4th 257, 273 (1st Dist.
5 2003)).

6 Here, plaintiffs do not allege that they were members
7 of one of these vulnerable communities before they engaged in the
8 poker game, either individually or collectively. (See FAC ¶¶
9 254-60.) Instead, their claim is unpersuasively predicated on
10 the "transaction at issue." See Alvarado, 2011 WL 3703192, at
11 *4. Plaintiffs have failed to adequately allege a fiduciary or
12 confidential relationship between themselves and Stones that
13 would support a claim for constructive fraud. Accordingly,
14 plaintiffs' constructive fraud claim must also be dismissed.

15 3. Negligent Misrepresentation

16 District courts in the Ninth Circuit appear to be
17 divided on whether claims for negligent misrepresentation need to
18 satisfy the heightened pleading requirements of Rule 9(b). See
19 Price Simms Holdings LLC v. Candle3, LLC, No. 2:18-CV-1851 WBS
20 KJN, 2018 WL 6271580, at *5 n.7 (E.D. Cal. Nov. 30, 2018) (citing
21 Petersen v. Allstate Indem. Co., 281 F.R.D. 413 (C.D. Cal. 2012)
22 (discussing the holdings of district courts in the Ninth Circuit
23 that Rule 9(b)'s heightened pleading standard applies to
24 negligent misrepresentation claims before holding that Rule
25 9(b)'s heightened pleading standard does not apply to negligent
26 misrepresentation claims)). The court need not express an
27 opinion on that issue here, however, because plaintiffs have
28 failed to fulfill the essential elements of negligent

1 misrepresentation.

2 The elements for negligent misrepresentation are almost
3 the same as the elements for fraud under California law. But
4 rather than “knowing” the representation was false at the time it
5 was made, the defendant must have made the representation
6 “without reasonable ground for believing it was true.” West v.
7 JPMorgan Chase Bank, 214 Cal. App. 4th 780, 792 (4th Dist. 2013).
8 Plaintiffs allege Stones engaged in negligent misrepresentation
9 by “conducting Stones Live Poker games in a licensed casino,”
10 which created “an implicit representation” that players would be
11 “protected from the cheating of other players through utilization
12 of adequate and sufficient security measures and protocols.”
13 (FAC ¶ 229.) Principally, plaintiffs claim Stones knew Postle
14 was cheating “because at least one agent of Stones served as a
15 John Doe or Jane Doe confederate of Mr. Postle.” (Id. ¶ 233.)

16 Critically, plaintiffs failed to disclose the identity
17 of the alleged confederate. (See id.) Without this information,
18 the court cannot adequately assess the intent to defraud, whether
19 the plaintiffs’ reliance was justified, or whether Stones held
20 itself out as an honest business “without reasonable ground for
21 believing” it to be true. See West, 214 Cal. App. 4th at 792.
22 At the same time, plaintiffs have represented they are prepared
23 to “allege the identity of Mr. Postle’s chief confederate by name
24 and position.” (Pls.’ Opp’n to King’s Mot. at 54.) Accordingly,
25 the negligent misrepresentation claim will be dismissed with
26 leave to amend.

27 4. Consumer Legal Remedies Act

28 The CLRA prohibits “unfair methods of competition and

1 unfair or deceptive acts or practices undertaken by any person in
2 a transaction intended to result or which results in the sale or
3 lease of goods or services to any consumer." Cal. Civ. Code §
4 1770(a). However, it is not "an otherwise applicable general
5 law" as the CLRA "applies only to transactions for the sale or
6 lease of consumer 'goods' or 'services' as those terms are
7 defined in the act." Fairbanks v. Superior Court, 46 Cal. 4th
8 56, 65 (2009). A "consumer" is defined as "an individual who
9 seeks or acquires, by purchase or lease, any goods or services
10 for personal, family, or household purposes." Cal. Civ. Code §
11 1761(d). "Services" are defined as "work, labor, and services
12 for other than a commercial or business use, including services
13 furnished in connection with the sale or repair of goods." Cal.
14 Civ. Code § 1761(b). "Goods" are defined as "tangible chattels."
15 Cal. Civ. Code § 1761(a).

16 Neither party offers authority to support or refute the
17 proposition that poker is a "service" under the CLRA, nor is the
18 court aware of any California case directly addressing the issue.
19 Plaintiffs argue that "[t]he services Stones provided to
20 Plaintiffs -- the tables with requisite dealers, the supporting
21 staff of security, management, directors, food staff, and the
22 cage and its accompanying staff -- constitute services under the
23 statutory definition." (Pls.' Opp'n to King's Mot. at 48.) But
24 by that logic, almost everything would fall under the definition
25 of "service," turning it into a "general law." See Fairbanks, 46
26 Cal. 4th at 65. Gambling is not "work or labor, nor is it
27 related to the sale or repair of any tangible chattel." See id.,
28 46 Cal. 4th at 61 (holding life insurance is not a "service")

1 under the CLRA); see also Hall v. Sea World Entm't, Inc., No.
2 3:15-cv-660-CAB-RBB, 2015 WL 9659911, at *15 (S.D. Cal. 2015)
3 (finding ticket to enter an amusement park was not a "service"
4 under the CLRA). To find what is inherently a game a "service"
5 requires a strained and unnatural reading of the statute.
6 Accordingly, plaintiffs' CLRA claim will be dismissed.

7 5. Negligence

8 In California, the elements of negligence are: (1) a
9 legal duty to use reasonable care; (2) a breach of that duty; (3)
10 causation; and (4) damages. See Ladd v. Cty. of San Mateo, 12
11 Cal. 4th 913, 917 (1996). Where, as here, the plaintiffs do not
12 allege any physical harm, "[t]he economic loss rule has been
13 applied to bar a plaintiff's tort recovery of economic damages."
14 N. Am. Chem. Co. v. Superior Court, 59 Cal. App. 4th 764, 777 (2d
15 Dist. 1997). Liability for purely economic loss is "the
16 exception, not the rule under [California Supreme Court]
17 precedents." S. Cal. Gas Leak Cases, 7 Cal. 5th 391, 400 (2019)
18 (citation and internal quotations omitted). However, plaintiffs
19 argue the "special relationship" exception to the economic loss
20 rule applies here. (Pls.' Opp'n to King's Mot. at 27-29.)

21 The special relationship exception applies when "the
22 plaintiff was an intended beneficiary of a particular transaction
23 but was harmed by the defendant's negligence in carrying it out."
24 S. Cal. Gas Leak Cases, 7 Cal. 5th at 400 (citing J'Aire Corp. v.
25 Gregory, 24 Cal. 3d 799, 804 (1979)). To determine whether the
26 parties had a special relationship, courts will consider "(1) the
27 extent to which the transaction was intended to affect the
28 plaintiff, (2) the foreseeability of harm to the plaintiff, (3)

1 the degree of certainty that the plaintiff suffered injury, (4)
2 the closeness of the connection between the defendant's conduct
3 and the injury suffered, (5) the moral blame attached to the
4 defendant's conduct and (6) the policy of preventing future
5 harm." J'Aire, 24 Cal. 3d at 804.

6 The first factor alone may be dispositive if plaintiffs
7 fail to allege the transaction was intended to affect them
8 specifically, rather than any number of potential poker players.
9 See Greystone Homes, Inc. v. Midtec, Inc., 168 Cal. App. 4th
10 1194, 1230-31 (4th Dist. 2008). Here, plaintiffs generally
11 allege that Stones breached a duty to them by "maintaining a
12 control room that did not adhere to prevailing industry standards
13 for security" and "not properly regulat[e] and/or supervis[e]"
14 employees in the performance of their duties. (FAC ¶¶ 249-50.)
15 While plaintiffs claim in their opposition the game was "intended
16 to affect [them]" because "they are literally the consumers
17 paying Stones to operate those games and wager[] money in those
18 games," (see Pls.' Opp'n to King's Mot. at 28), this fails to
19 adequately suggest that any cheating was intended to specifically
20 affect them, rather than any possible poker player. Their FAC is
21 similarly devoid of any such allegation. Accordingly, because
22 the plaintiffs have failed to plausibly allege that they had a
23 special relationship with Stones, the economic loss rule will bar
24 their negligence action.

25 6. Libel Per Se

26 Plaintiff laintiff Veronica Brill alleges she suffered
27 "bullying, harassment, and emotionally-taxing non-physical
28 attacks on social media" after Stones called her cheating

1 allegations "completely fabricated" on its social media account.
2 (FAC ¶¶ 269, 271.)

3 Under California law, the elements of defamation are:
4 "(a) a publication that is (b) false, (c) defamatory, and (d)
5 unprivileged, and that (e) has a natural tendency to injure or
6 that causes special damage." Taus v. Loftus, 40 Cal. 4th 683,
7 720 (2007). Plaintiffs can bring a claim for either libel per se
8 or libel per quod. Brill asserts a claim for libel per se.⁴

9 Libel per se occurs when the publication's "defamatory
10 meaning appears from the language itself without the necessity of
11 explanation or the pleading of extrinsic facts." Palm Springs
12 Tennis Club v. Rangel, 73 Cal. App. 4th 1, 5 (4th Dist. 1999).

13 "In defamation actions[,] the First Amendment . . . requires that
14 the statement on which the claim is based must specifically refer
15 to, or be 'of and concerning,' the plaintiff in some way."

16 Blatty v. N.Y. Times Co., 42 Cal. 3d 1033, 1042 (1986). "[T]he
17 plaintiff need not be mentioned by name, but may be identified by
18 clear implication." Id. at 1044 n.1. "Whether defamatory
19 statements can reasonably be interpreted as referring to
20 plaintiffs is a question of law for the court." Tamkin v. CBS
21 Broad., Inc., 193 Cal. App. 4th 133, 146 (2d Dist. 2011).

22 The allegedly libelous tweet sent from the Stones Live
23 Poker account (@StonesLivePoker) reads in full:

24 Earlier this year an accusation was made that a
25 player was cheating in our game[.] We conducted

26 ⁴ While Brill generally alleged a cause of action for
27 libel in plaintiffs' FAC, the opposition clarifies that she is
28 alleging only libel per se because she does not allege the
special damages required for libel per quod. (Pls.' Opp'n to
King's Mot. at 51); see also Cal. Civ. Code § 45a.

1 a full investigation & found no evidence that
2 cheating had occurred[.] Stones Live stream
3 remains a secure poker streaming platform[.]
4 The recent allegations are completely
5 fabricated[.]

6 (Request for Judicial Notice ("RJN"), Ex. C (Docket No. 47-3).)
7 Brill claims she was "known to be the person who had accused Mr.
8 Postle of cheating" on Twitter, and Stones' response on the same
9 platform means the post was "of and concerning" her. (Pls.'
10 Opp'n to King's Mot. at 53.)

11 Plaintiff suggests this court's decision in Yow v.
12 National Enquirer, Inc., 550 F. Supp. 2d 1179 (E.D. Cal. 2008),
13 supports her contention that the tweet was "of and concerning"
14 her. (Pls.' Opp'n to King's Mot. at 52-53.) While the
15 defamatory article at issue in Yow did not expressly identify
16 the plaintiff, she was still identifiable by reasonable
17 implication because she was one of "four or five women" with
18 actor Mel Gibson at the time he was allegedly snorting "a mound
19 of cocaine." 550 F. Supp. 2d at 1187-88. Here, "numerous
20 individuals" approached Mr. Kuraitis to accuse Postle of
21 cheating "as early as February 2019." (FAC ¶ 155.) However,
22 the allegedly libelous tweet was published on September 29,
23 2019. (RJN, Ex. C.) With 88 other plaintiffs in this action
24 and millions of users on Twitter, it is possible -- indeed,
25 quite probable -- that Stones' tweet could have been in
26 reference to any number of allegations, made by any number of
27 people. Under California law, courts have consistently held
28 that plaintiffs cannot show that statements were "of and
concerning" them in "any group numbering over twenty-five."
Blatty, 42 Cal. 3d 1046 (internal citations omitted). The need

1 to explain the statement and the extrinsic facts surrounding it
2 disqualifies it from meeting the elements for libel per se. See
3 Palm Springs Tennis Club, 73 Cal. App. 4th at 5. Accordingly,
4 Brill's libel claim will be dismissed.

5 B. Kuraitis' Motion to Dismiss

6 Plaintiffs bring claims against defendant Justin
7 Kuraitis for negligent misrepresentation (Claim 3), negligence
8 (Claim 6), and fraud (Claim 8). (See FAC ¶¶ 228, 246-47, 262-
9 64.) Kuraitis moves to dismiss each claim against him and joins
10 in King's Motion insofar as plaintiffs' claims are plead against
11 them both. (Kuraitis Mot. (Docket No. 46).)

12 1. Fraud

13 As stated above, Brill and Mills' fraud allegation is
14 founded upon representations Kuraitis made to them while acting
15 "for himself and on behalf of Stones" in March 2019. (See FAC ¶¶
16 159, 164, 262, 267.) The court dismissed the claim against
17 Stones for failure to particularly plead damages. See supra Part
18 III(A)(1). The same rationale requires dismissal of their fraud
19 claim against Kuraitis, albeit for a slightly different reason.

20 Under California law, "the fact that the principal
21 becomes liable under the rules of vicarious liability . . . does
22 not exonerate an agent from liability for a tortious act
23 committed by the agent while acting under the authority of the
24 principal." Peredia v. HR Mobile Servs., Inc., 25 Cal. App. 5th
25 680, 692 (5th Dist. 2018). However, "agents are not vicariously
26 liable for the torts of their principals." Id. As previously
27 discussed, the plaintiffs may be able to proceed with their
28 claims to the extent they are predicated on the rake, because the

1 court assumes at this point in the proceedings that the rake is
2 not a "gambling loss" under Kelly. See supra Part III(A). But
3 if plaintiffs' damages are confined to the "monies paid to Stones
4 as and for the rake," to allow plaintiffs to proceed against
5 Kuraitis for damages predicated on money kept and collected by
6 Stones alone would be to hold an agent liable for the torts of
7 his principal. (See FAC ¶ 266.) Damages are an essential
8 element of fraud. Lazar, 12 Cal. 4th at 638. Without a
9 connection between Kuraitis and the rake, the claim cannot
10 proceed.

11 2. Negligent Misrepresentation

12 Plaintiffs allege Kuraitis engaged in negligent
13 misrepresentation both individually and as an agent of Stones
14 when he "allayed suspicions of cheating by telling people Mr.
15 Postle's play of poker was simply on 'a different level,'" and
16 when he told "at least one Plaintiff that Stones undertakes a
17 quarterly security audit of its Stones Live Poker system." (FAC
18 ¶ 228.) Yet, as with the fraud claims and the negligent
19 misrepresentation claim brought against Stones, plaintiffs fail
20 to offer anything other than a general allegation that Kuraitis
21 "made these representations without a reasonable basis for
22 believing them to be true." (Id. ¶ 232.) Although plaintiffs
23 allege Kuraitis "continuously concealed allegations of cheating,"
24 they fail to identify the "John Doe or Jane Doe confederate"
25 responsible for aiding Postle, or whether Kuraitis knew of the
26 relationship. (Id. ¶¶ 232-33.) Since the plaintiffs have
27 represented they can "allege the identity of Mr. Postle's chief
28 confederate by name and position," (Pls.' Opp'n to King's Mot. at

1 54), however, the negligent misrepresentation claim will be
2 dismissed with leave to amend.

3 3. Negligence

4 Again, the elements of negligence are: (1) a legal duty
5 to use reasonable care; (2) a breach of that duty; (3) causation;
6 and (4) damages. See Ladd, 12 Cal. 4th at 917. Plaintiffs again
7 do not allege any physical harm in connection with their
8 negligence claim against Kuraitis, instead alleging that he
9 "individually and as an agent of Stones" had "a duty to ensure
10 the game was carried out in a manner reasonably free of
11 cheating." (FAC ¶¶ 245-46.) Even assuming Kuraitis had a duty
12 to "the game," that would be a duty owed to his principal -- not
13 the plaintiffs. "Where the effect of an agent's failure to
14 perform a duty owed by the principal is merely to cause economic
15 loss, the law does not yet recognize liability to a third person,
16 except where a duty is created by statute." 3 Witkin, Summary of
17 California Law (11th ed. 2019) Agency and Employment § 210.
18 There is no such duty. This also comports with the economic loss
19 rule. See S. Cal. Gas Leak Cases, 7 Cal. 5th at 400.
20 Accordingly, the negligence claim against Kuraitis must be
21 dismissed.

22 C. Postle Motion to Dismiss

23 Finally, defendant Michael Postle moves to dismiss the
24 five claims raised against him: violation of the Racketeer
25 Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c)
26 (Claim 1); fraud (Claim 2); negligent misrepresentation (Claim
27 3); negligence per se (Claim 4); and unjust enrichment (Claim 5).
28 (Postle Mot. at 1 (Docket No. 50).

1
2 1. Fraud, Negligent Misrepresentation, Negligence Per
3 Se & Unjust Enrichment

4 Plaintiffs' allegations against Postle for fraud,
5 negligent misrepresentation, negligence per se, and unjust
6 enrichment are all predicated on "monies lost to Mr. Postle" and
7 "the loss of opportunity to earn monies through honest games of
8 poker." (FAC ¶¶ 224, 231, 239, 241-43.) Unlike damages stemming
9 from the rake, these damages are quintessential gambling losses
10 that are barred for recovery by California public policy. See
11 Kelly, 72 Cal. App. 4th at 466. By plaintiffs' own admission,
12 Stones alone collected and profited from the rake. (FAC ¶¶ 224,
13 236, 239, 286.) Accordingly, California's strong public policy
14 against judicial resolution of civil claims arising out of
15 gambling disputes mandates the dismissal with prejudice of
16 plaintiff's claims against Postle for fraud, negligent
17 misrepresentation, negligence per se, and unjust enrichment. See
18 Jamgotchian v. Sci. Games Corp., 371 F. App'x 812, 813 (9th Cir.
19 2010) (internal citations and quotations omitted) (affirming
20 dismissal with prejudice of plaintiffs' claims for breach of
21 contract, unjust enrichment, negligent misrepresentation, fraud,
22 and negligence in gambling dispute pursuant to Kelly).

23 2. RICO

24 Plaintiffs' RICO claim alleges Postle and his
25 confederate(s) "used one or more instrumentalities of wire
26 transmissions" to relay information about his opponents' cards on
27 numerous occasions. (FAC ¶¶ 201, 205.) Postle argues
28 plaintiffs' claims fail for lack of specificity, including

1 failure to allege facts in support of the required predicate act
2 and the harms suffered by specific plaintiffs. (Postle Mot. at
3 6-8 (Docket No. 50).)

4 RICO provides a private cause of action for “[a]ny
5 person injured in his business or property by reason of a
6 violation of [18 U.S.C. § 1962].” 18 U.S.C. § 1964(c). To state
7 a RICO claim, plaintiffs must allege: “(1) conduct (2) of an
8 enterprise (3) through a pattern (4) of racketeering activity
9 (known as ‘predicate acts’) (5) causing injury to plaintiff’s
10 business or property.” United Bhd. of Carpenters & Joiners of
11 Am. Bldg. & Const. Trades Dep’t, AFL-CIO, 770 F.3d 834, 837 (9th
12 Cir. 2014) (internal citation and quotations omitted). The fifth
13 element is RICO’s “standing” requirement. See Steele v. Hosp.
14 Corp. of Am., 36 F.3d 69, 70 (9th Cir. 1994). In order to
15 satisfy the fifth element, plaintiffs must “show proof of
16 concrete financial loss, and not mere injury to a valuable
17 intangible property interest.” Chaset v. Fleer/Skybox Int’l, LP,
18 300 F.3d 1083, 1086 (9th Cir. 2002) (internal citations and
19 quotations omitted). This prevents RICO from providing “a
20 federal cause of action and treble damages to every tort
21 plaintiff.” United Bhd. of Carpenters, 770 F.3d at 837.

22 Generally, courts have found injury to expectancy or
23 speculative interests do not constitute harm to business or
24 property interests. See, e.g., Chaset, 300 F.3d at 1087 (holding
25 trading card purchasers do not suffer a federal RICO injury when
26 they do not receive a prize card because they paid for and
27 received the chance to obtain the card); Doug Grant, Inc. v.
28 Greate Bay Casino Corp., 232 F.3d 173, 188 (3d Cir. 2000)

1 (holding lost speculative opportunity in blackjack is not an
2 injury to business or property); Price v. Pinnacle Brands, Inc.,
3 138 F.3d 602, 607 (5th Cir. 1998) (holding “[i]njury to mere
4 expectancy interests . . . is not sufficient to confer RICO
5 standing”). Relying on these cases, courts have specifically
6 found that “gambling losses are not sufficient injury to business
7 or property for RICO standing” because they do not present a
8 tangible injury to property. McLeod v. Valve Corp., No. C16-
9 1227-JCC, 2016 WL 5792695, at *2 (W.D. Wash. Oct. 4, 2016)
10 (citing Chaset, 300 F.3d at 1087).

11 “Private plaintiffs alleging injuries resulting from
12 their own gambling cannot establish ‘injury to business or
13 property’ under RICO” because there is no concrete financial
14 loss. Adell v. Macon Cty. Greyhound Park, Inc., 785 F. Supp. 2d
15 1226, 1238 (M.D. Ala. 2011) (quoting Green v. Aztar Corp., No.
16 02-C-3514, 2003 WL 22012205, at *2 (N.D. Ill. Aug. 22, 2003)).
17 While plaintiffs premise their damages here in part on the rake,
18 (FAC ¶ 217), the plaintiffs have made clear that the rake was
19 collected and retained by Stones alone, and the plaintiffs would
20 have had to pay the rake regardless of whether or not Postle
21 cheated. (See, e.g., id. ¶¶ 224, 236, 239, 286.) Consequently,
22 they cannot rely upon it to make their damage claim any more
23 concrete. Plaintiffs lack standing under § 1964(c) to proceed
24 with their RICO claim because they have failed to allege facts
25 demonstrating a concrete injury to their “business or property.”
26 Plaintiffs’ RICO claim against Postle must therefore be
27 dismissed.

28 IT IS THEREFORE ORDERED that the motions of defendants

1 King's Casino (Docket No. 45), Justin Kuraitis (Docket No. 26),
2 and Michael Postle (Docket No. 50) to dismiss the First Amended
3 Complaint be, and the same thereby are, GRANTED.

4 Plaintiffs are granted twenty days from the date this
5 Order is filed to file an amended complaint against defendants
6 King's Casino and Kuraitis if they can do so consistent with this
7 Order.

8 Dated: June 3, 2020



9 WILLIAM B. SHUBB
10 UNITED STATES DISTRICT JUDGE
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