

1 California, located at Courtroom 5, 14th Floor, Robert T. Matsui
2 Federal Courthouse, 501 I Street, Sacramento, CA 95814, Defendant
3 Michael Postle, by and through his undersigned counsel, will and
4 hereby does move this Court for an order dismissing the claims
5 against him in Plaintiffs Veronica Brill, et al.'s Complaint for
6 failure to state a claim upon which relief may be granted and
7 failure to allege claims of fraud and misrepresentation with the
8 required particularity under Fed. R. Civ. P. 8, 9(b), 12 (b)(6);
9 28 U.S.C. § 1367.

10 For the reasons set forth below, Mr. Postle respectfully
11 requests that this Court grant his Motion to Dismiss. This
12 Motion is based upon this Notice, the attached Memorandum of
13 Points and Authorities, and such other matter that may be
14 presented at the hearing thereof.

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16 Respectfully submitted,

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19 Date: March 24, 2020

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MICHAEL POSTLE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs' Complaint for Damages ("Complaint") should be dismissed in its entirety because it fails either to state a claim upon which relief can be granted or to plead fraud with particularity.

Counts I, II, III, and IV should be dismissed because Plaintiffs fail to plead fraud with particularity. Plaintiffs fail entirely to lay out the who, where, why, when, or how of the alleged fraudulent conduct underlying each cause of action. Instead, Plaintiffs present facts indicating that unknown parties, lost unknown funds, based on undescribed conduct, at an unknown time, via unknown means. The allegations of the Complaint consist entirely of speculative or conclusory statements and improper or illogical inferences from neutral facts. Because Plaintiffs do not satisfy their elevated pleading burden, Counts I through IV should be dismissed under Fed. R. Civ. P. (hereinafter "Rule") 9(b) and 12(b)(6).

Second, Counts II through IV must also be dismissed for the reasons set forth in King's Casino LLC's Motion to Dismiss, ECF 31, and Justin Kuraitis' Motion to Dismiss, ECF 33: (1) Plaintiffs fail to plead each count with particularity; (2) gambling losses are not cognizable as damages under California law and public policy; and (3) Plaintiffs allege purely economic losses and fail to assert a special relationship between Plaintiffs and Mr. Postle.

1 Finally, Count V should be dismissed under 12(b)(6). Count
2 V purports to bring an action for unjust enrichment. Unjust
3 enrichment is not a recognized cause of action under either
4 federal or California law but rather a synonym for restitution.

5 **III. Argument**

6 A. Standards Governing Motions to Dismiss

7 Pursuant to Rule 12(b)(6), dismissal is appropriate where
8 the complaint lacks a cognizable legal theory or sufficient facts
9 to support a cognizable theory. *Navarro v. Block*, 250 F.3d 729,
10 732 (9th Cir. 2001). A complaint is also subject to dismissal
11 for failure to state a claim if the allegations on their face
12 show that relief is barred for some legal reason. *Jones v. Bock*,
13 549 U.S. 199, 215 (2007); see also *Groten v. California*, 251 F.3d
14 844 (9th Cir. 2001).

15 The factual allegations in a complaint "must be enough to
16 raise a right to relief above the speculative level." *Bell*
17 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim
18 has facial plausibility when the plaintiff pleads factual content
19 that allows the court to draw the reasonable inference that the
20 defendant is liable for the misconduct alleged." *Ashcroft v.*
21 *Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not
22 establish a probability of success on the merits, he or she must
23 demonstrate "more than a sheer possibility that a defendant has
24 acted unlawfully." *Id.* Importantly, "[w]here a complaint pleads
25 facts that are merely consistent with a defendant's liability, it
26 stops short of the line between possibility and plausibility of
27 entitlement to relief." *Id.*

1 The pleading of a cause of action involving fraud or mistake
2 is subject to the significantly more exacting standards of Rule
3 9(b). In contrast to the more lenient standard set forth in Rule
4 8(a)(2), Rule (9)(b) requires that a party "state with
5 particularity the circumstances constituting fraud or mistake" in
6 his or her complaint. Fraud must be plead "with a high degree of
7 meticulousness." *Desaigouadar v. Meryercord*, 223 F.3d 1020, 1022
8 (9th Cir. 2000). The allegations of fraud "must be accompanied by
9 'the who, what, when, where, and how' of the misconduct charged"
10 and "must 'set forth more than the neutral facts necessary to
11 identify the transaction.'" *Vess v. Ciba-Geigy Corp. USA*, 317
12 F.3d 1097, 1106 (9th Cir. 2003).

13 The exacting specificity required by Rule 9(b) functions "to
14 give defendants notice of the particular misconduct so that they
15 can defend against the charge and not just deny that they have
16 done anything wrong." *Vess, supra*, at 1106. Rule 9(b) also
17 functions to deter the filing of actions as a pretext for
18 discovery of unknown wrongs, to protect defendants from "the harm
19 that comes from being subject to fraud charges, and to prohibit
20 plaintiffs from unilaterally imposing upon the court, the parties
21 and society enormous social and economic costs absent some
22 factual basis." *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th
23 Cir. 2001). The remedy when a plaintiff fails to plead fraud
24 with particularity is the same as in a Rule 12(b)(6) motion for
25 failure to state a claim on which relief can be granted. *Vess*,
26 317 F.3d at 1107.

1 B. Counts I through IV Must be Dismissed for Failing
2 to Plead Fraud with Particularity

3 **1. Legal Standard**

4 Counts I through IV all "sound in fraud." Counts II, III and
5 IV are fraud offenses. Count I also sounds in fraud as it
6 alleges wire fraud as the predicate racketeering offense.

7 The Racketeer Influenced and Corrupt Organizations Act
8 ("RICO") makes it "unlawful for any person employed by or
9 associated with" an enterprise engaged in or affecting interstate
10 commerce "to conduct or participate, directly or indirectly, in
11 the conduct of such enterprise's affairs through a pattern of
12 racketeering activity." 18 U.S.C. § 1962(c). To a state a RICO
13 claim, a plaintiff must allege: "(1) conduct (2) of an enterprise
14 (3) through a pattern (4) of racketeering activity." *Odom v.*
15 *Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir.2007). The term
16 "racketeering activity" includes a number of so-called "predicate
17 acts," including mail and wire fraud. See 18 U.S.C. § 1961(1). To
18 establish the predicate acts of mail and wire fraud, a plaintiff
19 must show a scheme to defraud, involving use of the U.S. wires or
20 mail, with the specific intent to defraud. *Schreiber Distrib. Co.*
21 *v. ServWell Furniture Co.*, 806 F.2d 1393, 1399-1400 (9th
22 Cir.1986).

23 Plaintiffs pleading a RICO violation predicated on fraud
24 must meet the heightened pleading standards imposed by Rule 9(b).
25 See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir.
26 2004). For the predicate offense of wire fraud, a plaintiff must
27 allege with particularity: (1) the precise statements, documents,
28 or misrepresentations made; (2) the time and place of and person

1 responsible for the statement; (3) the content and manner in
2 which the statements misled the Plaintiffs; and (4) what the
3 Defendants gained by the alleged fraud. *Miccosukee Tribe of*
4 *Indians of Fla. v. Cypress*, 814 F.3d 1202, 1212 (11th Cir. 2015);
5 see also *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th
6 Cir.2007).

7 **2. Argument**

8 i. Counts I, II, III, and IV Each Fail
9 Because Plaintiffs Fail to Plead
10 Fraud with Particularity

11 Plaintiffs' Complaint fails to set forth facts with
12 particularity in support of Plaintiffs' averments of fraud. In
13 the place of the required fact pleading, Plaintiffs set forth
14 hypotheticals, speculation, and spurious statistical claims.
15 Plaintiffs fail to describe any specific poker hand, with any
16 specific Plaintiff, describing any specific fraudulent conduct,
17 causing any specific injury. As a result, Plaintiffs utterly
18 fail their pleading burden under Rule 9(b), by failing to set
19 forth facts with particularity in support of fraud.

20 Plaintiffs' Complaint alleges that Mr. Postle worked with an
21 unidentified "confederate" through an unidentified method to
22 secure information regarding the cards of unidentified poker
23 players in unidentified historical games. This utterly fails the
24 requirements of Rule 9(b). Plaintiff has failed to identify the
25 time, place, method, and specific content of Mr. Postle's alleged
26 misrepresentations constituting wire fraud. Plaintiffs instead
27 make speculative and nonspecific allegations such as "Mr. Postle
28 was able to achieve these results by engaging in a pattern and

1 practice of using one or more wire communication mechanisms to
2 defraud his opponents by gaining knowledge of their Hole Cards...".
3 ECF 1, paragraph 61. This sort of rote recitation of the elements
4 of the cause of action cannot and does not suffice to meet the
5 burden of Rule 9b. Similarly, rather than identify the particular
6 poker transactions during which Mr. Postle was alleged to have
7 conducted his scheme, the Complaint merely states that Mr. Postle
8 played on a range of dates throughout 2018 and 2019. ECF 1,
9 paragraph 100. There is no attempt to describe any particular
10 hand or any particular conduct by Mr. Postle that is alleged to
11 have comprised fraud.

12 Likewise, Plaintiffs fail entirely to allege the specific
13 harms suffered by specific plaintiffs. Each Plaintiff must
14 specifically plead the who, what, when, where, and how of the
15 alleged fraud to meet the pleading standard. The Complaint does
16 not offer facts laying out a single poker hand that Plaintiffs
17 allege to have been tainted by fraud or the manner in which they
18 allege such fraud to have taken place. As a result, no specific
19 injury sustained by any captioned Plaintiff can be identified nor
20 the logic behind the implication that Mr. Postle caused that
21 injury. Pleading these elements with particularity is a
22 requirement, not a suggestion of Rule 9(b). Without such
23 specific allegations, no substantive response beyond a general
24 denial is possible.

25 In the place of the requisite specific fact pleading, the
26 Complaint engages in five pages of spurious statistics and
27 speculative claims purporting to demonstrate that Mr. Postle's
28 winnings were extraordinary. ECF 1, paragraphs 50 to 68. These

1 statistical claims are confused at best and substantially
2 insufficient to raise Plaintiffs' allegations above a merely
3 speculative level. The allegations of the Complaint merely
4 demonstrate that Mr. Postle won money, nothing more. Any
5 inference of unlawful conduct drawn from the naked fact of his
6 winning would be entirely unfounded and illogical. Gambling is
7 inherently an activity involving players hoping for statistical
8 aberrations. The conclusion that a winning gambler is cheating
9 is a non sequitur, though undoubtedly a common one among losing
10 gamblers.

11 While a court must accept as true all "well-pleaded factual
12 allegations." *Iqbal, supra*, 129 S. Ct. at 1950, a court is not
13 "required to accept as true allegations that are merely
14 conclusory, unwarranted deductions of fact, or unreasonable
15 inferences." *Sprewell, supra*, at 988. Here, Plaintiffs' pleading
16 fails entirely to allege that Mr. Postle engaged in any specific
17 behavior amounting to, or creating a strong inference, of fraud.
18 Plaintiffs instead present page after page of speculation,
19 unsupported conclusion, spurious statistical claims and improper
20 or illogical inferences from neutral facts. As such, Plaintiffs
21 fail to plead sufficiently even to adequately describe the
22 conduct complained of, let alone the manner in which it amounted
23 to fraud or proximately caused any specific injury.

24 Accordingly, Counts II through IV should be dismissed for
25 failure to plead fraud with particularity as required under Rule
26 9(b). Count I should similarly be dismissed because Plaintiffs
27 fail to allege facts in support of the required predicate act of
28 racketeering with particularity as required under Rule 9(b).

1 B. Count V Must be Dismissed for Failing to
2 State a Claim Under Which Relief Can Be
3 Granted

4 Plaintiff purports to bring a cause of action for "unjust
5 enrichment." As the Ninth Circuit has held repeatedly, California
6 law does not allow for a standalone cause of action for unjust
7 enrichment. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753,
8 762 (9th Cir. 2015). Rather, California law treats "unjust
9 enrichment" as synonymous with restitution. See e.g., *Durell v.*
10 *Sharp Healthcare*, 183 Cal.App.4th 1350 (2010); *Jogani v. Superior*
11 *Court*, 165 Cal.App.4th 901. Therefore, Plaintiffs' Count IV
12 fails to state a claim for relief and must be dismissed.

13 C. Counts II through V must also be Dismissed
14 for the Reasons Set Forth in Defendants Kings
15 Casino, LLC and Justin Kuraitis' Motions to
16 Dismiss

17 Defendants' Motions to Dismiss lay out numerous reasons why
18 each of these claims should be dismissed and Mr. Postle joins in
19 each of those arguments and adopts Defendants' Motions to Dismiss
20 and the arguments and authority cited therein as though fully set
21 forth herein.

22 As Kings' Casino, LLC's Motion to Dismiss demonstrates,
23 California law precludes each of these claims because alleged
24 gambling losses are not recoverable, both because such losses are
25 speculative and because lawsuits to recover such damages are
26 barred by long-standing California public policy. ECF 31, at 5-8.

27 Additionally, with regard to the putative negligence claims,
28 Plaintiffs fail entirely to allege the existence of a legal duty

1 owed to them by Mr. Postle. In fact, no specific person,
2 statement or event causing injury is described in the Complaint
3 as required by Rule 9(b).
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9 Respectfully submitted,

10 Date: March 24, 2020

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12 Defendant Michael L. Postle
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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 VERONICA BRILL, et al.,

12 Plaintiffs,

13 v.

14 MICHAEL L. POSTLE, et al.,

15 Defendants.
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No. 2:19-CV-02027-WBS

**[PROPOSED] ORDER GRANDING
DEFENDANT MICHAEL POSTLE'S
MOTION TO DISMISS**

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18 **[PROPOSED] ORDER**

19 Upon consideration of Michael Postle's Motion to Dismiss
20 plaintiffs' complaint, and for good cause appearing therein,

21 **IT IS HEREBY ORDERED** that Defendant Michael Postle's Motion
22 to Dismiss Plaintiffs' Complaint is GRANTED.

23 Date: _____, 2020
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WILLIAM B. SHUBB
Senior United States District Judge
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PROOF OF SERVICE

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3 I, William Portanova, declare:

4 I am a citizen of the United States and employed in the City
5 and County of Sacramento, CA. I am over the age of 18 and not a
6 party to the within action; my business address is 400 Capitol
7 Mall, Suite 1100, Sacramento, CA 95814.

8 On March 24, 2020, I served the following document(s)
9 described as:

10 **DEFENDANT MICHAEL POSTLE'S NOTICE OF MOTION AND MOTION TO**
11 **DISMISS PLAINTIFF'S COMPLAINT**

12 BY FACSIMILE TRANSMISSION: As follows: The papers
13 have been transmitted to a facsimile machine by the
14 person on whom it is served at the facsimile
15 machine telephone number as last given by that
16 person on any document which he or she has filed in
17 the cause and served on the party making the
18 service. The copy of the notice or other paper
19 served by facsimile transmission shall bear a
notation of the date and place of transmission and
the facsimile telephone number to which transmitted
or be accompanied by an unsigned copy of the
affidavit or certificate of transmission which
shall contain the facsimile telephone number to
which the notice of other paper was transmitted to
the addressee(s).

20 BY MAIL: As follows: I am readily familiar with the
21 firm's practice of collection and processing
22 correspondence for mailing. Under that practice it
23 would be deposited with U.S. postal service on that
24 same day with postage thereon fully prepaid at San
25 Francisco, CA, in the ordinary course of business.
I am aware that on motion of the party served,
service is presumed invalid if postage cancellation
date or postage meter date is more than one day
after date of deposit for mailing in affidavit.

26 BY OVERNIGHT MAIL: As follows: I am readily
27 familiar with the firm's practice of collection and
28 processing correspondence for overnight mailing.
Under that practice, it would be deposited with
overnight mail on that same day prepaid at San
Francisco, CA in the ordinary course of business.

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X BY ELECTRONIC MAIL TRANSMISSION: By electronic mail transmission from William Portanova on March 24, 2020, by transmitting a PDF format copy of such document(s) to:

Michael Lipman at mllipman@duanemorris.com
(Lead Attorney for Defendant King's Casino, LLC);

Maurice VerStandig at mac@mbvesq.com
(Lead Attorney for Plaintiffs, Pro Hac Vice); and

Richard Pachter at richard@pachterlaw.com
(Lead Attorney for Defendant Justin Kuraitis).

The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

Executed on March 24, 2020 at Sacramento, CA.



William Portanova