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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Case No. 2:19-cv-02027-WBS-AC

DEFENDANT KING'S CASINO MANAGEMENT CORP.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: May 18, 2020
Time: 1:30 p.m.
Dept.: Courtroom 5
Judge: Hon. William B. Shubb

Complaint Filed: October 8, 2019

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; KATHERINE STAHL; MIKE NELSON; BRANDON STEADMAN; BRYANT MILLER; HONG MOON; MATTHEW GOUGE; NICHOLAUS WOODERSON; CARLOS WELCH; ARIEL REID; DAN MAYER; ANTHONY GIGLINI; RYAN JACONETTI; ARIEL CRIS MANIPULA; TRENTON SIDENER; JAMES JOHN O'CONNOR; PATRICK VANG; MARCUS DAVIS; ADAM COHEN; DERICK COLE; AARON MCCORMACK; BRENNEN ALEXANDER COOK; MICHAEL PHONESAVANH RASPHONE; BENJAMIN TENG; SCOTT SORENSON; ANTHONY HUGENBERG; BILLY JOE MESSIMER,

Plaintiffs,

v.

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

Defendants.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 18, 2020 at 1:30 p.m., or as soon thereafter as this matter may be heard before the Honorable William B. Shubb, U.S. District Judge of the Eastern District of California, located at Courtroom 5, 14th Floor, Robert T. Matsui Federal Courthouse, 501 I Street, Sacramento, CA 95814, Defendant King's Casino Management Corp., successor by merger with King's Casino, LLC dba Stones Gambling Hall ("Stones"), by and through its undersigned counsel, will and hereby does move this Court for an order dismissing the claims against Stones in Plaintiffs Veronica Brill, et al.'s First Amended Complaint for failure to state a claim upon which relief may be granted and failure to allege claims of fraud and misrepresentation with the required particularity. Fed. R. Civ. P. 8, 9(b), 12(b)(6); 28 U.S.C. § 1367.

For the reasons set forth below, Stones respectfully requests that this Court grant its Motion to Dismiss. This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, and such other further matters that may be presented at the hearing thereof.

Respectfully submitted,

Dated: April 8, 2020

By: */s/ Mark C. Mao*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit reflects the oldest complaint of gamblers—that their lack of success means they were cheated. Plaintiffs ask this Court to hold King's Casino Management Corp., successor by merger with King's Casino, LLC, dba Stones Gambling Hall ("Stones") liable because Defendant Michael Postle won too many hands of poker from them. Yet Plaintiffs make no credible allegations of wrongdoing by Stones, and Plaintiffs have no basis to keep Stones in the case. The case has ballooned from 25 Plaintiffs to 89, but the deficiencies remain unchanged.

Plaintiffs sue Stones on the premise that one or two of them told one Stones employee of her/their suspicion that Mr. Postle was cheating. There are no allegations of discussions between Stones and the remaining 87 or 88 Plaintiffs or any reliance. Plaintiffs also do not allege that Stones benefitted from Mr. Postle's alleged cheating—no ill-gotten profits or sinister motivations are imputed to Stones. In the one example provided, the player lost the hand because he chose to fold. No amount of access could have predicted that the player would choose not to play.

Nonetheless, Plaintiffs again ask that the Court draw non sequitur conclusions and make rulings divorced from precedent. Plaintiffs' claims each fail for multiple independent reasons. *First*, gambling-related losses are not cognizable as damages. Plaintiffs' negligence claim is subject to the economic loss rule, and Plaintiffs can point to no precedent establishing that Stones breached a cognizable duty of care for their negligence claim. Casinos do not owe a general duty of care to gamblers. Despite referencing various unrelated gambling statutes, there is no statute that applies here to create a duty; and there is no special relationship among the parties, which Plaintiffs tacitly admitted in the original complaint and this First Amended Complaint ("FAC").

Second, Plaintiffs' fraud claims against Stones—for fraud, constructive fraud, and negligent misrepresentation—still fall short of Federal Rules of Civil Procedure Rule ("Rule") 8 and 9(b)'s pleading standards. Plaintiffs still cannot identify more than two statements made to at most three or four Plaintiffs, and even these allegations fall short of Rule 9(b)'s requirements. The FAC fails to allege when each of the remaining 85 Plaintiffs spoke with Stones, how they were misled, what they were told or relied on, and whether they actually lost money to Mr. Postle.

Finally, where Plaintiffs can neither prove negligence nor fraud, they rely on innuendos and insinuations that are not substitutes for facts or law.

Plaintiffs had the prior motion to dismiss outlining all of these deficiencies. Their failure to include adequate facts establishes they cannot support their claims. Stones respectfully requests that the Court dismiss Counts III, VI, VII, VIII, IX, and X of the FAC with prejudice.

II. PLAINTIFFS' FACTUAL ALLEGATIONS

Plaintiffs' core allegations in the FAC are unchanged from their original complaint, ECF 1. Stones owns and operates a casino with gaming space for playing poker, FAC ¶ 104, and has installed a radio-frequency identification ("RFID") reader in one of the poker tables and cameras to facilitate broadcasting video of poker games, *id.* ¶ 105. The RFID reader transmits the players' hole cards to a control room, which then broadcasts the game on a delayed feed along with commentary from guests in a commentary room viewing the game on the delayed feed. *Id.* ¶¶ 106, 110, 112. In January 2016, Stones began broadcasting poker games played at the RFID-enabled table on the internet as "Stones Live Poker." *Id.* ¶¶ 110, 113. Since 2018, Defendant Justin Kuraitis, a Stones employee, has been the director of Stones Live Poker. *Id.* ¶ 115. Stones Live Poker was suspended just before the initial complaint was filed in this case. *Id.* ¶ 113.

Mr. Postle played in Stones Live Poker in 2018 and 2019. *Id.* ¶ 116. Plaintiffs allege in a conclusory fashion that Mr. Postle cheated in Stones Live Poker games on at least 68 dates. *Id.* ¶ 205. To support that allegation, Plaintiffs allege that Mr. Postle's success in Stones Live Poker games is evidence that he was cheating. *Id.* ¶¶ 117-118, 120-124, 133. Plaintiffs allege that he won more often than is statistically probable and had a quality of play multiple degrees higher than other poker players. *Id.* As in the original complaint, Plaintiffs conclude that Mr. Postle achieved these results by "using one or more wire communication mechanisms to defraud his opponents by gaining knowledge of their Hole Cards during the play of poker hands." *Id.* ¶ 127. Mr. Postle allegedly had the assistance of one or more unnamed confederates in this effort. *Id.* ¶ 128. Whereas the original complaint alleged that Mr. Postle cheated using a hat and cell phone, the FAC focuses only on an allegation about a cell phone. *Id.* ¶¶ 129-131. The Plaintiffs juxtapose the play by stating that there were some games (the dates for which are not listed in the FAC) where Mr. Postle had "sub-

optimal" play and did not look at his phone. *Id.* ¶¶ 140-145. Plaintiffs point to two instances where they allege there is particularly strong evidence that Mr. Postle was aware of other players' cards. *Id.* ¶¶ 135-141, 147-153. In one of those instances, they allege Mr. Postle's cards as read automatically by the table changed partway through the hand. Plaintiffs conclude that because the misread cards did not make sense with Mr. Postle's play and the corrected cards did make sense, the change must mean that cheating was occurring but being covered up. *Id.* ¶¶ 147-154.

The FAC contends that "at least as early as February 2019, numerous individuals approached Mr. Kuraitis to indicate that the play of Mr. Postle on Stones Live Poker can only be attributed to cheating or, at a minimum, is strongly indicative of the presence of cheating." *Id.* ¶ 155. And "Mr. Kuraitis repeatedly told multiple persons Mr. Postle was not cheating but, to the contrary, Mr. Postle's play is simply 'on a different level' or he is 'just on a heater'" and "told multiple persons Stones conducted a thorough investigation into the matter and such did not reveal the presence of cheating." *Id.* ¶¶ 164-165. The FAC does not articulate how many of the 89 Plaintiffs were involved nor when these statements reportedly took place.

In February 2019, an individual identified as "Player 1" allegedly "informed Mr. Kuraitis of concerns about the integrity of an individual's play in the Stones Live Poker streams," *id.* ¶ 156, and Mr. Kuraitis allegedly responded he "was aware of the concerns, had heard them elsewhere, and was taking appropriate steps to ensure the integrity of the Stones Live Poker games," *id.* ¶ 157. It is unclear whether "Player 1" is one of the 89 Plaintiffs. In March 2019, Ms. Brill "notified [Mr. Kuraitis] of her concerns Mr. Postle was cheating in Stones Live Poker games." *Id.* ¶ 159. Mr. Kuraitis allegedly responded "by insisting the Stones Live Poker game is 'one hundred percent secure,' claiming there is no possibility of anyone cheating, asserting there to be an outside agency that audits the Stones Live Poker stream every three (3) months, declaring that Mr. Postle is simply a 'fearless player' who uses a 'Martingale strategy' to win at poker, and alleging Mr. Postle's play is so unique as to be incomprehensible to professional poker players." *Id.* ¶ 160. Plaintiffs also allege that, at some unknown time, Mr. Kuraitis told Ms. Brill, Ms. Mills, and Mr. Goone there was no cheating in the Stones Live Poker broadcast. *Id.* ¶ 262. They allege Mr. Kuraitis said "a thorough investigation of such cheating allegations had occurred or would be occurring." *Id.* ¶ 263.

In their FAC, Plaintiffs added allegations that Stones "engage[d] Mr. Postle" to host Stones Live Poker shows known as "Postle and Pals!" broadcasts." *Id.* ¶ 173. He was allegedly compensated by Stones for hosting the shows on at least two dates. *Id.* ¶ 174.

The FAC alleges that "most" Plaintiffs suffered gambling losses to Mr. Postle. *Id.* ¶ 190. In addition, Plaintiffs seek to recover Stones' government-approved, fixed collection rate per hand. *Id.* ¶¶ 184-186. Plaintiffs improperly refer to this collection as the "rake."

Based on these allegations, Plaintiffs assert five causes of action against Stones in the FAC for negligent misrepresentation (Count III), negligence (Count VI), constructive fraud (Count VII), fraud (Count VIII), and violation of the Consumers Legal Remedies Act ("CLRA") (Count X).

Finally, Ms. Brill again asserts an individual libel claim (Count IX) against Stones, alleging that on an unspecified date she publicized her suspicions that Mr. Postle was cheating. *Id.* ¶ 269. She alleges that Stones "responded" later by commenting on Twitter, "The recent allegations are completely fabricated." *Id.* ¶ 269. As in the original complaint, nothing links Stones' Twitter comment to Ms. Brill. And she asserts no economic harm from the alleged libel. *Id.* ¶¶ 271-272.

III. LEGAL STANDARD

Under Rules 8(a) and 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A plaintiff must plead sufficient facts to show entitlement to relief with respect to a claim instead of the "mere possibility of misconduct." *Id.* at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). "'[A]llegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences'" do not withstand a motion to dismiss. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

Under Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Allegations sounding in fraud must be "'specific

enough to give defendants notice of the particular misconduct . . . .'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). A fraud allegation must set forth "'the who, what, when, where, and how'" of the alleged fraud. *Id.* (citation omitted).

IV. ARGUMENT

Plaintiffs allege six causes of action against Stones: negligence (Count VI), fraud (Count VIII), constructive fraud (Count VII), negligent misrepresentation (Count III), violation of the CLRA (Count X), and libel (Count IX). Each claim should be dismissed for failing to state a cognizable claim under California law, consistent with the relevant pleading standards.

A. Plaintiffs' Claims Relating to Their Gambling All Fail Because Such Claims Are Not Cognizable under California Law.

Plaintiffs' claims for negligence, fraud, constructive fraud, negligent misrepresentation, and violation of the CLRA all purport to seek recovery of purported gambling losses, foregone winnings, or collections while playing poker. California law forecloses these damages on two independent bases: (1) the lack of proximate causation and (2) public policy.

1. Plaintiffs' Claims Fail Because Their Damages Are Speculative and Therefore Unrecoverable.

Plaintiffs cannot establish the required causation for damages because gambling-related losses are too speculative. The California Court of Appeal addressed this issue in *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229 (1997). In *Vu*, the plaintiffs sued a cardroom regarding gambling losses that they argued were attributable to cheating. *Id.* at 232, 235. The alleged cheating scheme involved players signaling their hands to each other, vocal and hand signals from a game manager, and the use of marked cards. *Id.* at 231-32. The plaintiffs' "allegations and theory were that the club's failure to fulfill its implied promises of security from cheating enabled the plaintiffs' competitors to cheat, which in turn caused the plaintiffs' losses," but the court held that this "premise . . . was untenable as a matter of law." *Id.* at 233. The court observed:

> Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain. No such certainty or probability appertains with respect to plaintiffs' gambling losses, assertedly the result of cheating. Assuming arguendo that an adequate causal connection could be

> established between the club's alleged breach of security obligations and the cheating that plaintiffs allegedly encountered, no such relationship appears between the cheating and plaintiffs' losses. That is because winning or losing at card games is inherently the product of other factors, namely individual skill and fortune or luck. It simply cannot be said with reasonable certainty that the intervention of cheating such as here alleged was the cause of a losing hand, and certainly not of two weeks' or two years' net losses . . . .

Id. (citations omitted). *Vu* relied on *Youst v. Longo*, 43 Cal. 3d 64 (1987), which affirmed a sustained demurrer on tort claims by the owner of one horse against the driver of another horse for interference by the other horse and its driver during a race. Even though the plaintiff had alleged specific facts about how the interference caused his horse to lose the race, *id.* at 67-68, the court held that the plaintiff had no right to tort damages, because which horse would have won the race had there not been the alleged cheating was pure speculation. *Id.* at 83.

As in *Vu* and *Youst*, Plaintiffs here have not and cannot allege facts to establish how Mr. Postle's alleged cheating caused their damages. Stones argued in its initial motion to dismiss that Plaintiffs had failed to explain how each of them would have won the hands in which they suffered losses, but for Mr. Postle's supposed scheme, and that they could not plausibly plead such losses because of their individual decision to fold as opposed to continue to play. The FAC did not fix this problem. The causal connection of Stones to any losses is even more attenuated. Plaintiffs still have not even attempted to explain the "but for" causal connection to Stones, asserting that Stones is liable to them for the money that Mr. Postle won, without accounting for money they would have lost to him if the purported cheating had not occurred. FAC ¶¶ 224, 236, 252, 260.

Further, the insertion of the collection rate as alleged damages does not save Plaintiffs' claims because the collection was taken whether they won or lost the hand, and Plaintiffs were not harmed either way in a manner linked to Mr. Postle's alleged cheating. *See* Request for Judicial Notice ("RJN") Ex. A. The collection rates were taken from the pot after the flop, from the pot once it reached a specific dollar amount, or sometimes based on time at the table. On any hand of poker that Plaintiffs lost, including to a player other than Mr. Postle, Plaintiffs suffered no damages from the collection, which was drawn from a pot they did not win. The person who loses out on the collection is the winner of the pot. When Plaintiffs won, they presumably *wanted* to participate in the hand and therefore pay the collection fee. Even if Plaintiffs could establish that they would

have won but for Mr. Postle's cheating, they still would not have received the collection. Plaintiffs' demand for the collection rate as damages is, like other money in the pot, too causally attenuated from any alleged wrongdoing by Stones to be cognizable.

Plaintiffs' requests for future winnings and punitive damages are speculative and cannot salvage their negligence, misrepresentation, fraud, and CLRA claims. *Vu* forecloses the inference that Plaintiffs would have won future games as a basis of damages. Plaintiffs likewise cannot receive punitive damages because, "actual damages are an absolute predicate for an award of exemplary or punitive damages." *Kizer v. Cty. of San Mateo*, 53 Cal. 3d 139, 147 (1991).

2. California Public Policy Bars These Claims.

Plaintiffs' gambling-related claims are independently barred by California's public policy against judicial resolution of civil claims arising out of gambling transactions. *See Jamgotchian v. Sci. Games Corp.*, 371 F. App'x 812, 813 (9th Cir. 2010). A "'suit to be placed in the *ex ante* position after losing a bet is'" barred by public policy. *Id.* (citing *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462, 490 (1999)). "'California's public policy against judicial resolution of civil claims arising out of gambling contracts or transactions absent a statutory right to bring such claims, applies to all forms of gambling.'" *Id.* (quoting *Kelly*, 72 Cal. App. 4th at 490); *see Bradley v. Doherty*, 30 Cal. App. 3d 991, 994 (1973). Because Plaintiffs seek to recover gambling losses and Stones' state-approved collection, their claims are barred by California public policy.

This bar extends to seeking damages against casinos and others making gambling available. *See Alves v. Players Edge, Inc.*, 2007 WL 6004919, at *14 (S.D. Cal. Aug. 8, 2007) ("any purchasing of tips was part of the 'gambling' transactions which Plaintiffs conducted with Defendants" and so recovery was barred by California public policy); *Kyne v. Kyne*, 16 Cal. 2d 436 (1940). "[A] comprehensive scheme of regulation, overseen by the Attorney General's Bureau of Gambling Control and the Gambling Commission, as well as municipalities, exists to regulate entities such as [Stones]. After *Kelly* decided that gambling disputes may not be heard in court without a statutory right to bring such claims, the Legislature chose not to create a right to sue over gambling losses." *Strickland v. Bicycle Casino, Inc.*, 2012 WL 3756980, at *3 (Cal. Ct. App. Aug. 30, 2012) (affirming dismissal of allegations of being denied a set tournament payout from a

casino); *see Hang Ngoc Lam v. Hawaiian Gardens Casino*, 2020 WL 806655, at *2 (C.D. Cal. Jan. 8, 2020) (dismissing claims that a casino cheated a player out of a jackpot he had won). Thus, Plaintiffs' claims for negligence, fraud, constructive fraud, negligent misrepresentation, and violation of the CLRA all fail as a matter of law.

B. The Negligence Claim Still Also Fails for Want of an Actionable Duty.

Plaintiffs contend in their negligence claim (Count VI) that Stones owed a duty to them to prevent Mr. Postle from cheating, but no such duty exists. "The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998). As discussed above, Plaintiffs do not plausibly allege proximate causation for any damages based on Stones' alleged negligence. The FAC also fails to allege facts to support a duty of care. "The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1095 (1991). Plaintiffs contend Stones had a duty to protect them from Mr. Postle cheating, but Plaintiffs' proposed duty is barred by the economic loss rule. To attempt to overcome the economic loss rule, Plaintiffs have added allegations: (1) based on the Gambling Control Act, (2) banking regulations, and (3) Mr. Postle's alleged employment by Stones. FAC ¶¶ 175, 181, 246. None create the duty that Plaintiffs seek. Imposing a duty on Stones here would be unprecedented, and Plaintiffs' newly added allegations do not demonstrate such a duty.

Outside of narrow exceptions, a defendant owes no tort duty to guard against negligently causing "purely economic losses" to others. *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 398 (2019). This rule reflects "the need to safeguard the efficacy of tort law by setting meaningful limits on liability." *Id.* at 401. As in *Southern California Gas Leak Cases*, Plaintiffs seek recovery of only economic losses from Stones. To proceed with their negligence claim, Plaintiffs must show that they fall within an exception to the economic loss rule. As explained below, they do not.

1. Plaintiffs Cannot Allege a General Duty to Gamblers and Do Not Allege a Special Relationship.

The primary exception allowing recovery of purely economic damages applies when a

"special relationship" exists: "the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." *Id.* at 400 (citing *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979)). The California Supreme Court has enumerated factors relevant to whether a defendant had a special relationship with a plaintiff, including "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." *J'Aire*, 24 Cal. 3d at 804. "[I]t is only in a limited number of cases where such a duty will be found." *Adelman v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 352, 365 (2001) (no duty existed between an insurer for a condo association and homeowners in the association).

Plaintiffs can cite no precedent establishing that Stones owed them a general duty of care as gamblers and do not allege any special relationship with Stones. No such relationship exists. Stones' role was to host a poker game, not to benefit any particular player. In *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370 (1992), the plaintiffs sued a company's auditors contending that the plaintiffs relied on a negligently prepared report in investing. The court concluded the auditors owed no duty of care to the investors, despite the foreseeability of the injury. *Bily* raised three primary concerns with imposing a duty: (1) the tenuous causal relationship between an auditor's reports and economic losses from investment could expose an auditor to "potential liability far out of proportion to its fault," (2) the sophisticated parties could "control and adjust the relevant risks through 'private ordering,'" and (3) finding of a duty would cause an adverse impact on the type of defendant at issue. *Id.* at 398. Each of these grounds equally applies to the relationship between Stones and the players. Plaintiffs cannot allege that Stones' role in any relationship was directed at their making money. There is only an attenuated connection between Stones' alleged actions and the injuries Plaintiffs contend they suffered. Plaintiffs do not allege that Stones impacted their ability to win or lose money in a given hand of poker. Nor are there any allegations that Stones received a benefit if one player won more often than another player. *See* RJN Ex. A. To the contrary, the injury Plaintiffs assert they suffered is "part of [poker players'] ordinary business

risk." *J'Aire*, 24 Cal. 3d at 808 (identifying that as a factor opposing duty). Stones Live Poker players were aware of the various risks involved in poker gambling. And recognizing a special relationship in this context would have a strongly negative effect on casinos like Stones.

California law "decline[s] to recognize a duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 58 (1998). The plaintiffs in *Quelimane* asserted title insurance companies had a duty to "issue [title] insurance . . . without discrimination" and "to use known and accepted legal, actuarial, and statutory criteria to determine the legal status of parcels of land to be insured." *Id.* at 36. The "failure to insure any title to land purchased at a tax sale regardless of the merits of the chain of title" had increased the price of purchasing property for the plaintiffs. *Id.* *Quelimane* nevertheless declined to recognize a duty by the title insurance companies to potential purchasers. The relationship between Stones' conduct and the Plaintiffs is even more attenuated than the relationship analyzed in *Quelimane*. Plaintiffs argue they lost money when Stones negligently permitted a cheater to join them at the poker table, then employed less than (undefined) "prevailing industry standards for security" to thwart his alleged scheme. FAC ¶ 249. These allegations merely reflect business decisions by Stones that affected Plaintiffs as third parties and Stones letting Mr. Postle play poker with Plaintiffs. Plaintiffs' attempt to impose a duty that California courts have never recognized fails.

2. The Gambling Control Act and Banking Rules Create No Duty.

No duty was created by the Gambling Control Act from Stones to Plaintiffs. "To state a [negligence claim] based upon the violation of a statute, it must appear that at the time of the violation, the plaintiff was a member of the class for whose benefit the statute was enacted and that the event causing the alleged injury is of the precise nature the statute was specifically designed to prevent." *Keech v. Berkeley Unified Sch. Dist.*, 162 Cal. App. 3d 464, 469 (1984); Cal. Evid. Code § 669(a) (requiring, to presume a breach of a duty of care, that "(1) [The defendant] violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death

or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted"). At the threshold, Plaintiffs do not identify any provision of the Gambling Control Act that Stones violated. Nor do they identify a provision that was meant to guarantee them recompense for alleged cheating. The duties that Plaintiffs say flowed from the Gambling Control Act are ambiguous. *See* FAC ¶¶ 246, 248. The one specific statutory cite is to the Legislature's purpose in enacting the Act. The provisions that Plaintiffs cite do not "set out a duty or a standard of care." *Elsner v. Uveges*, 34 Cal. 4th 915, 940 (2004). As *Quelimane* and *Bily* demonstrate, the economic loss rule still applies in highly regulated industries. Both cases referenced laws or regulations governing the defendants, nonetheless rejecting negligence liability as those obligations did not create the relevant duties to the plaintiffs. *See Quelimane*, 19 Cal. 4th at 59 (insurance regulations); *Bily*, 3 Cal. 4th at 395-96 (federal securities law). Nonetheless enforcing a purported purpose of the Gambling Control Act in negligence would invite boundless litigation inconsistent with the highly regulated standards of the industry.

Plaintiffs' banking regulation allegations similarly identify no new duty. Although Plaintiffs assert that Stones employees allowed Mr. Postle to evade financial reporting requirements in cashing out chips, they do not assert any regulatory violation by Stones.[1] Plaintiffs concede they were not individually injured by any violation. FAC ¶ 183. And the banking regulations were not intended to benefit Plaintiffs except potentially in their attenuated role as taxpayers.

3. The Allegations About Employment by Stones Are Irrelevant.

Plaintiffs' negligence allegations are divorced from Mr. Postle's purported employment by Stones (and Stones denies Mr. Postle was an employee). Plaintiffs do not allege that they played against Mr. Postle during Postle and Pals! broadcasts, when Mr. Postle was allegedly acting as Stones' employee. *Cf.* FAC ¶¶ 173-179.[2] And they do not plead a vicarious liability theory, even assuming such a theory would be viable.

With respect to a duty, Stones is similarly situated to the boxing organizers and broadcaster sued in *In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation*, 942 F.3d 1160, 1169-

[1] Stones must assume the allegations are true, but they are counterfactual.
[2] As discussed below in the context of the fraud claims, knowledge of cheating by Stones also cannot be imputed from Mr. Postle's alleged employment.

70 (9th Cir. 2019). In *Pacquiao-Mayweather*, spectators to a high-profile boxing match sued when they found out one of the fighters had been injured and the defendants knew about the injury and related regulatory violations. The court held that the defendants (including the organizers and broadcaster) were not liable for the quality of the match. *Id.* The plaintiffs' "subjective expectations . . . did not negate the very real possibility that the match would not . . . live up to those expectations." *Id.* at 1170. The plaintiffs paid to see a boxing match, and they saw a boxing match. The allegation that the defendants, including the broadcaster, hid from the public the boxer's injury and the likelihood of a less high-quality match did not support liability for either the organizers or broadcaster. *Id*. Here, as in *Pacquiao-Mayweather*, Stones simply provided a venue. Plaintiffs decided whether they wanted to play, for how long, how much to bet, and in which hands to participate. Stones collected the same rate no matter which player won. RJN Ex. A.[3]

Plaintiffs still have not sufficiently pled the essential elements of a duty or proximate causation, and their negligence claim therefore fails.

C. Plaintiffs' Fraud and Misrepresentation Claims Fail to Plead Allegations with Sufficient Specificity and Fall Short of Other Required Elements.

Plaintiffs bring three claims against Stones based on alleged misrepresentations or fraud: fraud (Count VIII), constructive fraud (Count VII), and negligent misrepresentation (Count III). Claims sounding in fraud or mistake must "state with particularity the circumstances constituting fraud or mistake" under Rule 9(b). The heightened pleading standard provides defendants with a meaningful opportunity to rebut fraud allegations. Plaintiffs' fraud or misrepresentation-based claims do not satisfy the Rule 8 pleading standard or provide the specificity required by Rule 9(b).

Each Plaintiff must plead the who, what, when, where, and how of the alleged fraud. The number of individual plaintiffs has more than tripled to 89, yet the FAC remains silent as to all but four Plaintiffs about what each of them heard, from whom they heard it, where and when they heard it, how or when they relied on it to continue to play poker, or resulting damage. Notably, only one of these four Plaintiffs actually provides details regarding what was said to her individually.

[3] Stones explained in its previous motion to dismiss why a premises liability would fail. ECF 31 at 20-21. Plaintiffs do not appear to advance a premises liability theory in the FAC.

1. The FAC Still Fails to Plead Facts to Establish Any Fraudulent Misrepresentation by Stones.

Ms. Brill, Ms. Mills, and Mr. Goone (but not other Plaintiffs) allege a fraud claim (Count VIII) against Stones. FAC ¶¶ 261-267. "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294 (2005). "To properly plead fraud with particularity under Rule 9(b), 'a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as ***what is false or misleading*** about the purportedly fraudulent statement, and ***why it is false***.'" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 640 (2018) (citation omitted) (emphasis added). "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

The FAC provides only the "who"—Justin Kuraitis; Plaintiffs satisfy no other requirement. Ms. Brill, Ms. Mills, and Mr. Goone allege Mr. Kuraitis made statements that there was no cheating but then contradict what was said to support that assertion. FAC ¶ 262. They plead that Mr. Kuraitis stated that "a thorough investigation of such cheating allegations had occurred or ***would be occurring***." *Id.* ¶ 263 (emphasis added). If Plaintiffs were told that an investigation would be undertaken, they could not rely on a forthcoming investigation as grounds that they were told no cheating occurred. To the extent Plaintiffs allege they were told an investigation had already occurred, Plaintiffs concede that such representations were not objectively false, instead characterizing them as "normative[ly]" false. *Id.* ¶ 168. This is insufficient to meet the standards of a fraudulent statement.

With respect to an alleged statement to Ms. Brill regarding audits, Plaintiffs do not allege that Stones did not have audits but rather allege there must not have been audits, "unless such audits were grossly incompetent," because Mr. Postle did not get caught. *Id.* ¶ 163.

Further, Plaintiffs do not allege when the statements were made. The one exception, an alleged March 2019 misrepresentation to Ms. Brill, still falls short. Mr. Kuraitis' alleged statements to Ms. Brill that Mr. Postle was fearless, was extremely skilled at poker, and was utilizing a "Martingale" strategy are non-actionable opinions, not actionable statements of fact. *Id.* ¶ 160. To the extent that representations were made after September 28, 2019, they could not support any reliance because all the games occurred before that date.

Nor do Plaintiffs sufficiently plead Stones' knowledge or recklessness underlying any fraudulent statement. Plaintiffs still fail to link any allegedly fraudulent representation to their vague assertion that one or more "agents" of Stones acted as confederates of Mr. Postle in some unknown capacity and circumstance. *Id.* ¶ 233. Plaintiffs highlight a correction in the cards read by the RFID table for one hand in their FAC as possible evidence of Stones' knowledge of Mr. Postle's cheating. *Id.* ¶¶ 150-154. But Plaintiffs explain nothing else about the alleged correction to link it to fraud or knowledge of cheating by Stones.

Plaintiffs cannot argue that knowledge of Mr. Postle's alleged cheating is imputed to Stones based on their conclusion that Mr. Postle was an employee. Under governing California law, *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 84 (1994), an employee's knowledge is imputed to the employer only when it is gained within the scope of his duties. *See Uecker v. Zentil*, 244 Cal. App. 4th 789, 797 (2016). Cheating was not within the scope of Mr. Postle's employment with Stones. And, if he was cheating, Mr. Postle was acting with adverse interests to Stones such that any alleged knowledge should not be imputed to Stones. *See id.*; 3 Witkin, Summary of Agency § 166 (11th ed. 2019) ("Where an agent acts in a capacity adverse to the principal in the transaction, there is no reason to believe that the agent will keep the principal properly informed, and ordinarily the notice will not be imputed."). The fraud claim must therefore be dismissed.

2. Plaintiffs' Constructive Fraud Claim Also Fails Because Plaintiffs Still Have Not Alleged A Fiduciary or Confidential Relationship.

Plaintiffs' constructive fraud claim (Count VII) still fails because Stones was not in a confidential or fiduciary relationship with Plaintiffs and the allegations do not satisfy Rule 9(b). To assert a constructive fraud claim, Plaintiffs must allege "(1) a fiduciary or confidential relationship;

(2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage." *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006); *see* Cal. Civ. Code § 1573. "'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.'" *In re Harmon*, 250 F.3d 1240, 1249 n.10 (9th Cir. 2001) (quoting *Assilzadeh v. Cal. Fed. Bank*, 82 Cal. App. 4th 399, 415 (2000)). Plaintiffs have not alleged they were in a fiduciary or confidential relationship with Stones. Indeed, they allege no formal relationship with Stones, because they cannot. *See Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (affirming grant of demurrer on constructive fraud claim when the plaintiff had "fail[ed] to plead facts establishing the requisite fiduciary or special confidential relationship between plaintiff and defendant"); *Wilson v. Zorb*, 15 Cal. App. 2d 526, 532 (1936) ("It takes something more than friendship or confidence in the professional skill and in the integrity and truthfulness of another to establish a fiduciary relationship."). The collection rate charged by Stones does not create such a relationship. *See City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008) (describing the limited circumstances creating a fiduciary relationship).

In addition, the constructive fraud claim must satisfy Rule 9(b). *See Rose v. J.P. Morgan Chase, N.A.*, 2012 WL 1574821, at *2 (E.D. Cal. May 3, 2012) (Shubb, J.). No Plaintiff identifies with specificity "an act or omission" by Stones on which they relied. Cal. Civ. Code § 1573. Each Plaintiff must do so, along with alleging a confidential or fiduciary relationship with Stones.

3. Plaintiffs Allege Only Non-Specific, Non-Actionable Implied Negligent Misrepresentations to Them and Allege No Duty.

Plaintiffs' negligent misrepresentation claim (Count III) likewise fails because they allege only non-actionable implied negligent misrepresentations, fail to allege a duty owed to Plaintiffs by Stones, and do not describe Stones' alleged misrepresentations with particularity. To prevail on a negligent misrepresentation claim, Plaintiffs must prove: (1) "'[m]isrepresentation of a past or existing material fact,'" (2) "'without reasonable ground for believing it to be true,'" and (3) "'with intent to induce another's reliance on the fact misrepresented'"; as well as (4) "'ignorance of the truth'" and (5) "'justifiable reliance on the misrepresentation by the party to whom it was directed'"; and (6) "'resulting damage.'" *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins.*

Assocs., Inc., 115 Cal. App. 4th 1145, 1154 (2004) (citation omitted).

First, the negligent misrepresentation claim must be dismissed because "'[a]n "implied" assertion or representation is not enough'" to state a claim for negligent misrepresentation. *See Diediker v. Peelle Fin. Corp.*, 60 Cal. App. 4th 288, 298 (1997) (citation omitted). The FAC describes several of Stones' alleged representations as implied rather than express. FAC ¶¶ 226, 229. The mere fact that Stones Live Poker was played at Stones cannot in itself be enough to support a negligent misrepresentation claim. *Cf. id.* ¶ 229.

The FAC also purports to allege some express representations by Mr. Kuraitis. *Id.* ¶ 228. But those are either not alleged to be untrue or are not actionable misstatements. *See Mueller v. San Diego Entm't Partners, LLC*, 260 F. Supp. 3d 1283, 1296-97 (S.D. Cal. 2017) (dismissing negligent misrepresentation claim for lack of a misrepresentation as to a past or existing material fact). Some allegations even relate to conduct after Ms. Brill made her statement public, at which point Plaintiffs cannot have possibly been deceived because the Stones Live Poker Games had ceased and Postle was not playing at Stones. Instead, these are better understood as implied assertions that Mr. Postle was not cheating. *See Diediker*, 60 Cal. App. 4th at 298. The FAC confirms that understanding. *See* FAC ¶ 230 ("These representations were untrue, as Mr. Postle was cheating in the Stones Live Poker games . . . ."). Further, the FAC does not state that all Plaintiffs heard or understood any of the proffered express statements. The FAC states that "numerous individuals" spoke with Stones but does not identify those individuals. *Id.* ¶ 155. Only one Plaintiff may have been told that Stones undertakes quarterly security audits, *id.* ¶¶ 160, 228. The other 88 Plaintiffs could not have relied on a representation that was not made to them.

Second, Plaintiffs still do not sufficiently allege how Stones knew or should have known about Mr. Postle's purported cheating to turn any statements into misrepresentations. Plaintiffs provide no detail about the asserted confederate and agent of Stones who they allege as a basis for Stones' knowledge. *Id.* ¶ 233. They do not allege facts regarding purported "prevailing industry norms and standards" for live streaming poker. *Cf. id.* ¶¶ 107-111, 198. They do not allege facts to establish a way that they can prove whether Mr. Postle was cheating. They do not identify how allegedly lax securities measures, *id.* ¶ 232, should have tipped Stones off that Mr. Postle was

cheating (which is, in itself, a conclusion). And they do not allege they provided any facts to Stones regarding why and how they thought Mr. Postle was cheating. Indeed, Plaintiffs concede they cannot explain even today how Mr. Postle cheated. *Id.* ¶ 203.

Third, the claim independently fails for lack of a duty. "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise . . . ." *Eddy v. Sharp*, 199 Cal. App. 3d 858, 864 (1988). California law imposed no duty on Stones to prevent Plaintiffs from suffering economic losses for the reasons described above in the context of the negligence claim, *see supra* Section IV.B.

Finally, the claim falls short of Rule 9(b)'s particularity standards. Plaintiffs must comply with Rule 9(b) for their negligent misrepresentation claim because the claim is grounded in alleged fraud—that Stones deceived Plaintiffs about whether Mr. Postle was cheating. *See Vess*, 317 F.3d at 1103 (claims grounded in fraud must satisfy Rule 9(b)). Courts have generally held plaintiffs must allege negligent misrepresentation claims with specificity, particularly when they are grounded in fraud. *See Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements."); *cf. Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 184 (2003) ("Because of the potential for false claims, we hold that a complaint for negligent misrepresentation in a holder's action should be pled with the same specificity required in a holder's action for fraud.").

Plaintiffs fail to allege with the required particularity, for any individual Plaintiff or even for the 89 Plaintiffs collectively, the circumstances of the misrepresentations allegedly made to them, their reliance on those representations, or their damages from that reliance.[4] Plaintiffs must each plead and prove actual reliance on a negligent misstatement. *See Cal. Pub. Employees' Ret. Sys. v. Moody's Inv'rs Serv., Inc.*, 226 Cal. App. 4th 643, 670-71 (2014). There is no allegation of which Plaintiff heard any affirmative misrepresentation or when that misrepresentation was heard, further undermining any assertion of negligent misrepresentation.

[4] Plaintiffs allege some information for Ms. Brill, but her negligent misrepresentation claim is insufficiently particular for the reasons discussed above with respect to her fraud claim.

D. Plaintiffs Have Failed to Allege A Cognizable CLRA Claim.

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiffs' CLRA claim (Count X) should be dismissed on four independent grounds:

First, "[a] violation of the CLRA may only be alleged by a consumer." *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1303 (S.D. Cal. 2003), *abrogated in unrelated part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). The CLRA defines a "consumer" as "an individual who seeks or acquires by purchase or lease any goods or services for personal, family, or household purposes." Cal. Civ. Code § 1761(d). Plaintiffs have not, and cannot, allege that they are "consumers" under the CLRA. The FAC alleges each Plaintiff was "deprived of the opportunity to maximize his or her respective profits in an honest poker game, while playing on Stones Live Poker." FAC ¶ 192. Plaintiffs' alleged activity of playing a game of chance for money by playing poker at Stones is not a good or service "for personal, family, or household purposes."

Second, Plaintiffs cannot allege the requisite element that Stones Live Poker is a "good or service" under the CLRA. The CLRA defines "goods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes," which does not apply to Plaintiffs playing poker. Cal. Civ. Code § 1761(a). CLRA "services" are "work, labor, and services for other than a commercial or business use." *Id.* § 1761(b). Here, Plaintiffs sought to win money by playing in Stones Live Poker with a business purpose. *See, e.g.*, FAC ¶¶ 192 ("Every one of the Plaintiffs herein was deprived of the opportunity to maximize his or her respective profits in an honest poker game, while playing Stones Live Poker . . . .").

Third, the CLRA claim fails because Plaintiffs do not allege the requisite "transaction." The CLRA defines a "transaction" as "an agreement between a consumer and another person." Cal. Civ. Code § 1761(e). The FAC fails to allege any agreement between any Plaintiff and Stones.

Fourth, Plaintiffs provided defective notice of their CLRA claim. *See* RJN Ex. B. The CLRA requires that "[t]hirty days or more prior to the commencement of an action for damages [under the CLRA], the consumer shall . . . [n]otify the person alleged to have employed or

committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770." Cal. Civ. Code § 1782(a). "Courts require strict compliance with the CLRA's notice" mandate. *Ruszecki v. Nelson Bach USA Ltd.*, 2015 WL 6750980, at *5 (S.D. Cal. June 25, 2015). Plaintiffs failed to meet the CLRA notice obligations for their allegations regarding "appropriate safeguards and security befitting a game played at an RFID Table." FAC ¶¶ 275-277. Plaintiffs' February 15, 2020 letter does not reference an RFID table or "illicit utilization" of the table. FAC ¶ 276. Plaintiffs' letter does not, therefore, provide notice of the particular alleged CLRA violation. The CLRA claims for damages on these allegations must therefore be dismissed. *See Allen v. Similasan Corp.*, 2013 WL 5436648, at *3 (S.D. Cal. Sept. 27, 2013) (dismissing plaintiffs' CLRA claims because the allegations were not raised in the notice letter).

E. Ms. Brill's Libel Claim Fails Because the Tweet Does Not Refer to Her Expressly or by Clear Implication and She Alleges No Special Damages.

Finally, Ms. Brill continues to assert a libel claim (Count IX) against Stones related to a statement that it made on Twitter in September 2019, addressing allegations of cheating in Stones Live Poker. A libel plaintiff must allege "'(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.'" *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (citation omitted). To state a claim for libel, a plaintiff must also plead that the allegedly defamatory statement was "of and concerning" the plaintiff, by name or by "clear implication." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1044 & n.1 (1986). California recognizes two types of libel: "libel per se" and "libel *per quod*." *See* Cal. Civ. Code § 45a. "If a defamatory meaning appears from the language itself without the necessity of explanation or the pleading of extrinsic facts, there is libel per se," however, if "the defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernable from the face of the publication," or that are common knowledge of "all reasonable persons," "then the libel cannot be libel per se but will be libel *per quod*." *Palm Springs Tennis Club v. Rangel*, 73 Cal. App. 4th 1, 5 (1999) (citation omitted). Ms. Brill's libel claim fails because she does not link the allegedly offending tweet to her except in a conclusory fashion and fails to allege special damages required for libel *per quod*.

Ms. Brill does not sufficiently allege that the tweet by Stones referred to her or was "of and concerning" her. *Blatty*, 42 Cal. 3d at 1044 & n.1. The tweet did not mention Ms. Brill by name. *See* RJN Ex. C. Nor did the statement that "[t]he recent allegations are completely fabricated," refer to Ms. Brill by clear implication. *See Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008). Indeed, the tweet refers to plural "allegations." The tweet is linked to Ms. Brill only by Plaintiffs' conclusory say-so. FAC ¶ 154. That is not enough. *See Williams v. Salvation Army*, 2014 WL 6879936, at *2 (C.D. Cal. Dec. 4, 2014) (dismissing allegation that defamatory statement referred to plaintiff for failure to plead supporting facts); *Art of Living Found. v. Does*, 2011 WL 2441898, at *7 (N.D. Cal. June 15, 2011) (dismissing defamation claim about "Art of Living" for failure to satisfy the "of and concerning" requirement because there were many chapters of the Art of Living organization).

Ms. Brill also does not allege "special damages" required for libel per quod. At most, Ms. Brill alleges libel per quod because, if the tweet has any defamatory meaning related to Ms. Brill, that meaning requires information extrinsic to the tweet. *See Todd v. Lovecruft*, 2020 WL 60199, at *16 (N.D. Cal. Jan. 6, 2020) (statement was not libel per se given required reference to other tweets for defamatory connection to plaintiff). To prevail on libel per quod, a plaintiff must have suffered "special damages." Cal. Civ. Code § 45a. "[S]pecial damages are defined narrowly to encompass only economic loss." *Gomes v. Fried*, 136 Cal. App. 3d 924, 939 (1982); *see* Cal. Civ. Code § 48a (defining special damages). In California, "special damages must be pled and proved precisely." *Gomes*, 136 Cal. App. 3d at 940; *see* Fed. R. Civ. P. 9(g). Ms. Brill still pleads no special damages, which again require specific allegations of economic harm. As a result, her libel claim must be dismissed on this ground as well. The FAC added no material allegations in support of the libel claim, making particularly clear that Plaintiffs cannot cure these defects.

V. CONCLUSION

For the reasons above, the Court should dismiss with prejudice the claims against Stones.

Respectfully submitted,

Dated: April 8, 2020

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PROOF OF SERVICE

I, Alexander J. Holtzman, declare:

I am a citizen of the United States and employed in the City and County of San Francisco, CA. I am over the age of 18 and not a party to the within action; my business address is 44 Montgomery St., 41st Floor, San Francisco, CA 94104.

On April 8, 2020, I served the following document(s) described as:

DEFENDANT KING'S CASINO MANAGEMENT CORP.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

☐ **BY FACSIMILE TRANSMISSION**: As follows: The papers have been transmitted to a facsimile machine by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause and served on the party making the service. The copy of the notice or other paper 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).

☐ **BY MAIL**: As follows: Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ **BY OVERNIGHT MAIL**: As follows: I am readily familiar with the firm's practice of collection and 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.

☒ **BY ELECTRONIC MAIL TRANSMISSION**: By electronic mail transmission from aholtzman@bsfllp.com on April 8, 2020, by transmitting a PDF format copy of such document(s) to each such person at the e-mail address(es) listed below their address(es). The party(ies) listed below have agreed to accept service by email from King's Casino Management Corp. in this case. The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

Michael L. Postle 3724 Deer Walk Way Antelope, CA 95843 JRSTOX@yahoo.com	*Pro Se*

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 8, 2020, at San Francisco, CA.

Alexander J. Holtzman