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FILED

APR 08 2020

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY  DEPUTY CLERK

4 In pro per

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 VERONICA BRILL; KASEY LYN
12 MILLS; MARC GOONE; NAVROOP
13 SHERGILL; JASON SCOTT; AZAAN
14 NAGRA; ELI JAMES; PHUONG
15 PHAN; JEFFREY SLUZINKI; HARLAN
16 KARNOFOSKY; NATHAN PELKEY;
17 MATT HOLTZCLAW; JON TUROVITZ;
18 ROBERT YOUNG; BLAKE ALEXANDER
19 KRAFT; JAMAN YONN BURTON;
20 MICHAEL ROJAS; HAWNLAY SWEN;
21 THOMAS MORRIS III; PAUL
22 LOPEZ; ROLANDO CAO; BENJAMIN
23 JACKSON; HUNG SAM; COREY
24 CASPERS; ADAM DUONG,

Plaintiffs,

v.

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

Defendants.

No. 2:19-CV-02027-WBS *AC*

**DEFENDANT MICHAEL POSTLE'S
NOTICE OF MOTION AND RENEWED
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

Date: May 4, 2020
Time: 1:30 pm
Courtroom: 5, 14th Floor
Judge: Hon. William B. Shubb

25 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

26 PLEASE TAKE NOTICE that on May 4, 2020, at 1:30 pm, or as
27 soon thereafter as this matter may be heard before the Honorable

28 Defendant Postle's Notice of
Motion and Renewed Motion to
Dismiss

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

10 For the reasons set forth below, Mr. Postle respectfully
11 requests that this Court grant his Renewed Motion to Dismiss.
12 This 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.

15
16 Respectfully submitted,

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19 Date: April 8, 2020

20 
21 MICHAEL POSTLE

22 In pro per
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs' First Amended 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, IV, and IX 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 and IX should be dismissed under Fed. R. Civ. P. (hereinafter "Rule(s)") 9(b) and 12(b)(6).

Second, Counts I through V and IX must also be dismissed for the reasons set forth in King's Casino LLC's Motion to Dismiss and Justin Kuraitis' Motion to Dismiss. Among these reasons are that: (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 Third, Count V should be dismissed under 12(b)(6). Count V
2 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 Finally, Counts IV and IX should be dismissed under
6 12(b)(6). Both counts purport to bring an action for negligence
7 per se. Negligence per se is not a recognized cause of action
8 under either federal or California law but rather a codified
9 evidentiary presumption under California law.

10 **III. Argument**

11 A. Standards Governing Motions to Dismiss

12 Pursuant to Rule 12(b)(6), dismissal is appropriate where
13 the complaint lacks a cognizable legal theory or sufficient facts
14 to support a cognizable theory. *Navarro v. Block*, 250 F.3d 729,
15 732 (9th Cir. 2001). A complaint is also subject to dismissal
16 for failure to state a claim if the allegations on their face
17 show that relief is barred for some legal reason. *Jones v. Bock*,
18 549 U.S. 199, 215 (2007); see also *Groten v. California*, 251 F.3d
19 844 (9th Cir. 2001).

20 The factual allegations in a complaint "must be enough to
21 raise a right to relief above the speculative level." *Bell*
22 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim
23 has facial plausibility when the plaintiff pleads factual content
24 that allows the court to draw the reasonable inference that the
25 defendant is liable for the misconduct alleged." *Ashcroft v.*
26 *Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not
27 establish a probability of success on the merits, he or she must
28 demonstrate "more than a sheer possibility that a defendant has

1 acted unlawfully." *Id.* Importantly, "[w]here a complaint pleads
2 facts that are merely consistent with a defendant's liability, it
3 stops short of the line between possibility and plausibility of
4 entitlement to relief." *Id.*

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

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

1 failure to state a claim on which relief can be granted. *Vess*,
2 317 F.3d at 1107.

3 B. Counts I through V and IX Must be Dismissed for
4 Failing to Plead Fraud with Particularity

5 **1. Legal Standard**

6 Counts I through V and IX all "sound in fraud." Counts II
7 through V and IX each allege fraud as the actionable underlying
8 conduct. Count I also sounds in fraud as it alleges wire fraud
9 as the predicate racketeering offense.

10 The Racketeer Influenced and Corrupt Organizations Act
11 ("RICO") makes it "unlawful for any person employed by or
12 associated with" an enterprise engaged in or affecting interstate
13 commerce "to conduct or participate, directly or indirectly, in
14 the conduct of such enterprise's affairs through a pattern of
15 racketeering activity." 18 U.S.C. § 1962(c). To state a RICO
16 claim, a plaintiff must allege: "(1) conduct (2) of an enterprise
17 (3) through a pattern (4) of racketeering activity." *Odom v.*
18 *Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir.2007). The term
19 "racketeering activity" includes a number of so-called "predicate
20 acts," including mail and wire fraud. See 18 U.S.C. § 1961(1). To
21 establish the predicate acts of mail and wire fraud, a plaintiff
22 must show a scheme to defraud, involving use of the U.S. wires or
23 mail, with the specific intent to defraud. *Schreiber Distrib. Co.*
24 *v. ServWell Furniture Co.*, 806 F.2d 1393, 1399-1400 (9th Cir.
25 1986).

26 Plaintiffs pleading a RICO violation predicated on fraud
27 must meet the heightened pleading standards imposed by Rule 9(b).
28 See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir.

1 2004). For the predicate offense of wire fraud, a plaintiff must
2 allege with particularity: (1) the precise statements, documents,
3 or misrepresentations made; (2) the time and place of and person
4 responsible for the statement; (3) the content and manner in
5 which the statements misled the Plaintiffs; and (4) what the
6 Defendants gained by the alleged fraud. *Miccosukee Tribe of*
7 *Indians of Fla. v. Cypress*, 814 F.3d 1202, 1212 (11th Cir. 2015);
8 *see also Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th
9 Cir.2007).

10 **2. Argument**

11 i. Counts I through V and IX Each Fail 12 Because Plaintiffs Fail to Plead 13 Fraud with Particularity

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

23 Plaintiffs' Complaint alleges that Mr. Postle worked with an
24 unidentified "confederate" through an unidentified method to
25 secure information regarding the cards of unidentified poker
26 players in unidentified historical games. This utterly fails the
27 requirements of Rule 9(b). Plaintiff has failed to identify the
28 time, place, method, and specific content of Mr. Postle's alleged
Defendant Postle's Memorandum of Point and Authorities

1 misrepresentations constituting wire fraud. Plaintiffs instead
2 make speculative and nonspecific allegations such as "Mr. Postle
3 was able to achieve these results by engaging in a pattern and
4 practice of using one or more wire communication mechanisms to
5 defraud his opponents by gaining knowledge of their Hole Cards...".
6 ECF 40, paragraph 127. This sort of rote recitation of the
7 elements of the cause of action cannot and does not suffice to
8 meet the burden of Rule 9b. Similarly, rather than identify the
9 particular poker transactions during which Mr. Postle was alleged
10 to have conducted his scheme, the Complaint merely states that
11 Mr. Postle played on a range of dates throughout 2018 and 2019.
12 ECF 40, paragraph 205. There is no attempt to describe any
13 particular hand or any particular conduct by Mr. Postle that is
14 alleged to have comprised fraud.

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

28

1 In the place of the requisite specific fact pleading, the
2 Complaint engages in five pages of spurious statistics and
3 speculative claims purporting to demonstrate that Mr. Postle's
4 winnings were extraordinary. ECF 40, paragraphs 116 to 126. These
5 statistical claims are confused at best and substantially
6 insufficient to raise Plaintiffs' allegations above a merely
7 speculative level. The allegations of the Complaint merely
8 demonstrate that Mr. Postle won money, nothing more. Any
9 inference of unlawful conduct drawn from the naked fact of his
10 winning would be entirely unfounded and illogical. Gambling is
11 inherently an activity involving players hoping for statistical
12 aberrations. The conclusion that a winning gambler is cheating
13 is non sequitur, though undoubtedly a common conclusion among
14 losing gamblers.

15 The sole additional relevant fact allegations Plaintiffs
16 appear to have added from their original Complaint regarding Mr.
17 Postle do nothing to aid Plaintiffs in rectifying their pleading
18 failure. ECF 40, paragraphs 129-130. The newly-plead
19 allegations amount to an assertion that Mr. Postle looked at his
20 phone sometimes during unidentified poker games. Instead of
21 requisite factual particularity Plaintiffs rely on speculative
22 generality. Alleging that Mr. Postle used a device to
23 communicate to unknown people through unknown means at
24 nonspecific times and places while playing against unidentified
25 opponents resulting in unidentified injury is precisely the type
26 of pleading prohibited by Rule 9(b). Plaintiffs allege no
27 specific means by which Mr. Postle's phone was or could have been
28 converted into some kind of cheating device. Instead, Plaintiffs

1 attempt to rely on a line of cases represented in their pleading
2 by *Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.*, 436 F.
3 Supp. 2d 1095 (C.D. Cal. 2006), as amended (Aug. 21, 2006).
4 Plaintiffs' reliance on this line of cases is misguided.

5 The Ninth Circuit has held that the requirements of Rule
6 9(b) may be relaxed in a narrowly-defined class of corporate and
7 securities fraud cases, owing to the difficulty of determining
8 the identity and specific actions of individuals acting inside
9 the corporate entity that caused the complained-of injury. It is
10 a doctrine born of the specific difficulties involved in alleging
11 fraud against certain types of corporate defendants, not an end-
12 run around Rule 9(b)'s requirements. *United States ex rel. Lee*
13 *v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)
14 ("Rule 9(b) may be relaxed to permit discovery in a limited class
15 of corporate fraud cases where the evidence of the fraud is
16 within a defendant's exclusive possession.") (emphasis added);
17 *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir.
18 1989).

19 Demonstrating the tightly limited application of this
20 doctrine is *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993 (9th
21 Cir. 2010). In *Ebeid*, the plaintiff attempted to rely on the
22 same line of cases that Plaintiffs do in this case, arguing that
23 he could not meet the requirements of Rule 9(b) in a False Claims
24 Act case because the allegedly false billing information
25 underlying the False Claims allegations was solely in the
26 defendant health care provider's possession. The Ninth Circuit
27 held that where the defendant failed to allege any specific
28 instance of false billing submissions, the date of that billing,

1 or the people involved, the Rule must not be relaxed. The court
2 found that to relax Rule 9(b)'s pleading requirements simply
3 because a plaintiff asserts he lacked the information to plead
4 adequately due to that information being in the hands of a
5 defendant would swallow the Rule entirely. Accordingly,
6 dismissal of the *Ebeid* plaintiff's complaint was affirmed.

7 As in *Ebeid*, here Plaintiffs fail entirely to allege any
8 specific conduct that would allow Mr. Postle to do more than
9 simply deny he has done anything wrong. Even after amending the
10 Complaint, Plaintiffs continue to rely entirely on spurious
11 statistics and speculative generalities instead of particularized
12 facts. Plaintiffs cannot correct this abject pleading failure by
13 appeal to an inapplicable line of authority. Ninth Circuit
14 authority is clear that this is not the type of case that would
15 justify relaxing the Rule 9(b) pleading standard.

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

1 Accordingly, Counts II through V and IX should be dismissed
2 for failure to plead fraud with particularity as required under
3 Rule 9(b). Count I should similarly be dismissed because
4 Plaintiffs fail to allege facts in support of the required
5 predicate act of racketeering with particularity as required
6 under Rule 9(b).

7 C. Counts IV and Count IX Must be Dismissed for
8 Failing to State a Claim Under Which Relief
9 Can Be Granted

10 Plaintiff purports to bring a cause of action for
11 "negligence per se." As the Ninth Circuit has held repeatedly,
12 California does not recognize a standalone cause of action for
13 negligence per se. See, e.g., *Waldon v. Arizona Pub. Serv. Co.*,
14 642 F. App'x 667, 669 (9th Cir. 2016). Rather, negligence per se
15 is simply a codified evidentiary presumption. Cal. Evid. Code §
16 669. It provides no independent basis for relief. *Ramirez v.*
17 *Nelson*, 44 Cal.4th 908 (2008); *Rice v. Ctr. Point, Inc.*, 154
18 Cal.App.4th 949 (2007). Therefore, Counts IV and IX fail to
19 state a claim for relief and must be dismissed.

20 B. Count V Must be Dismissed for Failing to
21 State a Claim Under Which Relief Can Be
22 Granted

23 Plaintiff purports to bring a cause of action for "unjust
24 enrichment." As the Ninth Circuit has held repeatedly, California
25 law does not allow for a standalone cause of action for unjust
26 enrichment. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753,
27 762 (9th Cir. 2015). Rather, California law treats "unjust
28 enrichment" as synonymous with restitution. See e.g., *Durell v.*

1 *Sharp Healthcare*, 183 Cal.App.4th 1350 (2010). Therefore, Count
2 V fails to state a claim for relief and must be dismissed.

3 C. Counts I through V and IX must also be
4 Dismissed for the Reasons Set Forth in
5 Defendants Kings Casino, LLC and Justin
6 Kuraitis' Motions to Dismiss

7 Defendants' Motions to Dismiss lay out numerous reasons why
8 each of these claims should be dismissed and Mr. Postle joins in
9 each of those arguments to the extent applicable and adopts
10 Defendants' Motions to Dismiss and the arguments and authority
11 cited therein as though fully set forth herein.

12 As the Motions to Dismiss demonstrate, California law
13 precludes each of these claims because alleged gambling losses
14 are not recoverable, both because such losses are speculative and
15 because lawsuits to recover such damages are barred by long-
16 standing California public policy.

17 Additionally, with regard to the putative negligence claims,
18 Plaintiffs fail entirely to allege the existence of a legal duty
19 owed to them by Mr. Postle. In fact, no specific person,
20 statement or event causing injury is described in the Complaint
21 as required by Rule 9(b).

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Respectfully submitted,

Date: April 8, 2020 Michael Postle

Defendant Michael L. Postle

PROOF OF SERVICE

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2
3 I, Rose Postle, 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 -

7 2219 Catherwood Way, Sacramento CA 95835

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

10 **DEFENDANT MIKE POSTLE'S NOTICE OF MOTION AND RENEWED MOTION**
11 **TO DISMISS PLAINTIFFS' 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
20 notation of the date and place of transmission and
21 the facsimile telephone number to which transmitted
22 or be accompanied by an unsigned copy of the
23 affidavit or certificate of transmission which
24 shall contain the facsimile telephone number to
25 which the notice of other paper was transmitted to
26 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.
26 I am aware that on motion of the party served,
27 service is presumed invalid if postage cancellation
28 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 rosepostle62@gmail.com 4-8-20, 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 April 8, 2020, 2020 at Sacramento, CA.

Rose Postle

Rose Postle

Name: