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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VERONICA BRILL, *et al.* Plaintiffs, vs. MICHAEL L. POSTLE, *et al.* Defendants.	Case No. 2:19-cv-02027-WBS-AC The Honorable William B. Shubb OPPOSITION TO DEFENDANT KING'S CASINO MANAGEMENT CORP'S MOTION TO DISMISS FIRST AMENDED COMPLAINT (DE #45)

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Come now Veronica Brill ("Ms. Brill"), Kasey Lyn Mills ("Ms. Mills"); Marc Goone ("Mr. Goone"), Navroop Shergill ("Mr. Shergill"); Jason Scott ("Mr. Scott"); Azaan Nagra ("Mr. Nagra"); Eli James ("Mr. James"); Phuong Phan ("Mr. Phan"); Jeffrey Sluzinski ("Mr. Sluzinski"), Harlan Karnofsky ("Mr. Karnofsky"); Nathan Pelkey ("Mr. Pelkey"); Matthew Allen Holtzclaw ("Mr. Holtzclaw"); Jon Turovitz ("Mr. Turovitz"); Robert Young ("Mr. Young"); Blake Alexander Kraft ("Mr. Kraft"); Jaman Yonn Burton ("Mr. Burton"); Michael Rojas ("Mr. Rojas"); Hawnlay Swen ("Mr. Swen"); Thomas Morris III ("Mr. Morris"); Paul Lopez ("Mr. Lopez"); Rolando Cao ("Mr. Cao"); Benjamin Jackson ("Mr. Jackson"); Hung Sam ("Mr. Sam"); Corey Caspers ("Mr. Caspers"); Adam Duong ("Mr. Duong"); Dustin McCarthy ("Mr. McCarthy"); Chou Vince Xiong ("Mr. Xiong"); Brian Olson ("Mr. Olson"); Cameron Smith ("Mr. Smith"); Jordan Diamond ("Mr. Diamond"); Aronn Solis ("Mr. Solis"); Alisha Daniels-Duckworth ("Ms. Daniels-Duckworth"); Christian Soto Vasquez ("Mr. Vasquez"); Andrew Hernandez ("Mr. Hernandez"); Darrell Steed ("Mr. Steed"); Arish S. Nat ("Mr. Nat"); Kyle Kitagawa ("Mr. Kitagawa"); Brian Michael Raasch ("Mr. Raasch"); Zeev Malkin ("Mr. Malkin"); David Crittenton ("Mr. Crittenton"); Patrick Laffey ("Mr. Laffey"); Paras Singh ("Mr. Singh"); Firas Bouri ("Mr. Bouri"); Idris M. Yonisi ("Mr. Yonisi"); Joshua Whitesell ("Mr. Whitesell"); David Duarte ("Mr. Duarte"); Harun Unai Begic ("Mr. Begic"); Brad Kraft ("Mr. Kraft"); Taylor Carroll ("Mr. Carroll"); Elias AbouFares ("Mr. AbouFares"); Tyler Denson ("Mr. Denson"); Andrew Lok ("Mr. Lok"); Jake Rosenstiel ("Mr. Rosenstiel"); Anthony Ajlouny ("Mr. Ajlouny"); Hector Martin ("Mr. Martin"); Dale Menghe ("Mr. Menghe"); Scott Schlein ("Mr. Schlein"); Auguste Shastry ("Mr. Shastry"); Nicholas Colvin ("Mr. Colvin"); Jason Markwith ("Mr. Markwith"); Brian Watson ("Mr. Watson"); Shane Gonzales ("Mr. Gonzales"); Katherine Stahl ("Ms. Stahl"); Mike Nelson ("Mr. Nelson");

Brandon Steadman ("Mr. Steadman"); Bryant Miller ("Mr. Miller"); Hong Moon ("Mr. Moon"); Matthew Gouge ("Mr. Gouge"); Nicholaus Wooderson ("Mr. Wooderson"); Carlos Welch ("Mr. Welch"); Ariel Reid ("Mr. Reid"); Dan Mayer ("Mr. Mayer"); Anthony Giglini ("Mr. Giglini"); Ryan Jaconetti ("Mr. Jaconetti"); Ariel Cris Manipula ("Mr. Manipula"); Trenton Sidener ("Mr. Sidener"); James John O'Connor ("Mr. O'Connor"); Patrick Vang ("Mr. Vang"); Marcus Davis ("Mr. Davis"); Adam Cohen ("Mr. Cohen"); Derick Cole ("Mr. Cole"); Aaron McCormick ("Mr. McCormick"); Brennen Alexander Cook ("Mr. Cook"); Michael Phonesavnh Rasphone ("Mr. Rasphone"); Benjamin Teng ("Mr. Teng"); Scott Sorenson ("Mr. Sorenson"); Anthony Hugenberg ("Mr. Hugenberg"); and Billy Joe Messimer ("Mr. Messimer") (collectively, the "Plaintiffs," with each sometimes being known as a "Plaintiff"), by and through counsel, and in opposition to the motion to dismiss (the "Motion," as found at DE #45, with the pleading to which it is directed being known as the "Complaint," as found at DE #40) filed by King's Casino Management Corp., successor by merger with King's Casino, LLC d/b/a Stones Gambling Hall ("Stones" or the "Defendant"),[1] state as follows:

I. Introduction

When Stones was notified Michael Postle ("Mr. Postle") was using the casino's own technology to cheat in broadcast poker games, it lied to players about its security, took myriad steps to coverup Mr. Postle's cheating, concealed Mr. Postle's cheating to viewers, continued to allow Mr. Postle to play in its broadcast games, and even went so far as to hire Mr. Postle to host some of those games in which he was cheating. Now confronted by 88 of the victims of this extensive, high-tech fraud, Stones insists it is immune from suit for any gaming-related

[1] There are other defendants to this action who have also filed motions seeking dismissal. Their respective motions are being addressed under separate cover.

actions it has taken, that is owes no duty to any of its poker clients, that the 54-page Complaint herein does not contain sufficient specificity, and that none of that pleading's various causes of action are validly stated as against Stones.

The crux of Stones' Motion is that Plaintiffs' Complaint and the allegations therein can be chalked up to the paradigmatic sob story of gamblers – sore losers claim they were cheated because they cannot accept the superiority of an adversary. To whittle Plaintiffs' argument down to a disparaging conclusion is not only offensive to Plaintiffs, but, too, to the very gaming community from which Stones draws its customer base. It is fundamentally errant for Stones to assert the Plaintiffs' basis for relief is on the grounds that Mr. Postle "won too many hands from [them]." Motion at 11:5-6.[2] Pleaded in the Complaint and summarized herein are lengthy, specific, and substantive allegations that detail how Mr. Postle cheated, how Stones covered up for his cheating, how both Stones and Mr. Postle profited off his cheating, and why Stones is thusly liable for its own actionable conduct.

For these reasons, and as discussed in greater length *infra*, the Motion merits denial. This is a case involving the victimization of the poker community in an unprecedented fashion and on an enormous scale (as evidenced by the cascade of individuals joining as named Plaintiffs herein). Both governing law and fundamental notions of equity instruct this suit is one that ought to proceed.

[2] References to page numbers herein are to the page numbers on ECF stamps, not page numbers on the foot of the Motion. Stones – just as the Plaintiffs are doing with this brief – included a series of prefatory pages that cause a distinction to exist between these two numbering schemes.

II. Standard

As this Honorable Court has observed of the standard governing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6):

> On a Rule 12(b)(6) motion, the inquiry before the court is whether, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the plaintiff has stated a claim to relief that is plausible on its face. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." "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." A complaint that offers mere "labels and conclusions" will not survive a motion to dismiss.

United States v. Aerojet Rocketdyne Holdings, Inc., 381 F. Supp. 3d 1240, 1245 (E.D. Cal. 2019) (Shubb, J.) (citing and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

As various – but not all – counts of the Complaint sound in fraud, a heightened pleading standard controls those claims:

> Under the heightened pleading requirements for claims of fraud under Federal Rule of Civil Procedure 9(b), "a party must state with particularity the circumstances constituting the fraud." The plaintiffs must include the "who, what, when, where, and how" of the fraud. Additionally, "[w]here multiple defendants are asked to respond to allegations of fraud, the complaint must inform each defendant of his alleged participation in the fraud."

Castaneda v. Saxon Mortg. Services, Inc., 687 F. Supp. 2d 1191, 1199–200 (E.D. Cal. 2009) (Shubb, J.) (quoting Fed. R. Civ. P. 9(b); *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); citing *Decker v. GlenFed, Inc*., 42 F.3d 1541, 1548 (9th Cir. 1994); quoting *Ricon v. Recontrust Co.*, 2009 WL 2407396, at *3 (S. D. Cal. 2009) (quoting *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir.1987))).

III. Summary of Pertinent Allegations

This case concerns the largest known cheating scandal in the history of broadcast poker. Complaint at ¶ 7. Stones operates a casino in Citrus Heights, California at which it previously hosted a series of poker games broadcast on the internet ("Stones Live Poker" games). Complaint at ¶¶ 1-2, 104-105, 110. To facilitate such broadcasts, Stones installed a poker table with imbedded radio-frequency identification abilities (the "RFID Table"), and correlative playing cards fitted with microchips, so that inlayed table sensors could read players' concealed cards in real time. Complaint at ¶ 105.

Stones did this as a means of promoting its relatively-new casino, allowing for targeted marketing to card players conveying the atmosphere of a poker "destination," and collecting money as and for the fees charged to players in Stones Live Poker games (the "rake"). *Id.* In so doing, it continued on the rising trend of broadcasting live poker games, over the internet and on television, that has been emerging in the gaming industry for well over a decade. Complaint at ¶ 107. The key to the RFID Table being part of the broadcast is that it permitted viewers to see players' concealed cards when watching the poker games, thus making the programming more entertaining as those at home acquire a degree of omniscience. *Id.* Without the ability to observe a player's cards, watching poker play is tantamount to watching paint dry; without the RFID Table, it is unlikely Stones would have been able to produce a captivating broadcast for its intended audience.

Justin Kuraitis ("Mr. Kuraitis"), a directorial and key employee of Stones, oversaw and supervised the Stones Live Poker broadcasts at all times relevant. Complaint at ¶ 115. Mr. Postle was a habitual participant in the Stones Live Poker broadcasts at all times relevant. Complaint at ¶ 116.

On at least 68 occasions (each specifically enumerated by date in the Complaint at ¶ 205), Mr. Postle, working with a confederate employed by Stones, cheated while playing against various combinations of the Plaintiffs in the Stones Live Poker broadcasts. Complaint at ¶¶ 116-145, *passim*. He did this by using a cellular telephone, lodged between his legs so as to be beyond the view of other players, to exploit the RFID Table and access the identity of his opponents' concealed cards, in real time. Complaint at ¶¶ 127, 129-130, 132.

Mr. Postle's cheating is evidenced by, *inter alia,* footage of his engaging in the cheating behavior (readily available since the games in which he was cheating were broadcast and archived on the internet), statistical analysis of his play over the rather appreciable sample size of the 68 subject games (each of which was several hours long), and instance-specific facts that evidence Mr. Postle having gained knowledge of the RFID Table's card readings in real time. Complaint at ¶¶ 116-145.

After multiple initial instances of Mr. Postle's unusual and suspicious behavior, Stones was notified by numerous persons – including Mesdames Brill and Mills – of their adamant concerns that Mr. Postle appeared to be cheating. Complaint at ¶¶ 155-159. Stones, through Mr. Kuraitis, responded by representing Mr. Postle is not cheating, the Stones Live Poker games are "one hundred percent secure," quarterly security audits are being undertaken, Mr. Postle is merely "on a heater," and Mr. Postle utilizes a novel strategy not comprehensible to most persons. Complaint at ¶¶ 157, 160, 164-165.

It appears Stones was not, in fact, having quarterly security audits undertaken, nor had it undertaken any reasonable investigation into Mr. Postle's cheating. Complaint at ¶ 163, 167-168. The strategy Stones alleged Mr. Postle to be using is one that cannot be applied to a game of poker. Complaint at ¶ 162.

In lieu of stopping Mr. Postle from cheating, Stones commenced to coverup Mr. Postle's cheating so as to further conceal it from, *inter alia*, the Plaintiffs. Complaint at ¶ 149-150, 169-170. Specifically, Stones created a series of graphics, portraying Mr. Postle as a deity-like figure – with one such graphic conflating an image of him with a depiction of Jesus Christ – so as to putatively explain his otherwise-inexplicable situation-specific play. Complaint at ¶ 118. When Mr. Postle's play of a given poker hand was too bizarre to address with these graphics, Stones would simply change the cards shown on the broadcast and explain his cards, as previously displayed, had been errant. Complaint at ¶¶ 146-150. For various technical reasons that can be testified to by an expert in the field, it is impossible for such an error to have occurred in this context. Moreover, the RFID Table and its accompanying technology would not have had the ability to correct any so-called "card read" errors (even those of a plausible variety) in real time. Complaint at ¶¶ 151-152.

By Stones and Mr. Kuraitis collectively covering up for Mr. Postle's cheating, Stones was able to continue to receive proceeds from the rake collected in Stones Live Poker games, was able to continue to hold itself out to the gaming community as an enticing poker destination, and was able to continue to receive the marketing goodwill associated with those broadcast games. Complaint at ¶¶ 105, 184-187. Mr. Postle, in turn, was able to profit by continuing to cheat the Plaintiffs out of their money, in excess of $250,000.00. Complaint at ¶¶ 188-193.

Ms. Brill, despite the false assurances of Mr. Kuraitis and Stones, eventually grew certain of Mr. Postle's cheating and revealed the same on an internet social media platform. Complaint at ¶¶ 166, 269. Stones responded by publicly accusing Ms. Brill of fabricating her allegations of Mr. Postle's cheating. Complaint at ¶¶ 166, 269.

Only after Ms. Brill suffered several days of ridicule, harassment, and bullying, in wake of Stones' accusations, did the *ad hoc* poker community undertake its own inquiry which revealed Mr. Postle to have, indeed, been cheating. Complaint at ¶ 5. At this point, Stones announced it would launch a new investigation into Mr. Postle's cheating, to be conducted by an "independent" third party (who, in actuality, is Stones' counsel). Complaint at ¶ 5. Despite a promise to share the outcome of that investigation "with transparency," Stones has failed to do so at all times since. Complaint at ¶ 6.

After accusing Ms. Brill of fabricating her allegations, only to have the poker community use video evidence to mount its own informal investigation supporting her recognition of Mr. Postle's cheating, Stones ceased operating Stones Live Poker games. Complaint at ¶ 113.

This suit is brought against Mr. Postle, Stones, Mr. Kuraitis, and several John Doe defendants. Complaint, *passim*. The Plaintiffs have indicated John Doe 1 is Mr. Postle's chief confederate, and the Plaintiffs have a good faith basis upon which to identify him if required. Complaint at ¶ 99. However, given the sensitivity of the allegations, they have indicated they will refrain from doing so until discovery may be taken, unless they must do so in order to conform with the pleading rigors of this Honorable Court. *Id.* None of Stones, Mr. Postle nor Mr. Kuraitis have asked, in their respective motions seeking dismissal, that the Plaintiffs name John Doe 1 at this time. *See* DE #45, DE #46, DE #50.

Motions to dismiss by both Messrs. Postle and Kuraitis incorporate by reference the arguments set forth in the Motion filed by Stones. *See* DE #46, DE #50. Separate oppositions to those motions are being filed, but to the extent those motions rely upon the papers of Stones, the Plaintiffs rely on this brief to oppose the incorporated arguments.

IV. Argument: The Gaming-Centric Nature of this Case is Not a Bar to Recovery

In 2009, this Honorable Court, entertaining a case concerning the speculative nature of litigation itself, mused lawsuits and poker games ought not be analogized because, "In a card game, the players do not get to see the cards of all their opponents," whereas, "In a civil lawsuit, however, broad discovery permits the parties to put all their 'cards' on the table before trial." *Britz Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d 1142, 1170 (E.D. Cal. 2009).

This Honorable Court was remarkably prescient in offering forth that observation, with it even coming in the prism of an analysis of *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229 (1997), a case upon which Stones heavily relies in its Motion. And now, barely a decade later, the Plaintiffs bring this case, which is quite literally premised upon a series of poker games in which Mr. Postle did "get to see the cards of all [his] opponents." *Britz Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d at 1170.

As discussed at greater length below, the Motion merits denial inasmuch as California law very much permits this case to proceed. Specifically, (i) the Motion often minimizes that the Plaintiffs herein are suing not merely for gaming losses but, too, recovery of the monies they paid over to Stones for its operation of a putatively honest and legal series of card games; (ii) California law expressly permits an award of punitive damages if even so much as nominal damages are found in a case; (iii) the *Vu* Court itself has acknowledged, a claim for poker-centric losses may be maintained in "extreme cases" (with this being perhaps the ultimate "extreme case"); (iv) California case law has long – and extensively – disfavored all manner of obligations collateral to illegal gambling, yet acknowledged the viability of certain claims related to legalized gaming activities; and (v) the prolonged nature of the cheating at issue *sub judice* is such that calculation of damages is not speculative in nature but, rather, something that

can be precisely shown as any issues related to small-sample randomness ultimately fall victim to the law of large numbers in the prism of this matter.

a. The Plaintiffs Seek Cognizable, Identifiable Monies Unrelated to Gaming Losses as Well as Statistically-Provable Cheating Losses

If someone tosses a coin once, they have a 50% chance of it coming up heads. If someone tosses a coin 1,000 times, they have a 99% chance of it coming up heads at least 465 times.[3] California case law has only disfavored claims for gaming losses because of the inherent speculation stemming from a single coin toss – or even a dozen coin tosses. Yet in this case, that proverbial quarter was thrust in the air, and permitted to fall to the turf, more than a thousand times, and it is thus entirely possible to find actual damages to a degree of statistical near-certainty far greater than that guiding approximations of damages in most civil cases. Moreover, an appreciable portion of the damages sought by the Plaintiffs is not reliant on this data, as the Plaintiffs sue, too, to recover the so-called "rake" they paid over to Stones for its operation of the at-issue card games.

In arguing gaming losses or proceeds to be too speculative to support a lawsuit, Stones relies heavily on *Vu*, a case in which "[a]t deposition, Vu admitted that he did not know whether his losses at the club were attributable to cheating, bad luck, or better players." *Vu*, 58 Cal. App. 4th at 232. *See also*, *Id.* at 234 ("Plaintiff Vu himself expressly disavowed being able to reckon whether his losses had resulted from the alleged cheating, from the superior play of competitors, or from bad luck. And plaintiff Matloubi characterized Pan-Nine as involving 100 percent luck.").

[3] $P(x \leq 535) = \sum_{x=0}^{535} \binom{100}{x} . 5^x (.5)^{100-x}$.

Moreover, in *Vu*, the litigants did not seek the so-called "rake" paid over to the casino defendant as a form of damages but, rather, sued solely for their gaming losses. *Id.* at 235 ("…neither by pleading nor responsive proof did plaintiffs identify any specific, identifiable sums that the club took from them.").

Yet even the *Vu* Court, in rejecting the litigants' gaming damages as too speculative, took care to specifically note such damages may be cognizable in an "extreme" circumstance:

> A concurring opinion in *Youst v. Longo* opined that some horse racing outcomes might not be too speculative to support a claim for damages resulting from interference – "e.g., a horse shot just before it crosses the finish line, 10 lengths ahead of the field." Conceivably, similar extreme cases might be hypothesized with respect to poker and Pan-Nine. But plaintiffs did not allege frustration of any such outcomes.

Vu, 58 Cal. App. 4th at 234, n. 5 (citing *Youst v. Longo*, 43 Cal. 3d 64, 84 (1987) (Grodin, J. concurring)).

Stones also relies on *Youst* in this portion of its brief, noting that case concerned a plaintiff who "alleged specific facts about how … interference caused his horse to lose [a] race." Motion at 167-8 (citing *Youst*, 43 Cal. 3d at 67-68). Yet that case concerns a single horse race and a single act of interference – not thousands of horse races with thousands of identical acts of interference. That court was also express in limiting the scope of its holding, noting, *inter alia*, "We emphasize, as did the Court of Appeal, that this holding applies only to claims for prospective economic loss." *Id.* at 78, n. 11.

Importantly, *Youst* has to be confined to prospective economic claims – as it expressly acknowledges – since it is a case concerning a horse race in which prizes are awarded but no entry fee is ever so much as mentioned. *See Id.* at 68, n. 2 ("The purse for the race was $100,000 distributed as follows: the winner received $50,000; second place received $25,000: third place

received $12,000; fourth place received $8,000; and fifth place received $5,000."). Without delving too far into the idiosyncrasies of horse racing, the industry generally features, *inter alia*, claiming races, allowance races, and stakes races; both claiming races and allowances races often permit free entry to qualified horses, with only stakes races regularly requiring the posting of an entry fee. *See, e.g.*, *Fowler v. C. I. R.*, 37 T.C. 1124 (1962) (discussing types of horse races). Unless *Youst* concerned a stakes race – which is nowhere referenced in the case or analyzed in the subject opinion – no monies would have been tendered as an entry fee and, as the court notes, any tort claims stemming from the race would be necessarily confined to those of "prospectively economic loss." *Youst*, 43 Cal. 3d. at 79.

This case is not one for prospective economic loss, nor is it not one based on a single race like *Youst*. Similarly, this case is not one where the Plaintiffs are unsure if their damages are "attributable to cheating, bad luck, or better players," as in *Vu*. Rather, this is a case where the Plaintiffs were meticulously cheated for over a year and where their damages extend to the monies wrongfully collected by Stones as and for its putatively fair operation of poker games.

The Plaintiffs are prepared to present detailed factual evidence showing how much money they each tendered to Stones to operate the subject poker games. Similarly, they have already engaged the services of multiple expert witnesses who will testify to the computation of damages based on, *inter alia*: (i) analysis of Mr. Postle's style of play and the statistical near-certainty of it leading to appreciable losses if not informed by cheating; (ii) the statistically-projected ranges of those losses by Mr. Postle (and, hence, proceeds realized by the Plaintiffs) over the hundreds of hours of poker games at issue *sub judice*; (iii) the standard deviations, and resultant margins of error, fetched by those statistical projections applied to the expert analysis

of Mr. Postle's play; and (iv) the resultant projection of damages tethered to high degrees of certainty.

Stated otherwise, the Plaintiffs are prepared to present factual evidence that there was an unprincipled divergence between the reasonable expectations they had when playing games on Stones Live Poker, and the reality of the situationally deceitful and fraudulently-obtained advantage Mr. Postle had during these 68 games. Stones argues that being cheated is an inherent risk of gambling, but that is not the case in the game of poker. It is customary within the industry to protect the integrity of the game at all costs – including literal costs the patrons pay by way of the "rake." The Plaintiffs are prepared to present not merely hard factual evidence of Mr. Postle's cheating but, too, expert statistical analysis that proves Mr. Postle's play and resulting win-rate was an astonishing exponential outlier of an anomaly that can only be achieved through his utilization of cheating devices.[4] The Plaintiffs are not suing for their prospective winnings; merely recovery of the monies paid to administer the games fairly and monies lost as a direct result of Stones' failure to administer the games with prevailing industry safeguards. This evidence handily takes the instant case out of the "speculative" realm of matters guiding the *Vu* and *Youst* Courts, and outlines a thorough and detailed fact-driven series of claims backed by expert witnesses showing damages to a degree of certainty that well-satisfies the governing standard.

[4] The Plaintiffs have engaged expert witnesses who will explain how Mr. Postle's play of poker correlates to a strategy certain to invite midterm and longterm losses unless aided by cheating. This is in addition to appreciable factual evidence (of a non-expert variety) showing Mr. Postle's cheating. Most significantly, these expert witnesses will also show that even if this Honorable Court were to discount all skill and merely assign random probability to the games in question, the sample size is so large as to allow a rather precise assignment of damages.

b. Punitive Damages are Permitted with Even Nominal Damages

The Plaintiffs' identification of so-called "rake" damages is essential to the matter *sub judice* because it presents a cognizable measure of economic harm in no way tied to gaming wins or losses. Thus even if, *arguendo*, this Honorable Court were to discount the expert testimony referenced *supra*, or find a casino to not be liable for gaming losses, this case would still be one in which cognizable, identifiable, actual damages can be shown. From those damages could spring punitive damages.

Axiomatically, "California permits the award of punitive damages where a plaintiff receives only nominal damages, provided the plaintiff has proven actual, but unquantifiable, damages." *Hynix Semiconductor Inc. v. Rambus, Inc*., 527 F. Supp. 2d 1084, 1102 (N.D. Cal. 2007) (citing *Kizer v. County of San Mateo*, 53 Cal.3d 139, 147 (1991); Nominal Damages as a Basis for Awarding Punitive Damages in California, 3 Stan. L. Rev. 341, 343 (1951)).

Here, the Plaintiffs allege they paid Stones to administer the card games in question. Complaint at ¶¶ 3, 105, 184-187, 217, 224, 236, 239, 252, 260, 266, 275-276, 286. These are not monies lost to Stones on account of a wager, nor monies taken by Mr. Postle as part of his cheating scheme; these are monies paid to Stones as a service fee for its operation of a putatively honest and properly-supervised poker game.

These damages are not nearly nominal in nature – they are estimated to add up to tens of thousands of dollars.[5] But no matter their size, they are in no way related to gaming wins or

[5] Inasmuch as all relevant games are preserved on tape, this number can be computed. While it is suspected an already-existing computation will be produced by Stones in discovery, if this Honorable Court feels the precise sum needs to be alleged to show the feasibility of the instant case even beyond the allowance of gaming damages, the Plaintiffs are prepared to engage someone to re-watch all of the tape, record the precise rake correlative to each hand, aggregate the figures, and produce a number that can be specifically alleged in an amended pleading.

losses, they are factually quantifiable, and they are thus sufficient to invite both an award of actual damages and an award of punitive damages.

c. California Case Law Allows Actions for Legal Gaming-Related Damages

Stones next contends the quantifiable nature of losses – both correlative to monies paid to Stones to operate poker games, and monies lost in the cheating scheme – is immaterial, as public policy *ipso facto* confers upon a casino civil immunity for any tortious conduct it may commit in connection with its gaming operations. Inasmuch as such public policy is rooted in 19th century case law speaking to the "evil tendency" of gambling,[6] this is a somewhat astonishing position for a licensed, regulated casino to take, as it is inherently rooted in two deeply disturbing premises: first, that Stones maintains it owes absolutely no legal duty to its patrons, in connection with gaming activity; and, second, that Stones maintains it enjoys such legal privilege on account of precedent speaking to the undesirable and morally corrupt nature of the individuals who are Stones' customers.

Fortunately, this is not the case. To the contrary, a review of governing case law reveals the gradual evolution of an antebellum disinclination of courts to engage illegal gaming disputes to a more nuanced, modern approach where California's courts regularly recognize the justiciability of gaming-centric disputes – especially when involving something more than an effort to recover mere gambling losses.

i. Origins of California's Topical Public Policy

California's first published encounter with the justiciability, *vel non*, of gaming debts dates back to 1851, when a litigant lost $4,000.00 (an astonishing sum at the time) in a banked

[6] *Gridley v. Dorn*, 57 Cal. 78, 80 (1880).

game of faro and did not pay up. *Bryant v. Mead*, 1 Cal. 441, 443–44 (1851). By way of necessary background, "faro" was an early betting game that ultimately fell out of favor by reason of its composition allowing dealers to readily and habitually cheat players. As George Devol – arguably the greatest 19th century American riverboat gambler – noted in his memoirs:

> It is said of me that I have won more money than any sporting man in this country. I will say that I hadn't sense enough to keep it; but if I had never seen a faro bank, I would be a wealthy man to-day.

George Devol, *Forty Years a Gambler on the Mississippi* 269 (1894).

The *Bryant* Court was quick to note it would not entertain the collectability of a faro-related debt because the same was thoroughly illegal:

> First, that four thousand dollars, if won uuder[7] any circumstances, at what is called, I believe, a *round game*, and in a private room, could not be recovered, because the amount is so large as to be excessive; second, that the fact of its being won at a *bank game*, such as faro, makes its recovery unlawful; and, third, that its being won at a common gaming-house, by the owner and keeper thereof, would alone bar the recovery; for it would be strange, that the law should punish the prosecution of a particular business in a certain way, *criminaliter*, and should, at the same time, lend its aid to enforce contracts *civiliter*, which should be made for the furtherance and prosecution of such business.

Bryant, 1 Cal. at 443-444.

On its face, *Bryant* hardly stands for a novel concept: debts born of illegal activity will not be collectible in California's courts. Since gaming was very much illegal at the time, and a particularly repugnant form of gaming (faro) was implicated in the case, this established a precedent that seems perfectly sensible in nature and generally without controversy.

[7][sic]. Though there is a smudge of sorts over the second "u" in the only copy of the original reporter undersigned counsel has been able to locate, suggesting there may have been a printer's effort to correct the typographical error.

Two years later, the Supreme Court of California would again visit the topic, this time making quite clear its feelings not merely on illegal debts but, too, on the practice of gambling itself: "It needs no authority or arguments to satisfy this court that **the practice of gaming is vicious and immoral in its nature**, and ruinous to the harmony and well-being of society." *Carrier v. Brannan*, 3 Cal. 328, 329 (1853) (emphasis added).

Not long thereafter, the same policy would be echoed in connection with a case concerning a dishonored check given for gaming chips. However, even then, only five years after pronouncing gambling "vicious and immoral" in the *Carrier* case, the Supreme Court of California began to acknowledge there may be some situation, collateral to a gambling debt, where courts might have to recognize the validity of a gaming marker. Specifically, in the prism of another faro case, the state's high court acknowledged its case law insulating a subsequent transferee in good faith, of an illicit market, would likely make a gaming marker collectible:

> The question presented in this case is, whether the illegality of the consideration, for which the check was given, is available as a defense against the plaintiff. As between the parties, it is not denied that the consideration may be inquired into. As between them, the consideration was illegal. Gaming is prohibited by statute; it is declared to be a felony in the keeper of the game, and a misdemeanor in the player. As to all persons except a *bona fide* holder without notice, the check is void.

Fuller v. Hutchings, 10 Cal. 523, 526 (1858).

The state's general attitude that gambling is criminally forbade and, ergo, gambling-related debts cannot generally give rise to enforceable judgments, continued unaltered for an expansive period of time thereafter. In 1872, an obligation related to an illegal wager on the presidential election was deemed unenforceable. *Hill v. Kidd*, 43 Cal. 615, 616 (1872). And shortly thereafter, the Supreme Court of California minced no words in sharing its loathsome view of horse racing, "If, notwithstanding **the evil tendency of betting on races**, parties will

engage in it, they must rely upon the honor and good faith of their adversaries, and not look to the courts for relief in the event of its breach." *Gridley*, 57 Cal. at 80 (emphasis added).

This trend extended into the former half of the 20th century. In a lawsuit to collect $2,000.00 paid for gaming chips, illegality and amorality were once again relied upon in deeming the putative debt non-justiciable in nature. *See, e.g., Lavick v. Nitzberg*, 83 Cal. App. 2d 381, 383 (1948) ("The principle upon which the rule of these cases rests is that the consideration for notes given in a gambling game in a gambling house is contra bonos mores and as such 'unlawful' under section 1667 of the Civil Code.") (citing *Union Collection Co. v. Buckman*, 150 Cal. 159 (1907); *Hamilton v. Abadjian*, 30 Cal.2d 49 (1947); *Rose v. Nelson*, 79 Cal. App. 2d 751 (1947); 38 C.J.S., Gaming, 326). *See also*, *Wallace v. Opinham*, 73 Cal. App. 2d 25, 26 (1946) ("Where the parties voluntarily engage in a gambling game which is prohibited by law, *in the absence of a statute authorizing a recovery of gambling losses*, neither courts of law nor equity will aid or assist either party to enforce rights growing out of that illegal transaction.") (citing *Babcock v. Thompson*, 3 Pick. 446 (Mass. 1826); 38 C.J.S., Gaming, § 29, p. 99) (emphasis in original).

In 1956, the policy of the *Bryant* Court – now over 100 years old and still uncontroversial in light of gaming's illegal status in California – was once again echoed by a state appellate court. This time the game in question was blackjack, and while perhaps less-predatory than faro, it was still very much proscribed by the state's penal laws:

> All of the games mentioned in the amended complaint are gambling games, and while the playing of either draw poker or low ball draw poker is not made a misdemeanor by the provisions of section 330 of the Penal Code, the playing of them, as well as the playing of blackjack (twenty-one), for money is unlawful as contrary to the policy of express law and good morals... The playing of these games for money being illegal, the consideration for the payment of a gambling loss incurred in playing them, that is, the opportunity to win more than the amount

> wagered, is likewise illegal, and does not constitute a fair consideration for the monies paid.

Tokar v. Redman, 138 Cal. App. 2d 350, 354 (1956) (citing Civil Code § 1667; *Lavick*, 83 Cal.App.2d 381; *Geary v. Schwem*, 280 Pa. 435 (1924); *Marbury v. Brooks*, 7 Wheat 556 (1822); Fraudulent Conveyances, § 144, p. 968).

With the dawning of legalized gambling in other jurisdictions, however, the absolutist posture of California's courts would soon change.

ii. California Courts Acknowledge Gaming-Related Obligations when Presented in Legal Contexts

Just five years after *Tokar*, this state's judiciary would acknowledge the proliferation of legalized gaming a few miles to the east, and the resultant policy needs to begin softening, and backing away from, the harsh anti-gaming rhetoric of its antebellum precedent. In 1961, a suit for an accounting of profits, correlative to the operations of a casino just across the state line in Reno, Nevada, would yield a memorable observation: "In these modern days Californians cannot afford to be too pious about this matter of gambling." *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc*., 194 Cal. App. 2d 177, 180 (1961).

To be sure, the *Nevcal Enterprises* Court not only noted the need to back away from the imposition of judicial morality; it went so far as to recognize a valid cause of action stemming from a gaming-related transaction. And key to its holding was the lawful nature of the activity in question: "It plainly provided for the doing of lawful acts in a lawful manner (conducting a Nevada gambling casino) and cannot fairly be said to be opposed to the public policy of this State." *Nevcal Enterprises, Inc.*, 194 Ca. App. 2d at 182.

The *Nevcal Enterprises* Case was not a one-off. In 1988, another California court would chisel away at the anti-gaming doctrine of *Bryant* and its progeny even further, this time

recognizing a cause of action for an actual gaming debt, and doing so with a debt not from a neighboring state but, rather, a foreign country. Confronted with a claim an individual had passed £400,000 in bad checks to garner chips at a British casino, the court noted, *inter alia*, "Si–Ahmed's argument overlooks the fact that these events took place in England, a jurisdiction which permits casino gambling… Contrary to Si–Ahmed's position, enforcing this judgment promotes rather than violates California public policy." *Crockford's Club Ltd. v. Si-Ahmed*, 203 Cal. App. 3d 1402, 1406 (1988). The same opinion continues:

> In view of the expanded acceptance of gambling in this state as manifested by the introduction of the California lottery and other innovations, it cannot seriously be maintained that enforcement of said judgment "is so antagonistic to California public policy interests as to preclude the extension of comity in the present case."

Id. at 1406 (quoting *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 136 (1985); citing *Advanced Delivery Service, Inc. v. Gates,* 183 Cal. App. 3d 967, 975 (1986)).[8]

In the years since *Nevcal Enterprises* and *Crockford's Club*, California's courts have continued to recognize the colorable nature of claims sounding in events related to licensed and lawful gaming operations. In dismissing a case for lack of federal question jurisdiction, the United States District Court for the Southern District of California suggested the plaintiffs' claims for gambling losses might prove fruitful in state court: "The right to redress that Plaintiffs may enjoy under California state law to sue individually for their gambling losses

[8] The progressive nature of the policy expressed by the *Crockford's Club* Court ought not be understated. Nearly 20 years later, Florida – a state littered with legal gaming establishments – would reaffirm its policy of dishonoring gaming debts from other states, even if expressly legal under the laws of those other states. *See, e.g., In re Simpson*, 319 B.R. 256, 264 (Bankr. M.D. Fla. 2003) ("Florida courts have consistently held that gambling obligations, even if valid in the state in which they were undertaken, are unenforceable in Florida as contrary to law and public policy.") (quoting *Froug v. Carnival Leisure Industries, Ltd*., 627 So.2d 538, 539 (Fla. 3rd DCA 1994)).

does not equate with the standing requirement of § 1964(c)." *Rodriguez v. Topps Co., Inc*., 104 F. Supp. 2d 1224, 1226 (S.D. Cal. 2000), aff'd sub nom. *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083 (9th Cir. 2002).

Rodriguez, of course, followed the *Vu* case, in which a casino sued for gambling losses did not rely on a now-broken public policy speaking to the forbade nature of collecting gaming debts but, rather, merely the difficulty in quantifying gaming losses. As noted *supra*, the *Vu* Court even acknowledged that under the right circumstances, a claim for poker losses might be justiciable. *See, supra, Vu*, 58 Ca. App. 4th at 234, n. 5.

To be sure, other cases have come along the way, offering conflicting theories as to the state of California's topical case law. In *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462 (1999), the court – after "conclude[ing] that Sycuan 21 is proscribed by section 330" of the state's penal code – launched into a dicta discussion of how the claimed debt might still be negatively treated even if derivative of a legal game. Yet even *Kelly* confined its dicta to claims for gambling losses and gambling debts; it did not speak to claims for monies related to gaming (like the rake-based claims in this case). *Id.* at 471. And in a three paragraph, unpublished opinion, the United States Court of Appeals for the Ninth Circuit found unintentional error in pari-mutuel horse racing software, which did not randomize tickets as desired, does not give rise to a valid claim. *Jamgotchian v. Sci. Games Corp*., 371 Fed. Appx. 812, 813 (9th Cir. 2010).

Importantly, though, *Kelly*'s contrary language is contemplative dicta that does not even feign application to the Plaintiffs' claims for rake-based damaged, and *Jamgotchian* does not speak to any manner of intentional tort (nor even to a scheme where damages would be at-all quantifiable – it is difficult to surmise how the random generation of pari-mutuel tickets begets a different result than the non-random generation of tickets).

This Honorable Court referenced *Vu* when making the aforementioned quip about poker players not being privy to the cards of others. *See Britz Fertilizers, Inc.*, 665 F. Supp. 2d at 1170. And, not coincidentally, it is *Vu* – the case most relied-upon by Stones – that now governs the landscape of gaming disputes in California.

As noted *supra*, the Plaintiffs believe their claims square with the holding of *Vu*. They have quantifiable damages, much of their damages are not correlative to gaming losses, and their Complaint presents the ultimate exemplar of an "extreme case." So, ironically, the Plaintiffs are unfazed by Stones' admonishment that *Vu* guide the matter *sub judice*.[9]

iii. The Pacquiao-Mayweather Case is Inapplicable to the Instant Controversy

Perhaps cognizant California's case law has evolved from the prohibitive days of *Bryant*, Stones also endeavors to analogize this case to *In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litig.*, 942 F.3d 1160 (9th Cir. 2019), the matter stemming from a particularly ho-hum, and radically over-hyped boxing match. That case simply is not relevant to the matter *sub judice*, however, as (i) it concerns claims of paying spectators – not participants; and (ii) its holding is expressly premised upon the fact that the rules of boxing were followed.

[9] Mr. Postle, in his motion to dismiss (DE #50), has endeavored to incorporate Stones' arguments. It bears notation that in connection with the claim against him for violation of the Racketeer Influenced and Corrupt Organizations Act (Count I of the Complaint), California law does not govern the viability, *vel non*, of the claim, as it is a federal question. *See, e.g., U.S. v. Wai Ho Tsang*, 632 F.Supp. 1336, 1337–1338 (S.D. N.Y. 1986) ("[T]he most recent interpretations of RICO establish that such state law defenses and procedural requirements are not incorporated into the federal statute."); *O'Donnell v. Kusper*, 602 F.Supp. 619, 623 (N.D. Ill. 1985) ("the determination of whether the plaintiff, as a taxpayer, has standing to bring a RICO action on behalf of a governmental entity must be determined under federal law."). The *Vu* case is thus inapplicable to this lone count of the Complaint.

In the *Pacquiao* Case, a boxer concealed an injury from the public, and made deceptive statements in the pre-fight media build up, which the court properly described as "puffery" while noting, "Here, although boxing fans—like all sports fans—can reasonably expect a regulation match, they also reasonably anticipate a measure of unpredictability that makes spectator sports exciting." *Id.* at 1170, n. 7; *Id.* at 1169.

After the match, fans brought suit to recover pay-per-view fees paid to view the contest, with the court classifying the case as one considering "the rights of a spectator disappointed by a sporting event…" *Id.* at 1166.

In finding such claims to lack merit, the *Pacquiao* Court expressly relied upon the fact that fans paid to see a rule-abiding contest, and were treated to a rule-abiding contest: "A sports match or game, unlike a consumer good or service, is defined only by a set of rules that are well-known to fans; the rest is determined by how the match is fought or the game is played." *Id.* at 1170.

The Plaintiffs herein are not suing in their capacity as the viewers who tuned into Stones Live Poker broadcasts; they are suing in their capacity as the players who partook in those games. And this is not a case where one of the players on a broadcast concealed some physical injury or condition hindering her or his ability to play poker. This is a case where the Plaintiffs were cheated by someone who, with the aid of Stones, was able to break poker's most sacrosanct rule, and who was able to do so because Stones perpetually covered up for him despite being on notice of his illegal conduct.

It is thus difficult to apply *Pacquiao* to the matter *sub judice*, other than to observe that the *Pacquiao* Court places a premium on the fidelity of contests where rules are followed, and this case concerns a series of 68 contests where the rules most certainly were not followed.

iv. Public Policy Favors Allowance of the Plaintiffs' Claims

The public policy of California – from the early days of *Bryant* through the modern days of *Crockford's Club* – has been to protect those who follow the law and to turn away those who do not. At a time when gaming was criminal and regarded as a moral scourge, no variety of suits related to such activities were permitted. Once gambling began to encounter legalization, suits stemming from lawful activities commenced finding a receptive judicial audience.

The Plaintiffs in this case walked into a licensed, regulated, taxed gaming establishment, paid Stones money to deal and provide security for honest card games, and were swindled time and again. They were swindled when Mr. Postle began cheating, they were swindled when Stones did nothing to stop Mr. Postle from cheating, they were swindled when Stones undertook to coverup Mr. Postle's cheating, they were swindled when Stones lied about investigating Mr. Postle's cheating, and they were swindled each time they sat down at a poker table with Mr. Postle when his cheating was aided by his confederate.

Much of the anti-gaming case law cited above references and relies upon Section 1667 of the Civil Code, which became the loose codification of the *Bryant* doctrine through its disallowance of contracts "contrary to good morals." Civ. Code § 1667. Even putting aside that this case sounds in tort and that provision concerns questions of contract law, it seems relatively manifest society has evolved to a point where poker games are not thought to be "contrary to good morals." These are not lawless gatherings of ne'er-do-wells, being "vicious and immoral" in the words of the *Carrier* Court; these are licensed, regulated, and taxed gatherings of everyday citizens who derive some communal pleasure through largely-cerebral competitions. Two of the Plaintiffs' lawyers handling this case (undersigned counsel of record and his law partner) openly hold themselves out as professional poker players; such a designation has not

proven an obstacle in their efforts to gain admission to various state bars with moral fitness requirements, nor to various courts of the United States upholding the same standards.

If the Plaintiffs in this case – who come armed with video evidence of the at-issue torts, a small army of expert witnesses capable of explaining the fraud and quantifying damages, and the cleanest of hands – cannot find judicial recourse, it would be difficult to fathom who could. Giving casinos absolute judicial privilege or immunity is a dangerous and gnarly road upon which to embark; there is no other non-governmental operator of consumers services, in the State of California, that is expressly exempt from consumer suit for its intentional tortious conduct. And in the face of a legislative scheme that legalizes casinos, but which does not confer any privilege upon such casinos, it is almost impossible to square how this could, in fact, be the public policy of the State of California.

The Plaintiffs are disappointed the casino they thought to be looking out for them was, in fact, looking out for the interests of a cheater. They are almost as disappointed that Stones has the *chutzpah* to defend this case not on the merits but, rather, on the theory that its patrons are simply without any recourse, no matter how egregious the casino's conduct.

The Plaintiffs thus respectfully urge this Honorable Court to follow the clear lines of equity and the evolving lines of public policy, and to permit this suit to proceed.

V. Argument: The Economic Loss Rule is Inapplicable *Sub Judice*

Stones also endeavors to expand the protective realm of this state's economic loss rule, arguing that provision ought to confer immunity from suit for all manner of tortious conduct that does not result in bodily harm. This position is more easily addressed, as Stones' argument – which, taken on its face, suggests one could *never* be liable for fraud, negligence, or any other tort, in the absence of non-economic damages – is plainly belied by governing case law.

a. There is No Contractual Relationship, or Quasi-Contractual Relationship, Alleged Between the Parties

The crux of California's economic loss rule is an effort to preempt individuals from morphing contractual disputes into tort claims. This is sensible, especially in a business context, as the doctrine serves to preempt contractual spats between merchants from manifesting as complex tort claims. Yet in the prism of a case where no contractual privity is alleged, the doctrine simply has no place.

As the United States District Court for the Central District of California has observed, "[t]he economic loss rule generally bars tort claims for contract breaches, thereby limiting contracting parties to contract damages." *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009) (citing *Aas v. Superior Court*, 24 Cal. 4th 627, 643 (2000)). *See also*, *Agape Family Worship Ctr., Inc. v. Gridiron*, 2016 WL 633864, at *3 (C.D. Cal. 2016) ("Given that there is no contract at issue here, the economic loss rule is inapplicable."); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) ("The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. Quite simply, the economic loss rule "prevent[s] the law of contract and the law of tort from dissolving one into the other.") (citing *Redarowicz v. Ohlendorf*, 92 Ill.2d 171 (1982); quoting *Rich Products Corp. v. Kemutec, Inc.*, 66 F.Supp.2d 937, 969 (E.D.Wis.1999)).

The Plaintiffs have not alleged the existence of a contract between themselves and Stones. The Complaint makes no reference to any contract. And if Stones believes one or more contracts to exist (which its Motion does not actually say or suggest), such is beyond the four

corners of the pleading addressed in the Motion. Thus, quite simply, the economic loss rule is inapplicable to the case *sub judice*.

b. Alternatively, a Special Relationship Exists Between a Casino Patron and a Casino Operator Under California Law

Given the black and white nature of the economic loss rule only applying to matters where the parties are in contractual privity, it appears Stones may be endeavoring to extend an alternative form of the rule that, too, is inapplicable *sub judice*. Specifically, while there are cases speaking to the rule's non-contractual application in the very narrow prism of commercial disputes, such cases equally make clear that exception is only applicable to claims for prospective economic advantage, and nothing about those cases even vaguely supports application of the doctrine *sub judice*.

The United States District Court for the Central District of California addressed this specific issue just a few years ago:

> If there is no contractual relationship between a plaintiff and a defendant, then defendant cannot invoke the economic loss rule. Plaintiffs cite a series of cases that allegedly stand for the proposition that privity of contract is not a prerequisite to invocation of the economic loss rule. All of these cases, however, involve situations in which, although the plaintiff could not sue on a contract theory, the dispute arose out of defendants' performance of a commercial transaction or sale.

UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 2015 WL 12746208, at *11–12 (C.D. Cal. 2015) (citing *Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc*., 556 F.3d 920, 921 (9th Cir. 2009); *Gauba v. Florence Hosp., LLC*, 2013 WL 614572, *3 (D. Ariz. 2013); *Wells v. Chase Home Fin., LLC*, 2010 WL 4858252, *6 (W.D. Wash. 2010) (quoting *Alejandre v. Bull*, 159 Wash.2d 674, 683 (2007)); *Miller v. United States Steel Corp*., 902 F.2d 573, 575 (7th Cir. 1990); *Laurens Elec. Cooperative, Inc. v. Altec Indus., Inc*., 889 F.2d 1323, 1326 (4th Cir. 1989); *Am. Stores Prop., Inc. v. Spotts, Stevens & McCoy, Inc*., 648 F.Supp.2d 707, 713 (E.D.

Pa. 2009); *Banknorth, N.A. v. BJ's Wholesale Club, Inc.*, 442 F.Supp.2d 206, 213 (M.D. Pa. 2006)).

To state the obvious, this case does not concern a commercial transaction or commercial relationship underlying a sale. To the contrary, one of the Plaintiffs' claims is quite literally for violation of one of California's consumer protection laws. So even if the expanded economic loss rule were to be contemplated, it is not one that would be applicable herein.

Yet even if, *arguendo*, (i) the economic loss rule is not confined to situations of contractual privity; (ii) the limitation of the expansion to commercial transactions were deemed inapplicable; (iii) this were a suit for prospective economic advantage; and (iv) the rule thus governed this case, the "special relationship" exception to the economic loss rule would still insulate the matter *sub judice*. Specifically, California courts acknowledge a "special relationship" to exist, and the expanded version of the economic loss rule to be thusly inapplicable, based on the following criteria:

> (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.

Andrews v. Plains All American Pipeline, L.P., 2017 WL 10543401, at *7–8 (C.D. Cal. 2017) (quoting *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979)).

Here, Stones' operation of poker games was most certainly intended to affect the Plaintiffs – they are literally the consumers paying Stones to operate those games and wagering money in those games. Similarly, the foreseeability the Plaintiffs might be harmed by cheating is manifest, especially after Stones was put on notice of the cheating and only took actions to cover it up. Equally, the Plaintiffs' injury is certain – they sue for the monies they paid Stones

(which are factually quantifiable) and the monies they lost (which, as discussed *supra*, are also demonstrably quantifiable). The "closeness of the connection" between Stones aiding a cheater and the Plaintiffs being damaged is rather intimate in nature. The moral blame in this case is extraordinary, for reasons discussed above that need not be restated (this case concerns what is generally regarded as the largest scandal in the history of broadcast poker). And it would seem public policy more than amply supports preventing future harm, as the actions of Mr. Postle, permitted by Stones, were directly in contravention of both the state and federal penal codes.

To be sure, a special relationship need not exist – there is no contractual privity alleged in the Complaint, this is not a merchant dispute over prospective economic damages, and the economic loss rule has no place in this suit. Yet even if one were to credit these positions, the same would still not invite dismissal of the Plaintiffs' Complaint.

c. The Complaint Properly States a Claim for Negligence

The Motion argues the Plaintiffs' claim for negligence (Count VI) should be dismissed on account of the economic loss rule and because Stones does not owe any duty to the Plaintiffs. Motion at § IV(B). As discussed above, the economic loss rule is inapplicable to the matter *sub judice*. This leaves only the question of an actionable duty. By virtue of both regulation and common law, Stones owes the Plaintiffs a duty upon which a negligence claim may be premised, and the Motion should accordingly be denied as to Count VI of the Complaint.

Familiarly, California law sets forth four elements for a claim of negligence: "(1) a legal duty to use due care; (2) a breach of such legal duty; (3) the breach was the proximate or legal cause of the resulting injury; and (4) actual loss or damage resulting from the breach of the duty of care." *Newman v. San Joaquin Delta Cmty. Coll. Dist*., 814 F. Supp. 2d 967, 980 (E.D. Cal. 2011) (Shubb, J.) (quoting *Megargee v. Wittman*, 550 F.Supp.2d 1190, 1209 (E. D. Cal. 2008)).

Mr. Kuraitis is a so-called "key employee" of Stones. Complaint at ¶ 246. California law requires a key employee, within five days of "obtaining knowledge or notice of any reasonably suspected" violation of the state's fraud, grand theft and/or petty theft statutes, to make a report to and notify the Bureau of Gambling Control's Criminal Intelligence Unit. 4 CA ADC § 12395(a)(3).

That regulation is promulgated pursuant to a statutory scheme observing, *inter alia*, "[p]ublic trust that permissible gambling will not endanger public health, safety, or welfare requires that comprehensive measures be enacted to ensure that gambling is free from criminal and corruptive elements, that it is conducted honestly and competitively, and that it is conducted in suitable locations." Bus. & Prof. Code § 19801. This regulation is thus expressly intended to prevent the exposure of the public to criminal activity in gaming establishments, and accordingly gives rise to an actionable duty under Section 669 of the California Evidence Code.

Stones also had a common law duty, as a proprietor of a business establishment, to protect the Plaintiffs from the wrongful acts of a third party upon the premises of that establishment. Under California law, "[t]he duty of a proprietor of a business establishment to business invitees generally includes a 'duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom.'" *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814, 819 (1997) (citing (*Taylor v. Centennial Bowl, Inc.*, 65 Cal.2d 114, 121 (1966)).

Here, Stones certainly had "reasonable cause to anticipate" Mr. Postle's criminal acts of cheating, in contravention of Section 337x of the Penal Code, as Mr. Kuraitis was quite literally put on actual notice of the cheating. Complaint at ¶¶ 155-159. The same acts putting Mr.

Kuraitis on notice of Mr. Postle's cheating sprung, in turn, an obligation for Mr. Postle's fraud, grand theft and petty theft to be reported, under governing regulations.

Stones breached these duties by not "taking affirmative action to control the wrongful acts" of Mr. Postle (*Kentucky Fried Chicken*, 14 Cal. 4th at 819), and by not making a law enforcement report that, in turn, would have triggered the derivative demise of Mr. Postle's cheating scheme. Rather than doing so, Stones engaged in a protracted series of actions aimed at covering up for Mr. Postle's criminal conduct. Complaint at ¶¶ 146-172.

These actionable breaches caused the Plaintiffs to sustain damages, as the Plaintiffs continued to play in Stones Live Poker games, with Mr. Postle, even after Stones was on notice of Mr. Postle's cheating. Complaint at ¶ 251. The Plaintiffs, in turn, have been damaged in a sum equal to the rake they paid to Stones to operate those putative-secure games, as well as in a sum equal to the monies they wrongfully lost to Mr. Postle pursuant to his cheating scheme. Complaint at ¶ 252.

d. Mr. Postle's Employment is Pleaded for Purposes of Imputing Knowledge, Not Creating *Respondeat Superior* Liability

The Motion correctly notes that while the Complaint alleges Mr. Postle to have been an employee of Stones, no claim for *respondeat superior* liability has been made in connection with his employment. Lest the Complaint prove unintentionally cryptic, the Plaintiffs are not presently suing Stones on the theory that it is vicariously liable for the actions of Mr. Postle; the Plaintiffs, as noted in the Complaint itself, are suing Stones for its own actions and inactions.

The allegations concerning employment in the Complaint are presently included solely for purposes of establishing agency and the imputation of knowledge arising therefrom under California law. *See* Civ. Code § 2332 ("As against a principal, both principal and agent are

deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."); *Garcia v. Martin*, 192 Cal. App. 2d 786, 790 (1961) ("…as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee.") (quoting *Munro v. Alcoholic Bev. etc. Control Appeals Bd.*, 181 Cal. App. 2d 162, 164 (1960)).

These allegations are included to put Stones on notice of the alleged employment. These allegations do not serve to craft any of the legal positions taken in this opposition (other than inasmuch as the Plaintiffs' periodically note the egregious and extraordinary nature of Stones' election, after being put on notice of Mr. Postle's cheating, to take various steps to coverup for his actions and to then go so far as to make him an employee).

Issues sounding in the imputation of knowledge may prove relevant as this case progresses, and the Plaintiffs did not want their understanding of Mr. Postle's employment to be a surprise when raised later in this litigation. For instant purposes, however, no claim is based on vicarious liability correlative to Mr. Postle's employment,[10] and none of the positions expressed in this brief are dependent upon any legal imputation of knowledge stemming from Mr. Postle's employment.

VI. Argument: The Complaint Validly States Claims for Fraud, Constructive Fraud and Negligent Misrepresentation

The Plaintiffs bring claims against Stones for constructive fraud and negligent misrepresentation, while solely Mesdames Brill and Mills bring a claim against Stones for fraud. The Motion seeks dismissal of these claims on various grounds, chiefly pegged to an

[10] For the avoidance of ambiguity, the Plaintiffs do take such positions based on Mr. Kuraitis' employment. Stones does not argue, in its Motion, that such positions are improper on account of Mr. Kuraitis' employment, however.

alleged insufficiency of pleading in the face of heightened rigors under Federal Rule of Civil Procedure 9(b) and a claimed absence of a relationship supporting liability for constructive fraud. As discussed below, however, the Complaint is pleaded with sufficient particularity, and the factual allegations contained therein amply create a relationship between the Plaintiffs and Stones from which a claim for constructive fraud may be asserted.

a. The Rule 9 Pleading Standards are Satisfied on the Claim for Fraud

Only Mesdames Brill and Mills (the "Fraud Plaintiffs") maintain a claim for fraud against Stones, as the Plaintiffs have been careful to craft their case in a manner that mirrors the facts as they are presently understood and the application of governing law to those facts.[11] While the other Plaintiffs have various other claims against Stones, only these two individuals have claims amounting to fraud. As this distinction suggests, appreciable care was placed into pleading this claim, and it is thusly one the Fraud Plaintiffs believe to amply withstand the Motion.

As this Honorable Court has previously observed, a claim for fraud, under California law, has five elements subject to the heightened pleading standard of governing rules:

> In California, the essential elements of a claim for fraud are "(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Under the heightened pleading requirements for claims of fraud under Federal Rule of Civil Procedure 9(b), "a

[11] The Complaint asserts Mr. Goone to also be pursuing this claim. In light of the arguments made by Stones in its Motion, and a careful examination of the facts the Plaintiffs have alleged, Mr. Goone voluntarily dismisses his fraud claim against Stones (Count VIII), without prejudice, pursuant to the allowances of Federal Rule of Civil Procedure 41(a)(1)(A)(i). He still maintains his other claims, brought on behalf of all Plaintiffs, and the Fraud Plaintiffs still maintain Count VIII on their respective behalves. The Plaintiffs take seriously the positions advanced by Stones and do not wish to advance an argument they believe to fall short of governing standards. Mr. Goone thus voluntarily dismisses of Count VIII as it applies to his personal claim.

> party must state with particularity the circumstances constituting the fraud." The plaintiffs must include the "who, what, when, where, and how" of the fraud.

Lane v. Vitek Real Estate Industries Group, 713 F.Supp.2d 1092, 1102 (E.D. Cal. 2010) (Shubb, J.) (quoting *In re Estate of Young*, 160 Cal. App. 4th 62, 79 (2008); Fed. R. Civ. P. 9(b); citing *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.2003); *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir.1994)). Case law also instructs the "knowledge of falsity" rigor of a fraud claim may be satisfied by a "reckless disregard for the statement's falsity." *In re Renovizors, Inc.*, 214 B.R. 232, 239 (Bankr. N.D. Cal. 1997), rev'd on other grounds by *In re Renovizor's, Inc.*, 282 F.3d 1233 (9th Cir. 2002) (citing *Alliance Mortg. Co. v. Rothwell*, 10 Cal.4th 1226, 1239 (1995)). *See also, Chang v. Wachovia Mortg., FSB*, 2011 WL 5552899, at *5 (N.D. Cal. 2011) ("However, taken together and construed in the light most favorable to Plaintiff, these allegations are still insufficient to state plausible claim for fraud, misrepresentation, and reckless disregard.").[12]

Here, the Plaintiffs have met these rigors. As the Motion itself acknowledges, the "who" requirement is satisfied by the Complaint pointing to Mr. Kuraitis making the fraudulent representations in his capacity as an employee of Stones. Motion at 23:16; Complaint at ¶ 262.

The "what" element is also satisfied: Mr. Kuraitis expressly told the Fraud Plaintiffs there was no cheating in the Stones Live Poker broadcast. Complaint at ¶ 262. He specifically made clear that Mr. Postle is not cheating. Complaint at ¶ 164. This was demonstrably counterfactual in and of itself. Complaint, *passim*. That Mr. Kuraitis also informed the Fraud

[12] The Plaintiffs acknowledge that while *In re Renovizors* references "reckless disregard for the statement's falsity" as an elemental alternative of actual knowledge, numerous cases – including *Lane* – set out the elements of a fraud claim, under California law, without making reference to such an alternative element.

Plaintiffs a thorough investigation had occurred and would be occurring only worsened the nature of his false representation on behalf of Stones. Complaint at ¶¶ 160, 263. He specifically alleged one such investigation already had occurred. Complaint at ¶ 165.

As for "when" the fraud occurred, the Complaint alleges Mr. Kuraitis made the representation to Ms. Brill on March 20, 2019. Complaint at ¶ 159. Ms. Mills is in possession of text messages from Mr. Kuraitis, dated March 13, 2019, in which he responds to her concerns about cheating by stating, *inter alia*:

> After live at the bike had a cheat scandal, I ordered a security audit of our systems. I also have ordered a second one being performed shortly. I plan to make this a quarterly expense and have already budgeted for it. Cell phones are not allowed in the production booth and the door is to always be shut. If the games gets cheated on my watch, I'll step down. I take it very seriously. Our data travels across a hard line and is not web based, so someone would literally have to tap into our hardline to hack us. Good news is we would notice that.
>
> Also, Mike [Postle] gets it in bad a lot and still gets there. An rfid cheat would not help with cards to come. He is just on a heater plan and simple.
>
> …
>
> Also, on another note .... I've known Mike a long time and I'm a good judge of character. I would vouch for him anyday[.] I dont know if you know my history Kasey, but I discovered, exposed and took a casino down over a cheating scandal. It was what first got me known in the industry. I will tell you the story sometime if you like. Game fairness is one of my highest priorities, and anyone who cheats on my watch will regret it[.]
>
> …
>
> On top of being a great player and reader, he does something else that gives him a huge edge over most players. Another thing I would be happy to discuss in person…

March 13, 2019 Text Messages from Mr. Kuraitis to Ms. Mills, attached hereto as Exhibit A.[13]

The "where" element is similarly satisfied, as Ms. Brill specifically alleges the comments to her were "made at Stones' eponymous facility." Complaint at ¶ 159. As noted *supra*, the representations to Ms. Mills were made via text message. The Complaint alleges all of the at-issue card games were played in Citrus Heights, California. Complaint at ¶ 2.

This leaves the "how" requirement, which is addressed with equal ease. The Complaint makes clear the conversation between Mr. Kuraitis and Ms. Brill was in-person. Complaint at ¶ 159-160. While the Complaint does not expressly say the conversation was oral in nature, such is the sort of "reasonable inference" contemplated by *Iqbal* and its progeny. As discussed above, the representation was made to Ms. Mills via text message.

The "who, what, when, where, and how" establish the misrepresentation element of a fraud claim. With regard to the required knowledge of falsity, Stones – through Mr. Kuraitis – represented the Stones Like Poker game was "one hundred percent secure" on account of it being audited quarterly, and that Mr. Postle is profitable through his use of a "Martingale strategy." Complaint at ¶¶ 160, 263; March 13, 2019 Text Messages from Mr. Kuraitis to Ms.

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[13] The Fraud Plaintiffs recognize these texts are not expressly appended to the Complaint, though they believe the fraudulent allegations are referenced in the Complaint, which takes care to delineate Mr. Kuraitis' representations and even quotes one of the texts ("on a heater"). Complaint at ¶¶ 164-165. If this Honorable Court feels these text messages need to be attached to the Complaint, or quoted or more specifically referenced in the Complaint, so as to satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b), the Fraud Plaintiffs respectfully request leave to do so. Otherwise, the Plaintiffs append them hereto as being referenced in the Complaint. *See, e.g., In re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1066 (N.D. Cal. 2010) ("while there is a general rule against referencing evidence outside the four corners of the complaint, an exception to the rule arises where a plaintiff references and relies on a particular document as part of the moving allegations of the complaint. In such cases, the court is justified in looking outside the four corners of the complaint, to the document itself if offered.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n. 13 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

Mills, *supra*. These were false assertions, and Stones would have known they were false as it would have known quarterly security audits were not, in fact, being performed. Complaint at ¶ 161. Moreover, Stones, as an operator of a poker room, would have known a so-called "Martingale strategy" cannot be used in a poker game. Complaint at ¶ 162. [14] Further, inasmuch as Mr. Postle's confederate was an employee of Stones, Stones was imputed with knowledge of the falsity of representations, to the Fraud Plaintiffs, Mr. Postle's play was honest. Complaint at ¶ 233.

Stones' intent to induce reliance is manifest as well, with the representations being plainly made to induce the Fraud Plaintiffs to continue playing in Stones Live Poker games. Complaint at ¶ 234. Had Stones not covered up for Mr. Postle, the cheating at issue *sub judice* would have been sooner revealed, Stones Live Poker games would have been sooner terminated, and Stones would not have continued to collect monies in the form of the rake taken in those games. Complaint at ¶¶ 184-187, 265. When Stones failed to take the proper steps to cure the security breach and resulting cheating, its exposed itself to legal liability.

The Fraud Plaintiffs justifiably relied on these assertions, continuing to play in Stones Live Poker games, which they would not have done had they known Mr. Postle was cheating.

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[14] Without delving too far into the weeds of gaming parlance, a "Martingale strategy" is one whereby a player places a wager. If that wager loses, the player then places a second wager for twice the size of the original wager. If that wager loses, the player again doubles the wager size (and so on and so forth). The idea is that once a winning wager comes, it will be of a size sufficient to cover the losses of all preceding wagers. *See, e.g.*, Lewis Mitchell, *Martingale System: How Does It (Really) Work?*, PokerNews (July 15, 2019), https://www.pokernews.com/casino/martingale-system.htm. In the context of a house-banked game (ie, roulette), this strategy has some application provided there is a sufficient spread between the size of a wager placed and the maximum allowable bet for the given table. In a poker game, however, where any wager has to be "called" by opposing players to be paid off, and where the stakes of a game remain constant for its entire duration, application of this strategy is quite literally impossible.

Complaint at ¶ 265. It is difficult to extrapolate upon this point (that one would not knowingly play in a card game with someone who is cheating), given that the proposition is fairly self-evident, though it bears note Stones does not specifically attack justifiable reliance in its Motion, likely for this precise reason.

Finally, the Complaint pleads the existence of "resulting damages" in the form of the rake paid to Stones to continue to operate the Stones Live Poker games, as well as the monies lost to Mr. Postle in those games. Complaint at ¶¶ 184-193.

As noted by this Honorable Court, the purpose of the heightened pleading standard of Federal Rule of Civil Procedure 9(b) is to "inform each defendant of his alleged participation in the fraud." *Castaneda*, 687 F. Supp. 2d at 1199–1200. Based on the foregoing, it is respectfully suggested Stones is very much on notice of that for which it is being sued, and the Plaintiffs have adequately pleaded each element of a claim for fraud. Accordingly, the Motion merits denial as to Count VIII.

b. The Plaintiffs Validly State a Claim for Constructive Fraud

There is a unique aspect to this case, born of the egregious conduct of Mr. Postle and Stones, the outrageous nature of that conduct, and the incredibly vulnerable posture in which the Plaintiffs placed themselves by agreeing to play poker at the RFID Table that would be reading their concealed cards in real time. While the Motion protests the Complaint does not make allegations giving rise to a confidential relationship – and, ergo, the Complaint does not support a claim for constructive fraud – the Plaintiffs respectfully suggest this markedly perverse collection of events does give rise to such a relationship and, by extension, such a claim.

"Constructive fraud 'arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice.' Actual

reliance and causation of injury must be shown." *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1131 (2014) (citing *Tyler v. Children's Home Society*, 29 Cal. App. 4th 511, 548 (1994); *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 516, n. 14 (1980); *Estate of Gump*, 1 Cal. App. 4th 582, 601 (1991); Civ. Code § 1573; *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 981–982, n. 13 (1997); *Assilzadeh v. California Federal Bank*, 82 Cal. App. 4th 399, 415 (2000)).

California law, in turn, imposes a confidential or fiduciary relationship in situations inviting "1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself." *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1161 (2005) (quoting *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257 (2003) (quoting *Langford v. Roman Catholic Diocese of Brooklyn*, 177 Misc. 2d 897, 900 (N.Y. Sup. Ct. 1998)).

To be clear, the Plaintiffs do *not* maintain casinos and their patrons are engaged in a confidential relationship as a matter of law. Nor do the Plaintiffs allege a confidential relationship would exist in myriad situations concerning casinos and their patrons. However, as the court of a sister state has observed, the existence, *vel non*, of a confidential relationship is tremendously fact-specific, and the facts *sub judice* do lend themselves to such a relationship being cognizable under the *Persson* test. *Wisniski v. Brown & Brown Ins. Co. of PA*, 906 A.2d 571, 578 (Pa. Super. 2006) ("The question of whether or not a confidential relationship exists between the parties is intensely fact-specific.") (citing *Porreco v. Porreco*, 571 Pa. 61 (2002); *Makozy v. Makozy*, 874 A.2d 1160 (Pa. Super.2005); *Owens v. Mazzei*, 847 A.2d 700 (Pa. Super. 2004)).

Working backward and addressing the fourth element of a confidential relationship first, the allegations of the Complaint show the Plaintiffs having an inability to protect themselves against Mr. Postle's cheating. It was Stones that was operating the subject card games, it was Stones that installed and operated the RFID Table used for those games, it was Stones that was promising to conduct quarterly security audits, and it was Stones that was responsible for the security of the subject card games. Complaint at ¶¶ 104-115. The Plaintiffs could not both participate in the games and operate security for the games; not only would such be logistically impossible, but the imagination need not wander too far to envision what happens to a casino patron who demands entry to the operation's security rooms and the right to audit security protocols. Moreover, the whole premise of the RFID Table was that players would not have access to its inner-workings; that Mr. Postle evaded this core understanding is very much the foundation of this case.

Addressing the third element, this was a situation accepted by Stones by virtue of it electing to be in the casino business and broadcast the Stones Live Poker games. Stones chose to operate its own security (albeit likely at the behest of state gaming regulators, though such does not change Stones' "acceptance" of the task for the elemental purposes of a confidential relationship). A company going into the taxi cab business inherently needs to acquire cars and to insure them; a company going into the casino business likewise needs to put in place a security system and operate that system on a continuous basis.

With regard to the second element, this most certainly results in the empowerment of Stones by its patrons. The Plaintiffs are buying chips and paying Stones a rake to operate games in a secure fashion, with specific trust being placed in Stones to manage its RFID Table in a secure fashion given the mayhem that would spring from failing to do so. Stones is empowered

to run the Stones Live Poker games, and operate that RFID table, by virtue of the Plaintiffs showing up to play and paying Stones to operate the game and the table in an honest fashion.

On the first element, this scheme leaves the Plaintiffs in an immensely vulnerable posture, ripe for exploitation if Stones does not fulfill its obligation to properly secure the at-issue poker games. The Plaintiffs are sitting at a table that reads their cards in real time, and they have literally no choice but to rely on Stones' security when playing in these games; as discussed above, they cannot much demand to personally audit such security protocols, and there are myriad reasons a poker player demanding to install her or his own security cameras, to be monitored by her or his own ad hoc entourage, on the premises of a licensed gaming establishment, would be shown the door and almost assuredly told to never return.

As the *Persson* Court observed, "vulnerability 'is the necessary predicate of a confidential relation,' and 'the law treats [it] as 'absolutely essential'....'" *Persson*, 125 Cal. App. 4th at 1161 (quoting *Richelle L.*, 106 Cal. App. 4th at 273 (quoting Bogert, Trusts & Trustees (2d ed.1978) § 482, at pp. 288–289)).

Here, the Plaintiffs' vulnerability could not have been greater. They were wagering money – often in appreciable sums – in a game for which they were trusting Stones to furnish adequate security; they were completely vulnerable to Stones' ultimate failure to adequately furnish that security, as well as Stones' efforts to coverup for Mr. Postle. The Plaintiffs were sitting under cameras – both broadcast cameras and security cameras – controlled exclusively by Stones, at a table with RFID technology controlled exclusively by Stones, and wholly giving over the legitimacy and security of their play to Stones.

Again, the Plaintiffs do not mean to suggest a casino always – or even normally – enters into a confidential relationship with its consumers. One can easily imagine a situation where a

patron is owed no such duty in the prism of being pickpocketed while playing a slot machine, or where a consumer is owed no such duty when mugged in the parking lot. But the existence of such a duty is fact-specific, and the facts of this case – especially as they relate to the enormous trust placed in Stones to operate the RFID Table, capable of reading every Plaintiff's concealed cards in real time – are both *sui generis* and extraordinary. One would not sit down at a table capable of revealing her or his concealed cards, and play a game of poker, unless that person was at peace with being wholly vulnerable and equally trusting of the operative casino to protect the individual in that vulnerable posture. Without an element of trust and acceptance of inherent vulnerability to be protected by a casino, no reasonable player would opt to play in a broadcast game with an RFID table.

Thus there was, in fact, a confidential relationship here, and the Plaintiffs believe they have adequately pleaded the facts underlying the same in their Complaint. (Though, as noted *infra*, to the extent the elaboration set forth herein needs to be more specifically pleaded in their Complaint, they respectfully request leave to do so.) This leaves only the questions of actual reliance and injury, to satisfy the rigors of the *Prakashpalan* Court.

Actual reliance is discussed above in connection with the analysis of the confidential relationship. Injury is specifically pleaded in the Complaint: the Plaintiffs paid monies paid to Stones as and for its operation of the at-issue poker games, and lost monies swindled in those games. Complaint at ¶¶ 184-193.

Accordingly, the Plaintiffs believe their Complaint adequately states a claim for constructive fraud, and that the Motion should be denied as to Count VII.

c. Negligent Misrepresentation is Sufficiently Alleged

i. Rule 9 is Inapplicable to the Plaintiffs' Claim for Negligent Misrepresentation

Concerning the claim for negligent misrepresentation, there is conflicting case law concerning the particularity, *vel non*, with which it must be pleaded. However, as a sister court has observed of efforts to subject claims for negligent misrepresentation to a heightened pleading standard, "After conducting its own research, this Court concludes that the holding that negligent misrepresentations must meet the heightened pleading requirements of Rule 9(b) appears to be cut from whole cloth." *Petersen v. Allstate Indem. Co.*, 281 F.R.D. 413, 416–17 (C.D. Cal. 2012). Indeed:

> Rule 9(b) is expressly limited to allegations of "fraud or mistake." Because the California tort of "negligent misrepresentation" has a critically different element from the tort of "fraud," analyzing negligent misrepresentation under Rule 9(b) is contrary to both the express language and policy of the statute.
>
> …
>
> Thus, the Court holds that the California tort of negligent misrepresentation need not satisfy the heightened pleading standard of Rule 9(b).

Petersen, 281 F.R.D. at 417-418 (C.D. Cal. 2012) (quoting Fed. R. Civ. P. 9(b)).

The *Peterson* Court's holding is not an outlier – it has been adopted by this Honorable Court on multiple occasions. *See, e.g., Woods v. Davol, Inc.*, 2017 WL 3421973, at *7 (E.D. Cal. 2017) ("Based on the court's persuasive reasoning in Petersen, and falling in with the more recent trend of authority, the court now considers whether plaintiff has satisfied the elements of a negligent misrepresentation claim under Rule 8."); *Roberts v. Orange Glo*, 2014 WL 5780961, at *2 (E.D. Cal. 2014) (Shubb, J.) ("While it has not decided the issue, the Ninth Circuit has held that 'only allegations ... of fraudulent conduct must satisfy the heightened pleading

requirements of Rule 9(b).' 'Because the California tort of 'negligent misrepresentation' has a critically different element from the tort of 'fraud,' analyzing negligent misrepresentation under Rule 9(b) is contrary to both the express language and policy of the statute.' Accordingly, the court will not apply a heightened pleading standard to plaintiffs' claim for negligent misrepresentation and will instead inquire whether plaintiffs state a plausible claim for relief under Iqbal.") (quoting *Vess*, 317 F.3d at 1105; *Petersen*, 281 F.R.D. at 417; citing *Iqbal*, 556 U.S. at 678).

Thus, the Plaintiffs respectfully suggest their lone claim for negligent misrepresentation (Count III) ought to be evaluated under the standard of Federal Rule of Civil Procedure 8, for the very reasons articulated by the *Peterson* Court and its progeny. However, to the extent this Honorable Court believes otherwise, they equally maintain the claim is backed by sufficient detail to adhere to the more rigorous pleading standard.

ii. The Plaintiffs Present a Valid Claim for Negligent Misrepresentation

The Complaint makes out a valid claim for negligent misrepresentation, in accord with governing law. The Plaintiffs have been express in identifying how they were deceived by Stones and its agents, how they relied upon such deception, and what harms have flowed therefrom. Stones' contentions to the contrary are belied by the Complaint itself.

As this Honorable Court has previously observed, California law provides five elements for a claim of negligent misrepresentation:

> (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant made the representation without reasonable ground for believing it to be true; (3) in making the representation, the defendant intended to deceive

> the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages.

Carlin v. DairyAmerica, Inc., 978 F. Supp. 2d 1103, 1111 (E.D. Cal. 2013) (citing *West v. JPMorgan Chase Bank*, 214 Cal. App. 4th 780, 792 (2013)).

Stones represented Mr. Postle to be an honest and extraordinary poker player, through expressly stating such to the Fraud Plaintiffs (Complaint at ¶¶ 160-161) and through its portrayal of him in such a light to the public writ large (Complaint at ¶¶ 118, 228). Indeed, despite being on notice of Mr. Postle's cheating (Complaint at ¶¶ 155-165), Stones endeavored to propagate to all – including the Plaintiffs – the falsity of his not being dishonest but, rather, simply gifted, through, *inter alia*, "produc[ing] various graphics portraying Mr. Postle as a deity-like individual imbued with omniscient powers (with one such graphic conflating an image of Mr. Postle and an image of Jesus Christ)." Complaint at ¶ 118. Further, when Mr. Postle's play would be of a character that would be so ludicrous as to expose his cheating, Stones would coverup for him by changing its on-screen graphics and announcing the existence of a technical mistake. Complaint at ¶¶ 146-154.

As noted above, Stones made these representations without a reasonable basis for believing them to be true. Specifically, Stones knew its own graphics were not errant and its production system had not malfunctioned. Complaint at ¶¶ 150-152. Stones also knew it was not actually conducting quarterly security audits. Complaint at ¶¶ 167-169.

These representations were made with an intent to deceive the Plaintiffs so as to conceal Mr. Postle's cheating. Complaint at ¶¶ 154, 232. Stones did so in an effort to induce the Plaintiffs to continue playing on the Stones Live Poker games. Complaint at ¶ 234.

The Plaintiffs relied on these representations by continuing to play on the Stones Live Poker games, continuing to pay Stones a rake to operate such games, and continuing to risk their money in such games. Complaint at ¶ 235. The Plaintiffs were damaged in this reliance by virtue of the rake they paid to Stones and the monies they had swindled by Mr. Postle. Complaint at ¶¶ 184-193, 236.

Accordingly, regardless of which pleading standard is applied, the Plaintiffs have made out a valid claim for negligent misrepresentation, and the Motion should be denied as to Count III.

VII. Argument: The CLRA Claim is Properly Set Forth

The Plaintiffs assert a claim under the Consumer Legal Remedies Act (the "CLRA") as consumers of Stones' establishment, on account of Stones having represented its Stones Live Poker games to be secure and honest when, in fact, such games were not. Stones, in turn, argues the Plaintiffs lack standing as consumers since they were playing poker for monetary gain, that operating a casino does not amount to providing a service, that no transactions occurred to trigger the CLRA, and that the Plaintiffs' statutory notice is defective. Each of these arguments is unavailing, with Stones contention that those who play games for money do not qualify as consumers being particularly difficult to square inasmuch as such a policy would grant Stones *ipso facto* immunity under the CLRA inasmuch as all gambling patrons are, by definition, persons playing games for money.

To succeed on a CLRA claim, a litigant must show that the defendant's conduct was deceptive, and that the deception caused the litigant harm. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) ("The statute requires that 'plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive, but that the deception caused them harm.'")

(quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)); *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 522 (C.D. Cal. 2015).

To state a claim under the CLRA, a plaintiff must show that: (1) a consumer is exposed to an unlawful business practice, and (2) the consumer is damaged by the unlawful practice. *Richter v. CC-Palo Alto, Inc*., 176 F. Supp. 3d 877, 899, (N.D. Cal. 2016) (quoting *MacRae v. HCR Manor Care Servs*., 2014 WL 3605893, at *3 (C.D. Cal. 2014) (quoting *Durell v. Sharp Healthcare*, 183 Cal.App.4th 1350, 1367 (2010))).

The CLRA defines "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Civ. Code §1761(d). Here, the Plaintiffs engaged the services of Stones in order to participate in the Stones Live Poker games for personal purposes. They were paying Stones to furnish poker dealers, poker tables, security, and all other manner of services traditionally attendant to a casino card game.

Stones asserts that "playing a game of chance for money by playing poker at Stones is not a good or service 'for personal, family or household purposes.'" Motion at ¶ 28:13-14. In so doing, Stones ignores that the CLRA expressly provides for the liberal construction of its terms "to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices." Civ. Code §1760. Nowhere does the Complaint allege any of the Plaintiffs to be professional gamblers; if Stones wants to argue one or more of the Plaintiffs are, in fact, professional gamblers, and that such ought to place them outside the protective purview of the CLRA, such would seem to be a question of fact ripe for assertion as an affirmative defense – not grounds upon which to seek dismissal. Moreover, poker is a game, and the inherent objective of all games is to derive enjoyment through winning; this is prototypical consumer behavior.

As analyzed and assayed herein, the Plaintiffs repeatedly compensated Stones, in the form of paying the rake associated with the Stones Live Poker games (Complaint at ¶¶ 184-187), thus giving rise to a series of transactions within the ambit of the CLRA. (It bears notation the Plaintiffs also had to buy gaming chips from Stones every time they sought to play in a Stones Live Poker game; that formalistic act would, in and of itself, more than handily satisfy the transactional rigor.)

The CLRA defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Cal. Civil Code § 1761(b). The services Stones provided to Plaintiffs — the tables with requisite dealers, the supporting staff of security, management, directors, food staff, and the cage and its accompanying staff — constitute services under the statutory definition. These various services Stones provided to the Plaintiffs were intended to create an enjoyable and safe atmosphere for consumers, situationally analogous to a barbershop, where patrons can enjoy the surroundings and entertainment while the establishment provides a personal service. Plaintiffs paid for these services through a portion of the "rake," or the fixed-rate amount of money Stones extracted from each played pot in the broadcast games. Complaint at ¶¶ 184-187.

Additionally, while the CLRA requires only services *or* goods, the statute defines "goods" as "tangible chattels bought of leased for use primarily for personal, family, or household purposes, […]." Cal. Civil Code §1761(a). Under this definition, the chips used to play in the Stones Live Poker games are tangible chattels the Plaintiffs bought from Stones for personal use during the subject games. Without said tangible chattels, the Plaintiffs would not be able to play in the Stones Live Poker broadcasts; acquiring these tokens – for which Stones has a

necessary monopoly on sales – is literally a condition precedent to playing in a Stones poker game.

The statutory scheme, in turn, defines "transaction" as "an agreement between a consumer and another person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement." Cal. Civil Code §1761(e). In this matter, there is a perceptible agreement between the Plaintiffs – the consumers – and Stones, whereby the Plaintiffs will utilize Stones' services and Stones will charge them a rake for the performance of such services. While the Complaint certainly does not allege the existence of an actual contract, the CLRA is express in making clear an "agreement" need not be "a contract enforceable by action," and the CLRA's liberal construction would be decimated if a formal written document had to underlie every consumer transaction to bring the subject transaction within the protective purview of the CLRA.

This is a statutory scheme that is in place to protect consumers against unfair and deceptive business practices such as cheating patrons, concealing the actions of persons who cheat patrons, and aiding persons in their cheating of patrons. The business practices of Stones, alleged throughout the Complaint, undoubtedly work against the common good of the general population and California's public policy. Application of the CLRA *sub judice* conforms with the statute's stated prophylactic intent and serves its express purpose of protecting California's consumer base.

Under the CLRA, litigants must provide at least thirty (30) days' notice to the alleged wrongdoer before filing an action for damages. *Allen v. Similasan Corp.*, 2013 WL 5436648, at *2 (S.D. Cal. 2013) (citing Cal. Civ. Code § 1782). Additionally, "[t]he notice must specify the

particular alleged violations" of the CLRA and demand that the person "correct, repair, replace or otherwise rectify" the alleged violations." *Id.*

The purpose of the notice requirement under § 1782 of the CLRA is to facilitate settlements and provide the alleged wrongdoer with an opportunity to correct or repair the at-issue violations. *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 41 (1975). Here, the notice was sent to Stones' litigation counsel of record in this case, after the case was already pending. In fact, the notice had to be sent to litigation counsel to avoid violation of the ethical rule governing direct communication with a party represented by counsel. *See* CLRA Notice, DE 47-1, at p. 2. The notice included extensive details of the nature of the demand being made, the statutory basis for the demand, and the facts giving rise to the demand. *Id.* at p. 1 ("Stones has violated Section 1770(a)(4-5, 7) of the California Civil Code by conducting so-called 'Stones Live' poker games in which representations of an implicit and explicit nature were made to participants that, in turn, were demonstrably counterfactual in nature. Without limitation, Stones deceptively represented – to all participants – the subject games were secure in nature; Stones represented – to all participants – the subject games have the characteristic of being secure and honest games; Stones represented – to all participants – that the Stones Live games were of a standard and quality featuring sufficient security protocols to avoid cheating through utilization of the games' electronic stream; and Stones represented to certain specific participants – including Veronica Brill – that allegations of Michael Postle cheating in these games had been investigated and determined to be unfounded in nature.").[15]

[15] In the interest of concision at the tail of an admittedly-lengthy brief, the Plaintiffs do not quote herein the whole of their notice, but respectfully note it has been placed on the docket by Stones, at DE #47-2.

Stones now alleges the Plaintiffs' CRLA claim must fail due to the underlying notice not referencing the RFID Table or illicit utilization of the table. Motion at 29:5-7. This argument is unavailing for two reasons, one legal and one pragmatic. First, the notice expressly incorporated the contents of the Plaintiffs' complaint initiating this case. *See* CLRA Notice, DE 47-1, at p. 1 ("as set forth in the complaint in the above-referenced case (the contents of which are incorporated herein by reference)…"). Second, requiring the Plaintiffs to restate the whole of their Complaint – or even just select portions thereof – in a new demand to Stones, and to then file a new CLRA claim once another 30 days have run, would promote no interest other than one of a purely dilatory and ministerial nature.

Moreover, the RFID Table does not alone give rise to the violations of the CLRA *sub judice*. Indeed, the notice expressly lays out several fraudulent activities, deceptive representations, and acts of misconduct in conjunction with violations of the CLRA. Simply put, the safeguards needed for the use of the RFID Table are not the only CLRA violation alleged in the notice and the Plaintiffs' CLRA claim does not rest solely on the poor safeguards used by Stones in connection with the RFID Table.

For these reasons, the Plaintiffs have validly stated a claim for violation of the CLRA, and the Motion should be accordingly denied as to Count X of the Complaint.

VIII. Argument: Mr. Brill has Put Forth a Proper Claim for Libel Per Se

After Ms. Brill exposed Mr. Postle as cheating in the Stones Live Poker games, Stones responded by posting a social media message describing her allegations as being "completely fabricated." On this basis, she (and she alone) sues Stones for libel per se; the Motion argues her claim to lack viability because the subject message does not expressly name her and she has not pleaded special damages. Inasmuch as California law does not require one to be expressly

named to state a claim for libel per se, and does not require a showing of special damages as a condition precedent to such a claim, the Motion merits denial as to Count IX.

As this Honorable Court has observed of the requirements for a claim for libel per se under California law:

> A statement is libelous per se if it defames the plaintiff on its face, that is, without the need for extrinsic evidence to explain the statement's defamatory nature. "Material libelous per se is a false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Yow v. Nat'l Enquirer, Inc., 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008) (quoting *Washburn v. Wright*, 261 Cal. App. 2d 789, 797 (1968)).

The *Yow* case is instructive instantly, as it concerns an article in which the National Enquirer accusing actor Mel Gibson of "snorting cocaine" in the back room of a bar, while "[t]here were four or five women around the table with him who were sharing the coke with him." *Yow*, 550 F. Supp. 2d at 1181. While the article did not expressly identify the plaintiff as being one of the women with whom Mel Gibson was utilizing an illicit drug, it quoted her father as saying, "Mel ended up sleeping with her friend. He wanted to sleep with my daughter Angela, but I told him if he tried to I'd break his face!" *Id.*

In *Yow*, this Honorable Court made clear a claim for libel per se is viable so long as the plaintiff is identifiable by reasonable implication, with the implication in that case being that the plaintiff had taken drugs with an actor: "[t]o survive a motion to dismiss, 'the plaintiff must effectively plead that the statement at issue either expressly mentions [her] or refers to [her] by reasonable implication.'" *Id.* at 1187 (quoting *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 (1986)).

Here, Ms. Brill exposed Mr. Postle and Stones, on the social media platform Twitter. Complaint at ¶ 269. Stones responded by issuing a statement – on the same social media platform – declaring "[t]he recent allegations are completely fabricated." *Id.* Following Stones' issuance of this statement, Ms. Brill – known to be the person who had accused Mr. Postle of cheating on Stones Live Poker broadcasts – "suffered bullying, harassment, and emotionally-taxing non-physical attacks on social media and elsewhere." Complaint at ¶ 271. This continued for a period of days until the poker community at large performed its own *ad hoc* investigation, realized Ms. Brill's allegations to be well-founded, and came to her defense. Complaint at ¶ 272. During those intervening days, before Ms. Brill was acquitted by the poker community, she "suffered the emotional duress of having her integrity and reputation sullied." *Id.*

Quite plainly, Stones made a public statement – that Ms. Brill's allegations about Mr. Postle were "completely fabricated" – on the same platform where Ms. Brill had made those allegations, to largely the same audience to whom Ms. Brill had made those allegations, and at a time when Ms. Brill was largely alone in making those allegations. In so doing, Stones identified Ms. Brill by "reasonable implication." And in so doing, Stones exposed Ms. Brill to "hatred, contempt, ridicule, [and] obloquy," causing her "to be shunned." *Yow*, 550 F. Supp. 2d at 1183.

Ms. Brill has thus properly stated a claim for libel per se, and the Motion should be denied accordingly.

IX. To the Extent Required, Leave to Amend is Sought

This is a somewhat-complex case, concerning a high-tech con involving casino security, brought by a fairly large number of individuals. Reality is not always as easily synthesized as one of the sagas of Daniel Ocean, and while the Plaintiffs have drafted their Complaint with an

eye toward pleading specific facts, drawing various causes of action from those facts, and ensuring all involved are reasonably on notice of that for which they are being sued, the Plaintiffs also respect and appreciate there is always room for greater detail to be inserted. Thus while they maintain the Complaint is stated sufficiently to merit the Motion's denial, they respectfully request leave to amend should this Honorable Court believe their claims to be wanting for any level of detail or extrapolation.

Specifically, and without limitation, the Plaintiffs are prepared to amend their Complaint to: (i) allege the identity of Mr. Postle's chief confederate by name and position; (ii) include – by transcription or attachment – the text messages sent to Ms. Mills; (iii) furnish additional allegations about Stones creating a narrative of Mr. Postle's gifted play to coverup for his cheating; (iv) furnish additional allegations concerning Stones' use of graphics to conceal some of Mr. Postle's most obvious cheating; (v) offer additional allegations concerning the information technology systems underlying the at-issue RFID table and the manner in which it read players' cards in real time; (vi) identify the rake paid over to Stones in the 68 subject poker games; (vii) allege the specific dates, among those 68 games, on which each Plaintiff played with Mr. Postle; (viii) describe in greater detail the mathematical reasons Mr. Postle's style of play is one that would produce appreciable losses over the midterm and long-term (with 68 sessions being long-term) if not informed by cheating; (ix) detail why Mr. Postle would not need knowledge of cards yet-to-be-dealt, but merely the card holdings of his adversaries, to effectively cheat; (x) allege with greater detail the benefits conferred upon Stones, aside from the rake it collected, for its operation of a broadcast poker game; (xi) further extrapolate upon how Stones fell well below prevailing industry standards in permitting Mr. Postle's cheating to not merely occur but, indeed, persist; (xii) identify the myriad casinos that banned Mr. Postle

from setting foot upon their premises before his scheme in this case was commenced; (xiii) provide details on Mr. Postle's history of endeavoring to cheat gaming operators; (xiv) furnish allegations tying Mr. Postle to Russ Hamilton, the individual generally regarded as having operated the largest cheating scandal in the known history of online gaming; (xv) allege actions undertaken by Mr. Postle and his surrogates, following the revelation of the scandal giving rise to this case, that evidence an ongoing effort to conceal his cheating through the perpetuation of further and additional acts of dishonesty; (xvi) allege the consideration Stones paid to Mr. Postle as an employee, after learning of his cheating; and (xvii) specify the dates on which Mr. Postle personally organized Stones Live Poker games in his capacity as an employee of Stones.

The Plaintiffs also note, as referenced in their Complaint, that should this Honorable Court find any infirmity in their claim against Mr. Postle and his confederate(s) for violation of the Racketeer Influenced Corrupt Organization Act (Count I), the Plaintiffs are prepared to amend their pleading to make this matter a class action, so as to preserve federal jurisdiction under Section 1332(d)(2) of Title 28 of the United States Code. Complaint at ¶ 102.

The above list of amendments the Plaintiffs can make, if necessary, is not exhaustive. The Plaintiffs and their counsel have poured considerable time, resources and effort into investigating this case; they have already engaged expert witnesses and they have already amassed appreciable evidence. So while they certainly do not mean to imply they wish to forego discovery, they do believe they can supplement their pleading to whatever degree necessary to conform to the rigors of this Honorable Court. And, thus, if this Honorable Court believes that pleading to be lacking in any way, they respectfully seek leave to do so.

X. Conclusion

WHEREFORE, the Plaintiffs respectfully pray this Honorable Court (i) deny the Motion; (ii) alternatively, afford leave to amend if additional allegations are necessitated; and (iii) afford such other and further relief as may be just and proper.

Dated this 4th day of May, 2020.

Respectfully Submitted,

THE VERSTANDIG LAW FIRM, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2020, I caused a true and correct copy of the foregoing to be served upon the following persons via this Honorable Court's CM/ECF system:

Michael L. Lipman, Esq.
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Counsel for King's Casino, LLC

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Law Offices of Richard Pachter
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Sacramento, CA 95825
Counsel for Justin Kuraitis

I further certify that on this 4th day of May, 2020, I have caused a true and accurate copy of the foregoing to be served on the following person via United States Mail, postage prepaid:

Michael L. Postle
3724 Deerwalk Way
Antelope, California 95843

/s/ Maurice B. VerStandig
Maurice B. VerStandig

9:14

2

J

Justin >

Wed, Mar 13, 3:27 PM

Come play the live stream tonight

I would have needed to have found a babysitter already. It's 5/5?

Yes

Goodlineup, would be cool to have you play

Just use the Stones day care

I agree. Is postle in the game?

😂😂😂

Yes, just wait for his bathroom breaks to play a hand

I know we run a super clean game but between you and I

Text Message

Pay

Justin >

I know we run a super clean game but between you and I have concerns he may have found away to cheat somehow. Or else he is a god which is very probable. It's going to be tough for me to play tonight on short notice but I'm ready to play on stream next chance I get.

After live at the bike had a cheat scandal, I ordered a security audit of our systems. I also have a second one being performed shortly. I plan to make this a quarterly expense and have already budgeted for it. Cell phones are not allowed in the production booth and the door is to always be shut. If the game gets cheated on my watch, I'll step down. I take it very seriously.

Our data travels across a hard line and is not web based, so

Text Message

2

J

Justin >

After live at the bike had a cheat scandal, I ordered a security audit of our systems. I also have a second one being performed shortly. I plan to make this a quarterly expense and have already budgeted for it. Cell phones are not allowed in the production booth and the door is to always be shut. If the game gets cheated on my watch, I'll step down. I take it very seriously.

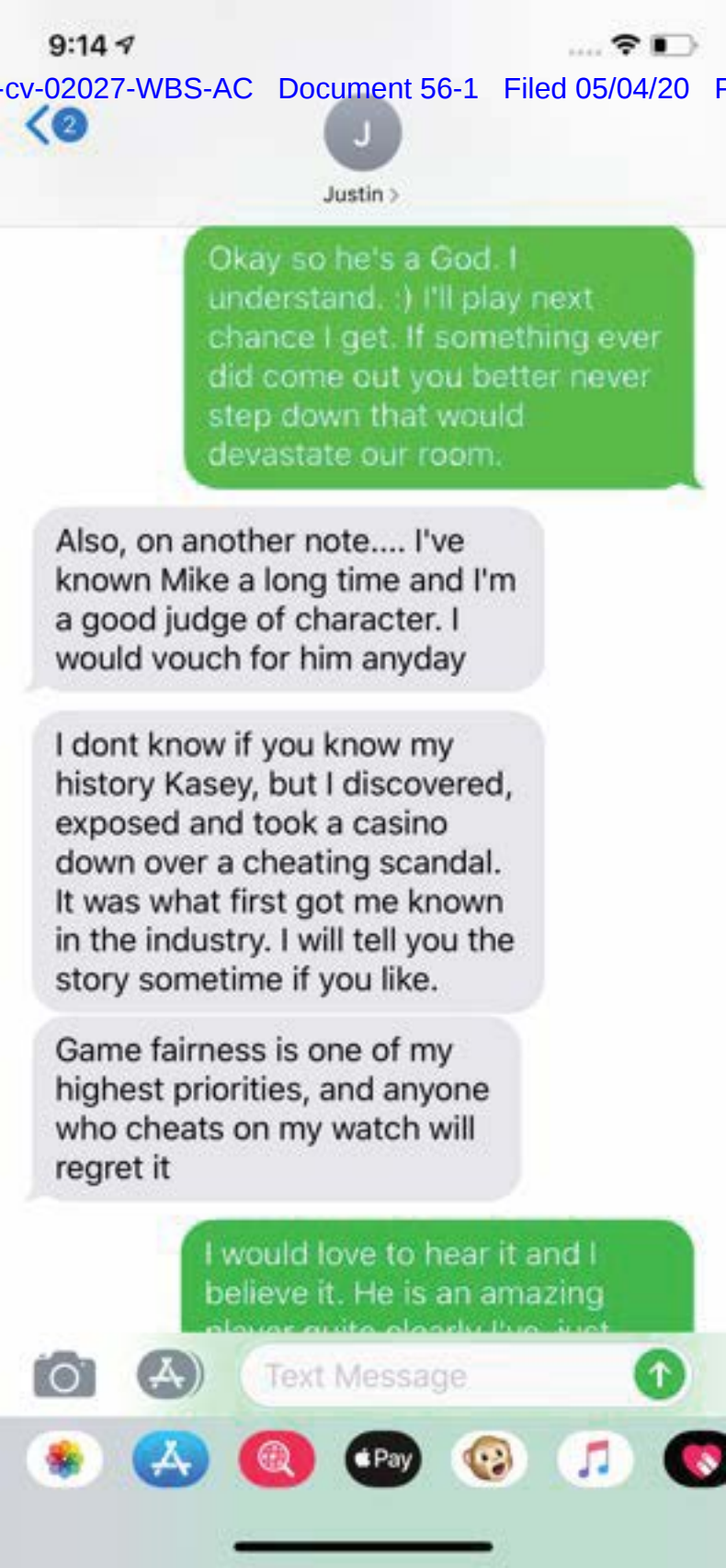
Our data travels across a hard line and is not web based, so someone would literally have to tap into our hardline to hack us. Good news is we would notice that.

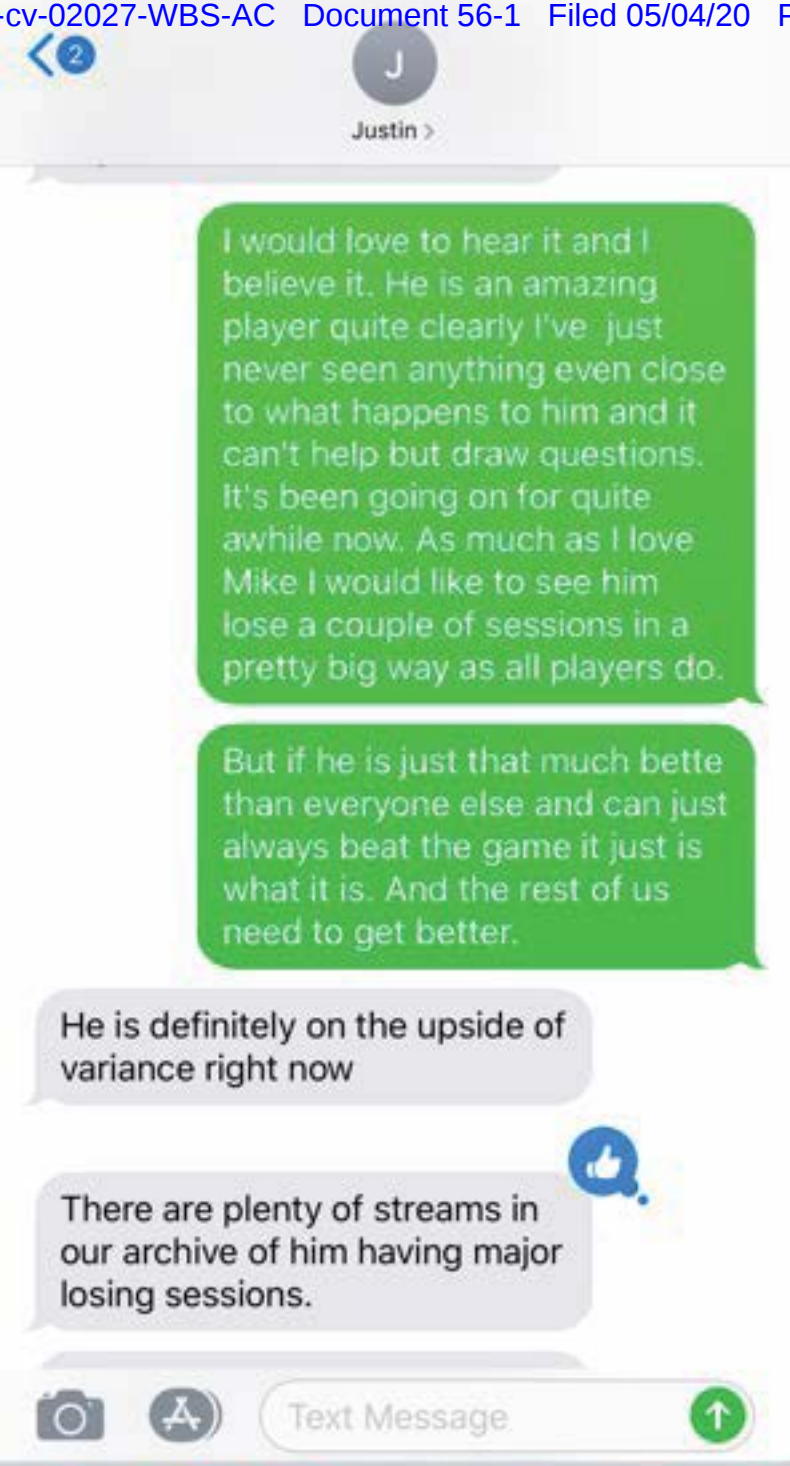
Also, Mike gets it in bad a lot and still gets there. An rfid cheat would not help with cards to come.

He is just on a heater plain and simple.

Text Message

Pay


2
J
Justin
Okay so he's a God. I understand. :) I'll play next chance I get. If something ever did come out you better never step down that would devastate our room.
Also, on another note.... I've known Mike a long time and I'm a good judge of character. I would vouch for him anyday
I dont know if you know my history Kasey, but I discovered, exposed and took a casino down over a cheating scandal. It was what first got me known in the industry. I will tell you the story sometime if you like.
Game fairness is one of my highest priorities, and anyone who cheats on my watch will regret it
I would love to hear it and I believe it. He is an amazing
Text Message
Pay


2
J
Justin
I would love to hear it and I believe it. He is an amazing player quite clearly I've just never seen anything even close to what happens to him and it can't help but draw questions. It's been going on for quite awhile now. As much as I love Mike I would like to see him lose a couple of sessions in a pretty big way as all players do.
But if he is just that much bette than everyone else and can just always beat the game it just is what it is. And the rest of us need to get better.
He is definitely on the upside of variance right now
There are plenty of streams in our archive of him having major losing sessions.
Text Message
Pay

9:15

2

J

Justin >

He is definitely on the upside of variance right now

There are plenty of streams in our archive of him having major losing sessions.

On top of being a great player and reader, he does something else that gives him a huge edge over most players.

Another thing I would be happy to discuss in person

Along with what I called you about the other day

We have a few things to catch up on

Let's do lunch

Soon

I'm free Friday

Text Message

Pay