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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VERONICA BRILL; KASEY LYN MILLS; MARC GOONE; NAVROOP SHERGILL; JASON SCOTT; AZAAN NAGRA; ELI JAMES; PHUONG PHAN; JEFFREY SLUZINSKI; HARLAN KARNOFSKY; NATHAN PELKEY; MATT HOLTZCLAW; JON TUROVITZ; ROBERT YOUNG; BLAKE ALEXANDER KRAFT; JAMAN YONN BURTON; MICHAEL ROJAS; HAWNLAY SWEN; THOMAS MORRIS III; PAUL LOPEZ; ROLANDO CAO; BENJAMIN JACKSON; HUNG SAM; COREY CASPERS; ADAM DUONG,

Plaintiffs,

v.

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

DEFENDANT KING'S CASINO, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: April 16, 2020
Time: 2:00 p.m.
Dept.: Courtroom 7
Judge: Hon. Morrison C. England, Jr.

Complaint Filed: October 8, 2019

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

Defendants.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 16, 2020 at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable Morrison C. England, Jr., U.S. District Judge of the Eastern District of California, located at Courtroom 7, 14th Floor, Robert T. Matsui Federal Courthouse, 501 I Street, Sacramento, CA 95814, Defendant King's Casino, LLC dba Stones Gambling Hall ("Stones"), by and through its undersigned counsel, will and hereby does move this Court for an order dismissing the claims against Stones in Plaintiffs Veronica Brill, et al.'s Complaint for failure to state a claim upon which relief may be granted and failure to allege claims of fraud and misrepresentation with the required particularity. Fed. R. Civ. P. 8, 9(b), 12(b)(6); 28 U.S.C. § 1367.

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

Respectfully submitted,

Dated: March 4, 2020

By: */s/ Mark Mao*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit reflects the oldest complaint of gamblers—that their lack of success means they were cheated. Plaintiffs ask this Court to hold King's Casino, LLC, dba Stones Gambling Hall ("Stones") liable because Defendant Michael Postle won too many hands of poker from them. Yet Plaintiffs make no credible allegations of wrongdoing by Stones, and longstanding California law forecloses their theories of liability.

Plaintiffs sued Stones on the premise that they told some employees of their suspicions that Mr. Postle was cheating at poker, and those employees failed to confirm Plaintiffs' fears. Plaintiffs do not allege that Stones benefitted from Mr. Postle's alleged cheating. No ill-gotten profits or sinister motivations are imputed to Stones. Plaintiffs even tacitly concede that cheating by players harms Stones' business and reputation. It is confounding that Plaintiffs now sue Stones rather than seeking its assistance in their shared goal of preventing cheating in poker.

Plaintiffs' Complaint includes hasty conclusions and speculation but no facts to support their claims. The Court should dismiss the claims against Stones. *First*, Plaintiffs' fraud and negligence claims—four of the five claims against Stones—all fail because gambling losses are not cognizable as damages under California law and public policy.

Second, the negligence claim fails because it alleges purely economic losses. Plaintiffs can point to no precedents suggesting that Stones breached a duty of care under such attenuated circumstances, especially because Stones admittedly had no motivation to promote cheating.

Third, the three fraud or misrepresentation claims against Stones—for fraud, constructive fraud, and negligent misrepresentation—fall short of Federal Rules of Civil Procedure Rule ("Rule") 8 and 9(b)'s pleading standards. The Complaint is devoid of information about when each Plaintiff spoke with Stones, how they were misled, what they were told, and how they were harmed by unpled statements. Plaintiffs do not get to keep Stones in their litigation merely by saying that Mr. Postle's winnings are statistically

improbable and it was therefore Stones' fault that each Plaintiff chose to fold a particular hand. Indeed, Plaintiffs concede that they continued to play with Mr. Postle despite their own beliefs about what was allegedly going on, suggesting that even Plaintiffs thought that Mr. Postle could have just been playing excellent poker.

Finally, Plaintiff Veronica Brill's libel claim against Stones fails because the alleged statement did not refer to her expressly or by clear implication and she fails to plead the required economic damages for the type of libel that she alleges.

Stones respectfully requests that this Court dismiss Counts III, VI, VII, VIII, and IX.

II. PLAINTIFFS' FACTUAL ALLEGATIONS

Below are the facts as pled by Plaintiffs in the Complaint:

Stones owns and operates a casino in Citrus Heights, California which includes gaming space for playing poker. Compl. ¶ 38. One of the poker tables in the casino is equipped with radio-frequency identification ("RFID") capabilities and video cameras. *Id.* ¶¶ 39-40, 44. The RFID readers transmit the hole cards to the control room, which then broadcasts the subject poker game to the public on a delayed feed. *Id.* ¶¶ 39-46. In 2016, Stones began broadcasting poker games at the RFID-enabled table on the internet under the name "Stones Live Poker." *Id.* ¶¶ 44, 47. Stones employs and invites guests to act as commentators on the Stones Live program to provide thoughts and opinions about the game and players. *Id.* ¶ 45. The commentators and the public do not see any of the game live but instead view it on a delayed feed. *Id.* ¶ 46. Since 2018, Defendant Justin Kuraitis, a Stones employee, has been the director of Stones Live Poker. *Id.* ¶ 49.

Defendant Michael Postle was a regular participant in the Stones Live Poker games in 2018 and 2019. *Id.* ¶ 50. Plaintiffs make the conclusory allegation that Mr. Postle cheated in the Stones Live Poker games on at least 68 dates. *Id.* ¶ 100. Plaintiffs also allege that, while playing in Stones Live Poker, "Mr. Postle has won more money than any other participant" and was often "the winningest player on the show." *Id.* ¶ 51. Plaintiffs' evidence of cheating is that Mr. Postle: profited more than $250,000 from his play on Stones Live Poker (*id.* ¶ 83); made the optimal decision for each hand, resulting in a more

than ninety-four percent win rate (*id.* ¶ 54); and had an average profit of more than 60 "big blinds per hour," which is six times more than an "exceptional" poker player (*id.* ¶ 55).

Plaintiffs conclude that Mr. Postle was "able to achieve these results by engaging in a pattern and practice of using one or more wire communication mechanisms to defraud his opponents by gaining knowledge of their Hole Cards during the play of poker hands." *Id.* ¶ 61. Mr. Postle purportedly had one or more unnamed confederates who provided information to Mr. Postle. *Id.* ¶ 62. Plaintiffs allege that the scheme involved "Mr. Postle's cellular telephone being grasped by his left hand while concealed under the poker table and/or Mr. Postle's baseball cap being imbedded with a communications device creating an artificial bulge in its lining (that is notably absent in photographs of the same baseball cap on Mr. Postle when he is not playing on Stones Live Poker)." *Id.* ¶ 63. Plaintiffs conclude that their allegations are "based on a statistical analysis of his results and analytical review of the manner in which he played." *Id.* ¶ 64.

Plaintiffs allege the cards as read automatically by the table with an RFID reader would sometimes change partway through a particular hand. *Id.* ¶¶ 69-72. Plaintiffs allege that the change in cards read by the table is a sign that cheating was occurring but being covered up. *Id.* ¶ 61.

Plaintiffs are poker players who allege they suffered gambling losses or were deprived of the chance to maximize their gambling winnings due to Mr. Postle cheating in one or more of the Stones Live Poker games between 2018 and 2019. *Id.* ¶¶ 85-87.

Plaintiffs allege that beginning at least as early as March 13, 2019, "numerous individuals"[1] told Mr. Kuraitis that "the play of Mr. Postle on Stones Live Poker can only be attributed to cheating or, at a minimum, is strongly indicative of the presence of cheating." *Id.* ¶ 73. Plaintiffs allege that Mr. Kuraitis "repeatedly told multiple persons Mr. Postle was not cheating but, to the contrary, Mr. Postle's play is simply 'on a different level' or he is

[1] The Complaint does not specify whether these "numerous individuals" are Plaintiffs or other people nor any other factual information about the individuals involved or the timing and content of the conversations.

'just on a heater' and his play is not something that can be explained." *Id.* ¶ 74. They allege that "Mr. Kuraitis told multiple persons that Stones conducted a thorough investigation into the matter and such did not reveal the presence of cheating." *Id.* ¶ 75. Plaintiffs also allege that Stones later stated on Twitter that "We conducted a full investigation & found no evidence that any cheating had occurred." *Id.* ¶ 76.

Based on these allegations, Plaintiffs assert four causes of action against Stones for negligent misrepresentation (Count III), negligence (Count VI), constructive fraud (Count VII), and fraud (Count VIII).

Finally, Plaintiffs allege that, on an unspecified date, Plaintiff Veronica Brill publicized her suspicions that Mr. Postle was cheating on the Stones Live Poker broadcast. *Id.* ¶ 154. While nothing links Stones' Twitter comment to Ms. Brill, Plaintiffs allege that Stones "responded" to Ms. Brill's assertions by commenting on Twitter, "The recent allegations are completely fabricated." *Id.* Based on these last allegations, Ms. Brill individually asserts a cause of action against Stones for libel (Count IX). *Id.* ¶ 158. She alleges no economic harm from the purported libel. *Id.*

III. LEGAL STANDARD

A complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court begins "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see Alvarez v. Chevron Corp.*, 656 F.3d 925, 930 (9th Cir. 2011). Taking well-pleaded factual allegations as true, Plaintiffs' "allegations must be enough to raise a right to relief above the speculative level" and must have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "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." *Iqbal*, 556 U.S. at 678. "'[A]llegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences'" do not withstand

a motion to dismiss. *In re Gilead Scis. Sec. Litig*., 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

Under Rule 9(b), allegations sounding in fraud must be "'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). A fraud allegation must set forth "'the who, what, when, where, and how'" of the alleged fraud. *Id.* (citation omitted).

Without converting a motion to dismiss into a motion for summary judgment, a court may take judicial notice of a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; *see Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (taking judicial notice of information made publicly available by a government entity).

IV. ARGUMENT

Plaintiffs allege five causes of action against Stones: (1) negligence (Count VI), (2) fraud (Count VIII), (3) constructive fraud (Count VII), (4) negligent misrepresentation (Count III), and (5) libel (Count IX). Each claim should be dismissed for failing to state a cognizable claim under California law, consistent with the relevant pleading standards.

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

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

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

Plaintiffs cannot establish the required causation for damages because gambling losses are too speculative. The California Court of Appeal addressed this issue in *Vu v.*

California Commerce Club, Inc., 58 Cal. App. 4th 229 (1997). In *Vu*, the plaintiffs sued a cardroom for negligence, breach of implied contract or covenant, and conversion regarding gambling losses that they argued were attributable to cheating. *Id.* at 232, 235. The alleged cheating scheme involved players signaling their hands to each other and betting accordingly, vocal and hand signals from a game manager, and the use of marked cards in poker games. *Id.* at 231-32. The plaintiffs' "allegations and theory were that the club's failure to fulfill its implied promises of security from cheating enabled the plaintiffs' competitors to cheat, which in turn caused the plaintiffs' losses," but the court held that this "premise . . . was untenable as a matter of law." *Id.* at 233. The court observed:

> Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain. No such certainty or probability appertains with respect to plaintiffs' gambling losses, assertedly the result of cheating. Assuming arguendo that an adequate causal connection could be established between the club's alleged breach of security obligations and the cheating that plaintiffs allegedly encountered, no such relationship appears between the cheating and plaintiffs' losses. That is because winning or losing at card games is inherently the product of other factors, namely individual skill and fortune or luck. It simply cannot be said with reasonable certainty that the intervention of cheating such as here alleged was the cause of a losing hand, and certainly not of two weeks' or two years' net losses . . . .

Id. (citations omitted).

Vu relied on an earlier decision by the California Supreme Court in *Youst v. Longo*, 43 Cal. 3d 64 (1987), which affirmed a sustained demurrer on tort claims by the owner of one horse against the driver of another horse for interference by the other horse and its driver during a race. Even though the plaintiff had alleged that the interference caused his horse to lose the race, and specific facts about the interference, *id.* at 67-68, the court held that the plaintiff had no right to tort damages, *id.* at 83.

As in *Vu* and *Youst*, Plaintiffs here do not and cannot allege facts to establish how Mr. Postle's alleged cheating caused their damages. Many factors go into winning a hand of poker, to say nothing of winning games over time. Plaintiffs fail to discuss how every one of them would have won the hands in which they individually suffered losses, but for

Mr. Postle's supposed scheme. Nor can they plausibly plead such losses because of their individual decision to fold as opposed to continue to play. And the causal connection of Stones to any losses is even more attenuated. Plaintiffs do not even try to explain the "but for" causal connection to Stones, simply asserting that Stones is liable to them for the money that Mr. Postle won, without accounting for what money they lost to him rather than other players, Compl. ¶¶ 125, 138, 145, 152.

Plaintiffs' requests for future winnings and punitive damages do not make cognizable their negligence, misrepresentation, and fraud claims. Plaintiffs purport to seek future winnings, but such damages are even more speculative than past losses. Plaintiffs would need to prove they would have played poker and won. *Vu* forecloses the latter inference. Nor are Plaintiffs' claims rescued by their unsupported request for punitive damages, which falls with their request for gambling losses because, "actual damages are an absolute predicate for an award of exemplary or punitive damages." *Kizer v. Cty. of San Mateo*, 53 Cal. 3d 139, 147 (1991).

2. California Public Policy Bars These Claims.

Plaintiffs' gambling loss damages claims are independently barred by California's public policy against judicial resolution of civil claims arising out of gambling contracts or transactions. *See Jamgotchian v. Sci. Games Corp.*, 371 F. App'x 812, 813 (9th Cir. 2010). A "'suit to be placed in the *ex ante* position after losing a bet is'" a suit to recover gambling losses and is barred by California public policy. *Id.* (citing *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462, 490 (1999)). And "'California's public policy against judicial resolution of civil claims arising out of gambling contracts or transactions absent a statutory right to bring such claims, applies to all forms of gambling.'" *Id.* (quoting *Kelly*, 84 Cal. App. 4th at 490). Because Plaintiffs seek to recover gambling losses, their claims are barred by California public policy. *See id.* This bar extends to seeking damages against third parties such as Stones. *See Alves v. Players Edge, Inc.*, No. 05CV1654 WQH (CAB), 2007 WL 6004919, at *14 (S.D. Cal. Aug. 8, 2007) ("any purchasing of tips was part of the 'gambling' transactions which Plaintiffs conducted with Defendants" and so

recovery was barred by California public policy).

Thus, Plaintiffs' claims for negligence, fraud, constructive fraud, and negligent misrepresentation all fail as a matter of law.

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

Plaintiffs contend that Stones owed a duty to them to prevent Mr. Postle from cheating. No such duty exists. "The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998).

As discussed above, Plaintiffs do not plausibly allege proximate causation for any damages based on Stones' alleged negligence. The negligence claim also fails to allege facts to meet the required element of a duty.

"The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1095 (1991). "[A]bsent a duty, the defendant's care, or lack of care, is irrelevant." *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 482 (1996). "Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court." *Quelimane* Co*. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 57 (1998). Plaintiffs contend that Stones had a duty to protect them from gambling losses to Mr. Postle because of cheating, but they do not explain the basis for such a duty. Plaintiffs' proposed duty is barred by the economic loss rule.

The California Supreme Court recently reaffirmed the general rule that, outside of narrow exceptions, a defendant owes no tort duty to guard against negligently causing "purely economic losses" to others. *S. California Gas Leak Cases*, 7 Cal. 5th 391, 398 (2019). This rule reflects "the need to safeguard the efficacy of tort law by setting meaningful limits on liability." *Id*. at 401. In *Southern California Gas Leak Cases*, local businesses sued a natural gas company for lost income and other financial harms from a

months-long gas leak. *Id*. at 394. While acknowledging that the natural gas company had legal and practical reasons to avoid causing *any* injury to members of the public, the court declined to impose tort liability for the businesses' lost income and other purely economic losses, because doing so would "create intractable line-drawing problems for courts." *Id*. at 395.

Here, as in *Southern California Gas Leak Cases*, Plaintiffs seek recovery of only economic losses from Stones. They do not allege any personal injury or property damage. Plaintiffs therefore cannot proceed with their negligence claim unless they fall within one of the narrow exceptions to the economic loss rule. For the reasons explained below, they do not.

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

Plaintiffs do not allege any special relationship between themselves and Stones. No such relationship exists. The California Supreme Court's decision in *Bily v. Arthur*

Young & Co., 3 Cal. 4th 370 (1992), is illustrative. In *Bily*, the plaintiffs sued the auditors of a company contending that they relied on a negligently prepared auditor's report in investing. The court rejected the argument that auditors owed a duty of care to investors, despite the foreseeability of the injury. The court in *Bily* raised three primary concerns with imposing a duty: (1) the tenuous causal relationship between an auditor's reports and economic losses from investment and credit decisions could expose an auditor to "potential liability far out of proportion to its fault," (2) the sophisticated parties could "control and adjust the relevant risks through 'private ordering,'" and (3) a finding of a duty would cause an adverse impact on the type of defendant at issue. *Id.* at 398. Each of these grounds equally applies to the relationship between Stones and the players. Plaintiffs do not and cannot allege that any relationship with Stones was directed at their making money playing poker. The Complaint asserts that Plaintiffs played at Stones and won or lost money from other players. There is only an attenuated connection between Stones' alleged actions and the injury Plaintiffs contend that they suffered. There are no allegations that Stones impacted Plaintiffs' ability to win or lose money in a given hand of poker because Stones is not a player in the game. Nor are there any allegations that Stones received any benefit if one player won more often than any other player. To the contrary, the injury Plaintiffs assert they suffered is "part of [poker players'] ordinary business risk." *J'Aire*, 24 Cal. 3d at 808 (identifying that as a consideration in holding that no duty applied).[2] Stones Live Poker players were sophisticated poker players, aware of the various risks involved in poker gambling. Recognizing a duty in this context would also have a strongly negative effect on casinos like Stones.

[2] Little moral blame should be attributed to Stones' alleged conduct, and the policy of preventing future harm does little work, given Plaintiffs' affirmative allegation that this was an exceptional cheating scheme by Mr. Postle, the preexisting non-tort incentives Plaintiffs allege for casinos to prevent cheating, and the lack of allegations regarding Stones' knowledge of actual cheating (rather than allegations of cheating). *See, e.g.*, Compl. ¶¶ 4, 43; *Burns v. Neiman Marcus Grp., Inc.*, 173 Cal. App. 4th 479, 490 (2009) ("[T]he person deserving of moral blame is [the person who forged checks], not Neiman Marcus [that accepted forged checks]. There is no allegation that Neiman Marcus actively participated in [the check forger's] alleged embezzlement of funds from plaintiff.").

The California Supreme Court has likewise "decline[d] to recognize a duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." *Quelimane*, 19 Cal. 4th at 58. The plaintiffs in *Quelimane* asserted that a title insurance company had a duty to "issue [title] insurance . . . without discrimination" and "to use known and accepted legal, actuarial, and statutory criteria to determine the legal status of parcels of land to be insured." *Id.* at 36. The defendant title insurance companies' "failure to insure any title to land purchased at a tax sale regardless of the merits of the chain of title" had vastly increased the price of purchasing property for the plaintiffs. *Id.* The California Supreme Court nevertheless declined to recognize a duty by the title insurance company to potential purchasers. The relationship between Stones' conduct and the Plaintiffs is even more attenuated than the relationship analyzed in *Quelimane*. Plaintiffs argue that they lost money when Stones negligently permitted a cheater to join them at the poker table, then employed less than "prevailing industry standards for security" to thwart his alleged scheme. Compl. ¶ 136. As in *Quelimane*, these allegations merely reflect business decisions by Stones that allegedly affected Plaintiffs as third parties and Stones allegedly exercising less than due care in letting Mr. Postle play poker with Plaintiffs. Imposing a duty on Stones here would be unprecedented under California law.

To the extent Plaintiffs rely on a premises liability theory for negligence, relief remains unavailable. If Stones owed any duty to Plaintiffs as proprietor, that duty was to protect them from foreseeable physical assaults and violence—not from their own gambling losses. California courts apply the doctrine of premises liability almost exclusively to cases involving physical harm or violence and require that a proprietor take reasonable steps to protect its customers against foreseeable third-party "criminal acts." *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 235 (2005). In the related context of commercial landlords and tenants, courts have refused to impose a duty on landlords to protect a tenant's property from third-party theft or burglary. *See Royal Neckwear Co. v. Century City, Inc.*, 205 Cal. App. 3d 1146, 1151 (1988) (dismissing shopping-center

tenant's negligence claim against a landlord to recover for merchandise lost in two burglaries because the landlord did not owe a duty to safeguard tenant property); *Tyson v. W. Residential, Inc.*, No. B263967, 2016 WL 3679501, at *3 (Cal. Ct. App. July 5, 2016) ("*Royal Neckwear* establishes that a commercial landlord does not owe its tenants a duty to safeguard the tenants' property from reasonably foreseeable criminal activity by third parties."). The doctrine of premises liability cannot cure Plaintiffs' failure to allege a duty.

With respect to a duty, Stones is similarly situated to the boxing organizers and broadcaster sued in *In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation*, 942 F.3d 1160, 1169-70 (9th Cir. 2019). In *Pacquiao-Mayweather*, spectators to a high-profile boxing match sued when they found out that one of the fighters had been injured and the defendants, including the organizers and broadcaster of the match, knew about the injury. The Ninth Circuit held that the defendants were not liable for claims over the quality of the match. The plaintiffs had paid to see a boxing match, and they saw a boxing match. The allegation that the defendants knew and hid from the public the boxer's injury and the likelihood of a less high-quality match did not support liability. *Id.* Here, poker players including Plaintiffs paid Stones for a seat at the poker table in the form of a collection rate schedule approved by the Bureau of Gambling Control.[3] Stones had no stake in who won money or lost money in the poker games. All Stones did was to provide a venue for the poker game. Plaintiffs decided whether they wanted to play, for how long, how much to bet, and in which hands to participate. *Pacquiao-Mayweather*, and the precedent it relies on, advise against making casinos like Stones liable for cheating by players when the casino is not alleged to have engaged in the cheating—or to have played in the games—but is merely alleged to have made a poker game available.

Plaintiffs do not sufficiently plead the essential elements of a duty or proximate

[3] The Court may take judicial notice of the publicly available document attached as Exhibit B, which is an excerpt of the relevant pages (pages 1-2, 97-102, 120-29) of approved rules and rates schedules (available on the California Attorney General's website at https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/saloon_stonegambling.pdf) showing that collections by Stones do not depend on who wins. *See Daniels-Hall*, 629 F.3d at 998.

causation. Thus, their negligence claim fails.

C. Plaintiffs' Claims for Fraud and Misrepresentation Fail to Plead Allegations with the Required Specificity.

Plaintiffs bring three claims against Stones based on alleged misrepresentations or fraud by the casino—fraud (Count VIII), constructive fraud (Count VII), and negligent misrepresentation (Count III). Claims sounding in fraud or mistake must allege "the circumstances constituting fraud or mistake" with particularity under Rule 9(b), except that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The heightened pleading standard provides defendants with a meaningful opportunity to respond to and rebut fraud allegations by plaintiffs. None of Plaintiffs' fraud or misrepresentation-based claims satisfy either the usual Rule 8 pleading standard or provide the heightened specificity required by Rule 9(b).

There are 25 individual Plaintiffs, but the Complaint is silent about what each of them heard, from whom they heard it, where and when they heard it, how or when they relied on it to continue to play poker, or resulting damage. Each Plaintiff must specifically plead the who, what, when, where, and how of the alleged fraud to meet the pleading standard. They do not and cannot.

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

Ms. Brill, Ms. Mills, and Mr. Goone (but not other Plaintiffs) allege a fraud claim (Count VIII) against Stones. Compl. ¶¶ 146-52. "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294 (2005) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). "To properly plead fraud with particularity under Rule 9(b), 'a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as *what is false or misleading* about the purportedly fraudulent statement, and *why it is false*." *Scott v. Bluegreen Vacations*

Corp., No. 1:18-CV-649 AWI EPG, 2018 WL 6111664, at *5 (E.D. Cal. Nov. 21, 2018) (emphasis added). "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

The only part that is met by the Complaint is the "who"—Justin Kuraitis; Plaintiffs satisfy none of the other requirements. Ms. Brill, Ms. Mills, and Mr. Goone allege Mr. Kuraitis made a statement that there was no cheating but then contradict what was said. Compl. ¶ 117. They plead elsewhere that Mr. Kuraitis stated that "an investigation of such cheating allegations had occurred or would be occurring." *Id.* ¶ 148. There is no reference to time, and the pleading makes clear that Plaintiffs are not even sure if they were told that an investigation had occurred or that one would be undertaken. If the statement is that an investigation would be undertaken, then they could not rely on the fact that an investigation had not yet occurred as grounds that they were told that there was no cheating. To the extent that Plaintiffs rely on allegations regarding representations about an investigation having occurred, even Plaintiffs appear to concede that such representations were not objectively false, instead characterizing them as "normative[ly]" false. *Id.* ¶ 78. Plaintiffs do not link any allegedly fraudulent representation to their assertion that one or more "agents" of Stones acted as confederates of Mr. Postle in some unknown capacity and circumstance. *Id.* ¶ 122. It is also unclear if any of those Plaintiffs were together when Mr. Kuraitis made alleged representations and when these Plaintiffs played poker with Mr. Postle in relation to when they allege that they heard any representations from Mr. Kuraitis. Further, there is no reference to when the statements were made. To the extent that the representations were made after September 28, 2019, they could not support any reliance because all the games occurred before that date. Without that information, it is impossible for Stones to "prepare an adequate answer from

the allegations." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). The fraud claim must therefore be dismissed.

2. The Constructive Fraud Claim Also Fails Because Plaintiffs Allege No Fiduciary or Confidential Relationship.

Plaintiffs allege a constructive fraud claim (Count VII), which fails because Stones was not in a confidential or fiduciary relationship with Plaintiffs and the allegations do not satisfy Rule 9(b). To assert a constructive fraud claim, Plaintiffs must allege "(1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage." *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006); *see* Cal. Civ. Code § 1573. "Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." *In re Harmon*, 250 F.3d 1240, 1249 n.10 (9th Cir. 2001) (quoting *Assilzadeh v. California Fed. Bank*, 82 Cal. App. 4th 399, 415 (2000)). Plaintiffs do not allege that they were in a fiduciary or confidential relationship with Stones. Indeed, they allege no formal relationship with Stones, because they cannot. *See Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (affirming grant of demurrer on constructive fraud claim when the plaintiff had "fail[ed] to plead facts establishing the requisite fiduciary or special confidential relationship between plaintiff and defendant."); *Wilson v. Zorb*, 15 Cal. App. 2d 526, 532 (1936) ("It takes something more than friendship or confidence in the professional skill and in the integrity and truthfulness of another to establish a fiduciary relationship.").

Further, Plaintiffs' constructive fraud claim must satisfy Rule 9(b). *See Sacramento E.D.M., Inc. v. Hynes Aviation Indus., Inc.*, 965 F. Supp. 2d 1141, 1152 (E.D. Cal. 2013) (England, J.). Given that they plead no fiduciary or confidential relationship, Plaintiffs necessarily do not allege such a relationship with the particularity required by Rule 9(b). Nor does any Plaintiff identify with specificity "an act or omission" by Stones or reliance on that "act or omission." Cal. Civ. Code § 1573. Each Plaintiff must do so, along with alleging a confidential or fiduciary relationship with Stones.

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

Plaintiffs' negligent misrepresentation claim (Count III) likewise fails because they allege only non-actionable implied negligent misrepresentations. The Complaint also fails to sufficiently allege a duty owed to Plaintiffs by Stones, and does not describe Stones' alleged misrepresentations with sufficient particularity. To prevail on a claim of negligent misrepresentation, Plaintiffs must prove: (1) "'[m]isrepresentation of a past or existing material fact,'" (2) "'without reasonable ground for believing it to be true,'" and (3) "'with intent to induce another's reliance on the fact misrepresented'"; as well as (4) "'ignorance of the truth'" and (5) "'justifiable reliance on the misrepresentation by the party to whom it was directed'"; and (6) "'resulting damage.'" *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*, 115 Cal. App. 4th 1145, 1154 (2004) (citation omitted).

First, the negligent misrepresentation claim must be dismissed because "[a]n 'implied' assertion or representation is not enough" to state a claim for negligent misrepresentation. *See Diediker v. Peelle Fin. Corp.*, 60 Cal. App. 4th 288, 299 (1997) (quoting *Wilson v. Century 21 Great W. Realty*, 15 Cal. App. 4th 298, 306 (1993)); *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 304 (1977). The Complaint itself identifies some of Stones' alleged representations as implied rather than express. Compl. ¶¶ 115, 118. The mere fact that Stones Live Poker was played cannot in itself be enough to support a negligent misrepresentation claim.

The Complaint also purports to allege some express misrepresentations. *Id.* ¶ 117. But those representations are either not alleged to be untrue or are not actionable misstatements. *See Mueller v. San Diego Entm't Partners, LLC*, 260 F. Supp. 3d 1283, 1296 (S.D. Cal. 2017) (dismissing negligent misrepresentation claim for lack of a misrepresentation as to a past or existing material fact). Some of those allegations even relate to conduct after Ms. Brill made her statement public, at which point Plaintiffs cannot have possibly been deceived. Instead, these are better understood as implied assertions that Mr. Postle was not cheating. The Complaint confirms that understanding. *See*

Compl. ¶ 119 ("These representations were untrue, as Mr. Postle was cheating in the Stones Live Poker games."). Further, the Complaint does not state that all Plaintiffs heard or understood any of the proffered express statements. The Complaint states that "numerous individuals" spoke with Stones but does not identify those individuals. *Id*. ¶ 73. Only one Plaintiff may have been told that Stones undertakes quarterly security audits, *id*. ¶ 117, and there is no timeframe for when that statement was made. The other 24 Plaintiffs could not have relied on a representation that was not made to them. Stones asserts that the Complaint is silent or vague on these facts because they do not exist.

Second, Plaintiffs do not sufficiently allege how Stones knew or should have known about Mr. Postle's cheating to turn any statements into misrepresentations. Plaintiffs provide no detail about the asserted confederate and agent of Stones who they allege as a basis for Stones' knowledge. Compl. ¶ 122. They do not allege facts regarding purported "prevailing industry norms and standards" for live streaming poker. *Id.* ¶¶ 41-45, 93. Nor do they allege facts to establish a way that they can prove whether Mr. Postle was cheating. And they do not identify how allegedly lax securities measures, *id.* ¶ 121, should have tipped Stones off that Mr. Postle was cheating (which is, in itself, a conclusion). Plaintiffs do not allege they provided any facts to Stones regarding why and how they thought Mr. Postle was cheating. Indeed, Plaintiffs concede they cannot explain even today how Mr. Postle cheated. *Id.* ¶ 98.

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

Finally, the claim falls short of Rule 9(b)'s particularity standards. Plaintiffs must comply with Rule 9(b) for their negligent misrepresentation claim because the claim is grounded in alleged fraud—that Stones deceived Plaintiffs about whether Mr. Postle was

cheating. *See Vess*, 317 F.3d at 1103 (claims grounded in fraud must satisfy Rule 9(b)). Courts have generally held plaintiffs must allege negligent misrepresentation claims with particularity. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements."); *see also Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 184 (2003) ("Because of the potential for false claims, we hold that a complaint for negligent misrepresentation in a holder's action should be pled with the same specificity required in a holder's action for fraud.").

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

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

Finally, Ms. Brill brings an individual libel claim against Stones related to a statement that it made on Twitter in September 2019, addressing allegations of cheating in Stones Live Poker. To plead a libel claim, a plaintiff must allege "'(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.'" *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (quoting 5 Bernard Earnest Witkin, Summary of Cal. Law Torts § 529 (10th ed. 2005)). To state a claim for libel, a plaintiff must also plead that the allegedly defamatory statement was "of and concerning" the plaintiff, by name or by "clear implication." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1044 & n.1 (1986). California recognizes two types of libel: "libel per

se" and "libel *per quod*." *See* Cal. Civ. Code § 45a. "If a defamatory meaning appears from the language itself without the necessity of explanation or the pleading of extrinsic facts, there is libel per se," however, if "the defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts . . . not discernable from the face of the publication, . . . then the libel cannot be libel per se but will be libel *per quod*." *Palm Springs Tennis Club v. Rangel*, 73 Cal. App. 4th 1, 5 (1999) (citation omitted). Ms. Brill's libel claim fails because she does not link the allegedly offending tweet to her except in a conclusory fashion and because she fails to allege special damages required for libel *per quod*.

Ms. Brill does not sufficiently allege that the tweet by Stones specifically referred to her or was "of and concerning" her. *Blatty*, 42 Cal. 3d at 1044 & n.1. The tweet did not mention Ms. Brill by name. *See* Ex. A.[4] Nor did the statement that "[t]he recent allegations are completely fabricated," refer to Ms. Brill by clear implication. *See Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008). This is so not least because it refers to plural "allegations." Instead, the tweet is linked to Ms. Brill only by Plaintiffs' conclusory say-so. Compl. ¶ 154. That is not enough. *See Williams v. Salvation Army,* No. 2:14-CV-06138-ODW, 2014 WL 6879936, at *2 (C.D. Cal. Dec. 4, 2014) (dismissing plaintiff's allegation that defamatory statement referred to her for failure to plead supporting facts); *Art of Living Found. v. Does*, No. 10-CV-05022-LHK, 2011 WL 2441898, at *7 (N.D. Cal. June 15, 2011) (dismissing a defamation claim about "Art of Living" for failure to satisfy the "of and concerning" requirement because there were many chapters of the Art of Living organization).

Ms. Brill's libel claim also fails because she does not allege "special damages" required for libel per quod. At most, Ms. Brill alleges libel per quod because, if the tweet has any defamatory meaning related to Ms. Brill, that meaning requires information

[4] The tweet is incorporated by reference in the Complaint and attached as Exhibit A. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Complaint describes the tweet, and Ms. Brill's claim depends on the tweet's contents.

extrinsic to the tweet. *See Todd v. Lovecruft*, No. 19-CV-01751-DMR, 2020 WL 60199, at *16 (N.D. Cal. Jan. 6, 2020) (holding that requiring reference to other tweets to derive defamatory connection to plaintiff meant that a statement was not libel per se). Claims for libel per quod require a plaintiff to plead that she suffered "special damages." Cal. Civ. Code § 45a. "[S]pecial damages are defined narrowly to encompass only economic loss." *Gomes v. Fried*, 136 Cal. App. 3d 924, 939 (1982); *see* Cal. Civ. Code § 48a (defining special damages). In California, "special damages must be pled and proved precisely." *Gomes*, 136 Cal. App. 3d at 940; *see also* Fed. R. Civ. P. 9(g). Ms. Brill pleads no special damages, which again requires specific allegations of economic harm. As a result, her libel claim must be dismissed on this ground as well.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the claims against Stones.

Respectfully submitted,

Dated: March 4, 2020

By: */s/ Mark Mao*

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PROOF OF SERVICE

I, Vicky L. Ayala, declare:

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

On March 04, 2020, I served the following document(s) described as:

DEFENDANT KING'S CASINO, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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

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

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

☐ **BY ELECTRONIC MAIL TRANSMISSION**: By electronic mail transmission from vicky.ayala@troutman.com on December 05, 2017, by transmitting a PDF format copy of such document(s) to each such person at the e-mail address(es) listed below their address(es). The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

Michael L. Postle 3724 Deer Walk Way Antelope, CA. 95843	*Pro Se*

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

Executed on March 04, 2020, at San Francisco, CA.

Vicky L. Ayala

Vicky L. Ayala