UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

VERONICA BRILL; KASEY LYN MILLS; MARC GOONE; NAVROOP SHERGILL; JASON SCOTT; AZAAN NAGRA; ELI JAMES; PHUONG PHAN; JEFFREY SLUZINSKI; HARLAN KARNOFSKY; NATHAN PELKEY; MATTHEW ALLEN HOLTZCLAW; JON TUROVITZ; ROBERT YOUNG; BLAKE ALEXANDER KRAFT; JAMAN YONN BURTON; MICHAEL ROJAS; HAWNLAY SWEN; THOMAS MORRIS III; PAUL LOPEZ; ROLANDO CAO; BENJAMIN JACKSON; HUNG SAM; COREY CASPERS; ADAM DUONG; DUSTIN MCCARTHY; CHOU VINCE XIONG; BRIAN OLSON; CAMERON SMITH; JORDAN DIAMOND; ARONN SOLIS; ALISHA DANIELS-DUCKWORTH; CHRISTIAN SOTO VASQUEZ; ANDREW HERNANDEZ; DARRELL STEED; ARISH S. NAT; KYLE KITAGAWA; BRIAN MICHAEL RAASCH; ZEEV MALKIN; DAVID CRITTENTON; PATRICK LAFFEY; PARAS SINGH; FIRAS BOURI; IDRIS M. YONISI; JOSHUA WHITESELL; DAVID DUARTE; HARUN UNAI BEGIC; BRAD KRAFT; TAYLOR CARROLL; ELIAS ABOUFARES; TYLER DENSEN; ANDREW LOK; JAKE ROSENSTIEL; ANTHONY AJLOUNY; HECTOR MARTIN; DALE MENGHE; SCOTT SCHLEIN; AUGUSTE SHASTRY; NICHOLAS COLVIN; JASON MARKWITH; BRIAN WATSON; SHANE GONZALES;

No. 2:19-cv-02027 WBS AC

MEMORANDUM AND ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

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

Plaintiffs,

v.

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

Defendants.

----oo0oo----

Before the court are motions to dismiss brought by defendants King's Casino, LLC ("King's Casino") (Docket No. 45), Justin F. Kuraitis, (Docket No. 46), and Michael Postle (Docket No. 50).

I. Background

King's Casino operates Stones Gambling Hall ("Stones") in Citrus Heights, California. (First Am. Compl. ("FAC") ¶¶ 97, 104 (Docket No. 40).) Starting in January 2018, Stones publicly broadcasted "live" poker games played at its casino several nights a week through a program called "Stones Live Poker". (Id. ¶¶ 110, 116.) Like most poker games, participants began Stones Live Poker by paying Stones a small fee, called "the rake," to

organize and run the game. (Id. ¶¶ 105, 185.) Unlike most poker games, however, the poker table was surrounded by video cameras and contained cards that were imbedded with radio-frequency identification capabilities that made it possible to transmit the composition of each player's hand and identity to a control room. (Id. ¶¶ 105-06.) Stones combined the film from the cameras with the information from the card sensors to provide viewers with an omniscient view of the game. (Id. ¶ 107.) While characterized as "live," the feeds are often delayed by fifteen to thirty minutes to prevent cheating. (Id. ¶ 108.) Justin Kuraitis, a mid-level employee of Stones, directed the series. (Id. ¶ 115.)

Michael Postle frequently played in the Stones Live Poker games and quickly became known for his success. (Id. ¶¶ 116-18, 120.) From July 18, 2018 to September 29, 2019, Postle allegedly recorded net winnings in more than 94% of the games in which he played. (Id. ¶ 120.) According to the FAC, Postle became an "in-house celebrity." (Id. ¶ 4.) Stones created graphics of Postle depicted as a "deity-like individual imbued with omniscient powers" and allegedly compensated him to host his own poker show, 'Postle and Pals!'. (Id. ¶¶ 118, 173-74.) Kuraitis told other players that Postle's skill was simply "on a different level." (Id. ¶ 164.)

Not everyone agreed. Plaintiff Veronica Brill took her concerns that Postle was cheating to Kuraitis on March 20, 2019. (Id. ¶ 159.) She claimed Postle was using a concealed cell phone to communicate with at least one unnamed confederate while playing the game. (Id. ¶¶ 127-28.) This John (or Jane) Doe would allegedly furnish him with information about the cards of

his competitors, and he would play his hand accordingly. (Id.) Kuraitis responded by insisting the game was "one hundred percent secure." (Id. ¶ 160.) After publicly tweeting out her allegations against Postle, Stones tweeted that it had "conducted a full investigation & found no evidence that any cheating [] occurred." (Id. ¶ 166.)

Brill, unsatisfied, and with over eighty other plaintiffs, followed with this action against defendants. Plaintiffs allege six causes of action against King's Casino, three against Kuraitis, and five against Postle himself. (See generally FAC.) Each defendant submitted its own motion to dismiss, although both Postle and Kuraitis joined King's motion.

II. Standard

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 plaintiffs' favor, the plaintiffs have stated a claim to relief that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" will not survive a motion to dismiss. Id. (citations and quotations omitted).

Normally, pleadings are subject to Federal Rule of Civil Procedure 8. Rule 8(a) provides that: "[a] pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . (2) a

short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). However, for claims involving fraud, plaintiffs must satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). Rule 9(b) requires parties to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To successfully plead fraud under Rule 9(b), "a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 964 (9th Cir. 2018) (internal citation omitted).

III. Discussion

A. King's Motion to Dismiss

King's Casino moves to dismiss all six causes of action alleged against its property, Stones: negligent misrepresentation (Claim 3), negligence (Claim 6), constructive fraud (Claim 7), fraud (Claim 8), libel per se against plaintiff Veronica Brill (Claim 9), and violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq. (Claim 10). (King's Mot. at 5.) At the outset, King's Casino argues plaintiffs' claims for negligent misrepresentation, negligence, constructive fraud, fraud, and the CLRA are not cognizable under California law because California public policy bars judicial intervention in gambling disputes, in part because the asserted damages are inherently speculative. (King's Mot. at 7.) In opposition, plaintiffs argue California courts have "regularly recognize[d] the justiciability of gaming-centric disputes" and seek to

recover their gambling losses (including money lost to Postle and loss of opportunity) and the rake, paid to Stones before each hand. (Pls.' Opp'n to King's Mot. at 12-13, 15-25 (Docket No. 56); FAC ¶¶ 184-87, 236, 252, 260, 266.)

In their briefs and at oral argument, both sides substantially relied on the California Court of Appeal's decision in Kelly v. First Astri Corp. 72 Cal. App. 4th 462 (4th Dist. 1999), review denied, No. S080081 (Cal. Sept. 1, 1999). In Kelly, three blackjack players sued a casino, the casino's manager, and one of the casino's employees for intentional misrepresentation, fraudulent concealment, conversion, money had and received, negligence, negligent supervision, and civil conspiracy following the discovery of a marked card scheme at the casino. Id. at 468. The court upheld the trial court's grant of summary judgment to defendants because plaintiffs' action to recover his gambling losses were barred "under California's strong and long-standing public policy against judicial resolution of civil claims arising out of lawful or unlawful gambling." Id. at 466.

While the Kelly court recognized California's "public attitudes about gambling" had shifted substantially since the Supreme Court of California refused to recognize a cause of action on moral grounds, see id. at 489, it held that the "public acceptance of some forms of gambling" did little to create an independent cause of action to recover gambling losses absent legislative action to "enact[] a statute permitting the use of the process of the courts in California to resolve . . . gambling loss claims." Id. at 489. Today, the California state

legislature still has not created a statutory right to permit individuals to recover their gambling losses, although other states have done so. See, e.g., Illinois Loss Recovery Act, 720 ILCS 5/28-8, et seq.

King's Casino argues that California's public policy against recovery of gambling losses and gambling debts should be sufficient to foreclose plaintiffs' claims here, but even if it is not, the speculative nature of the damages should be. (King's Mot. at 5-7.) Relying principally on Vu v. California Commerce Club, Inc., 58 Cal. App. 4th 229 (2d Dist. 1997), defendant argues that California courts have found "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." (King's Mot. at 5-6 (quoting Vu, 58 Cal. App. 4th at 233).) The Vu court's finding is consistent with Kelly's bar on recovering gambling losses. However, neither court fully addresses whether California's public policy sweeps broadly enough to preclude damages that can be proved with reasonable certainty.

Plaintiffs seek, in part, to recover the rake -- the fixed collection rate Stones collected before each poker hand. (See FAC ¶¶ 184-87, 236, 252, 260, 266, 275-276, 278.) The rake represents a cognizable measure of economic harm that is in no way tied to the ultimate outcome of a particular hand of poker. Unlike damage claims predicated on lost opportunities, the rake is not "speculative," or the product of chance. These amount to "recovery of the monies paid to administer the games fairly."

(Pls.' Opp'n to King's Mot. at 13.)

It does not appear that California's public policy barring judicial intervention to recover gambling losses sweeps so broadly as to include the concrete, identifiable damages represented by the rake. Accordingly, to the extent that "an appreciable portion of the damages sought by Plaintiffs" are not reliant on gambling losses and are instead predicated on the rake alone, (Pls.' Reply to King's at 10; FAC ¶¶ 184-93), the court proceeds to consider whether plaintiffs' claims are sufficient to withstand King's Casino's motion to dismiss.

1. Fraud

Plaintiffs Veronica Brill and Kasey Mills[1] allege a fraud claim against Stones. (Id. ¶¶ 261-67.) In California, the elements of 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." Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996).

Allegations of fraud must conform to Rule 9(b)'s strictures. Fed. R. Civ. P. 9(b). Brill and Mills allege that defendant Kuraitis defrauded them while acting for himself and on behalf of Stones on March 20, 2019 when he claimed Postle was not cheating when they confronted him at the casino. (FAC ¶¶ 159, 164, 262, 267.) However, Brill and Mills fail to particularly plead the damages they suffered as a result of this alleged

[1] Marc Goone also originally pursued a claim against Stone for fraud in the FAC, though that claim was voluntarily dismissed. (FAC ¶ 262; Pls.' Opp. to King's Mot. at 33 n.11.)

fraud.

Specifically, Brill and Mills do not allege what days they played poker at Stones Live Casino after they were defrauded.[2] They do not allege the cost of the rake during each game, let alone what they contributed individually.[3] Instead, they offer nothing more than a general allegation that the rake amounted to "tens of thousands of dollars during the life of Mr. Postle's scheme." (FAC ¶ 186.) This general allegation is not sufficient to satisfy Rule 9(b)'s rigorous demands. However, plaintiffs have represented to the court that they are prepared to "identify the rake paid over to Stones in the [] subject poker games." (Pls.' Opp'n to King's at 54.) Accordingly, plaintiffs' fraud claims must be dismissed with leave to amend to afford plaintiffs an opportunity to meet Rule 9(b)'s particularity requirement.

2. Constructive Fraud

The elements for constructive fraud are similar to fraud, although it requires "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." Prakashpalan v. Engstrom, Lipscomb & Lack, 223

---

[2] The court notes that while plaintiffs alleged a number of dates in connection with their RICO claim against Mr. Postle, they do not offer the same particularly to support their fraud claim. (FAC ¶ 205.) The court also notes a vast majority of the games (see id. ¶ 205(i) - (xliii)) also occurred before Brill and Mills purportedly approached Kuraitis in March 2019.

[3] For the reasons described above, the court will only consider plaintiffs' claims for damages "equal to monies paid to Stones as and for the rake." (FAC ¶ 226.)

Cal. App. 4th 1105, 1131 (2d Dist. 2014). Notably, constructive fraud is "applicable only to a fiduciary or confidential relationship." Id. (internal citations and quotations omitted).

"Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 386 (2008) (internal citations and modifications omitted). Here, while plaintiffs allege that Stones "had a legal duty to monitor the Stones Live Poker game for cheating" and Stones breached this duty by "concealing from the Plaintiffs allegations of cheating and fraud on the part of Mr. Postle," they fail to allege any fiduciary obligation to support a constructive fraud claim. (See FAC ¶¶ 255, 257.)

Plaintiffs claim they were particularly vulnerable to Stone's exploitation, and this vulnerability gives rise to a fiduciary relationship. (Pls.' Opp'n to King's Mot. at 39-41.) But as the California Supreme Court articulated in City of Hope, vulnerability, standing alone, does not necessarily create fiduciary obligations unless "one party's vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries." 43 Cal. 4th at 345. For this reason, "[v]ulnerability 'usually arises from advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity' that preexists -- as opposed to arising from -- the transaction at issue." Alvarado Orthopedic Res., L.P. v. Linvatec Corp., No. 11-CV-246 IEG (RBB),

2011 WL 3703192, at *4 (S.D. Cal. Aug. 23, 2011) (citing TMX Funding, Inc. v. Impero Techs., Inc., No. 5:10-cv-00202, 2010 WL 4774791, at *6 (N.D. Cal. Nov. 16, 2010) (quoting Richelle L. v. Roman Catholic Archbishop, 106 Cal. App. 4th 257, 273 (1st Dist. 2003)).

Here, plaintiffs do not allege that they were members of one of these vulnerable communities before they engaged in the poker game, either individually or collectively. (See FAC ¶¶ 254-60.) Instead, their claim is unpersuasively predicated on the "transaction at issue." See Alvarado, 2011 WL 3703192, at *4. Plaintiffs have failed to adequately allege a fiduciary or confidential relationship between themselves and Stones that would support a claim for constructive fraud. Accordingly, plaintiffs' constructive fraud claim must also be dismissed.

3. Negligent Misrepresentation

District courts in the Ninth Circuit appear to be divided on whether claims for negligent misrepresentation need to satisfy the heightened pleading requirements of Rule 9(b). See Price Simms Holdings LLC v. Candle3, LLC, No. 2:18-CV-1851 WBS KJN, 2018 WL 6271580, at *5 n.7 (E.D. Cal. Nov. 30, 2018) (citing Petersen v. Allstate Indem. Co., 281 F.R.D. 413 (C.D. Cal. 2012) (discussing the holdings of district courts in the Ninth Circuit that Rule 9(b)'s heightened pleading standard applies to negligent misrepresentation claims before holding that Rule 9(b)'s heightened pleading standard does not apply to negligent misrepresentation claims)). The court need not express an opinion on that issue here, however, because plaintiffs have failed to fulfill the essential elements of negligent

misrepresentation.

The elements for negligent misrepresentation are almost the same as the elements for fraud under California law. But rather than "knowing" the representation was false at the time it was made, the defendant must have made the representation "without reasonable ground for believing it was true." West v. JPMorgan Chase Bank, 214 Cal. App. 4th 780, 792 (4th Dist. 2013). Plaintiffs allege Stones engaged in negligent misrepresentation by "conducting Stones Live Poker games in a licensed casino," which created "an implicit representation" that players would be "protected from the cheating of other players through utilization of adequate and sufficient security measures and protocols." (FAC ¶ 229.) Principally, plaintiffs claim Stones knew Postle was cheating "because at least one agent of Stones served as a John Doe or Jane Doe confederate of Mr. Postle." (Id. ¶ 233.)

Critically, plaintiffs failed to disclose the identity of the alleged confederate. (See id.) Without this information, the court cannot adequately assess the intent to defraud, whether the plaintiffs' reliance was justified, or whether Stones held itself out as an honest business "without reasonable ground for believing" it to be true. See West, 214 Cal. App. 4th at 792. At the same time, plaintiffs have represented they are prepared to "allege the identity of Mr. Postle's chief confederate by name and position." (Pls.' Opp'n to King's Mot. at 54.) Accordingly, the negligent misrepresentation claim will be dismissed with leave to amend.

4. Consumer Legal Remedies Act

The CLRA prohibits "unfair methods of competition and

unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). However, it is not "an otherwise applicable general law" as the CLRA "applies only to transactions for the sale or lease of consumer 'goods' or 'services' as those terms are defined in the act." Fairbanks v. Superior Court, 46 Cal. 4th 56, 65 (2009). A "consumer" is defined as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Cal. Civ. Code § 1761(d). "Services" are defined 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. Civ. Code § 1761(b). "Goods" are defined as "tangible chattels." Cal. Civ. Code § 1761(a).

Neither party offers authority to support or refute the proposition that poker is a "service" under the CLRA, nor is the court aware of any California case directly addressing the issue. Plaintiffs argue that "[t]he 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." (Pls.' Opp'n to King's Mot. at 48.) But by that logic, almost everything would fall under the definition of "service," turning it into a "general law." See Fairbanks, 46 Cal. 4th at 65. Gambling is not "work or labor, nor is it related to the sale or repair of any tangible chattel." See id., 46 Cal. 4th at 61 (holding life insurance is not a "service"

under the CLRA); see also Hall v. Sea World Entm't, Inc., No. 3:15-cv-660-CAB-RBB, 2015 WL 9659911, at *15 (S.D. Cal. 2015) (finding ticket to enter an amusement park was not a "service" under the CLRA). To find what is inherently a game a "service" requires a strained and unnatural reading of the statute. Accordingly, plaintiffs' CLRA claim will be dismissed.

5. Negligence

In California, the elements of negligence are: (1) a legal duty to use reasonable care; (2) a breach of that duty; (3) causation; and (4) damages. See Ladd v. Cty. of San Mateo, 12 Cal. 4th 913, 917 (1996). Where, as here, the plaintiffs do not allege any physical harm, "[t]he economic loss rule has been applied to bar a plaintiff's tort recovery of economic damages." N. Am. Chem. Co. v. Superior Court, 59 Cal. App. 4th 764, 777 (2d Dist. 1997). Liability for purely economic loss is "the exception, not the rule under [California Supreme Court] precedents." S. Cal. Gas Leak Cases, 7 Cal. 5th 391, 400 (2019) (citation and internal quotations omitted). However, plaintiffs argue the "special relationship" exception to the economic loss rule applies here. (Pls.' Opp'n to King's Mot. at 27-29.)

The special relationship exception applies when "the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." S. Cal. Gas Leak Cases, 7 Cal. 5th at 400 (citing J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804 (1979)). To determine whether the parties had a special relationship, courts will consider "(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.

The first factor alone may be dispositive if plaintiffs fail to allege the transaction was intended to affect them specifically, rather than any number of potential poker players. See Greystone Homes, Inc. v. Midtec, Inc., 168 Cal. App. 4th 1194, 1230-31 (4th Dist. 2008). Here, plaintiffs generally allege that Stones breached a duty to them by "maintaining a control room that did not adhere to prevailing industry standards for security" and "not properly regulat[e] and/or supervis[e]" employees in the performance of their duties. (FAC ¶¶ 249-50.) While plaintiffs claim in their opposition the game was "intended to affect [them]" because "they are literally the consumers paying Stones to operate those games and wager[] money in those games," (see Pls.' Opp'n to King's Mot. at 28), this fails to adequately suggest that any cheating was intended to specifically affect them, rather than any possible poker player. Their FAC is similarly devoid of any such allegation. Accordingly, because the plaintiffs have failed to plausibly allege that they had a special relationship with Stones, the economic loss rule will bar their negligence action.

6. Libel Per Se

Plaintiff laintiff Veronica Brill alleges she suffered "bullying, harassment, and emotionally-taxing non-physical attacks on social media" after Stones called her cheating

allegations "completely fabricated" on its social media account. (FAC ¶¶ 269, 271.)

Under California law, the elements of defamation are: "(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). Plaintiffs can bring a claim for either libel per se or libel per quod. Brill asserts a claim for libel per se.[4]

Libel per se occurs when the publication's "defamatory meaning appears from the language itself without the necessity of explanation or the pleading of extrinsic facts." Palm Springs Tennis Club v. Rangel, 73 Cal. App. 4th 1, 5 (4th Dist. 1999). "In defamation actions[,] the First Amendment . . . requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way." Blatty v. N.Y. Times Co., 42 Cal. 3d 1033, 1042 (1986). "[T]he plaintiff need not be mentioned by name, but may be identified by clear implication." Id. at 1044 n.1. "Whether defamatory statements can reasonably be interpreted as referring to plaintiffs is a question of law for the court." Tamkin v. CBS Broad., Inc., 193 Cal. App. 4th 133, 146 (2d Dist. 2011).

The allegedly libelous tweet sent from the Stones Live Poker account (@StonesLivePoker) reads in full:

> Earlier this year an accusation was made that a player was cheating in our game[.] We conducted

[4] While Brill generally alleged a cause of action for libel in plaintiffs' FAC, the opposition clarifies that she is alleging only libel per se because she does not allege the special damages required for libel per quod. (Pls.' Opp'n to King's Mot. at 51); see also Cal. Civ. Code § 45a.

> a full investigation & found no evidence that cheating had occurred[.] Stones Live stream remains a secure poker streaming platform[.] The recent allegations are completely fabricated[.]

(Request for Judicial Notice ("RJN"), Ex. C (Docket No. 47-3).) Brill claims she was "known to be the person who had accused Mr. Postle of cheating" on Twitter, and Stones' response on the same platform means the post was "of and concerning" her. (Pls.' Opp'n to King's Mot. at 53.)

Plaintiff suggests this court's decision in Yow v. National Enquirer, Inc., 550 F. Supp. 2d 1179 (E.D. Cal. 2008), supports her contention that the tweet was "of and concerning" her. (Pls.' Opp'n to King's Mot. at 52-53.) While the defamatory article at issue in Yow did not expressly identify the plaintiff, she was still identifiable by reasonable implication because she was one of "four or five women" with actor Mel Gibson at the time he was allegedly snorting "a mound of cocaine." 550 F. Supp. 2d at 1187-88. Here, "numerous individuals" approached Mr. Kuraitis to accuse Postle of cheating "as early as February 2019." (FAC ¶ 155.) However, the allegedly libelous tweet was published on September 29, 2019. (RJN, Ex. C.) With 88 other plaintiffs in this action and millions of users on Twitter, it is possible -- indeed, quite probable -- that Stones' tweet could have been in reference to any number of allegations, made by any number of people. Under California law, courts have consistently held that plaintiffs cannot show that statements were "of and concerning" them in "any group numbering over twenty-five." Blatty, 42 Cal. 3d 1046 (internal citations omitted). The need

to explain the statement and the extrinsic facts surrounding it disqualifies it from meeting the elements for libel per se. See Palm Springs Tennis Club, 73 Cal. App. 4th at 5. Accordingly, Brill's libel claim will be dismissed.

B. Kuraitis' Motion to Dismiss

Plaintiffs bring claims against defendant Justin Kuraitis for negligent misrepresentation (Claim 3), negligence (Claim 6), and fraud (Claim 8). (See FAC ¶¶ 228, 246-47, 262-64.) Kuraitis moves to dismiss each claim against him and joins in King's Motion insofar as plaintiffs' claims are plead against them both. (Kuraitis Mot. (Docket No. 46).)

1. Fraud

As stated above, Brill and Mills' fraud allegation is founded upon representations Kuraitis made to them while acting "for himself and on behalf of Stones" in March 2019. (See FAC ¶¶ 159, 164, 262, 267.) The court dismissed the claim against Stones for failure to particularly plead damages. See supra Part III(A)(1). The same rationale requires dismissal of their fraud claim against Kuraitis, albeit for a slightly different reason.

Under California law, "the fact that the principal becomes liable under the rules of vicarious liability . . . does not exonerate an agent from liability for a tortious act committed by the agent while acting under the authority of the principal." Peredia v. HR Mobile Servs., Inc., 25 Cal. App. 5th 680, 692 (5th Dist. 2018). However, "agents are not vicariously liable for the torts of their principals." Id. As previously discussed, the plaintiffs may be able to proceed with their claims to the extent they are predicated on the rake, because the

court assumes at this point in the proceedings that the rake is not a "gambling loss" under Kelly. See supra Part III(A). But if plaintiffs' damages are confined to the "monies paid to Stones as and for the rake," to allow plaintiffs to proceed against Kuraitis for damages predicated on money kept and collected by Stones alone would be to hold an agent liable for the torts of his principal. (See FAC ¶ 266.) Damages are an essential element of fraud. Lazar, 12 Cal. 4th at 638. Without a connection between Kuraitis and the rake, the claim cannot proceed.

2. Negligent Misrepresentation

Plaintiffs allege Kuraitis engaged in negligent misrepresentation both individually and as an agent of Stones when he "allayed suspicions of cheating by telling people Mr. Postle's play of poker was simply on 'a different level,'" and when he told "at least one Plaintiff that Stones undertakes a quarterly security audit of its Stones Live Poker system." (FAC ¶ 228.) Yet, as with the fraud claims and the negligent misrepresentation claim brought against Stones, plaintiffs fail to offer anything other than a general allegation that Kuraitis "made these representations without a reasonable basis for believing them to be true." (Id. ¶ 232.) Although plaintiffs allege Kuraitis "continuously concealed allegations of cheating," they fail to identify the "John Doe or Jane Doe confederate" responsible for aiding Postle, or whether Kuraitis knew of the relationship. (Id. ¶¶ 232-33.) Since the plaintiffs have represented they can "allege the identity of Mr. Postle's chief confederate by name and position," (Pls.' Opp'n to King's Mot. at

54), however, the negligent misrepresentation claim will be dismissed with leave to amend.

3. Negligence

Again, the elements of negligence are: (1) a legal duty to use reasonable care; (2) a breach of that duty; (3) causation; and (4) damages. See Ladd, 12 Cal. 4th at 917. Plaintiffs again do not allege any physical harm in connection with their negligence claim against Kuraitis, instead alleging that he "individually and as an agent of Stones" had "a duty to ensure the game was carried out in a manner reasonably free of cheating." (FAC ¶¶ 245-46.) Even assuming Kuraitis had a duty to "the game," that would be a duty owed to his principal -- not the plaintiffs. "Where the effect of an agent's failure to perform a duty owed by the principal is merely to cause economic loss, the law does not yet recognize liability to a third person, expect where a duty is created by statute." 3 Witkin, Summary of California Law (11th ed. 2019) Agency and Employment § 210. There is no such duty. This also comports with the economic loss rule. See S. Cal. Gas Leak Cases, 7 Cal. 5th at 400. Accordingly, the negligence claim against Kuraitis must be dismissed.

C. Postle Motion to Dismiss

Finally, defendant Michael Postle moves to dismiss the five claims raised against him: violation of the Racketeer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) (Claim 1); fraud (Claim 2); negligent misrepresentation (Claim 3); negligence per se (Claim 4); and unjust enrichment (Claim 5). (Postle Mot. at 1 (Docket No. 50).

1. Fraud, Negligent Misrepresentation, Negligence Per Se & Unjust Enrichment

Plaintiffs' allegations against Postle for fraud, negligent misrepresentation, negligence per se, and unjust enrichment are all predicated on "monies lost to Mr. Postle" and "the loss of opportunity to earn monies through honest games of poker." (FAC ¶¶ 224, 231, 239, 241-43.) Unlike damages stemming from the rake, these damages are quintessential gambling losses that are barred for recovery by California public policy. See Kelly, 72 Cal. App. 4th at 466. By plaintiffs' own admission, Stones alone collected and profited from the rake. (FAC ¶¶ 224, 236, 239, 286.) Accordingly, California's strong public policy against judicial resolution of civil claims arising out of gambling disputes mandates the dismissal with prejudice of plaintiff's claims against Postle for fraud, negligent misrepresentation, negligence per se, and unjust enrichment. See Jamgotchian v. Sci. Games Corp., 371 F. App'x 812, 813 (9th Cir. 2010) (internal citations and quotations omitted) (affirming dismissal with prejudice of plaintiffs' claims for breach of contract, unjust enrichment, negligent misrepresentation, fraud, and negligence in gambling dispute pursuant to Kelly).

2. RICO

Plaintiffs' RICO claim alleges Postle and his confederate(s) "used one or more instrumentalities of wire transmissions" to relay information about his opponents' cards on numerous occasions. (FAC ¶¶ 201, 205.) Postle argues plaintiffs' claims fail for lack of specificity, including

failure to allege facts in support of the required predicate act and the harms suffered by specific plaintiffs. (Postle Mot. at 6-8 (Docket No. 50).)

RICO provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). To state a RICO claim, plaintiffs must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." United Bhd. of Carpenters & Joiners of Am. Bldg. & Const. Trades Dep't, AFL-CIO, 770 F.3d 834, 837 (9th Cir. 2014) (internal citation and quotations omitted). The fifth element is RICO's "standing" requirement. See Steele v. Hosp. Corp. of Am., 36 F.3d 69, 70 (9th Cir. 1994). In order to satisfy the fifth element, plaintiffs must "show proof of concrete financial loss, and not mere injury to a valuable intangible property interest." Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1086 (9th Cir. 2002) (internal citations and quotations omitted). This prevents RICO from providing "a federal cause of action and treble damages to every tort plaintiff." United Bhd. of Carpenters, 770 F.3d at 837.

Generally, courts have found injury to expectancy or speculative interests do not constitute harm to business or property interests. See, e.g., Chaset, 300 F.3d at 1087 (holding trading card purchasers do not suffer a federal RICO injury when they do not receive a prize card because they paid for and received the chance to obtain the card); Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 188 (3d Cir. 2000)

(holding lost speculative opportunity in blackjack is not an injury to business or property); Price v. Pinnacle Brands, Inc., 138 F.3d 602, 607 (5th Cir. 1998) (holding "[i]njury to mere expectancy interests . . . is not sufficient to confer RICO standing"). Relying on these cases, courts have specifically found that "gambling losses are not sufficient injury to business or property for RICO standing" because they do not present a tangible injury to property. McLeod v. Valve Corp., No. C16-1227-JCC, 2016 WL 5792695, at *2 (W.D. Wash. Oct. 4, 2016) (citing Chaset, 300 F.3d at 1087).

"Private plaintiffs alleging injuries resulting from their own gambling cannot establish 'injury to business or property' under RICO" because there is no concrete financial loss. Adell v. Macon Cty. Greyhound Park, Inc., 785 F. Supp. 2d 1226, 1238 (M.D. Ala. 2011) (quoting Green v. Aztar Corp., No. 02-C-3514, 2003 WL 22012205, at *2 (N.D. Ill. Aug. 22, 2003)). While plaintiffs premise their damages here in part on the rake, (FAC ¶ 217), the plaintiffs have made clear that the rake was collected and retained by Stones alone, and the plaintiffs would have had to pay the rake regardless of whether or not Postle cheated. (See, e.g., id. ¶¶ 224, 236, 239, 286.) Consequently, they cannot rely upon it to make their damage claim any more concrete. Plaintiffs lack standing under § 1964(c) to proceed with their RICO claim because they have failed to allege facts demonstrating a concrete injury to their "business or property." Plaintiffs' RICO claim against Postle must therefore be dismissed.

IT IS THEREFORE ORDERED that the motions of defendants

King's Casino (Docket No. 45), Justin Kuraitis (Docket No. 26), and Michael Postle (Docket No. 50) to dismiss the First Amended Complaint be, and the same thereby are, GRANTED.

Plaintiffs are granted twenty days from the date this Order is filed to file an amended complaint against defendants King's Casino and Kuraitis if they can do so consistent with this Order.

Dated: June 3, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE