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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LARY KENNEDY et al., Plaintiffs and Appellants, v. CHRIS FERGUSON et al., Defendants and Respondents.	B253090 (Los Angeles County Super. Ct. No. BC423036)

APPEAL from orders of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed in part; dismissed in part.

Sanais and Cyrus Sanai for Plaintiffs and Appellants.

Cozen O'Connor, Erik L. Jackson and Nathan Dooley for Defendants and Respondents Chris Ferguson, Howard Lederer, Raymond Bitar, Andy Bloch, Phil Ivey, John Juanda, Erik Lindgren, Erik Seidel, Michael Matusow, Allen Cunningham, Gus Hansen, Patrik Antonious, Tiltware, LLC and Pocket Kings Ltd.

Gibson, Dunn & Crutcher, Maurice Suh and Jay Srinivasan for Defendant and Respondent Philip S. Gordon.

Dykema Gossett, Craig N. Hentschel and Vivian I. Kim for Defendant and Respondent Perry Friedman.

INTRODUCTION

Plaintiffs Lary Kennedy (Kennedy) and Greg Omotoy (Omotoy) appeal from an order dismissing their action for failure to prosecute, a prior order denying them leave to amend to add class allegations, and from subsequent orders denying their motion to disqualify counsel, their motion for a new trial, and their motion to tax costs or strike the memorandum of costs. Because we hold that the trial court acted within its discretion in refusing leave to add class allegations which substantially altered the case and plaintiffs cannot justify their subsequent delay in obtaining leave to file an amended complaint, we affirm the order of dismissal. As to the subsequent orders, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Plaintiffs' Original Complaint*

Plaintiffs filed their original complaint on October 1, 2009, alleging multiple claims arising from defendants' operation of an online poker room. They alleged causes of action for fraud, relief under the Racketeer Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.), unfair competition (Bus. & Prof. Code, § 17200 et seq.), unjust enrichment, libel and slander. The original named defendants were Full Tilt Poker, Chris Ferguson, Howard Lederer, Raymond Bitar, Philip Gordon, Andy Bloch, Phil Ivey, Perry Friedman, John Juanda, Erik Lindgren, Erik Seidel, Michael Matusow, Allen Cunningham, Gus Hansen, Patrik Antonius and Tiltware, LLC. The gravamen of plaintiffs' complaint was that defendants, who operated online poker games, fraudulently induced them to deposit money and play on their website with promises that their operations did not constitute gambling, the company did not allow robots (computers) to play, money deposited was "safe" and the company treated its players "fairly and consistently in accordance with the highest standards of the poker community." They further alleged

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[1] Rule 8.204(a)(1)(C) of the California Rules of Court requires that a party's briefs support any reference to a matter in the record by citation to the record. (*American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 284.) To the extent the parties have made reference to factual or procedural matters without record references, we will disregard such matters. (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 765, fn. 3; *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.)

that defendants had falsely accused Kennedy of using a robot to assist her to play and confiscated $80,000 from her account because of this alleged rule violation. The complaint sought return of the $80,000, relief under RICO for these fraudulent statements and violations of the California Penal Code banning illegal gambling, damages to Kennedy for libel and slander based on statements that she was operating a "robot" to play on her behalf, restitution to California players misled by their business practices and punitive damages.

B. *Removal to Federal District Court*

On October 30, 2009, some of the defendants removed the action to federal district court based on the inclusion of the RICO cause of action in the complaint. (*Kennedy v. Full Tilt Poker Ltd.* (C.D.Cal., Oct. 12, 2019, No. CV09-07964) 2010 WL 3984749.)

On December 3, 2009, plaintiffs filed a first amended complaint in federal district court, adding Pocket Kings Ltd., an Irish company, as a defendant and adding a cause of action for libel under Irish law. On January 11, 2010, plaintiffs filed a second amended complaint adding causes of action for breach of fiduciary duty, negligence, deceit and misrepresentation.

Defendants filed a motion to dismiss the second amended complaint, and on April 26, 2010, the court dismissed plaintiffs' RICO cause of action for "failure to state a claim upon which relief can be granted" (Fed. Rules Civ. Proc., rule 12(b)(6)). It declined to exercise supplemental jurisdiction over the state law claims but granted plaintiffs leave to file an amended complaint which included the state law claims in addition to a properly pled RICO cause of action.

Plaintiffs filed a third amended complaint in federal court on May 17, 2010. They attempted to add new defendants and new causes of action. On August 5, 2010, the court struck the third amended complaint on the ground plaintiffs failed to obtain leave of the court to add the new defendants and causes of action (Fed. Rules Civ. Proc., rule 15). The court ordered plaintiffs to file a motion to amend or an amended complaint that complied with the court's April 26 order within seven days.

Instead, plaintiffs sought reconsideration of the May 17 order striking their third amended complaint. They also filed a notice indicating they did not contest the April 26 order dismissing their RICO claim without prejudice and requested dismissal of that claim and remand of the remaining causes of action to state court.

On October 12, 2010, the federal district court dismissed plaintiffs' RICO claim without prejudice and remanded the case to Los Angeles Superior Court. The court denied the request for reconsideration as moot.

C. *Proceedings Before Judge David L. Minning*

Upon remand, defendants[2] filed a demurrer to plaintiffs' second amended complaint, the operative pleading after remand. On January 27, 2011, the trial court sustained the demurrer without leave to amend as to the causes of action for breach of

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[2] In our discussion of the procedural history of this case, we use the term "defendants" for ease of reference, even though, for the most part, we are referring to actions taken by those defendants represented by Cozen O'Connor, who constitute a majority—but not all—of the defendants.

fiduciary duty and negligence. The court sustained the demurrer with leave to amend as to the causes of action for fraud, deceit, misrepresentation, unfair competition, unjust enrichment, slander and libel under the laws of California and Ireland. The court noted the RICO cause of action had previously been dismissed by the federal district court and was no longer at issue.

The court ruled that if plaintiffs intended to add new parties or causes of action, they were to file a properly noticed motion for leave to amend their second amended complaint. The court advised that any proposed third amended complaint "must address all aspects" of the court's order sustaining the demurrer to the second amended complaint, as well as matters discussed during argument on the demurrer. A hearing date was reserved for such motion to amend for March 29, 2011. Plaintiffs did not file the motion prior to the hearing date.

Instead, two weeks after the reserved date, on or about April 14, 2011, plaintiffs filed a motion for leave to file a third amended complaint. They sought to add causes of action for money had and received, relief under the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), and RICO. The fraud-based causes of action had been eliminated from the proposed third amended complaint. Full Tilt Poker had been eliminated as a defendant, plaintiffs acknowledging "there was not and is not any entity called Full Tilt Poker which could be sued." The causes of action for money had and received, unjust enrichment, unfair competition, CLRA and RICO were pled as class actions.

At the June 28, 2011 hearing on the motion, the court indicated its tentative ruling was to deny the motion, because plaintiffs "didn't comply with the local rules or with the Rules of

Court when you filed your motion initially. You attempted to correct that situation in your reply. When I read the reply and tried to read it against the complaint, tried to read it against the federal indictment [against some of the defendants], everything that came out of New York, I couldn't make sense of it." Plaintiffs' counsel requested leave to resubmit the motion, explaining that he would be "filing what you have in front of you plus the additional allegations." The court responded: "Don't give me this [indicating the proposed third amended complaint]. Give me something that makes sense. Also tell me how we have a civil RICO . . . in a state court. . . . [W]hat is it[,] two or three class action allegations in an individual or two individual case[s?] I don't understand. It is not even indicated that it is a class action in the filing page." The court gave plaintiffs until July 26 to file a renewed motion to amend and calendared it for September 27.

On September 2, 2011, plaintiffs filed a notice of amendment to notice of motion and motion for leave to file third amended complaint. Plaintiffs' counsel stated in his supporting declaration that "the request to file this exact complaint, in this exact form, could not have been made prior to September 1, 2011 as the most recent allegations set forth therein were learned of on June 29, 2011 and August 29, 2011."

Counsel explained that the proposed third amended complaint would add six new defendants, one of whom he previously knew about, and the other five of whom he learned about "from the April 15, 2011 revelation of the criminal forfeiture lawsuit filed against certain of the [d]efendants by the

United States Attorney for the Southern District of New York."[3] Counsel also generally explained the addition of the new causes of action and the class allegations.

At the September 27, 2011 hearing on the motion, the court observed that this case started out "as a single plaintiff, potentially two plaintiffs, claim for basically fraud. . . . [A] give me my money back type of case[,] coupled with [libel], slander and all that" based on plaintiff Kennedy's initial allegation "that [defendants] took her money, her [$]80,000 which represented . . . her winnings, and they said that she wasn't playing according to the rules." With the proposed third amended complaint, the case had evolved "into what now appears to be a national class action or potentially a national class action. . . . [I]t doesn't even sound like the same case anymore." The court stated that it believed

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[3] "On April 15, 2011, known as 'Black Friday' in the online gambling world, the United States Attorney for the Southern District of New York shut down the websites of the three largest online poker companies operating in the United States, including Full Tilt, seized their assets, and issued arrest warrants for their founders. [Citation.] An ensuing criminal indictment accused various defendants of multiple UIGEA [(Unlawful Internet Gambling Enforcement Act of 2006 [31 U.S.C. § 5361 et seq.])] violations, conspiracy to commit bank and wire fraud, and conspiracy to commit money laundering. [(]*See United States v. Scheinberg* [(S.D.N.Y. Apr. 14, 2011, S3 No. 10 Cr. 336)] . . . .[)] Soon after the indictment, the Department of Justice . . . filed a civil suit seeking *in rem* forfeiture of defendants' assets and any proceeds derived from their illegal acts. [(]*See United States v. Poker stars* (S.D.N.Y. Sept. 21, 2011, No. 11 Civ. 2564) . . . .[)] The suit also sought monetary judgments from each of the [i]ndividual [d]efendants." (*Lawson v. Full Tilt Poker Ltd.* (S.D.N.Y. 2013) 930 F. Supp. 2d 476, 481.)

the case ought "to remain Ms. Kennedy's case, and if plaintiff wants to pursue causes of action involving class allegations on either a state or a national basis, then they ought to do so in another case."

Plaintiffs' counsel pointed out that the new allegations were based on information not available at the time the case originally was filed. He also argued why class claims were appropriate, an argument vigorously opposed by defense counsel. Following extensive argument, the court denied the motion to amend based on its determination of how best to manage its own calendar. The court advised plaintiffs' counsel: "There will be no class assertions in this case. . . . If your client wishes to proceed on a class basis, I have no problem with her doing so. So you can do it in another case . . . because I cannot manage a national class in this courtroom on this case."

Plaintiffs' counsel registered skepticism regarding the court's basis for its ruling but added that Kennedy had individual RICO and CLRA claims, and she did not need to add the class allegations. The court responded that if plaintiffs wanted to file a third amended complaint, the court needed the motion to specify exactly what they would be amending. After further discussion about the fact the allegations in the original complaint regarding defendants' conduct towards Kennedy had not changed, the court questioned why an amended complaint was even necessary. It added, "Unless you want to bring in a class action and I cannot handle a class action. You can go forward on an individual basis. But if you are going to file a class action, you are going to do it in another forum."

When plaintiffs' counsel asked what the court meant, the court responded, "You can do it in federal court. You can actually

file another class action here. If you go forward with the class action, then we got to go through a whole thing deeming it complex and see what the complex court says and all that. This is Kennedy's case." Counsel again questioned the court's ruling, and the court told him it was denying the motion for leave to amend "[s]pecifically with respect to the class action allegation." But "if you want to go forward on Ms. Kennedy's behalf on the basis of the allegations set forth in the proposed third amended complaint, then do so. Give me another motion to amend and see what you have to say."

Plaintiffs' counsel stated that he could amend the defamation cause of action and "if I dismiss everything else without prejudice, I don't have any problem. I can have a nice simple no class action case in front of you" on "those claims I don't think are class actionable. And then I will separately go ahead with the class action claims. . . . [I]f I have leave to do that, I'll go do it. It seems to solve your problem as well." The court told counsel, "do whatever you wish to do. I'm not giving you leave to do anything. You just do what you think is right." Counsel responded that "it is critically important that I understand this because you have said on the record that if Ms. Kennedy and Mr. Omotoy wanted to pursue a class action claim in a separate lawsuit, be up [sic] in a separate forum, she is free to do that. If this is true, then that is what we are going to do."

Plaintiff's counsel then recited what he understood the court to be instructing: "I'm going to do as the court's given me leave to amend[,] which is amend the complaint with the deletion of all the class actionable claims. I'm going to file them in a separate lawsuit, and I'm going to leave this court with the defamation lawsuit that is separate and apart from anything

else, and I think that is going to be much smaller, much tighter, and it will leave all these other issues about the fraud, et cetera, in the hands of another court." The court concluded: "Record will reflect that the motion to amend is denied. We still have a demurrer that was sustained to the second amended complaint. If we are going to have an amendment to the second amended complaint, let's get it done. 20 days?" The court and parties agreed that "[20] days [was] sufficient."

The minute order for the September 27, 2011 hearing stated that plaintiffs' motion for leave to file a third amended complaint "comes on for hearing and is argued. [¶] As a result the Court DENIES the Motion. [¶] Counsel confer further with the Court. [¶] As a result, any amended complaint filed by plaintiff is to be filed and served no later than Oct[ober] 26, 2011."

Plaintiffs filed a third amended complaint on October 17, 2011. The new complaint contained causes of action for unjust enrichment, fraud, unfair competition, libel under California and Ireland law, and slander. It omitted class allegations.

Defendants filed a motion to strike the third amended complaint on the ground the trial court had not given permission to file it but had only given permission to file a *motion for leave to file* a third amended complaint. At the same time, defendants filed a motion to amend the September 27, 2011 minute order nunc pro tunc to reflect the trial court's denial of leave to file a third amended complaint. On February 17, 2012, the court granted both motions. It ruled: "It is clear that the court did not and has not authorized the plaintiff to file a third amended complaint. Therefore, the defendants' motion to strike plaintiff's third amended complaint is granted. [¶] Should plaintiff wish to

seek the court's authorization to file an amended complaint, plaintiff must file its motion to do so before 4/6/2012. Any proposed amended complaint should comply with the court's concerns and ruling articulated in the transcript of 9/27/2011. [¶] Defendants' motion to amend the minute order of 9/27/2011 is granted. The minute order shall be amended nunc pro tunc to omit the words 'as a result, any amended complaint filed by plaintiff is to be filed and served no later than October 26, 2011.'"

On April 23, 2012, plaintiffs filed a request to dismiss without prejudice all causes of action except for their causes of action for libel and slander under California and Irish law. The request stated it was made "[i]n reliance on" the September 27, 2011 order denying plaintiff's motion for leave to amend and stating that "the causes of action which [p]laintiffs sought to amend as class action claims could be brought in a different lawsuit filed in any forum." Dismissal was entered the same date.

D. *Class Action Filed in Federal District Court*

On the same day that they filed their third amended complaint in state court, plaintiffs also filed a nationwide class action complaint in federal district court, alleging causes of action for money had and received, unjust enrichment, CLRA, fraud, unfair competition, RICO, and constructive trust. (*Kennedy v. Ferguson* (C.D.Cal., 2011, No. CV11-8591) (the *Ferguson* action).)[4]

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[4] At least two other putative class actions had been filed in federal court as of that date seeking recovery of all money obtained by Full Tilt from its illegal gambling operations. (*Segal v. Bitar* (S.D.N.Y. Jan. 30, 2012, No. 11 Civ. 4521) 2012 WL

On July 2, 2012, plaintiffs filed a "motion to reopen" the original action in federal court, which had previously been dismissed. Defendants filed a motion to stay or dismiss the *Ferguson* action. On August 24, 2012, the court denied plaintiffs' motion to reopen. It rejected plaintiffs' suggestion, repeated here, "that Judge Minning's inability to handle the complexities of the case warrants relief," noting that "[p]laintiffs have misconstrued Judge Minning's statements." In addition, relief was available only if extraordinary circumstances prevented plaintiffs from prosecuting their case (Fed. Rules Civ. Proc., rule 60(b)(6)), and "[p]laintiffs have suffered no injury as a result of the dismissal and remand to which they consented. Nor have they proffered evidence that their current litigation posture is the result of circumstances beyond their control. Rather, the situation is entirely of their own making."

The court granted defendants' motion to stay the *Ferguson* action pending resolution of the Government's civil forfeiture action, which had been filed six months before the *Ferguson* action. Plaintiffs failed to oppose the motion, and the court granted it on that basis. In addition, the court explained, "it appears that the putative class members the *Ferguson* plaintiffs seek to represent will be able to recover any funds wrongfully taken from them if the government prevails." To avoid duplicative litigation, it was appropriate to stay the *Ferguson* action until the civil forfeiture litigation was resolved.

0273609 and *Lawson v. Full Tilt Poker*, *supra*, 930 F.Supp.2d 476.) Both alleged the same facts as here, drawn from the April 15, 2011 federal filing and subsequent indictments. The *Segal* and *Lawson* actions sought $150 million in funds "locked up" in Full Tilt player accounts. (*Lawson*, *supra*, at p.481.)

E. *Proceedings Before Judge Elizabeth White*

On August 20, 2012, defendant Tiltware filed notice of related case in *Cardroom International, LLC v. Mark Scheinberg et al.* (Super. Ct. L.A. County, 2013, No. SC114330) (*Cardroom*) and the instant case.[5] On August 28, the two cases were deemed related and both assigned to Judge Minning. Cardroom filed an affidavit of prejudice as to Judge Minning (Code Civ. Proc., § 170.6), and the cases were reassigned to Judge White.

On December 19, 2012, at plaintiffs' request, the court set March 13, 2013 as the date for a hearing on plaintiffs' renewed motion for leave to file a third amended complaint. Plaintiffs did not file a renewed motion, however, and the matter was taken off calendar.

Plaintiffs still had not filed their motion by the time of the July 8, 2013 status conference, at which time plaintiffs' counsel again stated that he would file the motion. The court issued an order to show cause (OSC) "why the case should not be dismissed for failure to file a motion to amend," and set the hearing for August 22, 2013. The court added that "[n]o appearance is necessary if plaintiff's motion to amend . . . [is] filed prior to the hearing."

On August 15, 2013, plaintiffs filed a notice of setting hearing date for motion for leave to amend and response to order to show case. In the notice, plaintiffs' counsel stated that "[p]laintiffs have set a hearing date of October 8, 2013 for filing their motion for leave to amend. This was the first date available

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5 *Cardroom* is currently on appeal before us in case No. B251313. The plaintiffs in both cases are represented by the same counsel, as are some of the defendants in both cases.

offered by this [c]ourt's clerk. . . . [¶] Pursuant to this [c]ourt's order, [p]laintiffs will not be attending the hearing and presume that the [OSC] will be discharged."

On August 22, 2013, the date set for the hearing on the OSC, plaintiffs filed a supplemental response to the OSC and requested to move the hearing date for the motion for leave to amend. Plaintiffs stated "[i]t appears that [p]laintiffs' counsel misunderstood the [c]ourt's oral order and that the court ruled that it would only be discharged without an appearance if [p]laintiff's counsel FILED the motions before August 22, 2013." Counsel explained that he only realized the misunderstanding when he reviewed the docket on August 21 and saw the OSC still on calendar. Only when he downloaded a copy of the order did he realize his error. Counsel "apologize[d] for misunderstanding the court's intention and for not checking the text of the order sooner," but added that "even if he had understood it, he still [would] have been unable to file the motion[] by August 22, 2013" based on events occurring in other litigation which affected how the proposed third amended complaint would be written.

After entertaining argument on August 22, 2013, the court dismissed the action pursuant to its powers under Code of Civil Procedure section 583.410. The court explained its ruling: "The case is not at issue. The [c]ourt has given [p]laintiffs abundant opportunity to amend after leave was granted by both the [d]istrict [c]ourt and the [s]tate [c]ourt. Plaintiffs have filed two [m]otions for [l]eave to [a]mend which were denied and have failed to file a further motion."

On September 10, 2013, despite the order of dismissal, plaintiffs filed a motion to disqualify defendants' counsel, Cozen O'Connor, for committing fraud on the court, to be heard on

plaintiffs' scheduled hearing date of October 8. The motion was based on counsel purportedly having lied about the law firm's authority to represent defendants Phil Gordon and Perry Friedman and having been "stripped of its authority" to act on behalf of defendant Pocket Kings Ltd. when Pocket Kings was placed into voluntary liquidation.

On September 12, 2013, plaintiffs filed a notice of intention to move for new trial based on irregularity in the proceedings (Code Civ. Proc., § 657, subd. (1)). Plaintiffs claimed that they "were not given the right to amend their complaint and indeed made multiple attempts to file amended complaints that were wrongfully and illegally refused or struck by the court." Plaintiffs also argued that no action could be taken in this case until the case of defendant Erik Lindgren (Lindgren) was bifurcated, due to an automatic bankruptcy stay as to him.

The court denied plaintiffs' motion to disqualify counsel. It explained that "Plaintiffs have not demonstrated how [d]efendants' continued representation by Cozen O'Connor will threaten cognizable injury or would undermine the integrity of the judicial process—especially in light of the dismissal of this action with only a motion for a new trial and motion to tax costs pending determination."

The court subsequently denied plaintiffs' new trial motion. The court ruled that to the extent plaintiffs were "challenging Judge Minning's rulings imposing conditions on leave to amend and striking the [proposed third amended complaint], this is a motion for reconsideration that does not comply with [Code of Civil Procedure section] 1008. Whether Judge Minning clearly abused his discretion is an issue for the reviewing court." The court also rejected the claim that Lindgren's bankruptcy stay was

an irregularity in the proceedings because it was not presented to the court as a basis for delaying the filing of a motion for leave to amend.

DISCUSSION

A. *Whether the Order of Dismissal Is Void Due to Lindgren's Automatic Bankruptcy Stay*

A claim that defendant Lindgren's bankruptcy voided any state court orders affecting plaintiffs' rights was raised both in this case and in *Cardroom*. "'It is fundamental under federal bankruptcy law that the automatic stay operates for the benefit of the debtor and trustee only, and gives other parties interested in property affected by the automatic stay no substantive or procedural rights. [Citations.] *If the debtor or trustee chooses not to invoke the protections of the automatic stay, no other party may attack any act in violation of the automatic stay*.' [Citations.]" (*Danko v. O'Reilly* (2014) 232 Cal.App.4th 732, 748; accord, *In re Pecan Groves of Arizona* (9th Cir. 1991) 951 F.2d 242, 245.) Thus, plaintiffs may not challenge the order of dismissal based on Lindgren's automatic bankruptcy stay.[6]

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[6] Plaintiffs were aware of the Lindgren bankruptcy, which was filed on June 8, 2012, at least as of February 11, 2013, when they filed a notice of stay in *Cardroom*. As pointed out by Judge White in ruling on the new trial motion, plaintiffs did not raise the bankruptcy as a basis for their failure to file the motion to amend prior to or at the time of the August 22, 2013 OSC set by Judge White. Accordingly, Judge White properly refused to find the existence of the bankruptcy proceeding an "[i]rregularity in the proceedings" which would warrant a new trial. Plaintiffs and their counsel cannot show they were ignorant of the bankruptcy

B. *Whether the Trial Court Abused its Discretion in Denying Plaintiffs' Motion for Leave To File a Third Amended Complaint on September 27, 2011*

As they did in the federal district court, "[p]laintiffs have misconstrued Judge Minning's statements" to suggest that Judge Minning denied their motion for leave to file a third amended complaint on September 27, 2011 because he "believe[d] he [was] inadequate to the task of managing the complexities of the case" and "because of the workload it would create." The transcript of the hearing makes it clear that Judge Minning denied plaintiffs' motion for leave to file a third amended complaint because plaintiffs did not comply with the procedural requirements regarding identifying the proposed amendments and because the amendments would substantially alter the case which had been pending in his court for two years, prejudicing the parties and making the case unmanageable.

Whether to allow leave to amend a complaint is a matter entrusted to the sound discretion of the trial court, and we will not disturb that court's exercise of that discretion except upon a clear showing of abuse. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242; *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1534.) "Generally, leave to amend must be liberally granted [citation], provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation. [Citation.]" (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

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and so they could not raise that issue as a grounds for a new trial. (Code Civ. Proc., § 657, subd. 1.)

It is not an abuse of discretion to deny leave to amend where the plaintiff seeks to add new parties and causes of action and "the proposed new plaintiffs could file a separate action and pursue their claims in that action, as opposed to adding new parties to the current action where the trial date [is] rapidly approaching . . . ." (*M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.*, *supra*, 202 Cal.App.4th at p. 1536; see also *Clark v. EZN, Inc.* (1997) 57 Cal.App.4th 852, 859; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487 [no abuse of discretion in denying leave to amend shortly before trial where it was "apparent that adding the new cause of action would have changed the tenor and complexity of the complaint from its original focus on" individual claims "to an exploration of [the respondents'] activities and practices in the entire Southern California area"]; accord, *Warden v. Kahn* (1979) 99 Cal.App.3d 805, 809-810 [no abuse of discretion to strike an amended complaint "alleging violation of an entirely different primary right, and . . . based upon an entirely different set of facts" despite general policy favoring liberal amendments]; see also *The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1037.)

Here, Judge Minning's stated concern was that the case had morphed from an action with two plaintiffs asserting fairly narrow and specific claims of fraud and defamation into a national class action alleging an entirely new set of facts. Based on the court's "ability to manage its own calendar," the judge concluded that the original case could remain in his court, and if plaintiffs wanted "to pursue causes of action involving class allegations on either a state or national basis," they could do so in a separate action in federal court or in one of the Los Angeles

Superior Courts specially designated to hear complex matters.[7] We find no abuse of discretion in the trial court exercising its discretion to disallow the amendment to raise class claims given that the plaintiffs sought to raise entirely new facts, to name new parties, and to fundamentally alter the theories of liability and damages sought.

In so ruling, we acknowledge that ordinarily a request to add class action allegations or a demurrer to class allegations requires the court to conduct a meaningful analysis of the case's amenability to class treatment. The "'"ultimate question"'" in such cases is whether "'"the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants."' [Citation.]" (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 539.)

While not as in depth as the analysis required at summary judgment or motion for class certification, "[w]hen class certification is challenged by demurrer, 'the trial court must determine whether "there is a 'reasonable possibility' plaintiffs can plead a prima facie community of interest among class members . . . ." [Citation.] '"The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the

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[7] As noted above, the plaintiffs proceeded to file a class action in federal court, which was subsequently stayed due to the filing of a federal forfeiture action.

judicial process and to the litigants.' [Citations.] If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage." [Citation.]' [Citations.]" (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101-1102.) That dismissal of class allegations can be ordered in the appropriate case without leave to amend is unquestioned. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440; *Newell*, *supra*, at pp. 1101-1102; *Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5 ["where the invalidity of the class allegations is revealed on the face of the complaint, and/or by matters subject to judicial notice, the class issue may be properly disposed of by demurrer or motion to strike"; "[i]n such circumstances, there is no need to incur the expense of an evidentiary hearing or class-related discovery"].)

Failure to apply the proper criteria in evaluating the viability of a class action at the demurrer or pleading stage ordinarily requires reversal of an order denying a party leave to raise class claims. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 435-436.) Appeal of an order denying class certification "presents an exception to the general rule on review that we look only to the trial court's result, not its rationale." (*National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1281.) Erroneous legal assumptions or improper criteria may require reversal ""'even though there may be substantial evidence to support the court's order.'" [Citations.]" (*Linder*, *supra*, at p. 436.)

It cannot be said that the trial court here conducted the requisite analysis of commonality, whether individual issues

would predominate or the impact on the judicial system of allowing the case to proceed as a class action. Had the case been filed originally as a class action or had the addition of class allegations not substantially changed the underlying theory of liability, it would be reversible error for a trial court to fail to weigh these factors and to state its reasoning before striking class action allegations without leave to amend. But where, as here, the addition of class action allegations substantially alters the nature of the original case, our review is a deferential one as with any motion for leave to amend, allowing the trial court considerable leeway to manage its cases to ensure that leave to amend does not unduly burden the court or prejudice the parties.

The original complaint in this action, while delving into a relatively new industry—online poker—sought damages based on the straightforward claim that plaintiffs had been misled about the rules of the services they were using on defendants' online site. The plaintiffs, one a professional poker player and one a recreational player, alleged that they deposited money with defendants in order to play online poker. They understood that there was no "house" to play against, but rather they would play against real players, each operating an "avatar," for a pool of money. Plaintiffs alleged they were aware when they signed up to play that defendants would take a "rake," a small amount from each pot, to which they raised no objection in the original complaint. They alleged defendants represented that their money would be safe, the defendants had no interest in the game (and would not play themselves), and no "robots" (computers) were permitted to play. In reliance on these representations and the belief the company would operate in a "fair" manner, plaintiffs deposited money with the company to join the games,

only to learn later that defendants had a stake in the game as they were using professional players or robots to play on their behalves. They claimed defendants ultimately wrongfully accused Kennedy of utilizing a robot in her stead, confiscated the $80,000 she had in her account for this rule violation, and defamed her in the process. The case turned on misrepresentations made to these two plaintiffs, their reliance on certain limited representations and the damages they suffered when they were singled out and falsely accused of violating the rules of the game. They specifically sought damages for fraud, slander and libel, and restitution of Kennedy's $80,000 money on account.

In addition, plaintiffs sought relief in the original complaint under RICO for the following allegedly fraudulent statements: (1) "Poker is a game of skill and is not deemed to be gambling under federal or state law; (2) Full Tilt operates a cardroom where everyone plays for their own account, including the [i]ndividual [d]efendants [meaning no use of substitutes or "ringers"]; (3) "Full Tilt does not tolerate the operation of robots on its site"; (4) "The money of players deposited and won on Full Tilt is safe"; and (5) "Full Tilt treats its customers fairly . . . ." They asserted that because defendants were participating in the games, via robots and the professional players they controlled, their operations were no longer a legal "cardroom" but an illegal gambling operation under various state laws, including California. They also sought relief under Business and Professions Code section 17200 et seq. for the same violations. The RICO claim was subsequently dismissed by the federal court after the action was removed.

The proposed third amended complaint was a different animal altogether from the original complaint. It sought to add six new corporate defendants, Kolyma Corporation, A.V.V., Pocket Kings Consulting Ltd., Filco Ltd., Vantage Ltd., Ranston Ltd., and Mail Media Ltd., three of which were foreign companies. The new complaint sought to pursue claims against these new defendants as well as the original group for the period October 1, 2005 through April 15, 2011, relating back to the earliest statute of limitations based on the original filing date.

In the proposed third amended complaint, the plaintiffs sought to transform the action into a nationwide class action based on an intricate and massive global conspiracy. Plaintiffs alleged that the original and newly added defendants sought to conceal their true identifies and avoid restrictions on internet gambling transactions as part of an international money-laundering conspiracy. To circumvent legal restrictions and bank and credit card company rules, the defendants devised a scheme to create incorrect transaction codes for internet transactions related to their businesses so as to dupe credit card companies and United States banks; processed transactions through fictitious companies to hide their involvement in internet gambling; created pre-paid credit cards for customers to hide transfers of funds to the company complete with fake internet websites and fake consumer reviews to make them appear legitimate; and implemented a fraudulent e-check process facilitated by the "creation of dozens of phony corporations and corresponding websites so that the money debited from [United States] customer's [*sic*] banks would falsely appear to United

States banks to be consumer payments to non-gambling related businesses."[8]

The allegations relating to the fraudulent e-check processing scheme alone consumed pages of allegations, describing the use of middlemen and the creation of multiple agreements between certain of the defendants and other unspecified "money laundering defendants" whereby the e-check processers received a fee for processing each e-check transaction that was substantially higher than fees paid for standard e-check processing for legitimate, non-gambling merchants. The complaint further described how the e-check processers directly or through third parties opened bank accounts in the United States to process the defendants' e-check transactions, lying and making false claims in the process. The complaint gave examples of the defendants' use of middlemen to hide gambling receipts, including several parties who disguised the transactions as payments to a medical billing company and "multiple co-conspirators" who created a phony direct sales household products business to disguise payments. The complaint intimated that there were many more such phony corporations which plaintiffs alleged were part of this massive conspiracy, including an elaborate e-check processing scheme revolving around an Australian company, which was engaged in litigation with one of the new defendants in Australian courts and another one involving an Arizona corporation using the names of "phony

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[8] These allegations of a complex money laundering scheme apparently were drawn from a federal indictment in the Southern District of New York returned on or about April 15, 2011 against certain of the defendants.

merchants," whose business had been seized by federal authorities in 2009.[9]

To add to the complexity of this scheme, plaintiffs alleged that when the e-check processing operations collapsed or were seized by the Government, defendants devised a new strategy which included "persuad[ing] the principals of certain small, local United States banks that were facing financial difficulties to engage in such processing" for defendants, for which the banks would receive sizeable fees "as well as promises of multi-million dollar investments in the banks from" various of the defendants. This final caper ensnared one Utah bank, plaintiffs alleged, which processed over "$100 million of payments" for the defendants, until directed to cease by the FDIC. Again, the complaint insinuated that there were many more examples of small local banks being caught up in this conspiracy, which it might seek to prove.

Pages of allegations were dedicated to outlining the byzantine relationship between the many defendants, some of which were alleged to be "dummy corporations," some of which were alleged to hold ownership interests in others, all of which were alleged to have "deliberately obscured the actual legal entities which comprise the Full Tilt Poker [e]ntities at any time." Moreover, the new complaint alleged that "[t]he roles and responsibilities of the individuals and corporate [e]ntities comprising the Full Tilt Poker entities shift over time, as it is a fluid and sophisticated conspiracy."

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[9] While plaintiffs now assure the court they intend to drop claims against various of the defendants, they also state that they intend to add new ones against the Doe defendants.

Based on these new allegations, plaintiffs sought to recover on behalf of thousands of players located throughout the United States the "rake," the small amount taken from each pot won by a player or the difference between the tournament fees and each tournament payout under a theory of "money had and received" and "unjust enrichment." Notably, plaintiffs had not listed this as one of the problems with defendants' operations in the original complaint; on the contrary, plaintiffs stated that they *understood* defendants would obtain a rake as part of operating a cardroom. In the third amended complaint, plaintiffs now sought to recover $900,000,000, the amount taken as a rake from all players who played for "real money" in the United States from October 1, 2005 to April 15, 2011 (the "class").

In addition plaintiffs sought relief under the CLRA for making materially false statements. Some of those statements were identical to those included in the original complaint, e.g. "Full Tilt does not tolerate the operation of robots," and "Full Tilt treats its customers fairly." But many of the allegations of material misrepresentations were new. For example, the third amended complaint alleged that defendants had the players sign an "end User License Agreement" with Full Tilt Poker which did not disclose that Full Tilt Poker is not a legal entity. Plaintiffs claimed this was a fraudulent practice, as it left the players with no legal remedy if they believed they were wronged by the company. Further, they alleged that defendants did not disclose they "were engaged in brazen money-laundering, violating the laws of the United States" and that they "did not create financial reserves for amounts held on behalf of players, but instead distributed the money [in various ways including] . . . massive distributions to [i]ndividual [d]efendants." For these misleading

statements (old and new), plaintiffs now sought $100,000,000 on behalf of a subclass of all California residents who played for real money with defendants between October 1, 2006 and April 15, 2011.

Separately, they sought to add a cause of action on behalf of a class of all United States residents who played for real money with defendants during the same time period based on the alleged fraudulent statement that "'Full Tilt Poker does ensure that there is adequate financing available to pay all current obligations,'" a statement which plaintiffs alleged was untrue as the company did not have adequate financing in place. This too was an entirely new allegation.

In addition, plaintiffs' sought to revive the RICO claim, although in substantially altered form. Now plaintiffs alleged "[t]he corrupt and fraudulent payment processor transactions alleged [in the third amended complaint] were an integral part of the fraud committed against [p]laintiffs and the [c]lass, in that the fraud against them could not be carried out in the absence of the fraud against the banks." They further alleged that the various fraudulent misrepresentations alleged elsewhere in the complaint and the wrongful conduct with respect to hiding payments constituted a pattern of racketeering activity under section 1961(5) of title 18 of the United States Code, for which they sought treble and punitive damages. Based on the same allegations, they also now sought relief under Business and Professions Code section 17200 on behalf of all California players.

As nearly an afterthought, plaintiffs continued to seek damages for libel and slander for being falsely accused of operating a robot online, for restitution of the $120,000 which was taken from Kennedy based on the allegedly false allegation

and a claim for defamation under the laws of Ireland, where Pocket Kings was based.

These new class allegations entirely eclipsed the original claimed injury which focused entirely on whether players could use robots or ringers to play on their behalves. The new factual allegations involve multiple new defendants playing a multitude of roles, numerous non-named bad actors operating in other states and internationally, a conspiracy which on its face involves tens of thousands of credit card, e-check, and other billing transactions with hundreds if not thousands of business entities on behalf of thousands of players, application and analysis of the laws of many states, formation and maintenance of shell or dummy corporations in the United States and abroad, and the involvement of scores of banks, credit card companies and state and federal agencies, including prosecutors. It sought to expand the fraudulent misrepresentation from one set of alleged misstatements to an entirely new and vastly expanded set. The two individual plaintiffs' request to have their name cleared through resolution of their causes of action for defamation and to have the not insignificant amount of money on account refunded ($120,000 by the time of the third amended complaint) were effectively buried and unlikely to see the light of trial for years, given these new allegations.

Plaintiffs' reliance on *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, is misplaced. While as a general rule leave to amend is liberally granted, *Kolani* confirmed that "[l]eave to amend may be denied if there is prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation." (*Id.* at p. 412.) In the instant case, the defendants would suffer substantial prejudice if the class action allegations

were added two years after commencement of the lawsuit. The original defendants were unlikely to have the case at issue as to them or brought to trial for an extended period with the new allegations. The cost of preparation would dramatically increase, with each new defendant having the right to bring its own motion to challenge the adequacy of the pleadings; to seek summary adjudication; and to separately pursue discovery. The prejudice to the original defendants in allowing the amendment is obvious: what was originally a dispute over the use of robots in an online poker game, for which the plaintiffs sought a total restitution of $80,000, had mushroomed into a dispute in which plaintiffs sought nearly $1 billion in damages and to restore all amounts deposited by every person who had played the game in a six-year period. The discovery and motion practice one could anticipate with the expanded suit would be of a different magnitude altogether than what they would have originally contemplated. Given the vastly different allegations plaintiffs sought to add, the likelihood of substantial delays in having the plaintiffs' initial claims resolved against the original defendants, and the addition of new defendants, several of whom were international corporations, the court did not abuse its discretion in denying leave to amend to add the class action allegations. The court correctly pointed out that, in so ruling, it was not interfering with plaintiffs' right to bring a new class action in state or federal court, which plaintiffs' promptly did by filing the *Ferguson* action in federal court.

We briefly note the arguments plaintiffs raise in their reply brief. They argue that the existence of the federal action does not affect their entitlement to relief in state court, because "multiple defendants who were validly served in this action were not able

to be served in the federal case, and thus have been dismissed," and "there is [a] limitations issue which affects the scope of the relief requested." Plaintiffs do not support these arguments with citations to the record, showing that they raised these issues in the hearing before Judge Minning. This court "ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)[10]

In addition, we do not consider points raised for the first time in reply briefs unless good cause is shown for the failure to raise them in the opening brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 355.) Plaintiffs make no attempt to show good cause for the omission of these arguments in their opening brief.

Nonetheless, in ruling that leave to amend was properly denied, we acknowledge and presume the trial court was aware that such denial could result in plaintiffs being unable, as a practical matter, to refile against and serve all defendants, or

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[10] We deny plaintiffs' request for judicial notice. The May 25, 2012 order of the federal district court dismissing a number of the defendants from the *Ferguson* action has no relevance to the propriety of Judge Minning's September 27, 2011 order denying plaintiffs leave to amend. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482 [court "may decline to take judicial notice of matters that are not relevant to dispositive issues on appeal"].) Documents filed in the federal district court in support of plaintiffs' motion to reopen their original action, which had been dismissed, also have no relevance to the issues currently before us on appeal. (*Ibid.*)

that a refiled class action might not cover the same class period, due to the statute of limitations. Plaintiffs do not have an automatic right to add new defendants or seek damages for new conduct based on the earliest statute of limitations merely because they have brought an action for damages against one group of defendants based on a limited theory of recovery. Subsequent amendments relate back provided they "(1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 409.) Given the new factual allegations, vastly different injuries and different instrumentalities used by defendants to carry out their scheme, it is unlikely plaintiffs could have availed themselves of the "relation back" doctrine to obtain the benefit of the earliest statute of limitations period in any event. Under these circumstances, the court did not abuse its discretion in denying leave to amend, even if the consequence may have been a shorter claims period for the class and failure to secure jurisdiction over all defendants.

C. *Whether Judge Minning's Nunc Pro Tunc Order Was Lawful*

It is well established that a trial court "'can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a *nunc pro tunc* order. [Citations.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made. . . . "The function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then,

but to enter now for then an order previously made.'"'" (*Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1265.) Thus, "'"[a]lthough grounds may exist for opening, modifying, or vacating *the* judgment itself, in the absence of such grounds, the court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered nunc pro tunc. . . .'" [Citation.]" (*Id.* at p. 1266, fn. 6.) "Conflicts between oral pronouncement of judgment and the minute order are presumed clerical, and generally are resolved in favor of the oral pronouncement. [Citation.]" (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 744.)

In arguing that Judge Minning improperly corrected his September 27, 2011 minute order to deny plaintiffs leave to file their third amended complaint, plaintiffs rely on Judge Minning's statement at the end of the hearing: "Record will reflect that the motion to amend is denied. We still have a demurrer that was sustained to the second amended complaint. *If we are going to have an amendment to the second amended complaint, let's get it done, 20 days*?" (Italics added.)

Previously in the hearing, however, the judge told plaintiffs, "If you are going to continue to desire to file a third amended complaint, file another motion to do so, give me something that I can get my hands on. . . . You know, I want to know what you are amending, not that you are restating the whole thing." The court later reiterated that it was denying the motion for leave to amend "[s]pecifically with respect to the class action allegation." But "if you want to go forward on Ms. Kennedy's behalf on the basis of the allegations set forth in the proposed third amended complaint, then do so. Give me another motion to amend and see what you have to say." When plaintiffs'

counsel stated that he wanted to make a record, the court told him, "We have the record . . . . Your motion is denied."

While Judge Minning may have intended to grant plaintiffs 20 days in which to file a motion to amend, it appears that he actually stated that plaintiffs had 20 days in which to file an amended complaint. If so, it was error to issue the nunc pro tunc order correcting the September 27, 2011 minute order to reflect that plaintiffs had to file a motion for leave to amend within 20 days. (*Golba v. Dick's Sporting Goods, Inc.*, *supra*, 238 Cal.App.4th at pp. 1265-1266 & fn. 6; *People v. Gonzalez*, *supra*, 210 Cal.App.4th at p. 744.)

Any error was not prejudicial, however. On February 17, 2012, the court granted defendants' motion to strike plaintiffs' third amended complaint but gave plaintiffs until April 6 to file a motion to amend their complaint. Plaintiffs did not file a motion to amend by this extended deadline. Instead, on April 23, 2012, they filed a request to dismiss without prejudice all causes of action except for their causes of action for libel and slander, based on the September 27, 2011 order denying plaintiffs' motion for leave to amend and stating that "the causes of action which [p]laintiffs sought to amend as class action claims could be brought in a different lawsuit filed in any forum." Thus, plaintiffs were not deprived of the opportunity to file an amended complaint by Judge Minning's nunc pro tunc order but rather chose another means of prosecuting their case.

D. *Whether the Order of Dismissal Must Be Reversed*

Plaintiffs assert the order of dismissal must be reversed because the OSC failed to give them sufficient notice of the

court's contemplated ground for dismissal, and that ground was "patently erroneous."

Code of Civil Procedure section 583.410, subdivision (a), provides: "The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case." We review the decision to dismiss for abuse of discretion. (*Roman v. Usary Tire & Service Center* (1994) 29 Cal.App.4th 1422, 1230.) We will not reverse such a dismissal """"unless a clear case of abuse is shown."""" (*Ibid*.) The plaintiffs have the burden of establishing an abuse of discretion. (*Ibid*.)

"'At a minimum, [procedural requirements that precede any dismissal for lack of prosecution] include notice to the plaintiff of a motion or intent to dismiss and an opportunity for plaintiff to be heard. [Citation.]' [Citation.]" (*Roman v. Usary Tire & Service Center*, *supra*, 29 Cal.App.4th at pp. 1428-1429.) However, it is not necessary that the notice specify the statutory authority or legal basis for the dismissal; it is sufficient that the plaintiffs be notified of the possibility of dismissal and have the opportunity to demonstrate why the case should not be dismissed. (*Id*. at p. 1429.)

Here, the case was assigned to Judge White on September 27, 2012. On December 19, at plaintiffs' request, the court set March 13, 2013 as the date for a hearing on plaintiffs' renewed motion for leave to file a third amended complaint. Plaintiffs did not file a renewed motion, and the matter was taken off calendar. At the July 8, 2013 status conference, plaintiffs' counsel again stated that he would file the motion. The court issued an OSC "why the case should not be dismissed for

failure to file a motion to amend," and it set a hearing for August 22, 2013. The court added that "[n]o appearance is necessary if plaintiff's motion to amend . . . [is] filed prior to the hearing."

The OSC made it clear that the court was considering dismissal for failure to file a motion for leave to amend, and filing the motion—which plaintiffs' counsel had twice said he would do—was all that was required to preclude dismissal. Plaintiffs were provided with adequate notice that the court was considering dismissal for failure to file a motion for leave to amend, i.e., for failure to prosecute their case.

Moreover, plaintiffs' supplemental response to the OSC makes it clear the problem was not lack of notice but counsel's "misunderstanding the court's intention and . . . not checking the text of the order sooner." Plaintiffs were provided with notice and an opportunity to be heard, but they did not avail themselves of that opportunity in a timely fashion.

As to the propriety of dismissal, plaintiffs argue that the dismissal must be reversed because the court "did not even address the question of jurisdictional stays, or any of the other factors required to be calculated" under the Code of Civil Procedure. The relevant statutes provide that the trial court may dismiss a case in its discretion if it is not brought to trial within two years. (Code Civ. Proc., § 583.420, subd. (a); Cal. Rules of Court, rule 3.1340.) In calculating the two-year period, "there shall be excluded the time during which any of the following conditions existed: [¶] (a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for

any other reason, was impossible, impracticable, or futile." (Code Civ. Proc., § 583.340; see also *id.*, § 583.420, subd. (b).)

In *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, the court explained that under Code of Civil Procedure section 583.340, subdivision (c), "the trial court must determine what is impossible, impracticable, or futile 'in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' [Citations.] A plaintiff's reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility. [Citation.] '"[E]very period of time during which the plaintiff does not have it within his power to bring the case to trial is not to be excluded in making the computation." [Citation.]' [Citation.] 'Time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of these exceptions.' [Citation.] Determining whether the subdivision (c) exception applies requires a fact-sensitive inquiry and depends 'on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.' [Citation.] '"[I]mpracticability and futility" involve a determination of '"*excessive* and *unreasonable* difficulty or expense,"' in light of all the circumstances of the particular case.' [Citation.]" (*Id.* at pp. 730-731.)

Questions of impossibility, impracticability or futility are "best resolved by the trial court, which 'is in the most advantageous position to evaluate these diverse factual matters in the first instance.' [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the [Code of Civil Procedure] section 583.340[, subdivision] (c) exception. [Citation.]" (*Bruns v. E-Commerce Exchange, Inc.*, *supra*, 51 Cal.4th at p. 731.)

Plaintiffs claim that "[b]ecause the [c]ourt did not even address the question of jurisdictional stays, or any of the other factors required to be calculated under [Code of Civil Procedure section 583.420, subdivision (b)], it was not possible for the [c]ourt's decision to fulfill the requirements articulated under *Bruns* . . . ."

Plaintiffs filed this case on October 1, 2009. It was removed to federal court for approximately one year—from October 30, 2009 through October 12, 2010. At the time Judge White issued the OSC on July 8, 2013, the case had been pending in state court for almost three years following remand by the district court. Thus, it was clearly within the discretionary dismissal period. (Code Civ. Proc., § 583.420, subd. (a); Cal. Rules of Court, rule 3.1340.)[11]

Plaintiffs argue that because they wanted this to be a class action and Judge Minning refused to allow them to file a third amended complaint which contained class allegations, it was impossible to bring the case to trial during the entire time it was before Judge Minning, and that time period should be excluded

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[11] As previously discussed, there was no "jurisdictional stay" based on Lindgren's bankruptcy.

from calculation of the two-year period. Alternatively, they argue that the case was in effect "stayed" due to Judge Minning's order striking their third amended complaint on February 17, 2012. Plaintiffs cite no authority to support this argument.

As noted in *Bruns*, time consumed in ordinary proceedings such as ruling on demurrers and amendment of the pleadings are not excluded from the computation of the two-year period. (*Bruns v. E-Commerce Exchange, Inc.*, *supra*, 51 Cal.4th at pp. 731-732.) That plaintiffs disagreed with Judge Minning's ruling was a basis for filing a petition for writ of mandate—which they did, unsuccessfully (*Kennedy v. Superior Court* (Apr. 19, 2012, No. B240589)). (*Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 554; see, e.g., *Johnson v. Superior Court* (2002) 101 Cal.App.4th 869, 876.) It did not prevent the two individual plaintiffs from prosecuting their case.

Plaintiffs had been placed on notice that they had no operative pleading on file as of January 11, 2011, when Judge Minning sustained the demurrer to the second amended complaint, and they then had more than 31 months to bring a motion for leave to amend before the hearing on the court's OSC re dismissal. The notice of ruling on the January 11, 2011 order sustaining the demurrer as to all causes of action stated succinctly that plaintiffs would need to obtain leave of court to add any cause of action or party, and had to "address all aspects of the [c]ourt's order sustaining [d]efendants' [d]emurrer to the [s]econd [a]mended [c]omplaint," to place an operative complaint on file. Six months later, at the first hearing on leave to amend, the court explained that what had been filed violated court rules with respect to presentation of a request to amend and was not comprehensible to the court. It gave plaintiffs a date certain,

July 26, 2011, to get a proper motion on file. Even if there was a misunderstanding about Judge Minning's order as announced in open court on September 27, 2011 and what was reflected in the minute order, it was certainly evident by the time of the entry of the nunc pro tunc order that the ball was in plaintiffs' court to immediately file a motion for leave to amend. Nothing in Judge Minning's rulings indicated that the matter was stayed or that they could not file such a motion. On the contrary, Judge Minning and Judge White repeatedly invited such motions and plaintiffs' counsel promised one was forthcoming. At least two hearing dates reserved by the court for such a motion were disregarded or moved by plaintiffs' counsel. The trial court did not abuse its discretion in finding, on these facts, that failure to file the motion after the September 27, 2011 hearing for nearly two years constituted failure to prosecute.

E. *Post-dismissal Orders*

Plaintiffs raise no claims of error with respect to the denial of their new trial motion or motion to tax or strike the memorandum of costs. We therefore dismiss the appeal as to those orders. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 888, fn. 12; *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 847, 852.)

Plaintiffs contend the lower court erred in denying their motion to disqualify the law firm of Cozen O'Connor from representing defendants. In light of our affirmance of the order of dismissal and dismissal of the appeal as to the orders denying the new trial motion and motion to tax or strike the memorandum of costs, this issue is moot. We therefore dismiss the appeal as to the order denying the motion to disqualify

counsel. (*In re Acknowledgment Cases* (2015) 239 Cal.App.4th 1498, 1510; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1547-1548 ["'[a]n appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief'"].)

DISPOSITION

The order of dismissal is affirmed. The appeal is dismissed as to the subsequent orders denying the motion to disqualify counsel, the motion for a new trial, and the motion to tax costs or strike the memorandum of costs. Defendants are to recover their costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.