IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) APACHE TRIBE OF OKLAHOMA, Plaintiff, v. (2) BETSY ANN BROWN, (3) FOSHEE & YAFFE LAW FIRM, (4) LAW OFFICES OF BROWN & CULLIMORE, (5) JOHN H. GRAVES, (6) YANCY REDCORN, (7) ALONZO CHALEPAH, (8) MARY RIVERA a/k/a MARY PRENTISS, and (9) WELLS FARGO NATIONAL BANK, Defendants.	)	**C**ase No. 10-CV-00646-D

RESPONSE IN OPPOSITION TO DEFENDANT
FOSHEE & YAFFE LAW FIRM'S MOTION TO DISMISS

Respectfully submitted,

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INTRODUCTION

There should be no mistake: this case is not about an intra-tribal dispute. This case is about an Indian tribe seeking redress against former lawyers, consultants, and government members who schemed to steal money from the tribe, defrauding banks and subverting the tribal government along the way to fund their activities and to keep themselves in control of the tribe. Plaintiff alleges Defendants' actions have cost Plaintiff millions of dollars in damages.

To be sure, the scheme carried out by Defendants included subverting the government of the tribe, including creating election disputes, conspiring to keep out of office legitimate winners of elections, and sabotaging constitutionally-mandated meetings of Plaintiff's tribal council, the supreme governing body of the tribe. But at its core, the claims asserted by Plaintiff in this case are for violation of a federal statute and several state common law claims. The Court is not being asked to settle any intra-tribal dispute, but to determine whether Plaintiff is entitled to recover damages under federal and state law as a result of the actions of Defendants.

Foshee & Yaffe Law Firm's Motion to Dismiss (Doc. No. 52) should be denied.

ARGUMENT AND AUTHORITIES

A. This Court has subject matter jurisdiction over this case.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. More specifically,

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly

> recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1362. More specifically still,

> Any person injured in his business or property by reason of a violation of §1962 of this chapter may sue therefor in any appropriate United States district court . . .

18 U.S.C. §1964(c). "Person" as used in §1964(c) "includes any individual or entity capable of holding a legal or beneficial interest in property . . . ." 18 U.S.C. §1961(3).

In addition,

> In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. §1367(a).[1]

Paragraph 1 of the Complaint alleges Plaintiff is a federally recognized Indian tribe. In its first claim for relief, Plaintiff has asserted a civil claim under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et. seq.* ("RICO") for injury to its business and property. Therefore, under the plain language of 28 U.S.C. §§1331 and 1362, and 18 U.S.C. §1964(c), this Court has original jurisdiction of this action. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676-8

[1] There are exceptions to the Court's exercise of supplemental jurisdiction set forth in §1367(b) and (c). Defendants have not raised any issue with the Court exercising supplemental jurisdiction in this case.

(1974); *Prairie Band of Pottawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767, 770 (10th Cir. 1963) (subject matter jurisdiction exists when case "involves a dispute or controversy respecting the validity, construction or effect (of Federal law) upon the determination of which the result depends.") (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)); *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978) (subject matter jurisdiction exists over action brought by Indian tribe to recover damages for injury to tribal rights). And under the plain language of §1367, this Court has supplemental jurisdiction over the remaining state law claims because they are so related to the RICO claim that they form part of the same case or controversy.

Defendants contend, however, that this case is nothing but a dispute between two competing factions within the Apache Tribe, over which this Court should not exercise jurisdiction. And if that were the case, the cases cited by Defendants would certainly be worth reading. But the very case highlighted by Defendants to support their position – *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) – demonstrates Defendants are relying on a line of cases which have nothing to do with the claims made in this case. As Defendants recognize, *Goodface* involved a tribal election dispute. The Eighth Circuit held that the district court did not have jurisdiction to address the merits of the election dispute, and in turn interpret the tribal constitution and bylaws in order to resolve the election dispute. 708 F.2d at 339.

Defendants also cite *Swanda Bros. Inc. v. Chasco Constructors, Ltd., LLP*, 2010 WL 1372523 (W.D. Okla. March 30, 2010), to support their position. In *Swanda Bros.*, an arm of the Kiowa Tribe asked this Court to decline to exercise jurisdiction on the basis

of tribal immunity. The Court declined to exercise jurisdiction, concluding that issues regarding the interpretation of the Kiowa Tribe's Constitution and laws "are best resolved by the appropriate tribal court." *Id.* at *5. *Swanda Bros.* has no application, as the Apache Tribe does not have a tribal court, Plaintiff is not asserting immunity in this case, and Plaintiff is seeking relief under federal law, as Congress expressly authorized in 28 U.S.C. §§1331 and 1362, and 18 U.S.C. §1964(c). Here, the Court is *not* being asked to resolve any election dispute. The Court is being asked to resolve Plaintiff's claim that Defendants manipulated an enterprise and engaged in a pattern of racketeering activity which harmed Plaintiff. In addition, Plaintiff claims Defendants are liable under various state law claims.

Indeed, it would be quite an anomaly if Defendants could subvert tribal elections and tribal council meetings as part of their scheme to defraud Plaintiff, then hide behind the election "disputes" and tribal council controversies they created to escape having to answer for their wrongdoing. If Defendants' position prevailed it would be open season on Indian tribes like the Apache Tribe who do not have a judicial branch of government, as they would have no place to turn.

Defendants subject matter jurisdiction argument is without merit.

B. Plaintiff has stated a claim for relief under RICO.

The RICO Defendants were engaged in the wholesale domination of an Indian tribe and its casino for their own personal gain. To that end, the RICO Defendants used unlawful and fraudulent means to obtain credit, cash, and power to enrich themselves and maintain control of Plaintiff through a minority of Plaintiff's Business Committee. The

RICO Defendants used unlawful and fraudulent means to push through a loan of $4,200,000, the budget for which (prepared mainly by the RICO Defendants) contained nearly $1,000,000 a year in professional and consulting fees for the RICO Defendants themselves! The unlawful means included subverting the trial government, committing bank fraud, and committing wire and mail fraud in order to obtain the loan, then subverting the tribal government, lying to the federal government, and fraudulently moving funds from federally regulated banks in an attempt to keep control of the tribe and to cover up their wrongdoing.

The RICO statute has been used on multiple occasions to attack political corruption, whether it is a mayor systematically plundering a city's contracts for the purpose of personal enrichment, *see U.S. v. Cianci*, 378 F.3d 71 (1st Cir. 2004), or a Congressman using his chairmanship of subcommittees within the United States House of Representatives. *See U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994).

This RICO claim is also about corruption. It is about corruption of an Indian tribe and its casino by its lawyers and consultants, aided and abetted by two members of the tribal government. Because of the nature of the RICO conspiracy, and the fact that nearly all of the relevant communications are in the exclusive control of Defendants, discovery will add to the particulars of the claim. However, Plaintiff has met its burden under Fed. R. Civ. P. 8 to plead the RICO claim and under Rule 9(b) to plead sufficient particularity of the bank, wire, and mail fraud alleged.

Defendants' motion to dismiss is somewhat ambiguous, as it provides the relevant elements of RICO pleading standards (occasionally in error within the brief), but then

simply concludes that Plaintiff has not met that burden, often without any explanation. The Court is left without much analysis of why the Complaint is insufficient in the RICO context, only the conclusory allegation from Defendants that it is deficient.

Needless to say, the Court should not accept Defendants' lack of reasoned analysis of the factual content in the Complaint. As the motions to dismiss occur before the start of any discovery, it is simply too early to dismiss any portion of Plaintiff's claim where so much information is alleged to provide both notice and a likelihood that more material, and predicate acts, will be learned of through discovery. Summary judgment "is the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Crawford-El v. Britton*, 522 U.S. 574, 600 (2002). The RICO claim should proceed to discovery, and the motion to dismiss should be denied.

1. Elements of a §1962(c) RICO claim

18 U.S.C. §1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) provides that it shall be unlawful for any person to conspire to violate the provisions of §1962(c).

To survive a motion to dismiss a §1962(c) RICO claim, a plaintiff must allege facts to establish (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002). A plaintiff must "allege each of these elements to

state a claim… . [T]he statute requires no more than this." *Sedima*, 472 U.S. at 496-7. The enterprise must either employ the defendants, or the defendants must be associated directly or indirectly in the conduct of enterprise affairs through a pattern of racketeering or the collection of an unlawful debt. 18 U.S.C. § 1962(c).

2. The Complaint properly identifies both an association-in-fact enterprise and the Silver Buffalo Casino as an enterprise infiltrated by the Co-Conspirators.

Defendants first allege the Complaint does not properly plead and identify the RICO enterprise. Defendants are incorrect.

First, the Complaint identifies the Silver Buffalo Casino as an enterprise with which the RICO Defendants were associated. Complaint, ¶18. In addition, the Complaint references that Plaintiff was exploring the possibility of acquiring land to construct and operate a much larger, much more profitable casino near the Red River north of Wichita Falls, Texas. Complaint, ¶¶18, 19. The Complaint identifies the involvement of the RICO Defendants with the Silver Buffalo Casino and the future Red River casino. *Id.*, ¶¶20-27, 41-50. The Complaint alleges:

> 41. The Silver Buffalo Casino proved to be very profitable after it opened, netting to the tribe anywhere from $250,000 to over $500,000 a month. The proposed Red River Casino looked to be much more profitable.
>
> 42. Brown, Foshee & Yaffe, Graves, and Redcorn devised a way to obtain money from the Apache Tribe's gaming operations by pledging the tribe's property and assets, including gaming revenues, to secure a loan the proceeds of which would fund, in part, their exorbitant attorney and consulting fees. To aid them in this effort they enlisted the assistance of Kean.

The Complaint goes on to detail how the RICO Defendants subverted the tribal government and unlawfully obtained the loan from Wells Fargo purportedly for casino improvements and development of the Red River Casino project.

In addition, each of the RICO Defendants is a member of an association-in-fact enterprise which committed the RICO predicates listed in the Complaint. The Supreme Court recently re-addressed the requirements of an association-in-fact enterprise under §1962(c).

> We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods-by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

Boyle v. U.S., 129 S.Ct. 2237, 2245 (2009). *Boyle* noted that in certain cases the existence of an enterprise may be inferred from the same evidence as the pattern of racketeering activity. *Id*. at 2247.

The Complaint in this case identifies both a formal enterprise – Plaintiff's Silver Buffalo Casino – and an association-in-fact enterprise – Plaintiff's gaming interests including development of the Red River Casino – through which Defendants conducted

their racketeering activity with a common purpose. The Complaint sufficiently alleges an enterprise.

3. The Complaint adequately sets forth predicate acts.

Next, Defendants contend Plaintiff has failed to plead predicate acts, though Defendants correctly note that Plaintiff's RICO claims are premised on the predicate acts of federal mail, wire, and financial institution fraud.

Financial institution fraud is defined as:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1344. Two separate acts of financial institution fraud are alleged in the Complaint. First, the Complaint alleges the RICO Defendants schemed to subvert the Apache tribal government following the May 2008 elections in order to close the loan and obtain funds from Wells Fargo. Complaint, ¶¶51-56. The RICO Defendants then knowingly made false representations to Wells Fargo to close the loan and obtain the funds. The RICO Defendants falsely represented to Wells Fargo the composition of the Business Committee, the authorization of the Business Committee to enter into the loan, and the status of another loan with a non-party. Complaint, ¶¶57-65. The scheme to

subvert the government and the misrepresentations made to Wells Fargo in the closing documents constitutes financial institution fraud and is a RICO predicate.

Second, the Complaint alleges that on May 19, 2010, the Regional Office of the Bureau of Indian Affairs recognized the five persons who received the most votes at the March 2010 election as constituting the Business Committee. The RICO Defendants, knowing they were about to lose control of bank accounts holding tribal operating and casino funds from which they were paying themselves and others to fight the results of the March 2010 election, directed the former members of the Business Committee to hold meeting on May 20, 2010. At the May 20 meeting the former Business Committee purported to pass resolutions, backdated them to May 14, 2010 (prior to the BIA's decision), and authorized signature cards that would make it difficult, if not impossible, for the recognized members of the Business Committee to exercise control over the funds. Then the RICO Defendants, using the backdated resolutions and signature cards, withdrew tribal funds from tribal bank accounts at one bank and fraudulently attempted to deposit them in another bank, all in order to remain in control of the funds. On May 21, two days after the BIA decision, the RICO Defendants caused the funds to be transferred to the second bank. The second bank then refused to release the funds to the duly elected members of the Committee, recognized by the BIA, causing significant damage to Plaintiff. These acts of financial institution fraud are all set forth in the Complaint at ¶¶95 and 97-100.

Foshee & Yaffe argues that no allegation is stated within the Complaint that Foshee & Yaffe misled a bank. Paragraphs 60-65, however, detail the misrepresentations made by Brown and Foshee & Yaffe to Wells Fargo in June 2008. While Foshee & Yaffe did not participate in the fraud practiced upon First Bank and Trust in May 2010, there is no requirement within RICO that each defendant be a participant in each RICO predicate. Such a requirement would be illogical and flatly contradict the purpose of the statute, which was to attack organized crime and all its tentacles.

In addition to the multiple acts of financial institution fraud, the Complaint sets forth predicate acts of wire and mail fraud. In connection with the June 23, 2008 loan from Wells Fargo, drafts of the loan documents, and the loan documents themselves, would have been exchanged through U.S. mail and/or e-mail around the time of the closing of the loan and on June 23. The particulars of exactly how and exactly when the communications were sent are under the exclusive control of Defendants and Wells Fargo.

Further, the Complaints sets forth allegations of mail and wire fraud in regard to the RICO Defendants' communications and representations to the Department of the Interior regarding meetings of the Business Committee in July and August 2008. The Complaint alleges that the RICO Defendants' scheme to gain a majority of the Business Committee to vote for the Wells Fargo loan was to (1) declare Ron Ahtone ineligible for office and appoint Defendant Chalepah's nephew in his place (an appointment which violated the Apache Constitution), then (2) remove Carattini and Banderas from office by holding three meetings, without notice, and when those individuals did not attend the

meetings declare their offices forfeited. Complaint, ¶67. The RICO Defendants, through written communication, telephone, and e-mail (though the precise method and date of these communications is within the exclusive control of parties other than Plaintiff), made these representations concerning Ahtone, Carattini, and Banderas to Wilson Pipestem and Ietan Consulting (their Washington, D.C. lobbyists) and the Department of the Interior. The Federal government relied upon these representations in the decisions which followed. Complaint at ¶82. The reliance directly damaged Plaintiff because it allowed the attorneys and consultants to maintain control over the Apache Tribal government so they could continue helping themselves to the Wells Fargo loan proceeds and gaming revenues.

4. The claim should not be dismissed because the Defendants are in exclusive possession of evidence regarding particulars of the RICO claim.

Dismissal is not appropriate where discovery will provide an opportunity to obtain facts supportive of a RICO claim. *See, e.g., Swistock v. Jones*, 884 F.2d 755, 758 (3rd Cir. 1989) (reversing a dismissal as the plaintiff would "have the opportunity to have their pattern allegations threshed out in discovery"); *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 790 (3rd Cir. 1984) ("[i]t is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action"). Rule 9(b) does not require plaintiffs to specify each and every element of the claim. *See, e.g., SEC v. Davis*, 689 F.Supp. 767 (E.D. Ohio 1988); *SEC v. Platt*, 565 F.Supp. 1244 (W.D. Okla. 1983) ("The court notes at the outset that the rule only requires the complainant to set out the *circumstances* constituting fraud with particularity; the rule

does not require the complainant to state the evidentiary facts constituting fraud with particularity.") (Emphasis in original). "While discovery is not appropriate where the complaint fails to state a cause of action, it may be warranted where the complaint merely lacks sufficient detail." *Parish v. Beneficial Illinois, Inc*., 1996 WL 172127, *4 (N.D. Ill. 1996). The only details which may be held as missing from the Complaint are the time and date of the transmission through the mail and wires of misrepresentations constituting mail and wire fraud.

The Complaint contains sufficient allegations regarding the content of the misrepresentations as well as the time period for the communications. At least one circuit court of appeal has held that the mere allegation of the contents of the misrepresentations, and that the wires and mail were used in transmission of those communications, was sufficient to state a claim and survive a motion to dismiss. *See Durham v. Bus. Mgmt. Assoc.*, 847 F.2d 1505, 1510 (11th Cir. 1988) (holding allegation of use of the mails sufficient).

5. The Complaint is required only to allege acts based upon fraud with particularity.

Defendants incorrectly argue that each RICO act and RICO predicate must be pled with particularity. Rather, Rule 9(b) applies only to predicate acts based upon fraud. *See Cayman Exploration Corp. v. United Gas Pipe Line Co*., 873 F.2d 1357, 1362 (10th Cir. 1989).

Defendants' confusion appears to arise from their citation to *Farlow v. Peat, Marwick, Mitchell & Co*., 956 F.2d 982, 989 (10th Cir. 1992), in which the Tenth Circuit

too broadly stated that "[u]nder Rule 9(b), plaintiffs must sufficiently allege each element of a RICO violation and its predicate acts of racketeering with particularity…." *Farlow* dealt with predicate acts involving mail and wire fraud, and cited *Cayman* for authority. *See Farlow,* 956 F.2d at 989. *Cayman* itself held that the particularity requirements of Rule 9(b) apply to predicate acts of mail and wire fraud. Nowhere did the Tenth Circuit state that Rule 9(b) applies to *all* acts of racketeering or to the rest of the RICO complaint, and it would appear that any such statement in *Farlow* is an error (as the case only involves fraud predicates) or dicta, which in any case, would be in contradiction to Supreme Court precedent in *Sedima*. Normal standards of notice pleading under Rule 8(a) notice pleading applies to the remainder of the RICO complaint.

6. Dismissal is not appropriate where discovery may yield particulars of fraud within the knowledge and control of defendants.

Dismissal is not appropriate where, as here, Defendants have ample knowledge of the acts of which Plaintiff complains. "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which [he] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). *See also Mid Atl. Telecom, Inc. v. Long Distance Serv., Inc.,* 18 F.3d 260, 264 (4th Cir.1994) (focusing on the role of discovery in elaborating upon mail and wire fraud charges, and emphasizing that the claims "are alleged in the complaint, and the plaintiff should have an opportunity to develop support for its claims through discovery"). The particulars of mail and wire fraud

do not need to be included in a complaint where the details of when and where the communication occurred is in the control of the defendants and the plaintiff may learn the same through discovery.

> However, in a RICO mail and wire fraud case, in regards to the details of just when and where the mail or wires were used, we hold that dismissal should not be *automatic* once the lower court determines that Rule 9(b) was not satisfied. In an appropriate case, where, for example the specific allegations of the plaintiff make it likely that the defendant used interstate mail or telecommunications facilities, and the specific information as to use is likely in the exclusive control of the defendant, the court should make a *second* determination as to whether the claim as presented warrants the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint.
>
> We advocate this procedure because of the apparent difficulties in specifically pleading mail and wire fraud as predicate acts. In the instant case, it is seemingly impossible for the plaintiff to have known exactly when the various defendants phoned or wrote to each other or exactly what was said. The plaintiff clearly set out a general scheme, which very plausibly was meant to defraud the plaintiff, and also probably involved interstate commerce. Assuming the facts as stated in plaintiff's complaint, defendant Monarch Investments is incorporated in a different state than that resided in by the other defendants. In this day and age, it is difficult to perceive how the defendants would have communicated without the use of the mail or interstate wires . . .
>
> . . . where there are multiple defendants, as here, and where the plaintiff was not directly involved in the alleged transaction, the burden on the plaintiff to know exactly when the defendants called each other or corresponded with each other, and the contents thereof, is not realistic. Plaintiff here provided an outline of the general scheme to defraud and established an inference that the mail or wires was used to transact this scheme; requiring plaintiff to plead the time, place and contents of communications between the defendants, without allowing some discovery, in addition to interrogatories, seems unreasonable.

New England Data Services, Inc. v. Becher, 829 F.2d 286, 290 (1st Cir. 1987). And the Eighth Circuit has stated:

> As to these uses of the mails and wires, the plaintiffs are surely correct that a court cannot reasonably expect highly specific allegations before allowing at least a brief discovery period. The facts that would have to be alleged are known to the defendants, but the plaintiffs have not yet had a chance to find them out. (This is especially true of telephone calls, which may leave little or no paper trail.) Where a plaintiff is not a party to a communication, particularity in pleading may become impracticable. For that reason, several of our sister circuits have declined to require, before discovery, the pleading of dates and times of communications in furtherance of a scheme to defraud, where the complaint alleges facts supporting the inference that the mails or wires were used.

Abels v. Farmers Commodities Corp, 259 F.3d 910, 921 (8th Cir. 2001).

While reversing dismissal of a civil RICO claim, the Sixth Circuit has held, "[a] plaintiff should have opportunity to flush out her claim through evidence unturned in discovery." *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988). In that case the appellate court noted that the information necessary to complete the complaint was both confidential in nature and in the exclusive possession of the bank defendants. *Id*.

Even the unpublished opinion cited by Foshee & Yaffe did not affirm the dismissal of a civil RICO claim solely on the basis of missing dates and times of the alleged mail fraud. In response to allegations that "on numerous occasions in 1993, 1994, and 1995, Mr. Gia unlawfully used the United States mail and made wire communications in furtherance of a scheme to engage in fraudulent billing practices . . . ." the Court actually stated: "…there are no details about the nature of the

fraudulent billing practices or when they occurred. The pleading does not allege what the billing practices were, let alone how they were fraudulent: the allegations fall well short of the particularity requirements for pleading fraud." *Smith v. Figa and Burns*, 69 Fed.Appx. 922, 925, 2003 WL 21465495, *3 (10th Cir. 2003). The sentence cited by Defendants likely refers to the failure to plead two separate RICO predicates because of the lack of information regarding "timing and the nature of the predicate acts" provided by the plaintiff. *Id*. at 926

7. The Complaint properly alleges a pattern of racketeering activity.

The Complaint alleges multiple acts of bank fraud and multiple acts of wire and mail fraud in furtherance of the bank fraud, and wire and mail fraud in relation to subverting the tribal government. These acts had their genesis in 2007, and continued unabated from 2008 until 2010 without interruption of any kind, and in furtherance of obtaining the Wells Fargo loan to provide funds to Defendants and to keep Defendants in control of Plaintiff so the Wells Fargo loan would continue and so their fraudulent scheme would not be prosecuted.

Under RICO,

> "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1961(5). Plaintiff's Complaint clearly pleads a pattern of racketeering activity.

Defendants' argument regarding a pattern of racketeering activity confuses a plaintiff's burden of proof with its burden to plead. Defendants' confusion most likely originates from the Supreme Court's footnote in *Sedima* concerning burden of proof that was subsequently misinterpreted by a number of circuit courts of appeal to require a higher standard of pleading for the element of a pattern of racketeering activity. *Sedima* at 497, fn 14. In a subsequent decision the Supreme Court held: "[w]hat a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, simpliciter." *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229, 241 (1989).

The cases cited by Defendants also recognize the difference between a question of fact and a pleading requirement. In *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), the Tenth Circuit stated, "[h]owever, because the extensiveness of the threat is a question of fact, we will assume for the purposes of this opinion that the predicate acts alleged by Bricktown, Inc. and Tal, Inc. establish a pattern of racketeering activity." *Id.* at 1268 (emphasis added).[2] The next case relied upon by the defendants, *Sil-Flo, Inc. v. SHFC, Inc*., 917 F.2d 1507 (10th Cir. 1990), also concerned matters of proof as it was an appeal from a summary judgment.

Plaintiff has met its burden of pleading the pattern of racketeering activity, as the RICO predicates took place over several years and continued up to the filing (and possibly beyond) the filing of this lawsuit.

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[2] The Tenth Circuit also questioned whether the predicate acts pled by Tal constituted a "continuing threat… to control the Development Authority and the city council." *Id.* The Complaint here clearly alleges a continuing threat to control the Business Committee and the Silver Buffalo Casino, a threat as evidenced by the appeal of the BIA's decision which forms the basis for Defendants seeking a stay.

8. A RICO case statement is not required, and should not be ordered unless Defendants move pursuant to Rule 12(e).

The Local Rules of the Western District do not require a RICO case statement to be filed with a RICO Complaint. Furthermore, Defendants have not moved pursuant to Fed. R. Civ. P. 12(e) for a more definite statement of Plaintiff's claims. A RICO case statement is not a requirement for merely filing a RICO claim, and such a requirement would contradict Fed. R. Civ. P. 8. Moreover, Rule 9(b) does not apply to RICO, but merely to RICO predicates sounding in fraud which may be contained within a RICO complaint.

While a RICO case statement may be required where the complaint is deficient in some respect, *see Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989*);Old Time Enterprises, Inc. v. International Coffee Corp*, 862 F.2d 1213, 1217 (5th Cir. 1989) (case statement may be ordered in response to motion for more definite statement), here information regarding the particulars of mail and wire fraud (not the contents and the time frame such fraud occurred which are alleged in the Complaint) are in the exclusive possession of the Defendants, and discovery has not yet commenced. A number of courts have held that a RICO case statement is appropriate after discovery is complete, in connection with a motion for summary judgment. *See, e.g., Halperin v. Jasper*, 723 F.Supp. 1091, 1096-8 (E.D. Pa. 1989); *Marriott Bros. v. Gage*, 704 F.Supp. 781, 734-5 (N.D. Tex. 1988).

C. Negligent training and supervision.

Foshee & Yaffe moves to dismiss the negligent training and supervision claim against it.

Under Oklahoma law, "[e]mployers may be held liable for negligence in hiring, supervising or retaining an employee." *N.H. v. Presbyterian Church (USA)*, 1999 OK 88, ¶20, 998 P.2d 592, 600.

The Complaint alleges Brown has been a lawyer since 2003 (Complaint, ¶39), and was employed by Foshee & Yaffe. *E.g., id.* at ¶¶20-21, 35, 60. Thus, Brown was a third year associate when she began representing the Apache Tribe. She was a fourth year associate when she signed, on behalf of Foshee & Yaffe, the Contract for Legal Services a few days after the Apache Tribal Council voted to terminate her and Foshee & Yaffe's services and to bar her and Foshee & Yaffe from their lands. Complaint, ¶31. And she was a fifth year associate when she negotiated the Loan Agreement with Wells Fargo, drafted and approved documents in connection with the loan, and gave the legal opinion to Wells Fargo that was fraudulent and constituted malpractice. Clearly, Plaintiff has stated a claim against Foshee & Yaffe for negligent training and supervision.

In *Therrien v. Target Corporation*, 2007 WL 431516 (10th Cir. Feb. 9, 2007), the plaintiff was shopping at a Target store when a suspected shoplifter and a Target loss-prevention employee began to scuffle. When the employee called out for help, the plaintiff responded, and the suspect stabbed and injured the plaintiff. The plaintiff sued Target for, among other things, negligent training and supervision of the loss-prevention employee. The district court dismissed the claim, and the plaintiff appealed. The Tenth

Circuit reversed, holding that the plaintiff stated a claim sufficient under Rule 12(b)(6). *See also Morgan v. Southland Associates*, 1994 OK CIV APP 136, 283 P.2d 205, 206-7 (reversing dismissal of petition that included claims of negligent training).

Foshee & Yaffe permitted Brown, a young associate only a few years removed from law school, to negotiate on behalf of Plaintiff, and advise Plaintiff to enter into, a multi-million loan with a national bank, mortgaging the Tribe's property and livelihood in the process. Brown had little or no supervision or training when she represented Plaintiff. Accordingly, Plaintiff has stated a claim of negligent training and supervision against Foshee & Yaffe.

D. Plaintiff has stated a claim for civil conspiracy.

Defendants state the correct law: "[a] civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." *Brock v. Thompson*, 1997 OK 127, ¶39, 948 P.2d 279, 294. Defendants then move to dismiss on the basis that "Plaintiff has simply pled that a civil conspiracy existed." *E.g.*, Foshee & Yaffe's Brief at 22.

It is hard to see how Defendants overlooked allegations demonstrating (1) there was a combination of two or more persons (2) to do an unlawful act or to do a lawful act by unlawful means. At the heart of the conspiracy was the Defendants' desire to line their own pockets at the expense of Plaintiff. The Complaint makes clear that the Defendants ignored valid resolutions from the Tribal Council, subverted the Apache Tribal Government in order to negotiate and secure a multi-million dollar loan from Wells Fargo, committed bank fraud in order to close the loan with Wells Fargo,

continued to subvert the Apache Tribal Government in order to keep control of the Business Committee through a minority of the Committee, committed additional bank fraud in an attempt to keep control of the finances of the tribe, etc. Plaintiff has clearly stated a claim for civil conspiracy.

Foshee & Yaffe also contends the conspiracy claim is barred by the statute of limitations, which it concedes is two years. While certainly some acts of the co-conspirators occurred more than two years before the filing of the lawsuit, substantial conspiratorial acts, including the closing of the Wells Fargo loan on June 23, 2008 as a result of the fraud perpetrated by Defendants, occurred within two years of the filing of the lawsuit. Indeed, the unlawful backdating of resolutions by an unauthorized committee, fraudulently submitted to a bank in order to open accounts which the Defendants could control, happened within a month of the filing of the lawsuit. The statute of limitations is no bar to the conspiracy claim.

E. Unjust enrichment.

Defendants move to dismiss Plaintiff's claim for unjust enrichment. Foshee & Yaffe states, "it is entirely unclear from the Complaint how Foshee & Yaffe allegedly collected or otherwise benefitted at Plaintiff's expense." Foshee & Yaffe's Brief at 24.

Well, Foshee & Yaffe (and the other Defendants) billed and collected money from an entity which terminated their services many times over. Foshee & Yaffe gave a legal opinion to Wells Fargo that the Apache Tribe had approved of and authorized entering into the Loan Agreement with Wells Fargo, when it knew that no valid approval or authorization was given, so the tribe would have funds to pay Defendants' exorbitant

legal and consulting fees. As a direct result of Foshee & Yaffe's actions, a casino that was netting the Apache Tribe anywhere from $250,000 to $500,000 a month before the loan with Wells Fargo, became far less profitable and began netting to the Tribe very little or no money, while nearly $900,000 of a $4,200,000 loan was budgeted for Defendants' legal and consulting fees – for one year alone!

The Complaint plainly states a claim for unjust enrichment.

F. Legal malpractice and breach of contract.

Defendants Betsy Brown and Brown & Cullimore adopt and incorporate Foshee & Yaffe's argument with respect to legal malpractice and breach of contract. Plaintiff has responded to the Motion to Dismiss the legal malpractice and breach of contract claims in response to the Brown Defendants' Motion to Dismiss. Plaintiff adopts and incorporates the response to legal malpractice and breach of contract that it made in Response to the Brown Defendants' Motion to Dismiss.

G. Breach of fiduciary duty/duty of loyalty.

The Brown Defendants adopt Foshee & Yoshee's argument for dismissing the breach of fiduciary duty/duty of loyalty claim. Plaintiff has responded to this argument in its Response to the Brown Defendants' Motion to Dismiss. Plaintiff adopts and incorporates its argument on breach of fiduciary duty/duty of loyalty set forth in Response to the Brown Defendants' Motion to Dismiss.

CONCLUSION

Plaintiff Apache Tribe of Oklahoma respectfully requests that the Court deny the Motion to Dismiss filed by Defendant Foshee & Yaffe.

Respectfully submitted,

DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.

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