Case No. 10-CV-00646-D

IN THE UNITED STATE DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

APACHE TRIBE OF OKLAHOMA,

Plaintiff,

v.

BETSY ANN BROWN,
FOSHEE & YAFFEE LAW FIRM,
LAW OFFICES OF BROWN & CULLIMORE,
JOHN H. GRAVES, YANCY REDCORN,
ALONZO CHALEPAH, MARY RIVERA
a/k/a MARY PRENTISS,
and WELLS FARGO NATIONAL BANK,

Defendants.

DEFENDANT JOHN H. GRAVES' MOTION TO DISMISS AND BRIEF IN SUPPORT

DAVID A. CHEEK
dcheek@cheekfalcone.com
CHEEK & FALCONE, PLLC
6301 Waterford Boulevard, Suite 320
Oklahoma City, Oklahoma 73118-1168
Telephone: (405) 286-9191
Facsimile: (405) 286-9670
Attorney for Defendant, John H. Graves

August 23, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

DEFENDANT JOHN H. GRAVES'
MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Defendant John H. Graves ("Graves"), and pursuant to Fed. R. Civ. P. 9(b) and 12(b)(1) & (6), as well as the heightened pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (changing the interpretation of Fed. R. Civ. P. 8(a)(2) pleading requirements), moves to dismiss Plaintiff's claims for (i) Violation of 18 U.S.C. § 1962(c) (RICO), (ii) Common Law Fraud and Deceit, (iii) Breach of Contract/Legal Malpractice, (iv) Breach of Fiduciary Duty/Duty of Loyalty, (v) Civil Conspiracy, and (vi) Conversion. In support of said motion, Graves provides the following brief in support.

STATEMENT OF THE CASE

This case arises out of a series of alleged incidents occurring between 2006 and the present in Anadarko, Caddo County, Oklahoma. During this time period Plaintiff alleges it was the victim of a sundry of illegal acts committed by the named defendants. In particular, the claims asserted against the defendants include (i) Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, (ii) Fraud and Deceit, (iii) Breach of Contract/Legal Malpractice, (iv) Breach of Fiduciary Duty/Duty of Loyalty, (v) Civil Conspiracy, and (vi) Conversion. Plaintiff is claiming damages for all of the above allegations.

The Apache Tribal Constitution provides for a five-member Business Committee that is empowered to handle all of the Tribe's business matters. Plaintiff generally contends that Graves somehow persuaded the Bureau of Indian Affairs ("BIA") to certify

the 2006 election results placing Alonzo Chalepah, Mary Rivera, Jimmy Komardley, and Leonard Chalepah (the "Chalepah Faction") in office in direct opposition of the Apache Tribal Constitution. The Complaint goes on to allege that Graves embarked on a conspiracy with others to gain control over the Business Committee, and raises a litany of other allegations which purportedly occurred while the Chalepah Faction controlled the Business Committee. The Plaintiff maintains Graves and others secured a loan from Wells Fargo in preparation for remodeling the Silver Buffalo casino. Allegedly the loan was also to be used to pay for Graves' "exorbitant" legal fees. Additional accusations are pled in the Complaint asserting that Graves and others attempted to defraud the federal government, Wells Fargo and others.

Graves served as a member of the Gaming Board of Directors from 2006 until the spring of 2008. In that capacity, the Gaming Board of Directors advised the Business Committee on requirements for compliance with the regulations of the National Indian Gaming Commission which had overall supervision of the Tribe's casino in Anadarko. At all times however, the decision making authority remained with the Business Committee evidenced by written resolutions.

After resigning from the Gaming Board of Directors in the Spring of 2008, Graves was engaged as an attorney for the Gaming Board of Directors until January of 2010. After terminating his professional relationship, Graves has had no further interaction with the Tribe.

As a member of the Gaming Board of Directors, Graves was paid a flat monthly fee of $3,000.00. After he became legal counsel to the Gaming Board of Directors,

Graves invoiced the Gaming Board of Directors monthly for services rendered at the rate of $200/hour.

The Apache Tribe's business is not limited to the gaming business. Graves' involvement with the Tribe was limited to its gaming business. The disputes referenced in the complaint cover a number of issues spanning a substantial amount of time. The Complaints are in large part very fact intensive and vary from Defendant to Defendant; yet Plaintiff relies on vague and non-specific allegations to assert its claims.

It is readily evident from the face of the Complaint that all allegations are predicated upon an ongoing tribal dispute surrounding the 2006, 2008 and 2010 general elections. Most notably, a dispute exists between the Chalepah Faction and Louis Maynahonah, Gloria Redbird, Marquita Carratini, Karen Herninokeky and Richard Bandreas (the "Maynahonah Faction") who were allegedly elected into office on March 20, 2010. This ongoing dispute between these two factions serves as the undercurrent and sole basis for the Complaint.

The allegations raised by Plaintiff amount to an inter-tribal dispute between competing factions.

ARGUMENTS AND AUTHORITIES

I. LEGAL STANDARD

A. 12(b)(1).

The Tenth Circuit has established a two pronged analysis to be applied in resolving challenges brought pursuant to Rule 12(b)(1). First, if the motion challenges only the sufficiency of the jurisdiction allegations in the Complaint, the Court then

confines its review of the motion to the pleadings; the allegations in the Complaint are accepted as true, and the Court may not consider evidentiary material. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir.1995). Second, where the motion challenges the underlying factual basis for subject matter jurisdiction, the Court looks beyond the Complaint, and it has wide discretion to consider documentary and even testimonial evidence; it may consider such evidence without converting the motion to one seeking summary judgment. *Holt*, 46 F.3d at 1002-03 (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir.1987)). Here, Defendant challenges the facts upon which the Court's subject matter jurisdiction is premised. Therefore, this Court can and may consider the evidentiary materials without converting the motion to one seeking summary judgment. *Holt*, 46 F.3d at 1002-03.

B. 12(b)(6).

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, a court need not accept as true those allegations that are conclusory in nature. *Erikson v. Pawnee County Bd. Of County Comm'rs*, 263 F.3d 1151, 1154-55 (10th Cir. 2001) "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiffs complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations omitted). The United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), heightened the pleading requirements

for complaints filed in federal court. It bolstered the previous "no set of facts" standard that a plaintiff had to plead as set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). *Twombly* further stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In order to make it past a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). A complaint has facial plausibility when it contains factual content that will allow a reasonable inference to be made that the defendant is liable for the alleged misconduct. *Id*. (citing *Twombly*, 550 U.S. at 556). A plaintiff cannot simply plead "facts that are 'merely consistent with' a defendant's liability." *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, "'naked assertions' devoid of 'further factual enhancement'" are insufficient. *Id.* (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555.

II. THIS COURT LACKS JURISDICTION

In this circuit, federal jurisdiction does not exist over matters involving tribal election disputes. *Motah v. United States*, 402 F.2d 1 (10th Cir.1968) (no federal question

jurisdiction over suit involving a tribal election to determine whether or not a separate constitution should be created for the Comanche tribe in Oklahoma). See also *Fletcher v. United States*, 116 F.3d 1315, 1319-20 (10th Cir.1997) (federal court had no subject matter jurisdiction to proceed in action challenging validity of franchise restriction and for a declaration on the validity of tribe's constitution); *Prairie Band of Pottawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767 (10th Cir.1963) (a dispute over tribal membership and entitlement to Congressionally appropriated funds); *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364 (10th Cir.1966), cert. denied, 385 U.S. 831, 87 S.Ct. 70, 17 L.Ed.2d 67 (1966) (no subject matter jurisdiction over suit involving exclusion from tribal role for distribution of funds); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir.1957), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (intra-tribal disputes over membership do not present a federal question).

Similarly, other courts have held, that "substantial doubt exists that federal courts can intervene under any circumstance to determine the rights of the contestants in a tribal election dispute." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir.1983) (District court over stepped jurisdictional boundaries by interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.) Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and law, and issue tribal membership determinations lies with the Indian tribes and not in the district courts. *United States v. Wheeler*, 435 U.S. 313, 323-26 (1978). A federal court does not have jurisdiction to interpret an Indian tribes constitution of law. *Swanda Bros., Inc. v. Chasco Constructors, Ltd. L.L.P.*, 2010 WL 1372523, *5 (W.D. Okla. March 20, 2010) (slip copy).

‘“Jurisdiction to resolve internal tribal disputes, interpret trial constitutions and laws . . . lies with Indian tribes and not in the district courts.’” *Swanda Bros., supra*, 2010 WL at *5 (quoting *Sac Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) (quoting *Wheeler, supra*, 435 U.S. at 323-26); *see also Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp.2d 1166, 1191 (N.D. Okla. 2009). “[T]ribal courts are best to interpret and apply tribal law.” *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1986).

A simple review of the Complaint quickly dispels any semblance of jurisdiction. Notably, the factual predicate asserted by Plaintiff in the Complaint encompasses a four-year dispute between the Chalepah Faction and the Maynahonah Faction which in essence attacks decisions made by the tribe’s then acting business committee, control over the tribe’s casino, and an ongoing election dispute. (Complaint, ¶¶ 18-107). The Complaint details outrageous allegations of corruption and illicit acts allegedly committed by the Chalepah Faction (then acting Business Committee) and attempts to sweep in non-tribal members for their unspecified “participation” and undisclosed conduct in carrying out decisions which were indisputably made by and approved by the acting Business Committee. The Plaintiff contends that the actions of the defendants (including the prior tribal business committee members) violate the Apache Constitution. (Complaint, ¶¶ 18-107). Notwithstanding the apparent issues of sovereign immunity over the tribal members and its attorneys, the issues raised by Plaintiff clearly seek a remedy this Court cannot provide – namely a resolution of the on-going internal tribal leadership

dispute and a judicial determination by this Court that the actions of the defendants violated the Apache Constitution.

Given these facts, *Goodface* is particularly instructive. In *Goodface*, a tribal election dispute erupted when a former tribal council refused to recognize the authority of the newly elected tribal council. *Goodface*, 708 F.2d at 339. The BIA refused to intervene stating the dispute was inter-tribal, but advised it would correspond with both councils on an interim basis pending a tribal resolution of the dispute. *Id.* at 339-40. An appeal of the BIA decision was made to the district court which then assumed jurisdiction over the matter. *Id.* On review, the district court examined the tribal constitution and bylaws, addressed the merits of the election dispute, determined that newly elected council was entitled to recognition, and issued a final order requiring the BIA to recognize the new council. *Id.* The Eighth Circuit, in reversing the district court's order, instructed it was improper for the district court to enter orders concerning the merits of an election dispute. *Id.* Notably, it was held that the district court acted without authority when it interpreted the tribal constitution and bylaws and addressed the merits of the election dispute. *Id.* at 339.

Here, the allegations raised in the Complaint are for all practical purposes asserted against the Tribe. The alleged illicit conduct asserted against the defendants involves acts which the majority of the then acting Business Committee approved and affirmed by resolution. Further, this alleged conduct spans over a course of four years and involves business transactions to which the Tribe assented and acquiesced. Additionally embedded in this controversy is an ongoing election dispute between two competing

factions over control of the Tribe. Thus, the acts Plaintiff complains of are tribal acts. Thus, the basic Complaint presents no justiciable controversy. Accordingly, whether the Plaintiff has stated any claim for relief is expressly contingent upon whether the alleged actions of the Chalepah Faction (or then acting Business Committee) was conducted within the purview of the Apache Constitution. Under the well established precedent set forth above, this Court lacks jurisdiction to resolve such questions as matters requiring the application and interpretation of the Apache Constitution and bylaws which are solely vested with the Indian tribes. For these reasons, the Complaint must be dismissed.

III. PLAINTIFF FAILS TO STATE RICO CLAIMS FOR WHICH RELIEF CAN BE GRANTED

To establish a civil RICO claim, Plaintiff must allege: (1) investment in, control of, or conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity." *Tal v. Hogan*, 453 F.3d 1244, 1262 (10th Cir. 2006) (citing 18 U.S.C. § 1962(a), (b) & (c)); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1541 (10th Cir. 1993). Plaintiff must also allege an injury resulting from the "substantive RICO violation." *Id.* "'Racketeering' activity is defined . . . as any 'act which is indictable' under federal law and specifically includes mail fraud, wire fraud and racketeering. These underlying acts are referred to as predicate acts because they form the basis for liability under RICO." *Id.* at 1261-62 (citations omitted). "A 'pattern of racketeering activity' requires proof of at least two racketeering acts[,]" and a "plaintiff must demonstrate not only the existence of two or more predicate acts, but also that those acts are related and pose at least a threat of

continued criminal activity." *Sedima, SPRL v. Inrex Co.*, 473 U.S. 479, 496 n, 14, (1985) and *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238-39 (1980)).

In addition to these requirements, the heightened pleading standard of Fed. R. Civ. P. 9 (b) must be satisfied. "[P]laintiffs must sufficiently allege each element of a RICO violation and its predicate acts of racketeering with particularity." *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992). "The threat of treble damages and injury to reputation which attend RICO actions justify requiring plaintiff to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis of the predicate acts." *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989). This standard is particularly important in cases "where the predicate fraud allegations provide the only link to federal jurisdiction." *Id.* Thus, Rule 9(b) requires particularity in pleading RICO mail and wire fraud. *Id.* Accordingly, to properly allege the predicate acts, Plaintiff must specify the "who, what, where, and when" of each purported act. *Farlow*, 956 F.2d at 989 (10th Cir. 1992).

Without question, the Complaint fails to meet this standard. Plaintiff does not specifically identify any fraudulent statements or representations by Graves, let alone set forth the time, place, or contents thereof. To the extent any specific acts are mentioned, Graves is not alleged to have participated. Further, Plaintiff fails to identify Graves as the maker of any false statements, or the consequences suffered thereby. Likewise, there are no facts showing (or even giving inference to) an enterprise or a pattern of racketeering activity. As for the rest of the Complaint, Plaintiff's RICO allegations

consist of labels and self-serving conclusions that are devoid of any factual enhancement. Graves' interaction with the Tribe varied from time to time depending on his role. Graves' interaction with the Co-Defendants and the Tribe were unique. The allegations are vague and conclusory. Graves is entitled to know the specifics of the claims made against him as opposed to the other Defendants. Whereas, none of allegations in the Complaint meet the heightened pleading standard of Rule 9 (b), it must be dismissed.

A. Plaintiff fails to adequately plead and identify the RICO enterprise.

As previously stated, Plaintiff has failed to sufficiently plead the existence of an enterprise. Indeed, Plaintiff's only reference to purported RICO enterprise occurs in Count VI which simply avers to the existence of an enterprise, but fails to draw the necessary associations between the parties. (Complaint, ¶¶ 111 -115). To prevail on a RICO claim, a plaintiff must plead and prove an enterprise under § 1962(c) that has three essential characteristics: "[a] common or shared purpose, some continuity of structure and personnel, and an ascertainable structure distinct from that inherent in a pattern of racketeering." *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *United States v. Sanders*, 928 F.2d 940 (10th Cir. 1991). The term "enterprise" is statutorily defined and includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). In addition to the enterprises specifically enumerated in the statute, an enterprise may be any union or group of individuals associated in fact

for a common purpose of engaging in a course of conduct. *See United States v. Turkette*, 452 U.S. 576, 580, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

Applied here, Plaintiff wholly fails to identify the alleged enterprise or even specify how this "enterprise" meets any of the characteristics of a properly-pled RICO enterprise. On the contrary, in the thirty-nine (39) page Complaint there are absolutely no specific allegations as to the structure of any group or entity, the relationship between the groups or entities, nor the relationship between individuals within a group or entity. Instead, the only allegations which even reference an enterprise are set forth in conjunction with the alleged pattern of racketeering. (Complaint, ¶¶ 111-115). Aside from the generalized and conclusory allegations of the commission of predicate acts, Plaintiff has alleged nothing which binds the Defendants together. Accordingly, Plaintiff has failed to show the requisite continuity that an enterprise existed for any purpose.

The Complaint is silent regarding the identity of the purported enterprise, and thus it fails to comply even with the generous pleading requirements in Rule 8. Without the identity of the alleged enterprise, this Defendant cannot respond to the self-serving assertion that it "conducted their enterprise through an ongoing, open ended pattern of racketeering activity." (Complaint, ¶ 113). For this reason alone the RICO claim must fail.

B. Plaintiff fails to plead the predicate acts with particularity.

Plaintiff's RICO claims are premised on the predicate acts of federal mail, wire and financial institution fraud under 18 U.S.C. § 1341, 1343 and 1344, respectively.

(Complaint, ¶ 109). To establish a mail fraud violation under 18 U.S.C. § 1341, the Plaintiff must allege: (1) a scheme to defraud; and (2) the mailing of a letter for the purpose of executing the scheme. *See United States v. Taylor*, 832 F.2d 117-87, 1192 (10th Cir. 1997). To establish the crime of wire fraud, the Plaintiff must prove: (1) a scheme or artifice to defraud or obtain money by false pretenses representations or promises; and (2) use of interstate wire communications to facilitate the scheme. *United States v. Drake*, 932 F.2d 861, 863-64 (10th Cir. 1991). To establish the crime of financial institution fraud, the Plaintiff must prove (1) that the defendant knowingly executed or attempted to execute a scheme to defraud or to obtain property by means of false or fraudulent pretenses, representations, or promises; (2) that defendant did so with the intent to defraud a financial institution; and (3) that the financial institution was federally insured. *United States v. Akers*, 215 F.3d 1089, 1100 (10th Cir. 2000).

As set forth above, plaintiff must sufficiently allege each element of a RICO violation and its predicate acts of racketeering with particularity. *See Farlow, supra*, 956 F.2d at 989; *Cayman, supra*, 873 F.2d at 1362. In this regard, Plaintiff has accused multiple defendants under the general moniker of "Co-Conspirators" of mail, wire and financial institution fraud. In so doing, Plaintiff has failed to plead each element of fraud with particularity as to each defendant. *See Id.*; *see also, Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993).

This notwithstanding, the Plaintiff does not allege any details of the specifics of the mail/wire/financial institution fraud acts. For example, the Plaintiff does not allege the contents of the mail/wire fraud; the sender of the alleged mail/wire fraud

communications; the recipient of the alleged mail/wire communications; or the time of the alleged mail/wire fraud communications. Accordingly, Plaintiff's allegations of mail and wire fraud fall well short of the particularity requirements for pleading fraud. *See e.g. Farlow, supra*, 956 F.2d at 989-990 (plaintiff failed to sufficiently plead mail/wire fraud where the plaintiff alleged only that defendants frequently used the mail to mail class members false and misleading offering memoranda, financial statements and investor newsletters, but failed to identify the exact dates of the mailings); *Smith v. Figa*, 69 Fed. Appx. 922, 926 (10th Cir. 2003)(mail and wire fraud claims found lacking in the required specificity where the allegation contains no details of the specifics of the predicate mail/wire fraud acts and there were no details about the matter of the acts or when they occurred).

In addition, Plaintiff's allegations regarding financial institution fraud are equally lacking. Plaintiff has not alleged any misrepresentations by Graves or made any allegation that he intended to defraud the bank. Moreover, the Complaint does not allege that the bank was in fact defrauded. Rather, Plaintiff contends the loan was allegedly used to pay for "exorbitant" legal fees and remodeling. Thus, the financial institution fraud claim made by Plaintiff cannot be a predicate act under RICO.

In sum, Plaintiff's allegations fail to provide any explanation of the alleged false representations, the particular circumstances of fraud, or any justifiable reliance made by Plaintiff. Accordingly, Plaintiff's RICO claims must fail.

C. Plaintiff fails to adequately plead racketeering activity.

Plaintiff also fails to adequately plead the requisite racketeering activity. In fact, Plaintiff does not even identify the purported racketeering activity of which they complain. Instead, their RICO claim starts and ends with no substantive detail in between. (Complaint, ¶ 110, 113-114). Though Plaintiff generically alleges civil fraud and conspiracy to commit fraud in other Counts of the Complaint, they fail to allege that Graves (or the unidentified "enterprise") committed a specific act indictable under federal law. *See Tal, supra*, 453 F.3d at 1261-62 (must plead an act which is indictable under federal law).

Given the applicability of Rule 9(b), Plaintiff's failure to offer any specific factual allegation of racketeering activity is remarkable. Even assuming *arguendo* that a generic allegation of civil fraud could satisfy RICO's racketeering requirement, which it cannot, Plaintiff fails to plead even civil fraud with the requisite specificity. As set forth *supra*, "a complaint alleging fraud must set forth the time, place and contents of the false representation." *Tal*, 453 F.3d at 1263 (internal quotation and citation omitted). As to Graves, the allegations do not specify any activity on his part. Nowhere in the Complaint does Plaintiff identify any of Graves' allegedly fraudulent statement(s) or any other racketeering activity. *See Farlow*, 956 F.2d at 989-90 (affirming dismissal where plaintiff failed to allege when the alleged fraudulent mailings were made). Unable to plead the existence of actual racketeering activity, Plaintiffs' RICO claim fails, and must be dismissed.

D. Plaintiff fails to allege a pattern of racketeering activity.

In addition to their failure to sufficiently plead a racketeering activity, Plaintiff necessarily, but independently, fails to plead a pattern of racketeering activity. "Pleading that a pattern exists requires the plaintiff to plead both that the predicate acts are related to each other, and that they either constitute or threaten long-term criminal activity." *Anderson v. Smithfield Foods, Inc.*, 209 F.Supp.2d 1270, 1275-76 (M.D.Fla. 2002) (citing *Northwestern Belle*, 492 U.S. at 239). The Complaint contains no such allegations. In fact, Plaintiff makes absolutely no mention of long-term criminal activity or a threat of continuing activity. As such, Plaintiff's failure to plead a pattern of racketeering activity, provides yet another independent basis for dismissing the RICO claim. *See Tal*, 453 F.3d at 1267-68 ("proof of two or more acts are not sufficient to prove a pattern unless there is a relationship between the predicate acts and a threat of continuing activity.") (citations omitted)); *Lane v. Peterson*, 899 F.2d 737, 745 (8th Cir. 1990) (affirming dismissal where "[plaintiffs] do not allege that [defendant's] acts amounted to or pose a threat of continued criminal activity.").

The Tenth Circuit case of *Sil-Flo Inc. v. SHFC, Inc.*, 917 F.2d 1507 (10th Cir. 1990) is on point in this matter. In *Sil-Flo*, the plaintiff corporation and its owner brought suit against buyers of the plaintiff's corporation alleging that the buyers had breached various fiduciary duties and committed various torts in connection with the purchase of plaintiff's corporation. The Tenth Circuit affirmed summary judgment on behalf of the defendants finding that:

> At most, what has been alleged is a business deal gone sour, accompanied by the breach of fiduciary duty and various other torts by the defendants. There certainly is no open-ended threat of future illegal activity. While the plaintiffs may have alleged a closed-ended series of predicate acts, they constituted a single scheme to accomplish one "discrete goal," directed at one individual with no potential to extend to other persons or entities. In enacting the RICO statute, "Congress was concerned in RICO with long-term criminal conduct." The objectives of this statute would not be served by recognizing a RICO claim in this instance.

Id. at 1516 *citing H.J. Inc.*, 109 S.Ct. at 2902. In the instant matter, there is no open-ended "threat of repetition" or of future illegal activity. Accordingly, where, as here, the alleged predicate acts occurred over a short period of time and are unlikely to recur, the Plaintiff has failed to establish a "pattern of racketeering." *Id.* Accordingly, Plaintiff's RICO claims must be dismissed.

IV. PLAINTIFF'S CLAIM FOR FRAUD AND DECEIT LEGAL ARE BARRED OR ALTERNATIVELY SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff has generally asserted a claim for fraud and deceit. (Complaint, ¶¶ 120-25). In Oklahoma, an action for fraud/deceit is governed by the two year statute of limitations. *See* 12 O.S. § 95 (3); *Hutchinson v. Carter*, 33 P.3d 958, 962 (Okla. Civ. App. 2001). However, Plaintiff's Complaint makes very clear that most of the alleged illicit acts occurred from 2006 – 2008; more than two years prior to the filing of this action. (Complaint, ¶¶ 18-67). Moreover, and considering the purported misrepresentations were made to then acting Business Committee (or the Chalepah Faction), it is evident that the purported acts complained of against this Defendant were

known and contested by the Tribe. Therefore, Plaintiff's fraud/deceit claims between 2006 and the 2008 are barred by the applicable limitations period, and must accordingly be dismissed.

Similarly, Plaintiff's claims for fraud and deceit fail to satisfy Rule 9(b). In particular, the Complaint does not provide (1) the precise statements, documents, or misrepresentations made; (2) the time and place of and the person responsible for the statement; (3) the content and manner in which the statement misled the Plaintiff; and (4) what the defendant gained by the alleged fraud. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236-37 (10th Cir.2000) (finding allegation that misrepresentations were made "during 1982 and continuing to the present time" insufficient to satisfy Rule 9 (b) because it did not "alert the [d]efendants to a sufficiently precise time frame"); *Near v. Crivello*, 673 F.Supp.2d 1265, 1284 (D.Kan.2009) (finding references in plaintiff's complaint to "pre- and postagreement time frame [were] insufficient" under Rule 9(b)); *Full Faith Church of Love W., Inc. v. Hoover Treated Wood Prods., Inc.*, 224 F.Supp.2d 1285, 1294 (D.Kan.2002) (finding complaint did not sufficiently plead time of alleged fraud under Rule 9(b) when complaint stated that misrepresentations were "ongoing" between 1982 and 1988 because said statement "d[id] not alert defendants to a sufficiently precise time frame")

Graves' role varies depending on the specific time frame. The allegations as to Graves specifically are necessary for him to frame a proper defense. The Plaintiff's broad use of "Co-Conspirators" actions without identifying specifically what each

defendant purportedly said to whom and when deprives Graves of the right to defend specific allegations as required by Rule (9)(b).

Plaintiff's fraud and deceit claims fail for another reason. Plaintiff maintains the "Co-Conspirators" made misrepresentations to federal government – not the Tribe. Plaintiff cannot maintain a cause of action for fraud/deceit for statements which were made to an independent third-party.

For these reasons, Plaintiff's claim for fraud and deceit must be dismissed.

V. PLAINTIFF'S CLAIM FOR LEGAL MALPRACTICE AND BREACH OF CONTRACT ARE BARRED OR ALTERNATIVELY SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff has generically asserted a claim for legal malpractice and breach of contract in its Complaint. (Complaint, ¶¶ 126-29). In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two year statute of limitations. *See* 12 O.S. § 95 (3); *Stephens v. General Motors Corp.*, 905 P.2d 797, 799 (Okla. 1995); *Funnell v. Jones*, 737 P.2d 105, 107(Okla. 1985). Here Plaintiff seeks retribution for acts which allegedly begin in 2006 and continued through 2010. However, a majority of the alleged "illicit" acts seem to have occurred from 2006 – 2008; more than two years prior to the filing of this action. (Complaint, ¶¶ 18-67). Plaintiff fails to provide any other particulars in support of these claims.

In order to support a cause of action for legal malpractice, a plaintiff must prove a contract established an attorney/client relationship relative to the issue for which advice

was sought, negligence and that the attorney's negligence caused damages in the underlying case for which he/she was hired. *Nicholas v. Morgan*, 58 P.3d 775, 780-781 (Okla. 2002). Damages are based on the value of the claim lost by the attorney's misconduct or neglect. *Id.* Nothing, however, within the Complaint establishes that the conduct of this Defendant was the cause of the underlying case or that the asserted damages were the direct result of the attorney's misconduct or neglect.

The Complaint does not allege a contract to provide legal services related to the alleged offenses. Graves is alleged to be a member of the gaming board but that is not a legal representation. One of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship. *Allred v. Rabon*, 572 P.2d 979, 981 (Okla.1977). However, Plaintiff's makes no distinction between the "Law Firm Defendants" nor does it identify any specific conduct which supports its claims. Graves is not required to speculate as to what acts constitute the alleged malpractice. Therefore, because this claim fails to comply with Rule 9(b), it must be dismissed.

VI. PLAINTIFF'S CLAIM FOR BREACH OF FIDUCIARY DUTY/DUTY OF LOYALTY SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff has failed to state a claim for breach of fiduciary duty upon which relief can be granted in its Complaint. (Complaint, ¶¶ 130-32). Plaintiff fails to identify a relationship giving use to this duty or that this duty was breached. While Plaintiff has made very broad and generalized assertions that the Defendants "obtain[ed] improper benefits for themselves and their cronies" and "engaged in self-dealing, deception, and

misrepresentations in their purported representation of Plaintiff, and have placed their personal interests over the interests of Plaintiff," Plaintiff has set forth no specific facts to substantiate a breach occurred. (Complaint, ¶ 131). Rather, these allegations are formulaic recitations of generalized "the-defendant-has-caused-me-harm claims." More than the conclusory self-serving statements are required to satisfy a claim under Rule 9(b).

Plaintiff has likewise failed to state a valid claim for breach of loyalty in its Complaint. (Complaint, ¶¶ 130-32). In fact, Oklahoma does not recognize a cause of action for a breach of the duty of loyalty and there is no Oklahoma authority establishing that such a duty exists here. Accordingly, Plaintiff's claim for breach of the duty of loyalty must also be dismissed.

VII. PLAINTIFF'S CLAIM FOR CIVIL CONSPIRACY SHOULD BE DISMISSED BECAUSE IT HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

It should be noted that Plaintiff has failed to set forth any specific allegations concerning how each of the defendants conspired to violate the RICO statute. At best, Plaintiff's allegations of conspiracy are conclusory and fail to give Defendants fair notice under Fed.R.Civ.P. 8. While Rule 8 does not require that the statement be factually detailed, it must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *See Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Moreover, Plaintiffs conspiracy allegations fail to delineate among the defendants as to their participation or responsibilities in performing the actions which

are the subject of the lawsuit. Failure to allege sufficient facts supporting a conspiracy allegation will result in dismissal. *See e.g. Swoboda v. Dubach*, 992 F.2d 286 (10th Cir. 1993).

The Plaintiff has also failed to state a claim for civil conspiracy in its Complaint. (Complaint, ¶¶ 136-37). Under Oklahoma 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." *Edwards v. Urice*, 220 P.3d 1145, 1152 (Okla. Civ. App. 2008). "Civil conspiracy itself does not create liability, but enlarges the pool of potential defendants from whom a plaintiff may recover." *Id.* (citing *Brock v. Thompson*, 948 P.2d 279, 294 (Okla. 1997)). If the act complained of and the means employed are lawful, there is no civil conspiracy. *Brock*, 948 P.2d at 294. In order to state a good cause of action for damages for conspiracy, the plaintiff must allege facts showing conspiracy and that as a result the plaintiff suffered damages entitling him to recover – mere charging of conspiracy is insufficient. *Pearl v. Oklahoma City*, 145 P.2d 400, 401 (Okla. 1943).

Plaintiff has simply pled that a civil conspiracy existed. (Complaint, ¶¶ 136-37). The Complaint makes a brief reference to actions that the Plaintiff seems to believe amount to a civil conspiracy. (Complaint, ¶¶ 51-56). However, at no point does the Plaintiff claim that there was an agreement made between any of the alleged "Co-Conspirators," but rather simply states that the Defendants "embarked on a conspiracy to gain control of a majority of the Business Committee." (Complaint, ¶ 54). Because of the ongoing dispute between the Chalepah Faction and the Maynahonah Faction, none of the allegations that the Plaintiff has made indicate any unlawful acts or lawful acts

accomplished through unlawful means. With regard to the civil conspiracy claim, the Plaintiff has failed to plead any facts sufficient to allow it to proceed under either the federal *Twombly* standard of heightened specificity in pleading or the *Oklahoma Pearl* standard for pleading civil conspiracy.

VIII. PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff has failed to state a claim for unjust enrichment upon which relief can be granted in its Complaint. Notably, the only assertion set forth in support of Plaintiff's claim for unjust enrichment is that "the conduct described in this Complaint constitutes unjust enrichment." (Complaint, ¶ 145). It is axiomatic that a claim for unjust enrichment will lie only where "it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." *Lapkin v. Garland Bloodworth, Inc.*, 23 P.3d 958, 961 (Okla.Civ.App.1996) (internal quotation omitted). A review of the Complaint does not support an unjust enrichment claim.

Importantly, it is entirely unclear from the Complaint how the Defendants allegedly collected or otherwise benefited financially at Plaintiff's expense. While Plaintiff asserts in a conclusory fashion that "the Defendants were unjustly enriched at the expense of the Plaintiff," the Plaintiff plead no facts to support such an inference. (Complaint, ¶ 145). The Plaintiff does not identify the funds or the amount which is allegedly at issue, nor does Plaintiff allege what each defendant was allegedly paid or whether the payment received by such defendants was paid as part of contract approved

by the Tribe. Accordingly, Plaintiff's averments fall short in complying with Rule 9(b) and therefore must be dismissed.

CONCLUSION

The Plaintiff has failed to set forth causes of action upon which relief can be granted as many of its claims are not supported by law, the facts as alleged, or by federal statute. Based on the above and foregoing arguments, Defendant Graves move that this Court dismiss Plaintiff's Complaint and for such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ David A. Cheek
DAVID A. CHEEK, OBA #1638
dcheek@cheekfalcone.com
Cheek & Falcone, PLLC
6301 Waterford Boulevard, Suite 320
Oklahoma City, Oklahoma 73118-1168
Telephone: (405) 286-9191
Facsimile: (405) 286-9670
Attorney for Defendant,
John H. Graves