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

APACHE TRIBE OF OKLAHOMA, Plaintiff, v. BETSY ANN BROWN, FOSHEE & YAFFE 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.	)	Case No. 5:10-CV-00646-D

DEFENDANT FOSHEE & YAFFE LAW FIRM'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Kevin R. Donelson, OBA No. 12647
Carole L. Houghton, OBA No. 18047
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C.
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659
E-mail: kdonelson@fellerssnider.com
choughton@fellerssnider.com

Attorneys for Defendant, Foshee & Yaffe

August 23, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

DEFENDANT FOSHEE & YAFFE LAW FIRM'S
MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Defendant Foshee & Yaffe Law Firm ("Foshee & Yaffe"), and pursuant to Fed. R. Civ. P. 9(b), 12(b)(1) and 12(b)(6) moves to dismiss Plaintiff's Complaint in its entirety. In support of this Motion, Foshee & Yaffe states as follows:

STATEMENT OF THE CASE

This case is an internal tribal dispute between factions competing for control of the Apache Tribe of Oklahoma. Indeed, it is an effort by the Plaintiff and the current controlling faction of the Tribe to convert complaints about tribal constitutions, laws, and processes into private rights of action using federal and state laws of general applicability. Indeed, the Complaint fails to identify any chargeable act of Defendant Foshee & Yaffe which was taken without the knowledge and approval of the Tribe when it was controlled by a different faction.

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 Foshee & Yaffe participated in an elaborate scheme with the other Defendants to somehow persuade 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 violation of the Apache Tribal Constitution. The Complaint goes on to allege that Foshee & Yaffe 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. In particular, the Plaintiff maintains Foshee & Yaffe improperly assisted the Business Committee in securing a loan from Wells Fargo in preparation for remodeling the Silver Buffalo Casino. Allegedly, the loan should not have included amounts sufficient to pay for Defendant Betsy Brown's legal fees. Brown worked at Foshee & Yaffe until the Spring of 2009. All of the 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 Banderas (the "Maynahonah Faction") who were allegedly elected into office on March 20, 2010. To be sure, the crux of Plaintiff's claims are all predicated upon purported faulty election results from 2006 and 2008 and include allegations that despite the 2010 election results, the Chalepah Faction, along with others, are still attempting to control the tribal funds.

Accordingly, the allegations raised by Plaintiff amount to an intra-tribal dispute between competing factions requiring interpretation of the laws and Constitution of the Apache Tribe – all issues for which this Court lacks jurisdiction. In addition to the lack of jurisdiction, the Complaint fails to plead sufficient facts to state a claim upon which relief can be granted and should be dismissed with prejudice.

ARGUMENT AND AUTHORITY

I. MOTION TO DISMISS STANDARD.

A. Lack of Subject Matter Jurisdiction, Rule 12(b)(1).

The Tenth Circuit applies a two-pronged analysis to resolve challenges to subject matter jurisdiction brought pursuant to Rule 12(b)(1). First, if the motion challenges only

the sufficiency of the jurisdictional allegations in the Complaint, the Court 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. It has wide discretion to consider documentary and even testimonial evidence, and it may consider such evidence without converting the motion to one seeking summary judgment. *Holt,* 46 F.3d at 1003 (citing *Wheeler v. Hurdman,* 825 F.2d 257, 259 n. 5 (10th Cir. 1987)). Here, Foshee & Yaffe 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. Failure to State a Claim Upon Which Relief Can Be Granted, Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), "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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). 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.* 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.*

II. THIS COURT LACKS JURISDICTION.

At its core, this case is yet another in a long line of disputes between two competing factions within the Apache Tribe of Oklahoma over who controls the Tribe. In this circuit, federal jurisdiction does not exist over matters involving such internal tribal disputes, such as tribal elections. *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 66 (1966) (no subject matter jurisdiction over suit involving exclusion from tribal role for distribution of funds); *Martinez v. S. Ute Tribe of So. Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960, 78 S. Ct. 997, 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 circumstances 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 tribe's constitution or laws. *Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P.,* 2010 WL 1372523, *5 (W.D. Okla., Mar. 30, 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 1372523 at *5 (quoting *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) (quoting *U.S. v. Wheeler, supra*); *see also Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1191 (N.D. Okla. 2009). "[T]ribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

A simple review of the Complaint dispels any semblance of jurisdiction. Notably, the Complaint is based upon a four-year dispute between the Chalepah Faction and the Maynahonah Faction. The Complaint further attacks prior decisions made by the tribe's Business Committee involving control over the tribe's casino and the ongoing election dispute. (Complaint, ¶¶ 18-107). The Complaint details outrageous allegations of corruption and illicit acts allegedly committed by the Chalepah Faction (which had majority control over the Business Committee at the time) and attempts to sweep in non-

tribal members for their "participation" and 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, ¶¶ 22-25; 31-32; 54-59; 61-62; 67-70; 82-93; 102-107). In essence, Plaintiff seeks to convert one tribal faction's self-serving interpretation of the Apache Constitution into private federal and state causes of action.

This is not a Court for the enforcement of Tribal Council resolutions, the interpretation of tribal constitutions, the determination of whether Tribal Council "special meetings" were constitutional, or the determination of whether tribal laws or tribal gaming ordinances were followed in the performance of the duties of the Business Committee. This Court should not place itself in a position to become the "decider" as to which branch of a tribal government has power over a certain issue and whether that power was properly exercised. Indeed, should the Court accept the inartfully pled effort by Plaintiff to convert the federal courts into the arbiter of internal tribal disputes, this Court will be inundated with "RICO" or "tort" actions based upon every perceived wrong by every faction in the multitude of intra-tribal disputes which constantly arise within Oklahoma's 39 recognized tribes. Regardless of the labels placed on Plaintiff's claims, the issues raised by the Complaint 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 Plaintiff's allegations, *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 intra-tribal, but advised it would correspond with both councils on an interim basis pending a tribal resolution of the dispute. *Id.* at 339-40. The BIA decision was appealed to federal district court. *Id.* On review, the court examined the tribal constitution and bylaws, addressed the merits of the election dispute, determined the newly elected council was entitled to recognition, and issued a final order requiring the BIA to recognize the new council. *Id.* The Eighth Circuit reversed, holding that it was improper for the district court to enter orders concerning the merits of an election dispute. *Id.* Notably, appeals courts held 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. 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 and laws. Under the well established precedent set forth above, this Court lacks jurisdiction to resolve such questions, and the Complaint must be dismissed.

III. PLAINTIFF'S RICO CLAIMS FAIL AS A MATTER OF LAW.

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 (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, S.P.R.L v. Imrex Co., Inc.,* 473 U.S. 479, 496 n. 14, (1985); *H.J., Inc. v. Nw. Bell Tele. Co.,* 492 U.S. 229, 239 (1989)).

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 Expl. 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.

Similarly, the Western District applies critical scrutiny to RICO actions. When civil RICO claims were particularly popular among plaintiffs, the judges in this District required plaintiffs to provide a "RICO case statement" setting forth the requisite particularities of the RICO claims. This practice appears to continue, as just this month Judge West entered such a "case statement" order in a civil RICO class action. *See Hancock v. A.T.&T., et al.,* CIV-10-822-W, DKT No. 6, attached hereto as Exhibit "1". Likewise, Judge Friot, in *William D. McDonald v. Joe Heaton, et al*; CIV-06-0601-F-DKT No. 7 (W.D. Okla. June 16, 2006) ("the Friot Order"), issued a lengthy order outlining this district's specific requirement to substantiate a private cause of action under RICO. Specifically, Judge Friot provided, *intra alia*, that a RICO Case Statement was required which "shall include the facts plaintiff relies on to initiate this complaint as a result of the 'reasonable inquiry' required by Rule 11." *See* Friot Order, p. 7. The RICO Case Statement was to be submitted in such detail and with particularity to satisfy a seventeen (17) pronged questionnaire, each with sub-parts, or the action would be dismissed *sua sponte* by the Court. *Id.*; *see also Andrews v. Heaton*, CIV-06-510-R DKT No. 6 (W.D. Okla. May 17, 2006) (*sua sponte* order dismissing claims and directing the filing of RICO Case Statement).

Here, the Complaint fails to plead a RICO case under Rule 9(b) or comply with the RICO Case Statement requirements applied in this District. Plaintiff does not specifically identify any fraudulent statements or representations by Foshee & Yaffe, let alone set forth the time, place, or contents thereof. In fact, the Plaintiff's first cause of

action for RICO does not even refer to Foshee & Yaffe. Rather, it defines Foshee & Yaffe as a "Co-Conspirator Defendant," the term used throughout the RICO cause of action, in the seventh cause of action for civil conspiracy. Further, Plaintiff fails to identify 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. For example, Plaintiff states in a conclusory fashion that all Defendants are an "enterprise" and "conducted their enterprise through an ongoing, open-ended pattern of racketeering activity." (Complaint ¶¶ 110-116). Whereas, none of the allegations in the Complaint meet the heightened pleading standard of Rule 9(b) or this District's strict standards, it must be dismissed.

A. Plaintiff Fails to Adequately Plead and Identify the RICO Enterprise.

Plaintiff has failed to sufficiently plead the existence of an enterprise involving Foshee & Yaffe. Indeed, Plaintiff's only reference to a 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, 583 (1981); *United States v. Sanders,* 928 F.2d 940, 943 (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 Turkette,* 452 U.S. at 580-83.

Plaintiff fails to identify the alleged enterprise or 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, or 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 other than the commission of the baseless, unspecified predicate acts.

The Complaint is silent regarding the identity of the purported enterprise. Without the identity of the alleged enterprise, Foshee & Yaffe 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 Has Failed to Plead Predicate Acts.

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). However, Plaintiff fails to plead specific facts to support each element of the alleged offenses. 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 1187, 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,* 873 F.2d at 1362. In this regard, Plaintiff has accused multiple Defendants of mail, wire and financial institution fraud. In so doing, Plaintiff is required 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).

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. In fact, the Complaint is devoid of any facts that any Defendant even used the mail. (Complaint, ¶¶ 18-107). Accordingly, Plaintiff's allegations of mail and wire fraud fall well short of the particularity requirements for pleading fraud. *See e.g. Farlow,* 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 and Burns,* 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 manner 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 any Defendant, much less Foshee & Yaffe, or made any allegation that they 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. (Complaint, ¶¶ 42, 47, 50). Thus, the financial institution fraud claim made by Plaintiff cannot be a predicate act under RICO.

In sum, Plaintiff fails to specifically plead or support any legally cognizable predicate act. Accordingly, Plaintiff's RICO claims must fail as a matter of law.

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 it complains. Instead, the 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, it fails to allege that Foshee & Yaffe (or the undefined and unidentified "enterprise") committed one of the statutorily-specified predicate acts indictable under federal law. *See Tal*, 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). For example, nowhere in the Complaint does Plaintiff identify the "when" of Foshee & Yaffe's allegedly fraudulent statement(s). *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 *H.J., Inc.,* 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. Indeed, all of Plaintiff's allegations are ultimately based upon whether the acts were authorized in accordance with tribal law. Plaintiff essentially attempts to convert its view of the Apache Constitution and law into "criminal" activity without providing any explanation as to how federal criminal law can be based upon purported breaches of tribal law. 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 predicate 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.")

In *Sil-Flo Inc. v. SHFC, Inc.,* 917 F.2d 1507 (10th Cir. 1990) 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 (internal citations omitted). 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, involve a single alleged victim (the Tribe), and are based upon alleged failures in the Defendants' Tribal-law duties to the Tribe, the Plaintiff has failed to establish a "pattern of racketeering," *id.,* and Plaintiff's RICO claims must be dismissed.

IV. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS TO ITS STATE LAW CAUSES OF ACTION.

Plaintiff has failed to state a claim upon which relief can be granted on each claim brought under state law. Notably, each cause of action alleged is devoid of the requisite specificity and fails to provide the "who, what, where, and when" necessary to support the claims asserted. For this reason, and as more fully set forth below, dismissal is proper.

A. No Action for Legal Malpractice and Breach of Contract Exists.

Plaintiff generically pleads 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 (2) year statute of limitations. *See* 12 O.S. § 95 (3); *Stephens v. Gen. 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). Moreover, because legal advice was given to the then acting Business Committee (or the Chalepah Faction) it is evident that the alleged "illicit" conduct of Foshee & Yaffe was known by the Tribe. Therefore, Plaintiff's malpractice and breach of contract claims between 2006 and the 2008 are barred by the applicable limitations period, and must accordingly be dismissed. *Stephens,* 905 P.2d at 799.

Notwithstanding a limitations bar for this malpractice and breach of contract claim, in order to support a cause of action for legal malpractice, a plaintiff must prove the attorney's negligence caused the underlying case for which he/she was hired. *Nicholas v. Morgan,* 58 P.3d 775, 780-781 (Okla. 2002). Damages are normally proved in a legal malpractice case by introducing evidence establishing the value of the claim lost by the attorney's misconduct or neglect. *Id.* Nothing, however, within the Complaint establishes that the conduct of Foshee & Yaffe was the cause of the underlying case or that the damages sought were the direct result of the attorney's misconduct or neglect.

Rather the Plaintiff has made clear that the aggrieved conduct was done so in culmination with decisions made by and approved by the Chalepah Faction (or then acting Business Committee). (Complaint, ¶¶ 31, 57). Outside of the broad and conclusory assertions that Foshee & Yaffe "owed a duty to Plaintiff . . . to not take actions to injure Plaintiff," the Complaint is devoid of any specific facts which support this claim. (Complaint, ¶ 127). Instead, the Plaintiff simply avers the "Lawyer and Law Firm Defendants breached their duty by engaging in the conduct described above, and breached their contract with Plaintiff." (Complaint, ¶ 128). However, the Complaint is devoid of any specific details as to precisely how the conduct of the "Lawyer and Law Firm Defendants" actually caused the underlying case or how the damages sought are the result of the misconduct or neglect are provided.

In particular, the Plaintiff takes great issue with the Business Committee's decision to rehire Ms. Brown while she was employed with Foshee & Yaffe in 2007 (Complaint, ¶ 31-32). However, the decision by the Business Committee to rehire Ms. Brown does not constitute malpractice – rather simply points out yet another political issue between these factions. Moreover, Plaintiff's purportedly recite to terms of the contract for legal services between Ms. Brown and the Business Committee; yet fail to provide any factual predicate as to precisely how the terms of this contract was breached. (Complaint, ¶¶ 33-39).

Likewise, it is undisputed that Betsy Brown left Foshee & Yaffe in May, 2009; thus once Ms. Brown's association with Foshee & Yaffe ceased, so did its representation of the Tribe. 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. Likewise, Plaintiff also makes loose reference to the term "co-conspirators," a term to define Foshee & Yaffe, in a convoluted attempt to sweep in alleged conduct which undisputedly occurred after Ms. Brown left Foshee & Yaffe. (Complaint, ¶¶ 83-107). Therefore, because this claim fails to comply with Rule 9(b), it must be dismissed.

B. No Facts Support a Claim for Negligent Training and Supervision.

Just as with Plaintiff's malpractice and breach of contract claim, Plaintiff's claim for negligent training and supervision also fails. Where there is no independent civil action for alleged attorney misconduct, there is no cause for negligent supervision. *Hutchinson v. Carter*, 33 P.3d 958, 962 (Okla. Civ. App. 2001) (citing *Bladen v. First Presbyterian Church of Sallisaw,* 857 P.2d 789, 797 (Okla. 1993) (because the asserted underlying actions, alienation of affections and clergy malpractice for improper sexual conduct, were not cognizable, there can be no cause for negligent hiring or supervision by the church).

The Complaint is devoid of any specific facts which identify Ms. Brown's inexperience or provide precisely when, how and over what matter Foshee & Yaffe failed to supervise. Instead, the Complaint simply concludes Foshee & Yaffe "failed to properly train and supervise Brown, permitting Brown to engage in the wrongdoing described in this Complaint." (Complaint, ¶ 134). Thus, it appears Plaintiff's claim is not based upon inexperience or negligence at all, but rather the vague assertion that Foshee & Yaffe

failed to prevent Ms. Brown from committing "wrongdoing." In fact, the Complaint is devoid of any allegations which even support a negligence cause of action.

In particular, the Complaint contains no allegations, dates, or events which establish a negligent hiring cause of action. Notably, there are no allegations which precisely identify where or when Foshee & Yaffe failed to train or oversee Ms. Brown's work much less indicate that any negligence occurred at all. In fact, nothing within the Complaint identifies what Foshee & Yaffe allegedly did wrong. Rather every reference made to "Foshee & Yaffe" is accompanied by a vague act allegedly committed by Ms. Brown. (Complaint, ¶¶ 21-22, 29, 31-40, 42, 47, 60-61 & 63). The Complaint is bereft of any independent action or conduct allegedly committed by Foshee & Yaffe. Accordingly, this claim fails to comply with Rule 9(b) and must be dismissed.

Furthermore, and as set forth above, it is well established that the statute of limitations for negligence is two years. 12 O.S. § 95 (3) . While the alleged misconduct of Ms. Brown is altogether vague and unclear, the majority of "illicit" acts complained of occurred between 2006 – 2008; over two years preceding the filing of the Complaint. (Complaint, ¶¶ 18-67). Accordingly, any alleged conduct which occurred more than two years before the filing of the Complaint is time-barred. Accordingly, this claim must be dismissed.

C. Plaintiff's Claim for Breach of Fiduciary Duty/Duty of Loyalty Fails.

Plaintiff's claim for breach of fiduciary duty/duty of loyalty is without any factual support. (Complaint, ¶¶ 130-32). Although, generally, there is a fiduciary relationship between an attorney and client, Plaintiff has not pled any facts that indicate 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).

In particular, it is readily apparent that the Business Committee (Chalepah Faction) approved of every action that was taken by Foshee & Yaffe, vague and unclear as those actions may be drawn. (Complaint, ¶ 57). Moreover, despite the self-serving accusations by Plaintiff, it is disingenuous to contend that Foshee & Yaffe somehow breach its duty because Wells Fargo required collateral to secure a loan. (Complaint, ¶¶ 42, 54). Moreover, no where in the Complaint does Plaintiff contend it did not accept or utilize the benefit of the loan for the intended purpose. Rather, the complaint is limited to the "exorbitant legal fees," which were paid and approved of by the Business Committee. Thus because any reference to Foshee & Yaffe is altogether sparse, it cannot be said to have breached a duty when there are no specific allegations of any independent conduct. (Complaint, ¶¶ 21-22, 29, 31-40, 42, 47, 60-61 & 63). Accordingly, the claims for breach of fiduciary duty and loyalty against Foshee & Yaffe must be dismissed.

D. Plaintiff's Claims for Civil Conspiracy Fail.

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 insufficient to satisfy Rule 9(b). (Complaint, ¶¶ 136-37). Notably, Plaintiff's 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).

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." *Brock v. Thompson*, 948 P.2d 279, 294 (Okla. 1997). "Civil conspiracy itself does not create liability, but enlarges the pool of potential defendants from whom a plaintiff may recover." *Edwards v. Urice*, 220 P.3d 1145, 1152 (Okla. Civ. App. 2008). 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 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. Okla. 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 Foshee & Yaffe "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 raised indicate any unlawful acts or lawful acts accomplished through unlawful means. Accordingly, 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. Plaintiff's bald assertions are baseless and have no factual support and therefore must be dismissed.

In addition, Plaintiff's conspiracy claim is also barred by the statute of limitations. A cause of action based upon an alleged fraudulent conspiracy must be brought within two years from the time said cause of action accrued or it is barred by the statute of limitations. *Paxton v. Hyer*, 87 P.2d 938, 939 (Okla. 1939). As previously stated, a majority of the purported acts occurred prior to June 22, 2008. (Complaint, ¶ 18 -56). Accordingly, given the majority of the loose allegations against Foshee & Yaffe occurred prior to June 22, 2008, those claims must be dismissed. (Complaint, ¶¶ 21-22, 29, 31-40, 42 & 47).

E. Plaintiff's Claim for Unjust Enrichment Fails.

Plaintiff's claim for unjust enrichment fails to allege any basis for which relief can be granted. 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. 2000) (internal quotation omitted). A review of the Complaint does not support an unjust enrichment claim.

Importantly, it is entirely unclear from the Complaint how Foshee & Yaffe allegedly collected or otherwise benefitted financially at Plaintiff's expense. While Plaintiff asserts in a conclusory fashion that "the Defendants were unjustly enriched at the expense of the Plaintiff," no facts have been pled to support such an inference. (Complaint, ¶ 145). Specifically, Plaintiff fails to state how, what and why regarding the alleged wrongful conduct. In particular, Plaintiff does not identify the funds or the amounts which are allegedly at issue, nor does Plaintiff allege what each Defendant was allegedly paid or whether the payments received by the such Defendants were paid as part of the contract approved by the Business Committee. In fact, Plaintiff does not even allege any set of facts which could explain how all of the named Defendants, collectively and wrongfully, retained monies belonging to Plaintiff. 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 any cause of action upon which relief can be granted. Plaintiff's claims are unsupported by law, the facts as alleged, or by federal statute. Accordingly, Defendant Foshee & Yaffe moves that this Court dismiss Plaintiff's Complaint and for such further relief as the Court deems just and proper.

Respectfully submitted,

s/ Kevin R. Donelson
Kevin R. Donelson, OBA No. 12647
Carole L. Houghton, OBA No. 18047
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS, P.C.
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659
E-mail: kdonelson@fellerssnider.com
E-mail: choughton@fellerssnider.com

Attorneys for Defendant, Foshee & Yaffe