IN THE DISTRICT COURT IN AND FOR OSAGE COUNTY
STATE OF OKLAHOMA

OSAGE NATION, et al., Plaintiffs, -against- CAROL LEESE, et al., Defendants.	Case No.: CJ-2015-111 Hon. M. John Kane IV **RED EAGLE FEATHER AND TERADACT DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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The Red Eagle Feather and TeraDact Defendants[1] (collectively, "Defendants"), move to dismiss the Petition brought by Plaintiff Osage Nation ("Nation") and Plaintiff Osage Limited Liability Corporation ("OLLC" and collectively "Plaintiffs"), for failure to state a claim upon which relief can be granted pursuant to 12 Okla. Stat. § 2012(B)(6), for failure to file claims in a timely manner that fall within the applicable statutes of limitations, and because public policy dictates that these claims should be considered by the Osage Nation Courts. Defendants submit a memorandum in support of its motion.

PRELIMINARY STATEMENT

Some venture capital investments return a profit. Most do not. Some return a profit after five, ten, fifteen years. Most never do. In this instance, the fact that Plaintiffs' investment in NewMarket-I has yet to return a profit does not mean it never will, and it certainly does not establish a claim for fraud under Oklahoma law. Plaintiffs are understandably disappointed that their investment has yet to return a profit, but disappointment does not render Defendants liable for fraud.

Plaintiffs' claims fail as a matter of law because Plaintiffs have failed to plead facts sufficient to substantiate their claims under Oklahoma law. Although Oklahoma law requires Plaintiffs to articulate the who, what, when, and where of any fraudulent or negligent misrepresentations they relied upon, Plaintiffs have failed to specify what Defendants said, when they said it, and how the statements factored into their decision to invest in NewMarket-I.

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[1] For purposes of this motion, the "Red Eagle Feather" and "TeraDact" Defendants include Red Eagle Feather Distributing, LLC, an Oklahoma limited liability company; Yancey Redcorn; Betsy A. Brown; NewMarket Technology Fun I, LLC, a Delaware limited liability company; Howard C. Hill; Christopher K. Schrichte; and TeraDact Solutions, Inc., a Delaware corporation. Plaintiffs have identified NewMarket Technology Fund, LLC as a defendant in their Petition, however, Defendants are not aware of this entity's existence.

Plaintiffs' Petition is remarkably void of any allegations that Defendants made any misrepresentations *before* June 17, 2010—the day the OLLC Enterprise Board elected to make the now challenged investment. Nothing in Plaintiffs' Petition supports the notion that Plaintiffs made their investment because of, or in *reliance* on, Defendants' alleged misrepresentations, and this missing link is fatal to Plaintiffs' claims.

Instead of alleging how any supposed misrepresentations caused them to invest in what they now claim to be a failed venture capital fund, Plaintiffs predicate their claims for fraud and negligent misrepresentation almost entirely on the allegation that, after they invested in NewMarket-I, their investment failed to return a profit. The absence of a return on an investment alone, however, is not actionable under Oklahoma law. *See, e.g., Farley v. Stacy*, No. 14–CV–00082015, 2015 WL 3866836, at *7-11 (N.D. Okla. June 23, 2015) (concluding that the lack of a return on an investment alone, without the pleading of an actionable misrepresentation and reliance, does not give rise to a claim for fraud under Oklahoma law).

The only details Plaintiffs provide regarding the misrepresentations that allegedly duped them is that Defendants told Plaintiffs an investment in NewMarket-I was a "sure-thing." *See* Pet. ¶ 32. Such statements of "corporate optimism," however, do not constitute a "misrepresentation" under the law. *See Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119 (10th Cir. 1997) ("Statements classified as 'corporate optimism' or 'mere puffing' . . . are generalized statements of optimism that are not capable of objective verification," and consequently, they "are not actionable because reasonable investors do not rely on them in making investment decisions.").

Defendants' failure to articulate actionable misrepresentations indicates that, as a matter of law, there simply are none. If Plaintiffs cannot, in their Petition, articulate with clarity what

Defendants said that caused them to make a decision they now regret—no amount of discovery will ever fill this void. Nothing in Defendants' control or possession will shed light on why the OLLC elected to make this investment in summer 2010. Accordingly, because Plaintiffs are unable to establish the most basic pleading elements of misrepresentations and reliance, they fail to state claims for fraud, violations of the Oklahoma Securities Act, and negligent misrepresentation under Oklahoma law.

As Plaintiffs' Petition notes, on June 17, 2010, and again on August 31, 2010, the parties entered into written contractual agreements. *See* Pet. ¶ 20. What Plaintiffs fail to note—but cannot escape because their Petition incorporates these contracts by reference—is that these contractual agreements govern Plaintiffs' investment in the NewMarket Fund, and furthermore, that the contracts the parties entered into make clear that Plaintiffs risk losing *their entire investment*. Plaintiffs, therefore, cannot rely on claims for fraud to circumvent the legal effects of a contract they signed—particularly where they acknowledged that the very thing they now complain of was a potential outcome of their decision to invest.

It is no mystery why Plaintiffs have filed a barebones Petition that fails to meet Oklahoma's most basic pleading standards. Plaintiffs' attorneys have openly admitted they have no evidence or information that leads them to believe that any fraud actually took place (beyond the fact they lost money on their investment), and because Plaintiffs are upset the OLLC lost money, they have elected to "hail [] into court" anyone from whom they may be able to extract some compensation to offset the OLLC's failed investments. *See* Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:58 of Audio, Pt. 2) (emphasis added) ("[W]e're kind of flying in the dark, . . . [but we need] to try to find out what

happened . . . [and] *the easiest way is to hail them into court and you say, 'well you come in and tell me what happened*.') (emphasis added).

Courts, however, do not permit Plaintiffs to plead barebones fraud claims on the hopes that they can instigate "fishing expeditions" such as the one Plaintiffs have attempted to effectuate here. *See Seattle-First Nat'l Bank v. Carlstedt*, No. Civ-83-2425, 1984 WL 2430, at *4 (W.D. Okla. May 17, 1984) (noting that the more stringent pleading requirements for fraud are designed "to prevent the filing of meritless securities fraud claims which the filing party subsequently fleshes out by conducting *fishing expeditions* . . . .") (citing *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig*., 467 F. Supp. 227, 250 (W.D. Tex. 1979) (emphasis added)). Oklahoma law does not permit Plaintiffs to file claims for fraud every time their investments lose money in the hopes that they will discover their way into successfully alleging fraud.

Moreover, there is no need for a fishing expedition here. Plaintiffs' claims are demonstrably false based on the documents they incorporate, cite, and reference in their Petition. The documents incorporated in Plaintiffs' Petition explain what Plaintiffs contractually agreed to, where their investment money went in terms of expenditures for TeraDact, what the 2010 recapitalization actually constitutes and how it benefits TeraDact and all of TeraDact's investors, as well as the efforts Defendants Hill and Schrichte have made, and continue to make, to ensure that Plaintiffs' investment will, one day, produce a return. The Court need look no further than the documents incorporated by reference in Plaintiffs' Petition to determine that Plaintiffs' claims are fully and completely without merit.

Plaintiffs' allegations that they have been duped by Defendants are further undermined by the fact that they waited five years to bring this lawsuit, and as a result, all of their claims are

barred by Oklahoma's statutes of limitations. Plaintiffs allege that they were guaranteed an 8% return annually on their investment. Pet. ¶ 33. Plaintiffs then allege—and the documents they incorporate in their Petition demonstrate—that Plaintiffs were paid *nothing* on their investment in 2010, 2011, and 2012. Pet. ¶¶ 25-26. If Plaintiffs truly believed they were guaranteed an 8% return annually when they invested in this venture capital fund, they could have and should have filed their Petition alleging fraud in January 2012, when their 2010 investment failed to return any payment for the entire year of 2011. Claims for fraud, violations of the Oklahoma Securities Act, and negligent misrepresentation all expire two years after the cause of action is discovered. In this instance, according to the facts alleged in Plaintiffs' Petition, Plaintiffs' claims expired in December 2013, or at the very latest, January 2014.

Defendants vigorously assert that this Court should dismiss the Plaintiffs' Petition in its entirety. However, in the alternative to the dismissal of the Petition, Defendants request that this Court transfer the claims against them to the Osage Nation Courts. The claims against Defendants implicate important matters of Osage constitutional law and sovereignty – and involve accusations of wrongdoing between Plaintiffs' current and former officials – that the Osage Nation Judiciary would most appropriately consider. Plaintiffs' continued opposition to a transfer to their own courts is remarkable – even historical – and calls into question the soundness of the legal and policy theories underlying their claims.

Defendants maintain that Plaintiffs' investment in NewMarket-I was a reasonable investment that could still return a profit. Defendants Hill and Schrichte have worked tirelessly over the last five years to advance TeraDact. Of course, baseless allegations of fraud impose new challenges to the further development of business and undermine Plaintiffs' interest in a

financial return. This is, after all, why Oklahoma imposes a more stringent pleading standard for fraud claims.

Because Plaintiffs have failed to plead sufficient facts to support their claims under Oklahoma law, all of their claims must be dismissed. In the alternative, Plaintiffs request that this Court transfer the claims against them to the Osage Nation Courts.

STATEMENT OF FACTS

A. The Osage Nation Establishes the OLLC

The Nation is a federally-recognized Indian Tribe headquartered in Pawhuska, Oklahoma. Pet. ¶ 1. On March 11, 2006, the Osage people ratified the Constitution of the Osage Nation ("Osage Constitution"), which vests powers of the Nation in three separate branches of government. Osage Const., art. V, § 1.[2] The Osage Constitution mandates that the Osage Congress establish one or more Tribal Enterprise Boards in the Executive Branch, and that the Principal Chief appoint qualified professionals to oversee operations of Osage Nation business enterprises, with the advice and consent of the Osage Congress. *Id.* art. VII, § 14. The Osage Constitution also establishes a Code of Ethics that protects the "independence" of the Tribal Enterprise Boards, making "improper[] influence [of] the deliberations, administrations, or decisions of established boards" an ethical violation for Osage Nation officials and employees. *Id.* art. X, § 8.

[2] Citations to the Osage Nation Constitution do not transform Defendants' motion to dismiss into one for summary judgment because the Osage Constitution constitutes a source of law, subject to judicial notice. *See* 12 Okla. Stat. § 2201(A) ("Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States."); *see also Panama Processes, S.A. v. Cities Serv. Co.,* 1990 OK 66, ¶ 47, 796 P.2d 276, 294 ("The trial court may take judicial notice of a foreign country's laws if it can be properly informed of its terms."). With the Osage Nation as a plaintiff, there is no doubt that this Court's consideration of Osage law will be properly informed.

On April 14, 2008, the Osage Congress passed a resolution to create the OLLC (the "OLLC Act").[3] *See* Affirmation of Abi Fain in Support of Defendants' Motion to Dismiss, February 11, 2016 ("Fain Aff."), Ex. 1 (A Resolution to Adopt the Articles of Operation for the Limited Liability Company, Osage, LLC, to be Formed Under the Osage Nation Limited Liability Companies Act, Osage Nation Cong. Resolution 08-09 (2008) ("ONCR 08-09")); *see also* Pet. ¶ 17. As Plaintiffs allege, the OLLC Act established the OLLC as a limited liability company wholly owned by the Osage Nation for the purpose of generating profits for the OLLC and Osage government. *See* Pet. ¶ 17.

Plaintiffs further assert that the Nation created the OLLC to make "venture capital" investments. Pet. ¶ 17. By definition, "[v]enture capital funds build companies from the simplest form—perhaps just the entrepreneur and an idea expressed as a business plan—to freestanding, mature organizations." Nat'l Venture Capital Ass'n, *Yearbook 2010*, p. 7 (2010) ("NVCA *Yearbook 2010*").[4] Consequently, venture capital investments are high risk, high return

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[3] Citations to the OLLC Act do not transform Defendants' motion to dismiss into one for summary judgment because the OLLC Act constitutes a source of law, subject to judicial notice. *See* 12 Okla. Stat. § 2201(A) ("Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States."); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (noting that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment . . . ."). Furthermore, consideration of the OLLC Act at this stage in the proceedings is proper because Plaintiffs have incorporated the OLLC Act into their Petition. *See* Pet. ¶ 17; *see also Gaylord Entm't Co. v. Thompson*, 1998 OK 30, n. 10, 958 P.2d 128, 136 ("A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."). The OLLC Act is also available online. *See* ONCR 08-09, https://www.dropbox.com/sh/c3jyq5w7bzk946v/AAAalihBQmJjLv9o_SnkDLgWa/ONCR08-09_Enacted.pdf?dl=0.

[4] Reference to the National Venture Capital Association's *Yearbook 2010* publication does not transform Defendants' motion to dismiss into one for summary judgment as the publication is available online, and consequently, the Court may and should take judicial notice. *See* Nat'l Venture Capital Ass'n, *Yearbook 2010*, p. 7 (2010), available at http://growthandjustice.typepad.com/files/nvca_2010_yearbook.pdf; *see also O'Toole v. Northrop Grunman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web"); *see also Schaffer v. Clinton,* 240 F.3d 878, 885 n. 8 (10th Cir. 2001) (taking judicial notice of information found in a political reference almanac and

and take time to become profitable. *See* U.S. Small Business Administration ("SBA"), *Understanding Venture Capital*[5] (noting that investing in venture capital funds "inherently carries a high degree of risk."); *see also* George W. Dent, Jr., *Venture Capital and the Future of Corporate Finance*, 70 Wash. U. L.Q. 1029, 1034 (1992) ("[M]ost companies that seek venture capital are unstable and risky."); Curtis J. Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate*, 91 Nw. U. L. Rev. 865, 868 n.16 (1997) ("In broad terms, venture capital is risky, private investment of monetary and nonmonetary capital in emerging businesses.").

As one scholar has noted, "one-third of venture capital-financed companies wind up in bankruptcy." Dent, *supra* at 1034. "Another one-third end up in 'limbo' or as 'living dead'—limping along, able to pay expenses (including managers' salaries), but unable to go public or pay significant dividends." *Id.* Accordingly, "[o]nly one-third of the companies that use venture

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citing to the almanac's website); *Tal*, 453 F.3d at 1264 n.24 (10th Cir. 2006) (noting that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment," and, "[t]his allows the court 'to take judicial notice of its own files and records, as well as facts which are a matter of public record.'"). Furthermore, Oklahoma courts have made clear that "in construing a provision of our [Oklahoma] Pleading Code[, Oklahoma courts] consider the federal counterpart from which it was derived." *Shaffer v. Jeffery*, 1996 OK 47, ¶ 9, 915 P.2d 910, 913; *see id.* ("We have said that in construing a provision of our [Oklahoma] Pleading Code we consider the federal counterpart from which it was derived."). That is, Oklahoma § 2012(b) is "virtually the same as Federal Rule of Civil Procedure 12(b)," and consequently the interpretation of Fed. R. Civ. Pro. 12(b) guides this Court's interpretation of the Oklahoma state equivalent when considering the documents accompanying Defendants' motion to dismiss. *Visteon Corp. v. Yazel*, 2004 OK CIV APP 52, ¶ 14, 91 P.3d 690, 693.

[5] SBA, *Understanding Venture Capital*, Venture Capital (Feb. 7 2016, 12:45), https://www.sba.gov/content/venture-capital#Understanding%20Venture%20Capital. Reference to SBA's *Understanding Venture Capital* publication does not transform Defendants' motion to dismiss into one for summary judgment as the publication is available online, and consequently, the Court may and should take judicial notice. *See O'Toole*, 499 F.3d at 1225 ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web"); *see also Schaffer,* 240 F.3d at 885 n. 8 (10th Cir. 2001) (taking judicial notice of information found in a political reference almanac and citing to the almanac's website); *Tal*, 453 F.3d at 1264 n.24 (10th Cir. 2006) (noting that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment," and, "[t]his allows the court 'to take judicial notice of its own files and records, as well as facts which are a matter of public record.'").

capital financing succeed." *Id.* As a result of its inherently high-risk nature, "venture capital is long-term or 'patient capital,'" that does yield immediate results, but instead, "allows companies the time to mature into profitable organizations." SBA, *Understanding Venture Capital*; *see also* NVCA *Yearbook 2010*, p. 7 (2010) ("When an investment is made in a company, it is an equity investment in a company whose stock is essentially illiquid and worthless until a company matures five to eight years down the road.").

With the knowledge that the OLLC was created to invest in venture capital, the OLLC Act further mandates that the Principal Chief make Osage Constitution § 14 appointments of "qualified professionals" to the OLLC Enterprise Board (the "Board"), with Congressional consent of the appointments. Fain Aff. Ex. 1 (ONCR 08-09, referencing by Exhibit the OLLC Articles of Operation), art. VII, § 7.3(b). Non-Osage appointees to the Board must have "substantial business, financial or industry experience." *Id*. The OLLC Act tasks the Board with "manag[ing] [t]he business and affairs of the [OLLC] under its direction (*id.* § 7.2) with the "power and authority" to make investments (*id.* § 7.4(e)), entering into contracts (*id.* §7.4(i)), and otherwise conducting the OLLC's business, in accordance with Osage law. *Id.* § 7.4(k).

The OLLC Act also establishes that each individual Board member has a fiduciary obligation to the OLLC to "discharge[e] duties in good faith, in a manner the Board member believes to be in the best interest of the Company, and with the care of an ordinary prudent person in a like position would exercise under similar circumstances." *Id.* § 7.1. Specifically, Board members must, in conjunction with the Chief Executive Officer ("CEO"), present to the Osage Nation officials annual and quarterly reports and plans about the OLLC (*id.* § 7.15), as well as quarterly financial reports and an operational update to Nation officials. *Id.* art. XV, § 15.5. The OLLC Act specifically requires the Board to "maintain and preserve . . . relevant

[OLLC] documents" (*id.* art. VIII, § 8.2), and keep "[p]roper and complete records and books of account." *Id.* art. XV, § 15.2.

B. The OLLC Looks to Invest in NewMarket-I Securities, Specifically the TeraDact Fund

According to Plaintiffs, the OLLC elected to invest in NewMarket-I Securities based on a recommendation made by Defendant Carol Leese ("Leese") sometime "[p]rior to June 17, 2010 . . ." Pet. ¶ 19. Plaintiffs assert that Leese "is the former manager and chief executive officer of OLLC." Pet. ¶ 4. Plaintiffs further assert that "Leese resigned all offices and terminated his employment with OLLC on or about March 31, 2014." Pet. ¶ 4.

Plaintiffs assert that Leese worked closely with Defendant Robert Petre ("Petre"), and further, that Petre "is the former chief financial officer and treasurer of OLLC." Pet. ¶ 5. Petre allegedly "resigned all offices and terminated his employment with OLLC on or about August 31, 2013." Pet. ¶ 5. Thus, according to Plaintiffs, Leese and Petre "were the senior managers of OLLC, engaged by the Nation to carry out OLLC's purposes faithfully, honestly, competently and consistently with such managers' fiduciary and other duties at law." Pet. ¶ 18.

Although Plaintiffs' Petition does not assert any facts pertaining to the inception of the relationship between the Red Eagle Feather Defendants and the OLLC, Plaintiffs do assert that "Defendant Red Eagle Feather Distributing, LLC . . . is or was an Oklahoma limited liability company with its principal offices, on information and belief, located in Norman, Oklahoma." Pet. ¶ 6. Plaintiffs allege that defendant Yancey Redcorn ("Redcorn") "was a member of [][Red Eagle Feather] and at all times relevant to this Petition acted as an agent for [][Red Eagle Feather]." Pet. ¶ 7. Plaintiffs also allege that defendant Betsy Brown ("Brown") "was a member of [Red Eagle Feather] and/or a manager of [Red Eagle Feather] who, at all times relevant to this Petition acted as an agent for [Red Eagle Feather]." Pet. ¶ 8. And further, according to

Plaintiffs, Red Eagle Feather acted as a "broker" for the relationship between the OLLC and the TeraDact Defendants. Pet. ¶ 32.

Likewise, although Plaintiffs' Petition offers no explanation for the genesis of communications or relations between the OLLC and the TeraDact Defendants, Plaintiffs do allege that Defendant Christopher K. Schrichte ("Schrichte"), "at all times relevant to this Petition, acted as an agent for TeraDact and/or other NewMarket Group entities." Pet. ¶ 13. Plaintiffs further allege "[a]t all relevant times, Schrichte held himself out as President and CEO of TeraDact." Pet. ¶ 13. Plaintiffs allege that Defendant Howard Hill ("Hill") "at all times relevant to this Petition, acted as an agent for NewMarket, NewMarket-I and Defendant TeraDact Solutions, Inc. ('TeraDact')," and that "[a]t all relevant times, Hill held himself out as Executive Vice-President, General Counsel and Secretary of TeraDact." Pet. ¶ 11.

According to Plaintiffs, Defendants NewMarket Technology Fund I, LLC ("NewMarket Fund" or "NewMarket-I") and NewMarket Technology Fund, LLC are Delaware limited liability companies Pet. ¶¶ 9-10.[6] Plaintiffs assert that defendant "TeraDact is a Delaware limited

[6] Delaware's Department of State, Division of Corporations lists NewMarket Technology Fund I, LLC as a corporation incorporated under Delaware law on April 6, 2001. Defendants are unaware of the existence of the entity that Plaintiffs refer to as "NewMarket Technology Fund, LLC," and nothing on the Delaware Department of State, Division of Corporations' publically available website reveals any information related to the existence of such an entity. To be sure, Defendants' reference to information on file with the Delaware Division of Corporations is subject to judicial notice and does not transform Defendants' motion into one for summary judgment because it is publicly available online and constitutes a public record. *See O'Toole*, 499 F.3d at 1225 ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web"); *see also Schaffer,* 240 F.3d at 885 n. 8 (taking judicial notice of information found in a political reference almanac and citing to the almanac's website); *Tal*, 453 F.3d at 1264 n.24 (10th Cir. 2006) (noting that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment," and, "[t]his allows the court 'to take judicial notice of its own files and records, as well as facts which are a matter of public record.'").

liability company with its principal offices located, on information and belief, in Missoula, Montana. . . ." Pet. ¶ 12.[7]

Plaintiffs further allege that TeraDact is an "affiliate" of NewMarket Fund, "with common direct or indirect ownership with those companies, in whole or in part." Pet. ¶ 12. The corporate relationship between the NewMarket Fund and TeraDact is accurately stated in NewMarket Fund's 2011 and 2012 Annual Financial Reports (Fain Aff. Ex. 2 ("2012 Annual Report")),[8] which Plaintiffs cite and reference in their Petition.[9] The 2012 Annual Report reveals that NewMarket-I invests directly, and exclusively, in TeraDact. *See* Fain Aff. Ex. 2 (2012 Annual Report), p. 6 of 50, ("We are pleased to present the annual report of NewMarket Technology Fund I, LLC . . . . The sole investment of the Fund continues to be in TeraDactTM Solutions, Inc.").

Thus, with nothing more than the aforementioned allegations to describe the events leading up to the OLLC's investment, Plaintiffs merely assert that "[p]rior to June 17, 2010, Leese asked the OLLC Board of Directors [OLLC Enterprise Board] to fund an investment in a venture operated by one or more of the NewMarket Group." Pet. ¶ 19. According to Plaintiffs, "[t]he Board did so." Pet. ¶ 19.

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[7] Delaware's Department of State, Division of Corporations lists TeraDact Solutions Inc. as a corporation incorporated under Delaware law on October, 13, 2000. The inclusion of information on file with the Delaware Division of Corporations is subject to judicial notice and does not transform Defendants' motion into one for summary judgment as it is publicly available online and constitutes a public record. *See* note 6, *supra*.

[8] *See* Fain Aff. Ex. 2 (NewMarket Tech. Fund I, LLC and TeraDact Solutions 2012 Ann. Rep., Tab 2 Financial Statements of TeraDact – Celcorp, Inc. Profit & Loss (2013) ("2012 Annual Report")), p. 34 of 50.

[9] Plaintiffs claim to have received the 2012 Annual Report in ¶ 25 of their Petition and they quote directly from the 2012 Annual Report in ¶ 19, claiming that "[a]ccording to OLLC management (Leese and Petre), the NewMarket Group or one of such entities was in the business of 'providing] an integrated delivery of information intelligence solutions.'" Pet. ¶ 19 (quoting Fain Aff. Ex. 2 (2012 Annual Report), p. 24 of 50); *compare with* Fain Aff. Ex. 2 (2012 Annual Report), p. 24 of 50 ("TeraDact is a technology company which provides an integrated delivery of Information Intelligence solutions. . . .").

That is, Plaintiffs allege no facts related to the Red Eagle Feather or TeraDact Defendants' actions prior to Leese's June 2010 recommendation. The Petition does not list, detail, or identify any statements (or even misrepresentations) that the Red Eagle Feather or TeraDact Defendants made to Leese prior to June 2010 that in any way influenced his recommendation that the OLLC Enterprise Board undertake an investment in the NewMarket-I venture capital fund.

Following Leese's alleged June 2010 recommendation that the OLLC invest in NewMarket-I, Plaintiffs allege that "Leese and Petre continued thereafter, from time to time, to make representations to the Board and/or the Congress concerning the NewMarket Group's business expertise, concerning its access to lucrative contracts or other sources of revenue, and concerning the NewMarket Group's economic viability." Pet. ¶ 19. Nothing in the Petition alleges or asserts that these representations were based on statements made by any one of the Red Eagle Feather or TeraDact Defendants.

C. The OLLC Conducts its Own Due Diligence and Decides to Purchase 20 Units of NewMarket-I Securities

Plaintiffs then allege that on June 17, 2010, the OLLC purchased five units of NewMarket Fund at $50,000 per unit, a $250,000 investment, through a Subscription Agreement. Pet. ¶ 20 (incorporating by reference Fain Aff. Ex. 3 (NewMarket Tech. Fund I, LLC, Subscription Agreement (June 17, 2010) ("June Subscription Agreement")).[10] On August

[10] Plaintiffs incorporate and rely directly on the June Subscription Agreement in ¶¶ 20, 22, and 29 of their Petition. Accordingly, the inclusion of the Subscription Agreement in Defendant's motion to dismiss does not transform the motion into one for summary judgment. *See Gaylord Entm't Co.*, 1998 OK 30, n. 10, 958 P.2d 128, 136 ("A Petition is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."); *Tucker v. Cochran Firm-Criminal Def. Birmingham L.L.C.*, 2014 OK 112, ¶ 30, 341 P.3d 673, 685 ("When a defendant files a § 2012(B)(6) motion with an incorporated exhibit which is relied on by plaintiff in the petition, or is integral to plaintiff's petition, the motion is *not* converted into one for summary judgment.").

31, 2010, the OLLC purchased fifteen more units of NewMarket Fund at $50,000 per unit by Subscription Agreement, an investment of $750,000, for a total OLLC equity position in NewMarket Fund of $1,000,000. Pet. ¶ 20.

The June Subscription Agreement sets forth the terms and conditions of the OLLC's "Membership Interest" in the NewMarket Fund.[11] That is, the June Subscription Agreement incorporates by reference the terms and conditions found in the Amended and Restated Limited Liability Company Agreement of NewMarket Technology Fund I, LLC (June 17, 2010), Fain Aff. Ex. 4 (Operating Agreement). Specifically, the June Subscription Agreement says that the admission of the OLLC "as a member of the Company (a 'Member')" is predicated "upon the terms and conditions set forth herein and further set forth in the Company's Limited Liability Company Agreement (the 'Operating Agreement') . . . ." Fain Aff. Ex. 3 (June Subscription Agreement), p. 2 of 13.

In the Operating Agreement, the OLLC Enterprise Board specifically acknowledges that the Board – before making the NewMarket Fund investment – conducted its own due diligence; asked the Red Eagle Feather and TeraDact Defendants questions about the company and investment; had the knowledge and expertise necessary to make an informed decision; and, finally, understood the risk associated with the investment. *See* Fain Aff. Ex. 4 (Operating Agreement), art. 3, § 3.02(d). The Operating Agreement states:

> [The OLLC Enterprise Board] has *asked such questions* and *conducted such due diligence*, concerning such matters and concerning its acquisition of Membership Rights as it has desired to ask and conduct, and all such questions have been answered to its full satisfaction; it has such *knowledge and experience in financial and business matters* that it is capable of evaluating the merits and risks of an investment in the Company it understands that owning Membership Rights involves various risks, including the restrictions on Dispositions and Encumbrances . . . the lack of any public market . . . the risk of owning its Membership Rights for an

[11] *See* Fain Aff. Ex. 3 (June Subscription Agreement), p. 2 of 13.

> indefinite period of time and ***the risk of losing its entire investment in the Company***; it is able to bear the economic risk of such investment . . .

Id. (emphasis added).

The June Subscription Agreement required that the investors acknowledge whether they had received all the documents "they have requested relating to an investment in the Company" and that the Company "has provided answers to all of his, her or their questions concerning the offering and an investment in the company." Fain Aff. Ex. 3 (June Subscription Agreement), § B(1)(c). In signing the June Subscription Agreement, the OLLC represented that it did not rely "upon any representations or other information (whether oral or written) other than [what is] contained in any documents or answers to questions so furnished [] by the Company." *Id.*

The Operating Agreement also states that the OLLC receives a return on its investment in the event that a "Realized Investment" occurs, meaning when:

> (a) the portfolio company or the Company's interest in such portfolio company has been sold; (b) the Company's interest has been merged with or acquired by a public company; (c) a public market have developed for the securities held by the Company; or (d) the Manager determines that all interests of the Company should be distributed.

Fain Aff. Ex. 4 (Operating Agreement), art. 5, § 5.01.

D. The NewMarket Fund / TeraDact Investment Has Not Yet Returned a Profit to the OLLC

It is no secret that the OLLC's investment in NewMarket-I has yet to return a profit. Plaintiffs allege that "OLLC records reflect that none of the NewMarket Group has ever paid any dividend or made any other profit distribution to OLLC." Pet. ¶ 26. "Neither has any such defendant ever repaid any of the capital contributed to NewMarket-I by OLLC." Pet. ¶ 26. Plaintiffs allege that "[f]or the year ended December 31, 2010, TeraDact (shown in its financial statements as 'Celcorp, Inc.'), posted a loss of $573,255.91 on income of $47,100.00." Pet. ¶ 23.

The Plaintiffs further allege that "[t]his means that, in the calendar year in which OLLC invested $1 million in TeraDact (via OLLC's investment in TeraDact's parent, NewMarket-I), TeraDact spent $500 thousand and ended up with less than $8,000.00 in the bank, according to TeraDact's balance sheet for the year ended December 31, 2010." Pet. ¶ 23. Plaintiffs further note that "[f]or the year ended December 31, 2011, TeraDact . . . . posted a loss of $634,859.45 . . . ." Pet. ¶ 23.

The NewMarket Fund acknowledged the financial challenges it faced in 2010, stating that:

> Adverse economic conditions have limited Celcorp's [TeraDact] ability to market its products at sufficient amounts to recover its operating and administrative costs. As a result, Celcorp, Inc. and its wholly owned subsidiary 941997 Alberta Ltd. lost approximately $1,015,000 in 2010. While the Company is reducing its operating costs and administrative expenses and the Fund continues to seek additional sources of capital including equity capital, there can be no assurance that the Company and/or the Fund will be successful in accomplishing these objectives.

Fain Aff. Ex. 5 (NewMarket Tech. Fund I, LLC, Reviewed Financial Statements, For The Year Ending December 31, 2010 ("NMTF 2010 Financials")), p. 12 of 14, Note 4.[12]

Plaintiffs' citation to TeraDact's losses in 2010 and 2011 is accurate and fully reflected in the actual documents—specifically the 2012 Annual Report—that Plaintiffs cite and incorporate in ¶ 23 of their Petition. A review of these same reports reveals that during these years, TeraDact spent hundreds of thousands of dollars on legitimate business expenses. In 2011, TeraDact's total expenses were $681,959.45. *See* Fain Aff. Ex. 2 (2012 Annual Report), p. 34 of 50. The

[12] Plaintiffs reference the NMTF 2010 Financials in their Petition ¶ 23, and consequently, the inclusion of the NMTF 2010 Financials in Defendants' motion to dismiss does not render the motion one for summary judgment. *See Tucker*, 2014 OK 112, ¶ 30, 341 P.3d at 685 ("When a defendant files a § 2012(B)(6) motion with an incorporated exhibit which is relied on by plaintiff in the petition, or is integral to plaintiff's petition, the motion is *not* converted into one for summary judgment."); *see also Gaylord Entm't Co.*, 1998 OK 30, n. 10, 958 P.2d at 136 ("A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.").

expenses listed include administrative expenses, connectivity and Ethernet expenses, marketing expenses, payroll expenses, consulting expenses, *etc.* *See id.* at 32-33. In 2012, TeraDact's total expenses were $865,636.51. *See id.* at 33. The 2012 expenses listed included the same expenses in 2011, which were administrative expenses, connectivity and Ethernet expenses, marketing expenses, payroll expenses, consulting expenses, *etc.* *See id.* at 32-33.

E. Plaintiffs Allege that the Red Eagle Feather Defendants Guaranteed Profits to the OLLC

Plaintiffs allege that the Red Eagle Feather Defendants, at some unspecified time and place, guaranteed that the NewMarket Fund / TeraDact deal was a "sure thing" investment. Pet. ¶ 32. Plaintiffs further assert that Yancey Redcorn, on behalf of both the Red Eagle Feather and Teradact Defendants, "gave specific assurances to OLLC, on those defendants' own behalf and on behalf of the NewMarket Group, concerning the value of the NewMarket Units." Pet. ¶ 33. The Plaintiffs allege that Redcorn's written statement in an unspecified written document, on an unspecified date, stated that the NewMarket Fund "will provide Osage LLC an 8% preferred return on investment annually." *See id.* Plaintiffs' quote Redcorn's alleged written statement as follows:

> REFD [i.e., REF) has recommended a specific transaction with Newmarket [sic] Technology Fund I and TeraDact Solutions, Inc. NewMarket [sic] Technology Fund I owns a unique product which is anticipated to be necessary to the transaction of business for government and non-government entities. The Fund will provide Osage LLC an 8% preferred return on investment annually. REFD has performed the necessary due diligence regarding this stock purchase and has recommended purchase to the Osage LLC. The Osage LLC has been presented this opportunity primarily because of REFD's relationship with Newmarket [sic] Technology Fund.

Id. (quoting an unidentified source).

F. The Recapitalization of TeraDact Only Increased the Value of the OLLC's Investment

Plaintiffs rely on Exhibit A in ¶ 21 of their Petition to assert that the TeraDact Defendants "completed a 'recapitalization' on July 27, 2010, just thirty days after OLLC's first purchase of NewMarket Units." Pet. ¶ 21 (quoting Pet. Ex. A). Based on their reading of Exhibit A, Plaintiffs allege that "[t]he recapitalization involved purchasing 'the remaining founder's stock' in TeraDact." Pet. ¶ 21.

Exhibit A to Plaintiffs' Petition provides a more detailed description of the alleged recapitalization, stating that:

> The recapitalization closed on July 27, 2010. By operation of law, all of the remaining founder's stock was cancelled and purchased by the Company at a price determined to be fair to the Board and consistent with an outside valuation prepared by The McLean Group, an investment advisory concern retained by the Company for this purpose. Immediately following recapitalization, new shares of common stock with the same or lesser value were issued to employees, consultants, directors and certain creditors of the company.

Pet. Ex. A.

Furthermore, the "valuation prepared by The McLean Group" referenced and incorporated in Exhibit A of Plaintiffs' Petition states explicitly that the recapitalization of the company involved a payment of ***$8,800*** – not $1 million – to the company's founders to buy out their interests in the company. *See* Fain Aff. Ex. 6 (McLean Group Fairness Opinion on Celcorp Inc. ("TeraDact") Recapitalization (Jul. 27, 2010) ("McLean Fairness Opinion")), p. 14 of 57.[13] The

[13] Plaintiffs' Petition references, cites to, and incorporates the McLean Fairness Opinion, and consequently, Defendants' inclusion of this document in their motion to dismiss does not transform the motion into one for summary judgment. *See Gaylord Entm't Co*., 1998 OK 30, n. 10, 958 P.2d at 136 ("A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."); *Tucker*, 2014 OK 112, 341 P.3d at 685 ("When a defendant files a § 2012(B)(6) motion with an incorporated exhibit which is relied on by plaintiff in the

McLean Fairness Opinion states "the planned buyout of the 880,000 common shares at $0.01 per shares implies an equity value of $8,800." *Id.*

Furthermore, documents incorporated by reference in Plaintiffs' Petition make clear the identity of the individuals whose stock was re-purchased in the recapitalization. *See* Fain Aff. Ex. 7 (Celcorp, Inc. Resolution, *Written Consent of Stockholders Approving Recapitalization*, (July 27, 2010) ("2010 Common Stockholder Resolution")), p. 4 of 4.[14] That is, the 2010 Common Stockholder Resolution makes clear that recapitalization bought out the common stock holders, *not* the preferred stock holders. *See id.* (noting that "the undersigned Common Stockholder" agrees to sell the outstanding shares of *common stock* back to the company). Defendant Chris Schrichte also signed the 2010 Common Stockholder Resolution on behalf of the *preferred* stockholders, the only stockholders left after the recapitalization because their stock was *not* repurchased by the company. *See id.*; *see also* Fain Aff. Ex. 6 (McLean Fairness Opinion), p. 22 of 57, (noting that as a result of the recapitalization "there will be no common stock outstanding. Only the Preferred Stock held by NewMarket . . . will exist after the transaction."). Defendants Schrichte and Hill, as owners of preferred stock, received no payments as a result of this recapitalization. *See* Fain Aff. Ex. 7 (2010 Common Stockholder Resolution); Fain Aff. Ex. 6 (McLean Fairness Opinion).

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petition, or is integral to plaintiff's petition, the motion is *not* converted into one for summary judgment.").

[14] By referencing the recapitalization in Pet. ¶ 21, the Plaintiffs have made the recapitalization integral to their complaint and, consequently, Defendants' inclusion of documents pertinent to an accurate understanding of the recapitalization does not transfer Defendants' motion to dismiss into one for summary judgment. *See May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 19, 151 P.3d 132, 139 ("When a plaintiff fails to attach to the complaint (or incorporate by reference) a pertinent document upon which it solely relies and which is integral to the complaint (or referred to in the complaint), a defendant may introduce the document as part of its motion attacking the pleading. The submission of the exhibit is not considered a reliance on extraneous materials so as to require the recasting of the dismissal motion into one for summary judgment.").

NewMarket's 2010 Annual Report—a document in Plaintiffs' possession and referenced, cited, and incorporated in ¶ 23 of their Petition—further demonstrates that Plaintiffs were informed of the McLean Group's valuation of the recapitalization, as well as the McLean Group's conclusion that the recapitalization was deemed fair and reasonable pursuant to a valuation performed by an outside investment advisory group, The McLean Group. *See* Fain Aff. Ex. 8 (NewMarket Tech. Fund I, LLC, 2010 Ann. Rep. (2011) ("2010 Annual Report")), p. 2 of 17.[15] Specifically, on the issue of recapitalization, the 2010 Annual Report informs investors like the OLLC that:

> By operation of law, all of the founders' stock was cancelled and purchased by the Company at a price determined to be fair by the Board and consistent with an outside valuation prepared by The McLean Group, an investment advisory concern retained by the Company for this purpose. While weakening economic conditions caused the recapitalization of the company to take much longer to close than originally anticipated, we have achieved our objective of reducing the number of shareholders to a manageable number.

Id.

G. TeraDact Has Yet to Make Profits—but Prospects Remain on the Horizon

Although the OLLC's investment in NewMarket Fund / TeraDact has yet to return profits, serious and significant prospects remain on the horizon—the development of which is only undermined by the current spurious and unspecified allegations of fraud in Plaintiffs' Petition.

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[15] Because the Plaintiffs have referenced, cited, and incorporated TeraDact's 2010 Annual Report in ¶ 23 of their Petition, the inclusion of this report in Defendants' motion to dismiss does not render the motion one for summary judgment. *See Tucker*, 2014 OK 112, ¶ 30, 341 P.3d at 685 ("When a defendant files a § 2012(B)(6) motion with an incorporated exhibit which is relied on by plaintiff in the petition, or is integral to plaintiff's petition, the motion is *not* converted into one for summary judgment."); *see also Gaylord Entm't*, 1998 OK 30, n. 10, 958 P.2d at 136 ("A Petition is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.").

Despite extraordinary challenges, TeraDact remains a viable company with a valuable product and several government contracting opportunities.[16] For example, TeraDact is currently engaging with serious investors; most recently, TeraDact arranged a successful partnership with Intel Security (McAfee, Inc).[17]

TeraDact's leadership demonstrates that the company is legitimate. TeraDact has serious and credible executives, including Defendants Christopher Schrichte and Howard Hill, as well as advisors who have signed on to TeraDact because of its business potential.[18] "TeraDact's advisors include the Honorable John H. Dalton and Lieutenant General Francis H. Kearney III who joined TeraDact's advisory board in 2012."[19] "Mr. Dalton was former Secretary of the Navy under President Clinton from July 1993 until November 1998, and he joined the Financial Services Roundtable in January 2005."[20] "General Francis H. Kearney III served 35 years in the United States Army achieving the rank of Lieutenant General; he was a career Infantry and Special Operations officer."[21] Indeed, LTG Kearney's most recent assignment was as "the Deputy Director for Strategic Operational Planning at the National Counter-Terrorism Center in Washington DC . . . ."[22] "Prior to his assignment at the National Counter-Terrorism Center,

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16 *See* TeraDact Solutions, http://www.teradact.com/index.html (last visited Jan. 27, 2016); *see O'Toole*, 499 F.3d at 1225 ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web).

17 *See* McAfee, Inc. Security Innovation Alliance Partner Directory, http://www.mcafee.com/apps/partners/partnerlisting.aspx?region=us#teradact (listing TeraDact as a Partner). *See O'Toole*, 499 F.3d at 1225 ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web).

18 *Hon. John Dalton and LTG. Frank Kearney Join TeraDact Solution Advisory Board*, PR Newswire (Oct. 3, 2012), http://www.prnewswire.com/news-releases/hon-john-dalton-and-ltg-frank-kearney-join-teradact-solutions-advisory-board-172463931.html. *See O'Toole*, 499 F.3d at 1225 ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web).

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

LTG Kearney was the Deputy Commander of the United States Special Operations Command."[23]

Mr. Dalton and LTG Kearney are not the only notable, distinguished executives on TeraDact's Advisory Board. In addition, the Hon. George Foresman and Mr. Ken Mortensen also serve on TeraDact's Advisory Board.[24] "Mr. Foresman is currently serving as President of Secure Mountain (www.securemountain.com) and previously served first as Undersecretary for Preparedness and then as Undersecretary of National Protection and Programs for the United States Department of Homeland Security (DHS) under President Bush."[25] Mr. Mortensen is equally distinguished, as he "is currently serving as Chief Privacy Officer of CVS Caremark and previously served as the Chief Privacy and Civil Liberties Officer at the U.S. Department of Justice and Deputy Chief Privacy Officer at the U.S. Department of Homeland Security under President Bush."[26]

H. The Osage Congress Expresses Serious Concerns about the Dysfunction within the OLLC and its Repeated Failure to Conduct its Own Due Diligence

On September 18, 2015, the Osage Congress Commerce and Economic Development Committee (the "Osage CED Committee") held a meeting where the current OLLC Enterprise Board gave an update on the OLLC's litigation and discussed the transition of the OLLC to a new legal entity referred to as Tallgrass LLC. *See* September 18, 2015 Osage Nation Cong. Comm. on Commerce and Econ. Dev. Meeting, Audio Pt. 1 (Sept. 18, 2015),

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23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*

https://www.osagenation-nsn.gov/who-we-are/congressional-legislative-branch/committee-information/commerce-economic-development.[27]

On September 18, 2015, OLLC Enterprise Board Member Jim Parris stated:

> [W]e are . . . trying to get a new fresh start, trying to build on relationships that we've got, trying to unravel some of the old companies and get away from some of the legal issues that we've been wrestling with for the last year or better, and trying to focus on what we can to build relationships for establishing the basis of income in the future.

Comm. on Commerce and Econ. Dev. (Sept. 18, 2015) (statement of Member Jim Parris beginning at 5:15 of Audio, Pt. 1). OLLC Enterprise Board Member Parris then stated:

> We've seen how not to do it, by not doing the due diligence on the companies when you buy them, I think uh, our experience in the litigation that we're involved in right now with those companies have shown how we've failed as a company to do the kind of homework that should have been done, ... there were financial statements that should have been reviewed, that were not. (emphasis added).

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[27] In lieu of transcripts, audio for all Committee hearings is available on the Osage Nation website under the heading entitled "Committee Information." The Committee hearings are a matter of public record under Osage law, and as a result, their incorporation into Defendants' motion to dismiss does not render the motion one for summary judgment. The Osage Nation Open Records Act defines a public record as:

> All audio recordings of public meetings or public portions of meetings; All audio recordings or meeting minutes of executive sessions if the executive session was held in violation of the Open Meetings Act as determined by the Osage Nation courts.

15 Osage Nation Code § 8–103. Public Records.

In deciding a defendant's motion to dismiss, courts may "take judicial notice of . . . facts which are a matter of public record." *Tal*, 453 F.3d at 1265. Because Osage congressional meetings are a matter of public record, their inclusion here does not render the present motion one for summary judgment. *See Marshall v. Whirpool Corp.*, No. 07-CV-534-JHP-TLW, 2010 WL 348344, at *6 (N.D. Okla. Jan. 26, 2010) ("the court is permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record when reviewing the Motion to Dismiss without converting it to a Motion For Summary Judgment."); *see also Shaffer*, 1996 OK 47, ¶ 9, 915 P.2d at 913 ("We have said that in construing a provision of our [Oklahoma] Pleading Code we consider the federal counterpart from which it was derived."); *Visteon Corp.*, 2004 OK CIV APP 52, ¶ 14, 91 P.3d at 693 (Oklahoma § 2012(b) is "virtually the same as Federal Rule of Civil Procedure 12(b).").

Comm. on Commerce and Econ. Dev. (Sept. 18, 2015) (statement of OLLC Board Member Jim Parris beginning at 24:45 of Audio, Pt. 1).

OLLC Enterprise Board Member Raymond Hankins then stated:

> I've sat through now, roughly 15 months of looking at an operation that had no internal control, that didn't do due diligence in any fashion and in a way I look at it, didn't do due diligence in any fashion on those investments that were made, that paid too much, and expected too little from what they bought, and um, and again, that's not to be disrespectful in any way to anybody that was there at the time, it was just probably not very well done, and I think you have a group of people right here today that aren't going to allow that to happen.

Comm. on Commerce and Econ. Dev. (Sept. 18, 2015) (statement of Member Raymond Hankins beginning at 1:14:25 of Audio, Pt. 1).

I. Plaintiffs' Attorney Explains the Rationale Behind the Instant Litigation

Before the aforementioned testimony was given concerning the OLLC's failure to conduct its own due diligence, the same Osage CED Committee convened a meeting on July 7, 2015 to specifically discuss the instant litigation. *See* July 7, 2015 Osage Nation Cong. Comm. on Commerce and Econ. Dev. Meeting, Audio Pt. 2 (July 7, 2015), https://www.osagenation-nsn.gov/who-we-are/congressional-legislative-branch/committee-information/commerce-economic-development.[28] That is, at the July 7, 2015 the Osage CED Committee meeting, Shield Law Group and Sneed Lang, the law firms representing the Osage Nation and the OLLC, gave the Committee an update on status of the current litigation, as well as three other lawsuits the Nation and OLLC recently filed. *See* Comm. on Commerce and Econ. Dev. (July 7, 2015). Attorney Jorgenson noted that, as of July 2015, the Nation had filed "four actionable cases that

[28] In lieu of transcripts, audio for all Committee hearings is available on the Osage Nation website under Committee Information. The Committee hearings are a matter of public record under Osage law, and as a result, their incorporation into Defendants' motion to dismiss does not render their motion one for summary judgment. *See* note 27, *supra*.

do have substantial amounts [of money] involved and resulted in near complete losses, money in and never a nickel back as far as we can see." Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:10 of Audio, Pt. 2).

Jorgenson then discussed the state of the OLLC's records, noting:

> [T]here's been a substantial problem, Amanda Proctor and her office has been much closer to that than I have, I rely on them and they report to me, but, the state of the records of the OLLC is not very good, lots and lots of e-mail traffic that you would expect to see, lots and lots of financial documents that you would expect, *are just not there*.

Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:33 of Audio, Pt. 2) (emphasis added). Based on the absence of the OLLC's requisite records, Jorgenson then stated,

> [W]e're kind of flying in the dark in some sense, and sometimes you have to, unless you want to spend thousands and thousands of dollars on financial investigators to try to find out what happened to these people, *the easiest way is to hail them into court and you say, 'well you come in and tell me what happened*.'

Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:58 of Audio, Pt. 2) (emphasis added).

Because Defendants have been hailed into Court to answer Plaintiffs' frivolous and baseless claims, Defendants file the following motion to dismiss them; indeed, Plaintiffs' claims fail to satisfy even the most minimum pleading requirements under Oklahoma law.

STANDARD OF REVIEW

Under Oklahoma law, a petition will be dismissed "for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory." *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24. However, "[a] motion to dismiss should be denied if relief is possible under any set of facts which can be established and

is consistent with the allegations." *Id.* Consequently, "[w]hen considering a defendant's quest for dismissal the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." *Id.*

This does not absolve Plaintiffs of their obligation to plead their claims with sufficient particularity, as Oklahoma courts will grant a defendant's motion to dismiss when the plaintiffs "can muster no set of facts in support of their quest for relief . . . under any legal theory." *Brock v. Thompson*, 1997 OK 127, ¶ 1, 948 P.2d 279, 282, *as corrected* (Apr. 3, 1998); *see also, e.g., Hervey v. Am. Airlines*, 1986 OK 19, ¶ 4, 720 P.2d 712, 713 (dismissing petition where Court could "find no law nor theory of law which supports plaintiffs' claims against defendant."). Indeed, the plaintiff must "frame a complaint with enough factual matter (taken as true) to suggest that he is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citation, quotation marks, and ellipses omitted). Plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1247. And as a result, the Plaintiffs' "obligation to provide the 'grounds' of [their] ... '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." *Hitch Enters., Inc. v. Cimarex Energy Co.,* 859 F. Supp. 2d 1249, 1261 (W.D. Okla. 2012) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)).

Furthermore, in applying the doctrine of *forum non conveniens*, Oklahoma courts will "refuse to entertain an action" if and when the action "would be more appropriately heard in another [sovereign's] courts." *Lovett v. Wal-Mart Stores*, *Inc.,* 2001 OK CIV APP 9, ¶ 7, 18 P.3d 387, 388. "The rule of 'forum non conveniens' is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried

elsewhere." *St. Louis-San Francisco Ry. Co. v. Superior Court, Creek Cty*., 1954 OK 223, ¶ 12, 276 P.2d 773, 775. Accordingly, "whether to dismiss an action on the basis of *forum non conveniens* is left to the trial court's discretion." *Lovett,* 2001 OK CIV APP 9, ¶ 7, 18 P.3d 387.

ARGUMENT

The allegations in Plaintiffs' Petition—or lack thereof—call for dismissal at this stage in the proceedings. The facts Plaintiffs allege do not support, under Oklahoma law, any of Plaintiffs' claims for fraud, violation of the Oklahoma Securities Act, or negligent misrepresentation. Furthermore, Plaintiffs have failed to plead facts to demonstrate damages under any cognizable theory of law. Finally, Plaintiffs' claims are all time-barred under Oklahoma's statutes of limitations.

Plaintiffs' primary theory for Defendants' culpability extends from their allegation that the OLLC's 2010 investment in a venture capital fund (NewMarket-I) failed to return a profit within five years, or by the time they elected to file the current Petition. Even if such allegations could sustain claims for fraud and negligent misrepresentation—they cannot—it is clear from the face of the Petition, as well as black letter Osage law, that any damages the OLLC may have suffered or will suffer are attributable not to the actions of outsiders, but rather, are attributable to the OLLC's failure to comply with Osage law. Plaintiffs, in their Petition, admit that one plaintiff, the OLLC, through its governing Board of Directors (the OLLC Enterprise Board), has failed to meet the specific legal obligations established by the other plaintiff, the Nation, to maintain OLLC business records. The OLLC Act specifically requires the Board to "maintain and preserve . . . relevant [OLLC] documents" (Fain Aff. Ex. 1 (ONCR 08-09), § 8.2), and keep "[p]roper and complete records and books of account." *Id.* § 15.2. Plaintiffs, however, state that "accounting, correspondence and contract records that . . . are necessary in order for OLLC to set forth the

particulars for the NewMarket Group transactions in greater detail than is found in this pleading" because the OCCA has destroyed or lost its own business records. Pet. ¶ 36. Plaintiffs blame the OLLC Enterprise Board's fiduciary failures on the OLLC's former employees. *See id.* Rather than clean its own home first – including its relationship with former OLLC Enterprise Board members, Plaintiffs have chosen to "hail into court" an Osage citizen and other business associates alleging non-specific allegations of fraud, conspiracy, and other non-contractual claims. Oklahoma law simply does not allow such lawsuits to continue. For these reasons, and the reasons articulated below, Plaintiffs' claims should be dismissed as a matter of law.

I. Plaintiffs' Common Law Fraud, Constructive Fraud, Conspiracy to Defraud, Violation of Oklahoma Securities Act, and Negligent Misrepresentation Claims Fail to Meet Basic Oklahoma Pleading Requirements

a. Plaintiffs' Claims for Common Law Fraud Fail as a Matter of Law

Pleading fraud under Oklahoma law is a "special matter" that requires specification of time, place, and content. *See* 12 Okla. Stat. § 2009(B) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Thus, a fraud pleading "requires specification of the *time*, *place and content* of an alleged false representation . . . ." *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, ¶ 11, 861 P.2d 308, 310-11. Oklahoma's fraud pleading requirements were adopted verbatim from the Federal Rules of Civil Procedure 9(b) ("Fed. R. Civ. Pro."). *See id.* ("In section 2009(B), Oklahoma adopted the federal rule verbatim."); *see also Young v. Macy*, 2001 OK 4, n. 8, 21 P.3d 44, 47 ("Where the text of the Federal Rules has been adopted in the Oklahoma Pleading Code, the construction placed on it by federal and state courts should be presumed to have been adopted as well.").

Under Fed. R. Civ. Pro. 9(b), and the Oklahoma equivalent, the imposition of more stringent pleading requirements for claims alleging fraud serve an important purpose; these

stringent pleading requirements protect the reputation of defendants from the damage caused by baseless allegations. *See, e.g., Farlow v. Peat Marwick, Mitchell & Co*., 956 F.2d 982, 987 (10th Cir. 1992) (the particularity requirements for pleading fraud serve to "safeguard[] defendant's reputation and goodwill from improvident charges of wrongdoing").

To be sure, the more stringent pleading requirements for fraud are designed to prevent "fishing expeditions" such as the expedition Plaintiffs have attempted to effectuate here, in the current litigation. *See Seattle-First Nat'l Bank v. Carlstedt*, No. Civ-83-2425-B, 1984 WL 2430, at *4 (W.D. Okla. May 17, 1984) ("The purpose of Rule 9(b) is, in part, to prevent the filing of meritless securities fraud claims which the filing party *subsequently* fleshes out by conducting *fishing expeditions* . . . .") (citing *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig*., 467 F. Supp. 227, 250 (W.D. Tex. 1979) (emphasis added)). Without these stringent pleading requirements, plaintiffs "can sue now and discover later what his claim is," but Rule 9(b) and its Oklahoma state equivalent require a "claimant [to] know what his claim is when he files it." *Id.* at 4 (citing *In re Commonwealth Oil*, 467 F. Supp. at 250). In direct violation of this rule, Plaintiffs have publicly admitted they know of no evidence to indicate any actual fraud has taken place, but hope that by filing a lawsuit and proceeding with discovery, they will discover something to show fraud has taken place.[29] Plaintiffs' claims—for this reason alone—must be dismissed.

Under Oklahoma law, establishing a fraud claim requires pleading and proving: 1) a material false representation, 2) made with knowledge of its falsity, or recklessly made without knowledge of its truth, and as a positive assertion, (3) with the intention that it be relied upon by another, (4) reliance thereon by another party to its injury, and finally, (5) that all elements be

[29] *See* discussion above, *supra*, at 27-28; *see also* Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:58 of Audio, Pt. 2).

proven with a reasonable degree of certainty. *Whitson v. Oklahoma Farmers Union Mut. Ins. Co.*, 1995 OK 4, ¶ 5, 889 P.2d 285, 287; *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 12, 760 P.2d 174, 176-77. Plaintiffs' common law fraud claims fail to meet these basic requirements for three reasons: (1) they have failed to plead the time, place, and/or content of any actionable misrepresentation; (2) they have not pled sufficient reliance on any misrepresentation; and (3) they have not alleged a cognizable theory of damages under Oklahoma law.

i. Plaintiffs' Claims for Fraud Fail Because They Have Failed to Plead any Actionable Misrepresentations

The Plaintiffs allege that the Red Eagle Feather Defendants committed common law fraud when Yancey Redcorn allegedly made "specific assurances" to the OLLC that the NewMarket-I/TeraDact investment would make money for the OLLC. In Pet. ¶ 33, Redcorn is cited as writing:

> [Red Eagle Feather] has recommended a specific transaction with Newmarket [sic] Technology Fund I and TeraDact Solutions, Inc. NewMarket [sic] Technology Fund I owns a unique product which *is anticipated* to be necessary to the transaction of business for government and non-government entities. *The Fund will provide Osage LLC an 8% preferred return on investment annually*. REFD has performed the necessary due diligence regarding this stock purchase and has recommended purchase to the Osage LLC. The Osage LLC has been presented this opportunity primarily because of REFD's relationship with Newmarket [sic] Technology Fund." (emphasis added).

This fraud claim must fail.

First, Yancey Redcorn's alleged "specific assurances" cannot be the basis for fraud because they address future acts, and because they express his *opinion* that the OLLC's investment would return a profit. A false representation must be a statement of existing fact and not a mere expression of opinion. *See Eckert v. Flair Agency, Inc.,* 1995 OK CIV APP 151, ¶ 7, 909 P.2d 1201, 1204 ("Fraud may not be predicated on a mere expression of opinion.").

Likewise, "[f]or a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts." *Roberts v. Wells Fargo AG Credit Corp*., 990 F.2d 1169, 1172 (10th Cir. 1993); *see also Slover v. Equitable Variable Life Ins. Co.*, 443 F. Supp. 2d 1272, 1282 (N.D. Okla. 2006) ("To be actionable, a misrepresentation 'must be regarding existing facts and not . . . future events.'"). Redcorn's alleged "assurance" includes language of futurity – "anticipated to be" and "will" – that cannot be reasonably interpreted as anything but speculation, optimism, and future acts—the ordinary language individuals use to tell investors they believe an investment to be worthwhile and turn a profit. Such language, without any misrepresentation of an actual fact concerning the investment itself, is not actionable as fraud. *See Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119 (10th Cir. 1997) ("Statements classified as corporate optimism or mere puffing are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification.").

Plaintiffs also allege that Betsy Brown of Red Eagle Feather committed fraud by her May 12, 2011 e-mail to Leese and knoble@osagellc.com of the OLLC where she gave "assurances to the OLLC concerning the prospects of TeraDact." Pet. ¶ 35. In that e-mail, Brown "summar[izes]" her "hour long conversation with Chris Schrichte" about TeraDact business activities and previews the information expected to be in the next annual report.[30] *Id.* Plaintiffs cannot sustain a fraud claim based on these alleged "assurances" because as described below, to sustain a claim for fraud, Plaintiffs must establish reliance on the alleged misrepresentations made by Defendants; it is simply impossible for Plaintiffs' decision in August 2010 to have been

[30] This email, attached to the Petition as Exhibit A, contains information protected by a non-disclosure agreement ("NDA") in the Operating Agreement. Plaintiffs' counsels' disclosure of the document violates the NDA, and Defendants' counsel has informed them of the breach. Defendants do not want to exacerbate the breach by restating confidential business information in this Motion.

based on statements made by Defendants subsequently in May 2011, nine months after the OLLC completed its investment.

Likewise, to the extent that Plaintiffs wish to rely on Brown's email to effectively toll the statute of limitations on their aging fraud claim, their attempt fails for nothing in their Petition articulates a fact, theory, or reason to believe that anything stated in Brown's email is untrue or misleading. TeraDact, at the time of Brown's email, was and continues to be an operating company. *See* discussion, *supra* at 23-25. A plain reading of the email, attached as Exhibit B to Plaintiffs' Petition, reveals the email makes no misrepresentations whatsoever and absolutely no guarantees that TeraDact's business prospects will render the OLLC's investment in NewMarket Fund profitable within any given timeframe. *See* Pet. Ex. B. And although Brown's email expresses optimism about TeraDact's prospects and future, statements of "corporate optimism" are not actionable as fraud. *Grossman*, 120 F.3d at 1119 (dismissing fraud claim because statements of '"corporate optimism' or 'mere puffing' are . . . . not actionable because reasonable investors do not rely on them in making investment decisions.").

When considered as a whole, all of Plaintiffs' allegations concerning fraudulent misrepresentations amount to nothing more than "corporate optimism"—or simply put, the ordinary statements corporate representatives give to potential investors in the ordinary course of business. Such statements do not give rise to fraud, and consequently, courts routinely dismiss claims predicated on them. *See, e.g, Raab v. General Physics Corp*., 4 F.3d 286, 289 (4th Cir. 1993) (statements in Annual Report that company expected "10% to 30% growth rate over the next several years" and was "poised to carry the growth and success of 1991 well into the future" held to be immaterial "soft 'puffing'" statements and not fraud); *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos*., 75 F.3d 801, 811 (2d Cir. 1996)

(statement that company was "'optimistic' about [its earnings] in 1993" and that it "*should* deliver income growth consistent with its historically superior performance" held to be mere "puffery" and to "lack the sort of definitive positive projections that might require later correction") (emphasis in original) (internal quotations omitted); *Hillson Partners Ltd. v. Adage, Inc*., 42 F.3d 204, 212–14 (4th Cir.1994) (statements in press release that year would "produce excellent results" and that "significant sales gains should be seen as the year progresses" held to be mere general predictions and not material as a matter of law); *Searls v. Glasser*, 64 F.3d 1061, 1066–67 (7th Cir. 1995) (holding that statements that a company was "recession-resistant" and that it would maintain a "high" level of growth were too vague to constitute material statements of fact); *In re Storage Tech. Corp. Sec. Litig*., 804 F.Supp. 1368, 1372 (D.Colo. 1992) (statement of being "proud" of a particular product and opining that it would be a "blowout winner" were mere puffing and could not support a claim because no reasonable person would be misled by them); *In re Software Publishing Sec. Litig*., No. C 93-20246 RMW (PVT), 1994 WL 261365, at *4–*7 (N.D. Cal. Feb.2, 1994) (dismissing claims based on statement that company believed it had "the combination of people and products in place to be successful" and was "now positioned to effectively compete").

In line with the above, the fact that "Brown made numerous assurances to OLLC concerning the prospects of TeraDact" (Pet. ¶ 35) constitutes nothing more than a statement of corporate optimism that individuals like Brown are entitled to make without being sued for fraud. Plaintiffs' reliance on statements such as "sure-thing" (Pet. ¶ 32) fare no better, as "reasonable investors do not rely on" statements such as *sure-thing* "in making investment decisions." *Grossman*, 120 F.3d at 1119.

Because the Plaintiffs have alleged no other specific facts with information about time, place, and/or content of an *actionable* misrepresentation, Plaintiffs' generally pleaded fraud claims must be dismissed. *See Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1112 (N.D. Okla. 2003) (granting Defendants' motion to dismiss for Plaintiff's claim for actual fraud because "Plaintiffs failed to allege with particularity any misrepresentations or omissions by Defendants which have caused them harm.").

ii. Plaintiffs' Claims for Fraud Fail Because They Have Failed to Plead any Reasonable Reliance on any Actionable Misrepresentations

Second, Plaintiffs have not sufficiently pleaded, and cannot demonstrate, reliance upon Redcorn's alleged statements. To sustain a claim for fraud, Plaintiffs must allege facts sufficient to show that they "acted in reliance on the [Defendants'] representation." *Citifinancial Mortgage Co. v. Frasure*, No. 06-CV-160-TCK-PJC, 2007 WL 2401750, at *22 (N.D. Okla. Aug. 17, 2007); *see also, e.g., Whitson,* 1995 OK 4, ¶ 5, 889 P.2d 285, 287 (affirming dismissal of fraud claims where plaintiff alleged misrepresentations were made, but "did not rely on them," and consequently, plaintiff "failed to state a cause of action for fraud."). Claims "for fraud/deceit fail[] as a matter of law [when plaintiffs] cannot show any detrimental reliance on the alleged false statements." *Citifinancial Mortgage Co*., 2007 WL 2401750 at *23.

Reliance is impossible to establish, as a matter of law, where the plaintiff could have, and should have, ascertained the truth based on documents with plaintiff's possession. *See Silver v. Slusher*, 1988 OK 53, n. 8, 770 P.2d 878, 881 ("An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence."). Indeed, Plaintiffs' access to all the information necessary to know the veracity of Defendants' representations precludes their current claims for fraud. *See id.* ("Where the means

of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he had been deceived by the vendor's misrepresentations.") (citing *Nowka v. West,* 1919 OK 367, ¶ 8, 186 P. 220, 223).

Plaintiffs' inability to allege reliance as a matter of law is made clear by the documents (including contracts) referenced in their Petition that make clear the lack of a return on the OLLC's investment is not the result of fraud but rather misfortune. Plaintiffs may have somehow lost these records and documents (which Osage law requires them to maintain), but that does not permit Plaintiffs to allege they relied on Defendants' alleged misrepresentations and thereby circumvent the legal consequences of the written agreements to which they agreed to abide. Accordingly, Plaintiffs' claims for fraud fail as a matter of law.

The Plaintiffs' Petition, when taken as a whole, demonstrates that Plaintiffs' decision to invest in NewMarket Fund was not based on Defendants' representation that the investment would likely turn a profit, but rather, was a decision based on Plaintiffs' own business judgment. And again, even if Plaintiffs did rely on Defendants' vague, optimistic statements that an investment would be successful, such reliance, as a matter of law, does not establish a claim for fraud. *See Grossman*, 120 F.3d at 1119 ("Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.").

To be sure, the TeraDact Defendants made clear in all relevant written agreements that investing in TeraDact was risky and that the OLLC could lose its entire investment. For instance, in the Operating Agreement, the OLLC Enterprise Board specifically acknowledges that the Board: conducted its own due diligence; asked the Red Eagle Feather and TeraDact Defendants questions about the company and investment; had the knowledge and expertise necessary to make

an informed decision; and finally, understood the risk associated with the investment—a risk that Defendants made clear entailed losing the entirety of Plaintiffs' investment. *See* Fain Aff. Ex. 4 (Operating Agreement), art. 3, § 3.02(d). The Operating Agreement states:

> [The OLLC Enterprise Board] has *asked such questions* and *conducted such due diligence*, concerning such matters and concerning its acquisition of Membership Rights as it has desired to ask and conduct, and all such questions have been answered to its full satisfaction; it has such *knowledge and experience in financial and business matters* that it is capable of evaluating the merits and risks of an investment in the Company it understands that owning Membership Rights involves various risks, including the restrictions on Dispositions and Encumbrances . . . the lack of any public market . . . the risk of owning its Membership Rights for an indefinite period of time and ***the risk of losing its entire investment in the Company***; it is able to bear the economic risk of such investment . . .

Fain Aff. Ex. 4 (Operating Agreement), art. 3, § 3.02(d) (emphasis added).

Furthermore, pursuant to the June Subscription Agreement, Plaintiffs acknowledged they had received all the documents "they have requested relating to an investment in [NewMarket/TeraDact]" and that the NewMarket/TeraDact officials, including Chris Schrichte and Howard Hill, have "provided answers to all of his, her or their questions concerning the offering and an investment in the company." Fain Aff. Ex. 3 (June Subscription Agreement), § B(1)(c). In signing the June Subscription Agreement, the OLLC represented that it did not rely "upon any representations or other information (whether oral or written) other than [what is] contained in any documents or answers to questions so furnished [] by the Company." Fain Aff. Ex. 3 (June Subscription Agreement), § B(1)(c). Thus, the written agreement Plaintiffs incorporate in their Petition, specifically the June Subscription Agreement, precludes them from establishing—as a matter of law—that they reasonable relied on any alleged extrinsic misrepresentations concerning the likelihood of the investment to turn a profit.

In a similar case decided last year, *Farley v. Stacy*, No. 14-CV-0008-JHP-PJC, 2015 WL 3866836, at *7 (N.D. Okla. June 23, 2015), the Court dismissed a plaintiff's fraud claim based on allegations that the defendants met with him in person on multiple occasions and promised returns exceeding 14% for his investment. *See id.* The Court highlighted that the defendants' written memorandum stated that the investment involves a "substantial degree of risk" and reiterated in the "Risk Factors" section that investment in the partnership "involves various and substantial risks." *Id.* The Court further noted that the parties' written memorandum also warned in the "Risk of Loss" section that an investor "could incur substantial, or even total, losses on an investment in the Partnership." *Id.* Finally, the Court reasoned that "[t]he warnings throughout the Memorandum, which were fully accessible to Plaintiff at the time of his investment, plainly indicate that his reliance on the promised 14% returns was unjustified as a matter of law." *Id.*

Likewise, in the present case, Defendants informed Plaintiffs, in writing, that the OLLC's investment in NewMarket-I Securities involved "the risk of losing its entire investment." Fain Aff. Ex. 4 (Operating Agreement), art. 3, § 3.02(d). Plaintiffs' Petition incorporates the Operating Agreement by reference, and as a result, Plaintiffs cannot circumvent the legal consequences of the Operating Agreement through the assertion of additional representations made in unspecified written instruments on unspecified dates. *See, e.g.,* Pet. ¶ 33; *see also Silver,* 1988 OK 53, n. 8, 770 P.2d at 881 ("An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence."). Accordingly, Plaintiffs' alleged "reliance on the promised [8]% returns was unjustified as a matter of law." *Farley*, 2015 WL 3866836, at *7.

iii. Plaintiffs' Claims for Fraud Fail Because They Have Not Alleged any Cognizable Theory of Damages

Finally, to sustain a fraud claim, Plaintiffs must show that they suffered damages as a result of Defendants' alleged conduct. *See State ex rel. Sw. Bell Tel. Co. v. Brown*, 1974 OK 19, ¶ 24, 519 P.2d 491, 496-97 ("Fraud without damage will not support an action."). Accordingly, a party bringing a fraud action "must be able to show he was damaged as a result of the alleged fraudulent acts." *Oklahoma Quarter Horse Racing Ass'n v. Remington Park, Inc.,* 1999 OK CIV APP 75, ¶ 7, 987 P.2d 1216, 1218. Plaintiffs offer two theories to support their allegations that they have suffered damage. Neither of these two theories, however, establish that they have suffered legal injury, damage, or any cognizable form of detriment. Thus, Plaintiffs' fraud claims fail as a matter of law.

First, Plaintiffs claim that the OLLC has never been paid any dividend or received a profit distribution from NewMarket-I. Pet. ¶ 26. But the Subscription Agreement and Operating Agreement state clearly that the OLLC only receives a return on its investment when "Realized Investment" occurs. Fain Aff. Ex. 4 (Operating Agreement), art. 5, § 5.01. According to the parties' contractual agreement, a "Realized Investment" occurs when: "(a) the portfolio company or the Company's interest in such portfolio company has been sold; (b) the Company's interest has been merged with or acquired by a public company; (c) a public market have developed for the securities held by the Company; or (d) the Manager determines that all interests of the Company should be distributed."[31] Fain Aff. Ex. 4 (Operating Agreement), art. 1, § 1.01, Definition of

[31] With companies like TeraDact, the payoff for investing in venture capital usually is made several years down the road. *See supra*, SBA, *Understanding Venture Capital* (noting that as a result of its inherently high-risk nature, "venture capital is long-term or 'patient capital,'" that does yield immediate results, but instead, "allows companies the time to mature into profitable organizations."). The potential for the LLC's investment to pay off in this instance, however, has been greatly jeopardized by the current lawsuit.

Realized Investment. To date, none of the Realized Investment events have occurred. As a result, pursuant to the written agreements Plaintiffs and Defendants signed, the OLLC is not contractually entitled to payment and therefore, has not sustained legal injury on this basis.

Nor can Plaintiffs' successfully allege damages based on unreasonable inferences that their failure to receive a return on the investment constitutes fraud. Indeed, "[t]he mere fact that fraud is claimed will not justify the submission of that issue unless facts are produced from which an irresistible deduction of fraud reasonably arises." *Silk*, 1988 OK 93, ¶ 13, 760 P.2d 174, 177. Here, Plaintiffs' allegations that they have yet to receive a return on their investment in a venture capital fund does not give rise to an "irresistible deduction of fraud."

Second, Plaintiffs assert they were damaged because "some or all" of the OLLC investment was used to pay "founders" rather than TeraDact's operating expenses. *See* Pet. ¶ 21. According to Plaintiffs, TeraDact's 2010 and 2011 Annual Reports allegedly showed losses for those years (they do), and the recapitalization purchase "took place just thirty days after OLLC's first purchase of NewMarket-I Units."[32] Pet. ¶ 21 (quoting Pet. Ex. A). Plaintiffs, however, claim that these facts support an *inference* that the "OLLC's million-dollar funding of TeraDact via NewMarket-I went straight into the pockets of TeraDact's 'founders'" rather than TeraDact operating expenses. Pet. ¶ 23. Here, the Court cannot take this inference as true because the facts in the documents that Plaintiffs cite in their Petition demonstrate squarely that this inference is false.

Under existing law, the Plaintiffs cannot base fraud claims "on information and belief" unless the Plaintiffs can show that the facts in question, (the financials as detailed in the Annual Reports), are peculiarly within the knowledge of the Defendants, which the Plaintiffs cannot

[32] This is also true. *See* Fain Aff. Ex. 6 (McLean Fairness Opinion).

show. That is, "[a]llegations of fraud may be based on information and belief *when the facts in question are peculiarly within the opposing party's knowledge* and the complaint sets forth the factual basis for the plaintiff's belief." *Koch v. Koch Indus.*, *Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000). In this instance, neither of the two aforementioned *Koch* factors are present. First, the facts are not peculiarly within Defendants' knowledge because they are all contained within the documents Plaintiffs possess, cite to, and incorporate in their Petition, including the Annual Reports and the McLean Fairness Opinion (Fain Aff. Exs. 2, 5, 6, 8). Consequently, Plaintiffs' allegations that "[o]n information and belief, some or all of the OLLC funds . . .were downstreamed to TeraDact and used to pay founders . . . ." (Pet. ¶ 21) is entitled to no deference or assumptions at this stage in the proceedings. Based on the documents Plaintiffs' cite in their Petition, it is patently false.

A further review of the documents incorporated and cited in Plaintiffs' Petition reveals that the recapitalization was legitimate, fair, free from fraud, and only increased the value of Plaintiffs' investment in NewMarket Fund. To be clear, Plaintiffs do not allege that the TeraDact Defendants made any misrepresentations with regards to the recapitalization. Moreover, the TeraDact Defendants disclosed the fact of the recapitalization on two occasions, in documents provided to Plaintiffs and cited in their Petition. In its 2010 Annual Report, TeraDact openly and directly informs its investors, which includes the OLLC, of the recapitalization:

> By operation of law, all of the founders' stock was cancelled and purchased by the Company at a price determined to be fair by the Board and consistent with an outside valuation prepared by The McLean Group, an investment advisory concern retained by the Company for this purpose. While weakening economic conditions caused the recapitalization of the company to take much longer to close than originally anticipated, we have achieved our objective of reducing the number of shareholders to a manageable number.

Fain Aff. Ex. 8 (2010 Annual Report), p. 2 of 17.

Plaintiffs' own Exhibit A, a memorandum from Chris Schrichte to Yancey Redcorn dated May 11, 2011, also discloses the date of the recapitalization and the process TeraDact went through to achieve the recapitalization in language similar to the 2010 Annual Report. *See* Pet. ¶ 21 (quoting Pet. Ex. A). In Plaintiffs' Exhibit A, TeraDact discloses that its Board "first resolved . . . to proceed with the recapitalization at its May 2009 meeting," *well before the OLLC and NewMarket Fund entered into agreements*. *See id.* Exhibit A also states that TeraDact acted with approval of its Board of Directors and relied upon an outside company to value the stock of the founders before purchasing it. *See id.* These are not false statements nor were they made with knowledge of falsity, and Plaintiffs do not allege as much.

Plaintiffs also appear to misunderstand that the TeraDact Defendants are not the "founders," and so they were not enriched by the recapitalization. *See* Fain Aff. Ex. 7 (2010 Common Stockholder Resolution). That is, the 2010 Stockholder Resolution makes clear that recapitalization bought out the common stock holders, *not* the preferred stock holders. *See id.* (noting that "the undersigned Common Stockholder" agrees to sell the outstanding shares of *common stock* back to the company). Defendant Chris Schrichte also signed the 2010 Common Stockholder Resolution on behalf of the *preferred* stockholders, the only stockholders left after the recapitalization because their stock was *not* repurchased by the company. *See id.*; *see also* Fain Aff. Ex. 6 (McLean Fairness Opinion), p. 22 of 57, (noting that as a result of the recapitalization "there will be no common stock outstanding. Only the Preferred Stock held by NewMarket . . . will exist after the transaction."). Defendants Schrichte and Hill, as owners of preferred stock, received no payments as a result of this recapitalization. *See* Fain Aff. Ex. 7 (2010 Common Stockholder Resolution); Fain Aff. Ex. 6 (McLean Fairness Opinion).

Furthermore, the McLean Fairness Opinion conducted a third party valuation review and concluded the recapitalization was in the best interests of the company and its investors, including the OLLC. *See* Fain Aff. Ex. 6 (McLean Fairness Opinion), p. 8 of 57. This information is located in documents cited in and incorporated into Plaintiffs petition. *See* Pet. ¶ 21; Pet. Ex. A (referring to and incorporating "the valuation prepared by The McLean Group"). These documents also should be located within the OLLC's business records, pursuant to Osage law. Plaintiffs' failure to review their own documents prior to filing their Petition in no way alleviates them of their burden to meet Oklahoma's pleading standards for fraud. As the Oklahoma Supreme Court has stated, "[a]n action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence." *Silver*, 1988 OK 53, n. 8, 770 P.2d 878, 881.

In this same vein, the July 27, 2010 McLean Group Fairness Opinion (which Exhibit A specifically references), shows that the TeraDact paid the founders, the formers owners of the company, a total of $8,800 – not $1 million – to buy out their interests in the company. Fain Aff. Ex. 6 (McLean Fairness Opinion), p. 14 of 57. The McLean Fairness Opinion states "the planned buy-out of the 880,000 common shares at $0.01 per shares implies an equity value of $8,800." *Id.* An $8,800 expenditure from a $1 million investment does not constitute "injury" to an investor to sustain a fraud allegation, even if the underlying allegations were true—but, as the above demonstrates, they are not.

b. Plaintiffs' Constructive Fraud Claims Fail as a Matter of Law

Plaintiffs' constructive fraud claims fail as a matter of law because Defendants, as a matter of law, owe Plaintiffs no duty. Oklahoma statute defines constructive fraud as an action that gives rise:

> (1) In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
> (2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

15 Okla. Stat. § 59. Constructive fraud, therefore, "requires the existence of a fiduciary duty, or a duty based upon a confidential relationship." *Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Properties, Ltd.,* 740 F. Supp. 1553, 1570 (W.D. Okla. 1989). According to the Oklahoma Supreme Court, "[c]onstructive fraud is 'the concealment of material facts which one is bound under the circumstances to disclose.'" *Bankers Trust Co. v. Brown*, 2005 OK CIV APP 1, ¶ 14, 107 P.3d 609, 613. Thus, constructive fraud requires "a breach of some legal or equitable duty." *Silver*, 1988 OK 53, n. 11, 770 P.2d at 882.

Plaintiffs' claims sounding in constructive fraud fail because Plaintiffs never allege that the Defendants owe legal or equitable duties to them, nor could they, as their relationship does not give rise to a "special" or "fiduciary" relationship under Oklahoma law. Plaintiffs allege that the Red Eagle Feather Defendants are "brokers" or "facilitators" of the NewMarket/TeraDact relationship with the OLLC. This, however, is an arm's length business relationship, not a fiduciary one that creates a "special relationship" giving rise to special duties under Oklahoma law. *See id.* (noting that plaintiffs' claim for constructive fraud is precluded because the plaintiffs' relationship with defendant was "at arms' length and they did not stand *vis-à-vis* each other in any recognized form of 'special relationship.'"). Ultimately, the burden is on Plaintiff, as the drafter of the Petition, to include the specific facts that give rise to any alleged "special relationship" under Oklahoma law. *See Horan v. Detello*, No. 15-CV-0051-CVE-PJC, 2015 WL 4132908, at *3 (N.D. Okla. July 8, 2015) ("[P]laintiffs must allege *some* facts tending to support a finding that defendants acquired some influence over plaintiffs that would give rise to a

fiduciary relationship.") (emphasis added). Here, Plaintiffs allege *no* facts to support a finding that Defendants acquired an influence over Plaintiffs that would give rise to a fiduciary relationship. Consequently, their claims for constructive fraud fail. *See id.*

In addition, the constructive fraud claims must be dismissed as a result of Plaintiffs' failure to plead sufficient reliance. To be actionable, constructive fraud, like actual fraud, "require[s] detrimental reliance by the ... complaining [parties]." *Hitch Enters., Inc. v. Cimarex Energy Co.,* 859 F. Supp. 2d 1249, 1259 (W.D. Okla. 2012); *see also Howell v. Texaco Inc.,* 2004 OK 92, ¶ 32, 112 P.3d 1154, 1161 (citation omitted). For the reasons discussed above, Plaintiffs have failed to plead actual reliance under Oklahoma law.

Finally, Plaintiffs' constructive fraud claims require concealment of a material fact. Plaintiffs do not allege that the TeraDact Defendants hid anything that could be characterized as a "material fact" – largely because they fail to allege any facts at all beyond bland allegations that Defendants told Plaintiffs their investment would result in a profit. Such cursory allegations do not sufficiently plead the concealment of a "material fact." *See, e.g., Pine Tel. Co. v. Alcatel Lucent USA Inc.*, 617 F. App'x 846, 860 (10th Cir. 2015) (upholding district court's dismissal of constructive fraud claim where plaintiff failed to plead the "concealment of a material fact" because that is an "essential element[] of constructive fraud.").

And, as discussed above, Plaintiffs' failure to allege a cognizable theory of damages is fatal to their claim for constructive fraud. In sum, Plaintiffs' claims for constructive fraud suffer from the same defects as their common law fraud claims, and accordingly, should be dismissed in full.

c. Plaintiffs' Conspiracy Claims Fail as a Matter of Law

Plaintiffs' attempt to dress up their insufficiently pled fraud claims as some sort of conspiracy also fails. First and foremost, Plaintiffs' claims for conspiracy fail because Plaintiffs have not sufficiently plead their underlying claims for fraud. *See Transp. All. Bank, Inc. v. Arrow Trucking Co*., No. 10-CV-16-GKF-PJC, 2011 WL 221863, at *6 (N.D. Okla. Jan. 21, 2011) (dismissing claim for conspiracy because "the underlying tort alleged is fraud" and "the proposed amended complaint fails to state a claim for fraud against" defendant). Apart and separate from Plaintiffs' failure to adequately plead fraud, Plaintiffs' claims for conspiracy to commit fraud must be dismissed as a result of the claims' own, unique failings under Oklahoma law.

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*, 1997 OK 127, ¶ 39, 948 P.2d 279, 294. "To be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means." *Id.* Furthermore, "[t]here can be no civil conspiracy where the act complained of and the means employed are lawful." *Id.* Ultimately, "[i]n order to make out a prima facie case of conspiracy, the evidence must be (1) clear and convincing and (2) such evidence must do more than raise suspicion it must lead to belief." *Dill v. Rader*, 1978 OK 78, ¶ 8, 583 P.2d 496, 499. At best, Plaintiffs' allegations related to conspiracy raise a suspicion; they do not, however, come close to leading the Court to the requisite level of belief. *See id.* Indeed, Plaintiffs' attorney has admitted they filed their Petition on nothing more than a suspicion, in the hopes they would uncover evidence to substantiate a belief. This type of pleading, however, does not suffice under Oklahoma law.

Plaintiffs allege that the TeraDact and Red Eagle Feather Defendants "conspired with the OLLC Management Defendants to defraud Plaintiffs of the $1 million paid for the NewMarket Units and to carry out the plan to misappropriate the funds paid to one or more NewMarket Group entities and to one or more of the REF Defendants." Pet. ¶ 46. According to Plaintiffs, "[t]he NewMarket Group and their principals (Hill and Schrichte), OLLC's own faithless management, and the defendants whose actions are described in the next four numbered paragraphs below, acted in concert to foist a million dollars' worth of bogus Securities on OLLC." Pet. ¶ 31.

Beyond using the word "conspired," Plaintiffs have pled nothing related to conspiracy. Plaintiffs' Petition is noticeably lacking any allegations regarding what conspiratorial agreement Defendants allegedly reached, the nature of the agreement, and what actions Defendants *independently* took in furtherance of the conspiracy. This Court, however, cannot assume Defendants conspired simply because Plaintiffs used the word. *See Hitch Enters., Inc.*, 859 F. Supp. 2d 1249 at 1261 ("Allegations are not entitled to be assumed to be true when they merely restate the essential elements of a claim rather than provide *specific facts* to support those elements."). Accordingly, with no specific facts to support their claims, Plaintiffs' claims for conspiracy fail as a matter of law.

d. Plaintiffs' Petition Fails to Establish a Violation of the Oklahoma Securities Act

Plaintiffs have also failed to plead facts sufficient to sustain their claim for a violation of the Oklahoma Securities Act. Under the Oklahoma Securities Act, a plaintiff must show that:

> (1) That the plaintiff purchased a security from the defendant;
> (2) That the defendant made an untrue statement of material fact or omitted to state a material fact necessary to make the statements made not misleading; and

(3) That the plaintiff was not aware of the untruth or omission at the time he purchased the security from defendant.

Lillard, 267 F. Supp. 2d 1081, 1111 (N.D. Okla. 2003). Here, "[b]ecause Plaintiffs' state securities fraud claim is based in fraud, Rule 9(b) applies and requires more particularity than Plaintiffs have provided in their Complaint." *Id.* Oklahoma has incorporated Fed. R. Civ. Pro. 9(b) to require that all a fraud pleading under Oklahoma law "requires specification of the *time, place and content* of an alleged false representation." *Gianfillippo*, 1993 OK 125, ¶ 11, 861 P.2d at 310-11. Plaintiffs have failed to provide a single one of the three requisite elements.

Nothing in Plaintiffs' Petition provides the time or place of the alleged misrepresentations. Indeed, nothing in Plaintiffs' Petition supports the notion that any misrepresentations were made prior to the OLLC Enterprise Board's decision on June 17, 2010 to invest in NewMarket Fund (Pet. ¶ 19), and although Plaintiffs characterize Defendants as having described the investment in NewMarket Fund as a "sure-thing," they provide no time and place detailing when and where, or in what meeting or written communication, Defendants stated the investment would be a "sure-thing." And even if Plaintiffs had provided the requisite detail to plead the time and place of Defendants' general assurances, such assurances do not establish fraud because "reasonable investors" do not and cannot rely on mere "corporate optimism . . . . in making investment decisions." *Grossman*, 120 F.3d at 1119; *see also id.* ("Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.").

Consequently, in cases like the one here, where Plaintiffs have failed to plead fraud with particularity, Oklahoma courts dismiss a plaintiff's parallel claim for violation of the Oklahoma Securities Act. *See, e.g., Lillard*, 267 F. Supp. 2d at 1111 (dismissing Oklahoma Securities Act claims because the plaintiff's "blanket and conclusory allegations lack specificity as to the time,

date, place, facts, and materiality of the allegations . . . ."). Accordingly, Plaintiffs have failed to state their a claim for violation of the Oklahoma Securities Act, and the claim must be dismissed.

e. Plaintiffs' Petition Fails to Establish a Claim for Negligent Misrepresentation

First and foremost, "[t]he Oklahoma Supreme Court has not expressly recognized the tort of negligent misrepresentation." *Southcrest, L.L.C. v. Bovis Lend Lease, Inc.*, No. 10-CV-0362-CVE-FHM, 2011 WL 3881495, at *5 (N.D. Okla. Sept. 2, 2011). Although "[t]he Oklahoma Supreme Court has not expressly recognized the tort of negligent misrepresentation, [] it has recognized a similar claim of constructive fraud in the field of banking or securities trading." *Qassas v. Daylight Donut Flour Co., LLC*, No. 10-CV-0362-CVE-FHM, 2010 WL 2365472, at *12 (N.D. Okla. June 10, 2010). Plaintiffs' claims for negligent misrepresentation, therefore, fail for the same reasons as their claims for constructive fraud.

That is, Plaintiffs' inability to establish justifiable reliance on any actionable misrepresentation precludes a claim for negligent misrepresentation. Under Oklahoma law, to establish a claim for negligent misrepresentation, Plaintiffs must plead facts sufficient to show they suffered a "pecuniary loss caused to them by their *justifiable reliance* upon the information" provided by Defendants. *Bank of Oklahoma, N.A. v. PriceWaterhouseCoopers, L.L.P.*, 2011 OK CIV APP 56, ¶ 12, 251 P.3d 187, 190 (citation omitted) (emphasis added). Not only have Plaintiffs failed to plead an actual pecuniary loss, they have failed to plead anything akin to "justifiable reliance" or that they relied on Defendants' statements to their own detriment. *See Schulte v. Apache Corp.,* 1995 OK 148, ¶ 26, 949 P.2d 291, 296, *as modified on denial of reh'g* (Nov. 18, 1997), *op. corrected,* 957 P.2d 107 (Okla. 1998) (claims for either "constructive fraud [or] negligent misrepresentation [] require that a party rely to that party's detriment on the actions or words of the other party.").

Plaintiffs, as a matter of law, cannot establish "justifiable reliance" unless they demonstrate "the existence of a legally cognizable duty" that Defendants owe to Plaintiffs. *See First Nat'l Bank in Durant v. Honey Creek Entm't Corp.,* 2002 OK 11, ¶ 17, 54 P.3d 100, 105 ("In any action based on negligence, the first prerequisite must be to establish the existence of a legally cognizable duty."). For the reasons described above, *supra* 45-47, Plaintiffs have failed to establish any cognizable duty or fiduciary relationship between Plaintiffs and Defendants, and this failure requires the dismissal of their claims for negligence.

Even if Plaintiffs could establish that Defendants owe Plaintiffs a special duty, their Petition presents no misrepresentation upon which they were legally entitled to rely. Plaintiffs refer to general "assurances" provided by Defendants that an investment in NewMarket-I would be a "sure-thing" (Pet. ¶¶ 32-33)—but a reasonable investor like the OLLC is not, as a matter of law, entitled to rely upon such vague, optimistic statements. *See Grossman*, 120 F.3d at 1119 ("Statements classified as 'corporate optimism' or 'mere puffing' . . . are generalized statements of optimism that are not capable of objective verification," and consequently, they "are not actionable because reasonable investors do not rely on them in making investment decisions.").

Furthermore, Plaintiffs fail to identity the time, place, and content of any actionable misrepresentation. Plaintiffs do allege that the Defendants "supplied false information concerning the NewMarket Units directly to the [Leese and Petre] and indirectly to the [Plaintiffs] in the course of the NewMarket Defendants' business or profession." Pet. ¶ 51. Plaintiffs, however, do not identify *what* false information the Defendants allegedly supplied, what the allegedly false information relates to, or how it concerns the investment Plaintiffs ultimately decided to make.

A review of Plaintiffs' Petition reveals that Plaintiffs' allegations are nothing more than conclusory statements that fail to establish a claim under Oklahoma law. "Allegations are not

entitled to be assumed to be true when they merely restate the essential elements of a claim rather than provide *specific facts* to support those elements." *Hitch Enters, Inc.*, 859 F. Supp. 2d at 1261. Here, Plaintiffs have omitted both the specific facts necessary to demonstrate they can establish the requisite elements. Merely stating that "false information" was disseminated does not suffice. Accordingly, their claims for negligent misrepresentation must be dismissed.

II. Plaintiffs' Claims Have Expired under Oklahoma's Statute of Limitations

Furthermore, Plaintiffs' claims must be dismissed because they are barred by the applicable Oklahoma statute of limitations. It has been more than five years since Plaintiffs elected to make a venture capital investment in NewMarket Fund, and as Plaintiffs allege, they have yet to receive any return on their investment. *See* Pet. ¶ 26. Ordinarily a five year wait for a return on an investment in a venture capital fund would not be cause for concern—but in this instance, Plaintiffs have alleged this wait gives rise to claims for fraud, violation of the Oklahoma Securities Act, and negligent misrepresentation. To support their claims that the absence of a return on their investment amounts to fraud, Plaintiffs point to events and unspecified communications that all took place *several years ago*. When considered in the context of Oklahoma's statutes of limitations, it becomes clear that even if these events and communications could establish viable claims for fraud—they cannot—but even if they could, Plaintiffs' reliance on them to establish their claims reveals that Plaintiffs could have, and should have, brought the current claims years ago. Based on the facts alleged in Plaintiffs' Petition, it is clear that Plaintiffs' claims have expired.

The Oklahoma Supreme Court has stated that Oklahoma's statutes of limitations "exist to protect defendants from prejudice that may result from having to defend against stale claims." *Pan v. Bane*, 2006 OK 57, ¶ 9, 141 P. 3d 555, 559. This policy purpose serves an important role

in the present case, where Plaintiffs claim to have lost all relevant documents and records from 2010 concerning the claims they now bring against Defendants. *See* Pet. ¶ 36. Defendants have indeed already suffered prejudice from the stale claims Plaintiffs have brought—claims that apparently are not based on actual facts from the relevant time period because "the state of the records of the OLLC is not very good, lots and lots of e-mail traffic that you would expect to see, lots and lots of financial documents that you would expect, are just not there." Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:33 of Audio, Pt. 2).

The Nation and the LLC instituted this action on May 22, 2015, however, the purported facts they offer in support of their Petition establish that, for purposes of the statutes of limitations governing each of their claims, time accrual for their causes of action began, at the latest, by December 2011, effectively barring any relief sought after December 2013.

a. The Oklahoma Securities Act's Statute of Limitations Bars the Nation and OLLC's Claims for a Violation of the Act

The Oklahoma Securities Act imposes a two-year statute of limitations. 71 Okla. Stat. § 1-509(J)(2). Thus, a person may not obtain relief under this subsection "unless the action is instituted within the earlier of two (2) years after discovery of the facts constituting the violation or five (5) years after such violation." *Id*. Based on the theory of fraud and facts pled in Plaintiffs' Petition, the date of their discovery was, at the latest, December 2011. *See McCain v. Combined Commc'ns Corp. of Oklahoma*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867 ("Fraud is deemed to have been discovered when, in the exercise of reasonable diligence, it could have or should have been discovered."); *see also Consol. Grain & Barge Co. v. Structural Sys., Inc.*, 2009 OK 14, ¶ 9, 212 P.3d 1168, 1171 (noting that the time in which a party has to bring a claim begins to run "when the cause of action accrues.").

Plaintiffs' claims were discoverable in December 2011 based on facts pled in Plaintiffs' Petition. Plaintiffs predicate their fraud claims on the discovery of two alleged facts: (1) that Yancey Redcorn promised them an 8% return on their investment *annually* sometime around or before August 2010 (Pet. ¶ 33); and (2) that each and every year since making the investment in 2010, they have been paid nothing. Pet. ¶ 26. As explained above, such barebones allegations do not substantiate fraud under Oklahoma law—but if they did, then based on Plaintiffs' own allegations, Plaintiffs should have known that fraud was afoot in December of 2011, when they received no return on their investment for the entire year of 2011. Even though the Operating Agreement makes clear that any return remains contingent upon the NewMarket Fund making a profit and thus a distribution, the Petition lodged by the Nation and OLLC claims this statement made by Defendant Redcorn was an untrue statement, misleading, and/or a material omission, and as such, under their theory of fraud pled in their Petition and by their own omission, Plaintiffs discovered their fraud claim in December 2011.

Instead of filing their claims in 2012, of 2013, or even in 2014, the Nation and OLLC sat on their hands through four years of no dividends and no payments on their investment, and as a result, they missed their window to lawfully bring a claim within the two-year timeframe set forth by § 1-509(J)(2) of the Oklahoma Securities Act.

b. Oklahoma's Statute of Limitations Bars Plaintiffs' Common Law Fraud Claims

Similar to the limitations set forth in the Oklahoma Securities Act, the statute of limitations for common law fraud is two years. *See* 12 Okla. Stat. § 95(A)(3) (a civil action for fraud must be brought "[w]ithin two (2) years . . . [of] the cause of action . . . ."). Likewise, common law fraud "is deemed to have been discovered when, in the exercise of reasonable diligence, it could have or should have been discovered." *McCain*, 1998 OK 94, ¶ 8, 975 P.2d

865, 867. For the reasons stated above, Plaintiffs' Petition places their date of discovery squarely in December 2011—and consequently, their common law fraud claims expired in December 2013, or January 2014 at the very latest.

c. Oklahoma's Statute of Limitations Bars Plaintiffs' Claims for Negligent Misrepresentation

Negligent Misrepresentation, like fraud, "sounds in tort, and is governed by the two-year statute of limitations, 12 O.S. § 95(3)." *Bank of Oklahoma, N.A*, 2011 OK CIV APP 56, ¶ 15, 251 P.3d 187, 191 (citing *Funnell v. Jones,* 1985 OK 73, ¶ 6, 737 P.2d 105, 107.). And like the limitations statute for fraud, the limitations period for negligent misrepresentation, "begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of." *Id.* (citing *Marshall v. Fenton, Fenton, Smith, Reneau and Moon, P.C.,* 1995 OK 66, ¶ 6, 899 P.2d 621, 623) (citation omitted).

For the reasons stated above—and because of the theory and facts pled in Plaintiffs' Petition—Plaintiffs should have and could have discovered their negligent misrepresentation claim as of December 2011. Their failure to bring any such claim by January 2014, at the latest, is fatal to their ability to bring one now, more than five years after the alleged misrepresentation.

III. Plaintiffs' Claims Against the Red Eagle Feather and TeraDact Defendants Should be Transferred to Osage Nation Courts

Although Defendants vociferously assert that all of Plaintiffs' claims must be dismissed under Oklahoma law, in the event the Court allows Plaintiffs' claims to proceed, Defendants request this Court to transfer those remaining viable claims to the Osage Nation Courts.

Plaintiffs' allegations that the Red Eagle Feather and TeraDact Defendants deceived the Osage Nation and OLLC fall squarely within the sovereign interests of Osage Nation. The allegations in Plaintiffs' Petition implicate questions of Osage law; the alleged injury is to the Osage Nation, its citizens, its business—the OLLC; the allegations, therefore, present legal

questions that implicate the public interest of Osage Nation, and as a result, should be answered by the Osage Nation Courts. Furthermore, the veracity of Plaintiffs' allegations implicates the internal operations and workings of Osage Nation and Osage Government. That is, Plaintiffs' claims that the OLLC lost money as a direct result of Defendants' actions—and not as a result of the OLLC Enterprise Board's failure to comply with Osage law, maintain business records, perform due diligence, and manage the OLLC's business affairs—call into question Plaintiffs' compliance with the laws passed by the Osage Nation Congress that created the OLLC in the first place. *See, eg.,* Fain Aff. Ex. 1 (ONCR 08-09), Ex. A – OLLC Articles, art. VII, 7.1. Plaintiffs' claims against the Red Eagle Feather and TeraDact Defendants would be more appropriately transferred to and heard in the Osage Nation Courts.

Oklahoma law supports the transfer of the Plaintiffs' claims against the Red Eagle Feather and TeraDact Defendants under the doctrine of *forum non conveniens*. The doctrine of *forum non conveniens* has been recognized in Oklahoma since 1955. In the seminal case of *St. Louis-San Francisco Ry. Co. v. Superior Court, Creek County*, 1955 OK 111, 290 P. 2d 118, the Oklahoma Supreme Court applied the doctrine and concluded it was appropriate for the lower court to dismiss the actions from the Oklahoma courts because "Oklahoma ha[d] no real connection with th[e] controversy" and the defendants' requested forum "would be a more convenient and appropriate forum." *Id.* at 121. In granting the motion to dismiss and transfer, the Supreme Court noted that:

> The trend in favor of the use of considerations of *forum non conveniens* seems to us to be a wholesome one and in furtherance of the sound administration of justice. Trial courts should not hesitate to follow it in appropriate circumstances.

Id.

Oklahoma has codified the common law doctrine of *forum non conveniens*. *See* 12 Okla. Stat. § 140.3(A). This statute states that:

> A. If the court, upon motion by a party or on the court's own motion, finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum either in this state or outside this state, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay, transfer or dismiss the action.

12 Okla. Stat. § 140.3(A). In determining whether to grant a motion to transfer under § 140.3, Oklahoma law requires the consideration of a combination of six factors, specifically:

> 1. Whether an alternate forum exists in which the action may be tried;
> 2. Whether the alternate forum provides an adequate remedy;
> 3. Whether maintenance of the action in the court in which the case is filed would work a substantial injustice to the moving party;
> 4. Whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the action of the plaintiff;
> 5. Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the action being brought in an alternate forum; and
> 6. Whether the stay, transfer or dismissal would prevent unreasonable duplication or proliferation of litigation.

Id. § 140.3(B).

As the United States Supreme Court has noted, in considering the application of *forum non conveniens*, courts must "retain flexibility" because "'[e]ach case turns on its facts[,]'" as opposed to a rigid application of a particular test. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (quoting *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946)). Thus, when considered as a whole—in the context of the facts of this particular case—the factors of § 140.3(B) weigh heavily in favor of transfer to the Osage Nation Courts.

a. The Osage Nation Courts Provide a Viable Alternate Forum

The Osage Nation Courts provide a readily available forum that is easily accessible for all parties. The Osage Nation is the lead plaintiff in the current litigation, and thus it would be absurd for the Nation to claim its own courts do not provide a viable alternative forum.

b. The Alternative Forum Provides an Adequate Remedy

Furthermore, the Osage Nation Courts provide an adequate remedy under § 140.3(B)(2). In the event this case is transferred, Plaintiffs would be able to enforce a favorable tribal court judgment in the State of Oklahoma. As the Oklahoma Supreme Court has noted, the Oklahoma legislature has "clearly spoken on its desire for the courts of this State to give full faith and credit to the judgments of courts of Indian Tribes . . . ." *Barrett v. Barrett*, 1994 OK 92, ¶ 11, 878 P.2d 1051, 1054; *see also* 12 Okla. Stat. § 728 (recognizing "the power of the Supreme Court of the State of Oklahoma to issue standards for extending full faith and credit to the records and judicial proceedings of any court of any federally recognized Indian nation, tribe, band or political subdivision thereof. . . .").[33]

Under the authority granted in this statute, the Oklahoma Supreme Court adopted Rule 30 to the Rules for District Courts of Oklahoma. *See Barrett*, 1994 OK 92, ¶ 10, 878 P.2d at 1054. Rule 30(B) provides:

> The district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith

[33] 12 Okla. Stat. § 728 further provides:

> In issuing any such standard the Supreme Court of the State of Oklahoma may extend such recognition in whole or in part to such type or types of judgments of the tribal courts as it deems appropriate where tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts.

> and credit under this rule than would a similar or comparable judgment of a sister state.

The Osage Nation Courts have granted reciprocity to Oklahoma State Courts with the sound expectation that they will receive the same consideration in return.[34] Osage law requires the Osage Nation Courts to treat a state court judgment "in the same manner as a judgment of the [Osage] Trial Court." 3 Osage Nation Code § 3-103, Filing and Status of Foreign Judgments.

Accordingly, there can be no doubt that the Osage Nation Courts provide an adequate remedy.

c. The Osage Nation Courts Can Exercise Jurisdiction over all Defendants Pursuant to the U.S. Supreme Court's Decision in *Montana v. United States*

The Osage Constitution affords the Osage Nation Courts broad jurisdiction "over all persons, subjects, property, and over all activities that occur within the territory of the Osage Nation and over all Osage citizens, subjects, property, and activities outside such territory affecting the rights and laws of the Osage Nation." Osage Const., art. II, §.2. Likewise, the Osage Nation Code provides "[t]he civil jurisdiction of the Osage Nation Courts shall extend over all persons, subjects, property, and over all activities that occur within the territory of the Osage Nation and over all Osage citizens, subjects, property and activities outside such territory affecting the rights and laws of the Osage Nation. *See* An Act to Amend 5 ONC § 1-105(A), Harmonizing the Civil Jurisdiction of the Courts with the Osage Constitution; and to Establish an Alternate Effective Date, Osage Nation Cong. Act 15-09 (2014) ("ONCA 15-09").

Plaintiffs' statement that the Osage Nation's jurisdiction "generally cannot be extended to include non-Indians" is patently false. *See* Pls.' Proposed Scheduling Order and Mem. in Supp.

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[34] *See* Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve*, 36 Tulsa L.J. 381, 391 n. 90 (2000) (listing the Osage Nation as granting reciprocity (Full Faith and Credit) to Oklahoma State Court judgments).

Thereof 4, January 22, 2016. Quite the opposite, the United States Supreme Court has repeatedly affirmed that a Tribal Court's jurisdiction "over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) (citing *Montana v. United States*, 450 U.S. 544, 565–66 (1981)). Accordingly, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on tribal lands. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

It is true that the Supreme Court's decision in *Oliphant* restricted the ability of Tribes to exercise their inherent criminal jurisdiction to prosecute non-Indians who commit crimes on tribal lands. The Supreme Court subsequently clarified, however, that "[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, . . . *their civil jurisdiction is not similarly restricted*." *Iowa Mut. Ins. Co*., 480 U.S. at 15 (emphasis added) (citations omitted). The United States Supreme Court has repeatedly recognized Tribes' civil jurisdiction "over the activities of non- Indians on reservation lands" (*id*. at 18), and has only restricted Tribes' civil jurisdiction in a few limited circumstances. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (no tribal court jurisdiction over civil lawsuit where both plaintiff and defendant are non-Indians and the conduct from which the lawsuit arose took place on non-Indian owned fee land); *Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 330 (2008) (concluding "the Tribe lacks the civil authority to regulate the [non-Indian] Bank's sale of its [non- Indian owned] fee land").

At the core of this Court's preservation of tribal civil jurisdiction is tribal self-government. Despite having been presented with several opportunities to eliminate the exercise of tribal jurisdiction over non-Indians altogether, the Court has continually affirmed civil

jurisdiction over non-Indians as an "inherent [tribal] power necessary to [sustain] tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982); *see also Montana*, 450 U.S. at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."). In furtherance of tribal self-government, *Montana* outlined two categories of non-Indian conduct over which Tribes retain the authority to exercise their inherent civil jurisdiction (also referred to as the "*Montana* exceptions").

First, the *Montana* Court confirmed that Tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

Second, the *Montana* Court went further, holding that a Tribe retains its:

> [I]nherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

Id. at 566.

The present case clearly falls within *Montana*'s first category. All of the defendants voluntarily entered into consensual business relationships with both the Osage Nation and the OLLC. As Plaintiffs' Petition alleges, Leese, Petre, the Red Eagle Feather Defendants, and the TeraDact Defendants all voluntarily entered into explicit contractual agreements—or employer/employee agreements—both of which qualify under *Montana*'s First category. *See, e.g.,* Pet. ¶¶ 4-5, 18, 20.

The Osage Nation's attempt to circumvent the public scrutiny of its own courts finds no support in the law. Indeed, this case goes to the heart of *Montana*, as it implicates significant

questions regarding Osage Tribal Government. The Osage Nation's legislative branch, specifically the Osage Congress, has called into question the OLLC Enterprise Board's compliance with Osage law. *See* Comm. on Commerce and Econ. Dev. (Sept. 18, 2015) (statement of OLLC Board Member Jim Parris beginning at 24:45 of Audio, Pt. 1). Indeed, Plaintiffs' own Member of Congress has stated publically that the OLLC lost money in the now challenged transaction because the OLLC Enterprise Board failed to do "due diligence on the companies" before investing, and furthermore, Plaintiffs' "experience in th[is] litigation [has] . . . shown how [the OLLC] failed as a company to do the kind of homework that should have been done." *Id.* The public expressions of Members of the Osage Congress reveals that the instant litigation implicates strong disagreements within the separate branches of Osage Tribal Government.

In response to these issues and concerns, however, the Osage Nation's executive branch decided to file a lawsuit against the Red Eagle Feather and TeraDact Defendants—and not against the individual Members of the OLLC Enterprise Board who, according to the Osage Congress, failed to comply with Osage law. *See* Comm. on Commerce and Econ. Dev. (July. 7, 2015) (statement of Attorney Jorgenson beginning at 4:58 of Audio, Pt. 2) ("We're kind of flying in the dark in some sense, . . . the easiest [option] is to hail [the Red Eagle Feather and TeraDact Defendants] into court and you say, 'well you come in and tell me what happened.'").

Because the Osage Nation Courts have civil jurisdiction over the current parties and claims, and because Plaintiffs' claims go to the heart of Osage Nation tribal self-government, the Defendants' motion to transfer more than satisfies the criteria set forth in § 140.3(B)(4).

d. The Balance of Private and Public Interests Favor the Placement of this Action in Osage Nation Courts

Both private and public factors support the transfer of this case to the Osage Nation Courts.

When considering the private interests implicated in a motion to transfer, courts consider whether the forum (1) is convenient for witnesses; (2) may reach unwilling witnesses by compulsory process; (3) allows a view of the premises; (4) is near the sources of proof; and (5) serves to make trial of the case less burdensome and more convenient. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).[35]

Here, the Osage Nation Courts provide the most convenient location for all parties and witnesses. The Osage Nation Courts are the closest courts to both Plaintiffs, and ultimately, are no farther for any of the Defendants than the current Court. Furthermore, should Plaintiffs' claims survive Defendants' motion to dismiss, Defendants will seek to take the deposition of all Members of the OLLC Enterprise Board. Given that the OLLC Enterprise Board is headquartered in and managed by Osage Nation, the Osage Nation Courts will provide the most convenient and effective forum for ensuring Defendants are able to take any and all discovery they are entitled to. The Osage Nation Courts' proximity to and jurisdiction over the witnesses thus support the transfer of this action. *See e.g., Lovett v. Wal-Mart Stores*, *Inc.,* 2001 OK CIV APP 9, ¶¶ 12-13, 18 P.3d 387, 389 (holding that trial court did not abuse its discretion in determining that the State of California is a more convenient forum for the trial because "all of [Defendant's] witnesses are located in California.").

Additionally, sources of proof such as business records and communications between the parties are within the possession of Osage Nation, and thus located squarely within the jurisdiction of the Osage Nation Courts. Accordingly, transfer to the Osage Nation Courts is appropriate because the transfer will facilitate the easiest and most efficient collection of the evidence the

[35] In articulating the relevant factors for consideration in adjudicating a motion to transfer for *forum non conveniens*, the Oklahoma Supreme Court has "adopt[ed] the view of the Supreme Court of the United States as expressed in the case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, ..." *St. Louis-San Francisco Ry. Co. v. Superior Court, Creek Cty.,* 1954 OK 223, ¶ 23, 276 P.2d 773, 778.

parties need to establish their respective sides. *See, e.g., Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 608 (10th Cir. 1998) (upholding district court's determination that the first private interest factor, relative access to sources of proof, favored transferring this action to France "because most of the evidence relevant to the defendants' claim that Mr. Gschwind was either contributorily negligent or committed suicide was more readily available in France."); *Fitzgerald v. Texaco*, *Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975) (explaining that all the relevant witnesses and records were located in England, so that "[t]he plaintiffs should find their best proof right there."); *Tazoe v. Airbus S.A.A.,* 631 F.3d 1321, 1331 (11th Cir. 2011) (upholding transfer under private factors reasoning that the "flight wreckage is in Brazil, including the digital flight data recorder and the cockpit voice recorder," and "[t]he parties will also likely find evidence in Brazil about the measure of damages," and "[t]hese sources of proof comprise a body of relevant evidence, located in Brazil, that is pertinent to both the claims and defenses.").

The public interests weigh heavily in favor of transfer as well. When considering the public interests implicated in a motion to transfer, courts consider the burden of jury duty on the community and the community interest in having local controversies decided at home. *Gulf Oil Corp.*, 330 U.S. 501, 508-09 (1947).

No community has more of a stake in the outcome of this case than the citizens of Osage Nation. This case deals with a wholly owned Osage company, the management of that company by a congressionally created Board of Directors, the investment of Osage tribal dollars, and alleged misrepresentations that occurred on Osage lands. Osage Nation, as a sovereign Nation, has the highest interest in the adjudication of the present case, and accordingly the case should be transferred to its courts. *See, e.g., Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 383-84 (5th Cir. 2002) (upholding district court's transfer of case to Mexico under the public and private factors

reasoning that "[a]fter all the tort victim was a Mexican citizen, the driver of the Chrysler LHS (Gonzalez's wife) is a Mexican citizen, and the plaintiff is a Mexican citizen," and "[t]he accident took place in Mexico."); *St. Louis-San Francisco Ry. Co.,* 1954 OK 223, ¶ 23, 276 P.2d 773, 778-79, *supplemented*, 1955 OK 111, 290 P.2d 118 (noting that regarding the public factors, there is a "there is local interest in having localized controversies decided at home."); *Piper Aircraft Co.*, 454 U.S. at 260 (1981) (upholding case being tried in Scotland reasoning, "Scotland has a very strong interest in this litigation," and "[t]he accident occurred in its airspace."). The Osage County community at large will not suffer if this case is moved to Osage Nation courts, and in fact, will only benefit.

An Oklahoma Supreme Court case is illustrative of why this case belongs in the Osage Nation courts. In *St. Louis-San Francisco Ry. Co. v. Superior Court, Creek Cty*., 1955 OK 111, ¶ 11, 290 P.2d 118, 120, the Oklahoma Supreme Court held that denial of defendant's motion to dismiss based on *forum non conveniens* was an abuse of discretion because alleged injury took place in Missouri, plaintiffs and defendants were from Missouri, a jury in Missouri could view the scene of the injury, and none of the interested parties or witnesses are residents of the State of Oklahoma. *Id.* The Court stated, "[i]t is apparent from the foregoing that Oklahoma has no real connection with this controversy and that Missouri would be a more convenient and appropriate forum." *St. Louis*, 1955 OK 111, ¶ 13, 290 P.2d at 121.

Like the case in *St. Louis*, the alleged misrepresentations here took place on Osage Nation land, Defendants Leese and Petre were OLLC employees, Defendant Redcorn is an enrolled citizen of Osage Nation, and the witnesses and former OLLC Enterprise Board members are Osage citizens. Thus, it is apparent that Oklahoma has no real connection with this controversy and the Osage Nation would be a more convenient and appropriate forum. Ultimately, because "[t]his

action did not arise in, and is of no legal importance to, the citizens of O[sage] County[, . . . i]t is an unnecessary burden upon its judicial system" and should be transferred to Osage Nation Courts. *Safeway Stores, Inc. v. Martin*, 1974 OK 149, ¶ 15, 530 P.2d 131, 134.

e. A Transfer to the Osage Nation Courts Would Prevent Duplication of Litigation

Because Osage Nation is the lead plaintiff in this action, moving the case to the Osage Nation Courts will prevent future duplication of litigation.

CONCLUSION

For the aforementioned reasons, Plaintiffs' claims against the Red Eagle Feather and TeraDact Defendants should be dismissed in their entirety. In the alternative, Plaintiffs' claims against Defendants should be transferred to the Osage Nation Courts.

Respectfully submitted,

Date: February 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2016, a copy of this Memorandum in Support of Proposed Scheduling Order was sent via e-mail to the following recipients:

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Dated: February 11, 2016

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