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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

PIPESTEM LAW, P.C.
Wilson K. Pipestem
Abi Fain
Joe Keene (*pro hac vice*)
320 S. Boston Ave., Suite 1705
Tulsa, OK 74103
Phone: (918) 936-4705
Attorneys for Defendants Red Eagle Feather Distributing, LLC; Yancey Redcorn; Betsy A. Brown; NewMarket Technology Fund I, LLC; Howard C. Hill; Christopher K. Schrichte; and TeraDact Solutions, Inc..

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The Red Eagle Feather and TeraDact Defendants[1] (collectively, "Defendants"), submit the following reply memorandum of law in further support of their motion to dismiss the Petition brought by Plaintiffs Osage Nation ("Nation") and 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.

OPENING STATEMENT

In the summer of 2010 when the OLLC Board of Directors entered into the written investment agreements Plaintiffs now reference and cite in their Petition (Pet. ¶¶ 20, 22, and 29), the Board acknowledged and agreed that they had conducted due diligence on the investment, had received all the documents they had requested related to the investment, had asked and received answers to all of their questions about the investment, and understood that the OLLC risked losing the entire amount of the investment. *See* Affirmation of Abi Fain in Support of Defendants' Motion to Dismiss, dated February 11, 2016 ("Fain Aff."), Ex. 4 (Operating Agreement), art. 3, § 3.02(d). Moreover, Plaintiffs acknowledged in writing that the OLLC would not receive a payment or other distribution from the TeraDact investment until TeraDact either went public, or was sold to or merged with another company, or the TeraDact Defendants decided to distribute all of the interests of TeraDact. *See* Fain Aff. Ex. 4 (Operating Agreement), art. 5, § 5.01 (definition of "Realized Investment"). The documents Plaintiffs cite in their

[1] For purposes of this reply memorandum, the "Red Eagle Feather Defendants" include Red Eagle Feather Distributing, LLC, an Oklahoma limited liability company; Yancey Redcorn; and Betsy A. Brown; the "TeraDact Defendants" include NewMarket Technology Fund I, LLC, a Delaware limited liability company; Howard C. Hill; Christopher K. Schrichte; and TeraDact Solutions, Inc., a Delaware corporation.

Petition demonstrate that the requisite "Realized Investment" has yet to occur, and consequently, as a matter of law, Plaintiffs are not currently entitled to returns. *See* Pet. ¶¶ 23-24.

Having not yet received a return on their TeraDact investment, Plaintiffs have sued Defendants for fraud and negligent misrepresentation. Their attempt to transform a legally binding, contractual reality into a nearly factless fantasy of fraud fails repeatedly as a matter of law.

In fact, Plaintiffs fail to even respond to several critical shortcomings in their Petition. As one example, all of Plaintiffs' claims require them to demonstrate reliance on Defendants' statements or actions as a necessary element under the law. Neither their Petition nor their opposition offers a fact or explanation, argument, or assertion showing how their reliance could be deemed reasonable under the law. None.

As the United State District Court, Northern District of Oklahoma, recently ruled in a similar fraud case, "[t]he warnings throughout the [Subscription and Operating Agreements], which were fully accessible to Plaintiff[s] at the time of [their] investment, plainly indicate that [their] reliance on the [allegedly] promised [8]% returns was unjustified as a matter of law." *Farley v. Stacy*, No. 14-CV-0008-JHP-PJC, 2015 WL 3866836, at *7 (N.D. Okla. June 23, 2015). Defendants cannot escape the legal consequences of the legally binding documents they signed, and as a result, they cannot establish "reliance" under Oklahoma law.

Their inability to meet basic pleading requirements requires this Court to dismiss their entire Petition. *See Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989) (granting a defendant's motion to dismiss "is appropriate" where "the district court ultimately finds [a question of law] is resolved against the plaintiff.").

As to the most appropriate forum to hear these claims, in a remarkable and incomprehensible move, the Osage Nation has elected to fight its own inherent sovereign jurisdiction. The Osage Nation Constitution sets forth a clear statement of Osage Nation jurisdiction that extends to "all persons" and "all activities" that occur within the Osage Nation territory. Osage Nation Const., art. II. § 2. As a matter of Osage and Federal law, all of the defendants – Osage and non-Osage, including Carol Leese and Robert Petre – have consented to Osage Nation jurisdiction by either affirmative statement (the Red Eagle Feather and TeraDact Defendants) or having been officers and full-time employees of the OLLC (Leese and Petre). Even so, the Plaintiffs oppose the jurisdiction of the Osage Nation Courts.

Remarkably, the Osage Nation and OLLC do not even mention Article II of the Osage Constitution, which defines Osage Territory and Jurisdiction, in their opposition, and instead rely only upon anti-sovereignty Federal cases that limit tribal jurisdiction over non-Indians but are not applicable to this situation. They also entirely ignore the Osage Nation Supreme Court's articulation of the Nation's jurisdiction that goes far beyond the restrictive arguments made in Plaintiffs' opposition.

Similarly, the Plaintiffs' denial of Osage Courts' subject matter jurisdiction over these claims is difficult to fathom. Osage Nation law says that its Judiciary can recognize and apply Oklahoma tort law. 3 ONC § 1-101(C) ("Any matters that are not covered by the traditional customs and usages of the Nation, or by applicable federal law and regulations, or by applicable Osage Nation law shall be decided by the Court, according to the law of the state in which the matter in dispute lies.").

Although the Nation, the OLLC, and its attorneys wish to have this Osage-centric dispute decided by this Court, and have this Court interpret the meaning of the Osage Nation's

Constitution and laws, that desire does not constitute a justifiable basis to undermine the Constitution and sovereignty of the Osage Nation, and this Court should not entertain it.

This Court should dismiss the Plaintiffs' Petition with prejudice. Alternatively, nothing in Plaintiffs' response, nor the memoranda submitted by defendants Carol Leese or Robert Petre, requires the denial of Defendants' motion to transfer.

STANDARD OF REVIEW

Even taking the statements of fact in the Petition as true, Plaintiffs' claims fail as a matter of law because Plaintiffs have failed to plead *any* facts for several of the requisite elements necessary to establish their claims. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (plaintiff's complaint must be dismissed where plaintiff fails to "frame a complaint with enough factual matter (taken as true) to suggest that he is entitled to relief.") (citation, internal quotation marks, and ellipses omitted).

Instead of alleging *facts* to substantiate their claims, Plaintiffs have merely recited the formulaic *legal elements* of fraud, securities violations, and negligent misrepresentation. Such formulaic recitations, however, do not suffice and need not be taken as true. *See Hitch Enters., Inc., v. Cimarex Energy Co.,* 859 F. Supp. 2d 1249, 1261 (W.D. Okla. 2012) (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.") (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "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." *Id.*

Moreover, this Court need not take as true the statements in Plaintiffs' Petition that are demonstrably false based on a reading of the very same documents Plaintiffs cite and reference

in their Petition. *See Silver v. Slusher*, 1988 OK 53, n. 8, 770 P.2d 878 ("An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence."). Here, Plaintiffs could have, and should have, exercised reasonable diligence and ascertained the truth from the documents in their possession: the very same documents they relied upon, quoted, cited, and incorporated into their Petition.[2]

In sum, Plaintiffs' claims must be dismissed because the Petition "lack[s] any cognizable legal theory to support the [Petition's] claim[s]," and further, because the Petition contains "insufficient facts" to substantiate "a cognizable legal theory." *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24.

ARGUMENT

I. Plaintiffs Have Failed to State a Claim for Common Law Fraud, Constructive Fraud, and Conspiracy

To successfully assert a claim for fraud under Oklahoma law, Plaintiffs must plead sufficient acts to allege: 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, and (4) reliance thereon by another party to its injury. *Whitson v. Oklahoma Farmers Union Mut. Ins. Co.*, 1995 OK 4, ¶ 5, 889 P.2d 285, 287; *Silk v. Phillips Petrol. Co.*, 1988 OK 93, ¶ 12, 760 P.2d 174, 176-77. In Defendants' motion to dismiss, Defendants noted that 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

[2] Plaintiffs' failure to exercise reasonable diligence renders their entire action frivolous, and leaves Plaintiffs and their attorneys subject to sanctions for failure to conduct a reasonable pre-filing inquiry. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990). Defendants reserve all rights and remedies with regards to filing a motion for sanctions against the Plaintiffs and their attorneys pursuant to 12 Okla. Stat. § 2011(B)(1), (C), as well as all rights and remedies to seek attorneys' fees for the costs of having to defend frivolous, baseless allegations.

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. *See* Def. Mot. at 30.

Plaintiffs have failed to respond, in whole or in part, to all three of their Petition's failings, and consequently, Defendants are entitled to dismissal as a matter of law.

a. Plaintiffs do not Even Attempt to Address Their Failure to Plead Reliance

First and foremost, as described above and in Defendants' motion (*see* Def. Mot. at 34-37), Plaintiffs cannot establish reliance as a matter of law. Plaintiffs signed binding legal agreements whereby they acknowledged they risked losing their investment (Fain Aff. Ex. 3 (June Subscription Agreement) §§(B)(1)(b)(iii), (B)(1)(c)), and they further acknowledged they would receive *no return on their investment* until or unless a "Realized Investment" occurred. Fain Aff. Ex. 4 (Operating Agreement), art. 5, § 5.01. Because Plaintiffs received, and signed, these documents, Plaintiffs' "reliance on the promised [8]% returns [i]s ***unjustified as a matter of law***." *Farley*, 2015 WL 3866836, at *7 (emphasis added).

In their opposition to Defendants' motion to dismiss, Plaintiffs offer no response. Because Plaintiffs failed to respond or offer any argument as to how they have sufficiently pled reliance, Plaintiffs waived these arguments under Oklahoma law. *See Rouse v. Oklahoma Merit Prot. Comm'n*, 2015 OK 7, n. 2, 345 P.3d 366 ("To the extent that each of its allegations of error were not contained within the arguments in its brief, they are waived. *Parties waive issues by failing to brief them.*") (emphasis added). This failure, and this failure alone, necessitates dismissal of their claims. *See Citifinancial Mortg. Co., Inc., v. Frasure*, No. 06-CV-160-TCK-PJC, 2007 WL 2401750, at *23 (N.D. Okla. Aug. 17, 2007) (granting defendant's motion to dismiss because claims "for fraud/deceit fail[] as a matter of law [when plaintiffs] cannot show any detrimental reliance on the alleged false statements.").

Indeed, because reliance is also a critical and necessary element for Plaintiffs' claims under the Oklahoma Securities Act and negligent misrepresentation, dismissal of Plaintiffs' entire Petition is warranted on this basis alone.

b. Plaintiffs' Fraud Allegations are Void of any Actionable Content

Plaintiffs fail to demonstrate how their pleadings meet the required legal standard of alleging specification of time, place, and content. Plaintiffs go to great lengths to assert that their Petition satisfies the "time and place" of the alleged misrepresentations (Defendants do not agree they do), but Plaintiffs provide *no* response, description, or argument as to how their pleadings provide the requisite "content." *See Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, ¶ 11, 861 P.2d 308, 310-11 (Oklahoma law "requires specification of the time, place *and content* of an alleged false representation . . . .") (citation and internal quotation marks omitted) (emphasis added). Courts require Plaintiffs' allegations to "be stated with particularity" (12 Okla. Stat. § 2009(B)) "to enable the opposing party to prepare his responsive pleadings and defenses." *Gay v. Akin*, 1988 OK 150, ¶ 18, 766 P.2d 985, 993.

Defendants cannot prepare responsive pleadings because Plaintiffs have not stated with any particularity what Defendants said or did that could possibly constitute an actual misrepresentation, other than telling Plaintiffs the NewMarket securities had "value" (Pet. ¶ 33) or were a "sure-thing" (Pet. ¶ 32)—statements that, under the law, are not actionable. *See Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119 (10th Cir. 1997) (dismissing fraud claim since statements of '"corporate optimism' or 'mere puffing' are . . . . not actionable because reasonable investors do not rely on them in making investment decisions."). Defendants may well have said the securities were "valuable" or had "value," but "mere expression[s] of opinion"—with nothing more—do not establish fraud. *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.").

In an unsuccessful effort to salvage their pleadings, Plaintiffs attempt to associate their pleadings with those in *Howard* and *Gay*. *See* Pl. Opp. at 7-9 (citing *Gay*, 1988 OK 150, ¶ 18, 766 P.2d 985, 993; *Howard Charitable Family Found. v. Trimble*, 2011 OK CIV APP 85, ¶ 48, 259 P.3d 850, 863). This reliance is misplaced, as both decisions only signal the significant deficiencies in Plaintiffs' own allegations.

First, the *Howard* allegations are far more specific than the Plaintiffs' claims. A side-by-side comparison reveals just how little guidance Defendants have received from Plaintiffs' Petition in the current case. Whereas the *Howard* plaintiffs included facts to describe the subject matter and content of the alleged misrepresentations (*i.e.*, defendants "claimed a hardware failure necessitated a change in the periodic reports to investors," *Howard*, 2011 OK CIV APP 85, ¶ 13, 259 P.3d 850, 855), in the current case, Plaintiffs have offered no content description other than the formulaic recitation that "Defendants gave specific assurances" to Plaintiffs concerning the value of the investment. Pet. ¶ 33. As Plaintiffs note in their Opposition, the *Howard* plaintiffs provided numerous facts and details, for instance, that "defendants failed to disclose the information about the methods used to make trades and in whose names trades were made, how funds were co-mingled, and how registrations by law for defendants for certain securities were not obtained." Pl. Opp. at 9 (quoting *Howard*, 2011 OK CIV APP 85, ¶ 48, 259 P.3d 850, 863) (internal brackets omitted). In contrast, where Plaintiffs attempt to plead a fraud claim by omission, Plaintiffs provide *no* details as to what material information Defendants omitted. *See* Pet. ¶ 38 ("In addition there were material omissions from such [offering] materials and other oral and written statements made by one or more of the REF Defendants"). Merely using the word "omission" and "material" does not satisfy the requisite standard under Oklahoma law. *See Hitch Enters., Inc., v. Cimarex Energy Co.,* 859 F. Supp. 2d 1249, 1261 (W.D. Okla. 2012)

("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.").

Plaintiffs' reliance on *Gay* fares no better. *Gay* involved a plaintiff, a bank Depositor, who alleged the defendant "held itself out as a Bank insured by the FDIC, when in fact it was not." 1988 OK 150, ¶ 7, 766 P.2d 985, 989. The *Gay* plaintiffs alleged that "this representation was made to her and other members of the public in a number of ways," including "[i]ts printed monthly statements, for example, included the notations 'Bank' and 'MEMBER FDIC.'" *Id.* at 989-90. Thus, the plaintiffs in *Gay* provided the exact content—indeed word for word—and even more, they provided the time and place of the actual misrepresentations, including descriptions of how and when the *Gay* plaintiffs received them. Plaintiffs' Petition in the current case contains no such allegations.

The question was—and remains—what do Plaintiffs believe Defendants said (wrote, expressed, shared, communicated, *etc.*) that constitutes fraud? Is their claim that Defendants misrepresented the assets on TeraDact's balance sheet? Is their claim that Defendants misrepresented the number of employees at TeraDact? The methodology that TeraDact uses to calculate the event necessary to effectuate a distribution pursuant to the Operating Agreement? Did the misrepresentations occur in an e-mail, at the Osage Congressional Chambers, on the phone, in person in Tulsa? Defendants have no idea because, to their knowledge, they made no misrepresentations.

Alleging fraud is a serious matter, and spurious fraud allegations come with repercussions. Plaintiffs have been given every opportunity to state the content of the alleged misrepresentations that purportedly deceived them—and their continued and inexplicable failure to do so necessitates dismissal of their claims. *See, e.g., Eastwood v. Nat'l Bank of Commerce,*

Altus, Okl., 673 F. Supp. 1068, 1081 (W.D. Okla. 1987) (dismissing fraud claim because "Plaintiffs have failed to allege any specific misrepresentations, omissions or other fraudulent acts made or done by this Defendant, much less the time, place and substance of the fraudulent acts by this Defendant and what was obtained or given up as a consequence, as required by Rule 9(b)."); *Gianfillippo,* 1993 OK 125, ¶ 13, 861 P.2d 308, 311 (affirming trial court's dismissal of plaintiffs' claims for fraud noting the allegations "fail to specify the time, place, and content of the alleged false representations.").

c. Plaintiffs Have Pled No Facts to Support a Claim to Damages

Plaintiffs assert that their claim to damages is "not a complex damages theory" because "[i]f a seller defrauds you into the purchase of a worthless item, you get your money back." Pl. Opp. at 14. Although Plaintiffs argue that by merely asserting fraud they are entitled to a legal assumption that they have sustained damages, Plaintiffs cite no law, authority, or precedent to support their theory. There is none. No authority supports Plaintiffs' "we said fraud" theory of damages.

Instead, a review of applicable precedent –authorities that Defendants cite in their motion to dismiss (*see* Def. Mot. at 38-39)—reveals that damages constitutes a *necessary* element that Plaintiffs must affirmatively plead to sue out a claim for fraud in Oklahoma. *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."). That is, as "the party bringing the action," Plaintiffs cannot merely say they were defrauded, instead, they must plead facts "to show [they were] 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.

As Defendants note in their motion, Plaintiffs have not pled any facts to demonstrate they suffered damages as a result of any alleged misrepresentation. *See* Def. Mot. at 38-39. This is not, as Plaintiffs retort, a "canned dissertation" (Pl. Opp. at 14), but rather, it is a basic requirement of Oklahoma law. Plaintiffs failure to plead facts—or even explain the missing facts in their opposition—renders their claims for fraud invalid as a matter of law. Accordingly, their claims must be dismissed.

d. Plaintiffs Have Failed to Plead Constructive Fraud Because Plaintiffs Do Not Allege Defendants Owed Them any Duty

Defendants, in their motion to dismiss, further noted that Plaintiffs' claims of constructive fraud fail as matter of law because Plaintiffs' Petition contains *no* allegations that the Defendants owe legal or equitable duties to them. *See* Def. Mot. at 42. Nor could they, as their relationship does not give rise to a "special" or "fiduciary" relationship under Oklahoma law. *See Silver*, 1988 OK 53, n. 11, 770 P.2d at 882 (concluding that constructive fraud requires "a breach of some legal or equitable duty."); *Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Props., Ltd.,* 740 F. Supp. 1553, 1570 (W.D. Okla. 1989) (Constructive fraud "requires the existence of a fiduciary duty, or a duty based upon a confidential relationship.").

Plaintiffs have offered no response.[3] Accordingly, Plaintiffs' claims for constructive fraud must be dismissed. Indeed, Plaintiffs' silence on a critical element necessary to establish their constructive fraud claim only underscores the frivolous nature of their claims.

[3] Plaintiffs have waived their arguments on constructive fraud. *See Rouse*, 2015 OK 7, ¶ 2, 345 P.3d 366 ("Parties waive issues by failing to brief them.").

e. Plaintiffs Have Not Pled Conspiracy

Plaintiffs' defense of their conspiracy claim amounts to nothing more than the repetition of the adage that this Court "must assume the truth of the pleadings" in their Petition. Pl. Opp. at 12, n. 10. Oklahoma law, however, does not allow courts to accept as true allegations that formulaically recite a claim's legal elements, particularly where plaintiffs fail to provide the "specific facts" to satisfy the elements. *See Hitch Enters., Inc.*, 859 F. Supp. 2d 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.") (emphasis added).

Further, the Court cannot assume the Red Eagle Feather and TeraDact Defendants conspired with Defendants Leese and Petre simply because Plaintiffs used the word "conspiracy" in their pleadings. Merely stating that Defendants "conspired" fails to allege a conspiracy under Oklahoma law because Plaintiffs must allege specific acts taken by Defendants "in furtherance of the alleged conspiracy or an agreement with other Defendants to defraud Plaintiffs, the time and place of the agreement and the substance thereof." *Eastwood*, 673 F. Supp. at 1081. Here, Plaintiffs' Petition is 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. *See id*. Consequently, Plaintiffs' conspiracy claims fail as a matter of law.

II. Plaintiffs' Claims for Violations of the Oklahoma Securities Act Fail as a Matter of Law

Attempting to save their securities fraud claims, Plaintiffs go to great lengths to deter this Court from considering the federal district court's analysis in *Lillard v. Stockton,* 267 F. Supp. 2d 1081 (N.D. Okla. 2003), asserting that *Lillard* is inapposite because the case "involves an

application of the federal Private Securities Litigation Reform Act ('PSLRA'), a highly pro-defendant statute passed by Congress in 1995." Pl. Opp. at 14. Plaintiffs further assert that the PSLRA is "a heightened pleading standard on steroids" and further, that "Oklahoma has no PSLRA or the equivalent thereof." *Id.*

Plaintiffs are simply wrong about *Lillard*'s inapplicability. The *Lillard* Court in fact was analyzing an alleged violation of the Oklahoma Securities Act under the standard articulated by the Oklahoma Supreme Court in *Gay v. Akin*, a case Plaintiffs rely on.[4] *See Lillard*, 267 F. Supp. 2d at 1110; *see also* Pl. Opp. at 8-9, 13, 18. *Lillard* relied on the Supreme Court's decision in *Gay* to conclude that "[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.* at 1111 (citing *Gay,* 1988 OK 150,¶ 8, 766 P.2d 985, 990; 12 Okla. Stat. § 2009(B) (2001)).[5]

Although Plaintiffs attempt to create a distinction between Fed.R.Civ.P. 9(b) and Oklahoma's fraud pleading standard, § 2009(B), Oklahoma courts have made clear no such distinction exists. *See Gianfillippo*, 1993 OK 125, ¶ 11, 861 P.2d 308, 310 ("In section 2009(B), Oklahoma adopted the federal rule verbatim."). In fact, in evaluating a claim under an Oklahoma law (the Oklahoma Securities Act), the *Lillard* Court followed the clear instructions provided by the Oklahoma Supreme Court. *See Lillard*, 267 F. Supp. 2d at 1111. And like the allegations in

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[4] *See also Lillard*, 267 F. Supp. 2d at 1110 ("The undersigned finds that Plaintiffs' claims of securities fraud in violation of 71 Okla. Stat. § 408(a)(2) [Oklahoma Securities Act], actual fraud, and constructive fraud lack the particularity required under Fed.R.Civ.P. 9(b), and recommends that the District Court **GRANT** Defendants' motions to dismiss Plaintiffs' state law securities fraud claims.").

[5] *Lillard* noted that the Oklahoma Securities Act "Section 101 is the Oklahoma corollary to § 10(b) of the 1934 federal Act and SEC Rule 10b–5." 267 F. Supp. 2d at 1110 (N.D. Okla. 2003) (citing Frederic Dorwart and David W. Holden, *An Overview of the Oklahoma Securities Act,* 25 Okla. L.Rev. 184, 185–86 (1972)).

Lillard, Plaintiffs' blanket and conclusory allegations fail here because they "lack specificity as to the time, date, place, facts, and materiality of the allegations." *Id*.

Plaintiffs' argument that the Oklahoma Securities Act imposes vicarious liability on defendants that are not the direct sellers of securities (*see* Pl. Opp. at 15) bears no relevance at this stage in the proceedings. Plaintiffs have not sufficiently alleged a cause of action under the Oklahoma Securities Act, precluding the existence of any aider and abettor liability. *See Howard*, 2011 OK CIV APP 85, ¶ 22, 259 P.3d 850, 857 ("Absent the establishment of prerequisite liability by a primary offender, no liability may attach for aiding and abetting under § 1–509(G).").

Finally, Plaintiffs' inability to establish the requisite reliance as a matter of law necessitates dismissal of their claims under the Oklahoma Securities Act. For this reason, and the reasons discussed above, Plaintiffs' claims against Defendants should be dismissed.

III. Plaintiffs' Claims for Negligent Misrepresentation Must be Dismissed

In Defendants' motion to dismiss (Def. Mot. at 48-50), Defendants note that Plaintiffs' claims must be dismissed because Plaintiffs have pled no facts to demonstrate their "justifiable reliance" on the alleged misrepresentations, nor have Plaintiffs pled facts to assert Defendants owe them a "cognizable duty" under the law; both constitute elements that Oklahoma law requires to establish negligent misrepresentation. *See* Def. Mot. at 48-49; *see also Bank of Oklahoma, N.A. v. PriceWaterhouseCoopers, L.L.P.*, 2011 OK CIV APP 56, ¶ 12, 251 P.3d 187, 190 (a plaintiff must plead facts sufficient to show they suffered a "pecuniary loss caused to them by their *justifiable reliance* upon the information" provided by Defendants) (emphasis added); *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."). Plaintiffs, in their opposition, do not even attempt to

respond. Plaintiffs offer a blanket statement that they "have pleaded every element of a negligent misrepresentation claim" (Pl. Opp. at 17) but they do not offer a single sentence to explain how the facts in their Petition are sufficient to establish justifiable reliance and the existence of a duty that Defendants owed Plaintiffs. For the reasons articulated in Defendants' motion (Def. Mot. at 48-50), and because Plaintiffs did not even offer a response, Plaintiffs' claims for negligent misrepresentation should be dismissed.[6]

Plaintiffs do reference the Oklahoma Supreme Court's decision in *Stroud* to assert that the Oklahoma Supreme Court recognizes negligent misrepresentation as a cause of action. *See* Pl. Opp. at 16 (citing *Stroud v. Arthur Andersen & Co.*, 2001 OK 76, ¶ 34, 37 P.3d 783, 793-94). Merely referencing *Stroud*, however, does nothing to fill in the gaps in Plaintiffs' Petition with regards to justifiable reliance and the absence of any cognizable duty.[7]

Plaintiffs' failure to respond to or address the legal deficiencies in their Petition is dispositive. Plaintiffs' claims for negligent misrepresentation should be dismissed.

IV. Plaintiffs' Claims Have Expired Under Oklahoma's Statutes of Limitations

Plaintiffs, as the masters of their own Petition, have the privilege of telling their own story. But once alleged, Plaintiffs cannot escape the reality of the facts they have pled. That is, although this Court is obligated to take Plaintiffs' alleged facts as true, this Court is not required—nor does it have the authority to—invent additional facts to breathe life into claims that have, as a matter of law and according to the facts in Plaintiffs' Petition, already expired.

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[6] Plaintiffs have waived their arguments on negligent misrepresentation. *See Rouse*, 2015 OK 7, ¶ 2, 345 P.3d 366 ("Parties waive issues by failing to brief them.").

[7] *Stroud* is of no help to Plaintiffs since in contrast to the plaintiffs in *Stroud*, Plaintiffs have made *no* allegations that Defendants owed them a duty of care (or *any* duty for that matter) or that their reliance on Defendants' representations were therefore justifiable. They cannot. As the Court in *Farley* concluded, where a subsequent Subscription Agreement—such as the one Plaintiffs acknowledge they signed here (Pet. ¶ 20)—contradicts written or oral promises, reliance on the written or oral promises is not justified as a matter of law. *See Farley*, 2015 WL 3866836, at *7.

See Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008); *Robinson v. Clark*, 2009 OK CIV APP 56, ¶ 11, 217 P.3d 155, 158. When considered as a whole, the facts Plaintiffs have pled—and the Plaintiffs' facts alone—demonstrate that Plaintiffs' claims have expired under Oklahoma's statutes of limitations.[8]

a. Plaintiffs' Own Facts Demonstrate Their Claims Have Expired

According to the facts in Plaintiffs' Petition, the alleged fraudulent conduct all took place in the summer of 2010, more than five years ago. Because all of Plaintiffs' claims are subject to a two-year statute of limitations, as a matter of law, Plaintiffs' claims are untimely and must be dismissed. *See* Def. Mot. at 51-53.

Plaintiffs assert their expired claims are saved by equitable tolling, but the Oklahoma Supreme Court has made clear that the discovery rule in equitable tolling only re-starts the clock from the date that Plaintiffs "could have or should have [] discovered" the fraud or negligent misrepresentation they allege took place. *McCain v. Combined Commc'ns Corp. of Oklahoma*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867 (concluding for purposes of equitable tolling, the requisite wrongful act that re-starts the clock "is deemed discovered when, in the exercise of reasonable diligence, it could have or should have been discovered."); *see also Daugherty v. Farmers Co-op. Ass'n*, 1984 OK 72, ¶ 12, 689 P.2d 947, 951 ("A plaintiff is chargeable with knowledge of

[8] To be sure, Oklahoma courts routinely grant defendants' 12 Okla. Stat. § 2012(B)(6) motions (or their Rule 12(b)(6) federal equivalent) and dismiss claims where the Plaintiffs' Petition demonstrates that the claims are time-barred. *See, e.g., McCarty v. Gilchrist*, No. CIV 07-1374-C, 2008 WL 506283, at *1 (W.D. Okla. Feb. 22, 2008) ("Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss."); *see also Billinger v. Weinhold*, 531 Fed.App'x 928, 929 (10th Cir. 2013) ("Although the statute of limitations is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss 'when the dates given in the complaint make clear that the right sued upon has been extinguished.'"). It is not a "rare" occurrence, as Plaintiffs allege.

facts which he ought to have discovered in the exercise of reasonable diligence.") (internal quotation marks and citations omitted).

First, Plaintiffs are not entitled to equitable tolling unless their Petition contains sufficient facts to demonstrate Plaintiffs "pursued [their] claims with reasonable diligence." *Young v. Davis*, 554 F.3d 1254, 1258 (10th Cir. 2009) (internal quotation marks and citations omitted). Plaintiffs have pled *no* facts to demonstrate any actions they undertook to pursue their claims with *any* diligence—let alone the requisite "reasonable diligence" required under Oklahoma law. *See id.* This alone supports the dismissal of their claims.

Second, even if Plaintiffs had alleged facts to demonstrate how they diligently pursued their claims—they have not—equitable tolling does not toll their claims indefinitely. Instead, the "could have or should have been discovered" standard takes Plaintiffs to December 2011, and no further. *See McCain*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867. Consequently, their claims expired, permanently, by the end of December 2013.[9]

This expiration is the result of the facts Plaintiffs themselves have pled in their 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. Thus, according to the story Plaintiffs have elected to tell, Plaintiffs should have known that fraud was afoot in December of 2011, when their

[9] Plaintiffs seek to combat an assertion that Defendants do not make – that a plaintiff is required to negate an affirmative defense in the petition. *See* Pl. Opp. at 17-18. They point to a Seventh Circuit case, *Clark v. City of Braidwood*, 318 F.3d 764 (7th Cir. 2003), that correctly notes that although "a plaintiff is not required to negate an affirmative defense in his complaint, . . . *a plaintiff can plead himself out of court if he alleges facts that affirmatively show that his suit is time-barred*." *Id.* at 767 (emphasis added). In the present case, the facts Plaintiffs have pled facts that affirmatively show their claims are time-barred, and consequently, Plaintiffs have "ple[d] [themselves] out of court." *Id.*

expectation that they would receive such a payment (Pet. ¶ 33) was shattered and they received no return on their investment for the entire year of 2011. *See McCain*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867; *see also Daugherty v. Farmers Co-op. Ass'n,* 1984 OK 72, 689 P.2d 947, 951 ("[P]laintiff cannot successfully set up a bar to the running of the statute if his failure to discover it is attributable to his own negligence.") (internal quotation marks and citations omitted).

In their opposition, Plaintiffs offer no alternative dates or explanations for when, based on the facts alleged in their Petition, they could have or should have discovered the fraud they alleged took place. There is *no* question that Plaintiffs' claims fall far outside Oklahoma's two year statutes of limitations for fraud, negligent misrepresentation, and Oklahoma Securities Acts violations, for as explained above, the barebones facts found in Plaintiffs' Petition all center around the summer of 2010, events that took place more than *five years* ago. If Plaintiffs cannot discern the date of discovery from the facts pled in their Petition, they cannot expect Defendants—or this Court—to ascertain when Plaintiffs claim to have "discovered" the fraud they now alleged occurred. Plaintiffs' inability to articulate when they discovered the fraud they allege occurred only underscores the truly frivolous nature of their claims.

Plaintiffs have a more serious problem. In cases similar to the one presently before the Court, courts have concluded that Oklahoma's statute of limitations begins to toll on the day the investor signs the investment agreement, if and when plaintiff alleges defendant's misrepresentations contradicted that written agreement. *See Farley*, 2015 WL 3866836, at *13 (concluding Plaintiff's claims had expired because "the Subscription Booklet and Memorandum [] directly contradict[ed] Defendants' alleged misrepresentations in the period leading up to Plaintiff's investment . . . and [a]s a result, as of the date Plaintiff received the Memorandum and Subscription Booklet, he is deemed to have known of Defendants' alleged misrepresentations.").

In this case, the Subscription Agreement directly contradicts any and all references to misrepresentations in Plaintiffs' Petition. *See* Pet. ¶ 20; Fain Aff. Ex. 3 (June Subscription Agreement) §§(B)(1)(b)(iii), (B)(1)(c)). Moreover, Plaintiffs signed this agreement on August 31, 2010. *See* Pet. ¶ 20. Accordingly, "the statute of limitations for Plaintiff[s'] cause of action beg[ins] to run" on August 31, 2010, the date "when [they] discover[ed], or in the exercise of reasonable diligence should have discovered, that [they] purchased interests [] by means of Defendants' misrepresentations." *Farley*, 2015 WL 3866836, at *13 (citing *Horton v. Hamilton*, 2015 OK 6, ¶ 12, 345 P.3d 357, 362). Because the Plaintiffs' allegations of Defendants' misrepresentations did not align with the actual representations in the subscription booklet that Plaintiffs received and signed in August 2010, and because the Oklahoma Uniform Securities Act "charge[s] [Plaintiffs] with knowledge of the information contained with [a] . . . Subscription Booklet," the statute of limitations began to toll when plaintiff signed a written agreement that did not conform to the misrepresentations plaintiff alleges defendant made. *Id.* at *14. That date was August 31, 2010. Plaintiffs' claims have expired under Oklahoma law and, as a result, should be dismissed.

b. Oklahoma's Statutes of Limitations Serve to Protect Defendants

To be sure, the Oklahoma legislature did not create its statutes of limitations to be draconian, but rather, "[t]he Legislature intended that a defendant be given timely notice of a claim so that [the Defendant] can preserve [] evidence and adequately prepare his defense." *Crain v. TRW/REDA Pump*, 1990 OK 63, ¶ 5, 794 P.2d 757, 758. That is, 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.

These concerns are entirely appropriate here where Plaintiffs have filed a skeleton Petition that provides Defendants with little to no guidance as to what Defendants did, when, and where, or how that alleged conduct could constitute fraud as a matter of law—and furthermore, Plaintiffs claim that any records they once maintained pertaining to the fraud they claim occurred have long since been inexplicably destroyed. *See* Pet. ¶ 36; *see also Daugherty v. Farmers Co-op. Ass'n*, 1984 OK 72, ¶ 12, 689 P.2d 947, 951 ("Statutes of limitation were not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by the facts.") (internal quotation marks and citations omitted). Thus, the facts pled—and the facts *not* pled—in Plaintiffs' Petition demonstrate that Plaintiffs have been "neglectful of their rights, and [] fail[ed] to use reasonable and proper diligence in the enforcement thereof." *Crain*, 1990 OK 63 ¶ 5, 794 P.2d 757, 758. Under Oklahoma law, "[t]hose who refrain from pursuing inquiries plainly suggested by the facts will not be extended the benefit of a rule which would toll the applicable statutes of limitations." *Kinzy v. State ex rel. Oklahoma Firefighters Pension & Ret. Sys*., 2001 OK 24, ¶ 11, 20 P.3d 818, 823 (internal quotation marks and citations omitted).

In sum, nothing in Plaintiffs' Petition supports the argument that Plaintiffs could not have, or should not have, discovered what they allege to be fraud (and/or negligent misrepresentation) by the conclusion of 2011. Accordingly, their claims have expired as a matter of law and must be dismissed.

V. Oklahoma Law Allows Defendants to Attach the Documents Plaintiffs Cited and Incorporated in Their Petition

Plaintiffs cannot, as a matter of law, preclude this Court from considering the documents Defendants filed as exhibits to the Fain Affirmation. Plaintiffs refer to these documents as "outside the pleadings"—however, a review of Plaintiffs' Petition reveals that *all* of the eight Fain Affirmation Exhibits are cited, quoted, and/or incorporated by reference into Plaintiffs'

Petition. Indeed, Defendants' motion to dismiss identified each document's reference, citation, or incorporation in Plaintiffs' Petition, as well as the authority that supports each document's attachment as an exhibit at this stage in the proceedings.[10] Nothing in Plaintiffs' opposition denies that the Plaintiffs' allegations cite, reference, or incorporate the Fain Affirmation Exhibits. *See* Pl. Opp. at 2-6. Accordingly, there is no basis, under the law, for Plaintiffs to protest their inclusion.

To be sure, the Fain Affirmation Exhibits are more than appropriate for consideration on a motion to dismiss, and their inclusion does not—contrary to Plaintiffs' attempts to assert otherwise—transform Defendants' motion into one for summary judgment. *See 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.") (emphasis added). Because Plaintiffs relied on the Fain Affirmation Exhibits in drafting and filing their Petition, they cannot prevent Defendants from relying on those very same documents when defending themselves from the false allegations made in the very same Petition.

According to the Oklahoma Supreme Court, 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*." *Gaylord Entm't Co. v.Thompson*, 1998 OK 30, n. 10, 958 P.2d 128, 136. (emphasis added). The Oklahoma Supreme Court has gone farther and held that Defendants may

[10] *See* Def. Mot. at 7 n.3 (Fain Aff. Ex. 1) (citing Pet. ¶ 17); Def. Mot. at 12 n.9 (Fain Aff. Ex. 2) (citing Pet. ¶ ¶ 19, 25); Def. Mot. at 13 n.10 (Fain Aff. Ex. 3) (citing Pet. ¶¶ 20, 22, 29); Def. Mot. at 14 (Fain Aff. Ex. 4) (incorporated within Fain Aff. Ex. 3); Def. Mot. at 16 n.12 (Fain Aff. Ex. 5) (citing Pet. ¶ 23); Def. Mot. at 18 n.13 (Fain Aff. Ex. 6) (citing Pet. ¶ 21, Ex. A); Def. Mot. at 19 n. 14 (Fain Aff. Ex. 7) (citing Pet. ¶ 21); Def. Mot. at 20 n.15 (Fain Aff. Ex. 8) (citing Pet. ¶ 23).

also attach documents that were *not* included in Plaintiffs' Petition, but instead are found to be "pertinent" and "integral" to the Petition. *See, May v. Mid-Century Ins. Co.,* 2006 OK 100, n. 30, 151 P.3d 132. Specifically, the Oklahoma Supreme Court has held:

> 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.

Id. Defendants' submission of an exhibit that is both pertinent and integral to the claims Plaintiffs have articulated in their Petition is therefore "not considered a reliance on extraneous materials so as to require the recasting of the dismissal motion into one for summary judgment." *Id.* (citing *Gaylord*, 1998 OK 30, n.10, 958 P.2d 128).

Likewise, to the extent Plaintiffs wish to attack Defendants' citations to information found online, such attacks are unfounded and unsupported by the law. Courts routinely take judicial notice of information found on the world wide web. *See O'Toole v. Northrop Grumman 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 citing to the almanac's website). Moreover, in securities cases, courts routinely allow for the consideration of publicly filed documents related to the company at issue in the plaintiff's petition. *See, e.g.*, *S.E.C. v. Shields*, 744 F.3d 633, 636-37 (10th Cir. 2014) ("In a securities case, we may consider, in addition to the complaint, documents incorporated by reference into the complaint, public documents filed with the SEC, and documents the plaintiffs relied upon in bringing suit.").

Finally, citations to law, statutes, and/or constitutions do not transform Defendants' motion to dismiss into one for summary judgment because, under Oklahoma, law, sources of law are always 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.").

In sum, Plaintiffs' Petition cites, incorporates, and references a handful of documents (eight to be exact) that are both integral and pertinent to the claims made in the Petition. Although Plaintiffs wish to selectively quote and cite from these documents in forming their allegations, Oklahoma law permits Defendants to attach the actual documents in whole for this Court's consideration. Plaintiffs have provided no authority or precedent that requires the Court to ignore the actual documents cited and incorporated in Plaintiffs' Petition, and consequently, Plaintiffs' request that Defendants' motion to dismiss be converted into a motion for summary judgment fails as a matter of law.[11]

VI. The Transfer of all Claims Against Defendants to Osage Nation Courts Would Best Serve the Public Interest

Because it is clear that the Osage Nation Courts have jurisdiction over the instant litigation, and because a transfer to Osage Nation would best serve the public interest, this Court

[11] Finally, Plaintiffs' attempt to convert Defendants' inclusion of exhibits into a discovery dispute is wholly without merit. Plaintiffs assert that the Fain Affirmation Exhibits are "documents [that] Plaintiffs have already requested" but Defendants have refused to produce. Pl. Opp. at 5. Plaintiffs' discovery requests, however, are irrelevant to Defendants' motion to dismiss as this Court has made clear that all discovery is stayed until and after this Court's consideration of Defendants' motion. Furthermore, Plaintiffs have provided no argument, reason, or factual basis to support the notion that these documents are not already in Plaintiffs' possession. Indeed, Plaintiffs openly admit their possession of these documents when they cite, reference, and incorporate statements from them into their Petition. *See, e.g.,* Pet. ¶ 25 (stating Plaintiffs have received and have in their possession Fain Aff. Ex. 2 (2012 Annual Report); Pet. ¶ 23 (noting that Fain Aff. Exs. 5 and 8 are in Plaintiffs' possession). Moreover, many of the Fain Affirmation Exhibits constitute legally binding agreements that Plaintiffs signed and agreed to abide by when they entered into the Subscription Agreement referenced in ¶¶ 20, 22, and 29 of Plaintiffs' Petition. Plaintiffs do not need discovery to gain access to legally binding documents that they themselves executed.

should exercise its discretion and grant the requested transfer.

To be clear, Defendants do not question the jurisdiction or fairness of the Osage County Court. Rather, Defendants remain concerned that Plaintiffs' empty, baseless claims were driven by internal Osage politics; this concern compels Defendants to urge that Plaintiffs' claims be considered by the courts closest to the parties and dispute. Indeed, Osage Nation's unfathomable opposition to its own jurisdiction contradicts both Federal and Osage law.

a. Federal and Osage Law Affirm the Jurisdiction of Osage Nation Courts over the Nation and OLLC's Claims

Plaintiffs are simply wrong when they assert that "a Tribe's jurisdiction . . . does not extend beyond the Tribe's enrolled membership." Pl. Opp. at 20. Plaintiffs cite no authority to support this proposition. Instead of limiting tribal jurisdiction to enrolled members, the Supreme Court has confirmed that "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." *Montana v. United States*, 450 U.S. 544, 565 (1981); *see also Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) (A Tribal Nation's inherent jurisdiction "over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.") (citing *Montana*, 450 U.S. at 565-66 (1981)). "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***." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added).[12] It is clear that the jurisdiction of Osage Nation Courts is not limited to disputes arising between and/or concerning enrolled tribal members.

[12] Plaintiffs and Defendant Petre's reliance on *Strate v. A1 Contractors*, 520 U.S. 438 (1997) is misplaced. *See* Pl. Opp. at 20; Petre Opp. at 8. *Strate* involved a non-Indian plaintiff and non-Indian defendants and the "injury" at issue was a car accident that "arose between two non-Indians involved in

In fact, the Nation's argument violates the Nation's Constitution. The Osage Constitution provides that the Nation's courts maintain broad subject matter jurisdiction, specifically that:

> The jurisdiction of the Osage Nation 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.

Osage Const., art. II, § 2. The Osage Nation Code likewise affords the Osage Judiciary broad subject matter jurisdiction, stating that the "jurisdiction of the Osage Nation Courts shall extend over all persons, subjects, property, and all activities that occur within the territory and over all Osage citizens, subjects, property and activities outside the territory affecting the rights and laws of the Osage Nation." ONCA 15-09, amending 5 ONC § 1-105(A). Further, the Osage Nation courts can recognize and apply claims that sound in tort law; as the Osage Nation law makes clear, if no controlling or applicable Osage Nation law exists, Osage Nation Courts will apply "the law of the state in which the matter in dispute lies." *See* 3 ONC § 1-101(C) ("Any matters that are not covered by the traditional customs and usages of the Nation, or by applicable federal law and regulations, or by applicable Osage Nation law shall be decided by the Court, *according to the law of the state in which the matter in dispute lies*.") (emphasis added). In the present case, this would be the law of Oklahoma. Remarkably, Plaintiffs do not cite to, or explain their divergence from, the Osage Nation Constitution and Osage Code.

Nor could they. The Nation's Executive Branch is not the final authority on the interpretation of the Osage Constitution. Instead, that power lies with the Osage Judiciary. *See* Osage Const. art. VIII, § 1 ("The *judicial branch* shall be responsible for interpreting the laws of

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[a] run-of-the-mill [highway] accident," which was "distinctly non-tribal in nature." 520 U.S. at 457. In contrast, the present case involves Indian plaintiffs, an Indian defendant, the management of a tribally owned and operated business with its principal place of business on the reservation, and the management of tribal funds in compliance with tribal law.

the Osage Nation . . . .") (emphasis added). And according to the Osage Nation Courts, "[t]he [Osage Nation] Trial Court shall have original jurisdiction . . . over all cases and controversies arising under the Constitution, laws, and customs and traditions of the Osage Nation." *Gray v. Mason*, SPC-2008-01, at *8 (Dec. 11, 2009). Plaintiffs, therefore, cannot unilaterally strip their own courts of subject matter jurisdiction because a court's "power [is] authorized by Constitution and statute," (*Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994))—and *not* by Executive Branch decree. Consequently, until the Osage Congress passes legislation, or until the Nation effectuates an amendment to its Constitution, the Osage Nation Courts will continue to exercise the subject matter jurisdiction afforded the Nation's Judicial Branch of government in the Osage Nation Constitution.

b. Osage Nation Courts May Exercise Jurisdiction over Leese and Petre under *Montana*'s First Category of Tribal Jurisdiction

Leese's and Petre's employment with the OLLC constitutes a "consensual relationship" under *Montana*'s first category that vests the Osage Nation Court with jurisdiction over the Nation's claims against them. *See Montana*, 450 U.S. at 565 (noting that Tribal Governments maintain civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). That is, Osage Nation Courts may exercise jurisdiction over Leese and Petre as a result of "the existence of a consensual employment relationship" between both men and the Nation (specifically, the OLLC). *MacArthur v. San Juan Cty*., 497 F.3d 1057, 1071-72 (10th Cir. 2007).

Defendant Petre challenges the existence of the requisite consensual relationship, asserting that he was never employed by "Osage Nation." Petre Opp. at ¶ 3. Under Osage

Nation law, however, Petre and Leese's employment with the OLLC rendered them employees of the Osage Nation. The Osage Nation Limited Liabilities Companies Act provides that:

> The LLC's established under Sections 2–911 and 2–912 of this Title shall be considered to be instrumentalities of the Nation, *and their officers and employees considered officers and employees of the Nation,* created for the purpose of carrying out authorities and responsibilities of the Osage Nation government for economic development of the Nation and the advancement of its members. . . ."

4 ONC § 2-913 (emphasis added). Leese's and Petre's consensual relationship with the OLLC—an entity created by Osage law and wholly owned by Osage Nation—rendered them employees of the Nation under Osage law.[13]

Defendant Leese further attempts to geographically parse his way out of jurisdiction, asserting that "Leese was not employed within the physical confines of the reservation," and therefore the Osage Nation Courts are without jurisdiction concerning his employment with the Nation. *See* Leese Opp. at 6. Osage law, however, does not place the OLLC's business outside the legal "confines of the reservation" and instead provides that:

> The principal office of the [OLLC] shall be 627 Grandview, Pawhuska, OK 74056. The Company may locate additional places of business and registered office at any other place or places as the Manager may from time to time deem advisable provided that *the principal office shall remain within the exterior boundaries of the Osage Nation Reservation.*

[13] In this regard, Plaintiffs' reliance on the Tenth Circuit's decision in *Stidham* is unavailing. *See* Pl. Opp. at 20-21 (citing *Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2011)). The Court in *Stidham* concluded that the Muscogee Creek Nation Court was attempting to exercise jurisdiction over the non-Indian defendants whose consensual relationship with the tribe (membership in the Creek Nation Bar) had no bearing on or relation to the actual dispute over which the Court exerted its jurisdiction. *See Stidham*, 640 F.3d at 1152. In contrast, Leese's and Petre's consensual relationship with the Osage Nation (their employment with the OLLC) constitutes the actual dispute over which the Osage Nation Court will be exercising its jurisdiction. *Stidham* does not support the Nation's opposition to its own jurisdiction.

Fain Aff. Ex. 1 (ONCR 08-09, referencing by Exhibit the OLLC Articles of Operation) art. II, § 2.3 (emphasis added). As manager and Chief Executive Officer (Leese), and as treasurer and Chief Financial Officer (Petre), of a company whose principle place of business is located within the boundaries of the Osage Nation, neither Leese nor Petre can claim to have had a reasonable legal expectation that their employment existed outside of "the physical confines of the reservation," and consequently, Osage Nation may exercise jurisdiction over both defendants as a result of their "consensual employment relationship" with the Tribe. *MacArthur*, 497 F.3d at 1071-72.[14]

c. In the Alternative, this Court Should Bifurcate Plaintiffs' Claims

While it is clear that the Judicial Branch of the Osage Nation Government has and may exercise jurisdiction over the claims brought by the Executive Branch in this action—and although it is clear that a transfer to the Osage Nation Courts will not result in prejudice to any party and will only serve the public interest—in the alternative, Defendants request this Court to bifurcate Plaintiffs' claims against the Red Eagle Feather and TeraDact Defendants from defendants Leese and Petre. Should this Court entertain any concerns about transferring the claims against Leese and Petre to the Osage Nation, this Court should transfer the Plaintiffs' claims against TeraDact and Redeagle Feather alone.

[14] Leese's argument that *McArthur* requires the denial of Defendants' motion to transfer (Leese Opp. at 6) is misplaced. *McArthur* involved enrolled tribal members who sued several defendants asserting claims arising out of their employment with the San Juan County Health District, a political subdivision of the State of Utah. *See MacArthur*, 497 F.2d at 1061. In contrast to the facts in *MacArthur*, this case involves private individuals employed by a tribal business, not state actors employed by the state. Indeed, under *MacArthur*'s reasoning, Osage Nation jurisdiction is proper because Leese and Petre were employed by a business owned and operated by Osage Nation, with its principle place of business within "the physical confines of the reservation." *MacArthur*, 497 F.2d at 1071-72.

CONCLUSION

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

Respectfully submitted,

Date: April 5, 2016

By: _____

Wilson Pipestem (OBA No. 16877)
Abi Fain (OBA No. 31370)
Joe Keene (admitted *pro hac vice*)
Pipestem Law, P.C.
320 S. Boston Ave., Suite 1705
Tulsa, OK 74103
918-936-4705 (Office)
wkpipestem@pipestemlaw.com
afain@pipestemlaw.com
jkeene@pipestemlaw.com

Attorneys for the Defendants Red Eagle Feather Distributing, LLC, Yancey Redcorn, Betsy A. Brown, NewMarket Technology Fund I, LLC, Howard C. Hill, TeraDact Solutions, Inc., and Christopher K. Schrichte

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, a copy of this Reply Brief in Further Support of Defendants' Motion to Dismiss was sent via first class mail to the following recipients:

Amanda S. Proctor
Talahina Nofire Blakestad
SHIELD LAW GROUP PLC
400 Riverwalk Terrace, Suite 240
Jenks, Oklahoma 74037
Counsel for Plaintiffs

J. David Jorgenson
G. Steven Stidham
Patrick O. Waddel
Sneed Lang, P.C.
1 W. 3rd Street, Suite 1700
Tulsa, OK 74103-3522
Counsel for Plaintiffs

Holli A. Wells
Attorney General
Osage Nation
1223 Grandview
Pawhuska, OK 74056
Counsel for Plaintiffs

John J. Carwile
Bethany N. Whitfield
McDonald, McCann, Metcalf & Carwile, LLP
15 East Fifth Street, Suite 1400
Tulsa, OK 74103
Attorneys for Defendant Robert Petre

Pansy Moore-Shrier
Matt Covert
Moore-Shrier Law Firm
624 South Boston Ave., Suite 1030
Tulsa, OK 74119
Attorneys for Defendant Carol Leese

Dated: April 5, 2016

Joe Keene