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

(1) MODOC NATION a/k/a MODOC TRIBE OF OKLAHOMA; (2) RED CEDAR ENTERPRISES, INC.; (3) EAGLE TG, LLC; (4) BUFFALO MTE, LLC; (5) TALON MTE, LLC; (6) MODOC MTE, LLC; and (7) WALGA MTE, LLC, Plaintiffs/Counterclaim Defendants, v. RUSTY BOHL, Defendant, and (1) RAJESH SHAH; (2) SHARAD DADBHAWALA; (3) SOFTEK MANAGEMENT SERVICES, LLC; (4) SOFTEK FEDERAL SERVICES, LLC; and (5) SOFTEK SOLUTIONS, INC., Defendants/Counterclaimants, v. (1) BLAKE FOLLIS, (2) TROY LITTLEAXE, AND (3) LEGAL ADVOCATES FOR INDIAN COUNTRY, LLP Counterclaim Defendants.	NO. 4:19-cv-00588-CVE-JFJ

RESPONSE IN OPPOSITION TO COUNTERCLAIM DEFENDANT BLAKE FOLLIS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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I. INTRODUCTION

Counterclaim Defendant Blake Follis ("Follis")[1] asks this Court to dismiss Defendants/Counterclaimants (collectively "Softek")'s counterclaims for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Follis' motion should be **DENIED**. Follis has been sued in his personal capacity, for garden-variety torts with no relationship to tribal governance.

Follis also submits that he is entitled to summary judgment pursuant to Fed. R. Fed. P. 56 because there is no genuine issue of material fact for trial. This motion, too, should be **DENIED,** in part.[2] Reviewing the evidence presented in the light most favorable to Softek, there are numerous genuine issues of material fact.

In the alternative, Fed. R. Civ. P. 56(f) requires that Follis' motion be denied, because Softek have not had the opportunity to discover information that is essential to their opposition.

II. LAW AND ARGUMENT[3]

A. MODOCS' FED. R. CIV. P. 12(B)(1) MOTION MUST BE DENIED.

1. Rule 12(b)(1) Standard

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction generally take one of two forms. *Stuart v. Colo. Interstate Gas Co.,* 271 F.3d 1221, 1225 (10th Cir.

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[1] According to the Modoc Tribe's newsletter, Follis and the Modoc Tribe "agreed to part ways due to differing business philosophies" on October 4, 2019. ECF No. 99-7, at 3. "Mr. Follis is no longer employed with the Nation and no longer serves in any official capacity." *Id.*

[2] Softek voluntarily dismiss their conversion claim against Follis.

[3] Softek hereby incorporates by reference the facts and evidence submitted in its Response in Opposition to Plaintiffs/Counterclaim Defendants Motion for Summary Judgment, ECF No. 97.

2001). "First, a moving party may make a facial attack on the complaint's allegations as to the existence of subject matter jurisdiction." *Id.* "In reviewing a facial attack, the district court must accept the allegations in the complaint as true." *Id.* "Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction is based." *Id.* "In reviewing a factual attack, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (quotation omitted).

Motions to dismiss based on tribal sovereign immunity are generally treated as a facial challenge on a court's subject matter jurisdiction. *Gooding v. Ketcher*, 838 F. Supp. 2d 1231, 1245-46 (N.D. Okla. 2012) (citing *Gold Bank v. Johanns,* No. 05-2239, 2005 WL 3536197, at *1 (D. Kan. Dec. 23, 2005); *Jones v. U.S. Dept. of Justice,* No. 02-2056, 2003 WL 24303731, at *1 (D. Colo. Sept. 22, 2003)).

2. The Modoc Tribe's Waiver Of Immunity Proscribes Follis' Ability To Assert Tribal Immunity.

Neither the Modoc Tribe nor its Modoc Tribal Entities ("MTE"s) are entitled to sovereign immunity.[4] First, it has been clear for nearly a decade in the Tenth Circuit that "when a tribe or tribes form an entity under the law of a different sovereign, such as a state" their sovereign immunity does not transfer, "because such entities are under the authority of the state under which they are incorporated, not an Indian tribe." *Eaglesun Sys. Prod., Inc. v. Ass'n of Vill. Council Presidents*, No. 13-0438, 2014 WL 1119726, at *8 (N.D. Okla. Mar. 20, 2014) (citing *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012)). Here, Modoc has conceded that, with the exception of the

[4] This was explained in more detail in Softek's Response in Opposition to Plaintiffs/Counterclaim Defendants Motion for Summary Judgment, ECF No. 97, at 8-11.

Modoc Tribe, each Modoc entity is chartered under state law and is not entitled to assert the Tribe's immunity.[5] And questions of fact prevent summary judgment as to whether the Modoc Tribe is also a state-chartered entity.[6]

What is more, since it was the Modoc Tribe that filed this action against Softek, and "filing a lawsuit constitutes waiver of tribal sovereign immunity," the Modoc Tribe has no sovereign immunity to assert. *In re Greektown Holdings, LLC*, 917 F.3d 451, 464 (6th Cir. 2019); *see also Miller v. Wright*, 705 F.3d 919, 925 n.2 (9th Cir. 2013) ("[A] tribe waive[s] its sovereign immunity when the tribe itself initiates or joins a lawsuit.").

Because the Modoc Tribe does not possess sovereign immunity, neither does Follis. While it is generally true that "immunity extends to tribal officials when acting in their official capacity and within the scope of their authority," here there is no sovereign immunity for the Modoc Tribe to extend. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002) (quotation omitted); *see, e.g., Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 n.6 (9th Cir. 2016). Follis' immunity—which is "derivative of the Tribe's immunity"—was waived by the Modoc Tribe. *Id.*

3. Assuming There Is Any Immunity To Assert, Follis Was Sued In His Personal Capacity And Is Therefore Not Entitled To Assert The Modoc Tribe's Immunity.

After the Supreme Court's opinion in *Lewis v. Clarke*, it is crystal clear that "'sovereign immunity does not erect a barrier against suits to impose individual and personal liability.'" *Corn v. Mississippi Dep't of Pub. Safety*, No. 19-60247, 2020 WL 1471843, at *4 (5th Cir. Mar. 26, 2020) (quoting *Lewis v. Clarke*, 137 S. Ct. 1285, 1290,

[5] ECF No. 86, at 7-8.
[6] ECF No. 97, at 9; ECF No. 99, ¶2.

(2017)). This is true even where "the tribal defendants have been sued for actions they allegedly took in the course of their official duties and even if the Tribe chooses to indemnify the tribal defendants for any adverse judgment against them." *JW Gaming Dev., LLC v. James*, 778 F. App'x 545 n.1 (9th Cir. 2019), *cert. denied*, 2020 WL 1124446 (U.S. Mar. 9, 2020); *see also Wopsock v. Dalton*, No. 12-0570, 2018 WL 1578086, at *2 (D. Utah Mar. 29, 2018) ("A tribal officer does not enjoy tribal immunity for his individual actions, even if taken under color of law.") (citing *Lewis*, 137 S. Ct. at 1292).

Here, Follis has been "sued in his personal capacity."[7] "'[O]fficers sued in their personal capacity come to court as individuals,' and the real party in interest is the individual, not the sovereign." *Lewis*, 137 S. Ct. at 1291 (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Naming a party in their individual capacity, in other words, necessarily limits the execution of any judgment obtained against that party to his or her individual assets—it cannot be collected against the sovereign. *Thornsberry v. W. Sur. Co.*, 738 F. Supp. 209, 211-12 (E.D. Ky. 1990) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)). Where this is the case, as here, "[t]he protection offered by tribal sovereign immunity" is not triggered. *Lewis*, 137 S. Ct. at 1292.

4. Follis' Tortious Conduct Not Within The Scope Of Authority Delegated To Him As "Attorney General."

Before *Lewis* made crystal clear that personal capacity suits categorically do *not* trigger tribal sovereign immunity, courts applied a "substantial party in interest" test.[8] As the court described it in *Solomon v. Am. Web Loan*:

[7] ECF No. 82, ¶13.
[8] The pre-*Lewis* authority cited by Follis, for example, applies this standard. ECF No. 77, at 8 (citing cases).

> To identify the real, substantial party in interest, one factor that the court examines is the substance of the claims stated in the complaint, positing inquiries such as whether the actions of the state officials were taken to further personal interests distinct from the [Tribe]'s interests. Other factors include: whether the unlawful actions of the officials were tied inextricably to their official duties, whether the burden of the relief would be borne by the sovereign if the official had authorized the relief at the outset, whether a judgment would be institutional and official in character so as to operate against the sovereign, and whether the official's actions were ultra vires.

375 F. Supp. 3d 638, 661 (E.D. Va. 2019).

Here, Follis submits that Softek's counterclaims arise "out of the investigation he conducted as Attorney General . . . in his official capacity delegated as Attorney General" of the Modoc Tribe.[9] According to Follis, because "there is no allegation in the Counterclaims that Follis was acting outside the scope of the authority delegated to him," Softek's "claims are thus barred by the Modocs' sovereign immunity."[10]

Apparently, Follis has a massively broad definition of what it means to conduct an "investigation" as an "Attorney General."[11] Softek has alleged, and evidenced, that:

> Follis demanded to use the resources of one or more of the MTEs—including the time of contracted personnel on military bases working on legitimate, income-generating enterprises—to benefit his personal, failed fantasy sports operation. When Softek and others objected to Follis's scheme . . . Follis retaliated, interfered with Softek's good faith endeavors to meet its contractual obligations, [and] fabricated a false narrative that Softek had defrauded Modoc and the MTEs . . . .[12]

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[9] ECF No. 77, at 8.
[10] *Id.*
[11] Softek has not seen the results of any alleged "investigation," is not aware of the methods or sources used to conduct the alleged "investigation," or what exactly this alleged "investigation" revealed or to whom. ECF No. 99, ¶ 18. In fact, by Modoc's own admission, this alleged "investigation" resulted in no evidence of wrongdoing—at least not enough to make a *prima facie* case, even when viewed in a light most favorable to Modoc. *See generally* ECF No. 92; ECF No. 96.
[12] ECF No. 82, ¶¶ 32-33.

At this point—utilizing the MTEs and with assistance from Counterclaim Defendant Troy Littleaxe—Follis "acted in a concerted action to push Softek out of its role with the MTEs" so that he and his co-conspiring Counterclaim Defendants could keep Softek's profits and management fees for themselves.[13]

There was no "investigation."[14] The tortious action evidenced by Softek is not by any stretch of the imagination tied to Follis' duties as so-called "Attorney General."[15] *Solomon*, 375 F. Supp. 3d at 661. These actions were taken to further Follis' own personal interests, distinct from the Modoc Tribe's interests. *Id.*

Were the fact that Follis was sued in his "personal capacity" not dispositive under *Lewis* (it is), his effort to seek shelter under the Modoc Tribe's immunity pursuant to the pre-*Lewis* "substantial party in interest" test fails.

5. *Williams v. Lee* Is Not Applicable Here.

The case against Follis involves state-chartered corporations, managed by other state-chartered corporations, that Follis chose to injure for his personal benefit. It involves nation-wide business relationships and projects executed throughout the Country, including in Oklahoma and on military bases that constitute the "territorial jurisdiction of the United States." 18 U.S.C. § 7. Yet Follis submits that "state laws are not enforceable"

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[13] *Id.* ¶45.

[14] ECF No. 99, ¶ 18. This is made abundantly clear by the fact that Modoc cannot point to a single shred of evidence to substantiate the claims made in their Complaint. ECF No. 92. "Summary judgment is the 'put up or shut up' moment in a lawsuit," *Zisumbo v. Ogden Reg'l Med. Ctr.*, No. 10-73, 2013 WL 1194717, at *9 (D. Utah Mar. 22, 2013) (quotation omitted), and Modoc cannot "put up" *any* evidence of its alleged "investigation." ECF No. 92; *see also generally* ECF No. 96.

[15] Nothing in the "Attorney General Code" (written by co-conspirer and former Softek attorney Troy LittleAxe, and signed off by Follis' grandfather), for instance, provides that the "Attorney General" is allowed to divert someone else's investment monies to a personal fantasy sports gambling operation. ECF No. 77-1, at 5-15.

against him, citing the principle that "intrusions of state law into Indian country" should be avoided.[16]

But Softek's claims against Follis do not intrude. Follis chose to commit tortious conduct against corporations and persons located in the State of California, and did so vis-à-vis acts and omissions executed throughout the Nation. "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *see, e.g., Muscogee (Creek) Nation v. Henry*, 867 F. Supp. 2d 1197, 1208 (2010), *aff'd*, 669 F.3d 1159 (10th Cir. 2012). Put another way, "tribal immunity does not extend to shield individual members from the legal consequences of their own private off-reservation activities." *Richmond v. Wampanoag Tribal Court*, 431 F. Supp. 2d 1159, 1178 (D. Utah 2006) (citing *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Cheyenne River Sioux Tribe v. State of South Dakota*, 105 F.3d 1552, 1556 (8th Cir. 1997); *Tunica–Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992)); *see also, e.g., Dep't of Health & Human Servs. v. Maybee*, 965 A.2d 55, 57 (Me. 2009). Here, *Mescalero* applies, not *Williams*. Indeed, the Modoc Tribe has conceded as much by evoking this Court's jurisdiction instead of its own. *Cf. Montana v. United States*, 450 U.S. 544 (1981). Follis' argument to the contrary is borderline frivolous.

6. Follis Is Not Entitled To Prosecutorial Immunity.

"Prosecutorial immunity bars claims for damages against a prosecutor sued in [his] individual capacity." *Blair v. Osborne*, 777 Fed. Appx. 926, 929 (10th Cir. 2019) (citing *Lewis*, 137 S.Ct. at 1291). Such immunity applies only to activities that are "'intimately

[16] ECF No. 77, at 9 (citing *Williams v. Lee*, 358 U.S. 217 (1959)).

associated with the judicial phase of the criminal process.'" *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Such immunity does not apply "when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009). As recently explained by the Tenth Circuit in *Bledsoe v. Vanderbilt* the need to draw a line between these functions to determine whether immunity applies makes one thing certain:

> [A] prosecutor's absolute immunity is not grounded in any special esteem for those who perform these functions. Rather, determining whether to grant a prosecutor absolute immunity requires courts to take a "functional approach," wherein they examine the nature of the function performed, not the identity of the actor who performed it.

934 F.3d 1112, 1117 (10th Cir. 2019).

While Follis' argument that his position as "Attorney General" with the Modoc Tribe is analogous to a state attorney general may some surface appeal, it does not withstand scrutiny when compared with the evidence adduced and viewed through the summary judgment lens. As discussed above, questions of fact abound as to whether Follis was "acting within his representative capacity, and whether he was within the scope of his delegated authority" when he undertook a purported investigation leading to this litigation. *Stock W. Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991). Viewing the evidence in a light most favorable to Softek, Follis' conduct, marshaled for his and his co-conspirers' personal benefit, is a far cry from anything that "an officer of the court" would traditionally engage in. *Van de Kamp*, 555 U.S. at 342. At best, a reasonable jury might conclude that

Follis was playing the part of "an investigator"[17]—which is still not a function "connected with a prosecutor's role in the judicial proceedings." *Quiroz v. Licalsi*, No. 03-5181, 2005 WL 3283708, at *26 (E.D. Cal. Nov. 30, 2005). Follis is not entitled to prosecutorial immunity.

7. The "Litigation Privilege" Does Not Bar Softek's Suit.

Follis submits that he is entitled to summary judgment because "the litigation privilege applies to communications made by an attorney prior to initiation of litigation."[18]

First, so what? Softek has just recently propounded discovery,[19] and is not seeking privileged communications. If Counterclaim Defendants believe otherwise, they can produce a privilege log, as required by Fed. R. Civ. P. 26(b)(5).[20]

Second, Softek's claims against Follis do not hinge on any communications or writings "made in preparation for litigation or before the Court during litigation." *JTG Ventures, LLC v. Prosperity Bank*, No. 17-464, 2019 WL 1387701, at *3 (N.D. Okla. Mar. 27, 2019); *see also Oklahoma Agents All. v. Torres*, No. 17-1343, 2018 WL 8754115, at *5 (W.D. Okla. May 4, 2018) (noting that the privilege applies only to "statements with an immediate and direct connection to either a court filing or testimony given in various types of proceedings"); *Amaretto Ranch Breedables v. Ozimals*, 790 F. Supp. 2d 1024, 1030 (N.D. Cal. 2011) (litigation privilege applies only to "communications made in a judicial

[17] *See* ECF No. 77-1, ¶3 (Follis submitting that Softek's claims "relate to purported actions during an official investigation [he] commenced in July 2019").
[18] ECF No. 77, at 10.
[19] ECF No. 98-1.
[20] Given the evidence adduced in response to Modocs' Motion for Summary Judgment, any such communications would likely fall under the crime-fraud exception, since "the purpose of the communication was to further crime or an intended fraud." *In re Grand Jury Proceedings*, 857 F.2d 710, 712-13 (10th Cir. 1988)

or quasi-judicial proceeding"). The litigation privilege stands for the proposition that "attorneys cannot be held liable for the tort of defamation when the alleged defamatory statements are made in the course of judicial proceedings." *Babb v. Eagleton*, 616 F. Supp. 2d 1195, 1207 (N.D. Okla. 2007).[21] That is not the case here. In fact, Softek's claims do not hinge on writings or communications at all. Softek are not aware of a single case where the privilege has been evoked as a bar to cases that do not rest on the alleged communication itself, such as publication in false light, defamation, slander, or disparagement. At any rate, because Follis has not identified a single communication intended "as part of any court filing, testimony or proceeding" that Softek base their claim on, the litigation privilege does not apply. *Torres*, 2018 WL 8754115, at *5.

B. FOLLIS' FED. R. 56 MOTION MUST BE DENIED BECAUSE SOFTEK HAS RAISED ISSUES OF MATERIAL FACT.

1. Rule 56 Standard

Courts may grant motions made under Rule 56 only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Id.* at 248. The issue also must be based on a viable legal theory to be "genuine." *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342, 346 (10th Cir.1986). An issue of fact is "material" if proof of it might affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 249. In effect, the inquiry on a summary

[21] The only case that Follis cites—or, copies and pastes in a blockquote, with little argument—is a defamation case. ECF No. 77, at 10-11 (quoting *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327 (Okla. 1999)).

judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

The movant's burden under Fed. R. Civ. P. 56 is to specify those portions of "'the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any,'" which demonstrate the absence of a genuine issue of fact. *Windon*, F.2d at 345 (quoting Fed. R. Civ. P. 56(c)). Summary judgment will be granted only if "the movant can show it is entitled to judgment as a matter of law based upon the uncontroverted, operative facts." *Songmaker v. Forward of Kansas*, No. 90-4156, 1993 WL 106833, at *1 (D. Kan. Mar. 5, 1993).

The party opposing a motion for summary judgment must set forth specific facts that show a genuine issue for trial remains and that are supported by the kinds of evidentiary materials listed in Rule 56(c)—*i.e.* not the allegations made in their own pleadings. *Anderson*, 477 U.S. at 250. Because its evidence is deemed true and all reasonable inferences are drawn in its favor, the opposing party need come forth with only such evidence from which a fair-minded jury could return a verdict for it. *Windon*, 805 F.2d at 346. A summary judgment motion "is not the chance for a court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences." *Songmaker*, 1993 WL 106833, at *1 (citing *Windon*, 805 F.2d at 346).

2. Follis Is Not Entitled To Summary Judgment On Softek's Conspiracy Counterclaim.

"In essence, a civil conspiracy claim enlarges the pool of potential defendants from whom a plaintiff may recover for an underlying tort." *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 148 n.85 (Okla. 1998). The claim "'consists of a combination of two or

more persons to do an unlawful act, or do a lawful act by unlawful means. . . . To be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means.'" *Batton v. Mashburn*, 107 F. Supp. 3d 1191, 1198 (W.D. Okla. 2015) (quoting *Brock v. Thompson*, 948 P.2d 279, 294 (Okla. 1998)).

Follis' argument that "Softek fails to allege any facts establishing a tortious or illegal object of the alleged conspiracy" is simply not true.[22] Softek have alleged and provided evidence that each Counterclaim Defendant agreed to and had acted in a concerted action to push Softek out of their role with the MTEs, so that the Counterclaim Defendants could keep all MTE profits and loan proceeds to themselves.[23] Specifically, Softek have evidenced that Modoc and Follis acted in a joint effort to interfere with Softek's contractual agreements with Modoc and the profitable operation of the MTEs, thereby enriching themselves with loan proceeds and profit owed to Softek.[24] Because, at minimum, Softek have evidenced that each Counterclaim Defendant unlawfully and unjustly enriched themselves—*i.e.*, kept all MTE profits to themselves—questions of fact better suited for a jury exist as to this claim. *See Kiefner v. Sullivan*, No. 13-0714, 2014 WL 2197812, at *10 (N.D. Okla. May 27, 2014) (holding that a civil conspiracy claim "is dependent on the viability of other alleged torts"); *see also, e.g., Schlottman v. Unit Drilling Co.*, No. 08-1275, 2009 WL 1657988, at *2 (W.D. Okla. June 11, 2009); *Batton*, 107 F. Supp. 3d 1191; *Thompson v. City of Shawnee, Okla.*, No. 09-1350, 2010 WL 1780314, at *2 (W.D. Okla. May 3, 2010).

[22] ECF No. 77, at 21.
[23] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; ECF No. 99, ¶ 18.
[24] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; ECF No. 99, ¶ 18.

Follis also submits that he cannot be liable for civil conspiracy because his co-conspirers created a position called the "Modoc Attorney General" and appointed him to it.[25] According to Follis, his conduct with Softek was "within the scope of representation" for the Modoc Tribe.[26] But, again, questions of fact abound as to whether Follis was "acting within his representative capacity, and whether he was within the scope of his delegated authority." *Taylor*, 942 F.2d at 664. Viewing the evidence in a light most favorable to Softek, Follis' conduct, marshaled for his own personal benefit,[27] is a far cry from anything that "an officer of the court" would traditionally engage in. *Van de Kamp*, 555 U.S. at 342.

The cases cited by Follis do not help. Follis is not being sued for "abuses in litigation" of the type "punishable by sanctions administered by the courts in which the litigation occurs." *Farese v. Scherer*, 342 F.3d 1223, 1231 (11th Cir. 2003) (quotation omitted). Follis is not being sued for "conduct within the scope of representation" of the type "regulated and enforced by disciplinary bodies established by the courts." *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999). And Follis is not being sued for "acts within the scope of his authority" as so-called "Attorney General." *Astarte, Inc. v. Pac. Indus. Sys., Inc.*, 865 F. Supp. 693, 708 (D. Colo. 1994). Viewed in a light most favorable to

[25] ECF No. 77-1, at 5.
[26] ECF No. 77, at 21.
[27] *See* ECF No. 82, ¶32 ("Follis demanded to use the resources of one or more of the MTEs—including the time of contracted personnel on military bases working on legitimate, income-generating enterprises—to benefit his **personal, failed fantasy sports operation**.") (emphasis added); ECF No. 76 ¶45 ("[W]hen Softek objected to Mr. Follis's use of MTE funds and resources to support his now-failed fantasy sports gambling scheme, Mr. Follis retaliated, interfered with Softek's good faith efforts to meet its contractual obligations, [and] fabricated a false narrative that Softek had defrauded Modoc and the MTEs . . . .").

Softek, whether Follis conspired with his co-counterclaim defendants to bilk Softek out of loan proceeds and profits owed is a question of fact.[28]

3. Follis Is Not Entitled To Summary Judgment On Softek's Intentional Interference With A Contractual Relationship, Intentional Interference With A Prospective Business Advantage, Or Unjust Enrichment Counterclaims.

"For the past seventy-five years [Oklahoma] has repeatedly protected contractual relationships between parties from unprivileged, unjustified, and inexcusable interference from one who is not a party to the contract or business relationship." *Fulton v. People Lease Corp.*, 241 P.3d 255, 264 (Okla. Ct. App. 2010) (quotation omitted). Yet Follis submits that he cannot be liable for intentional interference or unjust enrichment because Softek have failed to provide evidence of "an enforceable contract."[29] But as explained in opposition to Modocs' Motion for Summary Judgment, Softek and Modoc had entered into an oral agreement, executed in September of 2010, under which the Parties had been performing until Modoc breached the agreement last summer.[30] *See Osage Energy Res. v. Pemco*, 394 P.3d 265, 274 (Okla. Ct. App. 2016) ("[P]artial or complete performance of an oral contract . . . render[s] the contract enforceable . . . ."). In addition, Softek and Talon entered into a written contract on December 31, 2014.[31]

Follis also contends that there is no claim for intentional interference if the tortfeasor is a lawyer and one of the parties is his or her client.[32] But this is not the rule

[28] Follis' argument that Softek's conspiracy counterclaim should be dismissed because the term "upon information and belief" is used in the Second Amended Counterclaim, ECF No. 77, at 22-23, is moot in light of the Court's conversion to the summary judgment standard and the evidence proffered by Softek, *see generally* ECF No. 76; ECF No. 99.
[29] ECF No. 77, at 23, 27.
[30] ECF No. 99, ¶¶ 11-16; *see also generally* ECF No. 97.
[31] ECF No. 99, Ex. F.
[32] ECF No. 77, at 25.

when the lawyer is not acting "within the scope of authority of an attorney." *Kline v. Schaum*, 673 N.Y.S.2d 992 (N.Y. App. Term 1997). As discussed at length above, questions of fact preclude a finding that Follis was acting within the scope of authority as an attorney.

Finally, Follis argues that because Softek had no "reasonable expectation of future profits with its business dealings," Softek cannot assert a claim for intentional interference.[33] The summary judgment evidence says otherwise. According to Mr. Shah:

> [U]nder the terms of the executed oral agreement between Mr. LittleAxe and myself, Softek would incur startup and supporting operational funds for RCE, provide loans for working capital purposes, and create and operate additional entities for participation in the U.S. Small Business Administration ("SBA")'s 8(a) program. In return, Softek would receive a 40% management fee and 49% of RCE's (and any subsequently formed entities') net profit. As RCE grew and other entities were formed, I expected that Softek would enter into the same business relationship with each subsequently formed entity and project that they embarked upon. In reliance upon this executed oral agreement, Softek immediately began transforming RCE into a profitable business. Softek made investments for operational costs, created websites, printed brochures, and generally got RCE up and running.[34]

C. IN THE ALTERNATIVE, MODOCS' FED. R. CIV. P. 56 MOTION MUST BE DEFERRED OR DENIED BECAUSE SOFTEK HAS NOT YET BEEN ALLOWED TO TAKE DISCOVERY.

Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). The party requesting additional discovery must

[33] ECF No. 77, at 28.
[34] ECF No. 99, ¶¶5-6.

present an affidavit that identifies "the probable facts not available and what steps have been taken to obtain these facts. The nonmovant must also explain how additional time will enable him to rebut the movant's allegations of no genuine issue of material fact." *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (quotation omitted). "The general principle of Rule 56(d) is that summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Price v. W. Resources*, 232 F.3d 779, 783 (10th Cir. 2000). Unless dilatory, a party's 56(d) application "'should be liberally treated.'" *Jensen v. Redevelopment Agency*, 998 F.2d 1550, 1553-54 (10th Cir. 1993) (quoting *Comm. for 1st Amend. v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992)).

Here, because Softek have submitted a Rule 56(d) affidavit that identifies the probable facts not available—and explains why those facts cannot be presented currently, what steps have been taken to obtain these facts, and how additional time will enable the party to obtain those facts and rebut the motion for summary judgment[35]—summary judgment is inappropriate as the case is presently postured. *Campbell*, 962 F.2d at 1522. Modoc appear to be in agreement.[36]

III. CONCLUSION

In light of the above, Softek respectfully request that Follis' Motion to Dismiss be **DENIED** or, in the alternative, **DEFERRED** so that Softek can conduct discovery.

Dated: April 10, 2020.

[35] *See generally* ECF No. 98.
[36] ECF No. 86, at 2 n.1; *id.*, at 11 n.4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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