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,	)	
vs.	)	Case No. 19-cv-00588-CVE-JFJ
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,	)	
vs.	)	
(1) BLAKE FOLLIS, (2) TROY LITTLEAXE, and (3) LEGAL ADVOCATES FOR INDIAN COUNTRY, LLP,	)	
Counterclaim Defendants.	)	

PLAINTIFFS' RESPONSE TO SOFTEK DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PLAINTIFFS' RESPONSE TO SOFTEK DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Modoc Nation, a/k/a Modoc Tribe of Oklahoma, ("Modoc Tribe" or "Tribe"), Red Cedar Enterprises, Inc. ("Red Cedar"), Eagle TG, LLC ("Eagle"), Buffalo MTE, LLC

("Buffalo"),Talon MTE, LLC ("Talon") Modoc MTE, LLC ("Modoc MTE") and Walga MTE, LLC ("Walga"), without prejudice to their position set forth in Plaintiffs' Rule 56(d) Motion to Defer Plaintiffs' Response to the Motion Pending Discovery (ECF 92), submit this response to the motion for summary judgment filed by Defendants Rajesh Shah ("Shah"), Sharad Dadbhawala ("Dadbhawala"), Softek Management Services, LLC ("SMS"), Softek Federal Services, LLC ("SFS"), And Softek Solutions, Inc. ("SSI") (the "Softek Defendants").[1]

I. INTRODUCTION

By its Order dated March 6, 2020, the Court converted Softek Defendants' Motion to Dismiss to a Motion for Summary Judgment, and allowed Softek Defendants 14 days to present additional evidence, legal authorities and arguments to support Softek Defendants' motion for summary judgment.[2]

Softek Defendants argue in support of summary judgment on the RICO claims that there is "no evidence to create a genuine dispute as to any material fact regarding the predicate alleged fraud underlying each of their RICO claims." (Motion (ECF 89), p. 4) That conclusory argument

[1] The Softek Defendants' motion for summary judgment consists of the Softek Defendants' Motion to Dismiss (ECF No. 75) and Declaration of Defendant Rajesh Shah (ECF No. 76), converted to a motion for summary judgment by Order of the Court (ECF No. 79), together with Softek's Supplemental Brief In Support of Their Motion to Dismiss/Motion for Summary Judgment (ECF No. 89).

[2] Softek Defendants argue that their motion should "remain subject to dismissal under Fed. R. Civ. P. 9(b) and 12(b)(6) because this Court need not go beyond the pleadings to determine that Plaintiffs' RICO and outrage claims do not satisfy the standard set forth in *Twombly* and its progeny. (Motion, p. 2)" However, the Court's conversion of the motion to one for summary judgment requires its resolution under Rule 56. See *Felmlee v. State of Oklahoma,* 2014 WL 4597724 *1, 9 (N.D. Ok. 2014).

does not satisfy Softek Defendants' Rule 56 obligation, as the Supreme Court's majority opinion in *Celotex Corp. v. Cattret*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 54 U.S.L.W. 4775 (1986) makes clear. Justice White's concurring opinion which provided the majority articulates that:

> But the movant must discharge the burden the Rules place upon him: it is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.
>
> A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit. 477 U.S. at 328.

That mirrors Softek Defendants' argument here. Softek Defendant point to their only evidence, Shah's Declaration (ECF 76) as evidence that SSI's, SMS's and SFS's (collectively "Softek") contractual relationship required Plaintiffs to pay management fees and, thus, Softek's receipt of fees cannot be fraudulent because Softek was entitled to the fees. (Motion, p. 5.) Based upon the Shah Declaration, Softek Defendants argue that the Softek Defendants are not liable under RICO because the evidence allegedly shows that Softek entered into a Letter of Intent ("LOI") with the Modoc Tribe that entitled Softek to a management fee of 49% of the Modoc Tribe's 8(a) entities ("MTE's) net profits and 49% of the net profits as a shareholder of the MTE's; that Softek generated $8.62 million of net profits of Red Cedar and Eagle (ECF No. 76, pars. 21, 23; and that the other MTE's were profitable (Id., par. 27); and Plaintiffs suffered no business injury because Softek was entitled to the referenced percentages of the net profits.

The Shah Declaration provides no such evidentiary support for the motion. The LOI, Stock Purchase Agreement ("SPA"), Profit Sharing Agreement ("PSA") and Corporate Management

Services Agreement ("CMSA") did not obligate Plaintiffs to pay fees or profits to Softek. None of the agreements were effective. (Littleaxe Supplemental Declaration, pars. 7-11). None entitled Softek to invoice, request and be paid fees from the MTE's and, thus, Softek's invoicing and receipt of payments on the basis of those agreements was unjustified and fraudulent.

As will be shown below, Softek's unsupported arguments and its minimal evidence is disputed if not refuted by Plaintiffs' evidence set forth in the Declaration of Troy Littleaxe, and Exhibits A-C thereto (ECF 61-1); the Supplemental Declaration Of Troy Littleaxe In Support Of Plaintiffs/Counterclaim Defendants' Motion For Summary Judgment Dismissing The Counterclaims and Exhibits A-K thereto (ECF 86-1); the Second Supplemental Declaration Of Troy Littleaxe and Exhibits 1-8 thereto filed herewith; the Declaration of James E. Nesland (ECF 92-1); and the Supplemental Declaration of James E. Nesland and Exhibits 1-14 filed herewith; and the Declaration of William Blake Follis (ECF 77-1) and Exhibits 1-4 thereto.

The Plaintiffs' evidence set forth in those declarations and the exhibits thereto establishes that the LOI was an unenforceable agreement that did not entitle Softek to 40% and 49% of the net profits of Red Cedar and Eagle and their receipt of those funds were fraudulent and caused serious business injuries. In fact, Softek Solutions, the party to the LOI, never entered into any of the contemplated agreements to manage and finance Red Cedar and the MTE's. Shah "restructured" Softek Solutions and had SMS and SFS enter into the contemplated agreements with the Modoc Nation and Red Cedar in December 2010 (before Shah restructured and formed SMS and SFS in January 2011). Moreover, Plaintiffs' evidence even at this early stage before any discovery supports a jury finding that Defendants' Shah and Dadhbawala conducted an association in fact enterprise comprised of SMS, SFS, and SSI ("Softek" or the "Softek Enterprise") through

a pattern of racketeering activities that injured Plaintiffs. That evidence requires a denial of Softek's motion for summary judgment and entitles Plaintiffs to proceed, conduct discovery and prove to the jury that Shah and Dadhbawala are liable for millions of dollars of damages for taking fees to which they were not entitled.

II. RAJESH SHAH'S DECLARATION DOES NOT PROVIDE EVIDENCE OF FACTS ON THE RICO CLAIMS THAT ARE NOT GENUINELY DISPUTED AND DOES NOT SUPPORT SUMMARY JUDGMENT.

1. Shah states in his Declaration that in August 2010 Softek entered into the LOI with the Modoc Tribe's non-profit corporation ("Modoc Non-Profit"), that provided Softek would incur startup and operational funds, would provide loans and would create SBA 8(a) qualified MTE's in return for assuming a 49% interest in Red Cedar and a 40% management fee. (ECF No. 76, pars. 4, 10 and Ex. B).

2. Plaintiffs have genuinely disputed if not refuted those alleged facts with the Declaration and Supplemental Declaration of Troy Littleaxe, with extensive supporting documentation, showing that the LOI was between the Modoc Nation, not the Modoc Non-Profit, and Softek Solutions, Inc. ("SS") (Declaration of Troy Littleaxe (ECF 61-1) Para. 6, Exhibit C); that the LOI was a proposed agreement to agree, not an enforceable contract; and that SS would acquire a 49% interest in Red Cedar and a 40% management fee. SS did not enter into any of the proposed agreements, and the proposed agreements entered into by SFS and SMS were conditioned on SBA review and approval, and never became effective. (Supplemental Declaration Of Troy Littleaxe In Support Of Plaintiffs/Counterclaim Defendants' Motion For Summary Judgment Dismissing The Counterclaims Declarations (ECF 86-1, pars. 6-9, Exhibits C-D).

3. Plaintiffs' evidence shows that the companies that supposedly would provide the management and financing–SFS and SMS–did not exist when the LOI was executed in August 2010. (Declaration of Rajseh Shah, ECF No. 76, par. 15-17, Ex. B-C; Supplemental Declaration Of Troy Littleaxe In Support Of Plaintiffs/Counterclaim Defendants' Motion For Summary Judgment Dismissing The Counterclaims (ECF 86-1, Paragraph 11. Exhibit E)). No enforceable contract could arise when the companies that were to enter into agreements to acquire, finance and manage Red Cedar did not exist, and the LOI expressly provided that "a set of legal agreement agreements will be executed within the next 60 days to formalize the relationship between the two parties." Nothing could be a clearer expression that the LOI was an agreement to agree to enter into future agreements for the acquisition, financing and management.

4. Shah states in his Declaration that in December 2010 "Softek" entered into a stock purchase agreement which was entitled "Ownership Purchase Agreement" ("SPA"), a Profit Sharing Agreement ("PSA), and a management agreement entitled "Corporate Management Services Agreement" ("CMSA") with the Modoc Non-Profit "that formalized the LOI." (Shah Declaration (ECF 76), par. 12-14, Exs. C, D and E). Shah's statement further confirms that the LOI was a proposed agreement to enter into a series of future agreement to formalize the relationship and, thus, not an enforceable contract; or at a minimum creates a genuine dispute of material fact whether the LOI was an enforceable contract.

5. Plaintiffs have genuinely disputed if not refuted the alleged fact that Softek entered into valid, enforceable agreements in 2010. The Littleaxe Declaration and Supplemental Declaration and supporting documentation show that the SPA and PSA that Red Cedar entered into were with SFS, not SS, and were conditioned upon SBA review and approval. That condition

was not satisfied, and the agreements never became effective entitling SFS to 49% of the net profits of Red Cedar. (Supplemental Littleaxe Declaration (ECF 86-1), pars. 8-9, Ex. D).

6. The SPA and PSA also did not become effective because SFS did not exist on December 20, 2010 and, thus, had no corporate authority to enter into the agreements. The agreements were fraudulently induced by SS's and Mr. Shah's false representations that SFS was a corporation organized under California law that could execute valid agreements. In fact, Shah admits that it was only after the agreements were executed that Softek did a "restructuring" and "officially formed" SFS and SMS. (Shah Declaration (ECF 76), para. 15). Nowhere does Shah state that he informed the Modoc Nation and Red Cedar of the material fact that SMS and SFS did not exist when the agreements were executed. In fact, the August 2010 LOI represents that the Modoc Tribe is entering into the LOI with "a Consortium headed by Softek Solutions, Inc…." which, of course, was false as SMS and SFS were not formed until 2011. (ECF No. 76-2, Ex. B, first paragraph).[3] These agreements were induced by fraud, and fraudulent inducement vitiates a contract. *Miller v. Troy Laundry Mach. Co.*, 178 Okla. 313, 62 P.2d 975, 977 (1936), and cases cited therein.

7. Shah also states in his Declaration (ECF 76), paragraph 12, that the 40% management and 49 % profit-sharing model was agreed to carry over into every subsequent Plaintiff entity Softek worked to create and manage. That evidence further underscores that the

[3] "This letter shall act as a Letter of Intent (LOI) between Modoc Tribe of Oklahoma ("Modoc"), with offices at 418 G St SE. Miami, OK 74354 ***and a Consortium*** headed by Softek Solutions, Inc. ("Softek") with offices at 4520 Niland Street, Union City, CA 94587, entered into on August 16, 2010 as follows…." (Emphasis added].

LOI which contemplated that model was an unenforceable agreement to agree upon future agreements.

8. Plaintiffs have genuinely disputed that the evidence that the 40% management fee and 49% profit sharing was carried over to other MTE's. The Supplemental Littleaxe Declaration shows that no member of the Softek enterprise entered into any agreements with the other MTE's to acquire a 49% profits interest or 40% management fee. (Supplemental Littleaxe Declaration (ECF 86-1), pars. 12-16) Thus, no member of the Softek enterprise was contractually entitled to 49% of profits or a 40% management fee from the Modoc Nation or any MTE.

9. Shah states that in December 2010 that Softek entered into a Corporate Management Service Agreement ("CMSA") with Red Cedar, (ECF No. 76, Para.14 and Ex. E). Plaintiffs have genuinely disputed if not refuted those facts. The Littleaxe Supplemental Declaration and supporting documentation, (ECF 86-1), para. 9, Ex. D), show that the CMSA that Red Cedar entered into with SMS-- not SS--was conditioned upon SBA review and approval. That condition was not satisfied, and the agreement never became effective.

10. Additionally, the CMSA also did not become effective because, as with SFS, SMS did not exist and had no authority to execute the CMSA. (Supplemental Littleaxe Declaration (ECF 86-1), par. 11, Exhibit E.) Like the SPA and PSA, the CMSA was fraudulently induced by SMS and Mr. Shah's false representations that SMS was a corporation organized under California law that could execute a valid agreement.

11. The CMSA also does not provide for a 40% management fee or any compensation for SMS's management. (Supplemental Littleaxe Declaration (ECF 86-1), par. 9, Exhibit D.) Thus,

SMS never had an agreement under which it was entitled to the 40% management fee took out of Red Cedar's net profits.

12. Shah states in his Declaration "[i]n the same month the agreements were signed—December 2010—Softek assumed a 49% profit—sharing interest and took over management of RCE consistent with and it furtherance of the management agreement identified below [the CSMA]. (ECF No. 76, Para.13). Plaintiffs have genuinely disputed if not refuted that Softek was entitled to "assume" a 49% profits interest, as there was no enforceable PSA and SPA in December 2010 for reasons stated above; and Softek had no contractual right and it was unlawful to "assume" a 49% profits interest and take 49% of the net profits of Red Cedar. Softek also had no contractual right to the 40% management fee to which Shah references for "taking over" management.

13. Shah states in his Declaration that the LOI was obtained by Eagle to qualify for a bid by Eagle on a contract and was agreed to by Eagle and the Modoc Nation. That Blake Follis, over Softek's business and religious objections, used funds drawn on the LOC for a Fantasy Sports business. (ECF. No. 76, 35-39). However, Shah's Declaration does not state that the representations upon which the draws were approved, which was that the draws were temporary and would be restored, were true and the funds were being repaid, which is the fraudulent conduct alleged in the SAC. The Second Supplement Declaration of Troy Littleaxe filed herewith, Paras. 3-4 and Exhibits 2-8 thereto, evidences that the draws were approved based upon those representations, which were false.

III. LEGAL STANDARD

Summary judgment is "appropriate if the pleadings, depositions, answers to interrogatories and admissions together with affidavits if any show there is no genuine issue as to any material

fact." *Burke v. Utah Transit Authority*, 462 F.3d 1253, 1257-1258 (10th Cir. 2006). *See Schutz v. Thorne*, 415, F.3d 1128, 1131 (10th Cir. 2005).

A disputed fact is material if it might affect the outcome under the governing law. A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Schutz*, at 1131. In reviewing the evidence, the court must view the evidence and draw all reasonable inferences in the light move favorable to the non-moving party. *Id*.

The Tenth Circuit explained the applicable burdens of the movant and nonmovant on a summary judgment as follows in *Comm'n. for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir 1992):

> (i) Movant must point to the portions of the record which demonstrate an absence of a genuine issue of material fact.
>
> (ii) If a movant establishes it is entitled to judgment as a matter of law given operative facts contained in the documentary evidence, summary judgment will lie.
>
> (iii) The burden is on the non-movant to defeat a properly supported summary judgment motion after the non-movant has had "the full opportunity to conduct discovery…."
>
> (iv) Summary judgment should not be granted where the non-moving party "has not had the opportunity to conduct discovery essential to his opposition…."
>
> (v) If additional discovery is required, the nonmoving party must submit an affidavit identifying

The Tenth Circuit went on to explain that if additional discovery is required, the nonmoving party must submit an affidavit identifying the probable facts, not the evidence, that are not available to present; what steps have been taken to obtain the probable facts; and how discovery will permit obtaining the probable facts.

In this case, the motion for summary judgment is at the outset of the case. The Joint Status Report is not entered. No Rule 34 document requests have been served; no Rule 33 interrogatories have been served; no Rule 30 and Rule 45 depositions have been taken; and no Rule 36 requests for admissions have been served; and no experts have been identified and deposed. In short, Plaintiffs have not had the full opportunity "to conduct discovery essential to [their] opposition…" to the pending motion. The motion should be deferred until Plaintiffs have had the full opportunity to conduct discovery.

If a Declaration is required even though Plaintiffs have had no opportunity to conduct discovery essential to the opposition of Softek's pending motion, as is the case, Plaintiffs have submitted the Declaration of James E. Nesland (ECF 92-1), one of Plaintiffs' counsel, and Supplemental Declaration of James E. Nesland and Exhibits 1-14 being filed herewith. These two declarations of Mr. Nesland and exhibits also are submitted in opposition to the Softek motion for summary judgment and are referenced herein. .

As set forth in the Supplemental Declaration of James E. Nesland, he obtained Exhibits 1-9 from April Roberts, the Director of Operations and the Utah accountant who did accounting for Softek Management Services, LLC ("SMS") from November 2011 to February 2014. Ms. Roberts confirmed to Mr. Nesland she had received these business records from Softek and copied and maintained them on her computer in the ordinary course of business. (Supplemental Declaration of James E. Nesland, Paragraphs 2, 3, 4, 7, 8, 9, 10). Exhibit 10 is an Offer Letter from SMS to April Roberts dated November 15, 2011 on SMS letterhead offering her a position as Director of Operations for SMS and an expense report from April Roberts on an SS form dated January 30, 2012 that Mr. Nesland received from April Roberts. (Supplemental Declaration of James E.

Nesland, Paragraph 11). Exhibits 11-14 are IBC bank statements for the bank accounts of Red Cedar, Buffalo, Eagle and Talon for the fiscal years 2012-2018. These documents were included within documents provided to Mr. Nesland that Ms. Roberts confirmed she maintained copies of on her computer in the ordinary course of business. (Supplemental Declaration of James E. Nesland, Paragraph 5).

As set forth in Paragraph 12 of the Supplemental Declaration of James E. Nesland:

> After I interviewed Ms. Roberts and obtained these business records from her, she resigned from her employment with Red Cedar on December 31, 2019. She is now available to provide testimony pursuant to subpoena to take her deposition in Utah where she resides, in order to obtain sworn testimony from her relevant to this case, including but not limited to authentication and explanation of these business records that she provided to me. At the present time, due to the COVID 19 emergency, I am unable to take her deposition.

Ms. Roberts clearly is in a position to authenticate the records she maintained in the ordinary course of business and provided to Mr. Nesland. Federal Rule of Evidence 901 states in relevant part:

> (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> (b) Examples. The following ***are examples only — not a complete list*** — of evidence that satisfies the requirement:
>
> (1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be. [Emphasis added].

Ms. Roberts's statements to Mr. Nesland authenticating Exhibits 1-14 to the Supplemental Declaration of James E. Nesland fall within the residual exception to the hearsay rule set forth in Federal Rule of Evidence 807:

> a) **In General**. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

> (1) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

There are sufficient guarantees of trustworthiness. Exhibit 10 to the Supplemental Declaration of James E. Nesland is evidence of Ms. Roberts' employment by Softek and that she has a foundation to authenticate its records. The Supplemental Declaration of James E. Nesland also explains why Softek cannot genuinely dispute the authenticity of these records (Para. 2, ("The Softek Defendants ("Softek") should not genuinely dispute these records as the checks were issued to SMS and SMS's Wells Fargo bank statements should reflect the receipt of payment"); Para. 3 ("Softek should not genuinely dispute these invoices and transmittal emails as they were issued by SMS to RCE and sent to April Roberts to record in RCE's accounts payable for SMS; they should be recorded in SMS's accounts receivable for fees due from RCE and payments received should be recorded as credits in the accounts receivable; and RCE's payments also should be reflected in SMS's Wells Fargo bank statements to which payments were wired."); Para. 4 ("Softek should not genuinely dispute this work paper as it reflects the adjustments which SMS proposed and the auditor proposed in SMS's meeting with the auditor."); Para. 5 ("The Softek Defendants should not genuinely dispute these records as the payments were issued to SMS and SMS's Wells Fargo bank statements should reflect the receipt of payment"); Para. 7 ("Softek should not genuinely dispute these invoices and transmittal emails, as they were issued by SMS to April Roberts for Eagle to record in its accounts payable due SMS on Softek's Quik Books accounting system; they should be recorded in SMS's accounts receivable for fees due from Eagle, and credits for payments

received, and payments also should be reflected in SMS's Wells Fargo bank statements. Nor should Softek genuinely dispute Eagle's fiscal 2013 Review Report which SMS received"); Para. 8 ("Softek should not genuinely dispute these invoices and transmittal emails as they were issued by SMS to April Roberts for Buffalo to record in its accounts payable due SMS on Softek's Quik Books accounting system; they should be recorded in SMS's accounts receivable for fees due from Eagle, the credits recorded for payments received, and payments also should be reflected in SMS's Wells Fargo bank statements. Nor should Softek genuinely dispute Eagle's fiscal 2013 Review Report which SMS received.");

Additionally, many of these records are emails bearing a Softek email address, providing further assurance of their authenticity. Softek also should have copies of these emails, by which it can confirm the authenticity of these records.

Ms. Roberts's statements are trustworthy. She was employed by Softek from 2011-2014 as an accountant and Director of Operations and thereafter as an accountant by Red Cedar until December 31, 2019. She was in a position that she reasonably would have received records such as these in the ordinary course of business, and relied upon and used them in the performance of her duties. Moreover, the fact that Softek should have copies of all of these documents or records corroborating the information in these documents assures that Softek has the ability to confirm the authenticity of these documents.

Ms. Roberts is no longer an employee of Red Cedar. Due to the infancy of the case, and under the circumstances of the COVID 19 emergency, Plaintiffs' counsel has not yet been able to take the deposition of Ms. Roberts so as to obtain her sworn testimony authenticating these documents.

Because Softek has the ability to confirm the authenticity of these documents by comparing them with its own copies and records, Softek should not be allowed to sit back and be heard to say these documents have not been properly authenticated and therefore may not be submitted in opposition to the Softek motion for summary judgment. The burden should be now be placed on Softek to come forward with sworn declarations stating these documents are not authentic if it genuinely disputes their authenticity—this it will not be able to truthfully do.

The only evidence in the record on Softek's Motion are the Shah Declaration; the Littleaxe Declaration and exhibits thereto; Supplemental Littleaxe Declaration and exhibits thereto; Second Supplemental Littleaxe Declaration and exhibits thereto submitted herewith; Declaration of William Blake Follis and exhibits thereto; Declaration of James E. Nesland; and Supplemental Declaration of James E. Nesland submitted herewith attaching Softek's invoices end email requests for fees, the bank records showing fee payments to SMS, and other documents referenced therein. Because of the early stage of the proceedings in which the motion arises, there has been no discovery and, thus, there are no other evidentiary materials such as Rule 30 deposition testimony, Rule 34 document and ESI discovery, stipulations, Rule 36 admissions, and Rule 33 interrogatory responses.[4]

[4] Softek suggests the Court should consider the parties' pleadings as evidence. (Motion, p. 5 and n. 2) Softek conceded the pleading are not evidence. (Id.) Rule 56(c) does not include pleadings as evidence. Were pleadings evidence, Softek's Counterclaims seek recovery of the alleged $3.4 million of unpaid fees and profits from Plaintiffs, Blake Follis, Troy Littleaxe and his law firm on Softek's alleged contractual rights under the LOI are further evidence of Softek's efforts to collect money for which it fraudulently billed.

IV. SOFTEK'S MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFFS' CIVIL RICO CLAIM UNDER 18 U.S.C. 1962(c) SHOULD BE DENIED BECAUSE THERE IS SUFFICIENT EVIDENCE FOR A JURY TO FIND FOR PLAINTIFFS.

18 U.S.C. §1962(c) provides, in pertinent part, "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate…commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Under 18 U.S.C. § 1962(c), a RICO plaintiff must prove a "person" "(1) conducted the affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity." *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1248 (10th Cir. 2016).

A. There Is Sufficient Evidence For A Jury To Find That Defendants Shah and Dadbhawala Are Persons.

Plaintiffs allege that Softek Defendants Shah and Dadbhawala, along with Defendant Rusty Bohl (the "Individual Defendants") are the *persons* who violated 18 U.S.C. 1962(c). (Amended Complaint, Para. 99). A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Plaintiffs believe it is undisputed that Shah, Dadbhawala and Bohl are individuals, and each of them are capable of holding a legal or beneficial interest in property.

B. There Is Sufficient Evidence for A Jury To Find That SMS, SFS, and SS Comprised An Association-In-Fact Enterprise That Was Engaged In Interstate Commerce, And That Its Affairs Were Conducted By The Individual Defendants.

1. Plaintiffs alleged (and there is sufficient evidence to support a jury finding) that the RICO *enterprise* consisted of an association in fact of SMS, SFS and SS, and that it was engaged in interstate commerce. (Amended Complaint, Para. 100). "RICO broadly defines enterprise as

any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Safe Sts. All. v. Hickenlooper,* 859 F.3d 865, 882 (10th Cir. 2017) (quotations omitted); *see also* 18 U.S.C. § 1961(4). The Supreme Court has made clear that "the very concept of an association in fact is expansive." *Boyle v. United States,* 556 U.S. 938, 944, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). An "association-in-fact enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct." *Id*. at 946, 129 S.Ct. 2237 (quotation omitted). It "need not have a hierarchical structure or a chain of command." *Id*. at 948, 129 S.Ct. 2237 (quotation omitted). Its existence only requires "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id*. at 946, 956, 129 S.Ct. 2237.

2. Here, the Softek Defendants have admitted that SMS, SFS and SS are three business entities organized and existing under the laws of the state of California with their principal places of business in California. (Answer (ECF 40), Para. 17). It may be inferred from Softek's Answer viewed in a light most favorable to Plaintiffs, that these three entities constituted an association-in-fact. ("Softek further admits that ***it*** was at times paid for the services that ***it*** rendered to Defendants, …and that ***Softek*** maintains a bank account with Wells Fargo, NA.") (Answer (ECF 40), Para. 17) (Emphasis added). Additionally, the Declaration of Rajesh Shah (ECF 76, Para. 3) states that "I am a founder of and occupy a management role in Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc***., referred to collectively as 'Softek'***". (Emphasis added). Indeed, in the LOI, Softek admits that it has formed a "Consortium." (ECF No. 76-2, Ex. B, first paragraph). *See* note 3, supra.

3. An association in fact may include corporations and partnerships. *U.S. v. Philip Morris, USA*, 566 F.3d 1095, 1111-1112 (D.C. Cir. 2009) ("…a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO " enterprise," even though section 1961(4) nowhere expressly mentions this type of association…" [citing] *United States v. Perholtz*, 842 F.2d 343, 351 n. 12, 353 (D.C.Cir.1988) and a legion of cases from different circuits.) The same analysis should apply here, where the enterprise consists of a corporation and two limited liability companies.

4. Here, Plaintiffs have alleged (and the evidence supports a jury finding) that *persons* (Shah, Dadbhawala and Bohl) who are distinct from the legal entities SS, SMS and SFS who comprise the association in fact *enterprise*, conducted the affairs of that enterprise, through a pattern of racketeering activity. This satisfies the "distinctness requirement" set forth in *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1182 (10th Cir. 2019):

> "[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Id.* (quoting *Cedric Kushner Promotions, v. King*, 533 U.S. 158, 161 (2001)).

5. In this case, the Softek Defendants' Answer, when viewed in a light most favorable to Plaintiffs, admits that the RICO *persons* Shah and Dadbhawala were employed by, associated with, and conducted the affairs of the three business entities SFS, SS, and SMS, that comprised the *enterprise* (Answer (ECF 40), Para. 18 ("Softek admits that Mr. Shah occupied a management role at Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc."); Para. 19 ("Softek Admits that Mr. Dadbhawala provided a management role Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc."); Para.

101 ("Softek admits that Mr. Shah and Mr. Dadbhawala occupied management roles at Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc.")).

6. That the RICO *persons* here constitute the management personnel of the members of the association in fact RICO *enterprise* does not violate the "distinctness requirement" is established by *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1182 (10th Cir. 2019), quoting *Cedric Kushner Promotions, v. King*, 533 U.S. 158, 161 (2001)):

> While accepting the "distinctness" principle, we nonetheless disagree with the appellate court's application of that principle to the present circumstances—circumstances in which a corporate employee, "acting within the scope of his authority," allegedly conducts the corporation's affairs in a RICO-forbidden way. ***The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that.*** Linguistically speaking, an employee who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any "person" unlawfully to conduct an "enterprise," particularly when the statute explicitly defines "person" to include "any individual capable of holding a legal or beneficial interest in property," and defines "enterprise" to include a "corporation." ***And, linguistically speaking, the employee and the corporation are different "persons," even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.*** (Emphasis added).

In the case at bar, the RICO *persons* are the management personnel of but are distinct from the business entities that form the association in fact *enterprise*.[5]

[5] *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1182 (10th Cir. 2019) does not impose a requirement that the members of the association-in-fact be distinct. There are no cases holding that members of an enterprise must be "distinct" from each other. Indeed the fact that "a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO 'enterprise,'" *U.S. v. Philip Morris, USA*, 566 F.3d 1095, 1111-1112 (D.C. Cir. 2009), leads to the logical conclusion that an enterprise may consist of interrelated business entities.

7. The Declaration of Rajesh Shah (ECF 76) admits that SS, SMS, and SFS had a relationship among each other, with longevity of "nearly a decade", and had a common purpose ostensibly "to create and grow new MTE's for the Tribe"[6], and thus the Softek Defendants have admitted the elements of an association-in-fact enterprise comprised of SMS, SS and SFS:

> 15. Upon entering into the partnership with Modoc, Softek immediately started to rehabilitate RCE and build up the infrastructure needed to create and grow new MTE's for the Tribe. This included an internal restructuring of Softek itself— Softek Management Services, LLC ("SMS") and Softek Federal Services, LLC ("SFS") were officially formed to better service the new partnership—it also included Softek hiring personnel, management staff, and consultants.
>
> 16. More specifically, SMS was formed to hire personnel on payroll and contract with consultants who could provide certain types of expertise to aid with managing and building the MTEs.
>
> 17. SFS was formed to arrange for capital financing. SFS secured its funding from internal sources and external partners, which was then used to finance the formation, initiation, growth, and support of the MTEs…
>
> 20. For nearly a decade Softek performed on and operated under…

8. Finally, the Softek Defendants have admitted "to using electronic mail and other means of interstate communication and commerce" in the conduct of their relationship with the Plaintiffs. (Softek's Supplemental Brief In Support of Their Motion to Dismiss/Motion for Summary Judgment, (ECF 89, p. 2).

[6] This common purpose was corrupted by the Individual Defendants' operation, control, and management of the enterprise so as to conduct its affairs through a pattern of racketeering activity for the purpose of defrauding the Plaintiffs and enriching themselves, that injured the Plaintiffs as established in the Declaration Of James E. Nesland and Supplemental Declaration of James E. Nesland and as is discussed below.

C. There Is Sufficient Evidence for A Jury To Find That The Individual Defendants Conducted The Affairs Of The Association In Fact Enterprise Consisting of SMS, SFS, and SS Through A Pattern of Racketeering Activity By Wire Fraud In Violation Of 18 U.S.C. 1343, By Money Laundering In Violation Of 18 U.S.C. 1956 And 1957, By Transferring And Receiving Money Taken By Fraud In Violation Of 18 U.S.C. 2314 And 2315 Predicate Acts Constituting A Pattern Of Racketeering As Alleged In The Rico Claims Asserted In The Amended Complaint.

In Part C of Softek's Supplemental Brief In Support of Their Motion to Dismiss/Motion for Summary Judgment, (ECF 89), Softek asserts that "Plaintiffs have no evidence …regarding the predicate alleged fraud underlying each of their RICO claims". However, the evidence below establishes that the Individual Defendants conducted the affairs of the enterprise Softek through a pattern of racketeering activity so as to cause Softek to fraudulently bill Plaintiffs and be paid a certain amount of money by Plaintiffs substantially greater than that to which Softek was contractually entitled.

Softek also argues in footnote 3 of Part C, that Plaintiffs do not have any "evidence that any alleged RICO predicate act amounts to a "threat of continuing racketeering activity." However as set forth below, Plaintiffs' evidence shows an extensive pattern consisting of over 50 predicate acts of racketeering activity that took place over nearly a ten year period, that no doubt would be continuing to this day if Plaintiffs had not discovered it in July, 2019 and put an end to it. (Follis Declaration (ECF 77-1, Para. 6-8). Such racketeering activity goes far beyond that in *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) where the filing of two false annual reports sufficed to meet the continuity requirement because "His actions also carried with them the threat of continuity. He was filing annual reports ***and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business***."

The Supreme Court has held that plaintiffs need not allege more than one scheme to satisfy the "pattern" element of a RICO claim. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Phelps v. Wichita-Eagle Beacon*, 886 F.2d 1262, 1273 (10th Cir.1989). "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. at 241. Here there was both a closed and opened ended conduct, in that it not only took place over a ten year period, but would have continued had it not been discovered and this lawsuit filed.

In Part D of Softek's Supplemental Brief In Support of Their Motion to Dismiss/Motion for Summary Judgment, (ECF89), Softek argues Plaintiffs have failed to advance evidence that they suffered injury as a result of the RICO violations. However, the evidence below establishes that Plaintiffs suffered concrete financial loss from having paid Softek a substantially greater amount of money than that to which it was entitled, and that these overpayments resulted from the RICO violations.

The following evidence supports a jury finding that Shah, Dadbhawala and Bohl violated 18 U.S.C. §1962(c) by conducting and controlling the affairs of the Softek enterprise through a pattern of racketeering activities in violation of 18 U.S.C. §1343 (wire fraud), §1344 (bank fraud), §§1956-57 (money laundering), §1503 (obstruction of justice) and §§2314-15 (transporting and receiving money obtained by fraud) for the purpose of defrauding the Plaintiffs and enriching the Individual Defendants:

> 1. The August 10, 2010 Letter of Intent ("LOI") between SS and the Modoc Nation prepared by the Individual Defendants was an unenforceable agreement to agree that Softek did not enforce to acquire a 49% ownership in Red Cedar and the newly formed MTE's, Eagle, Talon, Buffalo, Modoc MTE and Walga entitling it to 49% of the MTE's

profits. (Littleaxe Declaration(ECF 61-1, Para.6, Exhibit C; Supplemental Littleaxe Declaration, ECF 86-1, Paragraphs 7, 8, 12-16; Nesland Declaration (ECF 92-1, Para. I-1.)

2. The LOI was not enforced by Softek to require the MTE's to pay a 40% management and financing fee and Softek was not entitled to profits or a management fee. (Supplemental Littleaxe Declaration (ECF 86-1, Paras.17, 21, 22, Exhibit K; Nesland Declaration (ECF 92-1, Para. I-2.)

3. The December 20, 2010 Stock Purchase and Profit Sharing Agreements prepared by the Individual Defendants by which SFS was to acquire 49% of the stock of Red Cedar entitling SFS to 49% of Red Cedar's profits did not become effective because the condition precedent of SBA review and approval was not secured. As a result, SFS did not request or receive and was not entitled to profit distributions of 49% of Red Cedar's net profits between 2011 and 2019. (Supplemental Littleaxe Declaration (ECF 86-1), Para.7, 8, Exhibit C; Nesland Declaration (ECF 92-1, Para. I-3.)

4. The December 20, 2010 Corporate Management Services Agreement between SMS and Red Cedar prepared by the Individual Defendants did not become effective because the condition precedent of SBA approval was not secured and the agreement did not provide for and SMS was not entitled to a 40% management fee. (Supplemental Littleaxe Declaration (ECF 86-1, Para.9; Nesland Declaration (ECF 92-1, Para. I-4.)

5. Unknown to Plaintiffs at the time, SFS and SMS were not in existence when the Stock Purchase and Profit Sharing Agreements and Corporate Management Services Agreement were executed, a fact first recently learned by Littleaxe, and the agreements are invalid. (Supplemental Littleaxe Declaration (ECF 86-1), Para. 11; Nesland Declaration (ECF 92-1, Para. I-5.) They also were not in existence at the time the LOI was signed, and the statement in the first paragraph of the LOI that "This letter shall act as a Letter of Intent (LOI) between Modoc Tribe of Oklahoma ("Modoc")…***and a Consortium*** headed by Softek Solutions, Inc. ("Softek")" [Emphasis added], (ECF No. 76-2, Ex. B, first paragraph), was a fraudulent misrepresentation.

6. The Individual Defendants caused a "consortium" to be formed consisting of SS, SMS and SFS ("Softek"), the Civil RICO Enterprise, that at all times from January 2011 through July, 2019, was engaged in and its activities affected interstate commerce. (Declaration of Rajesh Shah (ECF 76, Paragraphs 15-17; Softek Answer to Amended Complaint (ECF 40, Paragraphs 17-19, 101, 104).

7. From 2011 through July 2019, each of the Individual Defendants were employed by or associated with and occupied management roles with Softek, and directly participated in the conduct, actual operation and management of Softek. (Declaration of Rajesh Shah, ECF 76, Paragraphs 3, 15-18; Softek Answer to Amended Complaint *ECF 40), Paragraphs 17-19, 101, 104).

8. The Modoc Nation and SMS agreed during fiscal years 2011, 2012, 2013 and 2014 that SMS would be paid a management fee of 40% of the MTE's net profits for managing and financing them. (Second Supplemental Littleaxe Declaration filed herewith, Para. 1; Nesland Declaration (ECF 92-1), Para. I-8.)

9. Softek's QuickBooks accounting records, IBC bank records, the MTE's monthly and annual fiscal financial statements show that during fiscal years 2011, 2012, 2013, and 2014 the Individual Defendants had SMS issue monthly, falsely inflated fee invoices calculated by Dadbhawala and emailed to SMS's former accountant in Utah who paid them that far exceeded 40% of the MTE's net profits and resulted in payment of millions of dollars of fraudulent payments. Plaintiffs were unaware of these fraudulent invoices and payments (Supplemental Littleaxe Declaration (ECF 86-1, Para. 1721, 22; Nesland Declaration, Para. I-9: Nesland Supplemental Declaration filed herewith, Paragraphs 3-6, Exhibits 1, 2, 3, 11-14).

10. The Individual Defendants' pattern of racketeering activities and predicate acts in violation of 18 U.S.C. §1343 (wire fraud) and 18 U.S.C. §§2314-15 (transporting and receiving money by fraud) in conducting the affairs of Softek consisted in part of making fraudulent requests for fees that were not owed upon which Plaintiffs relied to issue checks to Softek for fees which Dadbhawala deposited in Softek's Wells Fargo bank in California and then through interstate wire communications were paid by IBC from Red Cedar's IBC bank account in Oklahoma. Such requests for which checks to Softek for fees were issued to Softek, deposited by Sharad in Softek's California bank and paid by IBC from Red Cedar's account included the following ***according to records provided by April Roberts,*** the Director of Operations and the Utah accountant who did accounting for Softek Management Services, LLC ("SMS") from November 2011 to February 2014. ***That she was so employed by SMS is corroborated by an offer letter on SMS letterhead. That SMS and SS were part of the same association in fact enterprise is corroborated by her submission of an expense report on an SS form***:

a. A Red Cedar check for $17,500 issued to Softek for fees in March 2011;
b. Red Cedar checks for $3,000 and $2,000 issued to Softek for fees in April 2011;
c. A Red Cedar check for $5,000 issued to Softek for fees in May 2011;
d. A Red Cedar check for $5,000 issued to Softek for fees in June 2011; and
e. A Red Cedar check for $80,000 issued to Softek for fees in December 2014.

The Softek Defendants should not genuinely dispute these records, as the checks were issued by SMS and SMS's Wells Fargo bank statements should reflect the receipt of payment.

(Nesland Declaration, Para. I-10; Supplemental Declaration of James E. Nesland filed herewith ("Nesland Supplemental Declaration"), Para. 2, 11, and Exhibits 1 and 10 thereto.)

11. The Individual Defendants' pattern of racketeering activities and predicate acts in violation of 18 U.S.C. §1343 (wire fraud) and 18 U.S.C. §§2314-15 (transporting and receiving money by fraud) in conducting the affairs of Softek that occurred during that 2011-2014 period consisted in part of SMS invoices the Individual Defendants had SMS issue including the following monthly invoices for fees that were not owed that Dadbhawala emailed via interstate wire for payment to SMS's accountant April Roberts in Utah and which were paid by wire from Red Cedar's, Eagle's and Buffalo's IBC accounts in Oklahoma to SMS's Wells Fargo account in Texas, as shown by business records provided by April Roberts:

a. Inflated monthly invoices each for $300,000 in fees substantially in excess of 40% of RCE's monthly net profits individual Defendants Shah and Dadbhawala had SMS issue to RCE on April 30, 2013, May 31, 2013, June 30, 2013, August 31, 2013, September 30, 2013, October 31, 2013, November 30, 2013, December 31, 2013, January 31, 2014 and February 28, 2014 and emailed to SMS former accountant in Utah from SMS's California office, payments of which were wired from RCE's IBC account in Oklahoma to SMS's Wells Fargo bank account in Texas. Defendants' fraud becomes starkly apparent, when this fact that Defendants invoiced for and were paid $3,000,000 over only ten months in 2013 and 2014, is juxtaposed against Shah's admission in Shah's Declaration (ECF 76), Paragraph 21, that RCE only "made approximately $4.72 million in net profits between 2011 and 2015." The Softek Defendants should not genuinely dispute these invoices and transmittal emails as they were issued by SMS to RCE and sent to April Roberts to record in RCE's accounts payable for SMS; they should be recorded in SMS's accounts receivable for fees due from RCE and payments received should be recorded as credits in the accounts receivable; and RCE's payments also should be reflected in SMS's Wells Fargo bank statements to which payments were wired. (Nesland Declaration, Para. I-11a; Nesland Supplemental Declaration, Para. 3, and Exhibit 2 thereto.)

A copy of the Red Cedar auditor's work paper obtained from April Roberts which shows that the auditor determined that SMS's invoiced amount for fees in fiscal 2013 should be recalculated from $3,681,187.78 (close to $300,000 per month) invoiced to the correct amount of $1,130,431.76 for total fees due at 40% of net profits—reflecting the probable fact that SMS's invoices were inflated by more than $2.5 million. It is a probable fact that Red Cedar paid SMS fees for that same period in the amount of $2,861,369.06 as a result of those fraudulent invoices. It is a probable fact that Red Cedar paid SMS $1,730,937.30 to which SMS was not entitled for that time period. It is a probable fact that Red Cedar was injured by overpaying SMS $1,730,937.30 as a result of those fraudulent invoices. The Softek Defendants should not genuinely dispute this work paper as it reflects adjustments which SMS proposed and the auditor proposed in SMS's meeting with the auditor.

(Nesland Supplemental Declaration, Para. 2-6, and Exhibits 1, 3, and 11-14 thereto).

b. Inflated monthly invoices for $15,000 for fees well exceeding 40% of Eagle's monthly net profits that individual Defendants Shah and Dadbhawala had SMS issue to Eagle on October 31, 2012, January 31, 2013, June 30, 2013, and emailed to SMS's accountant April Roberts in Tropic, Utah from SMS's California office, payments of which were wired from RCE's IBC account in Oklahoma to SMS's Wells Fargo bank account in Texas.

The probable fact that these invoices were inflated is evidenced by the Auditor's Review Report on Eagle's fiscal 2013 financial statement reflecting its negative income in fiscal 2013, which was received from April Roberts. Softek should not genuinely dispute these invoices and transmittal emails, as they were issued by SMS to April Roberts for Eagle to record in its accounts payable due SMS on Softek's Quik Books accounting system; they should be recorded in SMS's accounts receivable for fees due from Eagle; and credits for payments received, and payments received and payments also should be reflected in SMS's Wells Fargo bank statements. Nor should Softek Defendants genuinely dispute Eagle's 2013 Review Report which Softek received. (Nesland Declaration, Para. I-11b; Nesland Supplemental Declaration, Para. 7, and Exhibits 4 and 5 thereto.)

c. Inflated invoices for $12,000 for fees well exceeding 40% of Buffalo's monthly net profits which individual Defendants Shah and Dadbhawala had SMS issue to Buffalo on July 31, 2013, for $3,000 on August 31, 2013, September 30, 2013 and January 31, 2014 and emailed to SMS accountant April Roberts in Tropic, Utah from SMS's California office, payments of which were wired from RCE's IBC account in Oklahoma to SMS's Wells Fargo bank account in Texas. The probable fact that these invoices were inflated is evidenced by the Auditor's Review Report on Buffalo's fiscal 2013 financial statement reflecting its negative income in fiscal 2013, which was received from April Roberts. Softek should not genuinely dispute these invoices and transmittal emails, as they were issued by SMS to April Roberts for Buffalo to record in its accounts payable due SMS on Softek's Quik Books accounting system; they should be recorded in SMS's accounts receivable for fees due from Buffalo; and credits for payments received, and payments received and payments also should be reflected in SMS's Wells Fargo bank statements. Nor should Softek Defendants genuinely dispute Buffalo's 2013 Review Report which Softek received. (Nesland Declaration, Para. I-11c; Nesland Supplemental Declaration, Para. 8, and Exhibits 6 and 7 thereto.)

d. Invoices for $15,000 for fees issued to RCE on October 31, 2012, November 30, 2012, December 31, 2012, January 31, 2013 and March 31, 2013 that Individual Defendant Rusty Bohl emailed for RKS Solutions, Inc., Rusty Bohl's company in

Texas, to SMS's former accountant in Tropic, Utah, payments of which were wired from RCE's IBC account in Oklahoma to RKS's Wells Fargo bank account in Texas and to which RKS was not legally entitled. (Nesland Declaration, Para. I-11d; Nesland Supplemental Declaration, Para. 9, and Exhibit 8 thereto.)

12. The payments referenced in paragraphs 10 and 11 violated 18 U.S.C. §1343 because Defendants Shah, Dadbhawala and Bohl knowingly and intentionally devised or participated in a scheme to defraud with the intent to defraud Plaintiffs out of money through the use of interstate wire communications.

13. The payments referenced in paragraphs 10 and 11 violated 18 U.S.C. §2314 because Defendants Shah, Dadbhawala and Bohl knowingly and intentionally caused $5,000 or more of money taken by fraud to be transported in interstate commerce.

14. The payments referenced above in paragraphs 10 and 11 violated 18 U.S.C. §2315 because Shah, Dadbhawala and Bohl received $5,000 or more using interstate commerce and taken by fraud from plaintiffs.

15. The payments referenced in paragraph 10 and 11 violated 18 U.S.C. §1957 (money laundering) because Shah, Dadbhawala and Bohl intentionally and knowingly engaged in monetary transactions at the IBC and Wells Fargo banks involving money taken by fraud.

16. In October 2014, the Modoc Nation and SMS executed a Corporate Management Services Agreement prepared by the Individual Defendants that provided SMS would be paid 40% of the MTE's net profits for managing the MTE's and SFS would be paid 49% of adjusted net profits for financing the MTE's. SMS did not provide management services to the MTE's after October 2014 and SFS did not finance and provide loans to the MTE's after October 2014 and as a result should not have been paid 40% of their net profits and 49% of their adjusted net profits. During that period Red Cedar, Eagle and Buffalo were profitable and SMS and SFS and SS were paid millions of dollars in management and financing fees which should not have been paid, based upon Softek's QuickBooks accounting records. (Supplemental Littleaxe Declaration (ECF 86-1), Para. 17, 21, 22; Nesland Declaration, Para.I-16, Nesland Supplemental Declaration Paragraphs 3-6, Exhibits 11-14).

17. The Individual Defendants' pattern of racketeering activities and predicate acts in violation of 18 U.S.C. §1343 (wire fraud), 18 U.S.C. §§2314-15 (transporting and receiving money by fraud), and 18 U.S.C. §§1956-57 (money laundering) in the conduct of Softek, that occurred during that 2014-2019 period consisted in part of interstate email requests from Defendants to RCE's accountant in Utah (formerly SMS's accountant) for monthly fee payments who they instructed to book the payment amounts without description in the intercompany transfer accounts, not as accounts payable due SMS, of Red Cedar, Eagle or Buffalo depending on available funds, transfer the amounts to Talon's transfer account without description, transfer the funds for payment from Red Cedar's, Eagle's or Buffalo's

IBC accounts without description to Talon's IBC bank account, and wire the payments from Talon's IBC bank account to SMS's Wells Fargo bank account in Texas. The following are some of the many emails requesting fees that were not owed that were sent to the Utah accountant and booked and paid
in the aforementioned manner:

a. Email request for $150,000 on or about 11/19/2014;
b. Email request for $75,000 on or about 12/03/2014;
c. Email request for $75,000 on or about 01/28/2015;
d. Email request for $75,000 on or about 05/06/2015;
e. Email request for $150,000 on or about 06/16/2015
f. Email request for $100,000 on or about 11/03/2015;
g. Email request for $50,000 on or about _11/03/2015;
h. Email request for $50,000 on or about 01/19/2016;
i. Email request for $100,000 on or about 02/09/2016;
j. Email request for $50,000 on or about 05/03/2016;
k. Email request for $150,000 on or about 06/21/2016;
l. Email request for $150,000 on or about_07/25/2016;
m. Email request for $150,000 on or about 09/13/2016;
n. Email request for $150,000 on or about 10/11/2016;
o. Email request for $75,000 on or about _01/23/2017;
p. Email request for $75,000 on or about 02/28/2017;
q. Email request for $30,000 on or about 08/31/2018.

Plaintiffs were unaware of these requests and payments. (Supplemental Declaration of Troy Littleaxe, (ECF 86-1), Paragraphs 17, 21, 22; Nesland Declaration, Para. I-17; Nesland Supplemental Declaration, Para. 10, and Exhibit 9 thereto.)

18. The payments referenced in paragraph 17 violated 18 U.S.C. §1343 (wire fraud) and §§2314-15 (transporting/receiving money taken by fraud) and 18 U.S.C. §1957 (money laundering) for the reasons stated in paragraphs 12, 13, 14 and 15.

19. The payments referenced in paragraph 17 violated 18 U.S.C. §1957 because Defendants, by causing undescribed payments of more than $10,000 representing proceeds of wire fraud, to be booked in Red Cedar's, Eagle's and Buffalo's transfer accounts and then booked in Talon's transfer account, then having the funds for payment transferred from Red Cedar's Eagle's and Buffalo's IBC accounts into Talon's IBC account, and then having the payments wired from Talon's IBC account and deposited in SMS's Wells Fargo account conducted financial transactions concealed and disguised the nature and source of the proceeds of wire fraud.

20. From January 2018 to May 2019 the Individual Defendants' pattern of racketeering activities and predicate acts in the conduct of Softek, that occurred during that 2014-2019 period also consisted in part of a scheme to fraudulently obtain money in the custody and

control of IBC in violation of 18 U.S.C. §1344 by requesting Eagle's and IBC approvals of draws on Eagle's $5.0 million dollar LOC at IBC based upon false statements to obtain the draws that the draws were temporary and would be, and were being, immediately restored and repaid. (Supplemental Declaration of Troy Littleaxe, (ECF86-1), Para. 18; Second Supplemental Declaration of Troy Littleaxe filed herewith, Para. 3-4, and Exhibits 2-8 thereto)

21. The scheme to obtain money by fraud from IBD was executed by Individual Defendants' predicate act requests for approval of the following draws IBC received, advanced and deposited into Eagle's account:

a. Request for approval of $500,000 draw on or about January 26, 2018;
b. Request for approval of $350,000.00 draw on or about April 17, 2018;
c. request for approval of $500,000 draw on or about May 16, 2018;
d. Request for approval of $350,000 draw on or about October 18, 2018;
e. Request for approval of $350,000.00 draw on or about December 4, 2018;
f. Request for approval of $400,000 draw on or about December 18, 2018;
g. Request for approval of $200,000 draw on or about May 1, 2019.

Second Supplemental Declaration of Troy Littleaxe filed herewith, Para. 3-4, and Exhibits 2-8 thereto)

22. In July 2019 when the investigation commenced, a preservation of evidence letter was sent to Rusty Bohl. Red Cedar later requested the return of Bohl's office equipment and business computer. When returned, the business computer contained no ESI. A preliminary examination reveals that the ESI has been removed. (Follis Declaration (ECF 77-1), Para. 4, Exhibit 2; Nesland Declaration, Para. I-22.).

23. That the racketeering activity and predicate act of obstruction of justice by Defendant Bohl in violation of 18 U.S.C. §1503, was in the conduct of the affairs of Softek.

The above probable facts demonstrate that there are disputed issues as to the facts material to establishing the elements of Plaintiffs' three RICO claims, including but not limited to the two elements of "predicate acts of fraud" and that Plaintiffs must have "suffered an injury" that are the professed basis for Softek's Motion for Summary Judgment, and that it incorrectly argues in Parts C and D, pp. 4-7 (ECF No. 89) respectively, are not supported by evidence. The predicate acts that constitute the pattern of racketeering activity are the probable facts listed in Paragraphs 1-23 above.

The injury suffered as a result is in the millions of dollars, as itemized in Paragraphs 10, 11, 17 and 21, and the fact that these amounts were actually paid is established by Paragraph 5 of the Supplemental Nesland Declaration which states and summarizes Red Cedar's 2011 financial records, Exhibit 1, and Red Cedar's, Eagle's, Buffalo's and Talon's IBC bank statements (Exhibits 11-14) recording payments of fees from their respective IBC accounts in Oklahoma to SMS's Wells Fargo account in Texas as follows:

2011:	$ 130,394.65
2012:	$ 837,543.87
2013:	$ 2,924,937.07 ($2,861,369.06 paid by Red Cedar, $63,560.01 paid by Eagle.
2014:	$ 1,858,776.10
2015:	$ 1,050,139.00
2016:	$ 1,160, 000.00
2017:	$ 900,000.00
2018:	$ 655,000.00

In addition to the evidence presented by Plaintiffs, the Shah Declaration when viewed in a light most favorable to Plaintiffs establishes a basis for a jury to find that the Individual Defendants engaged in a pattern of racketeering activity resulting in injury to the Plaintiffs:

1. The Shah Declaration offers as evidence that no fraud was committed that Softek was paid 49% of the MTE's net profits and 40% of the net profits of the MTE's as a management fee based upon the LOI, SPA, PSA and CMSA. The Declaration shows if believed that Softek

performed under those agreements to generate $4.72 million of net profits for Red Cedar between 2011 and 2015 and $4.9 million of net profits for Eagle through 2018. A jury can infer from that evidence that Red Cedar paid Softek 49% of the net profits and 40% of the net profits as a management fee (ECF No. 76, at 10-14)

2. The Court can infer and a jury can find from that evidence that Red Cedar paid Softek between 2011 and 2015 $4.192,000: $1,880,000 as 40% of Red Cedar's net profits in management fees; and $2,312,800 as 49% of Red Cedar's profits. None of the amounts were reported or reveal by the Defendants to the Modoc Nation. (Littleaxe Supplemental Decl., (ECF 86-1) par. 17)

3. The Court can infer and the jury can find that Softek's billing of Red Cedar and receiving payment from Red Cedar of $4,192,000 of its $4.72 million of net profits to which Softek was not entitled and which was not disclosed constitutes evidence upon which a jury can find fraud and a very substantial business injury.

4. The Shah Declaration also shows if believed that Eagle had net profits of over $4.9 million through 2018. The Court can infer and a jury can find from that evidence that Eagle paid Softek $4,361,000 out of its $4.9 million of net profits: 40% as a management fee, which is $1,960,000; and another 49%, which is $2,401,000. None of the amounts were reported or revealed by Defendants to the Modoc Nation. (Littleaxe Supplemental Decl. (ECF 86-1), par. 17) Eagle's payment of an undisclosed $4,361,000 of fees and profits to Softek to which Softek was not entitled constitutes evidence upon which a jury can find fraud and a very substantial business injury to Eagle.

5. In addition, Softek issued a demand in July 2019 that Softek was owed $2,403,861 million of fees as of September 30, 2018 to which Softek was not entitled, and which Softek provided no substantiation for the claimed $2,403,861. (Littleaxe Supplement Decl. (ECF 86-1), par. 21-22, Exhibit K). That constitutes evidence upon which a jury can find fraud and a very substantial business injury, especially in light of Softek's Counterclaims seeking recovery of the fees on the basis of the LOI. (Supplemental Littleaxe Declaration, (ECF 86-1), Para. 21 and 22, Exhibit K; Amended Counterclaims, ECF 65, Paras. 28, 30, 31, 32, 34).

6. The Court can infer and the jury could reasonably find from the above evidence of predicate acts that the pattern of racketeering activities was continuous from 2011 through July 2019 and involved wires transfers of payments from Red Cedar's Oklahoma IBC account to Softek's Texas Wells Fargo accounts between 2011 and 2015 of $4.192,000, everyone of which was a predicate act in violation of 18 U.S.C. §1343 (wire fraud), §§1956-57 (money laundering), and §§2314-15 (transporting and receiving money obtained by fraud).[7]

[7] Because this has been converted to a motion for summary judgment, the law requires its resolution under Rule 56. See *Felmlee v. State of Oklahoma,* 2014 WL 4597724 *1, 9 (N.D. Ok. 2014). However, Plaintiffs pleaded the elements of a RICO violation with great specificity and stated plausible claims for relief in Paragraphs 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 41, 42, 43, 44, 45, 47, 49, 51, 53, 54, 55, 66, 68, 70, 72, 73, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 87, 90 and 92, all of which were incorporated by reference into the three RICO claims for relief .

V. THE EVIDENCE SUPPORTS A JURY FINDING THAT SHAH AND DADBHAWALA CONSPIRED TO CONDUCT AND PARTICIPATE IN THE CONDUCT OF THE AFFAIRS OF THE RICO ENTERPRISE THROUGH A PATTERN OF RACKETERRING ACTIVITIES.

18 U.S.C. §1962(d) provides, in pertinent part, "it shall be unlawful for any person to conspire to violate any provisions of subsections (a), (b), or (c) of this section." Defendants Rajesh, Sharad and Rusty conspired to violate the provisions of 18 U.S.C. §1962(c) by engaging in, agreeing and conspiring with each other and other individuals, including Richie Bohl, Jesse McCarty, Burnell White, Manish Vyas, Pami Shah and others currently unknown to Plaintiffs, to participate in the pattern of racketeering and overt and predicate acts described in Part IV above.

The Softek Defendant's sole argument against this claim is that "Because Plaintiffs cannot allege a sufficient claim under subsections (b) or (c), their subsection (d) conspiracy claim fails as a matter of law. However, here Plaintiffs have evidence sufficient to support a jury finding of a violation of 18 U.S.C. Sections 1962 (c) as set forth above, and of 18 U.S.C. Sections 1962 (c) as set forth below.

Moreover, based on the evidence when viewed in a light most favorable to Plaintiffs, there clearly had to have been a meeting of the minds of the Defendants Shah and Dadbhawala to engage in the pattern of racketeering activity in the conduct of the affairs of SS, SMS and SFS, the association in fact enterprise, in order for the pervasive fraudulent billings detailed in Part IV above to have occurred. Softek Defendants' Answer, when viewed in a light most favorable to Plaintiffs, admits that the RICO *persons* Shah and Dadbhawala were employed by, associated with, and conducted the affairs of the three business entities SFS, SS, and SMS, that comprised the *enterprise* (Answer (ECF 40), Para. 18 ("Softek admits that Mr. Shah occupied a management role at Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc."); Para. 19

("Softek Admits that Mr. Dadbhawala provided a management role Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc."); Para. 101 ("Softek admits that Mr. Shah and Mr. Dadbhawala occupied management roles at Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc.")). They were conducting the affairs of the enterprise and had to have known and agreed upon the scheme in order for it to have occurred.

Moreover, their participation in the Counterclaims and the Softek Defendants to collect over $3 million is further proof of their agreement to engage in a pattern of racketeering activity, as is the submission by each of a Declaration in this lawsuit insisting that is the Softek Defendants who are owed money by Plaintiffs, based on contracts that they knew were not valid, as established by their course of conduct in not obtaining ownership interests in the MTE's, and concealing from Plaintiffs their fraudulent billings and payments received.

Plaintiffs have submitted evidence in Part IV above of the fact that Softek was paid millions of dollars more by Plaintiffs than that to which it was contractually entitled as a result of this conspiracy, and Plaintiffs certainly have been damaged in their business as a result.

VI. THE EVIDENCE SUPPORT A JURY FINDING THAT SHAH AND DADBHAWALA MAINTAINED AN INTEREST IN OR CONTROLLED THE RICO ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY.

18 U.S.C. §1962(b) provides, in pertinent part, "it shall be unlawful for any person through a pattern of racketeering activity…to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate commerce." Under *Tal v. Hogan*, 453 F.3d 1244, 1268 (10th Cir. 2006), to state a claim under Section 1962(b), the plaintiff must allege the defendant (1) acquired or maintained an

interest in or control of (2) an enterprise engaged in interstate commerce (3) through a pattern (4) of racketeering activity, or collection of an unlawful debt.

Defendants Shah and Dadbhawala violated 18 U.S.C. §1962(b) by using fees and profits derived from Plaintiffs through the pattern of racketeering activity described in Part IV above, to maintain directly and indirectly an interest in and control of the Softek Enterprise. Rajesh Shah says in pars 15-16 of his Declaration (ECF 76), that SMS and SFS were formed to better service the MTE's and, more specifically, SMS was formed to hire personnel on payroll and contract with consultants, When that evidence is taken in a light most favorable to Plaintiffs, the Court may infer and a jury can find that the millions of dollars of fees obtained by Softek as a result of the racketeering activity established in Part IV above were utilized to hire and pay the personnel and the consultants supposedly providing the SMS management so as to allow and maintain the services. The personnel, payroll records and consultant contracts evidencing the maintenance of the enterprise's operations are in the exclusive control of Softek.

VII. SOFTEK'S MOTION FOR SUMMARY JUDGMENT ON AN "OUTRAGE" CLAIM THAT PLAINTIFFS DO NOT ALLEGE SHOULD BE DENIED.

Softek repeats in this motion the arguments they made in the motion to dismiss that Plaintiffs "appear to stake out a claim for outrage in the AC, although it is not entirely clear." Plaintiffs have asserted no such claim under Oklahoma law. Softek cites to the allegations in the RICO claims in which Plaintiffs allege that they have "suffered outrage and severe economic damages…of not less than $13.6 Million. (Amended Compl. Pars. 123, 129, 134) Outrage is not an element of a RICO claim. As noted, all Plaintiffs have to allege and prove is economic or business injury from Softek's Rico violations, and here they have in the amount of $13.6 million.

Dated April 10, 2020.

Respectfully submitted,

By: s/ Charles D. Neal, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2020, I electronically transmitted the foregoing document foregoing document, together with the Second Supplemental Declaration of Troy Littleaxe and Exhibits 1-8 thereto; the Supplemental Declaration of James E. Nesland and Exhibits 1-14 thereto, to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

D. Michael McBride, III
Gerald Lee Jackson
James E. Nesland
Gabriel S. Galanda
Anthony S. Broadman
Ryan Dreveskracht
Robert Joseph Sexton
Kirk B. Holleyman
Matthew Devilliers

/s/Charles D. Neal, Jr.