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.

BLAKE FOLLIS,

Counterclaim Defendant.

NO. 19-cv-00588-CVE-JFJ

MOTION TO DISMISS CERTAIN CLAIMS AGAINST RAJESH SHAH, SHARAD DADBHAWALA, SOFTEK MANAGEMENT SERVICES, LLC, SOFTEK FEDERAL SERVICES, LLC, AND SOFTEK SOLUTIONS, INC. FOR FAILURE TO STATE A CLAIM, AND BRIEF IN SUPPORT.

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I. INTRODUCTION

This is a complex, multi-party contractual dispute. What is not in dispute is that from the time Softek[1] commenced their work with the Plaintiffs, Softek worked hand-in-hand with Plaintiffs and a mutual attorney who provided legal advice to all relevant parties to create several business entities. Most of those entities realized significant profits as a result of Softek's work.

Several months have elapsed since Plaintiffs sued Softek and despite the additional time Plaintiffs expended to file an Amended Complaint ("AC"), Plaintiffs have not advanced any plausible claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and its specific pleading requirements. Plaintiffs also appear to allege Softek has committed outrage, but such a claim is inapplicable here.

When the adjectives and conclusory claims in Plaintiffs' AC are stripped away, all that is left are statements that (1) Softek invoiced Plaintiffs for fees due to Softek under their contractual agreements; and (2) Softek requested payment reflecting their share of the profits realized through Softek's diligence and expertise. The funds used to pay Softek were largely derived from work that Softek performed on behalf of Plaintiffs—i.e., the creation of several profitable corporate entities—all but one of which did not exist before Softek commenced work for Plaintiffs. Simply, none of the factual claims amount to racketeering activity sufficient to support a RICO or outrage claim. Thus, Softek requests those claims be dismissed with prejudice under to Fed. R. Civ. P. 12(b)(6).

[1] "Softek" for purposes of this motion to dismiss include the following Defendants/Counterclaimants: Rajesh Shah; Sharad Dadbhawala; Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc.

II. ISSUES

Pleadings that do not provide sufficient factual matter to state a claim that "is plausible on its face" are subject to dismissal. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104 (10th Cir. 2017) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Mere "threadbare recitals" of a cause's elements and conclusory factual statements cannot render claims facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Here, Plaintiffs have made numerous civil RICO claims against Softek, none of which are supported by more than threadbare recitals of the various elements of the causes of action alleged and conclusory assertions. Because Plaintiffs' claims are not supported by adequate facts, all such claims against Softek should be dismissed.

In addition, "a RICO plaintiff must meet a higher pleading standard than that imposed on an ordinary plaintiff." *Brown v. Locke*, No. 90-18, 1990 WL 84568, at *2 (D. Or. June 12, 1990) (quotation omitted). The heightened pleading requirements for civil claims under the RICO statutory framework are specific, mandatory, and are required to be carefully applied to prevent creative plaintiffs weaponizing RICO's provisions to disguise ordinary fraud cases as legitimate civil racketeering claims. *Cedar Swamp Holdings, Inc. v. Zaman*, 487 F. Supp. 2d 444, 449 (S.D.N.Y. 2007). Such fraud cases "clothed in the Emperor's trendy garb should be flush[ed] out at early stages of the litigation." *Id.* (internal quotation and citations omitted); *see also Gross v. Waywell*, 628 F.Supp.2d 475, 481 (S.D.N.Y. 2009) ("[E]xperience reveals that many plaintiffs, rather than fostering RICO's mission as private attorneys general aiding public law enforcement, actually appear as private prospectors digging for RICO's elusive gold, and more often

than not generating substantial costs rather than net gains to the public"). Those words could have been written for this case. Plaintiffs have failed to adequately plead any of their civil RICO claims against Softek. Thus, an independent basis exists to dismiss Plaintiffs' claims.

Finally, the tort of outrage is inapplicable in this contractual dispute. Any claim Plaintiffs make against Softek based on alleged "outrage" should be dismissed with prejudice.

III. FACTS

Plaintiffs set out with Softek in 2010 to form mutually beneficial business relationships based on the success Softek built with the Cedar Band of Paiutes.[2] Prior to this lawsuit, Softek's work for Plaintiffs resulted in the rehabilitation of one of the Plaintiff entities, Red Cedar Enterprises, Inc. ("RCE"), into a profitable business, and ultimately led to the creation of several additional small business entities, including Plaintiff entities Eagle TG, LLC ("Eagle"), Buffalo MTE, LLC ("Buffalo"), Talon MTE, LLC ("Talon"), Modoc MTE, LLC ("Modoc MTE"), and Walga MTE, LLC ("Walga") (collectively "Plaintiff Entities").[3] Due to Softek's efforts, Plaintiffs realized approximately $7 million in net cumulative profits over the time period relevant to this lawsuit.[4] Up to last July, the relationship between the Parties was a garden variety, run-of-the-mill, profitable business relationship.

A. Background

Softek has a history of success in the creation, management, financing, and support

[2] Declaration of Rajesh Shah ("Shah Decl."). ¶¶8–12, *see also* Exhibit A.
[3] *Id.* ¶¶11–28, Exs. B, C, D, and E.
[4] *Id.* ¶28.

of tribal small business entities that predates Softek's successful partnership with Plaintiffs.[5] In 2010, Plaintiffs hired Softek to rehabilitate RCE, and eventually to provide financial support, risk capital, and management and operations support to various other business entities, most of which were to be developed by Softek.[6] Softek delivered upon these agreements over the course of the partnership—nearly all of the entities, including the newly developed entities, experienced significant growth in revenue and profits during Softek's work for Plaintiffs.[7]

The partnership between Plaintiffs and Softek began when the Modoc Nation ("Modoc")—a domestic not-for-profit corporation duly organized and existing under and by virtue of the laws of the state of Oklahoma[8]—was looking for new business partners to develop their entities. Modoc's criteria for selecting potential partners was to find those who: (1) possessed knowledge and experience in the federal small-business contracting domain; (2) were willing and prepared to take risks and expend their own funds for startup and operational costs; (3) were willing and prepared to provide loans to the entities for working capital purposes as the business of the economic entities developed; and (4) could develop and successfully secure federal Small Business Administration ("SBA") 8(a) certification for new entities as needed, i.e., when RCE and other earlier existing Plaintiff entities became successful to the point of no longer meeting the criteria for certification under the 8(a) program.[9]

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[5] Shah Decl. ¶¶6–7.
[6] *Id.* ¶¶10–14, Exs. B, C, and D.
[7] *Id.*
[8] ECF No. 29, at ¶7.
[9] Shah Decl. ¶¶10–14, Exs. B, C, D, and E.

In December of 2010, Modoc entered into several agreements with Softek Solutions, Inc.[10] As part of these agreements, Softek acquired a 49% interest in RCE's profits and negotiated a 40% management fee in exchange for Softek's commitment to provide management, financing, and business development services to expand RCE's business.[11] In addition to the financial investment in RCE, the Parties understood that Softek would support and "form, invest in, manage and finance other new MTE's and qualify them as 8(a) companies to enter into profitable government and commercial contracts."[12] The 40% management fee and 49% profit-sharing model was agreed to carry over into every subsequent Plaintiff entity Softek worked to build, manage, and finance[13]—and the Parties operated under this agreement for nearly a decade. These agreements were all negotiated by Plaintiffs with the benefit of their legal counsel, Troy Littleaxe, who also represented Softek as their legal counsel for over seven years in connection with Softek's work for Plaintiffs.[14]

From January 2011 through July 2019, by Plaintiffs' own admission, Softek performed on their agreements. Softek Solutions, Inc.: (1) negotiated a 49% interest in RCE's and the other MTEs' profits; and (2) provided management, financing through Softek Federal Services, LLC, and business development/operations support services through Softek Management Services, LLC, to expand and rehabilitate RCE.[15] As the Defendants helped form, market, capitalize, and manage each successive Modoc entity, the

[10] ECF No. 29, ¶36.
[11] Shah Decl., ¶¶12–13, Exs. C and D.
[12] ECF No. 29, ¶31; *see also* Shah Decl. Exs. B, C, D, E, and H.
[13] Shah Decl. ¶12.
[14] *Id.* ¶19, Ex. F.
[15] ECF No. 29,. ¶¶45, 46, 49, 51–52, 54–56.

Plaintiff Entities largely became profitable.[16] Alleged "fraudulent" payments made to Defendants were made pursuant to contractual arrangements and the agreed upon business structure between the parties (*i.e.*, the 40% management fee and 49% profit-sharing structure).[17]

In addition, Defendant Softek Management Services, LLC ("SMS") and Softek Federal Services, LLC ("SFS") were formed specifically for Softek's venture with Plaintiffs.[18] SMS was formed to hire personnel on payroll, contract with consultants to aid with managing and building Plaintiff Entities, secure contracts for Plaintiff Entities, deliver the Plaintiffs Entities' obligations under said contracts, help support customers, provide financial oversight, ensure SBA and corporate compliance, and otherwise help successfully manage the new Plaintiff Entities.[19] SFS was formed to arrange for risk capital financing.[20] This financing was initially provided to Plaintiff Entities, and later—under the direction and supervision of Plaintiffs, vis-à-vis Mr. Littleaxe, the Parties' joint counsel[21]—consolidated into Plaintiff Talon at the insistence of the Modoc Tribe.[22] SFS secured its funding from internal sources and external partners, which was then used to finance the formation, initiation, growth, and support of Plaintiff Entities.[23]

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[16] Shah Decl. ¶¶20–28.
[17] *Id.*
[18] *Id.* ¶15–16.
[19] *Id.*
[20] *Id.* ¶17
[21] As referenced *supra* at p. 5, in addition to Littleaxe serving as General Counsel for the Modoc, Littleaxe also served as the Softek Defendants' legal counsel—without securing any waiver of potential conflicts of interest. Shah Decl., ¶19, Ex. F.
[22] *Id.* ¶18.
[23] *Id.* ¶¶17–18.

B. Softek's Rehabilitation Of RCE

Commencing their work on behalf of Plaintiffs, Softek identified, recruited, and hired qualified personnel to rehabilitate RCE and increase profits.[24] RCE made approximately $4.72 million in net profits between 2011, when Softek Defendants began their work, and 2015.[25] Because of its growth, RCE graduated out of the SBA 8(a) program and the Parties decided together to form two new Plaintiff Entities: Eagle, for technology and IT business; and Buffalo, for construction, operations, and support business.[26]

C. Eagle, Buffalo, Talon, Modoc MTE, And Walga

Eagle initially experienced difficulty and incurred losses in excess of $1 million upon start up.[27] Under the direction and management of Softek in coordination and consultation with Plaintiffs, however, Softek were able to not only recover initial losses, but generated over $4.59 million in profits for Eagle through 2018.[28]

Buffalo incurred losses initially upon the failure of a subcontractor to deliver in a major project.[29] Although Buffalo did recover some of its losses, the Parties decided in 2016 to form a replacement entity with a focus on construction.[30] That entity was Walga—in which Softek has a profit-sharing arrangement, like all Plaintiff Entities.[31] Walga has since developed a profitable business relationship through joint ventures with other non-

[24] *Id.* ¶21.
[25] *Id.*
[26] *Id.* ¶22.
[27] *Id.* ¶23.
[28] *Id.*
[29] *Id.* ¶24.
[30] *Id.* ¶25.
[31] *See* Shah Decl. Ex. C

party entities.[32] Because of the work of Softek, Walga is presently working on construction contracts through its joint venture relationships, with a value exceeding $30 million; and by early 2018, Walga had contracts in waiting valued at approximately $150 million.[33]

Enter Crossclaim Defendant Blake Follis. When he inserted himself into Softek's work with Plaintiffs by late 2016 or early 2017, Softek's management and oversight role of various Plaintiff Entities was curtailed.[34] In effect, Plaintiffs minimized Softek's management and oversight roles in Talon and Modoc MTE despite the fact that these entities followed the successful Softek-established model that had made Plaintiffs significant profits (Plaintiffs realized cumulative net profits of approximately $7 million through their work with Softek).[35]

Softek supported all Plaintiff Entities in one way or another—through direct management, consultation, certification as 8(a) entities, implementation of Softek's business model, and strategies for securing profitable contracts on behalf of the Plaintiff Entities.[36] Softek also provided vital risk capital assistance, by way of both loans and retention of profit share within the entities, assisted Plaintiff Entities in their growth as they came online, and secured lucrative contracts and other profit-generating business.[37] Under their agreement with Plaintiffs, Softek are entitled to a share of the profits of all Plaintiff Entities, and continuing fees as negotiated and agreed upon by the Parties.[38] This

[32] *Id.* ¶26.
[33] *Id.*
[34] *Id.* ¶29.
[35] *Id.* ¶28.
[36] *Id.* ¶¶15–28.
[37] *Id.*
[38] *See, e.g.,* Shah Decl. Ex. C.

arrangement had been the case for nearly a decade, prior to Crossclaim Defendant Follis' interference.[39]

D. Fantasy Sports Gambling And The $5 Million Line Of Credit

Crossclaim Defendant Follis—the grandson of longtime Modoc Chief Bill Follis—inserted himself into the relationship between the Parties in or around late 2016 or early 2017, in order to promote his idea of an online sports gambling platform, Fantasy Sports Markets ("FSM").[40] Follis, over the objections of Softek, sought to leverage the finances, resources, and personnel of the Plaintiff Entities to develop his now-failed fantasy sports gambling platform.[41] As an example, Follis used Eagle personnel—who had requisite technical experience—to help develop his electronic platform to support his nascent gambling enterprise.[42] Follis not only used Eagle personnel, he hired additional personnel and spent significant Plaintiff Entity funds on marketing his gambling endeavor, even though this was never contemplated as part of Softek's business model.[43]

Meanwhile, in or around late 2016, Eagle was bidding on a large contract that required significant capital.[44] Plaintiffs and Softek agreed together to establish a $5 million line of credit taken against Modoc's capital savings for purposes of bidding on the contract.[45] Plaintiffs knowingly agreed to securing a line of credit.[46] Unfortunately for all involved, Follis's actions in using Eagle resources for his failed fantasy gambling

[39] *Id.* ¶20, ¶29, ¶31, ¶¶42–45.
[40] *Id.* ¶¶29–34, Ex. G.
[41] *Id.* ¶32.
[42] *Id.* ¶33.
[43] *Id.* ¶34.
[44] *Id.* ¶35, Ex. H.
[45] *Id.*
[46] *Id.* ¶37.

endeavors depleted capital and led to a decision to draw down on the line of credit to pay business expenses.[47] Softek never supported the use of the line of credit in support of Follis's failed fantasy gambling endeavors.[48] In fact, Softek uniformly maintained objections to the use of the model they had created for Plaintiffs on anything involving gambling, not only based on the fact that this use did not fit within the business strategies Softek brought to bear in helping Plaintiffs build up profitable entities, but because Softek objected to participation in any gambling endeavor based on their religious beliefs.[49]

E. Softek's Relationship With Suh'dutsing Technologies

Despite Softek's verifiable track record of success with Modoc, Plaintiffs now attempt to paint a vague but lurid picture of Softek as conspiratorial fraudsters. Sensing the weakening of their claims in this matter and as a prologue to their AC, Plaintiffs nebulously describe an unrelated dispute in which Softek was supposedly culpable. This separate lawsuit "triggered fraud claims" and involved a corporate entity owned by the Cedar Band of Paiutes' tribal government—Suh'dutsing Technologies.[50] Plaintiffs admit that parties not involved in this lawsuit "confidentially settled the lawsuit in 2013 preventing disclosure of the terms [of the settlement]."[51] Plaintiffs further allude to the idea that this separate suit spawned the conspiracy alleged here. In essence, Plaintiffs' claim that after certain Softek Defendants' relationships with Suh'dutsing Technologies "blew up," Softek then conspired to develop a similar relationship with Plaintiffs aimed at fraud.[52] In reality, none of the

[47] *Id.* ¶38.
[48] *Id.* ¶20, ¶29, ¶31, ¶¶42–45.
[49] *Id.* ¶39.
[50] ECF No. 29, at ¶27.
[51] *Id.* ¶28.
[52] *Id.* ¶¶2, 27–28.

Defendants named in this lawsuit were ever accused of any wrongdoing by the Cedar Band of Paiutes. In fact, none of the Defendants here were parties in the lawsuit involving Suh'dutsing.[53]

Moreover, as the *Yash Technologies v. Suh'Dutsing Technologies* case was in its infancy in September 2011, President of Suh'dutsing Shane Parashonts wrote a letter of recommendation for Defendant Shah, "personally recommend[ing] Rajesh Shah as a senior executive with a proven track record, a very effective manager, and a visionary."[54] Mr. Parashonts worked alongside Rajesh for more than five years, and noted that "Rajesh played a vital role in building and growing the company to a $50 million organization in just five short years."[55] Suh'dutsing's President further noted that Mr. Shah helped establish and manage a "very effective and efficient Operations organization and Shared Services model that helped increase the companies [sic] profit.[56] The 2011 letter of recommendation from Suh'dutsing's President goes on, offering praise for Mr. Shah's character, business acumen, dedication, leadership, and initiative.[57] Like the balance of Plaintiffs' direct claims against Softek, there are no facts underpinning Plaintiffs' claims that Softek's relationship with Suh-dutsing and the Cedar Band of Paiutes tribe was part of a fraudulent scheme Softek cooked up.

[53] *See generally Yash Technologies v. Suh'Dutsing Technologies*, No. 11-0602 (D. Utah).
[54] Shah Decl. ¶9, Exhibit A.
[55] *Id.*
[56] *Id.*
[57] *Id.*

IV. LAW AND ARGUMENT

A. Plaintiffs' RICO Claims Are Not Supported By Sufficient Facts, Are Not Facially Plausible, And Should Be Dismissed.

Under Fed. R. Civ. P. 12(b)(6), courts may dismiss claims that "fail[] to state a claim upon which relief can be granted." A complaint filed in federal courts must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.'" *Brokers' Choice*, 861 F.3d at 1104 (quoting *Twombly*, 550 U.S. at 570). Claims are considered facially plausible when the facts alleged in a pleading "allow[] the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 556).

Two years after the U.S. Supreme Court announced this standard in *Twombly*, the High Court clarified how courts should implement it:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, . . . [d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Iqbal, 556 U.S. at 678. Considering a motion to dismiss under *Twombly* and *Iqbal*, the analysis begins "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Only "well-pleaded factual allegations" are entitled to an assumption of veracity, and only those well-pleaded averments should be considered in determining whether a pleading is plausible on its face and satisfies the *Twombly* standard. *Id.* at 679. "Mere 'labels and conclusions' and 'a

formulaic recitation of the elements of a cause of action' are insufficient." *Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016) (quoting *Twombly*, 550 U.S. at 555).

The *Twombly*/*Iqbal* framework is designed to serve two purposes: (1) "to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense," and (2) "to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of 'a largely groundless claim.'" *Pace v. Swerdlow*, 519 F.3d 1067, 1076 (10th Cir. 2008) (Gorsuch, J., concurring in part) (*quoting Twombly*, 550 U.S. at 557). Under a *Twombly*/*Iqbal* analysis, the "nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (citing *Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009)). "The *Twombly* standard may have greater bite" in cases that "include complex claims against multiple defendants." *Id.* at 1215 (citing *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1249 (10th Cir. 2008)).

In *Robbins*, the Tenth Circuit made clear that in complex cases involving multiple individuals and entities, "it is particularly important . . . that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Robbins*, 519 F.3d at 1250 (emphasis in original); *see also Goodwin v. Bruggeman-Hatch*, No. 13-2973, 2014 WL 3057198, at *2 (D. Colo. July 7, 2014) ("[G]roup pleading is insufficient to meet satisfy [sic] plaintiff's pleadings burden."). This case, like *Robbins*, involves several individuals and entities, multiple complex RICO claims under federal law, and common law claims under state law. Accordingly, in this

context, Plaintiffs' allegations require more specific factual support than, for example, a personal injury action between two individuals involving a single alleged act of negligence. *See Colorado Legal Servs. v. Legal Aid Nat. Servs.*, No. 08-0258, 2009 WL 347500, at *3 (D. Colo. Feb. 11, 2009) (*Robbins* "applies with equal force" in a case "where a number of defendants are legal entities acting through officers and agents, and where other defendants are individuals of varying involvement in operational decisions").

Plaintiffs filed the AC on December 6, 2019, adding several claims, including civil claims for relief under RICO.[58] The AC sets forth several causes of action under RICO. Each of the claims under RICO relies on the paragraphs preceding the RICO allegations. Accordingly, each of these paragraphs must be examined for adequacy to determine if they support the latter allegations in the AC.

The first paragraph of the AC accuses Defendants of "a sophisticated conspiracy, scheme and fraudulent course of conduct" over a period of nine years during which Defendants "defrauded and deceived Plaintiffs and fraudulently and unlawfully took fees, salaries, loan interest and other payments from Plaintiffs of more than $14.6 million."[59] The second paragraph portrays a previous business relationship as a "fraud dispute," inferring without any factual allegation that Softek Defendants at least had committed fraud with respect to successful work they performed on behalf of Cedar Band of the Paiute Tribe in Utah.[60] Regardless, the second paragraph is irrelevant with respect to supporting any allegation in the suit before this Court because none of the Softek Defendants were parties to the separate and unrelated dispute involving the Cedar Band of the Paiute Tribe.

[58] *See* ECF No. 29.
[59] *Id.* ¶1.
[60] *Id.* ¶2; *cf.* Shah Decl., ¶¶6–9, Ex. A.

The third paragraph of the AC provides the foundation of Plaintiffs' narrative with respect to their claims against Softek: the factual assertion that Softek "carried out the scheme, conspiracy and fraudulent course of conduct by entering into a number of agreements with Plaintiffs in 2010 and 2014."[61] The specific factual allegation that Plaintiffs and Defendants entered into a "number of [contractual] agreements" is entitled to an assumption of truth, and every allegation thereafter springs from this contractual relationship.[62] But no additional allegation at any point in paragraph three or any of the paragraphs preceding or following it are supported by specific factual allegations that meet the *Twombly/Iqbal* standard. Each payment of fees, profit sharing, interest on financing furnished to Plaintiffs, etc., was made pursuant to contractual agreements between the Parties. In fact, Plaintiffs advance no specific factual allegations in any of the paragraphs preceding the RICO allegations and other causes of action that allege any of the payments exceeded the amounts due the Defendants under their agreements between the Parties or were otherwise fraudulent or in some way illegal.

Instead of alleging any detailed facts for Plaintiffs' RICO claims, Plaintiffs merely allege Softek are liable for "conducting the affairs of the enterprise in violation of 18 U.S.C. § 1962(c)."[63] Effectively, Plaintiffs allege that Softek conducted or participated in conduct that amounted to a pattern of racketeering activity with respect to their activities on behalf of Softek Solutions, Inc., Softek Management Services, LLC, and Softek Federal Services, LLC., which Defendants refer to as "SS, SMS, and SFS" respectively. Plaintiffs assert flatly that SS, SMS, and SFS are all three collectively or individually (it is not clear) the

[61] ECF No. 29, ¶3.
[62] *Id.*
[63] *Id.* ¶¶26–27.

"association-in-fact 'enterprise' for the First, Second and Third RICO Claims," which Defendants also assert collectively comprise "the Civil RICO Enterprise."[64]

As noted *supra,* under *Twombly* and *Iqbal* this Court commences its analysis of this motion "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Thus far in the AC, the only allegations Plaintiffs have advanced specific to civil RICO claims are mere conclusions or formulaic recitations of the elements of each specific allegation Plaintiffs contend form the basis of their RICO claims. The following analysis of the Plaintiffs' RICO claims, and the AC in general, demonstrates a dearth of factual allegations that are entitled to an assumption of truth. And those few specific factual allegations that are entitled to an assumption of truth do not approach satisfaction of the pleading standards required by *Twombly* and *Iqbal*.

1. Paragraphs 99–107 Of The AC Lay Out Conclusory Claims And Allegations That Are Not Entitled To An Assumption Of Truth.

Insofar as any facts supporting the first RICO cause of action are concerned, the allegations in paragraphs 99 through 107 contain mere conclusions and a formulaic recitation of the elements of a cause of action of conducting the affairs of a RICO enterprise in violation of 18 U.S.C. § 1962(c). These allegations are therefore not entitled to the assumption of truth Plaintiffs generally otherwise enjoy in defending a motion to dismiss. For example, the allegations in these paragraphs follow a pattern laced throughout the entire AC of deploying adjectives interwoven with conclusory factual allegations, repeatedly alleging, for example, that Defendants participated in a "fraudulent scheme" or

[64] *Id.* ¶100.

made a "false request" or otherwise "defrauded" Plaintiffs.[65] But there is no specific material factual allegation lodged in paragraphs 99 through 107 of the AC that would support Plaintiffs' RICO claims. Thus, these allegations are not entitled to an assumption of truth. Plaintiffs simply fail to meet the RICO-specific pleading standards for alleging a defendant conducted the affairs of a RICO enterprise.

2. In Paragraphs 108–135 Of The AC Plaintiffs Fail To Allege Specific Facts Showing That Any Payments Softek Requested Amount To A Pattern Of Racketeering.

In paragraphs 108 through 135, Plaintiffs make specific allegations of actual crimes that may be considered part of a "pattern of racketeering activities" in a case where such activities actually happened and where a plaintiff has buttressed these conclusory claims with facts that tend to show racketeering activity occurred. Specifically, Plaintiffs make allegations against Softek Defendants of wire fraud, money laundering, general fraud, bank fraud, obstruction of justice, conspiracy, and maintaining and managing a RICO enterprise. But Plaintiffs do not support any of their specific claims of a pattern of racketeering activity that might give rise to civil RICO liability with specific factual assertions necessary to sustain a cause of action.

a. Paragraphs 108–119: Wire Fraud Claims

The paragraphs alleging wire fraud furnish either "formulaic recitation[s] of the elements" of wire fraud that are insufficient under the law of pleading in this jurisdiction, or they make factual assertions that do not on their own amount to racketeering, even if assumed true. *Fallin*, 841 F.3d at 1107 (*quoting Twombly*, 550 U.S. at 555). These allegations are insufficient under the applicable RICO standards and the general pleading

[65] *Id.* ¶¶102–107.

standards under *Twombly* and *Iqbal*. As the District Court in *Apache Tribe of Oklahoma v. Brown* held, the specific pleading requirements with respect to fraud under Rule 9(b) are applicable with equal force to allegations of fraud meant to establish predicate offenses giving rise to civil RICO liability. 966 F. Supp. 2d 1188, 1194 (W.D. Okla. 2013) (citing *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002)).

Mail fraud and wire fraud are similar claims with similar elements. *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999). To establish mail fraud, a plaintiff must allege "(1) the existence of a scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises, and (2) use of the United States mails for the purpose of executing the scheme." *Id.* (*quoting Bacchus Industr., Inc. v. Arvin Industr., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991)). "The elements of wire fraud are very similar, but require that the defendant "use interstate wire, radio or television communications in furtherance of the scheme to defraud." *Id.* (*citing* 18 U.S.C. § 1343 (1988)). The Tenth Circuit in *BancOklahoma* recognized that the "common thread" among bank fraud and wire fraud claims is "fraud" itself, and the elements of fraud applicable in the given jurisdiction are applicable. 194 F.3d at 1103. In Oklahoma, the elements of common law fraud are: 1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his (or her) own detriment. *Bowman v. Presley*, 2009 OK 48, 212 P.3d 1210, 1218 (Okla. 2009). The failure of any element of fraud, whether the foundational fraud claim or the additional elements required in bank or wire fraud, is fatal to any fraud claim. *See Tal*, 453

F.3d at 1263.

Here, as in *Apache Tribe of Oklahoma v. Brown*, Plaintiffs submitted lengthy allegations devoid of specific facts identifying a false representation of material fact that (1) was either known by a specific Defendant to false, or made recklessly without knowledge of the truth; (2) was made with an intention that Plaintiffs act on the false representation; and (3) Plaintiffs relied upon to their detriment. 966 F. Supp. 2d at 1195. The RICO claims in *Brown* were dismissed, as Plaintiffs' claims here should be. *See also, e.g., Tronsgard v. FBL Fin. Grp., Inc.*, 312 F. Supp. 3d 982, 993 (D. Kan. 2018).

Paragraph 108 of the AC is a lengthy one-sentence paragraph that never rises beyond mere conclusions. The paragraph includes bare assertions of "wire fraud," "defrauding Plaintiffs," and "racketeering activity" under RICO. As such, nothing in this paragraph is entitled to any assumption of truth and cannot be used to sustain Plaintiffs' deficient pleading.

Paragraph 109 is a three-sentence paragraph alleging conclusory facts to substantiate wire fraud claims by describing a system of invoicing and payment for contractually agreed-upon compensation owed to Softek, resulting from the work and success of Softek's efforts under their contractual arrangements with Plaintiffs. The factual allegations in the AC underlying the invoice system are entitled to an assumption of truth, but Plaintiffs fail to describe how the payments go beyond the four corners of their management and ownership agreement with Softek. Phrases in this paragraph accusing Defendants of "knowingly . . . devis[ing] . . . a scheme and artifice to defraud and fraudulently obtain payments of money from Plaintiffs" and using "other interstate wire, phone and email communications in interstate commerce that were incident to and an

essential part of the fraudulent scheme" are conclusory, and therefore not entitled to any assumption of truth which would sustain Plaintiffs' deficient RICO claims. Stripping away the serial adjectives like "fraudulent" and "scheme" and "artifice," the only specific factual assertions in this paragraph are that Defendants knew an interstate bank wire would be used to pay their invoices. Assuming such factual inferences are true, issuing invoices to get paid via interstate bank transfers does not make a plausible wire fraud allegation as a predicate offense to sustain a civil RICO claim.

Paragraphs 110–115 under Plaintiffs' wire fraud section in the AC largely follow the same pattern as the paragraphs described above, with the exception that they allege specific payments Plaintiffs issued to Softek for their work under the contractual obligations Plaintiffs negotiated are "fraudulent," with no further elaboration on how each of these payments was fraudulent. For example, in Paragraph 110, Plaintiffs allege that Softek's:

> scheme to defraud was perpetrated and carried out by said Defendants in conducting the affairs of Softek by causing fraudulent requests for fees upon which Plaintiffs relied to issue checks to Softek for fees which Sharad deposited in Softek's Wells Fargo bank in California and through interstate wire communications were paid by IBC from Red Cedar's IBC bank account in Oklahoma.[66]

What follows the above sentence is a list of five checks paid by one of the entities Softek and Plaintiffs co-owned and managed together. It is noteworthy that no allegation is made that any of these invoices violated or exceeded the amounts due and payable pursuant to the contractual obligations between the Parties. The only indication that any of the payments alleged in Paragraphs 110–115 rise to the level of statutory bank fraud are the

[66] ECF No. 28, ¶110.

Defendants' use of adjectives like "fraud" to describe them.

Paragraph 111 follows the pattern set in Paragraph 110: lengthy sentences filled with conclusory assertions followed by specific factual allegations of Defendants emailing monthly invoices. For example, Plaintiffs casting monthly emailed invoices as "fraudulent" without explaining how they were fraudulent and not merely invoices made for work performed under the contractual arrangements between the Parties or for profits due to Softek based on their ownership interest in a given Plaintiff Entity. This assertion fails to create a plausible wire fraud claim. Likewise, the specific facts alleged includes invoices Softek emailed to Plaintiffs precipitating payments of the same under the contractual arrangements between the Parties. No facts are offered in Paragraph 111 to support the claims that any of these invoices sent were "fraudulent" or otherwise meet the elements for wire fraud.

Paragraph 112 alleges that "Defendants scheme to defraud was perpetrated and carried out by [Softek] from 2015 to July 2019 falsely requesting transfers of millions of dollars of fees by means of phone calls and emails"[67] The first two sentences in Paragraph 112, as they pertain to any actions for which Softek can be held liable, are mere conclusions. This paragraph describes invoices communicated "via interstate commerce from computers and devices" in California to accountants in Utah. The "false requests" resulted in wiring of fees, according to Plaintiffs. Invoices communicated via interstate commerce are facts alleged which are entitled to an assumption of truth at the pleading stage. But Plaintiffs advance no alleged facts describing specifically how these invoices are "false" or "fraudulent" or otherwise constitute "wire fraud." Plaintiffs are not entitled

[67] *Id.* ¶ 112.

to an assumption of truth in respect to these allegations, and thus cannot satisfy the requisite pleading requirements.

Paragraph 113 alleges that Softek's "scheme to defraud" was carried out "by preparing and emailing, using interstate wire communications, management, profit-sharing, loan and employment agreements by which Defendants, by means of wire transmissions, derived fraudulent fees, salaries and interests payments."[68] As with the preceding paragraphs, Plaintiffs offer no facts in this paragraph, or anywhere in the AC, to support why the fees, salaries, and interest payments are fraudulent. Plaintiffs list a letter of intent, a management services agreement, two loan agreements, and two employment agreements, each of which Plaintiffs contend was "emailed using interstate wire communication."[69] These alleged specific facts support claims of contractual relationships between the parties, but they do not support a *prima facie* case of wire fraud.

Paragraph 114 alleges more requests "using interstate wire communications" from Softek to Plaintiffs' for payment of "fraudulent fees."[70] Plaintiffs further allege "false instructions to transfer and wire fees" to Softek, including four "instructions to wire" fees between 2015 and 2018.[71] These alleged specific facts, on their own, do not support a *prima facie* case of wire fraud. Taken as true they merely show Softek requesting payment of fees owed under their contractual arrangements with Plaintiffs. No facts are offered as to why these fees violate or exceed the terms of the contractual obligations or rights of the Parties.

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[68] *Id.* ¶113.
[69] *Id.*
[70] *Id.* ¶114.
[71] *Id.*

Paragraph 115 consists of the following largely verbose sentence that is not easy to decipher:

> Defendants Rajesh, Sharad and Rusty's scheme to defraud was perpetrated and carried out by said Defendants in conducting the affairs of Softek by establishing a $5.0 million letter of credit for Eagle ("LOC") for which said Defendants, by emails and cell phone calls using interstate wire communications from Texas and Oklahoma, fraudulently made and caused to be made, false requests to Eagle's IBC Oklahoma bank to draw on the LOC and deposit millions of dollars into Eagles' IBC Oklahoma bank account from which Softek was wired fraudulent fees via ACH transfers . . . .[72]

It appears here that Plaintiffs are alleging that Softek made "false requests" to draw on a line of credit, which was in turn used by Plaintiffs at Softek's request, to pay "fraudulent fees." At bottom, this sentence contains no specific factual assertions that would make Softek liable for wire fraud.

The list following the single sentence cited above from Paragraph 115 includes requests for draws purportedly made on the line of credit in 2018 and 2019. No facts are alleged that Softek secured the line of credit without the Plaintiffs knowledge and consent, and without the benefit of Plaintiffs' and Softek's legal counsel advising all parties on the legal consequences of a line of credit. No facts are alleged that Softek concealed the status of the line of credit from Plaintiffs; in fact, Plaintiffs have a tribal representative that was the *de facto* manager of each Plaintiff Entity that would have access to all information regarding a given entity's financing and certainly had access to information regarding Plaintiffs' line of credit. Again, no facts are offered in this paragraph showing how these requests violate or exceed the terms of the contractual obligations of the parties.

As the Tenth Circuit noted in its holding on an appeal involving a motion to dismiss

[72] *Id.* ¶115.

under the *Twombly/Iqbal* standards:

> "[P]lausible" cannot mean "likely to be true." Rather, "plausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible.

Robbins, 519 F.3d at 1247 (quotation omitted). Plaintiffs' allegations here encompass a "wide swath of conduct" all of which amounts to Softek invoicing Plaintiffs pursuant to the contractual agreements Plaintiffs reviewed and signed. Plaintiffs' displeasure with the ownership and fee structure agreement they negotiated with the benefit of legal counsel, or their dismay at business losses resulting from either normal market circumstances (*i.e.*, a failed competitive contract bid), or Blake Follis's failed sports gambling endeavor does not amount to a plausible cause of action for wire fraud under RICO.

b. Paragraphs 116–117: Money Laundering Claims

Paragraphs 116–117 accuse Defendants of "Money laundering in violation of 18 U.S.C. §§ 1956 and 1957," but in fact allege no facts that arise to money laundering. Again, taking the first step required under *Twombly*, the Court must determine if any of the facts alleged in these paragraphs are entitled to an assumption of truth. None are.

First, Paragraphs 116–117 must be stripped of conclusory allegations to determine the facts alleged. Plaintiffs contend here again that a "scheme to defraud" was carried out between 2012 and 2019 "by intentionally and knowingly engaging and attempting to engage in dozens of monetary transactions involving criminally derived money and property taken by fraud from Plaintiffs" amounting to "unlawful acts of wire fraud."[73] No further facts are offered showing how the alleged money transactions involved "criminally

[73] *Id.* ¶116.

derived money and property taken by fraud." Hence, no fact alleged in Paragraph 116 rises beyond the level of conclusory allegations.

Paragraph 117—what appears to be the heart of Plaintiffs' money laundering predicate allegations—fares no better. In one sentence that is 188 words long, Plaintiffs allege a "scheme to defraud" between 2014 and 2019. This sentence contends Softek Defendants carried out "dozens of transactions designed in whole or in part to conceal and disguise the nature, source and control of the criminally derived money and payments taken by wire fraud from Plaintiffs in violation and indictable under 18 U.S.C. § 1956(a)(1)," by requesting payments made via interstate banking transactions.[74] The sentence translates to the assertion that Softek directed or requested funds to be transferred from one Plaintiff Entity to another Plaintiff Entity—entities which Plaintiffs did, in fact, own and control. These requests for fund transfers were allegedly made at some time before Softek's requests to Plaintiffs' accountants to issue payments due to Softek as owners and managers of Plaintiff Entities. Assuming these facts to be true, they do not allege a scheme to conceal any money transaction in either of these paragraphs.

Detailed and lengthy but vague allegations of money laundering that do not specify relevant financial transactions or describe particularly how a defendant's actions meet the elements of money laundering with specific facts are insufficient under RICO. *See Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 315–16 (D.N.J. 2005), *aff'd*, 691 F.3d 527 (3d Cir. 2012) (allegations that "largely recite the elements of different money laundering provisions, but do not identify the relevant financial transactions . . . or describe more particularly [defendants'] 'money laundering activities'" insufficiently allege "facts to

[74] *Id.* ¶117.

state predicate acts of money laundering."). Plaintiffs offer no facts showing how these transfers of funds requested directly of Plaintiffs were fraudulent, unlawful, or criminal or in any way. Accordingly, no fact alleged in Paragraph 117 meets the standard for pleadings under *Twombly* and *Iqbal*.

c. Paragraphs 118–119: Allegations Of Transferring And Receiving Money Taken By Fraud

Paragraphs 118–119 largely repeat conclusory allegations made in the previous paragraphs of the AC and are not entitled to any assumption of truth. At no point in either paragraph do Plaintiffs allege specific facts supporting allegations of "money . . . taken by fraud." The transfers alleged, to the extent they are entitled to any assumption of truth, are not alleged to have violated the contractual obligations between the parties with more than conclusory remarks and summary recitation of the elements of the predicate offense.

d. Paragraph 120: Bank Fraud Allegations

Plaintiffs' allegations of bank fraud in Paragraph 120 follow the pattern of the previous adjective-riddled paragraphs, making allegations of a "scheme to defraud" to "obtain money and funds . . . by means of false and fraudulent pretenses, representations and promises in making and causing to made [sic] false requests" between banking institutions.[75] Beyond conclusory allegations of wrongdoing unsupported by factual allegations, these allegations are also formulaic recitations of the cause of action not entitled to any assumption of truth. At bottom, the allegations of bank fraud, like every other predicate offense alleged, are nothing more than Plaintiffs making sweeping allegations about funds Softek requested of Plaintiff Entities and caused to be paid to them

[75] *Id.* ¶120.

through valid invoices for services and other monies owed Softek under their contractual agreements with Plaintiffs. As noted *supra*, the line of credit Plaintiffs chose to secure, with the advice of their and Softek's mutual legal counsel, was an informed decision Plaintiffs made. To the extent funds were used in the line of credit to pay Softek what they were owed for their management, financing, and ownership stake in Plaintiff Entities, such funds were not fraud and do not meet the elements of bank fraud under 18 U.S.C. §§ 2314–15.

e. Paragraph 121: Obstruction Of Justice Allegation

Paragraph 121 appears to allege obstruction of justice solely against Defendant Rusty Bohl. To the extent this allegation also targets Softek, Plaintiffs have failed to allege any facts in this paragraph supporting an allegation of obstruction of justice against Softek and any such allegation against Softek must be dismissed.

f. Paragraphs 126–130: Conspiracy Allegations

No further specific facts adequate to support any allegations entitling Plaintiffs to civil relief under RICO are found in Paragraphs 126–130. These paragraphs lay out formulaic recitations of conspiracy coupled with bare, conclusory factual allegations consistent with all other allegations in the previous paragraphs of the AC. For example, in Paragraph 128, Plaintiffs allege Softek "conspired" to "participate in the pattern of racketeering and overt and predicate acts alleged in paragraphs 1 through 125."[76] The problem for Plaintiffs' AC is that there are no sufficient facts alleged in the preceding 125 paragraphs, or the paragraphs that follow, which are entitled to an assumption of truth that would sustain any allegation of conspiracy under 18 U.S.C. § 1962. Paragraph 129 alleges,

[76] *Id.* ¶128.

among other things "outrage and severe economic damages in the form of fraudulently paid fees, profits and fraudulent interest on loans . . . [which] damages were proximately caused by the RICO violations as herein alleged."[77] Here we have again nothing beyond conclusory factual allegations tracing the elements of an alleged predicate offense with no specific facts showing how fees, "profits," and interest payments on loans were "fraudulent" or amount to racketeering under RICO. To the extent Plaintiffs intend to plead the tort of "outrage," there is no attempt whatsoever to advance factual allegations satisfying such a claim and outrage is not a predicate offense under RICO. 18 U.S.C. § 1961(1).

g. Paragraphs 131–135: Maintaining and Controlling A RICO Enterprise Allegations

Paragraphs 131-135 of the AC suffer from the same ailments as the paragraphs described above—namely, they are unsupported by specific facts entitled to an assumption of truth. The operative factual paragraph in this allegation does nothing more than claim Softek violated 18 U.S.C. § 1962(b) "by receiving fees and profits derived from a pattern of racketeering activity and used the fees and profits to maintain directly and indirectly an interest in and control of Softek as alleged in paragraphs 1 through 130."[78] But, again, the preceding paragraphs advance no facts substantiating the claim that Softek engaged in anything tortious or unlawful, much less a "pattern of racketing activity" amounting to a RICO violation. Stripped of all adjectives and conclusory allegations of fraudulently or falsely requesting fees, Plaintiffs' AC alleges facts showing that Plaintiffs and Softek engaged in joint ventures, some of which were profitable, and Softek sought payment for

[77] *Id.* ¶129.
[78] *Id.* ¶131.

their work and ownership stake in each of their joint ventures.

B. Plaintiffs' RICO Claims Do Not Meet RICO'S Specific Pleading Requirements.

In addition to failing to meet the *Twombly/Iqbal* standard applicable to all civil causes of action, Plaintiffs' RICO claims fail under independent grounds, specific to civil RICO claims, as well.

Fraud allegations must be pled with particularity under Fed. R. Civ. P. 9(b), including when fraud or mistake is the basis for a RICO claim. *Iqbal*, 556 U.S. at 686; *see also Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F. 2d 982, 989 (10th Cir. 1992) ("Under Rule 9(b), plaintiffs must sufficiently allege each element of a RICO violation and its predicate acts of racketeering with particularity, a requirement justified by the threat of treble damages and injury to reputation.") (quotation omitted). Allegations of fraud must set forth the "who, what, when, where and how' of the alleged fraud." *Wynne v. Blue Cross & Blue Shield of Kansas*, No. 05-4035, 2006 WL 1064108, at *3 (D. Kan. Apr. 21, 2006) (quotation omitted). A complaint cannot merely suggest "that *some* plaintiff could prove *some* set of facts in support of the pleaded claims." *Robbins,* 519 F.3d at 1247 (quotation omitted). Rather, the complaint "must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Id* (emphasis in original). In other words, Rule 9(b) requires a plaintiff to "set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 726–27 (10th Cir. 2006) (quotation omitted).

If averments of fraud are not pled sufficiently under Fed. R. Civ. P. 9(b), a court must "'strip' the insufficiently pled averments of fraud from the counterclaim and examine

the remaining allegations to determine whether it states a claim." *Steed v. Warrior Capital*, No. 06-348, 2007 WL 2458790 at *4 (W.D. Okla. 2007) (citing *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1105 (9th Cir. 2003)).

1. Plaintiffs Are Unable to Allege A Section 1962(c) RICO Claim.

Plaintiffs allege Softek violated 18 U.S.C. § 1962(c) by participating in one of several enterprises that engaged in racketeering activities. The section 1962(c) claim is built on the alleged activities of three separate enterprises: (1) SS; (2) SMS; and (3) SFS.[79]

To plead a claim under section 1962(c), Plaintiffs must show that each defendant participated in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity ("predicate acts") or collection of unlawful debt, and (5) that conduct must also be the proximate cause of the harm to the victim. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496–97 (1985); *Holmes v. Sec. Inv'r Prot. Corp*, 503 U.S. 258, 268 (1992). Here, Plaintiffs' section 1962(c) claim does not satisfy these elements.

a. There Is No Association-In-Fact Enterprise Alleged.

Plaintiffs fail to establish that a RICO enterprise existed because they do not show the existence of two or more distinct entities, and even if they could meet the distinctness requirement, they are unable to plead a common purpose. RICO defines an enterprise as "any individual . . . corporation, association, . . . and any . . . group of individuals associated in fact although not a legal entity." *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1182 (10th Cir. 2019). An "association-in-fact" enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct and

[79] *Id.* ¶100.

requires evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit." *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)). "[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)).

Here, Plaintiffs allege that the association-in-fact enterprise for all RICO claims consisted of SS, SMS, and SFS.[80] However, Plaintiffs provide no explanation for how these associations meet the distinctness requirement necessary for stating RICO claims. Plaintiffs acknowledge that "SS is the sole member and owns SFS; and SFS is the sole member and owns SMS."[81] Further, all companies have the same principal place of business, maintain the same bank accounts, and have the same "founder, owner, managing member, and/or chief executive officer."[82] Accordingly, SMS and SFS are actually "part of, not distinct from, the identified enterprises." *Llacua*, 930 F.3d at 1185 (citing *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989)); *see also Moss v. BMO Harris Bank*, 258 F. Supp. 3d 289, 302 (E.D.N.Y. 2017) ("[T]here has to be something that ties together the various defendants allegedly comprising the association in fact into a single entity that was formed for the purpose of working together—acting in concert—by means of racketeering acts.") (quotation omitted). Plaintiffs fail the distinctness requirement.

But even assuming for the sake of argument that Plaintiffs could establish that the

[80] *Id.*
[81] *Id.* ¶17.
[82] *Id.* at ¶¶17–18.

entities are distinct, Plaintiffs still fail to establish that they engaged in the common purpose of trying to defraud Plaintiffs through alleged overbilling. Other than repeated use of the words "fraud," "fraudulent," "conspiracy," and "scheme," it is very difficult in reading the Complaint to even ascertain precisely what it is the Plaintiffs are alleging. Therefore, it is similarly difficult to rebut any allegations that there was a common purpose without knowing precisely what that purpose is. Because, other than fulfilling their contractual duties, and wanting to get paid for their work in accordance therewith, there isn't one. Plaintiffs' conclusory allegations are merely legal conclusions couched as facts and must be disregarded. *Iqbal*, 556 U.S. at 678.

b. There Is No Pattern Of Racketeering Alleged.

Plaintiffs also fail to meet the relatedness and continuity requirements of RICO. A RICO plaintiff's allegations must show both that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Because "RICO is not aimed at the isolated offender," *Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1544 (10th. Cir. 1993), proof of two or more predicate acts are insufficient to prove a pattern "unless there is a relationship between the predicate acts and a threat of continuing activity." *Tal*, 453 F.3d at 1267–68. Where, as here, a complaint alleges a series of predicate acts with a singular purpose, and does not allege additional victims, that complaint fails to allege continuity. *See, e.g., Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535–36 (9th Cir. 1992) (plaintiff failed to allege threatened continuity where the evidence suggested that a single episode was comprised of multiple predicate acts, but did not suggest that harm was meant to anyone but the plaintiff).

Here, again, there is nothing in the AC to demonstrate that the allegedly fraudulent invoices that were billed,[83] were related to the alleged fraudulent misrepresentations of fact,[84] or indeed any other alleged offense. The AC fails to demonstrate why or how the invoices were intentionally fraudulent. The AC similarly fails to identify which particular defendant was engaged in which alleged violation. Even when the Complaint does single out offenses of a particular defendant, it is left unclear whether the alleged violation relates to other alleged violations, or even whether that offense relates to the RICO claim at all.[85] More typically, throughout the AC, Plaintiffs refer to "Defendants" as a group and it is impossible to determine which entity or person is included in that definition.

Moreover, the Plaintiffs fail establish continuity (though the timing of the alleged racketeering activities as alleged are nearly impossible to track). The Plaintiffs allege that Softek engaged in a single "fraudulent" scheme between 2010 and 2019,[86] wherein they engaged in patterns of "racketeering" in support of that scheme. Critically, Plaintiffs contend the predicate acts all had one purpose, which was to "unlawfully [take] fees, salaries, loan interest and other payments from Plaintiffs."[87] Plaintiffs do not allege any other victims.[88] Thus, although Plaintiffs allege a number of predicate acts, the Defendants' alleged collective conduct is in reality a single purported episode with

[83] *See, e.g., id.* ¶¶42, 44.
[84] *See, e.g.*, *id.* ¶35.
[85] *See id.* ¶43 (alleging that Mr. Shah committed a "breach of fiduciary duty and act of disloyalty" under the section of the Complaint that supposedly is addressing Section 1962(c) RICO violations of SS, SMS, and SFS).
[86] *Id.* ¶4.
[87] *Id.* ¶ 1.
[88] Plaintiffs allude to other victims by referring to the Yash Technologies and Suh'dutsing Technologies dispute, but the dispute is misrepresented and entirely irrelevant to the current claim, as detailed *supra*.

singular purported purpose—to defraud Plaintiffs out of funds through a scheme of improper billing and payment collection. This does not satisfy the relatedness and continuity requirements under RICO

2. Plaintiffs Are Unable To Allege A § 1962(b) RICO Claim.

Plaintiffs fail to state a claim under 18 U.S.C. § 1962(b) because (1) as noted above, they cannot demonstrate the necessary element of an "association-in-fact" enterprise; and (2) they cannot demonstrate that Defendants' maintained or acquired control of the "enterprise" *through* the alleged predicate acts.

Title 18 U.S.C. § 1962(b) makes it illegal for "any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in . . . interstate . . . commerce." The purpose of Section 1962(b) is "to prohibit efforts to muscle in on legitimate business through the commission of a pattern of racketeering activity." *Tal*, 453 F.3d at 1268 (quotation omitted). 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. *Id.* at 1268. Like the other section 1962 claims, the injury must be attributable to the prohibited action. *Id.*

As *Tal* explains:

> Section 1962(b) claims are relatively uncommon because the first element requires sufficient allegations of "an interest in or control of" an enterprise, as opposed to the less demanding requirement of "association" with the enterprise in section 1962(c) claims. "Interest in or control of" requires more than a general interest in the results of its actions, or the ability to influence the enterprise through deceit.

Tal, 453 F.3d at 1268 (quoting *Univ. of Maryland at Baltimore v. Peat, Marwick, Main & Co.,* 996 F.2d 1534, 1539-40 (3rd Cir.1993)).

Here, Plaintiffs fail to sufficiently allege the existence of an enterprise. But, assuming for the sake of argument that there is an adequately alleged enterprise, Plaintiffs fail to show that it was acquired or maintained because of, or through, the predicate acts. At best, they show a misrepresentation to those entities. This is not enough to sustain a RICO claim. *See, e.g., id.* at 1269 ("[I]n the absence of sufficient allegations of bribery, [plaintiffs] did not adequately allege the defendants acquired or maintained an interest in or control of the [defendants] based on the three alleged acts of wire fraud.").

3. Absent A Substantive Violation, Plaintiffs' RICO Conspiracy Claim Fails.

Because Plaintiffs fail to state a valid RICO claim under sections 1962(c) or 1962(b), their RICO conspiracy claim necessarily fails. Title 18 U.S.C. § 1962(d) requires that a plaintiff must first allege a violation of subsections (a), (b), or (c), in order to plead a conspiracy claim under subsection (d). *See United States v. Hampton*, 786 F.2d 977, 978 (10th Cir. 1986) ("The object of a RICO conspiracy must be to violate a substantive RICO provision."); *Schroder v. Volcker*, 864 F.2d 97, 98 (10th Cir. 1988) (same). Therefore, if a plaintiff has no viable claim under § 1962(a), (b), or (c), then its subsection (d) conspiracy claim fails. *Tal*, 453 F.3d at 1270; *see also Condict v. Condict*, 826 F.2d 923, 927 (10th Cir.1987) ("[A]ny claim under § 1962(d) based on a conspiracy to violate the provisions of 18 U.S.C. § 1962(a), (b), or (c) must necessarily fall if the substantive claims are themselves deficient.") Because Plaintiffs cannot allege a sufficient claim under subsections (b) or (c), their subsection (d) conspiracy claim fails as a matter of law.

C. Plaintiffs' Alleged Injury Was Economic In Nature And Does Not Support A Claim For "Outrage."

Plaintiffs appear to stake out a claim for outrage in the AC, although it's not entirely clear.[89] To the extent Plaintiffs contend that Softek are liable for the tort of "outrage," Plaintiffs' claim fails because only economic harm is claimed—i.e., no emotional distress is claimed. "In order to prove the tort of intentional infliction of emotional distress or outrage, a plaintiff must prove each of the following elements: 1) the alleged tortfeasor acted intentionally or recklessly; 2) the alleged tortfeasor's conduct was extreme and outrageous; 3) the conduct caused the plaintiff emotional distress; and 4) the emotional distress was severe." *Durham v. McDonald's Restaurants of Oklahoma, Inc.*, 256 P.3d 64, 66 (Okla. 2011). It is not enough to simply say that the Plaintiffs "suffered outrage" to sustain a claim for the tort. *See Iqbal*, 556 U.S. at 678.

V. CONCLUSION

This is a complex contractual dispute between several parties involving several corporate entities. As such, the claims of breach or defenses to contractual breach must be litigated. But Plaintiffs have failed to advance any *prima facie* claim under RICO and have otherwise failed to meet the specific pleading elements required for civil causes of action under RICO.

Stripping away the serial adjectives like "fraudulent" and "scheme" and "artifice," the only specific factual assertions are that Softek worked for and with Plaintiffs successfully, for nearly ten years, and requested payment pursuant to an agreement between the Parties. Assuming such factual inferences are true, issuing invoices to get paid

[89] *See, e.g., id.* ¶¶ 123, 129, 134 (alleging that "Plaintiffs have suffered outrage").

via interstate bank transfers does not make a plausible wire fraud allegation as a predicate offense to sustain a civil RICO claim. Put another way, the facts underpinning every claimed instance of wire fraud, money laundering, bank fraud, conspiracy, etc., amount to payments made to Softek for actual services performed. The funds used to pay Softek were derived from work Softek performed on behalf of themselves and Plaintiffs in creating several profitable business entities that did not exist before Softek commenced work, under the relevant contractual agreements. In short, none of the allegations, taken on their face and assumed as true, amount to racketeering activity sufficient to support a RICO claim. Accordingly, Defendants request those claims be dismissed with prejudice.

Dated: March 5, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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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