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. 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. BLAKE FOLLIS, Counterclaim Defendant.	)	Case No. 19-cv-00588-CVE-JFJ

COUNTERCLAIM DEFENDANT BLAKE FOLLIS'S MOTION TO DISMISS RAJESH SHAH, SHARAD DADBHAWALA, SOFTEK MANAGEMENT SERVICES, LLC, SOFTEK FEDERAL SERVICES, LLC, & SOFTEK SOLUTIONS, INC.'S AMENDED COUNTERCLAIMS AGAINST BLAKE FOLLIS

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Counterclaim Defendant Blake Follis, through his attorneys submits this Motion to Dismiss the Amended Counterclaims filed by Defendants Rajesh Shah, Sharad Dadbhawala, Softek Management Services, LLC, Softek Federal Services, LLC, and Softek Solutions, Inc. against Follis on February 20, 2020 (Doc. No. 65) ("Counterclaims"). This Motion refers to the movant as "Follis" and refers to all the counterclaimants collectively as "Softek."

Follis seeks dismissal of all the Counterclaims under Fed.R.Civ.P. 12(b) (1) because they are barred by sovereign immunity. He also seeks dismissal of all the Counterclaims because they are barred by official immunity and the litigation privilege. Finally, the Counterclaims should be dismissed pursuant to Fed.R.Civ.P. 12(b) (6) because they fail to state a claim.

I. INTRODUCTION

As set forth in the Follis Declaration filed herewith ("Follis Dec."), Follis was the Modocs' Attorney General and at all times relevant hereto was acting in the scope of his authority as the duly appointed Attorney General of Plaintiffs Modoc Nation ("Modoc Tribe") and the Modoc Tribe's Modoc Tribal Entities ("MTE's") Red Cedar Enterprises, Inc. ("RCE"), Eagle TG LLC ("Eagle"). Buffalo MTE, LLC ("Buffalo), Talon MTE, LLC ("Talon"), Modoc MTE, LLC ("Modoc MTE") and Walga MTE, LLC ("Walga") (collectively "Modocs").

Unbeknownst to the Modocs, beginning in 2010 Softek surreptitiously concocted and in 2011 commenced a scheme to defraud the Modocs. Softek convinced the Modocs to trust them to manage and finance the Modoc Tribe's MTE's, and then betrayed the trust by secretly stealing millions of dollars out of the MTE's bank accounts behind the Modoc's back. Softek's scheme was to appear that they were managing and financing the MTE's. They succeeded from 2011 to July 2019. During that eight year period they also successfully embezzled almost $10.0 million from the MTE's.

In early July 2019 the Modocs' Chief discovered upon inquiry of Interstate Bank of Commerce ("IBC") that Eagle's Letter of Credit of $5.0 million ("LOC"), secured by a Certificate of Deposit of the Tribe, had been dissipated. The Chief immediately requested Follis, as the Tribe's Attorney General, to investigate the dissipation of the LOC and Softek's management and financing of the MTE's. Within the scope of authority granted to Follis as Attorney General by the Modocs, Follis immediately commenced an investigation of the facts and circumstances of the dissipation of the LOC and Softek's financing and management of the MTE's to determine whether prosecution of legal claims against Softek was warranted, which investigation took place on Indian Trust Lands, 18 U.S.C. § 1151, and is described in Paragraphs 3-8 of the Follis Dec. (hereafter referred to as the Investigation). The Investigation revealed that Softek and Rusty Bohl had drawn down $4.6 million from the LOC and had received millions in undisclosed payments. The Modocs' Chief terminated Softek's management contract and Rusty Bohl's employment, and the Modocs filed this action asserting RICO claims and Oklahoma state law claims.

Softek's response was to file Counterclaims against the Modocs. The crux of Softek's Counterclaims against the Modocs is that Softek entered into a Letter of Intent with the Modoc Tribe to purchase a 49% interest in the MTE's and share in 49% of the MTE's profits. Softek alleges that the Tribe's termination of Softek's management of the MTE's in July 2019 breached the LOI and has caused Softek $3.1 million of lost profits plus future profits.

Softek filed a "Third Party Complaint" against Follis on December 24, 2019. On January 20, 2020, Softek served the Third Party Complaint and Amended Summons. [ECF 43]. Follis moved to strike the Third Party Complaint because it did not assert proper third party claims under Rule 14(a)(1) alleging Follis is or may be liable for all or part of the claims against Softek. Softek filed a Praecipe claiming the Third Party Complaint was somehow a mistake (although the

Summons and six claims were denominated as Third Party Claims) and tried to change the pleading's name to Counterclaims. The Court refused to recognize the Praecipe as a proper pleading.

Softek then filed six duplicate Amended Counterclaims against Follis alleging a Conspiracy with the Modocs, Intentional Interference With A Contractual Relationship, Conversion, Negligence, Unjust Enrichment, and Tortious Interference With a Prospective Economic Advantage. The $3.1 million of alleged lost profits Softek seeks to recover from Follis on the Amended Counterclaims is the same $3.1 million of alleged lost profits Softek seeks from the Modocs on the Counterclaims asserted against the Modocs.

Follis moves to dismiss the Amended Counterclaims on the following grounds:

(1) Under Rule 12(b)(1) because the Court lacks subject matter over the Amended Counterclaims in that they are barred by the Modoc Tribe's sovereign immunity.

(2) Under Rule 12(b)(6) because the Amended Counterclaims are barred by Follis's official immunity for official actions taken as the Modoc's Attorney General; and they are barred by the litigation privilege applicable to Follis's actions which he took as an attorney conducting the Investigation that led to this action.

(3) Under Rule 12(b)(6) because the Amended Counterclaims fail to allege facts to state a plausible claim under *Khalik v. United Airlines*, 671 F.3d 1188, 1199 (10th Cir. 2012)("*Khalik*") and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007)("*Twombly*"), and they fail to allege the elements of a legal claim under applicable Oklahoma law.

II. FACTS

Follis is a member of the Modoc Nation. At all times relevant hereto, Follis has been a member of the Missouri bar admitted to practice in the Western District of Missouri, the District of Kansas, the Ninth and Second Circuit Courts of Appeal and the U.S. Supreme Court. Follis was appointed to serve as the Attorney General of the Modoc Nation on January 9, 2018 by Resolution No. 18-05, Attorney General Code. (A copy of the appointment of Follis is attached as Exhibit 1 to the Follis Dec., attached hereto as Ex. "1"). Follis served as the Attorney General until October 3, 2019. (Follis Dec., Paras. 1 and 2.)

Softek's claims and allegations in the Amended Counterclaims relate to alleged actions and communications Follis took during the official Investigation Follis commenced in July 2019 at the request of the Modoc Nation's Chief and conducted on Indian Trust Land within the scope of authority granted to Follis as Attorney General by the Modoc Nation of the facts and circumstances of dissipation of the LOC and Softek's management and financing of the MTE's to determine whether prosecution of legal claims may be warranted. He obviously determined they were. (Follis Dec., Para. 3).

Follis was initially assisted by Conly Schulte, Special Counsel to the Attorney General. (Follis Dec, Para. 3). Follis conducted the Investigation pursuant to Section 7, Paragraph 6 of the Attorney General Code ("direct…special prosecutors…"); and Section 7, Paragraph 21 of the Attorney General Code ("21. To investigate and prosecute all actions, civil or criminal, relating to civil actions or crimes against or within the jurisdiction of the Modoc Tribe.") (Follis Dec., Para. 3).

Follis wanted to assure evidence relevant to the investigation and possible prosecution of claims was preserved, so Follis directed Mr. Schulte to send evidence preservation letters on July

16, 2019 to thirteen employees of the MTE's and Softek, including Rajesh Shah, Sharad Dadbhawalla, and Rusty Bohl. (Follis Dec., Para. 4.) Copies of the evidence preservation letters to Messr's Shah, Dadbhawalla and Bohl are attached to the Follis Dec. as Exhibit 2).

Follis as Attorney General along with the Chief and Troy Littleaxe, the Modoc Nation's general counsel, interviewed a number of employees of the MTE's, including Rusty Bohl, then an employee of Red Cedar, who was interviewed on July 16, 2019 at the Tribe's Miami, Oklahoma office. (Follis Dec., Para. 5).

On July 17, 2019 The Modoc Nation's Chief terminated Softek's Corporate Management Services Agreement. (Follis Dec., Para. 6). A copy of the termination letter is attached as Exhibit 3 to the Follis Dec.

On July 24, 2019 the Modocs' Chief directed the termination of the employment of Rusty Bohl, a Red Cedar employee, and other MTE employees. (Follis Dec., Para. 7). A copy of Rusty Bohl's termination letter is attached as Exhibit 4 to the Follis Dec.

In early August 2019, Follis in his capacity and within the scope of his authority as Attorney General, recommended that the Modoc Nation engage James E. Nesland as counsel to assist Follis and lead the Investigation. The Investigation resulted in this action, which was filed on November 1, 2019 asserting RICO and Oklahoma state law claims against Softek and Rusty Bohl. (Follis Dec., Para 8).

III. DISMISSAL STANDARD

As the Modocs' Motion to Dismiss recites, this Court set forth in *Free v. Dellinger,* 18-CV-181-CVE-JF (N.D. Okla. July 24, 2018) the standard of review with respect to a Rule 12(b)(1) challenge to subject matter jurisdiction on the basis of tribal sovereign immunity and to a Rule

12(b)(6) challenge to the sufficiency of the factual and legal allegations to support plausible claims for relief.

Rule 12(b)(1).

If as here, where Follis is challenging the alleged factual basis for subject matter jurisdiction on the basis of sovereign immunity, this Court held:

> [A] district court may not presume the truthfulness of the complaint's factual allegations.... In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see also Free v. Dellinger,* 18-CV-181-CVE-JFJ, 2018 WL 3580769, at *2-3 (N.D. Okla. July 25, 2018) (quoting *Holt*).

When subject matter jurisdiction is challenged, the party asserting the existence of subject matter jurisdiction has the burden of establishing the facts to support it. *McNutt v. General Motors Acceptance Corp.* 298 U.S. 178, 189 (1936).

Rule 12(b)(6).

Where, as here, Follis is challenging the sufficiency of the claims, this Court held:

> In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a court must determine whether the claimant has stated a claim upon which may be granted. A motion to dismiss is properly granted when a complaint provides no more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) A complaint must contain enough facts to state a claim to relief that is plausible on its face and the factual allegation 'must be enough to raise a right to relief above a speculative level.' Id.

The Tenth Circuit implemented the *Twombly* standard in *Khalik v. United Airlines,* 671 F.3d 1188 (10th Cir. 2012) holding that "in examining a complaint under Rule 12(b)(6), we will disregard conclusory statements and look only to whether the remaining factual allegations plausibly suggest the defendant is liable." 761 F.3d at 1191. As the Tenth Circuit has since explained: "While it is true that when reviewing a motion to dismiss we must accept a plaintiff's allegations as true and view them in the light most favorable to the plaintiff, *see Sutton v. Utah*

State Sch. for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999), we need not—and, indeed, should not—manufacture allegations that are not there." *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001).

Evidence outside the pleadings can be considered on a Rule 12(b)(6) motion when they are relevant to references to documents in the complaint. As this Court noted previously, "[n]otwithstanding this general rule, a district court 'may consider documents referred to in the Complaint if they are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" *Babb v. Eagleton*, 616 F. Supp. 2d 1195, 1198 (N.D. Okla. 2007) (quoting *Alvarado v. KOB–TV, LLC,* 493 F.3d 1210, 1215 (10th Cir. 2007)). Accord: *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998); *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Fudge v. Penthouse Intern., Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

IV. ARGUMENT AND AUTHORITIES

A. The Sovereign Immunity Of The Modoc Tribe And MTE's Bars Softek's Counterclaims Against Follis, And They Should Be Dismissed Pursuant To Fed.R.Civ.P. 12(b)(1).

The Modoc Nation is a federally recognized Indian tribe organized under the Oklahoma Indian Welfare Act of 1936, Title 25 U.S.C. Section 5203. The MTE's are corporations wholly-owned by the Tribe. As such, the Tribe and the MTE's are protected by sovereign immunity against Softek's Counterclaims. E.g. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754 (1998). The "sue and be sued" consent required by the SBA and adopted

by the MTE's is limited to, and must be strictly construed to, suits related to their Business Development Program participation and 8(a) contract performance.

To avoid unnecessary duplication and repetition of the arguments and law supporting the Tribe's and MTE's sovereign immunity as a bar to Softek's claims, Follis adopts and incorporates the arguments and law in the Plaintiffs' Motion To Dismiss Rajesh Shah, Sharad Dadbhawala, Softek Management Services, LLC, Softek Federal Services, LLC, & Softek Solutions, Inc.'s Counterclaims at pages 6 through 11 [ECF 61].

The Modoc Tribe's sovereign immunity bars the Amended Counterclaims against Follis because every one arises out of the Investigation he conducted as Attorney General on Indian Trust Land in his official capacity delegated as Attorney General of the Modocs. A plaintiff may not avoid tribal sovereign immunity by naming individual tribal officers as defendants, because "the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organizations as when brought against the tribe itself." *Native American Distributing v. Seneca-Cayuga Tobacco Co.* , 546 F.3d 1288, 1296 (10th Cir. 2008). Here there is no allegation in the Counterclaims that Follis was acting outside the scope of the authority delegated to him by the Tribe, and the claims are thus barred by the Modocs' sovereign immunity. *Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir. 1984) (McKay, J., concurring) (""When a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.") *see also Burlington N. R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 902 (9th Cir. 1991) (stating that a tribe's immunity extends to officials "acting in their representative capacity and within the scope of their valid authority").

The Modoc Tribe's sovereign immunity also bars the Amended Counterclaims because the $3.1 million of lost profits damages Softek seeks from Follis are the same -$3.1 million of alleged profits damages Softek seeks to recover from the Modoc Tribe's treasury. The Tribe is the real party in interest and the claims are barred by the Tribe's sovereign immunity. Softek cannot circumvent the Tribe's sovereign immunity to Softek's claims for $3.1 million of lost profits damages by seeking the $3.1 million of alleged lost profits through Follis. Each of the six Amended Counterclaims seek recovery of those alleged lost profits damages.

Finally, the Modoc Tribe's sovereign immunity bars the enforcement of the Amended Counterclaims because Follis's alleged tortious actions Softek seeks to enforce against Follis occurred on Indian Trust Land. State laws are not enforceable for activities on Indian Trust Land and reservations. The Supreme Court's jurisprudence regarding Indian Tribe Sovereignty is governed by the long standing "policy of leaving Indians free from state jurisdiction and control...." *Rice v. Olson,* 342 U.S. 786,789 (1945). Sovereign immunity is a shield against intrusions of state law into Indian country. E.g., *Williams v. Lee,* 358 U.S. 217 (1959); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). See also, *Cash Advance and Preferred Cash Loans v. Colorado ex rel Suthers,* 242 P.3d 1099 (Colo. 2010).

B. All Of Softek's Counterclaims Against Follis Arise From Follis's Acts As Attorney General For The Modocs, And Therefore Are Barred By The Doctrine Of Official Immunity.

As set forth in the Follis Dec., all of the Amended Counterclaims arise out of his actions in his quasi-judicial official capacity as Attorney General undertaken in investigating the Modocs' claims against Softek. Consequently, Follis is absolutely immune from these claims under Oklahoma law as set forth in *Powell v. Seay,* 1976 OK 22, 553 P.2d 161, 163-164:

> We have consistently held a judicial officer is not liable in civil action for judicial acts. *Comstock v. Eagleton,* 11 Okl. 487, 69 P. 955; *Waugh v. Dibbens,* 61 Okl. 221, 160 P. 589; *Quindlen v. Hirschi, Okl.,* 284 P.2d 723.
>
> In *Mills v. Smith, Okl.,* 355 P.2d 1064, we rejected the contention that malicious acts of public officials engaged in a quasijudicial duty require application of a different rule. We stated:
>
> '* * * We think reason, justice and public policy demand that when a public officer is engaged in a quasi-judicial duty involving discretion, he be immune from liability for his acts, if they are within his jurisdiction, or lawful authority, ***regardless of his motive.*** As stated in *Sanders State Bank v. Hawkins, Tex.Civ.App.,* 142 S.W. 84, ***to hold him liable for discretionary acts in a 'private action, it must appear that he transcended the limits of his power, but as long as he remains within the scope of his legal authority he is not liable, notwithstanding his motive;*** * * *"
>
> In *Price v. Cook,* 120 Okl. 105, 250 P. 519, we held actions of county attorney done within scope of his authority are quasi-judicial in character and afford absolute immunity from liability… (Emphasis added).

C. Softek's Counterclaims Against Follis Arising From His Communications As An Attorney And Attorney General, Made In The Course Of The Investigation, Were Preliminary To And In Preparation Of The Filing Of This Lawsuit, And Therefore Are Barred By The Litigation Privilege.

The lynchpin of the Amended Counterclaims against Follis are communications vaguely described in Paragraph 23, allegedly made by Follis while engaged as an attorney and Attorney General in the Investigation that led to the Modocs filing this lawsuit:

> …Follis retaliated, interfered with Softek's good faith endeavors to meet its contractual obligations, ***fabricated a false narrative*** that Softek had defrauded Modoc and the MTE's, and ***has now directed Plaintiffs to commence this litigation*** against Softek. [Emphasis added].

The Oklahoma Supreme Court held in *Samson Investment Company v. Chevaillier,* 988 P.2d 327, 329-330 (Okla. 1999), that the litigation privilege applies to communications made by an attorney prior to initiation of litigation, and is absolute:

> …the litigation privilege…accords attorneys immunity for comments or writings made during the course of or preliminary to judicial or quasi-judicial proceedings. *Hawkins v. Harris,* 141 N.J. 207, 661 A.2d 284 (1995). This Court has adopted this privilege as to statements made during judicial proceedings, *Pacific Employers Ins.*

> *Co. v. Adams,* 196 Okla. 597, 168 P.2d 105 (1946) and as to statements made preliminary to proceedings. *Kirschstein v. Haynes,* 1990 OK 8, 788 P.2d 941 (Okla.1990)… Public policy demands that attorneys be granted the utmost freedom in the efforts to represent their clients. ***To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of his client. The conduct of litigation requires more than in-court procedures. An attorney must seek discovery of evidence, interrogate potential witnesses, and often resort to ingenious methods to obtain evidence; thus, he must not be hobbled by the fear of reprisal by actions for defamation.*** [Emphasis added].

While that case addresses the litigation privilege in the context of a defamation claim, the same rationale applies and should bar Softek's intentional tort claims against Follis here.

D. Softek's Counterclaims Against Follis Also Must Be Dismissed Because They Are Legally And Factually Deficient Under *Twombly, Khalik,* And Oklahoma Law.

1. Softek's First Counterclaim For Civil Conspiracy Against Follis And The Modocs Is Factually And Legally Deficient

a. The First Counterclaim For Civil Conspiracy Against Follis And The Modocs Fails To Meet The Requirements Of *Khali And Twombly.*

Softek asserts in a conclusory allegation that the Modocs and Follis "agreed to and have acted in a concerted action to push Softek out of its role with the MTE's so that they could keep all MTE profits to themselves." (Counterclaims, ¶35) *Twombly and Khalik* require that this conclusory allegation be disregarded. Once disregarded, there are no factual allegations that plausibly suggest Follis is liable on a conspiracy claim.

Softek fails to allege any facts establishing the existence of an agreement, just conclusory allegations of "agreement" and "concerted action." Softek fails to allege requisite facts to show knowledge of the conspiracy. As the Court held in *Schatz v. Republican State Leadership Committee*, 669 F.3d 50 (1st Cir. 2012), allegations of knowledge "are merely legal conclusions, which must be backed by well-pled facts." Id. at 56. Softek fails to allege any facts establishing

overt acts in furtherance of the alleged conspiracy. Softek fails to allege any facts establishing a tortious or illegal object of the alleged conspiracy. To allege a viable civil conspiracy claim, Softek must allege that the object of the conspiracy was to commit a cognizable underlying tort against it. *See Brock v. Thompson*, 1997 OK 127, 948 P.2d 279, 294, *as corrected* (Apr. 3, 1998); *Jurkowski v. Crawley,* 1981 OK 110, 637 P.2d 56, 62; *Barsh v. Mullins, Okl.,* 1959 OK 2, 338 P.2d 845, 847. Softek makes no such allegation of tortious conduct.

b. The First Counterclaim For Conspiracy Against Follis And The Modocs Is Legally Deficient Because An Attorney Acting Within The Scope Of His Employment Cannot Conspire With His Client Unless The Attorney Has Also Acted For His Sole Personal Benefit.

Softek acknowledges in Paragraph 38 of the Counterclaims that Follis was acting as an attorney in management of the MTE's ("Follis, a Missouri lawyer, managed the MTE's…As a professional attorney Follis had a duty…"). Moreover, the Follis Dec. establishes that Follis was acting as Attorney General for the Modocs. Nowhere does Softek allege that Follis has actively participated in a fraud, or that the "conspiracy" is a conspiracy to defraud. Nowhere does Softek allege that Follis was acting for his ***sole*** personal benefit.

An attorney acting within the scope of his employment cannot conspire with his client unless the attorney has also acted for his ***sole personal benefit***. See, e.g., *Farese v. Scherer*, 342 F.3d 1223, 1231 (11th Cir. 2003); *Heffernan v. Hunter*, 189 F.3d 405, 412-13 (3d Cir. 1999). This limitation reflects that "[t]he right of a litigant to independent and zealous counsel is at the heart of our adversary system and, indeed, invokes constitutional concerns." *Heffernan*, 189 F.3d at 413. Further, "[c]ounsels' conduct within the scope of representation is regulated and enforced by disciplinary bodies established by the courts. Abuses in litigation are punishable by sanctions administered by the courts in which the litigation occurs." Id. *See also Astarte, Inc. v. Pacific Industrial Systems* , 865 F.Supp. 693, 708 (D.Colo. 1994) (An attorney, being an agent of his

principal, cannot be held liable for conspiracy with his principal where the agent acts within the scope of his authority and do not rise to the level of active participation in a fraud. *See, e.g., Worldwide Marine Trading Corp. v. Marine Transport Service, Inc.,* 527 F.Supp. 581, 586 (E.D.Pa.1981); *Fraidin v. Weitzman,* 93 Md.App. 168, 611 A.2d 1046, 1079 (1992). Thus the First Counterclaim for Conspiracy is legally deficient because Follis, acting as Attorney General, cannot be liable for conspiracy with the Modocs, for whom he was Attorney General.

c. The First Counterclaim For Conspiracy Against Follis And The Modocs Is Based Upon "Information And Belief" And Thus Fails To Comply With Fed.R.Civ.P. 9(B).

Even if the First Counterclaim for Conspiracy is read to allege fraud or collusion by Follis—which it does not--it is based upon paragraphs 22, 23, and 24 of the Counterclaims, all three of which allegations are made "upon information and belief," without stating the factual basis for the belief, and without alleging the facts in question are peculiarly in Follis's knowledge. *See Scheidt v. Klein*, 956 F.2d 963 (10th Cir. 1992) ("Allegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's belief."). This Counterclaim therefore violates Fed.R.Civ.P. 9(b) and must be dismissed on this independent ground. As stated in *Fortelney v. Liberty Life Assurance Company of Boston,* 790 F.Supp.2d 1322 (W.D.Okla. 2011):

> Rule 9(b), Fed.R.Civ.P., governs the pleading of certain special matters. Rule 9(b) provides in pertinent part: " In alleging fraud ... a party must state with particularity the circumstances constituting fraud.... Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The requirements of Rule 9(b) are to be read in conjunction with the general pleading principles of Rule 8, Fed.R.Civ.P., calling for the pleadings to be " simple, concise, and direct, ... [and] be construed so as to do justice." Rule 8(d) and (e), Fed.R.Civ.P.; *Schwartz v. Celestial Seasonings, Inc.,* 124 F.3d 1246, 1252 (10th Cir.1997). As with Rule 8, Rule 9(b)'s purpose is to afford the defendant fair notice of plaintiffs' claim and the factual ground upon which it is based. *Id.* In order to plead fraud with particularity, plaintiffs' Amended Complaint must " set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the

> consequences thereof." *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir.2000) (quotations omitted). This means " ' the who, what, when, where, and how: the first paragraph of any newspaper story.' " *Caprin v. Simon Transportation Services, Inc.*, 99 Fed.Appx. 150, 158 (10th Cir.2004) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990)).

Softek does not plead the facts are peculiarly within the opposing party's knowledge and does not plead the factual basis for Softek's belief, and therefore the claim must be dismissed. *Koch*, 203 F.3d at 1237 (even in circumstances where allegations of fraud may be based on information and belief, because the facts are peculiarly within the opposing party's knowledge, Rule 9(b) continues to require the complaint to "set[] forth the factual basis for the plaintiff's belief.") *See also Otjen v. Kerr*, 1942 OK 30, 136 P.2d 411, 419 (""It is not sufficient to allege fraud or its elements on information and belief unless the grounds on which such belief is based are set forth, or the facts upon which the belief is founded are stated. It has also been considered necessary that the source of plaintiff's information, on which he bases his belief as to matters claimed to constitute fraud or mutual mistake, should be set forth," citing 49 C.J. 149).

2. Softek's Second Counterclaim Against Follis For Intentional Interference With A Contractual Relationship Is Factually And Legally Deficient.

The elements of tortious interference with a contract are:

> 1. That [the plaintiff] had a business or contractual right that was interfered with.
> 2. That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable.
> 3. That damage was proximately sustained as a result of the complained of interference.

Mac Adjustment, Inc. v. Property Loss Research, 1979 OK 41, 595 P.2d 427, 428.

a. The Letter Of Intent Is Not An Enforceable Contract Upon Which An Intentional Interference With A Contractual Relationship Can Be Asserted.

Defendants' Second Counterclaim against Follis for Intentional Interference With A Contractual Relationship is predicated on the success of Softek's breach of contract claim that

alleges the Modoc Tribe and RCE agreed in the August 2010 LOI that Softek would manage RCE and create and manage at least four other MTE's, Eagle, Buffalo, Modoc MTE, and Walga; in exchange, Softek would receive 49% of the MTE's profits. (Counterclaim, ¶¶18, 20, 28) Softek further alleges that in December 2010 it purchased 49% of RCE.

The LOI, a copy of which is attached as Exhibit B to the Littleaxe Affidavit (Doc. 61-1), is an unenforceable agreement to agree to sell a 49% interest in RCE and future MTE's. "[A]n 'agreement to agree' standing alone is too vague to be enforceable'" *American Automated Theaters, Inc. v. Hudgins, Thompson, Ball & Assoc.*, 1973 OK CIV APP 15, 516 P.2d 565, 567. *See, also, New York Life Ins. Co. v. K N Energy, Inc.*, 80 F.3d 405, 411 (10th Cir. 1996)(Colo.) (Agreement to agree does not form a binding contract; further negotiation must not be required to work out essential terms). "In order to create a contract, it is necessary for there to be a meeting of the minds of the parties thereto on all the terms of the contract sought to be enforced, and the acts to be done must be clear." *Cloud v. Winn*, 1956 OK 267, 303 P.2d 305, 309. *See also, Freitag v. Sonic Auto., Inc.*, 2006 WL 2456920, *11 (N.D. Okla. Aug. 22, 2006).

"Where the parties have left an essential part of the agreement for future determination, it is no doubt correct to say that the contract is not completed." *Griffin Grocery Co. v. Kingfisher Mill & Elevator Co.*, 1934 OK 247, 32 P.2d 63, 66. *See, also, Wynne v. McCarthy*, 97 F.2d 964, 970 (10th Cir. 1938) (citing *Griffin*) (where essential terms are left to be resolved, "no legal obligation arises until such future agreement is consummated."). The essential part of the agreement left for future determination here was that Softek and the Modoc Tribe would enter into legal agreements by which Softek would purchase 49% of the MTE's stocks and which would be approved by the SBA. 13 C.F.R. § 124.513. That essential part of the LOI was not completed and, thus, no enforceable agreement entitling Softek to 49% of the MTE's profits was consummated.

The Second Counterclaim is predicated on the LOI being the contract with which Follis intentionally interfered. Because the LOI is not a contract, the Second Counterclaim fails to state a claim upon which relief can be granted.

b. An Attorney May Not Be Liable For Intentional Interference With A Client's Contractual Relationship.

An attorney acting as an agent of the client cannot be liable for intentional interference with his own client's contract. *Bowdoin v. Oriel, Kline v. Schaum,* 174 Misc.2d 988, 673 N.Y.S.2d 992, 993 (N.Y.Sup.Ct.1997) ("Inasmuch as the relationship created between an attorney and his client is that of principal and agent, an attorney is not liable for inducing his principal to breach a contract with a third person, at least where it is acting on behalf of his principal within the scope of his authority.") (citations omitted); *Rhodes, Inc. v. Morrow,* 937 F.Supp. 1202, 1216 (M.D.N.C.1996) ("[T]he Court believes that the attorney should not be considered an 'outsider' for the purposes of applying the elements of this tort. Instead, the attorney, as a representative of the client, is the same entity as the client within the elements of this tort."). Therefore, the claim against Follis for intentional interference with a contract must be dismissed on this grounds as well.

3. Softek's Third Counterclaim Against Follis For Conversion Fails As A Matter Of Law Because It Does Not Allege Follis Possesses Softek's Tangible Personal Property.

Softek does not allege that Follis has possession of tangible personal property owned by Softek. Softek instead alleges in the Third Counterclaim that it "has been deprived of loan proceeds owed to them, and their management role with RCE and the MTE's and compensation for the same." This is a claim for money for which a conversion claim does not lie. Conversion claims are available to recover tangible personal property—not money. As this Court has stated previously:

> Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Welty v. Martinaire of Okla., Inc.,* 867 P.2d 1273, 1275 (Okla.1994) (internal citations omitted); *see also Shebester v. Triple Crown Insurers,* 826 P.2d 603, 608 (Okla.1992) ("Conversion is an illegal taking of another's personalty inconsistent with his ownership rights."). "The general rule in Oklahoma is that only *tangible* personal property may be converted." *Welty,* 867 P.2d at 1275 (internal citations omitted) (emphasis in original). When a plaintiff seeks to recover money, there is no conversion. *See Shebester,* 826 P.2d at 608 (finding no common-law conversion claim when claimant sought to recover money, which under Oklahoma law, "is considered intangible personal property"); *AG Equip. Co. v. AIG Life Ins. Co., Inc.,* No. 07–CV–0556–CVE–PJC, 2008 WL 4570319, at *5 (N.D.Okla. Oct. 10, 2008) (dismissing claim for conversion because conversion claim was based on allegation that defendant wrongfully retained money paid by plaintiff) ("[B]ecause [plaintiff] is seeking to recover money only, the Court finds that [plaintiff] has not stated a claim for conversion under Oklahoma law."); *Slover v. Equitable Variable Life Ins. Co.,* 443 F.Supp.2d 1272, 1279 (N.D.Okla.2006) (applying Oklahoma law) ("Generally, only tangible personal property may be converted, such that conversion will not lie where the seller has the right to recover money, which is considered to be intangible personal property.") (internal citations omitted).

Childs v. Unified Life Ins. Co., 781 F. Supp. 2d 1240, 1249 (N.D. Okla. 2011).

For this reason, the Third Counterclaim for Conversion fails to state a claim upon which relief can be granted and must be dismissed.

4. Softek's Fourth Counterclaim For Negligence Must Be Dismissed, Because Softek Does Not Allege Follis Owes It A Duty Of Care, And Does Not Allege Follis Was Attorney For Softek.

Softek alleges in its Negligence Counterclaim, Paragraph 38,, that "Follis [as] a Missouri lawyer, managed the MTE's in a manner that (1) created unreasonable risk to Softek; and (2) violated an agreement between Softek, Modoc, RCE and the MTE's." Softek's allegations are conclusory, and Softek does not allege any facts upon which these allegations are based, contrary to the requirements of *Twombly* and *Khalik* and the claim therefore must be dismissed.

Moreover, the claim is legally deficient because Softek fails to allege the elements of professional negligence set forth in *Whitehad v. Rainey, Ross Rice and Binns,* 2000 OK CIV APP 5, 997 P.2d 177, 179:

> (1) existence of an attorney-client relation, (2) a breach of duty arising from the relation, and (3) injury proximately caused by the breach. See, e.g., *Myers v. Maxey,* 1995 OK CIV APP 148, 915 P.2d 940; *Erwin v. Frazier,* 1989 OK 95, 786 P.2d 61; *Allred v. Rabon,* 1977 OK 216, 572 P.2d 979. Failure of any one of the elements renders such a claim subject to dismissal. See, e.g., *Haney v. State,* 1993 OK 41, pp 4, 18, 850 P.2d 1087, 1089, 1092 (on interlocutory appeal from trial court's order denying motion to dismiss professional negligence claim, held, no attorney/client relationship existed and order of trial court reversed/remanded with instructions to dismiss.)

Softek does not allege that an attorney-client relationship existed between Follis and Softek, that Follis owed a duty of care to Softek, and that Follis breached a duty of care owed to Softek causing damage to it.

5. Softek's Fifth Counterclaim Against Follis For Unjust Enrichment Must Be Dismissed.

Softek's unjust enrichment claim contains the conclusory allegation that Follis has received and is receiving "benefits in MTE profits and investment funds provided by Softek." However, Softek has not alleged facts plausibly establishing that Follis actually received the $3.1 million of fees and loan proceeds it also alleges in conclusory form have been received by Modoc and RCE in the Unjust Enrichment against them.

Moreover, such profits belong to Softek only if it has an enforceable contract to receive the profits. Unjust enrichment involves the result of the "failure of a party to make restitution in circumstances where it is inequitable." *N.C. Corff P'ship, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295.

> A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another.... [It] arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss.

66 Am.Jur.2d *Restitution and Implied Contracts* § 3 (1973) (quoted by *OXY USA, Inc.*, 929 P.2d at 295); *see also, McBride v. Bridges,* 1950 OK 25, 215 P.2d 830. "[T]here must be enrichment

to another coupled with a resulting injustice." *Teel v. Public Serv. Co. of Okla.,* 1985 OK 112, 767 P.2d 391, 398 (superseded by statute on other grounds).

Moreover, if an unjust enrichment claim is premised upon an alleged contractual agreement, then that agreement must be enforceable for the unjust enrichment claim to exist. *See Childs v. Unified Life Ins. Co.*, 781 F. Supp. 2d 1240, 1246 (N.D. Okla. 2011).

Thus, for the same reason that the breach of contract claim fails as a matter of law, so too does the claim for equitable restitution or unjust enrichment. On the facts alleged, Softek does not state a cognizable claim for unjust enrichment. The contract itself, the 2010 LOI, is not enforceable, and does not grant Defendants any right to payment of profits after the parties' agreement was terminated. Claims premised on the enforceability of the 2010 agreement are not cognizable.

6. Softek's Sixth Counterclaim Against Follis For Intentional Interference With A Prospective Business Advantage Is Factually And Legally Deficient.

As stated in *Fulton v. People's Lease Corporation,* 2010 OK CIV APP 84, 241 P.3d 255, 273:

> However, the terms "contract or contractual relations" are not synonymous with" business relations or business relationship." *See OUJI-Civil No. 24.1.* The former terms refer to a wrongful interference with an *existing* contract while the latter terms refer to an interference with an *existing* business relationship.
>
> When addressing *prospective* contractual relations, claims under R.S. Torts § 766B, Oklahoma courts have consistently used " interference with prospective ***economic*** advantage," *see Brock v. Thompson,* 1997 OK 127, n. 58, 948 P.2d 279, and *Crystal Gas Co. v. Oklahoma Natural Gas Co.,* 1974 OK 34, 529 P.2d 987, or " interference with prospective economic ***relations,*** " *see Gaylord Entertainment Co. v. Thompson,* 1998 OK 30, n. 96, 958 P.2d 128. " Interference with a prospective economic **advantage** usually involves interference with some type of reasonable expectation of profit." *Overbeck,* ¶ 4, 757 P.2d at 847 (emphasis original).

Here, Softek has made only a conclusory allegation that "Softek has a reasonable expectation of future profits from its business dealings" with Plaintiffs. Softek has failed to allege facts from

which it is reasonably plausible to conclude that Softek had a reasonable expectation of profit, and this claim therefore fails to meet the standards of *Twombly* and *Khalik* and therefore must be dismissed.

Moreover, for the same reason an attorney cannot be liable for an alleged conspiracy with his client, or for tortious interference with contract, so Follis cannot be liable for tortiously interfering with Softek's alleged prospective business advantage with Follis's clients, the Plaintiffs.

V. CONCLUSION

WHEREFORE, Follis moves the Court dismiss all Amended Counterclaims against Follis.

Dated: March 5, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2020, I electronically transmitted the foregoing document together with the Declaration of William Blake Follis and Exhibits 1-4 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
Anthony S. Broadman
Ryan Dreveskracht
Robert Joseph Sexton
Kirk B. Holleyman
John Matthew DeVilliers

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