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U.S. DISTRICT COURT
DISTRICT OF WYOMING

IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF WYOMING

MARGARET POTKINS, CLERK
CASPER

ANDREW W. BALDWIN, BERTHENIA
S. CROCKER, KELLY A. RUDD, and
BALDWIN, CROCKER & RUDD,
P.C.,

Plaintiffs,

vs.

KEITH HARPER, JOHN DOES 1-5, and
KILPATRICK, TOWNSEND AND
STOCKTON, LLP,

Defendants.

Case No. 20-CV-0160-SWS

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Court on the Defendants' *Motion to Dismiss First Amended Complaint and Jury Demand* (ECF No. 35). Plaintiffs did not timely respond to the present motion. The Court, having considered the brief submitted in support of the motion (ECF No. 36), and being otherwise fully advised, FINDS the motion to dismiss should be granted as to Plaintiffs' added claims for Fraud, Constructive Fraud, and Civil RICO Violation.

FACTUAL ALLEGATIONS

The Northern Arapahoe Tribe ("the Tribe") owns the Wind River Casino and Hotel. (First Amended Complaint ("FAC") ¶ 13.) The Tribe's Business Council is an elected body of six tribal members and is primarily responsible for the day-to-day governance of

the Tribe. *Id.* The Plaintiff law firm, Baldwin, Crocker & Rudd, P.C. (“BCR”), has specialized in the practice of federal Indian law for more than 25 years, representing tribes and tribal members across the West. *Id.* ¶ 14. Since approximately 1989, one or more of the Plaintiff attorneys have provided representation for the Northern Arapahoe Tribe, which included the establishment of “the only Indian casino in the country operating the full gamut of class III, casino-style gaming without a Tribal-State compact and without payments to the State or State regulation of the Casino.” *Id.* ¶ 15. BCR had a written contract with the Tribe to provide legal services, which included specific provisions governing the termination of the contract. *Id.* ¶ 17.

Defendant Keith Harper was the lead attorney for a small group of lawyers from Defendant Kilpatrick, Townsend and Stockton LLP (“KTS”), that focuses on Indian law and “sought to convince Indian nations with casinos that they should utilize Defendants as their lawyers.” *Id.* ¶ 16. As early as October 2017, Defendants began efforts to solicit the Tribe’s business; and in early 2019, Defendants approached the Business Council Chairman Spoonhunter and other Council members to discuss KTS taking over the legal work for the Tribe. *Id.* ¶¶ 19-20. Plaintiffs allege “these initial business development meetings disparaged BCR, including statements that KTS and its lawyers would be more loyal to the Tribe and better equipped to do its legal work than BCR.” *Id.* ¶ 21.

In February 2019, Defendants allegedly convinced the Business Council to hire them to undertake an evaluation of the Casino’s CEO, James Conrad. (FAC ¶ 22.) Two members of the Business Council – Co-Chairman Anthony Addison and Councilmember Samuel Dresser – advised BCR of their concern that the “evaluation” would not be fair and

was being carried out “as a pretext for the termination of Mr. Conrad, despite his strengths and experience as a Casino manager.” *Id.* ¶ 23. Plaintiffs allege that “[w]hen BCR contacted Defendant KTS to make [a] routine, good-faith inquiry [for purposes of conducting a conflicts check], BCR and its lawyers were rebuked” by KTS and KTS “used BCR’s good-faith inquiry as part of its intentional and improper efforts to have the Tribe terminate its contract with BCR.” *Id.* ¶¶ 26-27.

“BCR identified multiple concerns about potential conflicts between Defendant KTS and the Tribe due to many of Defendant KTS’s ongoing cases. . . . When confronted with these potential conflicts, Defendant Harper denied they existed, refused to discuss the matter in substance, and told BCR that Defendant KTS had been retained for a ‘very limited engagement.’” (FAC ¶¶ 28-29.) Plaintiffs allege “Harper got angry, lashed out, and disparaged BCR when BCR continued its due-diligence into potential conflicts of interests.” *Id.* ¶ 32. Defendants allegedly convinced four members of the Business Council “that BCR was usurping tribal authority” and drafted documents for the Council to “repeal” the Tribe’s conflict-of-interest policy. *Id.* Defendants encouraged Chairman Spoonhunter to issue directives purporting “to forbid [Business Council members] from speaking with lawyers at BCR.” *Id.* ¶ 38. “On June 3, 2019, at the urging of Defendants, Chairman Spoonhunter and his followers directed the Business Council to pass a resolution terminating BCR as the lawyers for the Tribe.” *Id.* ¶ 39. Co-Chairman Addison and Councilman Dresser made public statements indicating these actions in firing BCR were illegal and achieved through deceit, and other tribal officials and agencies directed BCR to keep doing their legal work and not to provide any of their files to KTS. *Id.* ¶¶ 40-41.

On June 7, 2019, Defendant KTS sent BCR a copy of a June 6, 2019, Business Council resolution and requested property and documents be returned “even though BCR stated in writing many times that the ethical rules prohibited them from turning over all files since there was not a clear pronouncement as to what the governing authority, the general Tribal council, wanted in regard to which law firm should represent the Tribe.” *Id.* ¶ 42. Plaintiffs allege that from June 10-12, 2019, “BCR returned all tribal funds held in its trust accounts (\$929,261.04). This was confirmed by the tribal finance department and their consulting accountant and reported back to the Business Council, and to Defendants, approximately six weeks before the Tribe would file its complaint against BCR.” *Id.* ¶ 43. BCR also engaged in efforts “to manage the difficulty created by the split within tribal government” and “to address the logistics of withdrawing from pending litigation and transferring client files in cooperation with other, longstanding and trusted legal advisors to the Tribe who had no potential conflicts of interest.” *Id.* ¶ 44. Plaintiffs allege their efforts in this regard were ignored. *Id.*

In addition to governing through the Business Council, the Tribe also conducts one or more meetings each year of its “General Council,” a gathering open to all adult members of the Tribe to consider certain issues of concern to the Tribe. (FAC ¶ 47.) Plaintiffs allege “Tribal members circulated a petition for a special General Council meeting with a stated purpose of removing Defendant KTS as attorneys for the Tribe. Chairman Spoonhunter and KTS subsequently added removal of BCR to the Agenda.” *Id.* ¶ 48. With their petition, “certain Tribal members also sought to remove Chairman Spoonhunter from office based on reports and allegations of gross abuse, including threats and sexual harassment

involving casino employees.” *Id.* ¶ 49. In response, “Defendant KTS again intensified the false narratives about BCR with the objective of influencing the Tribe’s General Council meeting scheduled on August 10, 2019, to discuss, *inter alia*, which law firm should be doing the work for the Tribe.” *Id.* ¶ 50.

Plaintiffs allege “Defendants convinced four members of the Business Council to file, and the Tribe filed on July 29, 2019, a frivolous and meritless lawsuit against BCR in an effort to improperly influence the result of the August 10, 2019, General Council meeting . . . with the goal of preventing BCR from doing work for the Tribe, and to improperly sway public opinion among tribal members against BCR.” (FCA ¶ 51.) Though they allegedly have no licensed Wyoming lawyers, Defendant KTS represented the Tribe in its lawsuit against BCR. *Id.* The Tribe’s complaint alleged BCR possessed over \$1,000,000 of Tribal funds and innumerable confidential and other Tribal documents. *Id.* ¶ 53. Plaintiffs allege Defendants knew, at the time the complaint was filed, the allegations were false and Plaintiffs had returned all tribal funds held in trust almost six weeks earlier. *Id.* ¶ 54. Notwithstanding, Defendant KTS allegedly communicated the allegations to members of the press. *Id.* ¶¶ 52, 55.

On August 5, 2019, five days prior to the General Council meeting and vote to determine whether the Tribe was going to terminate its attorney-client relationship with BCR, Defendants “published” allegations against BCR on a live YouTube broadcast, allegedly in “further effort to disparage Plaintiffs and improperly interfere with Plaintiffs’ business prospects.” (FAC ¶ 56.) Specifically, in the YouTube video, Defendant Harper accused BCR of numerous ethical violations and stated:

I'm going to be very, very blunt, very candid, I have not seen any situation like this in my twenty-five years of practicing law. . . [BCR] absolutely, steadfastly refused to return the documents of the Tribe . . . [and] refused to provide the Tribe's own money back to it, and they refused, they provided some of the money, not all the money, and they only produced a handful of documents. . . . This Tribe is left without being able to protect itself because your former lawyers will not return their documents. They make all kinds of excuses, none of them are any reason, or any basis, or any sound basis, to return your own documents.

Id. Defendant Harper continued by stating, falsely, that BCR would not let the Tribe make its own decisions and tribal members should not trust BCR because its lawyers were not Native American. *Id.* ¶ 58. On August 10, 2019, five days after this YouTube broadcast, the General Council terminated the Tribe's attorney-client relationship with BCR "and, reportedly, banned BCR from working for the Tribe in perpetuity." *Id.* ¶ 61.

BCR subsequently transferred to the Tribe all of the Tribe's trust account funds and a large number of client files and continued its efforts to both protect the Tribe from apparent conflicts of interest with KTS and return all remaining files to the Tribe. (FAC ¶ 63.) Plaintiffs allege BCR's efforts were frustrated by Defendants' refusal to cooperate with BCR; however, "by August 26, 2019, substantially all files had been returned to the Tribe or to one of its attorneys (outside the KTS firm) who did not have known or potential conflicts of interest." *Id.*

Following Defendants' refusal to amend its pleadings and withdraw the "defamatory, spurious, and slanderous allegations in the Tribe's" lawsuit against BCR, Plaintiffs served the Tribe with a Rule 11 motion. (FAC ¶¶ 64-66.) On July 1, 2020, the state court judge presiding over the Tribe's lawsuit stated in his order, as it pertains to the Plaintiffs' Rule 11 motion:

It is clear on the record to date that the factual underpinning of [the claim that BCR is in possession of over \$1,000,000 in Tribal funds] could not have been accurate on the date it was plead and Rule 11's requirement of factual basis was violated.

While [the Tribe] may believe there was some foul play by [BCR] over past accounting and overbilling (which seems to be the implication of this claim), it was not proper to plead an inflammatory allegation of misuse or withholding of \$1,000,000 in Tribal funds without evidentiary support. This is particularly true where the evidence was easily at hand at the time the Complaint was filed and under any characterization now argued, this could not have been true.

Id. ¶ 68.

Plaintiffs allege that, after the lawsuit and public disparagement on YouTube, BCR has experienced revenue decline and suffered unwarranted reputation damage that has greatly diminished BCR's ability to acquire work in the specialty area of Indian law. (FAC ¶ 67.) By their state court Complaint – removed to this Court by Defendants – Plaintiffs initially asserted claims for defamation and tortious interference with livelihood interests. (See ECF No. 4.) On September 23, 2020, Defendants moved to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1), (b)(6) and (b)(7). (ECF Nos. 10 & 11.) This Court denied Defendants' motion to dismiss (*see* ECF No. 19, 21) and subsequently granted Plaintiffs leave to amend their complaint (*see* ECF No. 30).

By their First Amended Complaint, Plaintiffs bring three additional claims for fraud, constructive fraud, and civil RICO violation, against all Defendants. (ECF No. 31.) Defendants have moved to dismiss with prejudice each of these additional claims pursuant to Fed. R. Civ. P. 12(b)(6).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal when a plaintiff's complaint fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss under Rule 12(b)(6), this Court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In order to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "plausibility standard" is not a probability requirement but requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that "offers labels and conclusions[,] a formulaic recitation of the elements of a cause of action[,] or "naked assertions devoid of further factual enhancement," will not survive a motion to dismiss. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (internal quotations omitted).

DISCUSSION

As a preliminary matter, the Court will address Plaintiffs' failure to timely respond to the present dispositive motion. This Court's local rules provide: "Each party opposing [a dispositive motion] shall have fourteen (14) days from the filing of the motion to file a written brief containing a short, concise statement of the argument and authorities in opposition to the motion." U.S.D.C.L.R. 7.1(b)(2)(A). Defendants filed the present motion

on June 21, 2021, so Plaintiffs' brief in response was due July 6, 2021.¹ There is no record before this Court that Plaintiffs requested an extension of time to respond to the motion, nor have the parties advised the Court regarding any informal agreement between them to extend the briefing deadlines.² Plaintiffs filed their response on July 20, 2021. Local Rule 7.1 further provides: "The Court may, in its discretion, consider the failure of a responding party to file a response within the fourteen (14) day time limit . . . as a confession of the motion." *Id.* Though the Court will not deem Defendants' motion confessed by Plaintiffs, it will not consider Plaintiffs' untimely response, as Plaintiffs have offered no reasonable explanation or justification for failing to file their response in accordance with the deadline set by the Court's rules.³

A. Fraud Claim

Rule 9(b) of the Federal Rules of Civil Procedure requires a party alleging fraud to "state with particularity the circumstances constituting fraud []. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." "The purpose of Rule 9(b) is to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based." *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (internal quotation and citation omitted). A complaint must "set forth the time,

¹ Because July 5, 2021 was a federal holiday, Plaintiffs' brief was due the following working day. *See* FED. R. CIV. P. 6(a)(1)(C).

² On July 1, 2021, Plaintiffs filed a motion to compel which was referred to Magistrate Judge Carman. (ECF No. 39.) This Court reviewed that motion to see whether Plaintiffs indicated therein a need for certain discovery in order to respond to the Defendants' motion to dismiss. Though Plaintiffs make repeated references to their FAC allegations of fraud/constructive fraud as supporting application of the crime-fraud exception to attorney-client privilege, there is nothing in their motion to suggest additional discovery was necessary before responding to the pending dispositive motion or that they had requested an extension of time to do so. *See id.* at 14-17 & n.6.

³ Indeed, Plaintiffs have not even acknowledged the untimeliness of their response brief.

place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.” *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 522 (10th Cir. 2013) (internal quotations omitted).

Still, “[t]he requirements of Rule 9(b) must be read in conjunction with the principles of Rule 8, which calls for pleadings to be simple, concise, and direct . . . and to be construed as to do substantial justice.” *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (internal quotations omitted). Rule 8 requires a plaintiff to allege enough factual matter, taken as true, to state a plausible claim to relief. *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). “This is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged.” *Id.*

To prevail on a fraud claim under Wyoming law, “a plaintiff must prove by clear and convincing evidence that: (1) the defendant made a false representation intended to induce *the plaintiff* to act; (2) *the plaintiff* reasonably believed the representation was true; and (3) *the plaintiff* relied on the representation and suffered damages as a result.” *Mantle v. N. Star Energy & Constr. LLC*, 437 P.3d 758, 786 (Wyo. 2019) (emphasis added). Thus, Wyoming’s common law formulation and elements of fraud acknowledge that only “[t]he *recipient* of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it,” and then “only if (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable.” Restatement (Second) of Torts § 537 (1977) (emphasis added).

Here, Plaintiffs allege “Defendants” made the following false representations: 1) that BCR had stolen over a million dollars from the Tribe; 2) that BCR was wrongfully withholding tribal documents; 3) that BCR could not be trusted because they were white; and 4) that BCR had been attempting to control the day-to-day operations of the Tribe. (FAC ¶ 91(a)-(d).) Outside of the state court complaint and YouTube broadcast, these allegations are short on specificity regarding the time, place, and the identity of the party making the false statements. More fatal to their claim, however, is Plaintiffs’ acknowledgement that the allegedly false representations were not made *to Plaintiffs* and were intended to induce *the Tribe* to rely on the misrepresentations in acting. (See FAC ¶ 93 (“Defendants intended that [the Tribe’s] members would believe and rely on the false misrepresentations and vote to keep KTS in power as the new lawyers for the tribe, and vote to preclude BCR from performing any legal work for the [Tribe] ‘in perpetuity.’”).) Because Plaintiffs’ amended complaint is devoid of any factual allegations that any Defendant made a false representation intended to induce *the Plaintiffs* to act, or one that *Plaintiffs* justifiably relied on in acting or refraining from acting, Plaintiffs have failed to state a plausible claim for fraud.

B. Constructive Fraud Claim

Constructive fraud consists of “all acts, omissions, and concealments involving breaches of a legal or equitable duty resulting in damage to another, and exists where such conduct, although not actually fraudulent, ought to be so treated when it has the same consequence and legal effects.” *Johnson v. Reiger*, 93 P.3d 992, 998 (Wyo. 2004) (internal quotation marks and citation omitted).

Ordinarily, for a duty to arise . . . *a fiduciary or other similar relation of trust and confidence must exist between the parties*. Two basic types of fiduciary relationships exist. The first type is based on formal legal relationships, such as trustee-beneficiary, partnership, attorney-client, and principal-agency relationships The second type is an informal fiduciary relationship, which is implied in law due to the factual situation surrounding the involved transaction, and the relationship of the parties to each other and to the transaction. This second type of relationship is often called a confidential relationship and would be considered a relation of trust and confidence. When determining whether the second type of fiduciary relationship exists, we are to consider *the relationship of the parties to each other* and to the transaction. Such a relationship exists when one party has gained the confidence of the other and purports to act or advise with the other's interests in mind.

Id. at 999 (emphasis added). “Whether a duty exists is a question of law for the court to decide.” *Id.* at 998.

In support of their constructive fraud claim, Plaintiffs assert Defendants breached their “legal and equitable duties to be honest” by making the false representations noted above, as well as by “falsely claiming in a meeting broadcasted on YouTube that BCR engaged in multiple unethical acts against the [Tribe], and it was the worst conduct Defendant Harper had seen in twenty-five years.” (FAC ¶¶ 98, 101(a)-(e).) However, Plaintiffs’ complaint contains no allegations establishing a relationship of trust and confidence *between Plaintiffs and Defendants*. “Fiduciary relationships are extraordinary and not easily created. Because they carry significant legal relationships, they cannot be the product of wishful thinking.” *Johnson*, 93 P.3d at 999. As a matter of law, a duty does not exist as between Plaintiffs and the Defendants. Therefore, Plaintiffs have failed to state a claim for constructive fraud.

C. Racketeer Influenced and Corrupt Organizations Act (RICO) Claim

In Count Five of their amended complaint, Plaintiffs allege a civil RICO violation under § 18 U.S.C. § 1962(c). RICO “created a new civil cause of action for ‘[a]ny person injured in his business or property by reason of a violation of [its] prohibitions.’” *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 881 (10th Cir. 2017) (internal quotation marks and citation omitted). *See also* 18 U.S.C. § 1964(c). “To maintain a cause of action under § 1964(c), a plaintiff must plead and ultimately prove: (1) that the defendant violated § 1962; (2) that the plaintiff’s business or property was injured; and (3) that the defendant’s violation is the cause of that injury.” *Safe Streets All.*, 859 F.3d at 881. Section 1962(c) “makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise’s affairs through a pattern of racketeering activity.” *Id.* at 882. The Tenth Circuit Court of Appeals has held that “a plaintiff asserting a § 1964(c) claim for a violation of § 1962(c) must plausibly allege that the defendants each (1) conducted the affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Id.* (internal quotations and citation omitted).

Plaintiffs allege Defendant Harper “orchestrated, coordinated, planned, directed, and implemented Defendant KTS’s plan to acquire Native American clients,” particularly “Indian Tribes that had their own tribal casinos and . . . their own counsel.” (FAC ¶¶ 109, 111.) Defendants allegedly accomplished this plan through wire fraud in violation of 18 U.S.C. § 1343. *Id.* ¶ 112. Plaintiffs allege Defendants committed the wire fraud “by using telephones, e-mail, social media, and a live YouTube streaming across state lines to knowingly make fraudulent statements about Plaintiffs and their actions regarding

Plaintiffs' client, the [Tribe], for the sole purpose of taking advantage of the [Tribe] and grossly overcharging the [Tribe] for legal services, reaping substantial monetary benefit based on a series of lies." *Id.* ¶ 113. As a result of Defendants' alleged racketeering activity, Plaintiffs claim to have suffered "substantial financial loss in the form of lost business income." *Id.* ¶ 121.

RICO's definition of "racketeering activity" includes wire fraud. 18 U.S.C. § 1961(1)(B). Rule 9(b)'s particularity requirement applies to RICO predicate acts based on fraud. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989). "[T]he threat of treble damages and injury to reputation which attend RICO actions justify requiring plaintiff to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis of the predicate acts." *Id.* "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.'" *Internet Archive v. Shell*, 505 F.Supp.2d 755, 768 (D. Colo. 2007) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006)). A RICO plaintiff must also identify the purpose of the use of wires within the defendants' fraudulent scheme. *Tal*, 453 F.3d at 1263.

The elements of wire fraud "require[e] evidence of (1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, (2) an intent to defraud, and (3) use of interstate wire or radio communications to execute the scheme." *United States v. Zander*, 794 F.3d 1220, 1230 (10th Cir. 2015) (internal quotation and citation omitted). Unlike the common law fraud claim requirement

of “justifiable reliance,” “no showing of reliance is required to establish that a person has violated § 1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of [wire] fraud.” *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649 (2008). “[O]ne can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation.” *Id.* Thus, Plaintiff’s failure to allege facts showing they justifiably relied on Defendants’ alleged false representations in acting or refraining from acting –which doomed Plaintiff’s state law fraud claim – is not fatal to their RICO claim based on fraud.

However, Plaintiffs’ amended complaint fails to adequately allege a “pattern” of racketeering activity. A “‘pattern of racketeering activity’ requires at least two acts of racketeering activity” within ten years. *Hall v. Witteman*, 584 F.3d 859, 867 (10th Cir. 2009) (quoting 18 U.S.C. § 1961(5)). The pattern element is not satisfied by simply showing relatedness between the predicate acts. *Duran v. Carris*, 238 F.3d 1268, 1271 (10th Cir. 2001). To satisfy this element, a plaintiff needs to allege “not only that the defendants had committed two or more predicate acts, but also that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.” *Hall*, 584 F.3d at 867 (emphasis in original). As did the district and appellate courts in *Hall*, this Court finds Plaintiffs here have, at best, alleged “a closed-ended series of predicate acts constituting a single scheme to accomplish a discrete goal [of obtaining the Tribe’s legal work] directed at only [Plaintiffs] with no potential to extend to other persons or entities.” *Id.* at 867-68. Although Plaintiffs broadly allege Defendants have “sought to convince Indian nations with casinos [to] utilize Defendants as their lawyers”

(see FAC ¶¶ 16, 109, 111), they have failed to allege any such activity with particularity. Plaintiffs' vague and conclusory allegations are insufficient to meet the heightened pleading requirements for a RICO claim based on fraud. Accordingly, Plaintiffs have failed to state a plausible claim under RICO.

CONCLUSION

Plaintiffs' amended complaint fails to state claims for fraud, constructive fraud, or civil RICO upon which relief can be granted. Accordingly, these claims must be dismissed. Furthermore, the Court finds dismissal without prejudice or leave to further amend the complaint is improper because no amendment will cure the deficiencies discussed herein. *See Anderson v. Sulters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (explaining "amendments would be futile because the . . . claims would be subject to dismissal"). THEREFORE, it is hereby

ORDERED that Defendants' *Motion to Dismiss First Amended Complaint and Jury Demand* (ECF No. 35) is GRANTED to the extent Plaintiffs' claims for Fraud, Constructive Fraud, and Civil RICO (Counts Three, Four and Five) are DISMISSED.

Dated this 30th day of July, 2021.



Scott W. Skavdahl
United States District Judge