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

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

REPLY IN SUPPORT OF RAJESH SHAH, SHARAD DADBHAWALA, SOFTEK MANAGEMENT SERVICES, LLC, SOFTEK FEDERAL SERVICES, LLC, AND SOFTEK SOLUTIONS, INC. MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs/Counterclaim Defendants ("Modoc")'s response in opposition to Defendants/Counterclaimants ("Softek")'s Motion To Dismiss, converted to a motion for summary judgment, fails to establish an issue of material fact precluding dismissal of

Modoc's RICO claims. Unfortunately for Modoc, they waste a significant portion of their overlength response brief attempting to prove that no contractual obligations exist under which Softek is entitled to fees from any of the Modoc Tribal Entities ("MTE") Plaintiffs, when it has itself advanced claims premised on the contractual relationship Modoc now asserts does not exist. Beyond the pleadings, the evidence submitted on the several dispositive motions before this Court establishes that: the parties formed a contractual relationship; this contractual relationship was understood to require payments from the MTEs to Softek under a 40% management fee / 49% net profit model; the parties labored generally under this model with mutual understanding for approximately 8 years; that audits were conducted applying this model; and that the payments made to Softek throughout the course of its largely successful relationship with Modoc were made pursuant to the model and the agreements in which the parties consummated it.

Softek is not an organized crime racket. Modoc is weaponizing RICO civil claims in an apparent attempt to cow Softek into submission. The Court should not reward Modoc's litigation tactics by allowing them to move forward with discovery on unsupported claims in an effort to harm Softek's reputation. In addition, Modoc's response fails to advance evidence or factual allegations sufficient to meet the standards for civil RICO claims under *Twombley* if this Court elects to consider Softek's Motion to Dismiss on the pleadings alone.[1]

[1]Modoc's citation to this Court's decision in *Felmlee v. Oklahoma*, No. 13-0803, 2014 WL 4597724, at *4 (N.D. Okla. Sept. 15, 2014) is curious. ECF No. 102, at 32 n.7. To be sure, it does not stand for the stated proposition that courts may not expressly decide a matter on the pleadings alone under Rule 12, even when extraneous materials beyond the pleadings are before it. That's not the law. *See Davis v. Michigan Dep't of Corr.*, 746 F. Supp. 662, 664 (E.D. Mich. 1990) ("[W]hen a Rule 56 motion for summary judgment can be granted

II. LAW AND ARGUMENT

A. MODOC FAILS TO APPREHEND THE BASIC FRAMEWORK FOR ADJUDICATING RULE 56 MOTIONS.

Modoc spends roughly five pages of their overlength response arguing that the evidence submitted to this point in support might fall under the various hearsay exceptions to the Federal Rules of Evidence and how it might be authenticated.[2] The formalistic requirements that Modoc speaks to here were "abandoned some years ago in the federal system." *Pertile v. Gen. Motors*, No. 15-0518, 2017 WL 4237870, at *2 (D. Colo. Sept. 22, 2017). In addition, Modoc submits without citing to any authority that "Rule 56(c) does not include pleadings as evidence."[3] The law is clear, however, that "factual matters contained in pleadings are generally relevant and admissible as party-admissions." *Hubbard v. Jefferson Cty. Bd. of Comm'n.*, No. 16-2444, 2018 WL 1626376, at *4 (D. Kan. Apr. 4, 2018); *see also Songmaker v. Forward of Kansas*, No. 90-4156, 1993 WL 106833, at *7 (D. Kan. Mar. 5, 1993) ("'[A]dmissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions.'") (quoting *Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990)).[4] Regardless of Modoc's misapprehension of motion practice under Rule 56, Modoc has failed to submit evidence adequate to establish a material issue of fact precluding judgment dismissing Modoc's unsupported RICO claims.

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without considering extraneous materials—such as affidavits—the district court has the discretion to view such a motion as a Rule 12 motion to dismiss.").

[2] ECF No. 102 at 10-15.

[3] *Id.*, at 15 n.4.

[4] Although immaterial for the purpose of Softek's motion, Modoc misrepresents that "[n]o Rule 34 document requests have been served; no Rule 33 interrogatories have been served . . . ." *Id.*, at 17. Written discovery was propounded upon each Defendant on April 7, 2020. ECF No. 98-1.

B. SOFTEK HAS MET ITS BURDEN UNDER RULE 56.

Further missing the mark, Modoc quotes Justice White's concurrence to distort the holding in the oft-cited Supreme Court case, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). ECF No. 102, at 2-3. Modoc claims that Softek must do more than submit the declarations and supporting evidence Softek has submitted to apparently *prove* an absence of any genuine issues of material fact. Modoc actually advances the court of appeals' reasoning in the *Celotex* case, which the majority opinion—joined by Justice White—specifically reversed:

> According to the [Court of Appeals] majority, Rule 56(e) of the Federal Rules of Civil Procedure, and this Court's decision in *Adickes v. S.H. Kress & Co*. . . . the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact" . . . .
>
> We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Celotex, 477 U.S. at 321-22.

Absent from Modoc's analysis is its recognition that Modoc—not Softek—bears the burden of proving Modoc's RICO claims, and that is significant under *Celotex*. The *Celotex* holding recognizes that when a non-moving party in a summary judgment motion bears the burden of proof at trial the moving party may rely solely on pleadings, and if it chooses, any discovery responses or deposition transcripts; the moving party need not submit supporting affidavits and additional evidence. *Id.* at 324. Modoc, on the other hand, as the party bearing the burden of proof on its RICO claims and as a non-movant in

a Rule 56 motion, bears the burden "to go beyond the pleadings" and designate "specific facts showing that there is a genuine issue for trial." *Id.*

The truth is, Softek has gone well beyond the *Celotex* standard. Softek has shown that there is no genuine issue of material fact regarding the existence of contractual agreements between the Parties, including the following:

1. The Parties signed a Letter of Intent agreeing to engage in a business relationship on the 40/49% model, providing that "until the 49% transfer of ownership [of RCE stock] Modoc and Softek will work on a profit-sharing model, which is agreed by both parties to be 51% to Modoc and 49% to Softek." ECF No. 76-2, 3.
2. The Parties made an oral agreement thereafter based on the LOI's 40/49% model. ECF No. 99-0 ¶¶3-6.
3. The Parties executed a Corporate Management Services Agreement containing language that the agreement would become effective on SBA approval. ECF 76-5, 3.
4. Troy LittleAxe counseled Softek to forego SBA approval due to Modoc's prior issues with PayDay lending and proceed on the basis of the good faith oral agreement between the Parties. ECF No. 99 ¶¶6-14.
5. A profit-sharing contract was finalized and fully executed between Softek and Modoc with no SBA approval as a precondition. ECF No. 76-3, 2.
6. The 40%/49% model was further consummated between the parties on October 1, 2014, in a Corporate Management Services Agreement signed by Chief Bill Follis.[5]

None of these facts are rebutted by Modoc. Instead, Modoc *argues* its RICO claims are

[5] Second Declaration of Ryan D. Dreveskracht ("Second Dreveskracht Decl."), Exhibit 16.

supported because there are genuine issues of material fact as to a contractual agreement between the parties entitling Softek to a 40% management fee and 49% of the net profits of the MTEs. Modoc is wrong. In Oklahoma, oral contracts are considered valid, conditions precedent can be waived based on performance, and an entity signing a contract before corporate formation does not dispositive void that contract. *Osage Energy Res. v. Pemco*, 394 P.3d 265, 274 (Okla. Ct. App. 2016); *Capps v. Hensley*, 100 P. 515, 518 (Okla. 1909). In short, Modoc's arguments on the invalidity of the contractual obligations at issue—contractual obligations that they have admitted exist, and have in fact sued Softek over—all fail as a matter of law.

Regardless, the parties moved forward with the understanding of the 40%/49% model and Softek proceeded to finance,[6] create, and manage several successful business entities benefiting both Modoc and Softek. Whether there is a question of the validity of the contracts between the Parties and their terms or not, these documents—along with the balance of evidence shown, including financing furnished by Softek to Modoc, which Modoc has to date failed to repay in full—show there is no question of material fact supporting Modoc's frivolous RICO claims. Softek is not an organized crime outfit. Softek is Modoc's former business partner; a partnership first profitable to all parties and now awry, but a partnership nonetheless. Modoc bears the burden to show that a jury may find in its favor on its RICO claims, and they cannot.

C. MODOC HAS FAILED TO MEET ITS BURDEN UNDER RULE 56.

Despite its voluminous pleading, briefing, and over 2000 pages[7] in supporting

[6] ECF No. 99-6.

[7] Softek has not had the time to carefully review more than 2000 pages of materials Modoc has dumped in lieu of properly pleading RICO allegations and reserves the right to contest

materials, and reviewing all evidence in a light favorable to Modoc, Modoc has still failed to establish *prima facie* RICO claims against Softek. That is because Softek did not engage in any racketeering. Modoc either mischaracterizes or does not understand how the MTE business works to claim that Softek fraudulently paid itself millions in fees to which it was not entitled. This is made clear when comparing Modoc's convoluted response brief with the clarity in the evidence Modoc itself submitted from an audit performed in 2014.[8] This audit was triggered by one of Modoc's auditors initially incorrectly concluding that Softek had overpaid itself by approximately $1,900,000 during the 2013 accounting year.[9]

After a *complete* independent audit, however, it was determined that there was, in fact, no overpayment.[10] The alleged overpayment was resolved, and the Parties continued their successful relationship.[11] If Modoc's claims here in 2020 had any merit, this auditor in 2014 would have raised the alarm that Softek was paying itself obscenely more than what it was due under whatever agreement Modoc contends it had with Softek. Indeed, the investigation and resolution of this issue reveals the principal fraud claims upon which all of Modoc's civil RICO claims rest as meritless. In fact, that an auditor discovered allegedly "inflated" invoices in 2014 would mean **that Modoc brought suit at least two**

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the validity, accuracy, or authenticity of any of this evidence. Notwithstanding, Softek does not dispute generally that it received funds from its successful work creating and managing lucrative businesses. This was the mutual goal of the parties laid out in 2010 and the sizable fees and profit-sharing model reflects the expertise and management capacity Softek and its officers brought to the table; expertise and management capacity Modoc clearly lacked at that time. Softek was paid for its work under its agreement with Modoc. This is not racketeering even if there is a dispute over the amount Softek received.

[8] ECF No. 103-3; *see also* Second Declaration of Sharad Dadbhawala ("Second Dadbhawala Decl."), ¶¶ 2-3; Second Dreveskracht Decl., Ex.16.

[9] Second Dadbhawala Decl., ¶ 2.

[10] Second Dadbhawala Decl., ¶¶ 2-3; Second Dreveskracht Decl., Ex.16.

[11] Second Dadbhawala Decl., ¶ 3.

years too late, since the statute of limitations for a civil RICO claim is four years. *Rotella v. Wood*, 528 U.S. 549, 552 (2000); *Agency Holding Corp. v. Malley–Duff & Assocs.*, 483 U.S. 143, 156 (1987).

Moreover, this episode in the history of the MTEs reveals the falsity of Modoc's claims that Softek cloaked the MTEs' business in an impenetrable shroud of secrecy and operated with total impunity for nearly a decade, siphoning millions of dollars from Modoc. Modoc clearly had the ability to review the MTEs' books and audit them. And Softek cooperated with the audit process and readily resolved a dispute.[12] Regardless, considering the cash flow through these entities at this point exceeded $30 million in 2013—as Modoc's own evidence shows[13]—such a minor dispute is hardly evidence of a racketeering scam, especially when one considers the uncontroverted fact that Softek had loaned Modoc well over one million dollars in capital financing at that point.[14] And, at any rate, again, the RICO ship for these allegations has long sailed away. *Rotella*, 528 U.S. at 552; *Agency Holding Corp.*, 483 U.S. at 156.

Modoc's arguments in opposition to summary judgment suffer from similar problems throughout its briefing, further exposing their RICO claims as meritless. For example, Modoc fails to account for the employment salaries and related overhead Softek was paying from its accounts, as part of its management services.[15] All of this "overhead" Softek paid to keep the MTEs operating must be deducted from Modoc's shoddy pseudo accounting reflected in its brief as funds used to continue successful MTE operation by

[12] Second Dadbhawala Decl., ¶¶2-3.
[13] *See* ECF No. 103-3 at 1 (total income noted on Modoc's evidence to be $37,217,473.23).
[14] ECF No. 96 at ¶9; see also Second Dadbhawala Decl., ¶4.
[15] Second Dadbhawala Decl., ¶ 5.

paying its bills and other overhead costs of the MTEs. Modoc also fails to account for any of the loans Softek made to help start the MTEs and extended to the MTEs on an ongoing basis to maintain cash flow. Modoc further refuses to acknowledge its commitment to pay Softek 49% of the MTE profits; a commitment ratified in practice and in a 2014 management agreement over years of reporting financials to LittleAxe and Chief Bill Follis based on the 40%/49% model.[16] Softek relied, to its significant detriment in hindsight, on the advice of its legal counsel to forego SBA approval and work under an oral contract that was executed in 2014.[17]

Despite Modoc's protests to the contrary, and viewing all record evidence in the light most favorable to Modoc, it is nevertheless established as a matter of law that Softek had a contractual agreement with Modoc and its MTEs under which Softek was to be paid for its work.[18] Modoc has still failed to provide specific allegations establishing the foundation for the RICO claims Modoc has raised against Softek. Those claims should be dismissed with prejudice.[19]

F. PLAINTIFFS HAVE FLOUTED THIS COURT'S LOCAL RULES AND DEADLINES.

[16] Second Dadbhawala Decl., ¶ 14.

[17] *See* generally ECF No. 99. Modoc's scandalization of Softek's dates of corporate formation have no legal effect on the contractual obligations of these parties to each other, since Oklahoma law allows "contracts made for and on behalf of corporations not yet organized or in existence, and made by those who propose to organize a corporation and in its interest." *Capps*, 100 P. at 518; *see also generally Cassidy v. Rose*, 236 P. 591, 594 (Okla. 1925); *Harris Tourist Bed Co. v. Whitbeck*, 294 P. 800, 802 (Okla. 1930).

[18] Indeed, the outlines of a valid civil RICO cause of action *against* Modoc, LittleAxe, Follis, and the MTEs comes into focus when objectively considering the evidence before this Court on the various dispositive motions now pending.

[19] Softek incorporates its briefing and argument requesting this Court dispose of Modoc's RICO claims under Rule 12 given the Court's authority to rule on the pleadings if such a ruling is justified, despite filing of extraneous materials. ECF No. 89 at 2-3; ECF No. 95 at 6-10.

Plaintiffs' Response violates LCvR7.2 (c) (limiting all briefs filed with this Court to 25 pages absent leave of the Court),[20] LCvR5.2 (requiring briefing to be double spaced),[21] LCvR56.1(c) (requiring responses in opposition to motions for summary judgment to list and number every alleged fact in dispute and refer, "with particularity to those portions of the record upon which the opposing relies . . ."),[22] and this Court's order setting the deadline under which the parties may file briefs in opposition to the parties' dispositive motions.[23] ECF No. 79 at 3 (the parties shall respond to the motions for summary judgment . . . by **April 10, 2020**) (emphasis in original).

"A court's local rules have the force and effect of law." *McGuire Glob. Energy, LLC v. Khatib*, No. 17-2040, 2018 WL 6137580, at *1 (C.D. Cal. Apr. 17, 2018) (citing *Atchison, Topeka & Santa Fe R.R. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998)). Counsel for Modoc is an experienced litigator and his decision to flout the Court's rules has imposed a substantial burden on counsel for Softek as well as scarce judicial resources. "[F]ailing to abide by basic rules is [also] sloppy practice." *See Perez v. County of Rensselaer, New York*, No.14-950, 2018 WL 3420014, at *2 n.9 (N.D.N.Y. July 13, 2018).

[20] Plaintiffs brief is presented as 35 pages long, violating LCvR7.2(c). But it's more than 35 pages long; Plaintiffs' brief contains over six pages of single-spaced material, violating LCvR5.2. ECF No. 102 at 22-29.
[21] ECF No. 102 at 22-29.
[22] Softek's Motion to Dismiss was filed pursuant to Rule 12 and, therefore, did not comply with the local rules governing motions under Rule 56. Nevertheless, Softek's response brief filed on April 10 complied with LCvR56.1(c). This Court should apply this rule to deem "[a]ll material facts set forth in the statement of the material facts of the movant . . . admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party." LCvR56.1(c).
[23] Although Plaintiffs filed their response brief on April 10, they filed hundreds of pages of materials late, between April 11 and April 17, 2020. ECF Nos. 104, 105, 106-0, 106-1, 106-2, 107-0, 107-1, 108-0, 108-1, 109-0, 109-1, 109-2, 109-3, 109-4, 109-5, 109-6, 110-1, 110-2, 110-3, 110-4, 111-1, 111-2, 111-3, 111-4, 111-5, 111-6, 111-7.

Softek respectfully requests that the Court fashion an appropriate sanction, "which may include dismissal of claims or this action, monetary sanctions, or other penalties" that the Court deems appropriate. *Cambridge Strategics, v. Grp. Affiliates, LLP*, No. 10-2167, 2012 WL 12883330, at *6 (N.D. Tex. Oct. 11, 2012).

III. CONCLUSION

Based on the foregoing, Softek requests this Court enter an order dismissing Modoc's RICO claims with prejudice and noting that Modoc has no valid outrage claims against Softek.[24]

Dated: April 24, 2020.

Respectfully submitted,

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[24] Modoc now admits that "Plaintiffs have asserted no [Outrage] claims under Oklahoma law," despite language they included in their complaint and amended complaint to the contrary. ECF No. 102, at 35. Plaintiffs' RICO claims should be dismissed as a matter of law and the order of dismissal should reflect that that Plaintiffs have no valid outrage claims here.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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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