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. 4:19-cv-00588-CVE-JFJ

RESPONSE IN OPPOSITION TO COUNTERCLAIM DEFENDANTS TROY LITTLEAXE, AND LEGAL ADVOCATES FOR INDIAN COUNTRY, LLP'S MOTION TO DISMISS

Respectfully submitted,

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I. INTRODUCTION

Counterclaim Defendant Troy LittleAxe ("LittleAxe") and his law firm, Legal Advocates for Indian Country, LLP, ("LAIC")'s [1] motion to dismiss Defendants/Counterclaimants' (collectively "Softek")'s Second Amended Counterclaims, converted to a motion for summary judgment under Fed. R. Civ. P. 56,[2] should be **DENIED**, in part.[3] Softek's Second Amended Counterclaims detail a disturbing series of ethically compromised actions taken by LittleAxe, who served counsel to both Softek and Plaintiffs/Counterclaim Defendants (collectively "Modoc") while at the same time negotiating contracts between the parties, and even continuing to serve as Softek's counsel after this suit was filed.

Now, with little or no citation to relevant law, and no evidence or argument submitted in response to the Court's conversion to summary judgment, LittleAxe submits that he did nothing wrong.[4] According to LittleAxe, there is nothing iniquitous about providing testimony adverse to his client. Counseling clients with opposing interests in contract negotiations? Perfectly fine. Providing attorney-client privileged information to an adverse party? Why not? Enriching himself with nearly $200,000 while furthering his client's adverse interests? Sign him up.

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[1] Because LittleAxe's conflicts are imputed to LAIC per ORPC 1.10, and because LIAC is liable for his conduct under *respondeat superior*, the Parties will be referred to collectively as "LittleAxe."

[2] ECF No. 94.

[3] Softek hereby voluntarily dismiss their sixth Counterclaim against LittleAxe for conspiracy, without prejudice.

[4] This is apparently par for the course for LittleAxe, who Softek now appreciates has a sordid legal career. *See, e.g., F.T.C. v. AMG Servs.*, No. 12-0536, 2012 WL 6800778, at *8 (D. Nev. Dec. 28, 2012); *U.S. v. Tucker*, No. 16-0091 (S.D.N.Y. Sept. 27, 2017), ECF No. 233.

The conduct of LittleAxe in this matter contravenes the oath that every lawyer takes upon admission to the bar: fidelity and unswerving loyalty to his or her client; an unyielding obligation to serve the client faithfully, fairly, and honestly; and in the performance of this obligation to be is held to a higher standard than that required or expected of other fiduciaries.

LittleAxe not only took undue advantage of a client, who was peculiarly in need of trustworthy professional assistance, but he persisted for years in the prosecution of this course of conduct, to keep Softek's money coming in. This was no error in judgment occasioned by the temptation of the moment, but a shrewd scheme for his own enrichment, at his unwitting client's expense. LittleAxe's motion should be denied.

II. FACTS, LAW, AND ARGUMENT

A. RULE 56 STANDARD

Courts may grant motions made under Rule 56 only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Id.* at 248. The issue also must be based on a viable legal theory to be "genuine." *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342, 346 (10th Cir.1986). An issue of fact is "material" if proof of it might affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 249. In effect, the inquiry on a summary judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

The movant's burden under Fed. R. Civ. P. 56 is to specify those portions of "'the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any,'" which demonstrate the absence of a genuine issue of fact. *Windon*, F.2d at 345 (quoting Fed. R. Civ. P. 56(c)). Summary judgment will be granted only if "the movant can show it is entitled to judgment as a matter of law based upon the uncontroverted, operative facts." *Songmaker v. Forward of Kansas, Inc.*, No. 90-4156, 1993 WL 106833, at *1 (D. Kan. Mar. 5, 1993).

The party opposing a motion for summary judgment must set forth specific facts that show a genuine issue for trial remains and that are supported by the kinds of evidentiary materials listed in Rule 56(c)—*i.e.* not the allegations made in their own pleadings. *Anderson*, 477 U.S. at 250. Because its evidence is deemed true and all reasonable inferences are drawn in its favor, the opposing party need come forth with only such evidence from which a fair-minded jury could return a verdict for it. *Windon*, 805 F.2d at 346. A summary judgment motion "is not the chance for a court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences." *Songmaker*, 1993 WL 106833, at *1 (citing *Windon*, 805 F.2d at 346).

Notably here, the only evidence that LittleAxe has produced is: (1) a declaration *against* his former client Softek, with no relevant testimony or exhibit[5]; and (2) a supplemental declaration, which proves LittleAxe's gross breach of the lawyer-client relationship.

B. OKLAHOMA RULES OF PROFESSIONAL CONDUCT

ORPC 1.6 states: "A lawyer shall not reveal information relating to the

[5] ECF No. 86-1.

representation of a client unless the client gives informed consent . . . ." As explained in *Oklahoma Bar Ass'n v. McGee*:

> A fundamental principle in the attorney-client relationship is that the lawyer maintain confidentiality of information relating to the representation. This principle applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information unless the client consents after consultation.

48 P.3d 787, 791 (Okla. 2002); *see also* ORPC 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client . . . ."); ORPC 1.8(f) (same). "[A]ny such informed consent must be in writing." *Snow v. HOC Indus.*, No. 10-486, 2011 WL 5563369, at *1 (E.D. Okla. Nov. 15, 2011).

> **ORPC 1.7**(a), titled "Conflict of Interest: Current Clients," directs:
>
> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

The comments to this rule advise, in relevant part:

> Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person or from the lawyer's own interests. . . . **A conflict of interest may exist before representation is undertaken, in which event the representation must be declined**, unless the lawyer obtains the informed consent of each client . . . . **If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation** . . . . Even where there is no direct adverseness, **a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests**. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the

> lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.

ORPC 1.7, comments 1, 2, 4, 8 (emphasis added). A lawyer violates this rule where, for example, "[i]t should have been immediately apparent . . . that any information . . . acquired representing [a client] could conceivably be useful" to another client. *McGee*, 48 P.3d at 792; *see also, e.g., Oklahoma Bar Ass'n v. Berry*, 969 P.2d 975, 979 (1998).

ORPC 1.9(a), titled "Conflict of Interest: Duties to Former Clients," provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Included within the first comment to ORPC 1.9 is the direction: "Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent." And as Judge Kern recently explained:

> Matters are "substantially related" for purposes of the Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Lee v. BP p.l.c., No. 15-525, 2018 WL 4932003, at *4 (N.D. Okla. Oct. 11, 2018).

C. FACTS

Modoc and Softek entered into a Letter of Intent ("LOI") on August 16, 2010.[6] In mid-September of 2010 Softek, vis-à-vis Rajesh Shah, began having conversations with

[6] ECF No. 76-2.

LittleAxe, in his capacity as General Counsel for the Modoc Tribe, about the timing of the business development work for Red Cedar Enterprises ("RCE"), as outlined in the LOI.[7] The LOI provides, in relevant part, that "[u]ntil the 49% transfer of ownership 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."[8] LittleAxe expressed that the Modoc Tribe wanted to get to work "as soon as possible."[9] In furtherance of this, LittleAxe (on behalf of the Modoc Tribe) and Mr. Shah (on behalf of Softek) executed an oral agreement "to make the profit-sharing model outlined in the LOI immediately and permanently effective, until such time as the transfer of ownership could be finalized."[10] Specifically, under the terms of the oral agreement between LittleAxe and Softek, "Softek would incur startup and supporting operational funds for RCE, provide loans for working capital purposes, and create and operate additional entities for participation in the U.S. Small Business Administration ("SBA")'s 8(a) program."[11] In return, Softek would receive "a 40% management fee and 49% of RCE's (and any subsequently formed entities') net profit."[12] In reliance upon this oral agreement with LittleAxe, Softek immediately began transforming RCE into a

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[7] ECF No. 99 ¶5.
[8] ECF No. 76-2 at 3.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* February 21, 2014, Softek corporate meeting minutes describe the "[b]asic understanding with the tribe" as follows:

a. SMS is paid 40% of the Net Profit as fees under the support services agreement.
b. SFS is paid 49% of the Net Profit (post SMS 40% fee).
c. SFS provides working capital and finance required to support RCE, ETG and BMTE growth.

Second Declaration of Ryan D. Dreveskracht ("Second Dreveskracht Decl."), Ex. 14; *see also id.* Ex. 15 (example of how the percentages would be broken down).

profitable business by investments for operational costs, creating websites, printing brochures, and otherwise generally getting RCE up and running.[13]

In October of 2010, LittleAxe sent Mr. Shah a draft of a Stock Purchase Agreement ("SPA") that he had drafted, as outlined in the LOI.[14] Based on LittleAxe's advice and assurances, in December of 2010, Softek agreed to the terms of the SPA.[15] LittleAxe also assured Mr. Shah that the "stock would be transferred to SFS at some time in the near future pursuant to this agreement."[16] That same day, Softek signed two other contracts drafted by LittleAxe: (1) a Profit Sharing Agreement ("PSA") that reiterated the executed oral agreement that the Parties were already operating under; and (2) a Corporate Management Services Agreement ("CMSA"), which also reiterated the executed oral agreement that the Parties were already operating under.[17]

In early 2011, LittleAxe informed Softek that Modoc and the SBA "were not exactly on good terms," due to the Modoc Tribe's involvement in short-term payday loan schemes.[18] According to LittleAxe, there was a real concern that any change the ownership structure of RCE might disqualify RCE for participation in the 8(a) program.[19] Thus, LittleAxe counseled Softek not to submit the SPA, PSA, or CMSA to the SBA for approval, reasoning that "submitting these documents for SBA approval or initiating a change in ownership would likely cause SBA to interfere with the business development that Softek

[13] ECF No. 99 ¶6.
[14] *Id.* ¶8.
[15] *Id.*
[16] *Id.*
[17] *Id.* ¶9.
[18] *Id.* ¶11.
[19] *Id.*

had thus far created."[20] Instead, LittleAxe advised that the Parties "continue operating under the oral agreement executed in September of 2010," and reflected in the terms of the LOI, to which Softek agreed.[21]

Shortly thereafter, on January 31, 2011, LittleAxe was named a signatory on all RCE bank accounts, with access to and a management role over all of RCE's financials.[22] By March of 2011, Softek had turned RCE around and were generating "a good ongoing income stream for RCE."[23] And by May of 2013, RCE was bringing in over $700,000 every six months.[24] LittleAxe played an integral role in all of it, providing legal advice on accounting, corporate management, and contract negotiation[25]—even clearing up an bookkeeping dispute over Softek's "40% and how its [sic] going to move around the companies through Talon to Softek and the Tribe."[26]

Softek formally engaged the legal services of LittleAxe in August of 2011.[27] LittleAxe requested that Softek pay him for the work that he had previously done on

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[20] *Id.* ¶12.
[21] *Id.*
[22] Second Dreveskracht Decl., Exs. 12-13. LittleAxe was intimately involved in the daily operations of RCE. *See, e.g., id.* Ex. 2 (LittleAxe making a presentation to the Board and Chief Follis on "corporate matters and formation of Red Cedar Staffing Services"). LittleAxe's representation that Softek employees "did not report or reveal the amounts of net profits" of the entities or the amount of loan proceeds taken out of the accounts is simply not true. ECF No. 86-1, ¶17. LittleAxe "was informed of, and had access to, all of the account information for each of these entities." ECF No. 99, ¶17; *see also* Second Dreveskracht Decl., Ex. 10 (September 2012 audit of RCE).
[23] Second Dreveskracht Decl., Ex. 5.
[24] *Id.*, Ex. 11.
[25] *See, e.g., id.* Ex. 1 (LittleAxe making representations as to documents provided to auditors in June of 2014); *id.* Ex. 4 (LittleAxe drafting "note agreements with SofTek for various entities…..Buffalo, Eagle, RCE, etc."); *id.* Ex. 7 (LittleAxe involvement in corporate meeting minutes).
[26] *Id.* Ex. 3.
[27] ECF No. 82, ¶23; ECF No. 76-6.

transactions with the Modoc Tribe, as described above, and asked to be paid $2,000 per month for continuing to work on transactions with the Modoc Tribe.[28] As of August 2011 at the latest, and at all times thereafter, LittleAxe formally and simultaneously represented the Modoc Tribe and, vis-à-vis the Modoc Tribe, all other Plaintiffs/Counterclaim Defendants.[29] Softek relied on the legal counsel it received from LittleAxe with respect to issues directly implicated in the claims between the Parties in this lawsuit, including, without limitation, reviewing and revising documents, drafting contracts, providing legal and fiduciary advice, and otherwise counseling Softek on matters related to Softek's work with Plaintiffs/Counterclaim Defendants.[30] LittleAxe also drafted, edited, negotiated, and/or provided Softek with legal counsel regarding the nature and substance of the contractual agreements with Plaintiffs/Counterclaim Defendants during this time.[31] In addition, LittleAxe was responsible for marshaling how Softek's invoices and fees were to be paid and arranged between Plaintiffs/Counterclaim Defendants to Softek, and financing the Parties' operations in general.[32]

The entire time, LittleAxe failed to maintain the confidentiality of the information Softek shared with him—essentially forcing Softek to unwittingly bargain against themselves in the business dealings with the Modoc Tribe and the other Plaintiffs/Counterclaim Defendants.[33] In other words, LittleAxe was either acting in his

[28] ECF No. 99-8; Second Dreveskracht Decl. Exs. 6, 8-9. This was represented in each and every billing statement as "10 Hours of Legal Services as Tribal and Legal Advisors." *Id.* Ex. 8.
[29] ECF No. 82, ¶24: ECF No. 76, ¶19.
[30] ECF No. 82, ¶27; ECF No. 99, ¶20.
[31] ECF No. 82, ¶64; ECF No. 99, ¶21.
[32] ECF No. 82, ¶61; ECF No. 99, ¶22.
[33] ECF No. 82, ¶54; ECF No. 99, ¶23.

sole interest or in the interests of Plaintiffs/Counterclaim Defendants throughout his whole engagement as Softek's legal counsel.[34] Softek paid LittleAxe at least $2,000 per month between 2012 and 2019, for a total of at least $192,000 in legal fees.[35] At no point in LittleAxe's work as legal counsel for Softek did LittleAxe advise Softek of a potential or actual conflict of interest or seek or request a waiver of actual or potential conflicts of interest.[36] In fact, LittleAxe is still counsel for Softek—LittleAxe has never formally terminated his legal representation of Softek.[37]

On or about February 13, 2020, LittleAxe filed a declaration on behalf of Modoc in this action in support of a motion to dismiss Softek's claims against his other clients, Plaintiffs/Counterclaim Defendants.[38] On March 20, 2020, LittleAxe filed another declaration in support of a motion to dismiss Softek's claims.[39] LittleAxe's declaration appears to support Modoc's argument that Softek's claims should be dismissed because there was no binding contract between the Parties and that Softek has no ownership right in any of the MTEs.[40] This, despite having for years advised Softek that under the executed oral agreement Softek was "for all practical purposes" 49% shareholders and otherwise generally advising Softek to "not have agreements with the Modoc Tribe in writing."[41]

D. ARGUMENT

1. LittleAxe Breached His Fiduciary Duty To Softek.

a. Elements Of A Lawyer-Client Breach Of Fiduciary Duty Claim

[34] ECF No. 82, ¶63; ECF No. 99, ¶23.
[35] ECF No. 82, ¶51; ECF No. 99, ¶24.
[36] ECF No. 82, ¶28; ECF No. 99, ¶25.
[37] ECF No. 82, ¶29; ECF No. 99, ¶26.
[38] ECF No. 82, ¶30; ECF No. 61-1.
[39] ECF No. 86-1.
[40] *See generally* ECF Nos. 61-1, 86-1.
[41] ECF No. 99, ¶13.

In order to state a claim of breach of fiduciary duty, a plaintiff must allege "(1) the existence of a fiduciary relationship; (2) a breach of a fiduciary duty; and (3) the breach of a fiduciary duty was the direct cause of damages." *Graves v. Johnson*, 359 P.3d 1151, 1155 (Okla. Ct. App. 2015).

"The lawyer-client relationship is a fiduciary relationship." *Id.* (citing *Lowrance v. Patton*, 710 P.2d 108 (Okla. 1985)); *see also Oklahoma Bar Ass'n v. Gassaway*, 196 P.3d 495, 503 (Okla. 2008) ("A lawyer is a fiduciary with a duty of loyalty, care, and obedience to the client. The relationship is, and must be, one of utmost trust.").

A lawyer's fiduciary duties "'equate specifically to client loyalty and confidentiality, in contrast to contractual obligations or the duty of due care.'" *Graves*, 359 P.3d at 1156 (quoting *Costa v. Allen*, 274 S.W.3d 461 (Mo. 2008)); *see also Fortelney v. Liberty Life Assurance Co. of Bos.*, No. 09-1205, 2013 WL 12348774, at *4 (W.D. Okla. July 11, 2013) (noting that breach of fiduciary duty is "a breach of trust which arises out of the [lawyer-client] relationship") (quotation omitted). A lawyer's "failure to disclose and counsel [a client] about conflicts of interest, . . . failure to withdraw from representing [a client] in light of these conflicts, and [the] failure to advise [a client] to retain separate counsel because of these conflicts" each establish a breach of fiduciary duty claim. *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 190 (Tex. App. 2002).[42]

Damages in a breach of fiduciary duty claim are usually the disgorgement of any funds paid to the lawyer. *See id.* at 192 ("[C]lients need not prove actual damages to obtain fee forfeiture for their attorney's breach of fiduciary duty.") (citing *Burrow v. Arce*, 997

[42] In *Graves*, the Court of Civil Appeals of Oklahoma adopted the reasoning in *Deutsch* to establish a lawyer breach of fiduciary duty claim. *Graves*, 359 P.3d at 1156.

S.W.2d 229, 238 (Tex. 1999)). As explained by the Court of Appeals of Texas in *Burrow*:

> It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.

997 S.W.2d at 238.

b. LittleAxe Breached His Fiduciary Duty To Softek.

LittleAxe submits that there can be no breach of fiduciary duty here because his "representation of the Modoc Nation was [not] adverse to Softek . . . until July 2019 when the Modoc Nation began discovering that the Softek Defendants had defrauded it."[43] LittleAxe is mistaken. Softek engaged the services of LittleAxe in August of 2011.[44] At that time, LittleAxe owed a duty "to disclose fully any *potentially* adverse situation of which he had knowledge." *Hurst v. Empie*, 852 P.2d 701, 705 (Okla. 1993) (emphasis added); *see also* ORPC 1.7(a)(2). And at no point in Littleaxe's work as legal counsel for Softek did Littleaxe advise Softek of a glaringly obvious potential conflict of interest existing between Softek and Modoc.[45] In addition, and more to the point, the Parties were *always* adverse. Between 2011 and 2019 LittleAxe negotiated, drafted, and edited numerous contracts between the Parties, while representing both parties at the same time.[46] This is a *per se* violation of at least ORPC 1.7(a)(1). *See* ORPC 1.7, comment 8 ("[A]

[43] ECF No. 93, at 5-6.
[44] ECF No. 82, ¶23.
[45] *Id.* ¶28.
[46] *Id.* ¶64.

lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others."); *Mitchell Co. v. Campus*, No. 08-0342, 2009 WL 532246, at *8 (S.D. Ala. Mar. 3, 2009) (noting that representing adverse contractual parties would violate the Model Rules of Professional Conduct).

LittleAxe also submits that he is not breaching a fiduciary duty by filing a declaration "in support of Plaintiffs/Counterclaim Defendants' motion"[47] to dismiss Softek's claims because an attorney is not "required to recuse himself as a witness and deprive the court and jury of the relevant testimony and facts."[48] First, yes he is. "[T]he advocate-witness rule requires the roles of advocate and witness be kept separate and an advocate should be called as a witness only in circumstances of utmost necessity."[49] *Pickens v. State*, 19 P.3d 866, 881 n.11 (Okla. 2001). While LittleAxe argues that he "represents none of the Plaintiffs in this action,"[50] he has submitted sworn declarations stating that he "serve[s] as General Counsel to the Modoc Nation," a Plaintiff/Counterclaim Defendant to this action.[51] More importantly, though, LittleAxe owed a *continuing* duty of "'loyalty and confidentiality'" to Softek. *Graves*, 359 P.3d at 1156 (quoting *Costa*, 274 S.W.3d 461); ORPC 1.9(a). A "a breach of trust which arises out of the [lawyer-client]

[47] ECF No. 86-1, at 1.
[48] ECF No. 93, at 6.
[49] "[C]ourts have narrowly defined the term 'necessary witness' for purposes of the advocate-witness rule to mean a witness with knowledge of facts to which he will be the only one available to testify." *Bell v. City of Oklahoma City*, No. 16-1084, 2017 WL 3219489, at *2 (W.D. Okla. July 28, 2017) (quotation omitted).
[50] ECF No. 93, at 5.
[51] ECF No. 86-1, ¶1.

relationship" is the *sine qua non* of a breach of fiduciary duty. *Fortelney*, 2013 WL 12348774, at *4. And it is harder to think of a breach of trust more obvious than filing a declaration "in support of" a client's adversary.[52] *Cf.* ORPC 1.16(d) ("[A] lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . ."); *see also Williams & Cochrane v. Rosette*, No. 17-1436, 2020 WL 1939065, at *4 (S.D. Cal. Apr. 22, 2020) (an attorney's "assumption of a position contrary to his client's interests violates his duty of fidelity to his client") (quotation omitted).

2. LittleAxe Was Negligent.

a. *Elements Of A Negligence Claim*

The plaintiff in a legal negligence action must prove: (1) the existence of an attorney-client relationship, (2) breach of a lawyer's duty to the client, (3) facts constituting the alleged negligence, and (4) a causal nexus between the lawyer's negligence and the resulting injury (or damage). *Worsham v. Nix*, 145 P.3d 1055, 1065 (Okla. 2006) (quoting *Manley v. Brown*, 989 P.2d 448, 452 (Okla. 1999)).

b. *LittleAxe's Negligence*

Simply put, LittleAxe owes Softek "a duty to provide competent representation," and Softek relied upon LittleAxe to provide it. *Gray Ins. Co. v. Heggy*, No. 11-733, 2012 WL 4128034, at *3 (W.D. Okla. Sept. 19, 2012) (quotation omitted). He also had "a duty to protect his client's rights and interests." *Oklahoma Orthopedic & Arthritis Found., Inc. v. Millstead*, 666 P.2d 242, 244 (Okla. Ct. App. 1983). And he had a duty "to diligently pursue negotiations on [Softek's] behalf." *Williams & Cochrane*, 2020 WL 1939065, at *5; *cf. Mickens v. Taylor*, 535 U.S. 162, 168 (2002) ("[J]oint representation of conflicting

[52] ECF No. 86-1, at 1.

interests is inherently suspect . . . .").

Here, by supporting Softek's adversary in this very action, LittleAxe did the opposite of protecting Softek's rights and interests.[53] LittleAxe is advocating that Softek's claims against Modoc should be dismissed, in contravention of Softek's interests and to Softek's detriment.[54]

In addition, Softek relied on the legal counsel it received from LittleAxe with respect to issues directly implicated in the claims between the Parties in this lawsuit, such as reviewing and revising documents, drafting contracts, providing legal and fiduciary advice, and otherwise counseling Softek on matters related to Softek's work with Modoc.[55] LittleAxe also drafted, edited, negotiated, and/or provided Softek with legal counsel regarding the nature and substance of the contractual agreements with Modoc.[56] In addition, LittleAxe was responsible for marshaling how Softek's invoices and fees were to be paid and arranged between Modoc to Softek, and financing the Parties' operations in general.[57]

Amongst other accusations, Modoc contends in this action—with support from LittleAxe—that there was no agreement between the Parties, or that if there was it is not enforceable.[58] Modoc has also alleged—with support from LittleAxe—that Softek "paid itself management and financing fees to which it was not entitled."[59] If any of this is true,

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[53] ECF No. 61-1; ECF No. 86-1.
[54] ECF No. 86-1, at 1.
[55] ECF No. 82, ¶27; ECF No. 99, ¶20.
[56] ECF No. 82, ¶64; ECF No. 99, ¶21.
[57] ECF No. 82, ¶61; ECF No. 99, ¶22.
[58] *See, e.g.,* ECF No. 86, at 9 (Modoc alleging that "no contract exists upon which Softek can assert a breach of contract claim").
[59] *Id.* at 12.

it is the result of relying on LittleAxe's advice, counsel, and negotiation. In other words, LittleAxe's unethical conduct finds him in a Catch 22. If the oral contract between the Parties is insufficient, LittleAxe provided erroneous legal advice. If Softek is not "for all practical purposes" 49% shareholders of RCE and the other MTEs, LittleAxe provided erroneous legal advice.[60] If there was something wrong with the way Softek was paid, LittleAxe provided erroneous legal advice. At a bare minimum LittleAxe failed to diligently pursue negotiations on Softek's behalf, since he literally was negotiating on behalf of Modoc at the same time.

But for LittleAxe's gross breach of duty to Softek, Softek would not have incurred the legal fees and costs it did during the course of LittleAxe's representation. In addition, Softek continues to be damaged as a result of LittleAxe's continued support of Modoc, at Softek's expense, causing continued incurred legal expenses in this very action.

"A plaintiff claiming negligence against her attorney need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Williams & Cochrane*, 2020 WL 1939065, at *5 (quotation omitted). Softek's burden is easily met here. LittleAxe's motion should be denied.

3. LittleAxe Was Unjustly Enriched.

"'Recovery, based on unjust enrichment depends upon a showing that Appellees have money in their hands that, in equity and good conscience, they ought not be allowed to retain.'" *Zero Down Supply Chain Sols., Inc. v. Am. Airlines, Inc.*, No. 05-327, 2006 WL 8458208, at *6 (N.D. Okla. May 18, 2006) (quoting *French Energy, Inc. v. Alexander*,

[60] ECF No. 99, ¶13.

818 P.2d 1234, 1237 (Okla. 1991)).

> 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.

Healy v. Cox Commc'ns Inc., No. 12-481, 2013 WL 120009, at *2 (W.D. Okla. Jan. 9, 2013) (quoting *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 295 (Okla. Ct. App. 1996)).

Here, Softek has evidenced that LittleAxe has retained a benefit that he should not be permitted to keep: at least $192,000 in legal fees.[61] This should be returned to Softek, for the same reason that Softek is entitled to this reparation for LittleAxe's breach of fiduciary duty, as described in *Deutsch*, 97 S.W.3d at 192, and *Burrow*, 997 S.W.2d at 238.

4. LittleAxe Intentionally Interfered With Softek's Contract And Prospective Business Advantage With Modoc.

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive and burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Wilspec Techs., Inc. v. DunAn Holding Grp., Co., 204 P.3d 69, 72 (Okla. 2009) (citing Restatement (Second) of Torts (1979)).

Softek and Modoc—via LittleAxe—had entered into an oral contract whereby Softek was "for all practical purposes" 49% shareholders of RCE and the other MTEs and, as such, would continue to receive profits therefrom.[62] Now, LittleAxe submits that

[61] ECF No. 82, ¶51; ECF No. 99, ¶24.
[62] ECF No. 99, ¶13; *see also* Second Dreveskracht Decl., Exs. 14, 15.

"Softek had no expectation of profit from its alleged contractual relationship with the Modoc Nation after the Modoc Nation terminated Softek in July 2019 and sued Softek in November 2019."[63] LittleAxe also submits, on Modocs' behalf, that Softek is not entitled to recover the contractual amounts owed, because there was no enforceable contract between the Parties—a position contrary to that made to the Parties for nearly ten years.[64] In essence, LittleAxe's ethically compromised position forced him to choose sides between his two clients, and he has (1) chosen Modoc, and (2) counseled Modoc to renege on its contractual obligations to Softek. LittleAxe's intentional and improper interference with the performance of the contract between the Parties has resulted in a pecuniary loss of at least $3,153,761 in loan proceeds and fees. LittleAxe's motion should be denied.

III. CONCLUSION

In light of the above, Softek respectfully requests that LittleAxe's Motion to Dismiss, converted by this Court's order to a Motion for Summary Judgment, be **DENIED**.

Dated: April 24, 2020.

Respectfully submitted,

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[63] ECF No. 93, at 10.
[64] *See generally* ECF No. 86-1.

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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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