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 TO DISMISS

I. INTRODUCTION

Plaintiffs/Counterclaim Defendants ("Modoc")'s response in opposition to Defendants/Counterclaimants ("Softek")'s Motion to Dismiss fails to set forth a factual or legal basis upon which relief for their RICO claims can be granted. Were this a game to see which of the Parties could fit the words "fraud," "fraudulently induced," or "racketeering activity" into a pleading, Modoc would win. But this is not a game for Softek. This is a Racketeer Influenced and Corrupt Organizations Act ("RICO") action contending that two Indian Nationals pose a "significant societal threat" to American citizens. *Johnston v. Prairie View*, No. 19-2041, 2020 WL 2025499, at *9 (D. Kan. Apr. 27, 2020) (quotation omitted); *see also United States v. Webster*, 639 F.2d 174, 183 (4th Cir. 1981) (noting the "stigma stemming from the connotations surrounding the offense of 'racketeering.").

This is a contract dispute; not a racketeering case. Modoc, a sophisticated party whose general counsel oversaw all aspects of the relationships between the parties, admits that they entered into valid contracts with Softek—and have in fact sued Softek for breach of contract.[1] But now, in the face of Softek's Motion to Dismiss, Modoc has come forward with two apparently new contradictory theories of the case: (1) there is no contract; (2) Modoc was "fraudulently induced" into the contractual relationship with Softek. According to Modoc, because Softek invoiced Modoc pursuant to what Modoc now asserts was a non-existent or "fraudulently induced" contract, Softek's invoices are purportedly "wire fraud."

Modoc's response brief does not substantively address a single argument made by

[1] ECF No. 29, ¶159.

Softek in its Motion to Dismiss, nor does it cite to any relevant authority or specific facts that might support Modoc's RICO claims. Softek's Motion to Dismiss, on the other hand, meticulously parses each relevant paragraph of Modoc's Amended Complaint ("AC"), searching without success for any material factual allegation supporting a RICO claim. And in response, instead of pointing out where exactly in the AC the Court may find evidence or factual allegations sufficient to meet the standards for civil RICO claims under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Modoc simply repeats some rendition of the word "fraud" over 130 times. This falls well short of specific factual allegations sufficient to meet the applicable standards for civil RICO claims under *Twombley*.

II. LAW AND ARGUMENT

A. MODOC'S BURDEN OF PROOF

In a section curiously titled "standard of review," Modoc apparently takes issue with the Rule 9(b) burden articulated in Softek's moving papers.[2] Modoc first submits that their burden under Rule 9(b) should be "relaxed" because they are "unable to obtain essential information in [Softek]'s possession without pretrial discovery."[3] While it is true that "Rule 9(b)'s normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control," *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1255 (10th Cir. 2016) (quotation omitted), the burden is on the plaintiff to allege, on information and belief, the specific facts which give rise to the necessary inference of fraud:

> To receive the relaxed application of Rule 9(b) in cases of corporate fraud, plaintiffs must allege that the necessary information lies within defendants'

[2] *See Sandoval v. Ives*, No. 17-1214, 2018 WL 2223318, at *1 (D. Or. May 15, 2018) (discussing the difference between a "standard of review" and "burden of proof").
[3] ECF No. 130, at 4.

> control and must include facts indicating why the charges against defendants are not baseless and why additional information lies exclusively within defendants' control. Plaintiffs must also delineate at least the nature and scope of their effort to obtain the information needed to plead with particularity and thoroughly investigate all possible sources of information, including but not limited to all publicly available relevant information, before filing a complaint.

Impala Platinum v. A-1 Specialized Servs., No. 16-1343, 2016 WL 8256412, at *5 (E.D. Pa. Sept. 16, 2016) (quotation omitted). The AC alleges none of this. In fact, Modoc does not explain specifically what "information" Softek is in the exclusive possession of and that Modoc is unable to obtain. At any rate, "[e]ven under a relaxed application of Rule 9(b) plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible." *George*, 833 F.3d at 1255 (quotation omitted). Here, Modoc has not provided any specific facts establishing that their RICO claims have merit.

Modoc also seems to object to the application of a "heightened pleading standard . . . beyond the requirements of Fed. R. Civ. P. 9(b)."[4] But Softek does not submit that such a standard applies. While Softek is aware of cases where the "probable cause" standard was applied to RICO cases, Softek does not assert that this standard applies here. In fact, the authority that Softek cites actually distinguished these cases, holding that the lower Rule 9(b) standard that Softek endorses applies:

> [A] RICO plaintiff must meet a higher pleading standard than that imposed on an ordinary plaintiff. RICO's *in terrorem* effect is potent, in that a RICO defendant faces the unsavory label "racketeer" as well as the risk of triple damages. In many cases the RICO defendant may be guilty of no more than negligence, yet his reputation for honesty is at great risk. Because a RICO claim threatens the same kind of harm to a professional reputation as a fraud claim, a RICO plaintiff should plead the facts constituting the predicate offenses with the particularity required by Rule 9(b).

[4] *Id.* at 7 n.2.

Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92, 97 (D. Or. 1985) (distinguishing *Laterza v. American Broadcasting Co.*, 581 F.Supp. 408, 413 (S.D.N.Y. 1984); *Taylor v. Bear Stearns & Co.*, 572 F.Supp. 667, 682-83 (N.D. Ga. 1983); and *Bache Halsey Stuart Shields v. Tracy Collins Bank*, 558 F.Supp. 1042 (D. Utah 1983)).

B. MODOC'S ARGUMENT THAT INVOICES SUBMITTED PURSUANT TO AN "UNENFORCEABLE CONTRACT" CONSTITUTE FRAUD IS UNTENABLE.

Modoc submits that because "the Alleged Contracts allegedly relied upon by Softek were not enforceable . . . Softek did not have any right to receive payments" and any invoices sent and paid where therefore "fraudulent."[5]

First, this position is belied by Modoc's own Complaint, which claims Softek breached the very same agreements between the Parties.[6] Assuming that Modoc succeeds on this claim, will the judgment against Softek be "fraudulent"? Will Softek have a valid RICO claim against Modoc or even the Court for "fraudulently" seeking monies pursuant to an "unenforceable contract"? Modoc cannot eat its cake and have it too.

Second, Modoc also appears to argue that if there were agreements between the Parties, those agreements are unenforceable because Modoc was "fraudulently induced" to enter into the contracts.[7] Putting aside that this argument is also undermined by Modoc's own Complaint alleging enforceable contractual obligations, this theory does not sound in RICO. Since *Miller v. Troy Laundry Mach. Co.*, 62 P.2d 975, 977 (Okla. 1936), is the only case cited by Modoc for its "fraudulent inducement" theory, it is a good place to start. At issue in *Miller* was this question:

Where plaintiff sues to rescind or recover damages, on the theory of fraud

[5] *Id.* at 14.
[6] ECF No. 29, ¶¶158-61.
[7] ECF No. 130, at 10.

> in inducing him to sign the contract, may he prove his case by evidencing oral representations at variance with the provisions of the written agreement, which oral representations were false, and induced him to his detriment to sign the contract, which he would not have signed but for the said misrepresentations?

Id. at 977. The court answered in the affirmative. *Id.* As to what the remedy might be available to the aggrieved party, *Miller* held: "A transaction into which one is induced to enter by reliance upon untrue and material representations as to the subject matter, made by an agent entrusted with its preliminary or final negotiations, is subject to rescission at the election of the person deceived." *Id.* at 979 (quotation omitted). In other words, a fraudulently induced contract does not vanish into thin air or otherwise become "unenforceable," as Modoc misrepresents, but becomes unilaterally terminable. *See, e.g., Alexander Hamilton Inst. v. Wayne*, 98 P.2d 37, 38 (Okla. 1940). Thus, assuming for the sake of argument that Modoc was "fraudulently induced" to enter into contracts with Softek, their remedy was to terminate the contract, which they did, and then presumably seek damages by asserting a "fraudulent inducement" claim. *See, e.g., Braun v. Medtronic Sofamor Danek, Inc.*, 719 F. App'x 782 (10th Cir. 2017). Having failed to do so, they now seek to bootstrap fraudulent inducement into a RICO action. This is not allowed. *See Ferguson v. Moeller*, No. 16-0041, 2016 WL 1106609, at *7 (W.D. Pa. Mar. 22, 2016) (plaintiffs are not allowed "to bootstrap a common law fraud into a RICO violation").

Third, to the extent Modoc is asserting that the alleged "fraudulent inducement" constitutes a RICO predicate act, nowhere in Modoc's AC is it alleged that this "fraudulent inducement" occurred via mail or wire. This does not come anywhere close to Rule 9(b)'s requirement that a plaintiff allege with particularly the specific dates, times, and persons involved in the alleged phone calls, mailings, or emails where the false statements were

made. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1255 (10th Cir. 2016). In addition, the alleged "fraudulent inducement" does not make the requisite showing that Softek poses a threat of continued criminal activity. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989); *see also Norfolk S. Ry. v. Boatright R.R. Prod.*, No. 17-1787, 2018 WL 2299249, at *7 (N.D. Ala. May 21, 2018) ("Courts have expressed understandable reluctance to allow a plaintiff to bootstrap predicate acts based on wire fraud committed during the course of a business relationship into a RICO claim.") (citing cases). Once the Parties entered into the contract, the alleged fraud, if indeed it was fraud, was complete. *Medallion Television Enters. v. SelecTV of Cal.*, 833 F.2d 1360, 1365 (9th Cir. 1987).

In sum, Modoc asks the Court to embrace their circular RICO logic: Modoc would not have entered into agreements with Softek if they knew they would be "defrauded" in the future, so there is no contract—and because there is no contract, any invoices submitted by Softek are automatically "fraudulent" because, well, there is no contract.[8] Modoc's logic games should be rejected.

C. SUBMITTING INVOICES DOES NOT CONSTITUTE FRAUD.

Since Modoc do not sufficiently allege that the purported "fraudulent inducement" to enter into contracts was a predicate RICO offence, they apparently propose that the invoices sent by Softek were somehow themselves fraudulent. But the AC only alleges that Softek "issue[d] fraudulent invoices for fees."[9] The AC does not identify what invoice was "fraudulent," when it was sent, by whom, or describe how that specific invoice was

[8] *See* ECF No. 29, ¶42 ("The Tribe would not have agreed to the Replacement Agreement had it known the concealed truth that Defendants intended to, would and did defraud Plaintiffs by fraudulently requesting, invoicing and billing fees to Plaintiffs for Softek's management and financing services.").
[9] *Id.*, ¶38.

"fraudulent." The closest the AC comes to meeting the Rule 9(b) standard is in Paragraphs 111 and 112, where specific invoices or requests for payment are identified. In using the adjective "fraudulent," however, Modoc advances no facts describing specifically how these invoices are "false" or "fraudulent" or otherwise constitute "wire fraud." Modoc's description of monthly emailed invoices as "fraudulent," without explaining how they were fraudulent and not merely invoices issued for work performed or for profits due to Softek, does not state a valid claim. *See Transportation All. Bank, Inc. v. Arrow Trucking Co.*, No. 10-16, 2011 WL 221863, at *4 (N.D. Okla. Jan. 21, 2011) (Rule 9(b) requires plaintiffs provide the time, place, and contents of alleged false representations, the identities of those making the false representations, and specific facts of alleged fraudulent activity as to each defendant where multiple defendants are involved).

While Modoc appears to generally allege that all of the invoices are *per se* fraudulent because there is no enforceable contract, this does not suffice, as described above. Modoc's "unenforceable contract" theory presents circular logic that is unavailing and makes no sense. If "Softek was not entitled to any payments," under any agreement,[10] then why did Modoc pay them for over ten years while Modoc itself was in ultimate control of every one of the subject Modoc Tribal Entities? Contractual agreements aside, did Modoc expect that Softek would do work for Modoc, but never invoice or be paid for that work because, for instance, the underlying contracts "had not been approved by the SBA"?[11] Does submitting an invoice for work completed constitute "fraud" if there is no "enforceable" contract laying out the scope of the work? Of course not.

[10] ECF No. 130, at 14-19.
[11] *Id.*, at 10.

Modoc also submits that all payments to Softek for a 2011-2014 "undisclosed incentive plan" were inappropriate,[12] but fails to tie the incentive plan to any "fraudulent" invoice, request for payment, or other use of mail or wire.[13] *See Paul v. Aviva Life & Annuity Co.*, No. 09-1490, 2010 WL 5105925, at *5 (N.D. Tex. Dec. 14, 2010) (predicate acts must be "tied to mail or wire fraud").

D. MODOC HAS NOT SUFFICIENTLY ALLEGED A "COMMON PURPOSE."

Arguing that Softek defendants engaged in the common purpose of fraud, Modoc uses the words "fraud," "fraudulent," and "racketeering" a number of times, and asks the Court to "infer" that Softek defendants acted with a common purpose of trying to defraud them.[14] Without the bellicose legal conclusions, though, this is Modoc's argument:

> The Complaint alleges a common purpose to . . . share[] in millions of dollars of . . . fees, paid to them and salaries . . . . Indeed [this] continued into July 2019, when Shah directed Dadbwhala to email the Tribe and . . . demand that the Tribe repay Red Cedar's and Eagle's loan balances, and also pay Softek $2.0 million of fees.

Softek does not deny that they are for-profit corporations, owned and operated by people who do not work for free. It is also true that Softek made loans to Modoc entities, and, when Modoc unilaterally terminated their contract, Softek asked to be repaid. This is not fraud or racketeering. Modoc does not sufficiently allege an unlawful "common purpose."

E. MODOC HAS NOT SUFFICIENTLY ALLEGED THAT SOFTEK MAINTAINED AN INTEREST IN MODOC ENTITIES BECAUSE OF, OR THROUGH, FRAUDULENT ACTS.

"To state a claim under § 1962(b), a plaintiff must allege that (1) it suffered an

[12] ECF No. 130, at 19.
[13] This claim would be time barred because civil RICO claims are subject to a four-year statute of limitations that runs "when the plaintiff discovers or should have discovered the RICO injury." *In re: Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998).
[14] ECF No. 130, at 26.

injury (2) resulting from the acquisition or control of an enterprise (3) acquired through a pattern of racketeering activity." *First Interregional Advisors Corp. v. Wolff*, 956 F. Supp. 480, 487 (S.D.N.Y. 1997) (quotation omitted). Modoc is, in part, correct that "SMS and SFS were formed to better service the MTE's and, more specifically, SMS was formed to hire personnel on payroll and contract with consultants. . . . Shah and Softek did in fact hire such personnel once the enterprise came into existence."[15] This is irrelevant, however, under § 1962(b). To the extent Modoc is submitting that Softek acquired its own corporate entities through a pattern of racketeering, and that this somehow injured Modoc, they are mistaken about how § 1962(b) works. Section 1962(b) applies when a defendant takes control of **a plaintiff's** enterprise through a pattern of pattern of racketeering. This claim, too, should be dismissed under Rule 12.

III. CONCLUSION

Farlow v. Peat Marwick Mitchell & Co., provides an example of what to do with this case. 666 F. Supp. 1500 (W.D. Okla. 1987). In *Farlow* the plaintiffs alleged numerous deceptive and fraudulent investment transactions, including specific undisclosed financial items in two certified financial statements to investors. *Id.* at 1502. The amended complaint listed specific purchases made by plaintiff which were induced by false representations made through mailings. *Id.* This was not enough. The Court dismissed the RICO claims against the defendants because the claims were not pleaded with requisite particularity of facts. *Id.* at 1509. The Court also would not allow the plaintiffs time for discovery of their fraud and RICO claims, noting "[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should seek to redress

[15] *Id.*, at 37.

a wrong, not to find one." *Id.*; *see also Mayfield SWD, L.L.C. v. Blevins*, No. 10–0467, 2011 WL 195656, at *3 (W.D. Okla. Jan. 19, 2011) (RICO claims dismissed for failure to plead with particularity the requisite mental state and proximate cause elements though other elements were present); *Friedlob v. Trustees of Alpine Mut. Fund Tr.*, 905 F. Supp. 843, 860 (D. Colo. 1995) (dismissed plaintiffs' RICO claims for failure to adequately plead scienter requirement in predicate acts though other elements were factually robust). Here, on Modoc's comparatively bare-bones pleading, the Court should do likewise.

The Parties agree that for over ten years Softek did some amount of work for Modoc, and was paid for it, pursuant to a "number of [contractual] agreements."[16] Although the Parties apparently disagree about the scope of the work that was done, and the terms of the compensation that Softek would receive, this is the extent of what is at issue. Modoc repeatedly uses the word "fraud," or some similarly inculpatory adjective, but Modoc advances no specific factual allegations that allege any of the payments to Softek were fraudulent or racketeering. That Modoc now believes that the contractual agreements are "unenforceable" does not transform invoices submitted pursuant to those contractual agreements into "fraudulent invoices" sufficiently supporting RIOC allegations.[17] They were regular invoices, submitted pursuant to what Softek reasonably believed was an operative agreement between the Parties. This is a contract dispute, not a valid civil RICO claim. *See, e.g., V.F. Assocs. v. Reissman*, No. 90-0378, 1991 WL 49733, at *6 (E.D. Pa. Apr. 2, 1991); *Primage Corp. v. Shorebank Pac.*, No. 10-5000, 2010 WL 2679899, at *3 (W.D. Wash. Jul. 2, 2010). Modoc's RICO claims should be dismissed.

[16] ECF No. 29, ¶3.
[17] ECF No. 130, at 7.

Dated: June 1, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 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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