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. BLAKE FOLLIS, Counterclaim Defendant.	NO. 4:19-cv-00588-CVE-JFJ

RESPONSE IN OPPOSITION TO PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

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I. INTRODUCTION

Plaintiffs/Counterclaim Defendants (collectively "Modoc") ask this Court to dismiss Defendants/Counterclaimants (collectively "Softek")'s counterclaims for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Modoc's motion should be **DENIED**.

First, none of the Modoc entities are entitled to the protection of tribal sovereign immunity. Sovereign immunity does not extend to a business owned by one sovereign but formed under the laws of a second sovereign. Such entities are under the authority of the state under which they are incorporated and are not entitled to immunity.

Second, Indian tribes are allowed to waive their immunity. And when a tribal entity waives its sovereign immunity as required by the Small Business Administration ("SBA")'s § 8(a) program, that language is sufficiently broad to grant federal jurisdiction over any "matter" that relates to its operation as a § 8(a) contractor.

Third, Modoc are not the kinds of tribal entities, analogous to a governmental agency, which should benefit from the defense of sovereign immunity. Rather, Modoc are commercial business enterprises, instituted solely for the purpose of generating profits. As such, Modoc are not entitled to immunity.

Fourth, by voluntarily asserting the jurisdiction of this Court, Modoc have waived immunity as to all claims arising out of the same transaction or occurrence.

Finally, Softek has plead sufficient factual allegations to allow the Court to draw a reasonable inference that Modoc is liable for the misconduct alleged as to each of their straightforward, largely uncontested, common law claims.

I. FACTS[1]

From 2010 to 2019, Softek had business dealings with Modoc Nation a/k/a Modoc Tribe of Oklahoma ("Modoc"), Red Cedar Enterprises, Inc. ("RCE"), Eagle TG, LLC ("Eagle"), Talon MTE, LLC ("Talon"), Buffalo MTE, LLC ("Buffalo"), Modoc MTE, LLC ("Modoc MTE"), and Walga MTE, LLC ("Walga").[2] Specifically, Modoc and RCE entered into an agreement with Softek whereby Softek would create and manage numerous MTEs for the benefit of Softek, Modoc, and RCE, collectively, splitting the profit between the Parties on an agreed-upon basis.[3] **Softek and Modoc operated under and mutually benefited from this agreement for nearly ten years**.

Then, in July of 2019, a dispute arose between Defendant Rusty Bohl, who had been assisting to manage the on-the-ground aspects of some of the MTEs for Softek, and Crossclaim Defendant Blake Follis ("Follis"), who had been managing a fledgling daily fantasy sports gambling operation that was losing Eagle capital and exposing Eagle to significant risk and liability.[4] Follis demanded to use the resources of one or more of the MTEs—including the time of contracted personnel on military bases working on legitimate, income-generating enterprises—to benefit his personal fantasy sports gambling

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[1] Throughout their motion—particularly in the "Introduction" section—Modoc assert facts without citing to any documentation or similar submission for support. *See, e.g.,* ECF No. 61, at 10 ("Defendants had misused their ostensible management and financing of the MTE's to fraudulently pay themselves hidden fees of at least $9.6 million to which they were not entitled."). "A motion to dismiss is not the place to argue factual matters not alleged in the complaint." *Whitebird v. Gibson*, No. 19-0184, 2019 WL 5699740, at *1 (W.D. Okla. Oct. 9, 2019). Softek respectfully requests that these unsupported assertions be stricken, as they have no possible relation to the motion before the Court and are only asserted to prejudice Softek. Fed. R. Civ. P. 12(f).

[2] ECF No. 65, ¶¶16-20. Eagle, Buffalo, Modoc MTE, and Walga will hereafter be referred to collectively as "MTEs".

[3] *Id.* ¶28.

[4] *Id.* ¶21.

operation.[5] When Softek and others objected to Follis's scheme, Follis retaliated by fabricating a false narrative that Softek had defrauded Modoc and the MTEs.[6]

On or about July 24, 2019, Softek was told, without warning, that they were to have no contact with anyone from Modoc, were not to access the books for any of the MTEs, and were constructively terminated from their management position with RCE and the MTEs.[7] As of July of 2019, Softek was owed at least $3,153,761 in loan proceeds and fees.[8] This amount continues to grow, exponentially, with each passing day that the MTEs that Softek helped build into profitable enterprises remain profitable for Modoc.[9]

A race to the courthouse ensued. On November 1, 2019, Modoc filed suit against Softek (which was amended on December 6, 2019), seeking no less than $43.8 million in compulsory and punitive damages.[10] Notable in Modoc's pleading is the admission that at all times the majority of Softek's business dealings were with state-chartered corporations. Specifically, it was acknowledged that Plaintiffs/Crossclaim Defendants **Modoc, Eagle, Talon, Buffalo, and Walga are each corporations duly organized and existing under and by virtue of state law**.[11] It was also acknowledged that **RCE, Eagle, Buffalo, Walga, and Modoc MTE were approved by and registered with the SBA's § 8(a) program**.[12]

On December 30, 2019, Softek asserted Counterclaims against Modoc, alleging, as previously acknowledged by Modoc, that Plaintiffs/Crossclaim Defendants Modoc, Eagle,

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[5] *Id.* ¶22.
[6] *Id.* ¶23.
[7] *Id.* ¶26.
[8] *Id.* ¶27.
[9] *Id.*
[10] ECF Nos. 2, 29.
[11] ECF No. 29, ¶¶7, 9-13.
[12] *Id.* ¶¶ 28, 45, 49, 51, 54-55.

Talon, Buffalo, and Walga are each corporations duly organized and existing under and by virtue of state law.[13] Softek also alleged that "**RCE was, at all relevant times, registered as a foreign for-profit business corporation with the State of Oklahoma pursuant to Oklahoma's General Corporation Act, Okla. Stat. tit. 18, § 1130, since 2005**."[14] Softek also alleged, as also previously acknowledged by Modoc, that RCE, Eagle, Buffalo, Walga, and Modoc MTE were approved by and registered with the SBA's § 8(a) program.[15]

III. LAW AND ARGUMENT

A. MODOCS' FED. R. CIV. P. 12(B)(1) MOTION MUST BE DENIED.

1. Rule 12(b)(1) Standard

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction generally take one of two forms. *Stuart v. Colo. Interstate Gas Co.,* 271 F.3d 1221, 1225 (10th Cir. 2001). "First, a moving party may make a facial attack on the complaint's allegations as to the existence of subject matter jurisdiction." *Id.* "In reviewing a facial attack, the district court must accept the allegations in the complaint as true." *Id.* "Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction is based." *Id.* "In reviewing a factual attack, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (quotation omitted).

Motions to dismiss based on tribal sovereign immunity are generally treated as a facial challenge on a court's subject matter jurisdiction. *Gooding v. Ketcher*, 838 F. Supp.

[13] ECF No. 65, ¶¶6, 8-10, 12.
[14] *Id.* ¶7. There is no substantive difference between a state-chartered corporation and an Oklahoma foreign corporation. Okla. Stat. Ann. tit. 18, § 1130(D).
[15] ECF No. 65, ¶¶ 7-8, 10-12.

2d 1231, 1245-46 (N.D. Okla. 2012) (citing *Gold Bank v. Johanns,* No. 05-2239, 2005 WL 3536197, at *1 (D. Kan. Dec. 23, 2005); *Jones v. U.S. Dept. of Justice,* No. 02-2056, 2003 WL 24303731, at *1 (D. Colo. Sept. 22, 2003)). This is particularly true where, as here, "defendants do not dispute the complaint's factual allegations." *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 918 (D. Wyo. 1997), *aff'd*, 163 F.3d 1150 (10th Cir. 1998).

Here, although they submit various documents with their motion, Modoc does not dispute the factual allegations relevant to this Court's jurisdiction. *Id.* As discussed below, all that is relevant to the motion submitted by Modoc is the fact that (1) Plaintiffs/Crossclaim Defendants Modoc, Eagle, Talon, Buffalo, Walga, and RCE are each corporations duly organized and existing under and by virtue of state law; (2) RCE, Eagle, Buffalo, Walga, and Modoc MTE were approved by and registered with the SBA's § 8(a) program and have waived any immunity that they may have otherwise possessed to the extent required by 13 C.F.R. § 124.109(c)(1); and (3) Plaintiffs/Crossclaim Defendants have filed suit against Softek, and Softek's counterclaims arise from the same transaction, seek the same relief, and seek an amount not in excess of Modocs' claims. These facts are not disputed.[16] Because "[t]he relevant jurisdictional facts are not disputed," the Court must accept Softek's allegations as true. *E.F.W. v. St. Stephen's Mission Indian High Sch.*, 51 F. Supp. 2d 1217, 1221 (D. Wyo. 1999), *aff'd*, 264 F.3d 1297 (10th Cir. 2001).

2. State-Chartered Corporations Are Not Entitled To Immunity.

Citing three out-of-Circuit cases, Modoc submits that "[a] subsidiary entity created under a state's laws by a tribe does not lose immunity merely by being created as a separate

[16] *Compare* ECF No. 29, ¶¶7, 9-13, 28, 45, 49, 51, 54-55, *with* ECF No. 65, ¶¶6, 7-12. The evidence submitted by Modoc either supports these undisputed facts, ECF No. 61-1, Exhibits A-B, or is irrelevant to this Court's jurisdiction, *id.*, Exhibit C.

entity."[17] Modoc is wrong. Modoc, Eagle, Talon, Buffalo, Walga, and RCE are state entities not entitled to sovereign immunity. Even a cursory review of the pertinent Tenth Circuit case law reveals that this argument is devoid of legal merit.

It has been clear for nearly a decade in the Tenth Circuit that "when a tribe or tribes form an entity under the law of a different sovereign, such as a state" their sovereign immunity does not transfer, "because such entities are under the authority of the state under which they are incorporated, not an Indian tribe." *Eaglesun Sys. Prod., Inc. v. Ass'n of Vill. Council Presidents*, No. 13-0438, 2014 WL 1119726, at *8 (N.D. Okla. Mar. 20, 2014) (citing *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012)). As now-Supreme Court Justice Gorsuch explained in *Somerlott*:

> Of course, Indian tribes are entitled to sovereign immunity absent congressional abrogation. And, of course, this immunity is not limited by the type of activity involved or where it takes place. But no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state—or tribe. . . . [T]his court has never applied the subordinate economic entity test to entities incorporated under the laws of a second sovereign. And for good reason. There's no need to. We can easily tell whether an entity like that is legally separate and distinct from the tribe by looking to the laws of the second sovereign. That's what we do when the federal government incorporates under state law. That's what we do when a foreign sovereign incorporates under state law. And that's what we do here.

Somerlott, 686 F.3d at 1154, 1156, 1158 (Gorsuch, J., concurring) (citation omitted). Courts in the Eighth and Ninth Circuits have held likewise. *See, e.g., Hunter v. Redhawk Network Sec., LLC*, No. 17-0962, 2018 WL 4171612, at *3 (D. Or. Apr. 26, 2018); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006); *Airvator, Inc. v. Turtle*

[17] ECF No. 61, at 15.

Mountain Mfg. Co., 329 N.W.2d 596, 603 (N.D. 1983).

The three cases cited by Modoc are inapposite. First, *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.* did not find that incorporation under state law has no import. 842 F.Supp.2d 1163 (D.S.D. 2012). Rather, the case held that state incorporation was merely one factor to take into account under the balancing test articulated in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).[18] Notably, in *Somerlott* the Tenth Circuit explicitly rejected *J.L. Ward* as "unpersuasive." 686 F.3d at 1149 n.3. *Somerlott* is binding upon this Court, not *J.L. Ward*.

Second, *Pink v. Modoc Indian Health Project, Inc.*, is easily distinguished, as there is simply no indication that the corporate entity involved in *Pink* was incorporated under state law, as opposed to tribal law. 157 F.3d 1185 (9th Cir. 1998); *cf. Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) ("Formation under tribal law weighs in favor of immunity."). But even had it been, the 1998 out-of-Circuit case is directly at odds with on-point, binding, Tenth Circuit law.

Finally, *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, a twenty-five-year-old non-federal case, held the same as the *J.L. Ward* case that was explicitly rejected by the Tenth Circuit. 658 N.E.2d 989 (N.Y. Ct. App. 1995). This case is of no import here.

With the final arrow in its quiver, Modoc attempts to thread a needle by distinguishing the Modoc Tribe from its non-profit corporation.[19] This argument is also unavailing. Softek did not assert claims against anything other than Modoc's "domestic

[18] Modoc, correctly, does not argue that the *Breakthrough* balancing test applies here. *See Eaglesun*, 2014 WL 1119726, at *8 (holding that "*Breakthrough* . . . is inapplicable when a tribe or tribes form an entity under the law of a different sovereign, such as a state").
[19] ECF No. 61, at 8.

not-for-profit corporation duly organized and existing under and by virtue of the laws of the state of Oklahoma."[20] There is nothing to dismiss. The "Modoc Tribe," to the extent it can be distinguished from the corporate entity that sued Softek, is not a Crossclaim Defendant. Indeed, Modoc itself has brought suit in its capacity as a "corporation under Oklahoma law" and has itself alleged and admitted that all transactions with Softek occurred in this corporate capacity.[21] By its own admission, Modoc is a "corporation under Oklahoma law."[22] As such, Modoc is not entitled to tribal sovereign immunity.

3. Modoc Voluntarily Waived Immunity By Agreeing To "Sue And Be Sued."

The SBA's § 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged. 15 U.S.C. § 637(a); 13 C.F.R. § 124.1. Small businesses owned and controlled by such individuals may apply to the SBA and, if admitted into the program, are eligible to receive technological, financial, and practical assistance, as well as support through preferential awards of government contracts.

Important here, 13 C.F.R. § 124.109 requires that a participating entity's originating documents include a broad "sue and be sued" waiver of sovereign immunity:

> [The entity's] articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) . . . program participation, loans, and contract performance.

[20] ECF No. 65, ¶6.
[21] ECF No. 29. Modoc's attempt to shapeshift at this late juncture—a clear attempt at a "gotcha" tactic—is more appropriately a defense in a Modoc suit against whoever negligently counseled them to incorporate under state law.
[22] ECF No. 29, at 3.

13 C.F.R. § 124.109(c)(1). **RCE, Eagle, Buffalo, Walga, and Modoc MTE have each waived their immunity pursuant to this provision**.[23]

While Modoc *argues* that its waiver under this provision does not "permit[] Softek to sue the MTE's on its Counterclaims," they cite no authority to support this position.[24] Because there isn't any. Courts analyzing waivers under 13 C.F.R. § 124.109 have found that "when a tribal organization waives sovereign immunity as required by [SBA]'s § 8(a) program, that language is sufficiently broad" to cover a number of disputes, including the type of conduct alleged by Softek in this case. *Hunter*, 2018 WL 4171612, at *7; *see also Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma*, No. 09-730, 2010 WL 597125, at *1 (W.D. Okla. Feb. 16, 2010). Specifically, the regulation's requirement of federal jurisdiction over "all matters relating to . . . program participation" is sufficiently broad to encompass Softek's claims because they involve a "matter" which relates to Modocs' "program participation," *i.e.*, their performance of § 8(a) contracts—the sole purpose of the Parties' relationship.[25] *Rassi v. Fed. Program Integrators*, 69 F. Supp. 3d 288, 292 (D. Me. 2014) (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000)); *see also Hunter*, 2018 WL 4171612, at *7 (holding that a 13 C.F.R. § 124.109 "waiver does not only apply to 8(a) program participation, but additional matters as well" and that "[t]he language notes that waiver is 'not limited to' program participation'" and includes a number of claims, including employment matters). If these state-chartered entities[26] were entitled to sovereign immunity in the first place (they were

[23] ECF No. 65, ¶¶7-8, 10-12, 20; *see also* ECF No. 61-1, ¶¶4-5.
[24] ECF No. 61, at 17.
[25] ECF No. 65, ¶18(3); ECF No. 29, ¶3.
[26] Modoc MTE is the only §8(a) Counterclaim Defendant that is not state-chartered.

not) they waived it by agreeing to "sue and be sued" in this Court.

4. Modoc Are Independent From The Tribe To Such A Degree That They Cannot Share In The Tribe's Sovereign Immunity.

"A subdivision of a tribe will only share the tribe's immunity if the relationship between the tribe and the entity is sufficiently close." *Private Sols. Inc. v. SCMC, LLC*, No. 15-3241, 2016 WL 2946149, at *5 (D.N.J. May 20, 2016). Assuming for the sake of argument that Modoc were not state-chartered (with the exception of Modoc MTE, they are), and had not explicitly waived their immunity (with the exception of Modoc and Talon, they did), the analysis set forth in *Breakthrough* does not weigh in their favor.

To determine whether a tribal entity is entitled to immunity, courts in this Circuit consider the following factors:

> (1) the method of the entity's creation; (2) the entity's purpose; (3) the entity's "structure, ownership, and management, including the amount of control the Tribe has over the entity"; (4) "whether the Tribe intended for the entity to have tribal sovereign immunity"; (5) the financial relationship between the Tribe and the entity; and (6) "whether the purposes of tribal sovereign immunity are served by granting [the entity] immunity.

Finn v. Great Plains Lending, LLC, 689 F. App'x 608, 610 (10th Cir. 2017) (quoting *Breakthrough*, 629 F.3d at 1191). The Supreme Court of Arizona described the application of these factors just last week in *Hwal'Bay Ba: J Enterprises v. Jantzen*:

> In considering [these factors] the objective is to determine whether the entity is part of the tribe and serves as the tribe's vehicle for conducting its affairs, thereby entitling it to share the tribe's immunity. In doing so, a court should consider both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe. Arm-of-the-tribe immunity must not become a doctrine of form over substance. The ultimate purpose of the inquiry is to determine whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe. Ordinarily, therefore, an entity must produce more than its plan of organization, bylaws, and the like to prove its entitlement to sovereign immunity. Evidence demonstrating the functional relationship

> between the tribe and the entity should also be provided to demonstrate that the entity is—in practice and on paper—an arm of the tribe.[27]

No. 19-0123, 2020 WL 891158, at *5 (Ariz. Feb. 25, 2020) (citation omitted); *see also Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 653 (E.D. Va. 2019) (holding that "'the practical operation of the entity in relation to the tribe'" should be taken into account) (quoting *Owen*, 386 P.3d at 365; citing *Finn*, 689 F. App'x at 610-11).

a. The Method Of The Entities' Creation

This factor, which "focuses on the law under which the entity was formed," weighs heavily against immunity. *Solomon*, 375 F. Supp. 3d at 653 (quotation omitted). "Formation under tribal law weighs in favor of immunity, whereas formation under state law has been held to weigh against immunity." *Id.* Here, as discussed above, each Modoc entity is a state-chartered entity (with the exception of Modoc MTE). In the Tenth Circuit this factor is dispositive; at a bare minimum it weighs against a finding of immunity.

b. The Entities' Purpose

Whereas Modoc MTE's incorporation under tribal law weighs in favor of immunity, the purpose of the entity weighs *heavily* against it. *See, e.g., Hunter*, 2018 WL 4171612, at *4 ("While Redhawk is fully owned by the [Tribe], that fact alone does not support a finding of sovereign immunity."). Though Modoc MTE was ostensibly formed as a §8(a) corporation—which agreed to "sue and be sued"—it became increasingly

[27] At a bare minimum—were state incorporation and the SBA 8(a) waiver not dispositive—Softek is entitled to jurisdictional discovery on these factors. *See Finn*, 689 F. App'x at 611 (noting "the potential importance of jurisdictional discovery in sovereign immunity cases involving tribe-created" corporations) (citing *Owen v. Miami Nation Enters.*, 386 P.3d 357 (Cal. 2016)); *Gristede's Foods, Inc. v. Unkechauge Nation*, No. 06-1260, 2006 WL 8439534, at *7 (E.D.N.Y. Dec. 22, 2006) (same).

obvious that the entity would be utilized as a shell entity for Crossclaim Defendant Follis' "personal, failed fantasy sports operation."[28] According to Mr. Follis' website:

> Modoc MTE, LLC dba Fantasy Sports Markets (FSM) offers various fantasy sports contests to eligible individuals throughout the United States. In each contest, participants will create a roster from the available athletes, or players, provided by FSM. The FSM Fantasy Sports contests are primarily associated with professional Football, NCAA Football, Basketball, NCAA Basketball, Baseball, Auto Racing, Hockey, Jockey Challenge; other contests are currently in development. There are no salary caps required.[29]

Modoc MTE is "simply a for-profit corporation" that is in no way "carrying out tribal governmental functions." *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1110 (Ariz. 1989). This weighs against a finding of immunity. *See Jantzen*, 2020 WL 891158, at *5 ("If the entity's purpose is solely to engage in commercial activity, this factor weighs against immunity."). What is more, at least one court has found this type of gambling activity to be illegal. *See, e.g., White v. Cuomo*, No. 528026, 2020 WL 572843, at *1 (N.Y. App. Feb. 6, 2020). Follis' attempt to use tribal sovereign immunity to shield himself "from the consequences of his otherwise illegal actions" also weighs against a finding of immunity. *Solomon*, 375 F. Supp. 3d at 657.

The remaining state-chartered Crossclaim Defendants[30] do not "actually serve[] the tribe in carrying out governmental functions." *Jantzen*, 2020 WL 891158, at *4. "[A] for-profit corporation involved in construction projects" is not entitled to arm-of-the-tribe immunity. *Dixon*, 772 P.2d at 1110; *see also People v. Miami Nation Enterprises*, P.3d 357, 372 (Cal. 2016) (noting that "if the entity was created solely for business purposes" it

[28] ECF No. 65, ¶22.
[29] ECF No. 76-7.
[30] With the exception of Modoc. For the purposes of this *Breakthrough* analysis only, Softek presumes that the remaining factors weigh in favor of Modoc.

is not entitled to immunity) (quotation omitted). This weighs against tribal immunity.

c. The Entities' Structure, Ownership, And Management, Including The Amount Of Control The Tribe Has Over The Entities

"When a tribe owns an entity, but delegates most of the control of the entity to non-tribal members, that fact weighs against a finding of sovereign immunity." *Hunter*, 2018 WL 4171612, at *4 (citing *Breakthrough*, 629 F.3d at 1193); *see also Jantzen*, 2020 WL 891158, at *4 ("A tribe's shared ownership of an entity suggests it is not an 'arm of the tribe' entitled to shared immunity.").

Here, Softek was intended to be, and was at all times relevant to the Counterclaims, in charge of all aspects of control, management, and funding of the MTEs.[31] According to Modoc: "Beginning in 2011, Softek ostensibly managed and financed RCE. When the other MTE's were formed and qualified as 8(a) companies in 2012 and 2013, Softek ostensibly managed and financed them."[32] This factor weighs against tribal immunity.

d. Whether The Tribe Intended For The Entities To Have Tribal Sovereign Immunity

While each Entity now claims that they are entitled to tribal immunity, a "'self-interested and unsupported claim' that they 'intended their sovereign immunity to extend to [the Entities] cannot, without more,' support immunity." *Miami*, 386 P.3d at 379 (*quoting White v. Univ. of California*, No. 12-1978, 2012 WL 12335354, at *7 (N.D. Cal. Oct. 9, 2012), *aff'd*, 765 F.3d 1010 (9th Cir. 2014)). "Thus, for example, . . . the procurement of liability insurance protecting the tribe and the entity from the entity's negligence, evidences the tribe's expectation that the entity" would not enjoy tribal

[31] ECF No. 65, ¶¶18-21; ECF No. 29, ¶¶36-37.
[32] ECF No. 61, at 2.

immunity. *Jantzen*, 2020 WL 891158, at *5; *see also Dixon*, 772 P.2d at 1110 (same).

Here, the formation of separate corporations and insuring each entity,[33] for the purpose of protecting the tribal fisc, weighs against a finding of immunity.

e. The Financial Relationship Between The Tribe And The Entities

This factor was recently described in *Jantzen* as follows:

> The court should determine whether the tribe's assets are protected from judgments entered against the entity. But even if tribal assets are not directly at risk, the court must consider whether enforcement of any judgment against the entity would effectively strike a blow against the tribal treasury due to the tribe's heavy dependence on entity revenues to fund governmental functions. If a significant percentage of the entity's revenue flows to the tribe, or if a judgment against the entity would significantly affect the tribal treasury, this factor will weigh in favor of immunity even if the entity's liability is formally limited.

2020 WL 891158, at *5 (citation omitted); *see also Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928, 935 (N.Y. 2014) ("If a judgment against a corporation created by an Indian tribe will not reach the tribe's assets . . . then the corporation is not an 'arm' of the tribe.") (quotation omitted).

Here, as evidenced above, the entities have been incorporated as separate entities, which themselves are insured, providing two levels of protection from any judgment. A judgment against these entities would not affect the tribal treasury. This weighs against a finding of tribal immunity.

f. Whether The Purposes Of Tribal Sovereign Immunity Are Served By Granting The Entities Immunity

Extending immunity to Modoc would not further the federal policy seeking to protect tribal assets. Insurance protects the corporate liability, and the corporate charter

[33] ECF No. 76-9.

exonerates the Modoc Tribe from corporate liability. Therefore, the Modoc Tribe's assets are not threatened. Policies protective of tribal cultural autonomy and self-determination also remain unhindered by permitting jurisdiction here. The entities were established for purely commercial reasons and not to promote, develop, or protect the Tribe's culture.

In contrast, the federal government's policy of promoting commercial dealings between Indian tribes and non-Indians is furthered by withholding immunity in this case. A purely commercial corporation's rental of tribal immunity—here, to commit tortious and/or illegal conduct, discussed above—will deter contractual relationships. *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977). Further, "Congress's provision for allowing Indian tribes to segregate themselves into governmental and commercial corporate units, arguably implies that Congress did not intend all commercial activity undertaken by Indian entities be immune from suit." *Dixon*, 772 P.2d at 1112.

5. Modoc Subjected Themselves To Recoupment By Filing Suit.

"[F]iling a lawsuit constitutes waiver of tribal sovereign immunity" under the doctrine of "recoupment." *In re Greektown Holdings, LLC*, 917 F.3d 451, 464 (6th Cir. 2019); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1035 (E.D. Wash. 2009) ("Waiver under the doctrine of recoupment does not depend on prior waiver by the sovereign or an independent congressional abrogation of immunity."). "Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff." *Berrey v. Asarco*, 439 F.3d 636, 643 (10th Cir. 2006). As the Tenth Circuit made clear in *Berrey*:

> [T]he Supreme Court has recognized that when the United States brings suit, it impliedly waives its immunity as to all claims asserted by the defendant in recoupment. *Bull v. United States*, 295 U.S. 247, 260-63 (1935). . . . The waiver of sovereign immunity is predicated on the rationale

> that "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the sovereign's action is grounded." *Bull*, 295 U.S. at 262. In *Jicarilla* [*Apache Tribe v. Andrus*], we extended application of the recoupment doctrine to Indian tribes; thus, **when a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment.** [687 F.2d 1324, 1344 (10th Cir. 1982)]; *see also Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995).

Id. at 643 (emphasis added); *see also Flandreau Santee Sioux Tribe v. Gerlach*, 162 F. Supp. 3d 888, 894 (D.S.D. 2016) ("[W]hen a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment.") (quotation omitted); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 500 F. Supp. 2d 1143, 1147 (E.D. Wis. 2007) (noting that "[s]everal district courts have also recognized the doctrine of recoupment as an exception to the bar otherwise created by sovereign immunity" and citing cases); *Beecher v. Mohegan Tribe of Indians*, 918 A.2d 880, 885 (Conn. 2007) (same).

Here, Softek's Counterclaims sound in recoupment because they (1) arise out of the same transaction or occurrence as that alleged by Modoc, (2) seek the same kind of relief as Modoc, and (3) does not seek an amount in excess of that sought by Modoc. *Pakootas*, 632 F. Supp. 2d at 1035 (citing *Berrey*, 439 F.3d at 643). Both Modocs' Complaint and Softek's Counterclaims arise out of the same contractual relationship.[34] Both Parties seek general, special, and punitive damages.[35] And Softek does not seek more than the $43.8 million sought by Modoc.[36] Thus, even if the state-chartered Counterclaim Defendants are entitled to assert tribal sovereign immunity (they're not), and even if the SBA approved §8(a) Counterclaim Defendants are entitled to assert tribal sovereign immunity (they're not), and even if Modoc were an arm-of-the-tribe (they're not), Modoc has waived

[34] *Cf. generally* ECF Nos. 29, 65.
[35] ECF No. 65, at 11; ECF No. 29, at 48.
[36] *Id.*

immunity as to Softek's counterclaims, which sound in recoupment.

B. MODOCS' FED. R. CIV. P. 12(B)(6) MOTION MUST BE DENIED.

1. Rule 12(b)(6) Standard

"To survive a motion to dismiss under Rule 12(b)(6), a [counterclaimant] must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.'" *Brokers' Choice of Am., Inc. v. NBC Universal* 861 F.3d 1081, 1104 (10th Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Claims are considered facially plausible when the facts alleged in a pleading "allow[] the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 556. "In a 12(b)(6) motion, 'the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'" *Carthaginian Fin. Corp. v. Skinner*, No. 05-003, 2005 WL 1388689, at *2 (D. Vt. Jun. 3, 2005) (quoting *Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998)).

As to evidence, the Tenth Circuit recently laid out the Rule 12(b)(6) rule in *Brokers'*:

> A motion to dismiss challenging the legal sufficiency of the complaint is properly considered under Rule 12(b)(6) if the court analyzes only the complaint itself. . . . When a party presents matters outside of the pleadings for consideration, as a general rule "the court must either exclude the material or treat the motion as one for summary judgment."

861 F.3d at 1103 (quoting *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004); citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991)). The exception to this rule is that "[a] district court may, however, consider documents **attached to or referenced** in the [pleading] if they are central to the [counterclaimant]'s claim and the parties do not dispute the documents' authenticity." *Id.* (quotation omitted); *see also Smith v. United*

States, 561 F.3d 1090, 1098 (10th Cir. 2009) ("In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also **attached exhibits and documents incorporated** into the complaint by reference.") (citations omitted).

Here, because Softek's Counterclaims did not attach or incorporate any exhibits, the Court must exclude any evidence submitted in support of Modoc's motion.[37]

2. Softek's Breach Of Contract, Promissory Estoppel, And Unjust Enrichment Counterclaims Are Viable.

While a pleading "must set forth the terms of the agreement upon which liability is predicated," a counterclaimant "is not required to attach copies of the contractual documents or plead the terms verbatim." *Pangaea v. Dynamax Imaging*, No. 15-6686, 2016 WL 9582835, at *3 (W.D.N.Y. June 22, 2016) (quotation omitted); *see also Great Am. Ins. Co. v. Crabtree*, No. 11-1129, 2012 WL 3656500, at *25 (D.N.M. Aug. 23, 2012) ("[A] plaintiff is not required to attach the subject contract to the complaint or plead its terms verbatim in order to state a claim.") (quotation omitted). "All that is required is a short and plain statement of the breach of contract claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Pangaea*, 2016 WL 9582835, at *3 (quotation omitted); *see also Highland Restaurants v. Judy's Foods*, No. 83-4030, 1990 WL 92484, at *2 (D. Kan. June 26, 1990) (holding that "a short and plain statement of a breach of contract claim" is all that is required to defeat a Fed. R. Civ.

[37] While Modoc submits that "relevant" evidence outside the pleadings should be considered, this is not the rule. ECF No. 61, at 13. In addition to not being attached or incorporated into Softek's Counterclaims, Mr. Littleaxe's declaration is disturbing from an ethical standpoint. At all times relevant to Softek's Counterclaims, Mr. Littleaxe was counsel for Softek. ECF No. 76, ¶19. An obvious conflict arises from Mr. Littleaxe's prior, concurrent, and in fact continuing relationship with Modoc; management of at least one of the Crossclaim Defendant MTEs; access to information that Softek assumed was privileged; and blatant violation of the advocate-witness rule.

P. 12(b)(6) motion).

> Here, Softek has alleged:
>
> > Modoc and RCE entered into an agreement with Softek whereby Softek would create and manage at least four MTEs: Eagle, Buffalo, Modoc MTE, and Walga. In exchange, Softek would receive 49% of the profit from these MTEs. In furtherance of this agreement, Softek created and managed Eagle, Buffalo, Talon, Modoc MTE, Walga.[38]

Although short and plain, this paragraph identifies an agreement that required Modoc to pay Softek for revenues earned and services rendered.

Any argument that the allegations in Softek's Counterclaims do not give fair notice of Softek's claim is unconvincing. According to Modoc themselves: "Beginning in 2011, Softek ostensibly managed and financed RCE. When the other MTE's were formed and qualified as 8(a) companies in 2012 and 2013, Softek ostensibly managed and financed them."[39] Softek did not manage and finance Modoc's MTEs as an act of altruism. Softek managed and financed the MTEs pursuant to "a number of agreements with [Modoc] in 2010 and 2014 by which from January 2011 through July 2019" they would create, manage, and fund MTEs and receive payment and proceeds therefrom.[40] Modoc acknowledges at least 27 times in its Amended Complaint that they entered into a contractual agreement with Softek[41]—and then Modoc unilaterally "terminated the Softek agreements."[42]

Softek's breach of contract counterclaim asserts that Modoc breached "the Softek

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[38] ECF No. 65, ¶28.
[39] ECF No. 61, at 10.
[40] ECF No. 29, ¶4.
[41] *Id.* ¶¶4-5, 36-39, 41-43, 70-75, 79-80, 82-83, 95, 113, 137-38, 141-42, 146, 159-61, 173.
[42] *Id.* ¶5.

agreements" by refusing to compensate Softek in accordance with "the Softek agreements."[43] While Modoc argues that it was Softek that breached the agreement, and Softek argues that Modoc breached the agreement, the Parties at least agree that there was an agreement that was breached. "The meaning of contract terms and the question of whether a party's behavior breached those terms is more appropriate at the summary judgment stage." *Carthaginian*, 2005 WL 1388689, at *2. Dismissal under Rule 12(b)(6) is inappropriate at this stage. *Id.*

Modoc's arguments as to promissory estoppel and unjust enrichment are also unavailing, for the same reason. Modoc ignores the actual allegations made in Softek's Counterclaim,[44] and instead insists that Softek could not have relied upon any promises, and Modoc could not have been unjustly enriched, because there was no "cognizable" agreement between the Parties.[45] But, again, Modoc themselves acknowledge at least 27 times in its Amended Complaint that they entered into a contractual agreement with Softek.[46] Reading Softek's Counterclaims in the light most favorable to Softek, as the Court must, Softek relied upon these promises, and Modoc was unjustly enriched by Softek's failure to honor them.[47] This is plenty to survive a Rule 12(b)(6) motion.

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[43] *Id*. Softek's counterclaim has nothing to do with the "Letter of Intent" offered as an exhibit by Modoc. ECF No. 61-1, Exhibit C. While Modoc has an easy time battering its strawman, they fail to address the *actual* contractual agreements with Softek—agreements that they agree were binding upon the Parties. *Compare* ECF No. 61, at 19 (discussing a letter of intent), *with* ECF No. 29, ¶¶4-5, 36-39, 41-43, 70-75, 79-80, 82-83, 95, 113, 137-38, 141-42, 146, 159-61, 173 (discussing Modoc/Softek contractual agreements).
[44] ECF No. 65, ¶¶28, 33-34.
[45] ECF No. 61, at 16-18.
[46] ECF No. 65, ¶¶4-5, 36-39, 41-43, 70-75, 79-80, 82-83, 95, 113, 137-38, 141-42, 146, 159-61, 173.
[47] *Id.* 33-34.

3. Softek's Accounting Counterclaims Are Viable.

Oklahoma recognizes three types of accounting claims. *Margaret Blair Tr. v. Blair*, 378 P.3d 65, 72 (Okla. App. 2016). The first, known as an "accounting by law" evokes the "court's enforcement of a legal duty to account created by contract." *Id.* (citing, *e.g., Mills v. Mills*, 512 P.2d 143 (Okla. 1973)). The second, known as an "equitable accounting," arises "where the plaintiff lacks a legal right to an accounting, but one is necessary to obtain an adequate remedy because the plaintiff has a cognizable legal right to recover, but no other adequate remedy at law." *Id.*, at 73; *see also Rowan v. Wells Fargo Bank*, No. 15-0830, 2015 WL 13548991, at *2 (W.D. Okla. Sept. 14, 2015) ("Equitable accounting is a proceeding to adjust mutual accounts and strike a balance.") (quotation omitted). The third arises where a court takes "equity jurisdiction over an otherwise legal action to enforce an accounting right" to determine damages "because the complicated and drawn-out character of the accounting may make it difficult for a jury to decide if the accounting is sufficient, and decide if the accounting shows damages." *Blair*, 378 P.3d at 72 (citing *Basinger v. Provident Life & Acc.*, 239 N.W.2d 735, 737-38 (Mich. App. 1976)).

Here, both Parties contend that the other owes money. Arguably, an accounting by law is required by the contractual agreement between the Parties, since "Softek is entitled to 49% of the net income generated by" the MTEs.[48] At a bare minimum, this requires an equitable accounting. Presuming Softek prevails on some or all of their claims, Softek must determine how much income was generated by the MTEs, how much income was wrongfully retained by Modoc, and how much money Softek are owed. Only Modoc have access these records—as of July 24, 2019, Modoc have prevented Softek's "access the

[48] ECF No. 65, ¶20.

books for any of the MTEs."[49]

While Modoc argues that Softek may not assert an accounting claim because Softek cannot "show that the Modocs have retained property or funds that were contractually owed to softek,"[50] this is a jury question contingent on the success of Softek's other claims. Softek need not "show" anything at this point. "Rule 12(b)(6) motions are decided on the face of the complaint, accepting all well-pleaded facts as true." *Knox v. Rosenberg*, No. 99-0123, 1999 WL 35233291, at *6 (S.D. Tex. Sept. 28, 1999).

4. Softek's Conspiracy Counterclaims Are Viable.

"In essence, a civil conspiracy claim enlarges the pool of potential defendants from whom a plaintiff may recover for an underlying tort." *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 148 n.85 (Okla. 1998). The claim "'consists of a combination of two or more persons to do an unlawful act, or do a lawful act by unlawful means. . . . To be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means.'" *Batton v. Mashburn*, 107 F. Supp. 3d 1191, 1198 (W.D. Okla. 2015) (quoting *Brock v. Thompson*, 948 P.2d 279, 294 (Okla. 1998)).

Here, Softek has alleged that each Counterclaim Defendant "agreed to and ha[s] acted in a concerted action to push Softek out of its role with the MTEs so that they could keep all MTE profits to themselves."[51] Specifically, Softek alleges that Modoc and Follis acted in a joint effort interfere with Softek's "contractual agreements with Modoc and the profitable operation of the MTEs," thereby illegally enriching themselves with loan

[49] *Id.* ¶ 24.
[50] ECF No. 61, at 20.
[51] ECF No. 65, ¶30.

proceeds and profit owed to Softek.[52] These allegations are sufficient to state a claim for civil conspiracy. *See, e.g., Batton*, 107 F. Supp. 3d at 1199.

It is no surprise that the Parties are in dispute over whether Softek can prove facts "demonstrating the existence of an unlawful act." *Schlottman v. Unit Drilling Co.*, No. 08-1275, 2009 WL 1657988, at *2 (W.D. Okla. June 11, 2009). But it is simply not true to say that Softek has not alleged "a cognizable underlying tort."[53] At minimum, Softek has alleged that each Counterclaim Defendant has unlawfully and unjustly enriched themselves[54]—*i.e.*, "kept all MTE profits to themselves."[55] This is all that is required under the Rule 12(b)(6) standard. *See Kiefner v. Sullivan*, No. 13-0714, 2014 WL 2197812, at *10 (N.D. Okla. May 27, 2014) (holding that a civil conspiracy claim "is dependent on the viability of other alleged torts"); *see also, e.g., Schlottman*, 2009 WL 1657988, at *2; *Batton*, 107 F. Supp. 3d 1191; *Thompson v. City of Shawnee, Okla.*, No. 09-1350, 2010 WL 1780314, at *2 (W.D. Okla. May 3, 2010).

5. Softek's Conversion Counterclaims Are Viable.

Modoc submits that Softek's conversion claim should be dismissed because it is "a claim for money for which a conversion claim does not exist."[56] Not true. Softek asserts that Modoc has "committed a distinct, intentional, and unauthorized act of dominion over Softek's property," including "shares in RCE" that would otherwise result in "continued rights to profit" to Softek.[57] This is a proper conversion claim. *Harris v. Mid-Continent*

[52] *Id.* ¶¶25, 30.
[53] ECF No. 61, at 22.
[54] ECF No. 65, ¶¶ 31, 33-34, 37, 39.
[55] *Id.* ¶30.
[56] ECF No. 61, at 22.
[57] ECF No. 65, ¶31.

Life Ins. Co., 182 P. 85, 87 (Okla. 1919); *First Nat. Bank v. Bryan*, 254 P. 34, 36 (Okla. 1926); *U.S. Cities Corp. v. Sautbine*, 259 P. 253 (Okla. 1927).

6. Softek's Negligent Entrustment Counterclaims Are Viable.

The theory of negligent entrustment as a basis for liability arises from the principle that "[a]nyone with normal experience is required to have knowledge of the traits and habits of . . . other human beings, and to govern accordingly." W. Keeton, Prosser & Keeton on Torts, 197-198 (5th ed. 1984). To the extent that the negligence of another causes the harm involved, "[t]he duty arises . . . only where a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of such negligence." *Id.*, at 199.

> "It is negligence to permit a third person to . . . engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to . . . conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

Green v. Harris, 70 P.3d 866, 869 n.5 (Okla. 2003) (quoting Restatement (Second) of Torts § 390 (1965)).

Here, Softek has alleged that Modoc permitted Follis to manage the MTEs with knowledge that Follis intended and was likely to create an unreasonable risk of harm to Softek by (1) breaching a fiduciary duty of care and loyalty to Softek,[58] and (2) violating agreements between the Parties.[59] Specifically, Modoc knew or should have known that

[58] Corporate directors owe a fiduciary duty of care and loyalty to all the corporation's shareholders, including its minority shareholders. *SFF-TIR, LLC v. Stephenson*, 264 F. Supp. 3d 1148, 1230 (N.D. Okla. 2017) (citing *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989)). "The duty of loyalty, in a nutshell, mandates that the corporation's interest and shareholders' interests take precedence over any interest that the directors possess independent of the shareholders." *Id.* (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).

[59] ECF No. 65, ¶ 31.

Follis intended to remove Softek from their role at the MTEs so that he could use the resources of the MTEs to benefit his personal fantasy sports gambling operation.[60] Assuming the facts alleged in Softek's Counterclaims to be true, as the Court must, Softek has stated a negligent entrustment counterclaim that is plausible on its face.

IV. CONCLUSION

In light of the above, Softek respectfully requests that Motion to Dismiss be **DENIED**.

Dated: March 5, 2020.

Respectfully submitted,

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[60] *Id.* ¶22.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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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