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 PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION TO DEFER OR DENY

Respectfully submitted,

s/Ryan D. Dreveskracht
Gabriel S. Galanda, admitted *pro hac vice*
Anthony S. Broadman, admitted *pro hac vice*
Ryan D. Dreveskracht, admitted *pro hac vice*

R. Joseph Sexton, admitted *pro hac vice*
GALANDA BROADMAN, PLLC
Attorneys for Softek Defendants
P.O. Box 15146, Seattle, WA 98115
(206) 557-7509 Fax: (206) 299-7690
Email: gabe@galandabroadman.com
Email: ryan@galandabroadman.com
Email: anthony@galandabroadman.com

s/ D. Michael McBride III
D. Michael McBride III, OBA #15431
Gerald L. Jackson, OBA #17185
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 S. Boston Ave.
Tulsa, OK 74103-3313
Telephone: (918) 592-9800
mike.mcbride@crowedunlevy.com
Attorney for Softek Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

Plaintiffs/Counterclaim Defendants' (collectively "Modoc") motion to dismiss Defendants/Counterclaimants' (collectively "Softek") counterclaims for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and/or for judgment in Modoc's favor under Fed. R. Civ. P. 56 should be **DENIED**. As to the issue of sovereign immunity, Modoc now admit that 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") are not entitled to tribal sovereign immunity under *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012).[1] Therefore, Modoc's motion to dismiss or for summary judgment as to sovereign immunity fails as a matter of law as to each of those counterclaim defendants. As to the Modoc Tribe, Modoc now submit that the Modoc Tribe alone is entitled to immunity because, although the Modoc Tribe "is incorporated as a non-profit corporation under Oklahoma law,"[2] the corporation was not the entity that caused damages to Softek.[3] Modoc are mistaken. At a bare minimum this is a question of fact. But even giving Modoc the benefit of the doubt on the issue, the Modoc Tribe waived immunity by voluntarily evoking, and thereby willingly submitting to, the jurisdiction of this Court.

Modoc also submit that they are entitled to summary judgment pursuant to Fed. R. Civ. P. 56 because there is no genuine issue of material fact for trial. This motion, too, should be **DENIED**. Reviewing the evidence presented in the light most favorable to Softek, there are numerous genuine issues of material fact. In the alternative, Fed. R. Civ.

[1] ECF No. 86, at 7-8.
[2] ECF No. 29, ¶7.
[3] ECF No. 86, at 2.

P. 56(f) requires that Modoc's motion be denied because Softek have not had the opportunity to discover information that is essential to their opposition.

II. FACTS[4]

1. For nearly ten years between 2010 to 2019, Softek had business dealings with Modoc.[5] This began in August of 2010 when the Modoc Tribe, RCE, and Softek entered into a Letter of Intent ("LOI") whereby Softek would:

(1) Incur startup and supporting operational funds for RCE;

(2) Provide loans on an as-needed basis for working capital purposes; and

(3) Create and operate certain entities certified under the Small Business Administration's 8(a) program ("MTEs").[6]

2. In return, Softek would assume a 49% interest in RCE's profits and would be paid a 40% management fee.[7]

3. The Parties formalized the LOI in mid-September of 2010, when Softek and the Modoc Tribe 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.[8]

4. Under the agreement, in addition to the financial investment in RCE, the Parties understood that Softek would form, invest in and/or secure risk capital for, manage

---

[4] Because of the Court's conversion of the original motions to dismiss, Softek has found compliance with the numbering requirement of LCvR56.1(c) to be somewhat unworkable, since there are no numbered facts to respond to.

[5] *See generally* ECF No. 76. At all times relevant to the allegations in Softek's Second Amended Counterclaims it was represented to Softek that it was dealing with the Modoc Tribe vis-à-vis its state-chartered corporate entity. Declaration of Rajesh Shah in Support of Response in Opposition to Plaintiffs/Counterclaim Defendants' Motion for Summary Judgment ("Second Shah Decl."), ¶¶2-3.

[6] ECF No. 76, ¶10; ECF No. 76-2.

[7] ECF No. 76, ¶10; ECF No. 76-2.

[8] Second Shah Decl., ¶¶5, 12-14, 16.

other new MTEs, and qualify them as 8(a) companies to enter into profitable government and commercial contracts, with Defendant/Counterclaimant Rajesh Shah fulfilling the role of RCE's Chief Corporate Officer ("CEO").[9]

5. The 40% management fee and 49% profit-sharing model was agreed to carry over into every subsequent Plaintiff entity Softek worked to create and manage.[10]

6. Immediately upon entering into its partnership with Modoc Tribe, Softek identified, recruited, and hired qualified personnel to rehabilitate RCE and increase profits.[11]

7. Softek furnished financing for the MTEs, as promised, and the businesses began to succeed.[12]

8. After Softek financed and took over management of RCE, for instance, the entity made approximately $4.72 million in net profits between 2011 and 2015.[13]

9. Because of this growth and the success of the partnership under the agreements, the Parties decided together to go ahead with the formation of two new MTEs: Eagle, for technology and IT business-related contracts; and Buffalo, for contracts related to construction, operations, and support.[14]

10. Eagle initially experienced difficulty and incurred losses in excess of $1

---

[9] *Id.* ¶10; *id.* Ex. D.
[10] *Id.* ¶5.
[11] ECF No. 76, ¶21.
[12] Later, under the direction and supervision of Modoc vis-à-vis Troy LittleAxe, and at the insistence of Modoc, all MTE debt was consolidated into Talon. *Id.* ¶18; Second Shah Decl., ¶15; *id.* Exhibit D. Notably, **Mr. LittleAxe provided legal counsel to both Modoc and Softek throughout the relevant times in this lawsuit until July 2019**. ECF No. 76, ¶19. Mr. LittleAxe drafted, edited, and/or negotiated the relevant agreements between the parties. *Id.*; Second Shah Decl., ¶5, 8-9, 11-14, 16.
[13] ECF No. 76, ¶21.
[14] *Id.* ¶22.

million upon start up. However, under the direction and management of Softek, and in coordination and consultation with the Modoc Tribe, Softek recovered Eagle's initial losses, and generated over $4.9 million in profits for Eagle through 2018.[15]

11. Buffalo also initially incurred losses, due to a subcontractor's failure to deliver on a major project.[16]

12. Although Buffalo did recover some of its losses, the Parties mutually decided in 2016 to form a replacement entity with a focus on construction.[17] That entity was Walga, which has since developed a profitable business relationship through joint ventures with other non-party entities.[18]

13. In all, in a relatively short amount time, it was clear that the model that Softek established and implemented was successful.[19] Not only had RCE been rehabilitated, but several new MTEs had been formed and were profitable as well.[20]

14. Through their partnership with Softek, Modoc realized cumulative net profits of approximately $7 million.[21]

15. The Parties operated under and mutually benefited from this agreement for nearly ten years.[22]

16. Despite the success of Softek's model, however, some time in

---

[15] *Id.* ¶23.
[16] *Id.* ¶24
[17] *Id.* ¶25.
[18] *Id.* ¶26. For example, as a direct result of work performed by Softek, Walga is presently working on construction contracts through its joint venture relationships, with a value exceeding $30 million, with contracts in the pipeline valued at approximately $150 million. *Id.* Per the Parties' agreement, Softek is owed a portion of the proceeds on this project.
[19] *Id.* ¶27.
[20] *Id.*
[21] *Id.* ¶28.
[22] Second Shah Decl., ¶¶14, 16.

approximately late 2016 or early 2017, Counterclaim Defendant Blake Follis inserted himself into Softek's work and curtailed Softek's management and oversight role of several of the entities.[23]

17. Specifically, on Blake Follis' advice, Modoc minimized Softek's roles in oversight of the Talon and Modoc MTEs so that Blake Follis could use these entities' resources to develop and promote his own personal illegal online gambling program.[24]

18. Softek objected to this. These uses of personnel and funds were never contemplated as part of Softek's business model, and Mr. Follis' takeover was putting both Modoc and Softek's profit in jeopardy.[25]

19. In July of 2019, a dispute arose between Mr. Follis and Rusty Bohl, who had been assisting to manage the on-the-ground aspects of some of the MTEs for Softek.[26]

20. Mr. Follis had previously demanded to use the resources 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 operation.[27]

21. When Mr. Follis was unsatisfied with the online gambling platform software he had (improperly) conscripted certain Eagle personnel to develop, he demanded Rusty Bohl travel several hours to the military base where these personnel were working

[23] ECF No. 76, ¶29.
[24] *Id.* ¶¶ 29-34, 39; *see also White v. Cuomo*, No. 528026, 2020 WL 572843, at *1 (N.Y. App. Div. Feb. 6, 2020) (holding that online "interactive fantasy sports contests" "constitute gambling in violation" of state law).
[25] ECF No. 76 ¶34,
[26] *Id.* ¶40.
[27] *Id.* ¶41.

and terminate them all personally.[28] Rusty Bohl refused, which enraged Mr. Follis.[29]

21. When Softek objected to Mr. Follis's use of MTE funds and resources to support his personal fantasy sports gambling scheme, Mr. Follis retaliated, interfered with Softek's good faith efforts to meet their contractual obligations, and fabricated a false and absurd narrative—considering Softek's record of success—that Softek had defrauded Modoc.[30]

22. On or about July 24, 2019, Softek were told, without warning, that they were to have no contact with anyone from Modoc; Modoc barred Softek's access the books for any of the MTEs; and Modoc notified Softek that Softek were constructively terminated from management positions with RCE and the MTEs.[31]

23. While the Modoc Tribe contends that an "investigation" was conducted by Blake Follis, Softek has not obtained the results of this alleged "investigation."[32] And because Softek have been completely denied access to anyone from Modoc and the books of any of the entities, Softek have thus far been unable to shield themselves from the sweeping, false allegations that Blake Follis and others—like Softek's own attorney, Troy LittleAxe—have made.[33]

24. Thus, 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

[28] *Id.* ¶42.
[29] *Id.*
[30] *Id.* ¶45.
[31] *Id.* ¶43.
[32] Second Shah Decl., ¶18.
[33] *Id.*

million in compulsory and punitive damages.[34]

25. On December 30, 2019, Softek asserted Counterclaims against Modoc, which were amended on March 10, 2020, to add Mr. LittleAxe and his law firm as Counterclaim Defendants.[35]

26. Now, relying on a declaration and supplemental declaration of Counterclaim Defendant LittleAxe, Modoc move that Softek's Counterclaims be dismissed. For the reasons set forth below, their motion should be denied.

III. LAW AND ARGUMENT

A. MODOC'S 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).

---

[34] ECF Nos. 2, 29. Notable in Modoc's pleading is the admission that at all times the majority of Softek's business dealings were with state-chartered corporations. While technically not evidence, "'admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions.'" *Songmaker v. Forward of Kansas, Inc.*, No. 90-4156, 1993 WL 106833, at *7 (D. Kan. Mar. 5, 1993) (quoting *Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990)).

[35] ECF Nos. 65, 82.

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. 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 do not dispute the factual allegations relevant to this Court's jurisdiction. Modoc have correctly abandoned their theory that the MTEs are entitled to tribal sovereign immunity.[36] And while Modoc continue to maintain that the Modoc Tribe is entitled to sovereign immunity, they do not deny that the Modoc Tribe has filed suit against Softek, and that Softek's counterclaims arise from the same transaction, seek the same relief, and seek an amount not in excess of Modoc's claims. 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.

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*

[36] *Compare* ECF No. 61, at 7, *with* ECF No. 86, at 7-8.

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)). Since Modoc appear to now concede that, with the exception of the Modoc Tribe, each Modoc entity is chartered under state law and is not entitled to assert the Tribe's immunity, Modoc's motion as to these Counterclaim Defendants should be denied.[37]

Modoc also attempt to thread a needle by distinguishing the Modoc Tribe from its non-profit corporation.[38] This argument is unavailing. Questions of fact abound. First, the Modoc Tribe 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.[39] This admission is binding for the purpose of summary judgment. *Songmaker*, 1993 WL 106833, at *7. In addition, while the Modoc Tribe *argues* that "Softek knew it was dealing with the Modoc Nation, not the Modoc Non-Profit," this argument is belied by evidence in the record.[40] Finally, while Mr. LittleAxe argues that the Modoc Tribe as a corporate entity has "been inactive since its incorporation,"[41] the Oklahoma Secretary of State tells us the entity is indeed "active."[42] The Court possesses jurisdiction over this corporate entity.

---

[37] ECF No. 86, at 7-8.
[38] ECF No. 61, at 8.
[39] ECF No. 29.
[40] *See* Second Shah Decl., ¶2 ("[T]he Modoc Nation and its representatives held themselves out as both a tribal government and a state-chartered corporate entity. We were made to believe that the Tribe *itself* had incorporated under state law, and that we were therefore dealing with a state chartered tribal government.") (emphasis in original).
[41] ECF No. 86-1, ¶ 4.
[42] Second Shah Decl., Exhibit A. In order to remain in "good standing," the Modoc Tribe had to, for instance, pay $100.00 to the State of Oklahoma on the first day of July each year. Okla. Stat. Ann. tit. 18, § 1142.A.18.

3. The Modoc Tribe Subjected Itself 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) do 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 Modoc's Complaint and Softek's Counterclaims arise out of the same contractual relationship.[43] Both Parties seek general, special, and punitive damages.[44] And Softek do not seek more than the $43.8 million sought by Modoc.[45] Thus, even if the Modoc Tribe was otherwise entitled to assert tribal sovereign immunity, and it is not, it waived any such claimed immunity by voluntarily submitting to the jurisdiction of this Court.[46] The Court possesses jurisdiction.

B. MODOC'S FED. R. 56 MOTION MUST BE DENIED BECAUSE SOFTEK HAS RAISED ISSUES OF MATERIAL FACT.

1. 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

[43] *Cf. generally* ECF Nos. 29, 65.
[44] ECF No. 65, at 11; ECF No. 29, at 48.
[45] *Id.*
[46] Modoc generally treats its supplemental briefing as one in reply to its original motion, responding to the arguments made in Softek's originally filed response brief. Softek asserted in its original response brief, quite clearly, that "Modoc has waived immunity as to Softek's counterclaims, which sound in recoupment" by bringing suit. ECF No. 78, at 16-17. Modoc's failure to address this argument in their supplemental filing is telling.

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*, 1993 WL 106833, at *1.

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).

2. Modoc Are Not Entitled To Summary Judgment On Softek's Breach Of Contract, Promissory Estoppel, Or Unjust Enrichment Counterclaims.

a. Modoc Have Admitted The Existence Of Binding, Enforceable, Agreements Between The Parties.

Modoc have admitted: Softek managed and financed RCE and 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.[47] Modoc acknowledge at least 27 times in their Amended Complaint that they entered into a contractual agreement with Softek[48]—and then Modoc unilaterally "terminated the Softek agreements."[49]

Modoc's arguments as to promissory estoppel and unjust enrichment are also unavailing, for the same reason. While Modoc insist that Softek could not have relied upon any promises, and Modoc could not have been unjustly enriched, because there was no contract between the Parties,[50] Modoc themselves acknowledge at least 27 times in their Amended Complaint that they entered into a contractual agreement with Softek.[51]

These admissions preclude summary judgment. *Songmaker*, 1993 WL 106833, at *7. It was Modoc that filed suit against Softek—for breach of contract—twice.[52] It cannot be the case that binding contracts exist when Modoc seeks to enforce them, but not when Softek seeks to enforce the same contracts. In other words, if Modoc *really* believe that there was no contract between the Parties, then Fed. R. Civ. P. 11 sanctions "must be imposed" against Modoc for their knowingly filing a frivolous Complaint based on contractual obligations that do not exist. *Marley v. Wright*, 137 F.R.D. 359, 362 (W.D. Okla. 1991) (citing Fed. R. Civ. P. 11). Modoc cannot have it both ways.

---

[47] ECF No. 29, ¶4.
[48] *Id.* ¶¶4-5, 36-39, 41-43, 70-75, 79-80, 82-83, 95, 113, 137-38, 141-42, 146, 159-61, 173.
[49] *Id.* ¶5.
[50] ECF No. 86, at 12.
[51] 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.
[52] ECF No. 2, ¶¶114-17; ECF No. 29, ¶¶158-61.

b. There Was No Condition Precedent.

In mid-September of 2010 Mr. Shah began having conversations with Mr. LittleAxe, General Counsel for the Modoc Tribe, about the timing of their business development work for RCE, as outlined in the LOI.[53] Mr. LittleAxe wanted to get to work as soon as possible.[54] Thus, Mr. 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."[55] Specifically, under the terms of the oral agreement between Mr. LittleAxe and Softek, Softek would incur startup and supporting operational funds for RCE, provide loans on an as-needed basis for working capital purposes, and create and operate additional entities for participation in the SBA's 8(a) program.[56] In return, "Softek would receive a 40% management fee and 49% of RCE (and any subsequently formed entities)'s profit."[57] According to the sworn testimony of Mr. Shah:

> In reliance upon this executed oral agreement, Softek immediately began transforming RCE into a profitable business. Softek made investments for operational costs, created websites, printed brochures, and generally got RCE up and running. Softek understands Chief Follis had directed Mr. LittleAxe to coordinate all business between Modoc and Softek. Therefore, Mr. LittleAxe was kept in the loop on all Softek-Modoc issues, and in fact directed and approved of all these initial arrangements.[58]

Again, the Parties operated under and mutually benefited from this agreement for nearly

---

[53] Second Shah Decl., ¶5.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* ¶6.

ten years.[59] It is hornbook Oklahoma law that "partial or complete performance of an oral contract . . . render[s] the contract enforceable." *Osage Energy Res. v. Pemco*, 394 P.3d 265, 274 (Okla. Ct. App. 2016).

The fact that some of the written contracts executed between the Parties contained conditions precedent is *precisely why* the Parties were operating pursuant to an executed an oral agreement—at the Modoc Tribe's insistence. Again, as explained by Mr. Shah:

> In early 2011, I became aware from Mr. LittleAxe that Modoc and the SBA representatives in Oklahoma were not exactly on good terms. For reasons unknown to me at the time—but have since learned was due to the Modoc Tribe's involvement in short-term payday loan marketing and servicing schemes—the local Oklahoma SBA office was not very supportive of Modoc. I was informed that when Mr. Littleaxe and Rusty Bohl reached out to SBA to tell them the Parties had agreed to change the ownership structure of RCE, they were told that doing so may disqualify RCE for participation in the 8(a) program.
>
> At this time Mr. LittleAxe advised me that he had decided not to submit the [Stock Purchase Agreement ("SPA"), Profit Sharing Agreement ("PSA"), or Corporate Management Services Agreement ("CMSA")] to the SBA for approval. Mr. LittleAxe reasoned 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 had thus far created, putting the award of contracts and continued 8(a) participation at risk. Mr. LittleAxe confirmed, again, that the Parties would continue operating under the oral agreement executed in September of 2010, and the terms of the PSA, which the Parties had been operating under from that point until around mid-2019.
>
> When I asked Mr. LittleAxe about Softek's ownership rights, Mr. LittleAxe informed me that under the executed oral agreement Softek was "for all practical purposes" 49% shareholders, but that he did not want to put this in writing because it would likely "raise red-flags for SBA." In fact, Mr. LittleAxe advised me that I should generally not have agreements with the Modoc Tribe in writing, because he thought this could "seriously impact" RCE's 8(a) development. Mr. LittleAxe repeated this advice before and after I formally retained him as counsel for Softek on August 11, 2011. ECF No. 76, ¶19.

[59] *Id.* ¶¶14, 16.

> Mr. LittleAxe and I agreed to proceed under the executed oral agreement, and each Party began fulfilling their duties. The Parties operated under and mutually benefited from this agreement for nearly ten years.[60]

The only other contract at issue here—the "Talon Loan Agreement" executed between Softek and Talon on December 31, 2014—has no conceivable condition precedent clause.[61]

c. Softek's Corporate Existence

Softek Solutions, Inc., has been active since its incorporation on January 14, 2003.[62] Modoc submits that there was no binding contract between the Parties because "SFS did not exist when it executed the OPA on December 20, 2010."[63] This is a red herring. The operative executed oral agreement was between Softek Solutions, Inc., and the Modoc Tribe. Mr. LittleAxe knew exactly who he was dealing with in September of 2010, and it was not a yet-to-be-formed corporate entity (created for the sole purpose of executing that very agreement).

The other agreement, the Talon Loan Agreement, was between SFS and Talon, and was entered into long after the incorporation of SFS.[64]

3. Modoc Are Not Entitled To Summary Judgment On Softek's Accounting Counterclaims.

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

---

[60] *Id.* ¶¶11-14. In hindsight, this was bad, ethically conflicted, legal advice. If Softek made any mistake here, it was following Mr. LittleAxe's legal advice and trusting that he would honor his fiduciary duties to his client—which is why he is a Counterclaim Defendant.
[61] *Id.* ¶15; *id.* Ex. D.
[62] *Id.* ¶3.
[63] ECF No. 86, at 10.
[64] *Compare* Second Shah Decl., Ex. F, *with* ECF No. 86-1, at 21.

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 Modoc and Softek agree that they were in a contractual relationship, and both Modoc and Softek contend that they are each owed money because of a breach of those contracts. 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.[65] At a bare minimum, this requires an equitable accounting. Presuming Softek prevail 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 books for any of the MTEs."[66]

[65] ECF No. 65, ¶20.
[66] *Id.* ¶ 24.

While Modoc argue 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,"[67] this is a jury question contingent on the success of Softek's other claims. Softek have shown, via the above evidence, that they are in fact contractually owed funds. And in order to determine the amount of funds that they are contractually owed, Softek are entitled to an accounting.

4. Modoc Are Not Entitled To Summary Judgment On Softek's Conspiracy Counterclaims.

"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 have provided evidence that each Counterclaim Defendant agreed to and had acted in a concerted action to push Softek out of their role with the MTEs, so that they could keep all MTE profits to themselves.[68] Specifically, Softek have advanced evidence that Modoc and Follis acted in a joint effort to interfere with Softek's contractual agreements with Modoc and the profitable operation of the MTEs, thereby illegally enriching themselves with loan proceeds and profit owed to Softek.[69] Because, at

[67] ECF No. 61, at 20.
[68] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; Second Shah Decl., ¶ 18.
[69] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; Second Shah Decl., ¶ 18.

minimum, Softek have evidenced that each Counterclaim Defendant unlawfully and unjustly enriched themselves—*i.e.*, kept all MTE profits to themselves—questions of fact better suited for a jury exist as to this claim. *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. Modoc Are Not Entitled To Summary Judgment On Softek's Conversion Counterclaims.

Modoc submit that Softek's conversion claim should be dismissed because it is "a claim for money for which a conversion claim does not exist."[70] Not true. Softek have evidenced that Modoc have committed a distinct, intentional, and unauthorized act of dominion over Softek's property, including shares in RCE that would otherwise result in Softek's continued rights to profit. Again, the agreement with Modoc was that "under the executed oral agreement Softek was 'for all practical purposes' 49% shareholders."[71] This is a proper conversion claim. *Harris v. Mid-Continent 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. Modoc Are Not Entitled To Summary Judgment On Softek's Negligent Entrustment Counterclaims.

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

[70] ECF No. 61, at 22.
[71] Second Shah Decl., ¶ 13.

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 have evidenced 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,[72] and (2) violating agreements between the Parties.[73] Specifically, Modoc knew or should have known that 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 and for other personal profits.[74] Viewing the evidence in the light most favorable to Softek, as the Court must, Softek's negligent entrustment counterclaim presents issues of material fact

[72] 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)).

[73] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; Second Shah Decl., ¶ 18.

[74] ECF No. 76, ¶¶29-34, 38-45; ECF No. 86-1, ¶19; Second Shah Decl., ¶ 18.

more appropriately decided by a jury.

Modoc disagree, submitting that in order to state a negligent entrustment claim "the unreasonable risk must be harm of bodily injury or death."[75] But Modoc cite no authority for this position. Neither of the cases cited by Modoc require bodily injury or death be alleged.[76] Modoc's motion should be denied.

D. IN THE ALTERNATIVE, MODOC'S FED. R. CIV. P. 56 MOTION MUST BE DEFERRED OR DENIED BECAUSE SOFTEK HAS NOT YET BEEN ALLOWED TO TAKE DISCOVERY.

Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). The party requesting additional discovery must present an affidavit that identifies "the probable facts not available and what steps have been taken to obtain these facts. The nonmovant must also explain how additional time will enable him to rebut the movant's allegations of no genuine issue of material fact." *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (quotation omitted). "The general principle of Rule 56(d) is that summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Price v. W. Resources*, 232 F.3d 779, 783 (10th Cir. 2000). Unless dilatory, a party's 56(d) application "'should be liberally treated.'" *Jensen v. Redevelopment*

[75] ECF No. 86, at 13.
[76] ECF No. 61, at 23 (citing *Barger v. Mizel*, 424 P.2d 41, 46 (Okla. 1967); *Holland v. Dolese Co.*, 643 P.2d 317, 322 (Okla. 1982)). In fact, *Holland*, isn't even a negligent entrustment case.

Agency, 998 F.2d 1550, 1553-54 (10th Cir. 1993) (quoting *Comm. for 1st Amend. v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992)).

Here, because Softek has submitted a Rule 56(d) affidavit that identifies the probable facts not available—and explains why those facts cannot be presented currently, what steps have been taken to obtain these facts, and how additional time will enable the party to obtain those facts and rebut the motion for summary judgment[77]—summary judgment is inappropriate as the case is presently postured. *Campbell*, 962 F.2d at 1522. Modoc appear to be in agreement.[78]

IV. CONCLUSION

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

Dated: April 10, 2020.

Respectfully submitted,

s/ Ryan D. Dreveskracht
Gabriel S. Galanda, admitted *pro hac vice*
Anthony S. Broadman, admitted *pro hac vice*
Ryan D. Dreveskracht, admitted *pro hac vice*
R. Joseph Sexton, admitted *pro hac vice*
GALANDA BROADMAN, PLLC
Attorneys for Softek Defendants
P.O. Box 15146, Seattle, WA 98115
(206) 557-7509 Fax: (206) 299-7690
Email: gabe@galandabroadman.com
Email: ryan@galandabroadman.com
Email: anthony@galandabroadman.com
Email: joe@galandabroadman.com

[77] *See generally* Declaration of Ryan D. Dreveskracht in Support of Softek's Fed. R. Civ. P. 56(d) Application. As explained in Softek's Response to Modoc's Rule 56(d) Motion, this standard does not apply to Modoc's claims brought under the Racketeer Influenced and Corrupt Organizations.

[78] ECF No. 86, at 2 n.1; *id.*, at 11 n.4.

s/ D. Michael McBride III
D. Michael McBride III, OBA #15431
Gerald L. Jackson, OBA #17185
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 S. Boston Ave.
Tulsa, OK 74103-3313
Telephone: (918) 592-9800
mike.mcbride@crowedunlevy.com
Attorneys for Softek Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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:

Charles D Neal , Jr
Steidley & Neal (Tulsa)
2448 E 81ST ST FLR 53
TULSA, OK 74137
918-664-4612
Fax: 918-664-4133
Email: cdn@steidley-neal.com

Clark Warfield Crapster
Steidley & Neal (Tulsa)
2448 E 81ST ST FLR 53
TULSA, OK 74137
918-664-4612
Fax: 918-664-4133
Email: cwc@steidley-neal.com

Richard Warren Wassall
Steidley & Neal (Tulsa)
2448 E 81ST ST FLR 53
TULSA, OK 74137
918-664-4612
Fax: 918-664-4133
Email: rww@steidley-neal.com

Stacie Lynn Hixon
Steidley & Neal (Tulsa)
2448 E 81ST ST FLR 53
TULSA, OK 74137
918-664-4612
Fax: 918-664-4133
Email: slh@steidley-neal.com

James E. Nesland
14252 E. Caley Avenue
Aurora, CO 80016
Phone: 303-807-9449
Fax: 303-680-2228
JENesland@comcast.net

s/ *Wendy Foster*
Wendy Foster