IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

BIRD INDUSTRIES, INC., et. al, Plaintiffs, vs. THE TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, Defendants.	)	REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 1:21-cv-0070

In its opposition brief, Bird Industries merely recycled the arguments it made before former federal magistrate judge Karen Klein during arbitration. Arbitrator Klein rejected those arguments, and this Court should do the same.

Bird Industries asks this Court to interfere with a dispute between a tribal member and her tribal government regarding how the Tribe undertakes its economic development and develops tribal resources on tribal land. Such disputes belong in tribal court in the first instance, and federal courts do not adjudicate intra-tribal disputes. Nor does Bird Industries provide any colorable basis for federal jurisdiction. Even if subject matter jurisdiction existed—which it plainly does not—black-letter law establishes that the Tribe is immune from suit. Finally, Bird Industries undisputedly failed to exhaust her tribal remedies – a step she must take before filing suit.

STANDARD AND SUMMARY JUDGMENT

The Tribe brought this motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The arguments made in the Tribe's motion are purely jurisdictional.

To support those arguments the Tribe's counsel included documents and evidence from outside of the pleadings. This Court can—and should—freely review that evidence without conversion to summary judgment.[1] *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990) (citing *Land v. Dollar, 330 U.S.* 731, 735 n.4 (1947)). Unlike summary judgment, the "existence of disputed material facts will not preclude [a court] from evaluation for itself the merits of jurisdictional claims." *Id.* A 12(b)(1) motion "is rooted in the unique nature of the jurisdictional question." *Id.* As such the issue becomes a court's "very power to hear the case" and a court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Bird Industries' argument that this Court cannot consider facts outside the pleadings when determining whether it has jurisdiction is simply wrong.

Ironically, despite arguing that the Tribe could not present evidence outside the pleadings relating to jurisdiction, Bird Industries included numerous unsupported allegations or other "evidence" into its Response and attempts have it considered. Such allegations have no place in resolving a Rule 12(b)(1) motion. This Court must only

[1] Although Bird Industries questioned whether the Court can consider jurisdictional facts outside the pleadings when resolving a Rule 12(b)(1) motion, no party has argued that this Court should convert the Tribe's motion to a summary judgment motion.

consider evidence relating to the question of whether jurisdiction exists. *Osborn v. United States*, 918 F.2d (citing M*ortensen v. First Fed. Sav. & Loan Ass'n, 549* F.2d 884, 891 (3d Cir. 1977)). Accordingly, this Court should ignore the accusations and "evidence" presented by Bird Industries in its Response.

I. The Federal RICO Statute Does Not Provide Jurisdiction In This Matter

In its Response, Bird Industries abandoned each alleged basis it offered for subject-matter jurisdiction in its Complaint, except for the RICO statute. The federal RICO statute does not grant jurisdiction here and dismissal is required.

This matter is an intra-tribal dispute, and nothing included in the arguments of Bird Industries' overcomes this Court's lack of jurisdiction over tribal matters. The issues in this matter concern the failure of a venture between a tribal segment corporation and a tribal member. This is a matter of tribal economic development and how the tribe decided to develop its resources. Bird Industries attempts to recast its failed venture as an ominous conspiracy.

As a matter of black-letter law, federal courts lack jurisdiction over intra-tribal disputes. *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996). Importantly, this rule applies to intra-tribal matters even when creatively recast as RICO claims. *Id.* at 559; *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 927 (D. Wyo. 1997).

Bird Industries' only attempt to distinguish these relevant cases is to state that this matter does not deal with election or membership determinations. That distinction misses the larger point. Both of the aforementioned cases establish that a plaintiff cannot use

creative pleading to manufacture a RICO claim out of an intra-tribal dispute. That is exactly what happened here. Bird Industries knew that the only way it can get into federal court was to dream up a nonexistent RICO claim. Plaintiffs cannot wish federal jurisdiction into existence.

Moreover, even if this lawsuit did not involve an intra-tribal dispute, the RICO statute still would not provide federal jurisdiction here. As the Tribe noted in its opening memorandum, Bird Industries' RICO claim patently fails because governmental entities cannot, as a matter of law, have the requisite *mens rea* to violate RICO. (*See* Dkt. 17 at 9-10 (discussing the law that governments cannot violate RICO and that such a failure deprives federal courts of jurisdiction.)[2] Bird Industries does not even attempt to explain how this Court has subject-matter jurisdiction in light of this fatal and incurable flaw in its RICO claim. Because RICO is the only possible basis for subject-matter jurisdiction here, that claim fails as a matter of law, and plaintiffs bear the burden of establishing federal jurisdiction, there is simply no basis for federal jurisdiction even independent of whether this is an intra-tribal dispute.

Plaintiffs cannot use RICO claims to circumvent tribal court jurisdiction over intra-tribal disputes, nor does RICO provide a basis for subject-matter jurisdiction here. The Court must dismiss for lack of jurisdiction.

II. The Tribe Is Immune From Suit

[2] *See* Section II.B, infra, for why a RICO claim does not waive a tribe's immunity.

Neither the Amended Complaint nor Bird Industries' Response provides the necessary evidence that either a statute or the Tribe has waived its immunity. To the contrary, the factual record developed during arbitration shows that the Tribe has not waived its immunity.

Arbitrator Klein thoroughly and persuasively analyzed the sovereign immunity issue and entered an order of dismissal. Bird Industries had ample time to discover and provide a factual or statutory basis for waiver. Bird Industries failed to show a wavier to Arbitrator Klein, and has failed to show a waiver to this Court. As Arbitrator Klein did, this Court should determine that the Tribe did not waive its immunity.

Bird Industries first attempts to argue that the Buy Out Agreement contains a waiver of the *Tribe's* immunity through the inclusion of an arbitration clause. Bird Industries argument is defective in two respects. First, no waiver of the Tribe's immunity occurred because the Tribal Business Council did not approve the waiver. Second, even if the waiver were approved the case law regarding the creation of a waiver through the inclusion of an arbitration clause is not applicable here.

a. <u>The Buy Out Arbitration Clause Does Not Waive Immunity Of The Tribe</u>

A waiver of Tribal sovereign immunity is enforceable only if it is valid under Tribal law. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004); *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011). In determining the validity of a waiver, courts must defer to Tribal sources and authorities, such as Tribal constitutions, ordinances, decisions of Tribal courts, or the charters of tribal corporations. *Memphis Biofuels, L.L.C.*,

585 F.3d at 922. Significantly, any alleged waivers of Tribal sovereign immunity "are to be strictly construed in favor of the Tribe." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995).

The requirement of an unequivocal and express waiver means that such a waiver cannot be implied. *United States v. Testan*, 424 U.S. 392, 399 (1976). A waiver "cannot be implied from conduct." *Buchwald Capital Advisors, L.L.C. v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706, 715 (E.D. Mich. 2018) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The Eleventh Circuit summarized that concept by stating that "the Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Florida v. Seminole Tribe*, 181 F.3d 1237, 1243 (11th Cir. 1999) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

The FBEDC's Articles of Incorporation imbues the corporation with "sovereign immunity from suit [identical to that of the Tribe]". Exh. 3 at 9.-. To be valid and binding, any waiver of immunity by the FBEDC must: (1) be explicit, (2) be contained in a written contract, and (3) be "specifically approved by the Tribe's Tribal Business Council." *Id.* at 10.Furthermore, even if those conditions are met any waiver "shall in no way extend to an action against the Tribe, nor shall consent to suit by the [FBEDC] in any way be deemed a waiver of any of the rights, privileges, and immunities of the Tribe." *Id.*

This leads to two inescapable conclusions. First, because the Tribal Business Council never approved any waiver of immunity, no valid waiver of FBEDC's immunity exists.

Second, even if FBEDC had waived its immunity, such a waiver would not extend to the Tribe (the defendant in this action).

Bird Industries' reliance on *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) to create a waiver through the use of an arbitration clause is unfounded as well. In *C & L Enters.*, a waiver occurred because the plaintiff in that matter contracted *directly* with the Tribe and not one of its corporations or agencies. *Id.* at 420. The Court relied upon the fact that the tribe itself offered the terms of the contract and that the tribe, not a subsidiary, executed it. *Id.* Here, the opposite is true. An independent corporation of the Tribe offered the terms and executed the contract. The record contains no evidence that the Tribe was aware of or approved the contract. This is underscored by the FBEDC's Articles of Incorporation which require "specific approval" of a waiver *and* states that any waiver by the FBEDC does not extend to the Tribe. The facts here confirm that *C&L Enters.* does not apply.

b. The Federal RICO Statute Does Not Waive Immunity

RICO does not waive the immunity of a Tribe or its tribal officials. "RICO contains no language which suggests Congress 'unequivocally' waived Indian tribes' sovereign immunity" and "absent a congressional or tribal waiver, [a tribe], like other sovereigns, is immune from suit for alleged RICO violations." *Smith v. Babbitt*, 875 F. Supp. 1353, 1365 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996).

In its Response, Bird Industries never addresses the lack of waiver within the RICO statute. Accordingly, this Court should find – as the Eighth Circuit has done before – that the statute does not waive the immunity of the Tribe. Because the Tribe is

immune from suit for RICO claims, this Court must dismiss Bird Industries' RICO claim.[3]

III. Bird Industries Has Not Exhausted Its Tribal Remedies

Although citing to no case law for support, Bird argues that the governmental structure of the Three Affiliated Tribes makes requiring exhaustion "futile" because "the TAT Tribal Court is subservient to the Tribal Business Council" and "there is no separation of powers." (Dkt. 25 at 7.) Bird's futility argument lacks merit. Eighth Circuit precedent makes clear that federal courts must not entertain a suit against tribal governments until the plaintiff has exhausted tribal remedies. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991-92 (8th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000)).

Although the Supreme Court has recognized an exception to this general rule, that futility exception has been applied in limited instances where no tribal court is in existence to hear a plaintiff's complaint. *See Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8th Cir. 1997). Indeed, "if there is no functioning tribal court, exhaustion would be futile and therefore would not be required." *Id.* Speculation that a tribal court will not consider a claim is insufficient to satisfy the futility exception to tribal exhaustion. *See Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014). Courts will not allow "parties to excuse themselves from the exhaustion requirement by *merely alleging* that

[3] Of course, this further confirms that the Court has no subject-matter jurisdiction because Bird Industries' RICO claim is fatally flawed.

tribal courts will be incompetent or biased." *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv.*, 27 F.3d 1294, 1301 (8th Cir. 1994).

The futility exception does not apply in this case. The Fort Berthold District Court is a fully functional tribal court capable of hearing Bird Industries' claims. The fact that the MHA Nation's tribal government is organized under a single branch rather than multiple does not make exhaustion of tribal remedies inherently futile. Bird Industries cites to no case law to support its arguments on this point. In fact, the Eighth Circuit has already rejected the futility argument and required exhaustion specifically in the Fort Berthold District Court. *Duncan Energy*, 27 F.3d 1294 at 1300-1301. Furthermore, the constitutional structure and organization of the Tribe directly contradicts Bird Industries' unsupported allegations of unitary control. The Tribe's Constitution and By-laws ("Constitution"), adopted as a standard constitution under the Indian Reorganization Act ("IRA") of 1934, provides checks on the Council's power. Article VI, Section 1 of the Constitution provides that "any power exercised through [the] Council shall be subject to a popular referendum…." and Article VI, Section 3(b) grants the tribal court the authority to enforce the Indian Civil Rights Act against the Council "if it is determined through an adjudication that the Tribal Business Council has…violated that Act." Additionally, the Council may only remove judges for cause and such cause must be based on violations of rules regarding judicial conduct. Three Affiliated Tribes Law and Order Code, tit. I, ch. 1 § 4. Any decision to remove a judge for cause is "appealable to the district court." *Id.*

Taken to its logical conclusion, the argument of Bird Industries would remove the exhaustion requirement. Any claim against the Tribe or its Council would automatically be futile according to Bird Industries. Bird's futility arguments simply cannot be reconciled with well-established Supreme Court precedent requiring that federal courts show strong deference to tribal courts. *See* Memorandum in Support of Motion to Dismiss, at 12 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978)).

Similarly unconvincing is Bird's assertion that requiring exhaustion would "bypass a specific Congressional mandate that all persons be given access to the Federal District Courts" when pursuing "corruption and racketeering" claims.[4] (*See* Dkt. 25 at 7.) Bird Industries is not prevented from pursuing its claims, but for the reasons stated above, they must exhaust tribal remedies. No exceptions apply to warrant excusing exhaustion in this case and this court should not consider Bird's claims until they have made their way through tribal court.

CONCLUSION

Bird Industries cannot show the Tribe waived its immunity, that this Court has subject matter jurisdiction, or that it exhausted its tribal remedies. This Court should dismiss the Amended Complaint.

Respectfully submitted this 13th day of December 2021.

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[4] That manufactured RICO claim fails for numerous reasons, as set forth above.

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