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

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

Laura Bird and Bird Industries, Inc. (collectively, "Bird") filed an Amended Complaint against the Tribal Business Council (the "Council") of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (the "Tribe"), alleging a RICO violation under 18 U.S.C. § 1962(c), and a claim for "fraud and interference with business advantage and emotional damage."

Although not acknowledged in the Amended Complaint, Bird herself is a member of the Tribe. Bird's allegations all relate to a joint venture she entered into with the Four Bears Economic Development Corporation, an entity established by the Four Bears segment of the Tribe. The business venture occurred on tribal trust land within the Fort Berthold Reservation.

Bird's Amended Complaint suffers from a litany of fatal deficiencies. The Amended Complaint does not articulate a colorable basis for federal jurisdiction. She

sued the Council—the governing body of a sovereign, federally-recognized tribe—but Bird made no showing that she exhausted her tribal court remedies, a prerequisite to filing suit against a tribal entity. Similarly, the Amended Complaint does not make any attempt to carry Bird's burden to prove that the Council does not enjoy sovereign immunity.

It should not come as a surprise to Bird that the Council is immune from suit. Bird already arbitrated this dispute against the Tribe. The arbitrator, former federal magistrate judge Karen Klein, dismissed Bird's claims based on tribal sovereign immunity. Inexplicably, Bird now attempts to circumvent that decision by naming a different defendant and recasting her argument as a RICO claim and a tort claim.

To divert the Court's focus from the myriad flaws in this lawsuit, Bird's Amended Complaint makes scandalous and false accusations of criminal conduct against the Council and its members. Bird's version of the facts presented in the Amended Complaint has no basis in reality. Bird and her business partner mismanaged the project from the outset, leaving the Tribe to clean up Bird's mess, including entering an Administrative Consent Order with the Environmental Protection Agency and paying off equipment leases on which Bird defaulted.

Here, though, the fanciful accusations Bird makes—and their lack of substance—do not matter because this Court lacks jurisdiction. The statutes the Amended Complaint cites do not provide federal jurisdiction. Bird must exhaust her tribal court remedies prior to bringing this suit. Even if Bird were not required to exhaust tribal remedies, the claims in the Amended Complaint are clearly barred by sovereign immunity. Just as the

arbitrator already concluded, this Court must dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

The Council is the governing body of the Tribe. It is composed of seven members: six representatives from six different segments and a tribal chairman who is elected at large. Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation, Art. III Sec. 2. (Breuer Decl. Ex. 1.)[1]

Bird Industries did not enter into a joint venture with the Council or the Tribe generally. Instead, on April 23, 2015, Bird Industries entered into a Joint Venture Agreement (the "JV Agreement") with the Four Bears Segment. (Breuer Decl. Ex. 2.) The interest of the Four Bears segment was assigned to its tribally formed corporation called the Four Bears Economic Development Corporation ("FBEDC"). The purpose of the JV Agreement was to establish "an Aggregate Manufacturing Facility and Ready Mix Manufacturing facility." (*Id.* at 1.) The entity formed as a result of the JV Agreement was called Lakeview Aggregates.

The FBEDC was incorporated on February 26, 2015. (Breuer Decl. Ex. 3.) The FBEDC was managed, operated, and directed by individuals. (Breuer Decl. Ex. 4.) The initial board of directors were Marcus Levings, Carmen Halverson, Ryan Dusenberry, Jolene Lockwood, and Brandon Grady. (*Id.* ¶ 4.) None of these persons were a part of the Council. (*Id.* ¶ 5.) The FBEDC also employed its own legal counsel. (*Id.* ¶ 6.) The articles

[1] As set forth below, the Court may consider matters outside the pleadings when resolving a motion under Rule 12(b)(1).

of incorporation and the by-laws of the FBEDC allowed it to operate independently. (Breuer Decl. Ex. 3 at 3-7, 7-10.)

Disputes arose between the FBEDC and Bird Industries as to the effectiveness of Bird's management. As a result of those disagreements the parties entered into negotiation for a buy-out of Bird's interests. FBEDC and Bird executed a buy-out agreement on May 23, 2017. (Breuer Decl. Ex. 5.)[2] The Council was not involved in this agreement. (Breuer Decl. Ex. 4 ¶¶ 5-6.) The buy-out agreement was entered into pursuant to tribal law. (Breuer Decl. Ex. 5 § 6.2.) Furthermore, the buy-out agreement selected binding arbitration as the method of dispute resolution. (*Id.* at § 6.9.)

After the buy-out, the Tribe discovered a number of irregularities and other evidence of mismanagement. For example, Lakeview failed to obtain a federally required permit for stormwater disposal for the aggregate facility. As a result, the Tribe—after the dissolution of the Joint Venture—was forced to incur significant costs to settle the permit issue and to perform additional construction at the facility site to properly drain stormwater.[3] (Breuer Decl. Exs. 6 and 7.) In addition, Bird allegedly brought equipment to the project that was subject to lease debt. As part of the buyout, Bird was relieved of approximately $2 million of this debt. (Breuer Decl. Ex. 5, Art. 4.1.)

Apparently unhappy with the buyout agreement, on October 23, 2019, Bird filed a demand for arbitration with the American Arbitration Association. (Breuer Decl. Ex. 8.)

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[2] This exhibit will be filed under seal.

[3] Because the Tribe was the beneficial owner of the land, and because Bird Industries had dissolved, the Tribe was forced to correct the issue as the land owner.

The demand for arbitration and the claims for relief are almost identical to the facts and claims at issue in this lawsuit, except for Bird's incorporation of the federal RICO statute. The demand for arbitration named both the Tribe and the FBEDC as defendants.

The parties selected former federal magistrate judge Karen Klein as the arbitrator. On November 12, 2019, the Tribe filed a motion to dismiss. Arbitrator Klein allowed for discovery on the issue of sovereign immunity to determine if the Council ever waived the immunity of the Tribe or the FBEDC.

After the discovery period, the arbitrator dismissed the matter. Arbitrator Klein determined that the Tribe—and the FBEDC, which was the party with whom Bird contracted—were immune from suit and that no waiver of immunity occurred. (Breuer Decl. Ex. 9.) Arbitrator Klein further ruled that Bird failed to provide any evidence of waiver or even the Tribe's consideration of a waiver. (*Id.*) Finally, Arbitrator Klein pointed out that the Tribe provided evidence that it had a process for waiving immunity and that process had clearly not occurred in this matter. (*Id.*)

STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the jurisdiction of a court to hear a case. " 'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.' " *Eckerberg v. Inter-State Studio & Publ'g Co.*, 860 F.3d 1079, 1084 (8th Cir. 2017) (quoting *Gunn v. Minton*, 568 U.S. 251, 256 (2013)). As such, before embarking on any exploration of a case's merits a federal court must first address the "threshold issue" of its subject matter jurisdiction. *U.S. Water Servs. v. Chemtreat, Inc.*, 794 F.3d 966, 971 (8th Cir. 2015). "The plaintiff bears the "burden of

proving subject matter jurisdiction.' " *Aly v. Hanzada for Imp. & Exp. Co., LTD, 86*4 F.3d 844, 847 (8th Cir. 2017) (quoting *V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000)).

When evaluating a motion brought under Rule 12(b)(1), a court may review documents and evidence beyond the pleadings. *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990). Furthermore, "no presumptive truthfulness attaches to [a] plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* at 730. A review of documents or evidence outside of the pleadings for a 12(b)(1) motion does not convert said motion to a motion for summary judgment. *Id.* at 729-30.

ARGUMENT

This Court lacks jurisdiction over this case. Bird has not—and cannot—establish subject matter jurisdiction. In addition, this matter presumptively belongs in tribal court and Bird failed to exhaust tribal remedies. Finally, the Council—as the governing political body of the Tribe—is immune from suit.

I. The Court lacks subject matter jurisdiction.

The Amended Complaint does not present any colorable basis for federal jurisdiction over this matter. The only jurisdictional allegation in the Amended Complaint is in Paragraph 1, which cites "28 U.S.C. § 1332, [18][4] U.S.C. § 2314, 18 U.S.C. § 1962(c), and a specific grant of federal jurisdiction in 18 U.S.C. § 1964." Each fails.

[4] The Amended Complaint actually cites 28 U.S.C. § 2314, but that statute does not exist. Presumably, this citation refers to 18 U.S.C. § 2314, a criminal statute.

Bird's attempt to apply the diversity jurisdiction statute at 28 U.S.C. § 1332 ignores black-letter law that tribes are not subject to diversity jurisdiction. As the Eighth Circuit has clearly articulated, the diversity statute does not provide jurisdiction over tribal governments. For the purposes of diversity jurisdiction, "[i]ndian tribes are neither foreign states, . . . nor citizens of any state." *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir. 2003) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-18 (1831); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974)).

Bird's Amended Complaint next references 18 U.S.C. § 2314, a criminal statute of general application. But this statute does not create federal question jurisdiction because it does not create a private right of action. *Cooper v. N. Jersey Tr. Co. of Ridgewood, N.J.*, 250 F. Supp. 237, 243 (S.D.N.Y. 1965); *Lai v. Guller,* No. 3:18-CV-1121-B-BK, 2018 U.S. Dist. LEXIS 199548, at *4 (N.D. Tex. Nov. 7, 2018); *Carvel v. Franchise Stores Realty Corp.*, No. 08 Civ. 8938 (JGK), 2009 U.S. Dist. LEXIS 113410, at *29-30 (S.D.N.Y. Dec. 1, 2009).

Finally, Bird cites two sections of the RICO statute, 18 U.S.C. §§ 1962(c) and 1964. RICO does not support subject-matter jurisdiction here because Bird is a tribal member and this is an intra-tribal dispute, not a federal racketeering case.

Although Bird attempts to disguise the fact that she is a tribal member by claiming only to be a resident of South Dakota in the Amended Complaint, she admitted in the

arbitration that she is, in fact, an enrolled member of the Tribe.[5] (Breuer Decl. Ex. 10 at ¶ 5.)

Despite Bird's creative pleading, the allegations in this case are intra-tribal matters. At its core, Bird's lawsuit argues that the Council itself should be responsible for the activities of an arm of a political subdivision of the Tribe. How the Tribe structures itself, how its subdivisions engage in economic development, and how the Tribe develops its land and its resources are all intra-tribal matters concerning the Tribe's governance. *See Longie v. Spirit Lake Tribe*, 400 F.3d 586, 590-91 (8th Cir. 2005) (holding that a land dispute between a tribal member and a tribe was an intra-tribal dispute because it was "contingent upon whether the tribe legally consented to and effectuated the transfer, i.e., whether there was an express or implied contract or other legal basis to force the tribe to honor its resolution"). This is particularly true where the resolution of the case depends on the interpretation of tribal actions, such as tribal resolutions or other discretionary decisions. *Id.*; *see also Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985) (holding that interpretation of tribal resolutions was a matter for tribal courts); *Sac & Fox Tribe of the Miss. in Iowa v. Bear, 25*8 F. Supp. 2d 938, 944 (N.D. Iowa 2003) (rejecting an

[5] The fact that Bird, as a tribal member, incorporated a non-tribal entity that did business on the Reservation does not change the nature of this intra-tribal dispute. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (stating that it is "immaterial" for purposes of tribal jurisdiction that the respondent was a non-Indian, because he purposefully did business on the reservation). Incorporation of a business does not alter or impact tribal jurisdiction, and here the Tribe's federally-approved jurisdiction extends to all persons—including non-members—who enter and conduct business on the Reservation. See Tribal Constitution, Art. I, Art. VI; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n.13 (1973) (observing that the "particular form" of a tribal business did not impact an immunity analysis).

attempt to frame an alleged violation of tribal law as a RICO claim), *aff'd* 340 F.3d 749 (8th Cir. 2003).

Federal courts lack jurisdiction to resolve intra-tribal disputes. *See Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996); *Runs After*, 766 F.2d at 352 ("Such an action would necessarily require the district court to interpret the tribal constitution and tribal law. We believe the district court correctly held that resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 927 (D. Wyo. 1997). A plaintiff may not circumvent tribal court jurisdiction by creatively pleading a RICO claim. *See Smith v. Babbitt*, 100 F.3d at 559 (holding, although the plaintiff pleaded a laundry list of claims, including RICO, that "upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court"). This is particularly true where resolving the alleged RICO violation would require the court to first determine the dispute that should be decided first by the tribal court. *Sac & Fox,* 258 F. Supp. 2d at 944. Moreover, as set forth below, RICO does not waive a tribe's sovereign immunity.

Even if Bird's claim was not merely an intra-tribal dispute re-labeled as a RICO claim, it would fail as a matter of well-established law.[6] Governmental entities cannot

[6] The Council has not included the numerous 12(b)(6) grounds for dismissal of the RICO claim and the multi-tort claim pleaded in Count 2 in this instant motion because this motion relates only to the Court's jurisdiction. The Council includes this example as an illustration of Bird's attempt to manufacture federal jurisdiction by abusing RICO.

form the mens rea to violate RICO. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (holding that RICO claims against a public hospital were properly dismissed because "government entities are incapable of forming [the] malicious intent" required under RICO). Where a RICO claim fails as a matter of law, it deprives a court of federal subject-matter jurisdiction. *See Oak Park Trust & Sav. Bank v. Therkildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (holding that a RICO claim failed to establish federal jurisdiction when it was no more than a simple breach of contract or fraud claim framed as a RICO claim in a "transparent" attempt to manufacture federal jurisdiction).

A plaintiff may not simply slap a RICO label on a dispute and transform a case into a federal racketeering charge. But that is exactly what Bird has done here. This dispute between a tribal member and the tribal government over tribal economic activity, land use, and resource development is an intra-tribal dispute governed by tribal law, and does not plausibly allege a RICO claim. It is not a pattern of federal racketeering and does not supply federal jurisdiction.

II. Bird did not exhaust tribal remedies.

Tribal exhaustion is mandatory and must occur before this Court takes any action besides dismissal. Even if subject matter jurisdiction existed, dismissal is warranted on this ground alone.

The Eighth Circuit has determined that a federal district court cannot entertain a suit filed against a tribal government until the would-be federal court plaintiff has fully and finally 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). "The law of the Eighth Circuit is clear when a party raises tribal sovereign immunity as a defense and tribal court remedies are not exhausted: the case goes to tribal court." *Romero v. Wounded Knee, L.L.C.*, No. CIV. 16-5024-JLV, 2018 U.S. Dist. LEXIS 148785, at *9-10 (D.S.D. Aug. 31, 2018) (citing *Davis*, 193 F.3d at 992; *Malaterre v. Amerind Risk Mgmt.*, 373 F. Supp. 2d 980, 982 n.3 (D.N.D. 2005)). Tribal courts, like any court of a sovereign nation, are just as competent to interpret federal law as a federal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987).

The exhaustion of tribal remedies requires a dismissal of this matter to allow the tribal court to determine its jurisdiction. In *Duncan Energy,* the Eighth Circuit held that *National Farmers Union* and *LaPlante* require exhaustion of tribal remedies before a case may be considered by a federal district. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv.*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994). Other circuits considering the issues have concluded that *National Farmers Union* and *LaPlante* "establish[ed] an inflexible bar to consideration of the merits of [a] petition by the federal court, and therefore requir[ing] that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]." *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991). The "requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (quoting *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991)), *cert. denied*, 502 U.S. 1096 (1992).

Tribal jurisdiction is at its strongest in cases like this, which involve the Tribe's internal affairs, and federal courts will not intervene absent a clear congressional directive to do so. *See generally Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978) (discussing tribal authority to regulate internal matters); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (citing *Santa Clara Pueblo* for the proposition that federal courts should "tread lightly [regarding tribal sovereignty] in the absence of clear indications of legislative intent" (quoting *Santa Clara Pueblo*, 436 U.S. at 60)). As discussed above in Section I, this case is an intra-tribal dispute between a member of the Tribe and the Tribe's governing body regarding the business of an arm of a political subdivision of the Tribe. This Court must dismiss Bird's Amended Complaint to allow a tribal court to resolve the case.

II. Sovereign Immunity Requires Dismissal.

Even if Bird were not required to exhaust tribal remedies and could establish subject-matter jurisdiction, this Court must still dismiss the Amended Complaint because the Council, as the governing body of the Tribe, is immune from suit.

Bird bears the burden to show that sovereign immunity has been waived. Arbitrator Klein explained why Bird failed to carry that burden. In response to that decision, Bird simply changed the defendant from the Tribe and the FBEDC to the Council. Yet Bird still made no attempt to show that the Council waived sovereign immunity. No such waiver exists. This Court should reach the same conclusion as Arbitrator Klein and dismiss this lawsuit for lack of jurisdiction based on tribal sovereign immunity.

"Among the core aspects of sovereignty that Tribes possess" is "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Under long-standing law, tribes enjoy sovereign immunity as a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Tribal sovereign immunity protects tribes from suit, absent a clear waiver of immunity by the tribe or express authorization by Congress. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Waivers of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotations omitted). Although Congress may abrogate tribal immunity, it must also do so expressly and unequivocally. *See Bay Mills*, 572 U.S. at 788-91 (discussing tribal sovereign immunity and requiring an express and unambiguous congressional waiver).

The protection of immunity is so powerful that courts have held there can be no "waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). The burden for showing a clear and unequivocal waiver of immunity rests upon the party asserting the waiver. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011). The party asserting waiver cannot carry such a burden through implication. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000).

"There is a strong presumption against wavier of tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001); *see also Van Wyhe v. Reisch*, 581 F.3d 639, 653 (8th Cir. 2009) (addressing state sovereign immunity and declaring that courts "indulge every reasonable presumption against waiver"); *Reuer v. Grand Casino Hinckley*, No. 9-cv-1798 (MJD/RLE), 2010 U.S. Dist. LEXIS 87765, at *25 (D. Minn. July 12, 2010) (Erickson, M.J.), *report and recommendation adopted at* 2010 U.S. Dist. LEXIS 87311 (D. Minn. Aug. 24, 2010). A waiver that meets the evidentiary standard is only enforceable if it is valid under tribal law. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004); *Amerind Risk Mgmt. Corp.*, 633 F.3d at 687-89; *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009).

a. The Council Has Not Waived Its Immunity

This is the second time the Tribe has been forced to assert its immunity from suit in response to an unwarranted claim from Bird. In the arbitration, Bird was given substantial leeway to prove that a waiver occurred and yet still could not provide any evidence that the Tribe waived its immunity. (*See* Breuer Decl., Ex. 9.) As the Arbitrator found:

- "Bird has been able to present no evidence that the Tribal Business Council approved a waiver of FBEDC's sovereign immunity with respect to the agreement to purchase Bird's interest in Lakeview Aggregates, LLC." (*Id.* at 3.)

- "In forming FBEDC, the Tribe specifically provided that any waiver of sovereign immunity on behalf of FBEDC must not only be explicit and written but also 'specifically approved by the Tribe's Tribal Business Council,' with any recovery against FBEDC being limited to the assets of FBEDC. . . . That critical piece is missing here and is fatal to Bird's claim." (*Id.* at 4.)
- "The Arbitrator allowed discovery on the issues of sovereign immunity and waiver to allow Bird to uncover evidence, if it existed, of the Tribe's waiver of sovereign immunity . . . . No such evidence surfaced. Instead, the Tribe has presented examples of Tribal resolutions on other projects in which the Tribe explicitly waived sovereign immunity at the insistence of a contractor to facilitate construction of those projects. This demonstrates that the Tribe has a procedure for waiving sovereign immunity of its business entities when it chooses to do so. It did not do so in this case." (*Id.* at 4.)

The Amended Complaint makes no allegations of waiver by the Council (or the Tribe). In fact, the Amended Complaint does not even contain the word immunity. Bird has not presented any evidence that the Tribe waived its immunity. In light of the substantial case law requiring a "clear and unequivocal" waiver of immunity this Court must find that Bird failed to prove that the Council waived its immunity.

b. The RICO Statute Does Not Waive Tribal Sovereign Immunity

The federal RICO statute is not a congressional waiver of tribal immunity. Federal courts have consistently held that the RICO statute does not waive the immunity of tribes.

The analysis of whether RICO claims can be brought against a tribal government is identical to the analysis of whether RICO claims can be brought against a state or the federal government. For any sovereign to be subject to a RICO claim, it must unequivocally waive its immunity or Congress must waive that immunity. *See McMaster v. Minnesota*, 819 F. Supp. 1429, 1434 (D. Minn. 1993), *aff'd*, 30 F.3d 976 (8th Cir. 1994).

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. Babbit*, 875 F. Supp. 1353, 1365 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996).

In addition, RICO only permits monetary damages in suits brought by private citizens. *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 726 (4th Cir. 1999); *Holmes High Rustler, LLC v. Gomez*, No. 15-cv-02086-JSC, 2015 U.S. Dist. LEXIS 170379, at *5 (N.D. Cal. Dec. 18, 2015). Here, the Amended Complaint seeks money damages from the Council, which is the governing body of the Tribe. But sovereign immunity operates to protect a tribal government from monetary relief. See, e.g., *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 745 (D.S.D. 1992). This is a quintessential example of a claim to which sovereign immunity applies because any relief granted would come directly from the Tribe's coffers.

Bird has not and cannot show that the Council (the named defendant) or the Tribe ever waived sovereign immunity.[7] This Court should reach the same conclusion that Arbitrator Klein reached, and should dismiss this suit based on tribal sovereign immunity.

CONCLUSION

Bird is attempting to avoid its loss in arbitration by running to this federal court. But this Court lacks jurisdiction over Bird's claims. Bird never exhausted tribal remedies. Even if Bird had complied with those prerequisites to suit, Bird's claims are barred by sovereign immunity. The Council respectfully requests that this Court dismiss Bird's Amended Complaint.

[7] Of course, a suit against the Council is a suit against the Tribe, and the Council (as the Tribe's elected governing body) shares the Tribe's immunity. *See, e.g.*, *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986).

Respectfully submitted this 7th day of October 2021.

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