

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

Bird Industries, Inc,)	
A South Dakota Corporation, and)	Case No. 1:21-cv-70
Laura Bird, Individually,)	
Plaintiffs,)	
vs)	PLAINTIFF’S SURREBUTTAL
)	BRIEF IN RESPONSE TO
The Tribal Business Council of the)	DEFENDANT’S REPLY IN
Three Affiliated Tribes of the Fort)	SUPPORT OF DEFENDANT’S
Berthold Indian Reservation)	MOTION TO DISMISS
Defendant,)	

SURREBUTTAL RESPONSE

[1] Attacks on the character and integrity of Laura Bird and her Corporation, (Bird) primarily prompted the request for permission to file this Response. Defendant, Tribal Business Council (TBC) asks the Court to consider all additional information it has submitted without converting its Rule 12(b)(1) Motion into one for Summary Judgment. At the same time, it insists nothing outside of the Amended Complaint submitted by Bird be considered. On page 6 of its Memorandum, the TBC argues, “When evaluating a motion brought under Rule 12(b)(1), a court may review documents and evidence beyond the pleadings.” (citing Osborn v United States, 918 F.2d 724 (8th Cir. 1990)). The TBC says, “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.” It then provides documents

and “evidence” outside the record. And, on page 2 of the Memorandum, the TBC states, “To support those arguments the Tribe’s counsel included documents and evidence from outside the pleadings. This Court can - and should - freely review that evidence without conversion to summary judgment.” (again citing Osborn (ibid)).

[2] Then, in its December 13, 2021, Reply, the TBC chides Bird for including other “evidence” in her Reply to support her Complaint. The TBC says, “Such allegations have no place in resolving a Rule 12(b)(1) motion. This Court must only consider evidence relating to the question of whether jurisdiction exists.” (again citing Osborn)

[3] October 7, 2021, the TBC first made allegations of “mismanagement”. It suggests that Laura Bird is a sinister plaintiff who attempted to hide her true identity as an enrolled member of the Three Affiliated Tribe behind a statement in the Amended Complaint that she is a resident of South Dakota. Bird’s Responses in the Amended Complaint simply show that Bird has met the requirements for jurisdiction of a RICO case in the Federal District Courts, because of a specific statute, 18 U.S.C. § 1964 (c).

[4] Critical to a final decision now or later is whether the many entities the TBC creates to do business on the Reservation are “arms” of the TBC. Shingobee Builders, Inc. v N. Segment All., 350 F.Supp 3d 887 (D.N.D. 2018)

is most instructive. The Court found an entity created by the TBC was an arm of the TBC. The reasoning supports a like decision here. Added here is the fact the TBC itself was directly involved. As in Shingobee, the “arms” that committed the RICO violations were Tribal entities organized to conduct business on behalf of the TBC. They were funded, controlled, chartered, and wholly-owned by the Tribe.

[5] In Shingobee, the Court said there was no discernible difference between the formation of the “arm” involved in that case from those the 8th Circuit has found to be tribal agencies. The TBC is always in charge of the business activities of its arms. Article VI, Section 5 of the Constitution of the Three Affiliated Tribes says that the Tribal Business Council has the power to manage all economic affairs and enterprises of the Tribe and to adopt resolutions regulating the procedure of all tribal agencies and tribal officials. When the TBC argues Bird Industries did not enter into a joint venture with the TBC but instead did so with a separate entity, it is asking the Court to ignore the reality of how business is conducted by the TBC. Numerous examples of the TBC’s direct involvement in the activities of its RICO violating arms are set forth in the Amended Complaint.

[6] The TBC stated falsely to the Arbitrator that it had no involvement in the buy-out of Laura Bird’s interest in the Joint Venture. The Buy-Out check

for \$320,000.00 paid to Laura Bird was written on TBC's bank account and was signed by the TBC's Chairman, Mark N. Fox. Are we to believe the Chairman of the TBC could just hand out checks for \$320,000.00 without the rest of the Council knowing what it was for and why it was being given? In another instance, the TBC simply transferred onto itself the profits remaining in the bank account of one of its arms that had major involvement in the aggregate venture. Bird had a 40% interest in the aggregate division and a 49% interest in the ready-mix division of the joint venture. The Records show that millions of dollars from sale of aggregate and concrete were diverted by TBC or its arms to undisclosed bank accounts from which Bird never received its 40% or 49%.

[7] No allegations made in the Amended Complaint are false. The TBC simply asserts without any supporting facts that accusations made in the complaint have no basis in reality. The TBC presents no facts to rebut its criminal activity as detailed in the Amended Complaint. In a newly created defense, the TBC claims Bird was removed from the aggregate excavation project because of mismanagement. Not until October 7, 2021, was there ever any accusation of mismanagement. Bird had been TBC's joint venture partner from April 2015 to May 2017. The accusation of Bird's "mismanagement" in TBC's October 7th brief comes as a complete surprise. The TBC's

Memorandum says a dispute arose between the FBEDC and Bird Industries as to the effectiveness of Bird's management. Where is the documentation of that? The TBC claims that as a result of those disagreements the parties entered into negotiation for a buy-out of Bird's interests. That is patently false. Mismanagement by Bird has never been an issue. Counsel writes in a supporting statement that it was the Economic Development Corporation and Bird that executed a buy-out agreement on May 23, 2017, and that the TBC was not involved. (Breuer Decl. Ex. 5). The statement is patently false. There is much evidence of TBC's involvement but just one short example is TBC's buy-out check for \$320,000.00 signed by Mark N. Fox, the TBC's Chairman.

[8] In the TBC's Memorandum, it is stated that after the buy-out, the Tribe discovered a number of irregularities and other evidence of mismanagement. What does it mean when it says, "after the buy-out"? The buy-out was executed in May of 2017. First mention of "mismanagement" or "irregularities" was 4 years later on October 7, 2021. The TBC took complete control of the joint venture project in June of 2017. Bird brought her corporation's equipment and employees on site in May of 2015. She left when ordered to do so in May 2017. The TBC operated the pit after May of 2017. The operation was done on property the TBC asserts was theirs as "beneficial owners". The site contained hundreds of millions of dollars' worth of high-grade aggregate. The TBC leased it to one of its own

arms virtually for free. There is no evidence in the record that the TBC, as owner, ever got the approval of the B.I.A., the Environmental Protection Agency, the Corp of Engineers, or any other governmental permitting authority to promote, manage, or finance this operation on or under land it “beneficially owned.” Now, 6 years later, it accuses Laura Bird, the excavator, that she should have gotten the permits. The TBC, through its arms, continued the excavation and cement making after ousting Bird. It claims it is Bird’s fault that the TBC is called to task by governmental environmental regulatory agencies for permit violations. Somehow this is supposed to mitigate the TBC’s RICO violations.

[9] Finally, in a desperate attempt to besmirch Laura Bird, counsel for the TBC suggests Laura Bird attempted to disguise the fact she is a tribal member by claiming in the Amended Complaint that she is a resident of South Dakota. She is a full-time resident of South Dakota and has been since 1987 (35 years). It is appropriate in a Complaint to declare the state of residency of the litigants. The TBC attempts to portray Laura Bird as a sinister plotter who was hiding the fact that she is an enrolled member at the Three Affiliated Tribes. Counsel suggests deceit as he declares, “she [Laura Bird] admitted in the arbitration that she is, in fact, an enrolled member of the Tribe.” (Breuer Decl. Ex. 10 at ¶5). She is in fact an enrolled member, has always been, and

is proud of it.

[10] The TBC was deeply implicated in criminal conduct. From the TBC's responses, there is an obvious attempt to besmirch the integrity and character of Laura Bird. Its only other response remains, "we are immune, and you can't touch us" and/or "if someone did bad things, it wasn't us." The allegations of criminal conduct are never rebutted.

[11] Rather than read and accept C & L Enterprises v. Cit. Bd. Potawatomi Ind. Tribe, 532 U.S. 411 (2001) and Amerind Risk Management Corp v Malaterre, 633 F.3d 680 (8th Cir. 2011), the TBC recycles its off the shelf, template arguments about sovereign immunity and exhaustion of remedies most with supporting cases from the last century. TBC relies heavily on Smith v Babbit, 875 F. Supp. 1353, 1365(D. Minn. 1995) aff'd 100 F.3d 556 (8th Cir. 1996) for the proposition that RICO cannot be used in a claim against an Indian Tribe. There are many facts in Smith v Babbit that differentiate that case from the present, but most importantly, it should be noted that Smith, was decided five (5) years before C & L Enterprises, supra was decided by the United States Supreme Court.

[12] The TBC argues that Arbitrator Klein allowed for discovery on the issue of sovereign immunity to determine if sovereign immunity was ever waived in this case. The discovery was essentially limited to a search for

words “sovereign immunity is waived”. Counsel was not surprised none could be found. As a consequence, the Arbitrator dismissed the case.

[13] What constitutes a waiver cannot be so easily dismissed. The Arbitrator refused to accept what the U.S. Supreme Court said in C & L Enterprises v. Cit. Bd. Potawatomi Ind. Tribe, 532 U.S. 411 (2001), and the 8th Circuit accepted as the law in Amerind Risk Management Corp v Malaterre, 633 F.3d 680 (8th Cir 2011). C & L Enterprises and Amerind are at complete odds with the Arbitrator’s Decision. These cases negate the pages and pages of argument and string citations where the TBC argues if no document says, “sovereign immunity is waived,” it is not. The TBC ignores there does not need to be a Tribal Resolution, or Tribal Code, or a Document that expressly says, “sovereign immunity is waived”.

[14] The buy-out contract containing a mandatory arbitration clause was drafted by a TBC lawyer or one working for one of its arms. Bird was fraudulently induced to sell her interest in the joint venture for millions of dollars less than she was entitled to. This was accomplished by false representations, omission of information, and fraudulent financial information as is set forth in the Amended Complaint.

[15] The Amended Complaint alleges TBC’s councilpersons, individually, as a group, or through its arms were knowingly involved in racketeering and

is responsible. The TBC can give or revoke a charter of its “arms” at any time. It controls financing, staff, work, equipment, and contracts. It steals money belonging to others.

[16] Millions of dollars’ worth of aggregate was contributed to the joint venture in the form of a lease by TBC to one of its own arms. Bird was chosen as a joint venture contractor because it had experience, equipment, and employees that knew how to do excavations, and it was willing to front some start-up expenses. But the TBC was always the owner of the pit. It was the TBC’s obligation as the owner of the land to deal with EPA, the B.I.A, or the Corp of Engineers for whatever permitting may have been required before there was mining.

[17] It should not be ignored that this is a Rule 12(b)(1) Motion. It provides exclusively for inquiry whether the allegations of a complaint fail to show that the Court has Subject Matter Jurisdiction. It is a facial inquiry. In its most recent Reply, the TBC again discusses a claim there has been a failure to exhaust remedies in Tribal Court. This is not a “subject matter” issue that can be decided facially under Rule 12(b)(1). If that were even an issue, Summary Judgment would not be appropriate until Bird had been given an opportunity to develop a record that goes to the issue of whether exhaustion is required under the RICO statute, and, if so, what exceptions there might be that apply

to this case. Beyond that, as to exhaustion of tribal court remedy, we rely fully on Paragraphs 16, 17, and 18 of our brief dated November 29, 2021.

[18] Respectfully submitted this 13th day of January 2022.

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CERTIFICATE OF SERVICE

I certify that on January 13, 2022, the **PLAINTIFFS' SURREBUTTAL BRIEF IN RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** and this **CERTIFICATE OF SERVICE** were filed electronically with the Clerk of Court through ECF, and ECF will send a Notice of Electronic Filing (NEF) to the following:

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Dated this 13th day of January 2022.

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