

NO. 22-2584

IN THE UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BIRD INDUSTRIES, et al.,
Plaintiffs/Appellants,

v.

TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED
TRIBES,
Defendant/Appellee

On Appeal from the United States District Court for the District of
North Dakota – Western Division

Case No. 1:20-cv-00177

APPELLEE’S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the 8th Circuit R. 26.1A, the Tribal Business Council of the Three Affiliated Tribes state they are the ruling body of the Tribe, are not a subsidiary of any corporation, and do not hold any public stock of a corporation.

SUMMARY OF THE CASE

Plaintiffs/Appellants Bird Industries, Inc., and Laura Bird (collectively, “Bird Industries”) waived oral argument. Defendant/Appellee The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation (the “Tribal Business Council”) agrees that oral argument is not necessary because this case presents a straightforward question of settled law. Should the Court screen this case for oral argument, the Tribal Business Council respectfully submits that only ten minutes of argument per side is necessary.

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JURISDICTIONAL STATEMENT

As recognized by Judge Hovland the district court held no jurisdiction to provide a decision on the merits. Because the district court lacked subject matter jurisdiction, Judge Hovland took the only action allowed to him – dismissal.

Appellants stated that this Court has appellate jurisdiction under “28 U.S.C. Fed. R. App. P Rule 4.” Applt. Br. 5. Because the district court entered a final judgment in favor of the Tribal Business Council, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

The appeal of Bird Industries from the district court’s final order of dismissal was timely filed on July 26, 2022.

STATEMENT OF THE ISSUES

1. Did Bird Industries carry its burden to show that the Tribal Business Council clearly and unequivocally waived its sovereign immunity?

Apposite Cases

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014)

C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)

Prescott v. Little Six, Inc., 387 F.3d 753, 756 (8th Cir. 2004)

STATEMENT OF THE CASE

This appeal focuses solely on the issue of sovereign immunity and whether the Tribe, through the Tribal Business Council, clearly and unequivocally waived such immunity. Both an arbitrator and the district court correctly concluded that Bird Industries did not prove that the Tribal Business Council waived its sovereign immunity.

The Tribal Business Council is the governing body of the Three Affiliated Tribes of the Fort Berthold Reservation (the “Tribe”). App 014-15 R. Doc. 18-1, at 4-5. It is composed of seven numbers: six representatives from six different segments and a Tribal Chairman who is elected at large. App. 015 R. Doc. 18-1, at 4.

On April 22, 2015, Bird Industries entered into a Joint Venture Agreement (“JV Agreement”) with the Four Bears Segment. App. 049 R. Doc. 18-1, at 1. The segment assigned its interest in the joint venture to a tribally formed corporation called the Four Bears Economic Development Corporation (“FBEDC”). App. 065 R. Doc. 18-9, at 1. The purpose of the JV Agreement was to create an aggregate manufacturing facility. *Id.* The JV Agreement created a new entity called Lakeview Aggregates to run the facility. *Id.*

FBEDC was incorporated on February 26, 2015. App. 059 R. Doc. 18-3, at 6. The FBEDC was managed, operated, and directed by a Board of Directors, none of whom were members of the Tribal Business Council. App. 055 R. Doc. 18-3, at 2; App. 062 R. Doc. 18-3, at 9; R. Doc. 18-4, at 1. The FBEDC employed its own legal counsel. App. 052 R. Doc. 18-2, at 4; R. Doc. 18-4, at 1. The FBEDC’s corporate formation and governance documents allowed it to operate independently. App. 055-063 R. Doc. 18-3, at 2-10.

The FBEDC formation and corporate governance documents provided that the entity is imbued with the same immunity as the Tribe. App. 063 R. Doc. 18-3, at 10. It also requires that any waiver of sovereign

immunity for FBEDC must be in writing and “specifically approved by the Tribe’s Tribal Business Council.” *Id.*

FBEDC lacked the power to waive the immunity of the Tribe or the Tribal Business Council. The governance documents of the FBEDC provide that any waiver of immunity by the FBEDC would only operate against FBEDC and would not extend to the Tribe or the Tribal Business Council. *Id.*

Following a dispute between the FBEDC and Bird Industries, the parties agree to a buy-out of Bird Industries’ interest. App. 077 R. Doc. 22, at 1. The Tribal Business Council was not involved in the negotiations or the resulting agreement for buy out. App. 067 R. Doc. 18-9, at 3. The buy-out agreement was entered into pursuant to tribal law and contained a binding arbitration clause. App. 074 R. Doc. 22, at 4 (governing law); App. 075 R. Doc. 22, at 7(arbitration clause) . The buy-out agreement was not presented to or approved by the Tribal Business Council as required by the governing documents of the FBEDC. App. 067-68 R. Doc. 18-9 at 3-4; App. 92 R. Doc. 30, at 9.

Bird Industries commenced an arbitration against FBEDC and the Tribe before former federal magistrate judge Karen Klein. Arbitrator

Klein allowed discovery on the issue of whether the Tribe had waived its sovereign immunity. App. 067 R. Doc. 18-9, at 3 (stating that the allowance of discovery was “essentially a dead end...Bird Industries presnte[ed] no evidence [of an approved waiver]”). Bird Industries did not find or present any evidence of a waiver of sovereign immunity. . Consequently, Arbitrator Klein issued a decision that neither the FBEDC nor the Tribe waived sovereign immunity. App. 067-68 R. Doc. 18-9, at 3-4.

Bird Industries then filed this suit in federal court against the Tribal Business Council, alleging RICO violations. App. 008-09 R. Doc. 10, at 8-9. The federal district court dismissed those claims for the same reason as Arbitrator Klein: Bird Industries has failed to present any evidence that the defendant here—the Tribal Business Council—waived its sovereign immunity. App. 092 R. Doc. 30, at 9.

The sole issue in this appeal is whether Bird Industries carried its burden to show that the Tribal Business Council clearly and unequivocally waived its sovereign immunity. Fed. R. App. P. 28(a)(6) requires that an appellant submit a “concise statement of the case setting

out the facts relevant to the issues submitted for review . . . with appropriate references to the record.”

Unfortunately, Bird Industries’ Statement of the Case consists almost entirely of unsupported factual allegations that are unrelated to the narrow legal issue of sovereign immunity. Furthermore, Bird Industries failed to provide appropriate references to the record.¹ Rather than address the merits of the sole issue on appeal, Bird Industries’ tactic appears to center on making as many incendiary (and unsupported) allegations as possible. With the exception of limited facts related to the question of jurisdiction that the Tribal Business Council presented with its motion to dismiss, the record in the district court consisted of Bird Industries’ unproven allegations in its complaint and briefing. Respectfully, those allegations simply do not establish a waiver of sovereign immunity. Consequently, this Court should ignore Bird Industries’ unsupported and irrelevant descriptions and accusations. As

¹ In fact, the only cites to the record Bird Industries provides in its Statement of the Case are to Bird Industries’ own surreply brief below. Briefs are not evidence and should not be placed in an addendum or appendix unless they have independent legal relevance, which this surreply does not. *See* Fed. R. App. P. 30(a)(2).

determined by both Arbitrator Klein and the district court, the only relevant issue is whether Bird Industries can establish a waiver of sovereign immunity.

STANDARD OF REVIEW

Bird Industries' statement of the Standard of Review is incorrect. This Court reviews the district court's conclusions of law de novo and factual findings for clear error. *J.P. by Ogden v. Belton Sch. Dist. No. 124*, 40 F.4th 887, 891 (8th Cir. 2022) (quoting *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006)).

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that Tribal Business Council is immune from suit. Longstanding federal law requires that any waiver of tribal sovereign immunity be clear and unequivocal. Bird Industries failed before both the arbitrator and the district court to present any evidence of a clear and unequivocal waiver of the Tribal Business Council's sovereign immunity.

Bird Industries' reliance on the arbitration clause with FBEDC does not establish a clear and unequivocal waiver of sovereign immunity. First, any waiver of immunity must be approved by the Tribal Business Council. It is undisputable that no such approval occurred here. Second, even if the waiver of FBEDC's sovereign immunity were somehow valid, it would only extend to FBEDC. The FBEDC cannot waive the immunity of the Tribe or the Tribal Business Council.

ARGUMENT

I. The Tribe is immune from suit, and any waiver of sovereign immunity must be clear and unequivocal.

At issue in this appeal is what the U.S. Supreme Court has termed as “[a]mong the core aspects of sovereignty that Tribes possess,” which is “the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). This common law immunity from suit is “a necessary corollary to Indian sovereignty and self-

governance.” *Id.* (quoting *Three Affiliated Tribes of Ft. Berthold Rsrv. v. Wold Eng’g, P.C.*, 476 U.S. 877, 890 (1986)).

Any alleged waiver of immunity must be clear and unequivocally expressed. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). A clear and unequivocal waiver may include either a authorization to suit by Congress or a waiver by the Tribe itself. *Id.* The protection of immunity is so fundamental and powerful that 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.” *Pan Am. Co. v. Syucan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1980), *overruled on other grounds*, *C & L Enters.*, 532 U.S. at 418. As the Supreme Court explained, “nothing short of a formal, express, and unequivocal waiver can defeat the sovereign immunity of an Indian Nation.” *C & L Enters.*, 532 U.S. at 418; *United States v. Testan*, 424 U.S. 392, 399 (1976).

The burden to show a clear and unequivocal waiver is on Bird Industries as the party asserting waiver. *Amerind Risk Mgmt. Corp. v.*

Malaterre, 633 F.3d 680, 685 (8th Cir. 2011).² Such a burden cannot be carried through implication. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000). The burden of proving a waiver must be shown by a preponderance of the evidence. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001).

A waiver 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 685; *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009).

II. The Tribal Business Council did not waive immunity

At no point did the Tribal Business Council expressly waive its sovereign immunity. Bird Industries has not presented any evidence or argument to support such a conclusion. Instead, Bird Industries hangs its hopes on convincing this Court that because FBEDC signed a contract with an arbitration clause, somehow that should imply a waiver of a different entity's sovereign immunity.

² Bird Industries cannot shift the burden of proof to the Tribal Business Council as the party asserting immunity. *Testan*, 424 U.S. at 399.

Bird Industries' implicit-arbitration-waiver argument entirely depends on the arbitration clause contained within the buy-out agreement entered into between FBEDC and Bird Industries. That arbitration clause does not waive the Tribal Business Council's sovereign immunity for two reasons.

First, the arbitration clause failed to follow the procedures necessary to create a valid and binding waiver. The FBEDC's governing document imbues the corporation with immunity from suit which is identical to the Tribe. App. 062 R. Doc. 18-3, at 9. For any waiver of immunity to operate against the FBEDC it must: (1) be explicit, (2) be contained in a written contract, and (3) be "specifically approved by the Tribe's Tribal Business Council." App. 062-63 R. Doc. 18-3, at 9-10. Bird Industries cannot point to any waiver approved by the Tribal Business Council. To the contrary, the only evidence on this issue shows that the Tribal Business Council did not approve any waiver. App. 067-68 R. Doc. 18-9, at 3-4; App. 92 R. Doc. 30, at 9.

Second, even if Bird Industries could show that FBEDC had validly waived its immunity, such a waiver would only operate against the FBEDC and *not* the Tribe as a whole or the Tribal Business Council.

Tribal law clearly provides that any waiver of immunity by FBEDC “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.” App. 063 R. Doc. 18-3, at 10. Thus, even if Bird Industries could establish that FBEDC waived its immunity—an issue Bird Industries already lost in arbitration—it still would not matter for this lawsuit. The Tribal Business Council did not expressly or unequivocally waive its immunity.

III. Bird Industries’ unfounded factual allegations cannot establish a waiver of immunity that does not otherwise exist.

Bird Industries implies that Tribal Business Council must have somehow participated in, or at least acquiesced to, the various unsupported and unfounded accusations Bird Industries continues to repeat. This Court should ignore these allegations because they are not relevant to the question on this appeal, largely lack citations to the record, and do not otherwise have factual support.³

³ To the extent that Bird Industries’ RICO allegations could be interpreted as an argument that RICO constitutes a congressional waiver of sovereign immunity, at least one court in this circuit has

More importantly, Bird Industries’ factual allegations are insufficient as a matter of law to waive the Tribal Business Council’s immunity. A waiver of immunity cannot be accomplished by implication or imputed knowledge of an agreement. *Testan*, 424 U.S. at 399. 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*, 436 U.S. at 58). As the Eleventh Circuit stated, “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*, 436 U.S. at 58)); *Memphis Biofuels, L.L.C.*, 585 F.3d at 921. No amount of unfounded accusations can cover up the fact that Bird Industries cannot establish any waiver of sovereign immunity.

rejected that proposition. *See Smith v. Babbitt*, 875 F. Supp. 1353, 1365 (D. Minn. 1995) (finding that RICO claims against the tribe’s business council were barred by sovereign immunity and reasoning that “RICO contains no language which suggests Congress unequivocally waived Indian tribes’ sovereign immunity” and “absent a congressional or tribal waiver [a tribe] is immune from suit for alleged RICO violations”), *aff’d* 100 F.3d 556 (8th Cir. 1996) (affirming on the grounds of the intratribal dispute doctrine), *cert. denied*, 522 U.S. 807 (1997).

IV. Bird Industries' cited cases are unavailing.

Bird Industries misapplies and misanalyses a number of cases while trying to manufacture support for its waiver arguments.⁴

First, Bird Industries fails to provide the full context of why the arbitration clause in *C & L Enters.* was deemed a waiver of sovereign immunity. In *C & L Enters.* the plaintiff contracted directly with the Tribe—not a corporation or agency of the Tribe. 532 U.S. at 420. The reason a waiver of immunity occurred through an arbitration clause is because the governing body of the tribe, not an agency or corporation, offered the terms of the agreement and executed the agreement. *Id.* at 418 The same is not true in this matter. Here, an independent corporation – which has a specific procedure for approving a waiver – offered the terms of the contract and executed it. The record contains no evidence that the Tribal Business Council reviewed, executed, or approved the arbitration clause waiver.

⁴ The district court did a thorough job of dissecting each of the cited cases as well. App. 093-94 R. Doc. 30, at 10-11. The district court determined that each of the cited cases provided no support for Bird Industries or its contention that a waiver had occurred.

Bird Industries tries to support its arbitration waiver argument by citing to – but not analyzing – *Dillon v. BMO Harris Bank, N.A.*, No. 16-mc-5-CVE-TLW, 2016 U.S. Dist. LEXIS 13433 (N.D. Okla. Feb. 4, 2016). This case is inapposite because it deals with whether a tribal official can assert the Tribe’s immunity when subpoenaed for testimony. *Id.* at * 19. The court in that case determined that sovereign immunity prevented a subpoena to a tribal official in the officer’s official capacity but not his individual capacity. *Id.* The tribal official could assert immunity to any questions upon which the answer relied upon knowledge gained as a tribal official. *Id.* This case simply has no bearing on the question of whether the Tribal Business Council waived its immunity here. Furthermore, the decision reaffirmed that a waiver can only occur through express means and could not be based upon any “apparent authority”.

Bird Industries citation to *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), only serves to strengthen the argument of the Tribal Business Council. In *Malaterre*, this Circuit explained that while a tribal corporation’s charter contemplated waivers of sovereign immunity any such waiver was required to be approved by the

corporation's board of directors. *Id.* at 687-88. *Malaterre* mirrors this case in that any waiver of immunity must be approved by the Tribal Business Council. App. 063 R. Doc. 18-3, at 10. This Circuit should reaffirm *Malaterre* and find that no waiver occurred in this matter.

Finally, Bird Industries attempts to use *Shingobee Builders, Inc. v. N. Segment All.*, 350 F. Supp. 3d 887 (D.N.D. 2018), to abrogate immunity. *Shingobee* deals with diversity of citizenship, not sovereign immunity, as a barrier to federal jurisdiction. 350 F. Supp. 3d at 889-90. While the tribal entity in *Shingobee* did assert that it was protected by sovereign immunity, the court did not reach the issue of immunity and instead issued a decision dismissing the case due to a lack of diversity. *Id.* at 889-90, 898-99.

In short, none of the cases Bird Industries cites provides any basis on which this Court could determine that the district court erred in concluding that Bird Industries failed to prove a clear and unequivocal waiver of sovereign immunity.

CONCLUSION

Clear federal law establishes that the Tribal Business Council is immune from suit. Bird Industries has no legal basis for its alleged

waiver of immunity and cannot carry its burden before the district court to prove a clear and unequivocal waiver of immunity occurred.

For the foregoing reasons, the Tribal Business Council respectfully requests that this Court affirm the decision of the district court.

Dated this 21st day of September 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME

LIMIT

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3454 words.

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The electronic version of this Brief filed with the Court complies with the Court's Local Rule 25A because it has been submitted in Portable Document Format (PDF), which was generated by printing to PDF from the original word processing file so that the electronic version may be searched and copied.

Dated this 21st day of September 2022

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that, with respect to the foregoing:

1. All required privacy redactions required by Local Rule 25A(i) have been made.
2. If required to file additional hard copies, the ECF submission is an exact copy of those documents.
3. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program – Bitdefender Plus – and according to the program is free of viruses.

Dated this 21st day of September 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellee's Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on September 21, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by this Court's CM/ECF system.

I also certify that upon notification that Appellee's Brief has been filed, I will file with the Clerk of Court ten (10) paper copies of the Appellee's Brief by sending them to the Court via Federal Express.

I further certify that upon notification that the foregoing has been filed, I will send one (1) paper copy of the foregoing to the counsel of record for the Appellant by U.S. Mail to the address listed on the Court's CM/ECF System.

Dated this 21st day of September 2022

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