No. ___

IN THE

Supreme Court of the United States

BIRD INDUSTRIES, INC, A SOUTH DAKOTA CORPORATION AND LAURA BIRD, INDIVIDUALLY,

Petitioners,

v.

THE TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does inclusion of a mandatory arbitration clause in an Agreement with an Indian Tribe waive the Tribe's sovereign immunity?

PARTIES TO THE PROCEEDING

Petitioner, Bird Industries, Inc, a South Dakota Corporation, and Laura Bird, Individually, were the Plaintiffs in the district court proceedings and Appellants in the court of appeals proceeding. Respondent, The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, was the Defendant in the district court proceedings and the Appellee in the court of appeals proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Bird Industries, Inc. is a South Dakota Corporation, in good standing with an office located at 504 West 8th Street South, Brookings, South Dakota, 57006-3533. Bird Industries is authorized to do business in South Dakota and North Dakota. All public stock in Bird Industries, Inc. is solely owned by Laura Bird, individually.

The Three Affiliated Tribes is an Indian tribe or nation with a governing body duly recognized by the Secretary of the United States Department of the Interior. It does not have a parent corporation, and no publicly held corporation stock in the Tribe.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *Bird, et al, v. The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation,* No. 1:21-CV-70, United States District Court for the District of North Dakota. Order entered July 11, 2022.

- *Bird, et al v. The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation,* No. 22-2584, United States Court of Appeals for the Eighth Circuit. Letter and opinion issued March 14, 2023.

- *Bird, et al v. The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation,* No. 22-2584, United States Court of Appeals for the Eighth Circuit. Petition for rehearing en banc and petition for rehearing by panel denied April 11, 2023.

- *Bird, et al, v. The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation,* No. 01-19-0003-3765 American Arbitration Association. Final Order on Motion to Dismiss entered December 28, 2020.

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PETITION FOR WRIT OF CERTIORARI

Bird Industries and Laura Bird respectfully petition for a writ of *certiorari* to review the letter and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit which is unpublished is reproduced at App. 1a – 2a. The opinion of the District Court for the District of North Dakota which is unpublished is reproduced at App. 3a – 18a.

JURISDICTION

This Court possesses jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit denied Bird Industries' petition for rehearing *en banc* on April 11, 2023.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961(1), (4) and (5) at App. 28a; 18 U.S.C. § 1962 at App. 29a – 30a; 18 U.S.C. § 1964 (c) at App. 31a; 18 U.S.C. § 2314 at App. 32a – 33a, and 28 U.S.C. § 1331 at App. 34a; and

Three Affiliated Tribes Tribal Code, Title VI Claims & Damages, Chapter 1, including Section 6 – Intentional Torts at App. 34a – 36a; and

Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, Article VI – Powers, Section 5 (a)[1] at App. 36a.

INTRODUCTION

Appellant is Laura Bird, individually, and as sole owner and President of Bird Industries, Inc, a South Dakota Corporation, (hereafter Bird Industries). The complaint she filed in Federal District Court in North Dakota is against Appellee, the Tribal Business Council of the Three Affiliated Tribes, Fort Berthold Indian Reservation, North Dakota (hereafter the "Tribe").

The complaint by Bird Industries against the Tribe is a RICO claim brought pursuant to 18 U.S.C § 1961 *et seq,* alleging theft and fraud in violation of 18 U.S.C. § 2314. The complaint Laura Bird filed as an individual is a Tribal Code Tort claim for theft that inflicted economic loss, damage to reputation, and emotional suffering pursuant to Three Affiliated Tribes Tribal Code, Title VI Claims & Damages, Chapter 1, Section 6 – Intentional Torts.

While only the Tribal Business Council of the Three Affiliated Tribes is the named defendant, here there are multiple arms, officers, segments, employees, managers, commissions, corporate entities, and sub entities involved. However, in dismissing the RICO violations, the lower court said this:

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1. The full text of the statutory provisions involved is set forth in the Appendix.

> *"The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of its officers, arms, segments, employees, department managers, commissions, corporate entities and sub-entities."* (P 2, ¶ 1 of the Order Granting Dismissal dated July 11, 2022, App. 4a).

In response to the Complaint, the Tribe filed a Rule 12(b)(1) Federal Rules of Civil Procedure Motion to Dismiss.

The Federal District Court dismissed the complaint finding the Tribe had sovereign immunity. Bird Industries Appealed to the 8th Circuit Court of Appeals. The 8th Circuit dismissed the appeal *Per Curiam* without comment. (Letter and Opinion dated March 14, 2023, App. 1a – 2a). A Petition for Reconsideration *en banc* was denied. (Order Denying Rehearing *en banc* and Petition for Rehearing by Panel, dated April 11, 2023, App. 26a – 27a). Bird Industries now Petitions the United States Supreme Court for Writ of Certiorari.

STATEMENT OF THE CASE

On April 22, 2015, one of the Tribe's six geographical segments, the "Four Bears Segment", entered into a "Joint Venture" Agreement with Bird Industries in which Bird Industries agreed to provide funds, equipment, management, and manufacturing knowledge to mine aggregates [gravel] from lands the Tribe claimed it owned and to produce ready-mix concrete products for sale. The Tribe created Lakeview Aggregates, LLC, a North Dakota Limited Liability Company, to accomplish the purposes of the Joint

Venture Agreement. The Agreement provided that Bird Industries would receive 40% of the net income generated by sales of aggregate and 49% of the net income generated from sales of concrete. Both parties were to contribute 50% of the first quarter's cost of goods and services.

In June of 2015, Bird Industries began excavation. The Tribe never contributed its 50% share of the cost of goods and services. Bird Industries advanced $3,007,888.98 so the project would not default on payments to its vendors and creditors.

In June of 2016, the Tribe advised Bird Industries that it was being removed from all day-to-day operations of the project and that the Tribe would be taking over. No dissatisfaction with Bird Industries' management of operations was expressed.

The only places where representation is made that there was dissatisfaction with Bird Industries' management of the project are found in a statement in a brief filed by the Tribe and in a statement by the District Court. There is no evidentiary support for either statement in the record. The District Court accepted counsel's *ipse dixit* statement from that brief and stated in its decision:

> "In June of 2016, the Tribal Business Council, *in the belief that Bird mismanaged the project,* advised Bird Industries that it was being removed from all day to day activities of the aggregate and ready mix operations." (App. 5a) (Emphasis added)

There is not a scintilla of evidence in the record to support the italicized comment in the above quote. It is found only in a Tribe's brief and accepted as fact by the District Court in its decision to dismiss. The record shows that the opposite was true. In a letter dated August 22, 2016, two months after the removal, Tribal Business Councilman, Frank Grady wrote:

> "Throughout the financial difficulties we experienced as a tribally-owned company, Bird Industries has not wavered in its financial support for our venture, and they have worked with us to make arrangements that will allow us to fulfill our contractual obligations. Four Bears and Bird Industries, Inc will be working together on projects with Four Bears and nationally. We are projecting gross profits exceeding 2.5 million in the next six months.
>
> Based on our experience, Laura (Lori) conducts business with a high degree of professionalism and integrity and is a valued partner of the Three Affiliated Tribes-Four Bears Segment." (United States Court of Appeals for the Eighth Circuit, No. 22-2584, Entry ID: 5189657, ADD. 014, R. Doc. 25- 1)

In the year following the Tribe's removal of its partner, the Tribe engaged in an effort to buy out Bird's interest in the Joint Venture. It made a series of buy-out offers to Bird Industries beginning with an offer of $5,000, then $25,000, then $75,000, and, finally, $320,000.00. (United States Court of Appeals for the Eighth Circuit, No. 22-2584, Entry ID: 5184449, R. Doc. 10, ¶11) In the course of

negotiations for a buy-out, the Tribe made a series of false financial representations and omissions asserting that the project had been a failure and was about to be defunct. Bird Industries requested it be provided past financial records to support the buy-out offers but none were provided. In the negotiations, no mention was ever made of the fact millions of dollars had been secretly and fraudulently diverted from the Joint Venture's bank account into other tribal bank accounts in North Dakota, Texas and elsewhere where the Tribe's joint venture partner, Bird Industries, was excluded, was never told about the accounts even though Bird Industries was entitled to its % share under the Joint Venture Agreement. To the extent any financial information was supplied it was false and grossly deficit by omission.

On May 23, 2017, a check for $320,000.00, signed by the Chairman of the Tribal Business Council, was presented to Laura Bird for all of her and Bird Industries' interest. (United States Court of Appeals for the Eighth Circuit, No. 22-2584, Entry ID: 5189657, ADD. 019 - Plaintiffs' Surrebuttal Brief in Response to Defendant's Reply in Support of Defendant's Motion to Dismiss, R. Doc. 29, ¶7, and United States District Court for the District of North Dakota, No. 1:21-CV-70, R. Doc. 25 - Plaintiffs' Return to Defendant's Motion to Dismiss, ¶21). She accepted relying on the misrepresentations made to her about the project's history and likely future.

18 months after the fraud induced buy-out agreement was entered into, Laura Bird received critical information from Bradly Bently. He was the Tribe's consultant on the project for a time. Bently whistleblew and told Laura Bird that he had become aware that during the time she managed the operation and thereafter the Tribe

had deposited large amounts of income from the Joint Venture project into bank accounts in North Dakota and other States that were never revealed to her or Bird Industries. In its RICO Compliant, Bird Industries Inc details other criminal enterprise activities of the Tribe involving interstate transportation of stolen property, financial concealments, fraud and theft from other contractors, all predicate acts that satisfy the criminal enterprise requirements of 18 U.S.C. [2]§ 2314.

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2. Payment for the fraudulently induced Buy-out was by a check for $320,000 and was signed by the Chairman of the Defendant, Tribal Business Council. The money came from a Tribal Account. After dismissal of this case by the District Court, two Tribal Business Councilmen, plus two Chief Assistants to Tribal Councilman, plus one conspiring contractor have all been given federal prison sentences for Criminal Fraud, Bribery, and Conspiracy on other Tribal projects committed during the same time period as the criminal enterprise activities involved in the present case.

Frank Charles Grady, Sentence was for 6+ years, Case No. 3:20-cr-000152, United States District Court for the District of North Dakota (Nov. 21, 2022)

Randall Jude Phelan, Sentence was for 5 years, Case No. 3:20-cr-151-01, United States District Court for the District of North Dakota (May 15, 2023)

Jolene Lockwood, Sentence was for time served, Case No. 1:19-cr-00027, United States District Court for the District of North Dakota (Jan. 18, 2023)

Delvin Reeves, Sentence was for 5+ years, Case No. 3:20-cr-151-02, United States District Court of North Dakota (Nov. 07, 2022)

Francisco Javier Solis Chacon a/k/a Pancho, Sentence was for 1+ year, Case No. 1:19-cr-00028, United States District Court of North Dakota (Feb. 13, 2023)

After learning of the fraud, Laura Bird, on her own behalf and for Bird Industries Inc, filed a Demand for Arbitration as required by the fraudulently induced Purchase Agreement. The Tribe filed a Motion to Dismiss based on a claim of sovereign immunity. The Arbitrator found that the Tribe had sovereign immunity and dismissed the case. (App. 19a – 25a).

Bird Industries and Laura Bird individually commenced this action in Federal Court on March 30, 2021. An amended complaint was filed on July 1, 2021. The amended complaint contains two claims. The first claim is a civil RICO action based on 18 U.S.C. § 1961 *et seq*. The second claim is made under the provisions of the Tribe's Civil Code that provide remedies when one has suffered economic losses, damage to reputation and emotional suffering from the wrongful acts of another. (App. 28a).

The Tribe filed a Rule 12(b)(1) Motion to Dismiss. The Federal District Court granted the Motion based on the Tribe's defense of sovereign immunity. Bird Industries and Laura Bird appealed dismissal to the 8th Circuit Court of Appeals. In a Per Curiam decision, the 8th Circuit dismissed the appeal without comment. The 8th Circuit subsequently denied rehearing *en banc.* (App. 26a – 27a).

Bird Industries Inc now files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case has been dismissed in the Courts below based on a claim of sovereign immunity. The decision of the 8th Circuit and its *Per Curiam* dismissal without comment

is in conflict with a previous decision of the U.S. Supreme Court. It is also contrary to previous decisions of the 8th Circuit Court itself and of the Federal District Court of South Dakota. The North Dakota Federal District Court in this case and the 8th Circuit Court of Appeals have misread and/or ignored the U.S. Supreme Court ruling that says there is a waiver of sovereign immunity when an Indian Tribe enters into a contract that contains a *mandatory* arbitration clause.

These decisions are:

> *C & L Enterprises, Inc. v Citizens Band Potawatomi Tribe of Okla.* 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).
>
> *Amerind Risk Management Corp. v Malaterre*, 633 F.3d 680 (8th Cir. 2011).
>
> *Rosebud Sioux Tribe v Val-U Constr. Co of S.D. Inc.* 50 F. 3d 560 (8th Cir. 1995).

Reversal of the Per Curiam decision of the 8th Circuit is of exceptional importance because of the need for consistency in the law and the fact that if it remains the law the Congressional RICO Act codified in 18 U.S.C. § 1961 *et seq.* will allow Indian Tribal governments or any other entity that is ordinarily clothed in sovereign immunity to use fraudulently induced buy-out contracts that provide for mandatory arbitration clauses when it intends to claim sovereign immunity in arbitration so as to cover up any consequence for its crimes.

The RICO Act applies in this case because of the waiver of sovereign immunity in the Purchase Agreement. The Act provides that any "person" injured in his [or her] business or property by reason of a violation of this Act may sue in any appropriate United States District Court and shall recover threefold the damages he [or she] sustains and the cost of the suit including a reasonable attorney fee. 18 U.S.C. 1964(c). Bird Industries and Laura Bird are "persons" within meaning of the Act 18 U.S.C § 1961(3). "Person" includes "any individual or entity capable of holding legal or beneficial interest in property".

In 2001, the US Supreme Court held in *C & L Enterprises, Inc.* supra, that a mandatory arbitration clause in a contract with an Indian Tribe constitutes a waiver of the Tribe's sovereign immunity. In its decision of July 11, 2022, the District Court misreads *C & L Enterprises* as authority when it said: "*The arbitration Clause cannot be read so broadly as to permit or authorize a RICO action in federal court".* Citing Page 422 of *C & L Enterprises.* The statute says no such thing. What it does say is this:

> "Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate. Brief for Respondent 21 ("An arbitration clause is what it is: a clause submitting contractual disputes to arbitration."). The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective;

> it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See *Eyak,* 658 P. 2d, at 760 'We believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. The arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.'); *Val/Del,* 145 Ariz., at 565, 703 P. 2d, at 509 (because the Tribe has "agree[d] that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity"); cf. *Rosebud Sioux Tribe* v. *Val-U Constr. Co.* 50 F.3d 560, 562 (CA8 1995) (agreement to arbitrate contractual disputes did not contain provision for court enforcement; court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense").

Accepting Federal District Court's misread of *C & L Enterprise,* the 8th Circuit dismissed Bird Industries' appeal *Per Curiam* without comment.

In 2011, in *Amerind Risk Management Corp,* supra, the 8th Circuit found immunity but, in a footnote, the Court made clear a distinction from *C & L Enterprise*, supra. What prompted the need for the footnote was a dissent

by Justice Kermit Bye saying it is clear any dispute arising from a contract cannot be resolved by mandatory arbitration if one of the parties asserts sovereign immunity. He noted that a mandatory arbitration clause would be meaningless if it did not constitute a waiver of sovereign immunity. He also cited as authority a previous decision of the 8th Circuit *Rosebud Sioux Tribe v Val-U Constr. Co of S.D. Inc.* 50 F. 3d 560 (8th Circ 1995).

Given this dissent, the majority found it necessary to clarify its finding of immunity. The Court distinguished its *Armerind* decision where immunity was found from that in *C & L Enterprises*, supra where immunity was denied. It noted that in *Armerind* the arbitration clause *was not mandatory.* In Footnote 9, the Majority stated:

> "This provision [in *Armerind*] is readily distinguishable from the arbitration provisions that operated as express waivers of tribal immunity in *C & L Enterprise, Inc. v Citizens Band of Potawatomi Indian Tribe of Oklahoma* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) and *Rosebud Sioux Tribe v Val-u Constr. Co of S.D.*"

In the present case the arbitration clause was mandatory. As well he could the Federal District Judge in North Dakota agonized that the facts of this case are "deeply troubling". He need not have done so. All that needed to be done was to recognize that the Purchase Agreement containing a mandatory arbitration clause was fraudulently induced and that the Tribe had waived any right to claim sovereign immunity related to that Agreement thereafter. A Tribe should never be given

sovereign immunity when it attempts to cover up its RICO crimes by extending a new contract with a mandatory arbitration clause it has no intention of honoring. The Purchase Agreement the Tribe tendered to Bird Industries attempted to put to rest and conceal the fact that for years the Tribe had been operating a criminal enterprise. (See Footnote 2, supra). The Tribe asserted that the Joint Venture had been a financial failure and that it was about to become defunct. 18 months later, Bird Industries learned the truth. The truth was that the Purchase Agreement was an attempt to cover up the Tribe's criminal conduct. The Joint Venture had not been a failure. It had made tens of millions of dollars that it hid from its joint venture partner so it would not have to share 40% of proceeds from sale of gravel and 49% from sale of concrete.

In his decision, the District Court Judge attempted to distinguish the present case from *C & L Enterprises, Inc.* supra, by saying the Joint Venture Agreement does not contain a mandatory arbitration clause, only the buy-out Purchase Agreement does. The RICO violations in this case took place when the Tribe purchased its joint venture partner's interest for pennies on the millions using multiple false statements and fraudulent financial representations.

Although the District Judge found the facts of the case to be "deeply troubling" he suggested if there is to be a remedy for cases like this it is up to Congress to change the sovereign immunity laws. No Congressional action is needed. All that is needed is that the holding in *C & L Enterprise Inc.* supra, be followed.

EXCEPTIONAL IMPORTANCE

Reversal of the 8th Circuit's *Per Curiam* decision is of exceptional importance because it provides a means by which any contracting entity that ordinarily has immunity can cover up a criminal enterprise by committing more crimes with numerous fraudulent acts that induced Bird Industries to accept a buy out of its interest. The Federal District Court's decision and the *Per Curiam* decision of the 8th Circuit makes it impossible for Plaintiffs such as these to get to the merits of their case to prove entitlement to damages under the RICO Act or the Tribal Code.

CONCLUSION & REMEDY REQUEST

Plaintiffs request its Petition for Writ of Certiorari be granted. The 8th Circuit's *Per Curiam* dismissal of Bird Industries' appeal of the lower court's ruling should be reversed and the case remanded.

Respectfully submitted this 3rd day of July 2023.

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MARCH 14, 2023

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-2584

BIRD INDUSTRIES, INC., A SOUTH DAKOTA CORPORATION; LAURA BIRD, INDIVIDUALLY,

Plaintiffs-Appellants,

v.

TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION,

Defendant-Appellee.

Appeal from United States District Court
for the District of North Dakota

Submitted: March 9, 2023
Filed: March 14, 2023
[Unpublished]

Before COLLOTON, KELLY, and GRASZ, Circuit Judges.

PER CURIAM.

Appendix A

Bird Industries, Inc. and Laura Bird appeal the district court's[1] dismissal of their civil action against the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation based on tribal sovereign immunity. Upon careful review, we affirm for the reasons stated by the district court. *See* 8th Cir. R. 47B.

1. The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED JULY 11, 2022

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

Case No. 1:21-cv-070

BIRD INDUSTRIES, INC., AND
LAURA BIRD, INDIVIDUALLY,

Plaintiffs,

vs.

THE TRIBAL BUSINESS COUNCIL OF THE
THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD INDIAN RESERVATION,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is a motion to dismiss for lack of jurisdiction filed by the Defendant on October 7, 2021. *See* Doc. No. 16. The Plaintiffs filed a response in opposition to the motion on November 29, 2021. *See* Doc. No. 25. The Defendant filed a reply on December 13, 2021. *See* Doc. No. 26. The Plaintiffs filed a surreply on January 13, 2022. *See* Doc. No. 29. For the reasons set forth below, the motion is granted.

Appendix B

I. BACKGROUND

Bird Industries Inc. is a South Dakota corporation with its principal place of business located in Brookings, South Dakota, and offices located in Bismarck, North Dakota. Laura Bird is the owner and president of Bird Industries. Bird is an enrolled member of the Three Affiliated Tribes. She resides in South Dakota.

The Defendant in this case is the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribal Business Council") which is located in western North Dakota. The Tribal Business Council is the governing body of the Three Affiliated Tribes ("Tribe"), a federally recognized Indian Tribe. For purposes of political representation, the Fort Berthold Indian Reservation is broken down into six geographic segments. The Tribal Business Council consists of six elected councilmen, one from each segment, and a chairman elected at large. The Tribal Business Council is vested with the authority to manage all the economic affairs and enterprises of the Three Affiliated Tribes. The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of any of its officers, arms, segments, employees, department managers, commissions, corporate entities, and subentities.

On April 22, 2015, the Three Affiliated Tribes-Four Bears Segment entered into a "Joint Venture" agreement with Bird Industries in which Bird Industries agreed to provide funds, equipment, management, and

manufacturing knowledge to produce aggregates and ready-mix products for sale. Lakeview Aggregates, LLC, a North Dakota Limited Liability Company, was created to accomplish the purpose of the Joint Venture. The agreement provided that Bird Industries would receive 40% of the net income generated by sales from the aggregate businesses and 49% of the net income generated by the ready-mix operation. The Three Affiliated Tribes-Four Bears Segment would receive 60% of the net income generated by sales from the aggregate businesses and 51% of the net income generated by the ready-mix operation. Both parties were to contribute 50% of the first quarter's cost of goods and services. The agreement specified that "[a]ny and all disputes shall be in the exclusive jurisdiction of the Fort Berthold District Court and the laws of the Three Affiliated Tribes shall apply exclusively." *See* Doc. No. 18-2, p. 4.

In June of 2015, Bird Industries began excavating aggregate and the development of a ready-mix plant to process aggregate and manufacture concrete. In the following months, the Tribal Business Council defaulted on its agreement to contribute 50% toward the cost of goods and services for the project. As a result, Bird Industries advanced $3,007,888.98 to cover the cost of goods and services for the project, one half of which was chargeable to the Tribal Business Council.

In June of 2016, the Tribal Business Council, in the belief that Bird mismanaged the project, advised Bird Industries that it was being removed from all day-to-day activities of the aggregate and ready-mix operations. The

Tribal Business Council demanded that Bird Industries sell its interest in the Joint Venture. The parties began negotiating a buyout. To assess the value of its interest, Bird Industries requested financial and sales information. The request was denied. In the course of the negotiations, the Tribal Business Council provided Bird Industries with information concerning the project's past income and expenses which Bird Industries contends were misleading. Bird Industries contends that records relating to assets, production, sales, financial disbursements, accounts receivable, and work in progress went undisclosed or were distorted in order to give Bird Industries the impression the operation had little or no monetary value and little chance for success.

In May of 2017, Bird Industries accepted a $320,000.00 offer to sell its interest in the project and Lakeview Aggregates LLC to the "Four bears Segment d/b/a Four Bears Economic Development Corporation, a Three Affiliated Tribes charted not-for profit corporation." *See* Doc. No. 22. The purchase agreement contains a choice of law provision that states the agreement is to be governed by the law of the Three Affiliated Tribes. *See* Doc. No. 22, ¶ 6.2. The parties also agreed to arbitrate all disputes related to the agreement and that California law would govern the arbitration. *See* Doc. No. 22, ¶ 6.9.1.

After Bird Industries sold its interest in the project, a company from Texas, Focus Energy, was hired to do marketing and perform some management functions for the aggregate and ready-mix operation. In October of 2018, Laura Bird was informed by an employee of Focus

Energy, Brandon Bentley, that the Tribal Business Council had established numerous bank accounts in North Dakota, Texas, and other states to enable it to hide millions of dollars in income from the sale of aggregate and ready-mix owed to Bird Industries and make disbursements to persons who were not so entitled.

Bentley told Bird that councilman Frank Grady and Jolene Lockwood had conspired to get Laura Bird and Bird Industries removed from the project in order to gain control over the project's funds and assets. Bentley also told Bird that there were bank records from bank accounts at Cornerstone Bank that had not been disclosed to her or Bird Industries that would confirm his accusations. Bird was able to obtain these records from another Focus Energy employee, Kirt Bailey, and which she contends confirm Bentley's accusations.

In addition, Bird Industries alleges several instances of fraud and theft by the Tribal Business Council including the interstate transportation and sale of equipment which Bird Industries claims an interest in, and withholding millions of dollars of profits owed to Bird Industries from the project. In support of its assertion of a continuing criminal enterprise, Bird Industries contends the Tribal Business Council has committed similar acts of fraud and theft of money owed to contractors who it hired to do construction work on reservation projects but were not paid for their work. It is alleges these predicate acts violate 18 U.S.C. § 2314 which prohibits the interstate transportation of stolen property.

Laura Bird did not learn of these activities until October of 2018. On October 23, 2019, Bird filed a demand for arbitration with the American Arbitration Association as contemplated by the purchase agreement. *See* Doc. No. 18-8. The demand for arbitration named both the Three Affiliated Tribes and the Four Bears Segment Economic Development Corporation as Respondents. The parties selected former federal Magistrate Judge Karen Klein as the arbitrator. On November 12, 2019, the Respondents filed a motion to dismiss. Discovery was permitted on the issue of sovereign immunity and waiver thereof. Ultimately, the arbitrator dismissed the matter on December 28, 2020. The arbitrator determined that the Respondents were immune from suit based upon tribal sovereign immunity and that no waiver had occurred. *See* Doc. No. 18-9, p. 5.

The Plaintiffs commenced this action in federal court on July 1, 2021. The complaint contains two claims. The first claim is a civil RICO action (18 U.S.C. § 1962(c)) by Bird Industries against the Tribal Business Council. The second claim is made by Laura Bird against the Tribal Business Council for theft, fraud, and interference with business advantage. The Defendant has filed a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction which has been fully briefed and is ready for disposition.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority

to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.,* 556 U.S. 635, 639, 129 S. Ct. 1862, 173 L. Ed. 2d 843 (2009). Jurisdictional issues are a matter for the Court to resolve prior to trial. *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). The Plaintiff bears the burden to prove subject matter jurisdiction exists. *Herden v. United States,* 726 F.3d 1042, 1046 (8th Cir. 2013).

"A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack'" on jurisdiction. *Osborn,* 918 F.2d at 729 n.6. In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* (internal citations omitted). The complaint may also be supplemented by "undisputed facts evidenced in the record." *Id.* at 730. "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* at 729 n.6 (internal citation omitted). If a defendant wishes to make a factual attack on the jurisdictional allegations of the complaint, the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute. *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993).

In this case, the Defendant makes a factual attack by citing to numerous documents outside the pleadings in support of its contention that the Court lacks subject matter jurisdiction. The issue of tribal sovereign immunity is jurisdictional and, as such, the motion is an attack on the jurisdictional facts alleged in the complaint. *Smith v.*

Babbitt, 875 F. Supp. 1353, 1359 (Dist. Minn. 1995). Thus, the Court may consider matters outside the pleadings to the extent necessary in ruling on the motion. *Id.; Buckler v. United States,* 919 F.3d 1038, 1044 (8th Cir. 2019); *Harris v. P.A.M. Transp., Inc.,* 339 F.3d 635, 637 n. 4 (8th Cir. 2003).

III. LEGAL DISCUSSION

The Tribal Business Council contend this Court lacks jurisdiction and asks that the action be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, the Tribal Business Council contends the Court lacks subject matter jurisdiction based upon the intra-tribal dispute doctrine, the Plaintiffs failure to exhaust their tribal court remedies, and the doctrine of sovereign immunity. The Plaintiffs maintain the Court has jurisdiction.

A. INTRA-TRIBAL DISPUTE DOCTRINE

The Tribal Business Council contends the Court lacks subject matter jurisdiction over this RICO action, 18 U.S.C. § 1961 *et seq.*, because the dispute is intra-tribal. Federal courts have long acknowledged the principle that it is important to guard the authority of tribal governments over their people. *Longie v. Spirit Lake Tribe,* 400 F.3d 586, 589 (8th Cir. 2005). This is especially true with regard to intra-tribal disputes. *Id.* Federal courts should only exercise federal question jurisdiction in cases involving tribal affairs when federal law is determinative of the issues involved. Typically, the intra-tribal dispute doctrine

has been applied to cases involving tribal "membership determinations, inheritance rules, domestic relations, and the resolution of competing claims to tribal leadership." *Miccosukee Tribe of Indians of Fla. v. Cypress,* 814 F.3d 1202, 1208 (11th Cir. 2015); *see also Longie,* 400 F.3d at 589 (finding intra-tribal dispute doctrine applied to a dispute between the tribe and a tribal member over a land transfer); *Sac & Fox Tribe of Miss. in Iowa v. Bear,* 258 F. Supp. 2d 938, 944 (N.D. Iowa) (finding intra-tribal dispute doctrine applied to a dispute over whether the defendants are unlawfully in control of the tribe).

In this case, the action is brought pursuant the federal RICO statute, 18 U.S.C. § 1961 *et seq.*, and involves allegations of theft and fraud in violation of 18 U.S.C. § 2314. The RICO statute provides that the district courts of the United States shall have federal question jurisdiction over civil actions to prevent and restrain prohibited racketeering activity. 18 U.S.C. § 1964(a); 28 U.S.C. § 1331. Thus, this case turns on the application of federal law. The case does not involve any of the internal tribal affairs such as tribal membership, politics, or domestic relations to which the intra-tribal dispute doctrine typically applies. Thus, the intra-tribal dispute doctrine does not apply.

Further, the Eighth Circuit Court of Appeals has held that "tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization." *Kodiak Oil & Gas (USA) Inc. v. Burr,* 932 F.3d 1125, 1135 (8th Cir. 2019). The question of whether a tribal court has exceeded its jurisdiction is a matter federal law.

Longie, 400 F.3d at 590. No provision of the RICO statute authorizes tribal court jurisdiction. *See* 18 U.S.C. § 1964; *Cf. Nevada v. Hicks,* 533 U.S. 353, 367-68, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (tribal courts are not courts of general jurisdiction and cannot hear Section 1983 actions as congressional authorization is lacking). Thus, the Court concludes the tribal courts would lack jurisdiction. And since tribal courts clearly lack jurisdiction over RICO actions, the tribal exhaustion doctrine is also inapplicable. *Kodiak,* 932 F.3d at 1133 (exhaustion is not required where the tribal court plainly lacks jurisdiction).

B. TRIBAL SOVEREIGN IMMUNITY

The Defendant contends the Plaintiff's action is barred by the doctrine of tribal sovereign immunity. The Plaintiffs contend sovereign immunity has been waived by the Tribal Business Council.

It has been long been recognized that Indian tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) reaffirming that tribal sovereign immunity includes off-reservation commercial conduct); *Kodiak,* 932 F.3d at 1131. The question of tribal sovereign immunity is jurisdictional. *Hagen v. Sisseton-Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000). Indian tribes and their governing bodies may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of immunity by Congress. *Baker Elec. Coop. v. Chaske,* 28 F.3d 1466,

1471 (8th Cir. 1994). A waiver of tribal sovereign immunity cannot be implied. *Hagen,* 205 F.3d at 1043. Any purported waiver of tribal sovereign immunity must be "strictly construed in favor of the tribe." *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1245 (8th Cir. 1995). The burden for showing a clear and unequivocal waiver of tribal sovereign immunity rests upon the party asserting the waiver. *Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 685-86 (8th Cir. 2011). Tribal sovereign immunity extends to tribal agencies, entities, and corporations. *Id.* at 685; *Hagen,* 205 F.3d at 1043.

The Plaintiffs do not contend Congress has abrogated the Tribe's sovereign immunity or that the RICO statute constitutes a waiver. Rather, the Plaintiffs contend the arbitration clause in the purchase agreement for the sale of Lakeview Aggregates, LLC to the Four Bears Economic Development Corporation constitutes a waiver of the Tribe's sovereign immunity. The contention is unpersuasive.

As the arbitrator correctly explained, the waiver was invalid because it was never approved by the Tribal Business Council. The Four Bears Economic Development Corporation is a wholly owned subordinate entity of the Tribe. The Four Bears Economic Development Corporation's Articles of Incorporation explicitly provides it with sovereign immunity from suit identical to that enjoyed by the Tribe. *See* Doc. No. 18-3, at 9-10. To be valid and binding, any waiver of immunity by the Four Bears Economic Development Corporation must: (1) be explicit, (2) contained in a written contract, and (3) specifically approved by the Tribal Business Council.

See Doc. No. 18-3, at 10. Further, 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 [Four Bears Economic Development Corporation] in any way be deemed a waiver of any of the rights, privileges, and immunities of the Tribe." *See* Doc. No. 18-3, at 10. There is no evidence in the record that the waiver/arbitration clause in the purchase agreement was approved by the Tribal Business Council.

Thus, the Court concludes, as did the arbitrator, that because the Tribal Business Council never approved the waiver, no valid waiver of the Four Bears Economic Development Corporation's immunity exists. Even if the Four Bears Economic Development Corporation had waived its immunity, such a waiver would not extend to the Tribe or the Tribal Business Council because the Four Bears Economic Development Corporation's Articles of Incorporation clearly limit the extent of the waiver such that it does not extend to the Tribe. *See* Doc. No. 18-3, at 10. In addition, the Tribal Business Council is the Defendant in this case and the Four Bears Economic Development Corporation is not. The Court concludes the Plaintiffs have failed to demonstrate the Tribal Business Council has waived its immunity in relation to this action.

Even if the arbitration agreement was deemed a valid waiver it is limited to the arbitration of disputes arising out of the purchase agreement. The arbitration clause in the purchase agreement provides "all disputes concerning this Agreement shall be settled by arbitration." *See* Doc. No. 22, ¶ 6.9. The arbitration clause also provides that

the award may be enforced in "any court of competent jurisdiction." *See* Doc. No. 22, ¶ 6.9.3. The waiver does not pertain to the Joint Venture agreement or any of the other instances of fraud alleged in the complaint which form the basis for the Plaintiff's RICO action. The arbitration clause cannot be read so broadly as to permit or authorize a RICO action in federal court. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 422, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). While an arbitration clause can certainly constitute a waiver of sovereign immunity, a waiver cannot be implied and the arbitration clause in this case only contemplates arbitration proceedings related to the purchase agreement. *See Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 685 (8th Cir. 2011). The arbitration clause in the purchase agreement makes no mention of disputes being resolved in federal, state, or tribal court and certainly not in a far reaching RICO action in federal court. The Plaintiffs seemingly recognized this as they were the ones who demanded arbitration. *See* Doc. No. 18-8. It was only when the Plaintiffs lost in arbitration that they filed this RICO action. The Court concludes that even if the waiver was valid, it only authorizes arbitration and is not broad enough to encompass a RICO action in federal court.

The Plaintiffs' reliance of *C & L Enterprises, Malaterre*, and *Shingobee* is misplaced. *C & L Enterprises* and *Malaterre* support a finding that the Tribal Business Council has not waived its sovereign immunity while *Shingobee* does not address the relevant issues.

Appendix B

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) a construction company sued an Indian tribe to enforce an arbitration award. The case arose out of a construction contract for roof repairs on a building owned by the tribe but not located on the reservation. *Id.* at 415. The contract between the construction company and the tribe contained an arbitration clause calling for binding arbitration. *Id.* When the tribe attempted to alter the terms of the contract, the construction company submitted a demand for arbitration. *Id.* at 416. The tribe claimed sovereign immunity and refused to participate. *Id.* The arbitrator ruled in favor of the construction company which sought to enforce the award in state court where the tribe again claimed sovereign immunity. *Id.* Several appeals ensued. The Supreme Court held the arbitration clause in the construction contract constituted an express waiver of sovereign immunity. *Id.* at 418. The Supreme Court explained that arbitration clause called for binding arbitration and enforcement of the arbitral award in any state or federal court with jurisdiction. *Id.* at 418-19. The tribe was required to adhere to the dispute resolution procedures outlined in the contract. *Id.* at 420. Notably, there is no language in *C & L Enterprises* which supports the idea of a blanket waiver of sovereign immunity as suggested by the Plaintiffs. The Supreme Court limited the waiver to the express language of the arbitration clause which called for arbitration pursuant to American Arbitration Association rules and judicial enforcement noting that the tribe "consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court." *Id.* at 423.

Appendix B

In *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) the Eighth Circuit Court of Appeals held that a tribal self-insurance risk-pool corporate administrator was entitled to tribal sovereign immunity. The Eighth Circuit explained that while the corporation's charter contemplated waivers of sovereign immunity any such waiver was required to be approved by the corporation's board of directors and this had not been done. *Id.* at 687-88. *Malaterre* is not unlike the present case where any waiver of sovereign immunity must be approved the Tribal Business Council. In both *Malaterre* and the present case, approval is lacking.

In *Shingobee Builders, Inc v. N. Segment All.*, 350 F. Supp. 3d 887, 889-90 (D.N.D. 2018) a construction company sued a tribal corporation in federal court for breach of contract based upon failure to pay for work performed. The case was dismissed for lack of subject matter jurisdiction because the tribal corporation was an extension of the tribe and thus was not a citizen of any state for diversity jurisdiction purposes. *Id.* at 898. The issue of sovereign immunity and waiver was not addressed and thus the case provides little guidance.

The Court concludes the Tribal Business Council is entitled to sovereign immunity and the Plaintiffs have failed to demonstrate an unequivocal waiver of that immunity as to the claims raised in this case. While the allegations in this case are deeply troubling, tribal sovereign immunity remains a matter of Congressional prerogative. *See Michigan,* 572 U.S. at 790. (deferring to Congress as to whether tribal sovereign immunity should be abrogated)

IV. CONCLUSION

For the reasons set forth above, the Defendants' motion to dismiss (Doc. No. 16) is **GRANTED**. The request for a hearing (Doc. No. 20) is **DENIED**.

IT IS SO ORDERED.

Dated this 11th day of July, 2022.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

APPENDIX C — ORDER OF THE AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, DATED DECEMBER 28, 2020

AMERICAN ARBITRATION
ASSOCIATION INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION

Case No. 01-19-0003-3765

LAURA BIRD, AND BIRD INDUSTRIES, INC.,

Claimants,

v.

THREE AFFILIATED TRIBES AND THREE AFFILIATED TRIBES – FOUR BEARS SEGMENT D/B/A THREE AFFILIATED TRIBES – ECONOMIC DEVELOPMENT CORPORATION, A THREE AFFILIATED TRIBES CHARTERED NOT-FOR PROFIT CORPORATION,

Respondents.

Final Order on Motion to Dismiss

Claimants Laura Bird and Bird Industries, Inc. (hereinafter collectively "Bird") filed this arbitration proceeding to seek damages from the Respondents stemming from a commercial project to develop and manufacture aggregate materials on tribal lands. Bird

entered into a joint venture agreement with Three Affiliated Tribes—Four Bears Segment for the project. Lakeview Aggregates, LLC was formed to carry out the joint venture. Subsequently, Four Bears Segment d/b/a Four Bears Economic Development Corporation purchased Bird's interest in Lakeview Aggregates, LLC. The agreement for the purchase of Bird's interest included a clause requiring all disputes relating to the agreement to be resolved in arbitration in accordance with the commercial arbitration rules of the American Arbitration Association.

Procedural History

Respondent Three Affiliated Tribes has made a special appearance in this proceeding to seek dismissal based on sovereign immunity of the Respondents. Counsel who appears for Three Affiliated Tribes does not represent Four Bears Economic Development Corporation. Bird resists the motion to dismiss, contending that Respondents waived any sovereign immunity by agreeing to arbitration of any disputes arising out of Four Bears Segment d/b/a Four Bears Economic Development Corporation's purchase of Bird's interest in the project. The Arbitrator deferred the motion to dismiss and allowed the parties to engage in limited discovery on the issues of sovereign immunity and waiver of sovereign immunity. A dispute arose between the parties over the scope of the discovery, which has now been resolved, and the parties have submitted their final briefs on the sovereign immunity and waiver issues.

Appendix C

Sovereign Immunity and Lack of Waiver

In 1936 the Three Affiliated Tribes of the Fort Berthold Reservation (hereinafter "the Tribe") adopted a Constitution and Bylaws under the Indian Reorganization Act. The Tribe consists of six community segments, one of which is the Four Bears Segment. The Constitution provides that the Tribe is governed by the Tribal Business Council, which is comprised of a Chairman plus one representative from each of the six segments.

In 2015 the Tribe created the Four Bears Economic Development Corporation of the Fort Berthold Reservation (hereinafter "FBEDC"). The FBEDC Articles of Incorporation provide that as a wholly owned subordinate of the Tribe, FBEDC enjoys the same sovereign immunity as the Tribe. Any waiver of FBEDC's immunity must be explicit, written and "specifically approved by the Tribe's Tribal Business Council," with any recovery against FBEDC being limited to the assets of FBEDC. FBEDC Articles of Incorporation, Art. VIII.

Because of the ambiguous reference in the purchase agreement identifying the buyer of Bird's interest in Lakeview Aggregates, LLC as "Four Bear Segment d/b/a Four Bears Economic Development Corporation," the Arbitrator allowed the parties to conduct limited discovery on the issues of sovereign immunity and waiver. The effort was essentially a dead end. 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.

Appendix C

Bird contends a formal action by the Tribal Business Council waiving FBEDC's sovereign immunity is unnecessary, based on the decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2011). In *C & L* the Tribe entered into a contract with C & L Enterprises for construction of a roof on a Tribe-owned commercial building on land owned by the Tribe off the reservation and not held in trust. The contract, a standard AIA form, was prepared and presented to C & L by the Tribe. The contract form included a clause providing for arbitration of disputes under AAA Rules and provided for enforcement of an arbitration award in any state court in Oklahoma. The Supreme Court held the Tribe had consented not only to a waiver of its right to a court trial, but also to a determination of contractual claims in arbitration. Therefore, by entering into the contract with the arbitration clause, the Tribe had waived its sovereign immunity and was subject to a determination in arbitration.

There is an important distinction between *C & L* and this case. In *C & L* the Tribe itself authorized and entered into the contract with the arbitration provision. In this case the entity that entered into the contract to purchase Bird's interest in Lakeview Aggregate, LLC was a business entity formed by the Tribe. 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. The contract between FBEDC and Bird contains an

arbitration clause that would serve as an explicit and written waiver of FBEDC's immunity, but for the Tribe's additional requirement in FBEDC's formation that any waiver be specifically approved by the Tribal Business Council. That critical piece is missing here and is fatal to Bird's claim.

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 on Four Bears Segment d/b/a FBEDC's purchase of Bird's interest in Lakeview Aggregates, LLC. 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.

Claimant also relies heavily on a North Dakota federal district court decision in *Shingobee Builders, Inc. v. North Segment Alliance,* 350 F.Supp.3d 887 (D.N.D. 2018). Shingobee Builders, Inc. served as construction manager and general manager of a housing construction project for North Segment Alliance (NSA), a non-profit corporation chartered by the Tribe. Ultimately, Shingobee Builders brought a breach of contract claim in federal court, alleging it had not been paid for its work under the contract. The basis asserted for federal jurisdiction by Shingobee Builders was diversity of citizenship. NSA

filed a motion to dismiss, contending it was not subject to diversity of citizenship jurisdiction because it was not a citizen of any state and because, as an arm of the Tribe, it was protected by sovereign immunity. The court recognized that these two issues were intertwined. It found NSA was a tribal entity, not a separate corporate entity under the law, so it was not a citizen of a state and could not be subject to federal court jurisdiction based on diversity of citizenship. The court did not address the issue of sovereign immunity or potential waiver of sovereign immunity by NSA.

Bird focuses on the *Shingobee* court's reference to NSA as a tribal entity and not a separate corporate entity, but that reliance is inapposite here. The court in *Shingobee* was focused on whether the tribal entity was subject to federal court jurisdiction based on diversity of citizenship, not whether the tribal business entity is considered one and the same as the Tribe for purposes of sovereign immunity and waiver of sovereign immunity. FBEDC, like NSA, is a tribally-created entity, rather than an entirely independent corporate entity. As a tribal entity, it enjoys the Tribe's sovereign immunity unless that immunity has been waived. As discussed above, no evidence of waiver has been presented.

The facts, as alleged by Bird, paint a disturbing picture of the Tribe's business dealings. Nevertheless, the focus at this point is narrowly focused only on the existence of sovereign immunity and waiver of that immunity. The Arbitrator finds that the Tribe and FBEDC are entitled to immunity from Bird's claims in this arbitration proceeding,

and they have not waived their sovereign immunity. Bird failed to secure a waiver of immunity from the Tribe as a condition of doing business with a tribal entity and must now live with the unfortunate consequences.

IT IS ORDERED that Laura Bird and Bird Industries, Inc.'s claims against Three Affiliated Tribes and against Three Affiliated Tribes—Four Bears Segment d/b/a Three Affiliated Tribes—Economic Development Corporation are **DISMISSED,** those claims being the entirety of all claims in this proceeding.

Dated: December 28, 2020.

/s/ Karen Klein
Karen Klein
Arbitrator

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED APRIL 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2584

BIRD INDUSTRIES, INC., A SOUTH DAKOTA CORPORATION AND LAURA BIRD, INDIVIDUALLY,

Appellants,

v.

TRIBAL BUSINESS COUNCIL OF THE THREE AFFILIATED TRIBES, OF THE FORT BERTHOLD INDIAN RESERVATION,

Appellee.

Appeal from U.S. District Court for the
District of North Dakota - Western
(1:21-cv-00070-DLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

April 11, 2023

Appendix D

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX E — RELEVANT STATUTORY PROVISIONS

18 U.S. Code § 1961 – Definitions

(1) "racketeering activity" means […] (B) any act which is indictable under any of the following provisions of title 18, United States Code: […] section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), […];"

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity"

Appendix E

18 U.S.C. § 1962 – Prohibited activities

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities

of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

Appendix E

18 U.S.C. §1964 – Civil Remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Appendix E

18 U.S. Code § 2314 – Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or

thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof; or

[…]

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money."

Appendix E

28 U.S.C. § 1331, which reads, "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Three Affiliated Tribes Tribal Code, Title VI Claims & Damages, Chapter 1, including Section 6 – Intentional Torts, which reads in part:

> "(c) *Infliction of mental distress.* A cause of action shall exist for the infliction of mental distress. Infliction of mental distress is an act which goes beyond the limits of accepted conduct in the community. The action must intend that the person injured will suffer mental distress of a very serious kind. The mental distress must in fact exist and result from the act."
>
> "(e) *Intentional interference with property: Trespass to personal property.* A trespass toa personal property may be committed by intentionally and unlawfully:
>
> (1) Dispossessing another of the personal property; or
>
> (2) Using or interfering with the use of the personal property in the possession of another, where
>
> (a) The personal property is impaired as to its condition, quality or value; or

(b) The possessor is deprived of the use of the personal property for a substantial time;"

"(h) *Conversion.*

1. Conversion is an intentional exercise of control or control over personal property which is so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the personal property.

2. In determining whether a conversion has been committed, the following factors shall be considered;

   (a) The extent and duration of the actor's exercise of control;

   (b) The actor's intent to assert a right in fact inconsistent with the owner's right of control;

   (c) The actor's good faith;

   (d) The extent and duration of the resulting interference with the owner's right of control;

   (e) The harm done to the personal property;

Appendix E

(f) The inconvenience and expense caused to the owner."

Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, Article VI – Powers, Section 5 (a) which reads:

> "The Tribal Business Council shall have the following powers, the exercise of which shall be subject to popular referendum as hereinafter provided in this Constitution.
>
> (a) To manage all economic affairs and enterprises of the Three Affiliated Tribes of the Fort Berthold Reservation in accordance with the terms of a charter to be issued to them by the Secretary of the Interior."