UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERESSA MESTEK, Plaintiff, v. LAC COURTE OREILLES COMMUNITY HEALTH CENTER, LOUIS TAYLOR, (in both his personal and official capacity) JACQUELINE BAE, PH.D., (in both her personal and official capacity) SHANNON STARR, M.D., (in both his personal and official capacity) SARAH KLECAN (in both her personal and official capacity) DAVID FRANZ, (in both his personal and official capacity) And MICHAEL POPP, in his personal capacity Defendants.	)	**Civil No. 3:21-cv-00541** Plaintiff's Opposition to Defendants' Motion to Dismiss

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Teressa Mestek, by and through the undersigned counsel, hereby submits her Opposition to Defendants' Motion to Dismiss.

Introduction

Plaintiff in her First Amended Complaint (FAC) asserts three claims against the seven named Defendants including claims under the anti-retaliation provision of the federal False Claims Act (FCA), 31 U.S.C. § 3730(h), and claims under Wisconsin common law. Ms. Mestek

asserts that during her employment as Defendant Lac Courte Oreilles Community Health Center (LCO-CHC)'s Director of Health Information Management (HIM), she engaged in a variety of efforts intended to stop LCO-CHC's submission of false claims for payment for healthcare services to Government-funded health insurance plans and government entities. Ms. Mestek further asserts that shortly after Defendants learned of Ms. Mestek's efforts, they terminated or caused the termination of her employment, and then interfered with her efforts to secure re-employment.

In their Motion to Dismiss, Defendants present four distinct arguments. None of Defendants' arguments address the merits of Ms. Mestek's claims. As explained *infra*, each of these arguments must be rejected, either as a matter of law or because they reflect, at best, a premature attempt to litigate a summary judgment motion in the guise of a motion to dismiss.

Defendants first argue that LCO-CHC is a tribal entity and that having such status means it is not a "person" under the FCA. Therefore, Defendants argue, that it is not subject to suit under the FCA, that Plaintiff's FCA retaliation claim is not colorable, and therefore this Court lacks federal question subject matter jurisdiction. Second, Defendants argue, based on their first argument, that since the Court lacks federal question subject matter jurisdiction, this Court also lacks supplemental jurisdiction over Ms. Mestek's Wisconsin common law claims. These first two arguments of Defendants fail as a matter of law because, explained *infra*, they are based on a misreading of the FCA and a misapplication of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

Third, Defendants argue that each of Ms. Mestek's claims must be dismissed because LCO-CHC is one and the same as "The Tribe," *i.e.*, the LCO Band of Lake Superior Chippewa Indians. At other times in its Motion, Defendants suggest that LCO-CHS is a separate "tribal

entity" entitled to the protection of the Tribe's sovereign immunity, which Defendants assert automatically extends to "shield" each of the individual defendants. However, regardless of precisely how Defendants characterize their tribal status or affiliation, their Motion to Dismiss relies entirely on matters outside the pleadings which are not subject to judicial notice. Specifically, Defendants rely on facts asserted in the declaration of Mr. Tweed Shuman and other exhibits. Therefore, pursuant to Fed. R. Civ. P. 12(d), Defendants' "motion must be treated as one for summary judgment under Rule 56."

Defendants' exhibits claim to support numerous factual allegations regarding LCO-CHC's operational and organizational relationship with the Tribe, which Ms. Mestek cannot contradict, dispute, or rebut without the opportunity to conduct discovery. For example, Ms. Mestek clearly alleges facts which, if assumed true (as they must be for purposes of Defendants' Motion), support a finding that LCO-CHC is not a tribal entity entitled to immunity. (Dkt No. 19, ¶¶ 14-29). Thus, Defendants' Motion to Dismiss based on tribal sovereign immunity must be denied so that Ms. Mestek is afforded the "opportunity to present all the material that is pertinent" to Defendants' immunity assertions as required by Fed. R. Civ. P. 12(d). If and when Defendants seek summary judgment, they must comply with the Summary Judgment Procedures referenced in the Court's Preliminary Pretrial Conference Order.

Fourth, and finally, Defendants argue that Ms. Mestek's claims should all be dismissed for failure to exhaust tribal remedies. However, like Defendants' third argument regarding sovereign immunity, this argument is one for summary judgment, not a motion to dismiss, because it relies on matters outside the pleadings. Thus, Defendants' motion must be denied as a premature Rule 56 motion, as Ms. Mestek has not had an opportunity to obtain pertinent evidence. Moreover, this argument presupposes the validity of Defendants' previous arguments

regarding LCO-CHC's nebulous, alleged tribal status.

Legal Standards Applicable to a Motion to Dismiss

On a Rule 12(b)(6) motion, the Court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in Plaintiff's favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

> When considering a defendant's motion to dismiss, we view the complaint's allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957). We take as true all well-pleaded facts and allegations in the plaintiff's complaint, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir.1986), cert. denied, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987), and the plaintiff is entitled to all reasonable inferences that can be drawn from the complaint. *Ellsworth v. Racine*, 774 F.2d 182, 184 (7th Cir.1985), cert. denied, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986).

Bontkowski v. First Nat. Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993).

Argument

I. Defendants Err as a Matter of Law in Asserting They Are Not Subject to Suit Under the FCA's Anti-Retaliation Provision and that this Court Lacks Federal Question Subject Matter Jurisdiction

Defendants' first argument relies on the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). In *Stevens* the Supreme Court held that a state does not fall within the meaning of the term "person" as used in the FCA provisions providing for *qui tam* claims. Defendants' argument here, based on *Stevens*, is that a tribal entity, like the state entity addressed in *Stevens*, is not a "person" subject to suit under the FCA's anti-retaliation provision.

This argument is incorrect as a matter of law, regardless of whether *Stevens'* rationale

regarding state entities would apply to tribal entities (a matter not decided in *Stevens*), because *Stevens* was a case regarding *qui tam* claims, not retaliation claims. Qui tam claims are brought under a different section of the FCA, 31 U.S.C. § 3729, whereas retaliation claims are brought under 31 U.S.C. § 3730(h).

Although 31 U.S.C. § 3729(a)(1) does use the term "person" in defining the class of parties potentially liable for submission of false claims to the government, *i.e.*, parties subject to a *qui tam* action brought pursuant to 31 U.S.C. § 3730(b), here Ms. Mestek's federal FCA claim is pursuant to the anti-retaliation provision of the FCA, 31 U.S.C. § 3730(h). The FCA does not use the term "person" in defining the class of parties who may be liable under the anti-retaliation provision (and no longer even uses the term "employer" in defining such class). For this reason, *Stevens* does not apply here.

Federal courts have recognized this distinction regarding the use of the term "person" in 31 U.S.C. § 3729 versus the absence of use of the term "person" in 31 U.S.C. § 3730(h), both before and after the 2009 and 2010 amendments to the FCA. This is no minor distinction here, it is a distinction that makes all the difference. The Eighth Circuit has held that it matters that the anti-retaliation provision of the FCA does not use the term "person" whereas the FCA's prohibition on submission of false claims provision does, explaining in the context of analyzing a municipal corporation's employer status:

> **The Supreme Court held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), that a state cannot be a "person" subject to suit under the qui tam provision of the FCA, 31 U.S.C. § 3729.** The court premised its holding on two basic presumptions. First, it noted the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780, 120 S.Ct. 1858. Second, it found that, because the treble-damages component of the qui tam statute is "essentially punitive in nature," state liability would be inconsistent with the "presumption against imposition of punitive damages on governmental entities."[8] *Id.* at 784–85, 120 S.Ct. 1858. The Court reasoned that, since Congress has failed

> to overcome these presumptions by expressing a clear intent to subject states to liability, states are not persons under the statute. *Id.* at 787, 120 S.Ct. 1858.
> ... **But none of these courts addressed the question before us in this appeal: whether *Stevens* requires a finding that local governments cannot be sued as "employers" under the FCA's anti-retaliation statute.**
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> * * *
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> **While we need not decide whether SLHA is a "person" for purposes of the qui tam provision, we agree with the *Satalich* court's view of the anti-retaliation provision, and this view is supported by the statute's legislative history: "As is the rule under other Federal whistleblower statutes as well as discrimination laws, the definitions of 'employee' and 'employer' should be all-inclusive.... Additionally, 'employers' should include public as well as private sector entities." S.Rep. No. 99–345, at 34–35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5299–5300. We find that SLHA is an "employer" subject to suit under section 3730(h).** The case is, therefore, properly before us on appeal.

Wilkins v. St. Louis Hous. Auth., 314 F.3d 927, 931–32 (8th Cir. 2002) (quoting *United States ex rel. Satalich v. Los Angeles*, 160 F.Supp.2d 1092 (C.D.Cal.2001) ("The court held that ... "retaliation claims under section 3730(h) are not dependent on a relator's ability to succeed on, or even file, a cause of action under section 3729.") (emphasis added).

Critically, *Wilkins* was decided prior to the 2009 and 2010 amendments to the FCA, which expanded the reach of the FCA's anti-retaliation provision by removing the term "employer" from the language of 31 U.S.C. § 3730(h) as a limitation on the class of potential defendants. *See also United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 435 (6th Cir. 2021) (holding that a former employee could pursue an FCA retaliation claim based on "post-employment retaliation" in order "to effectuate the statute's broader context and purpose."

More recently, the United States District Court for the District of Columbia also recognized the significance of this distinction years after the 2009 amendment to the FCA.

> First, WMATA argues that the FCA authorizes a lawsuit only against a legal person, which excludes any state agency. Memo. ISO Mot. Dismiss 6-8; Reply ISO Mot. Dismiss 8. According to WMATA, the Supreme Court has already decided this question by holding that state agencies are not persons liable to suit under the

> FCA's qui tam provision. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). But the FCA has other provisions authorizing other types of lawsuits. Indeed, *Stevens* noted that another provision of the FCA that enables the Attorney General to issue civil investigative demands explicitly includes states within its ambit. *See id*. at 783-84, 120 S.Ct. 1858. **Unlike the text of the qui tam provision, nothing in the text of the whistleblower provision at issue here limits liability to legal persons.**
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> **Compare 31 U.S.C. § 3730(b)(1) (authorizing qui tam lawsuits for violations of 31 U.S.C. § 3729, which establishes the liability of "any person" who performs a listed act) with 31 U.S.C. § 3730(h) (authorizing lawsuits for whistleblower retaliation without specifying who may be liable)**. WMATA's interpretation of the FCA lacks textual support and is at least in tension with the only interpretation of the whistleblower provision by a federal court of appeals that the parties have cited. *See Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 931-32 (8th Cir. 2002) (holding that FCA's whistleblower provision applied to public employer).

Slack v. Washington Metropolitan Area Transit Authority, 325 F.Supp.3d 146, 152-153 (D.D.C. 2018) (emphasis added).

Consequently, Defendants' reliance on the Supreme Court's decision in *Stevens* is misplaced, and Defendants' Motion to Dismiss Plaintiff's complaint because LCO-CHC is not a "person" under the FCA's anti-retaliation provision fails as a matter of law.

II. Defendants Err as a Matter of Law in Asserting that Plaintiff's State Common Law Claims Must Be Dismissed Because this Court Lacks Supplemental Jurisdiction

Defendants argue, based on their first argument, that because in their view the District Court lacks federal question subject matter jurisdiction, this Court also lacks supplemental jurisdiction to entertain Plaintiff's state common law claims. As explained *supra*, Defendants are simply incorrect in relying on *Stevens*, which addressed only the FCA's *qui tam* provision. Defendants' argument, based on *Stevens*, that a tribal entity, like a state entity, is not a "person" subject to suit under the FCA's anti-retaliation provision fails to note or distinguish the difference in statutory language between the FCA qui tam provisions addressed in *Stevens*, 31 U.S.C. §§ 3729(a)(1), 3730(b) and the FCA anti-retaliation provision at issue here.

Because here the Defendants are subject to the FCA's anti-retaliation provision, Ms. Mestek's FCA claim is colorable and this Court does have federal question jurisdiction to decide her FCA retaliation claim. This is true notwithstanding the Defendants' separate argument that they are entitled to tribal sovereign immunity because in the Seventh Circuit, as Defendants recognize, the issue of tribal sovereign immunity is not jurisdictional. *See, e.g.*, *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822 (7th Cir. 2016); *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008) (citing *Lapides v. University of Georgia*, 535 U.S. 613 (2002)).

Additionally, Defendants do not dispute that the facts of Ms. Mestek's state law claims are sufficiently closely related to Mestek's FCA retaliation claim to invoke the Court's supplemental jurisdiction under 28 U.S.C. § 1367. Consequently, Defendants' Motion to Dismiss Ms. Mestek's state common law claims for lack of supplemental jurisdiction must be denied. Since Ms. Mestek's FCA retaliation claim clearly raises a substantial question of federal law,[1] this Court has supplemental jurisdiction over Ms. Mestek's state law claims pursuant to 28 U.S.C. § 1367, unless the FCA retaliation claim is dismissed with regard to each Defendant.

Although Defendants have argued that their tribal sovereign immunity defense supports dismissal of Ms. Mestek's federal FCA claim at this stage, because tribal sovereign immunity is not a jurisdictional issue and because Defendants' motion to dismiss on this ground under Fed.

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[1] "The principle applied by the Court of Appeals—that a 'substantial' question was necessary to support jurisdiction—was unexceptionable under prior cases. Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' [citation omitted] 'wholly insubstantial,' [citation omitted]; 'obviously frivolous,' [citation omitted]; 'plainly unsubstantial,' [citation omitted]; or 'no longer open to discussion,' [citation omitted]. One of the principal decisions on the subject, *Ex parte Poresky*, 290 U.S. 30, 31—32, 54 S.Ct. 3, 4—5, 78 L.Ed. 152 (1933), held, first, that '(i)n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented.'" *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974).

R. Civ. P. 12(b)(6) relies on facts and documents outside the pleadings, it is premature to decide this issue. As discussed *infra*, Defendants' Motion to Dismiss must first be converted to a motion for summary judgment and decided as such.

III. Defendants' Motion to Dismiss on Tribal Sovereign Immunity Grounds Must Be Denied or, in the Alternative, Converted to a Motion for Summary Judgment with Allowance for Discovery Before Re-Submission, and Resubmission in a Form Compliant with this Court's Summary Judgment Procedures, Because Defendants' Motion Relies on Matters Outside the Pleadings Not Subject to Judicial Notice

Defendants argue that each of Ms. Mestek's claims must be dismissed because LCO-CHC is a tribal entity entitled to the protection of tribal sovereign immunity. Defendants also argue that each of the individual defendants[2] are also entitled to the protection of tribal sovereign immunity. However, Defendants' Motion to Dismiss relies on matters outside the pleadings that are not subject to judicial notice and therefore must be denied or converted to a motion for summary judgment.

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

The Defendants' asserted tribal sovereign immunity defense involves fact issues regarding its potential applicability to each of the different Defendants which range from the Tribal Chairman through clinic staff to an outside consultant. These fact issues must be resolved before the proper application of the doctrine of tribal sovereign immunity may be decided and these fact issues may not be resolved, at least not in Defendants' favor, without use of the summary judgment process because reliance on the pleadings alone does not support granting

[2] Neither Defendants' motion nor any of its exhibits explain how or why Defendant Popp, a third-party consultant, would be entitled to the same immunity as an employee or officer.

Defendants' motion.

In Defendants' Motion to Dismiss on tribal sovereign immunity grounds, Defendants assert and rely on the following facts and documents that are outside the pleadings and not subject to judicial notice:

1) The history of how the LCO-CHC was established by the LCO tribe, and Defendants' attached declaration of LCO Tribal Governing Board (TGB) member Tweed Shuman;

2) The existence and content of the LCO Sovereign immunity Code and Defendants' Exhibit 5; and

3) The authority of the LCO TGB to oversee the operation of the LCO-CHC and the implied assertion that it does so in a meaningful manner, and the attached declaration of LCO Tribal Governing Board (TGB) member Tweed Shuman.

Defendants rely on facts asserted in the declaration of Mr. Shuman and in other exhibits regarding which Ms. Mestek has not had the benefit of discovery and which she is otherwise not in an adequate position to properly dispute or rebut without the opportunities provided via the summary judgment process. Defendants have submitted their motion to dismiss based on tribal sovereign immunity in improper form, *i.e.,* as a motion for summary judgment in the guise of a motion to dismiss. The motion may be and should be denied on this basis.

If this Defendants' motion is not denied, in the alternative, it must be converted to a Motion for Summary Judgment and resubmitted in proper form that allows Ms. Mestek an opportunity to present her evidence opposing such summary judgment motion. *See, e.g., Peckmann v. Thompson,* 966 F.2d 295, 298 (7th Cir. 1992) ("To grant the motion when the supporting documents the rule contemplates are not before the court is to deprive the nonmovant

of the opportunity to be heard on the existence of disputed factual issues").

Further, allowance should be made for a reasonable period of discovery by Plaintiff Mestek before re-submission of Defendants' motion as a motion for summary judgment, as contemplated in the recently entered Preliminary Pretrial Order. The applicability of Defendants' tribal sovereign immunity defense also depends on the type of relief requested (*e.g.*, injunctive relief vs. damages), from which official(s) the relief is requested, and whether the tribal officials' conduct at issue was *ultra vires* or within the scope of their authority. *See, e.g., Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983); *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mt. Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Baker Electric Coop. v. Chaske*, 28 F.3d 1466, 1471-72 (8th Cir. 1994); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574-75 (10th Cir. 1984); *Comstock Oil & Gas Inc. v. Ala. and Choushatta Indian Tribes of Tex*, 261 F.3d 567, 574 (5th Cir. 2001); *7TEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). To the extent Defendants' motion seeks dismissal of Ms. Mestek's claims for injunctive relief or for damages on the basis of tribal sovereign immunity, Defendants' motion must be denied because there are fact issues beyond the pleadings to be decided such as whether Medical Director Starr acted *ultra vires*[3] in terminating Ms. Mestek's employment by signing the Health Director's name to the termination notice even though the Health Director had not made a decision to terminate Ms. Mestek's employment. *See* FAC at ¶¶ 17-20, 110-135.

[3] *See, e.g., Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Dugan v. Rank*, 372 U.S. 609, 621–22 (1963) regarding *ultra vires* exception to federal sovereign immunity.

IV. Defendants' Motion to Dismiss on the Ground of Failure to Exhaust Tribal Remedies Must Be Denied or, in the Alternative, Converted to a Motion for Summary Judgment with Allowance for Discovery Before Re-Submission, and Resubmission in a Form Compliant with this Court's Summary Judgment Procedures, Because Defendants' Motion Relies on Matters Outside the Pleadings Not Subject to Judicial Notice

Defendants also argue that Ms. Mestek's claims should all be dismissed for failure to exhaust tribal remedies. However, like Defendants' third argument regarding sovereign immunity, this fourth argument by Defendants is a motion for summary judgment in the guise of a motion to dismiss.

Defendants' motion on the ground of failure to exhaust tribal remedies relies on the following matters outside the pleadings that are not subject to judicial notice:

1) Ms. Mestek's consent to LCO-CHC's appeal procedures and tribal court review of employment claims, and Defendants' Exhibit 4;

2) LCO-CHC's policies and procedures, and Defendants' Exhibits 6-14; and

3) The purported asserted and actual reasons for LCO-CHC's termination of Complainant Mestek's employment, and whether the same constitute disciplinary actions under LCO-CHC's policies and procedures, and Exhibits 1, 6-14.

With respect to this Defendants' fourth argument, Defendants again rely on facts asserted in Defendants' exhibits on which Plaintiff Mestek has not had the benefit of discovery, and which she is otherwise not in an adequate position to properly dispute or rebut without the opportunities provided via discovery and the summary judgment process. Defendants have again submitted a motion for summary judgment in improper form in the guise of a motion to dismiss. The motion may be and should be denied on this basis.

In addition, Defendants' motion to dismiss based on this fourth ground of failure to exhaust tribal remedies may be denied as a matter of law (even if converted to a motion for

summary judgment) because Defendants in their Motion and the attachments thereto admit that when Ms. Mestek attempted to make use of the appeal rights LCO-CHC ostensibly provided, see Defendants' Exhibit 2, Ms. Mestek's appeal letter, LCO-CHC informed Ms. Mestek that she was not entitled to make use of those appeal rights, Defendants' Exhibit 3. Therefore, Ms. Mestek should be either deemed to have exhausted her LCO-CHC offered remedies (whether tribal or otherwise), or in the alternative the Court should conclude that any further attempts at such exhaustion of LCO-CHC provided remedies would be futile and therefore not required.[4]

Further, as with Defendants' motion based on the ground of tribal sovereign immunity, if Defendants' motion to dismiss based on alleged failure to exhaust tribal remedies is not denied, it must also be resubmitted in proper form as a motion for summary judgment in compliance with this Court's Summary Judgment Procedures (specified in the attachment to this Court's Preliminary Pretrial Order) which will allow Ms. Mestek to properly respond to this motion. *See, e.g., Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992). Prior to such resubmission, the Court should allow discovery, as contemplated in the recently entered Preliminary Pretrial Order.

Conclusion and Relief Requested

For all of the foregoing reasons, Defendants' Motion to Dismiss should be denied or, in the alternative, converted to a motion for summary judgment and resubmitted after a reasonable period in which Ms. Mestek may conduct discovery consistent with the recently entered Preliminary Pretrial Order.

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[4] "We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' cf. *Juidice v. Vail*, 430 U.S. 327, 338, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

Dated this 8th day of February, 2022.

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