No. 22-2077

In the United States Court of Appeals For the Seventh Circuit

TERESSA MESTEK,

Plaintiff-Appellant,

v.

LAC COURTE OREILLES COMMUNITY HEALTH CENTER, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 21-cv-541-wmc
The Honorable William M. Conley, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES LAC COURTE OREILLES COMMUNITY HEALTH CENTER, *et al.*

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2077

Short Caption: Teressa Mestek v. Lac Courte Oreilles Community Health Center, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Lac Courte Oreilles Community Health Center, Louis Taylor, Jacqueline Bae, Shannon Starr, Sarah Klecan, David Franz, and Michael Popp

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hogen Adams PLLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Andrew Adams III Date: January 23, 2023

Attorney's Printed Name: Andrew Adams III

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/Peter Rademacher Date: January 23, 2023

Attorney's Printed Name: Peter J. Rademacher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/Leah K. Jurss Date: January 23, 2023

Attorney's Printed Name: Leah K. Jurss

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Lorenzo E. Gudino Date: January 23, 2023

Attorney's Printed Name: Lorenzo E. Gudino

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Rules

Other

Jurisdictional Statement

The Plaintiff-Appellant's jurisdictional statement is complete and correct.

Statement of the Issues

Issue 1: In assessing a motion to dismiss based on failure to state a claim upon which relief can be granted, a district court may review the complaint (accepting all pleaded facts as true), exhibits attached thereto, and matters subject to judicial notice. Did the District Court err by not converting the Defendants-Appellees' motion to dismiss into one for summary judgment where the District Court only relied on the allegations in the Plaintiff-Appellant's complaint (accepting them as true) and the established, publicly available, Tribal Code of Laws?

Issue 2: Indian tribes, arms of Indian tribes, and tribal officials acting in their official capacity possess sovereign immunity from suit, unless Congress unequivocally expresses its intent to abrogate such immunity or an Indian tribe unequivocally expresses its intent to waive such immunity. Did the District Court err in dismissing Plaintiff-Appellant's complaint against Defendants-Appellees Tribal Defendants where Defendants-Appellees Tribal Defendants did not waive, and Congress did not abrogate, their sovereign immunity?

Issue 3: There is a presumption that a district court should not exercise supplemental jurisdiction over state claims when all federal claims are dismissed before trial. Did the District Court err in dismissing Plaintiff-Appellant's state claim against

Defendant-Appellee Popp, when all federal claims in the case were dismissed before trial?

Statement of the Case

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the "Tribe") is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2113 (Jan. 12, 2023). It established the Lac Courte Oreilles Community Health Center (the "LCO-CHC"), a "public body" and "subordinate entity of the Tribe" under the Tribal Code of Law—specifically, Title III, Chapter 5 of the Tribal Code of Law: Community Health Center Code. A-58. The LCO-CHC's ultimate mission is to "provide confidential quality family oriented healthcare in an environment that is respectful and fosters innovation . . . to maximize services to improve the overall health of the Tribal community." A-54. To that end, the Tribal Governing Board of the Tribe (the "TGB") enacted as law the LCO Community Health Center Personnel Policies and Procedures of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Tribal Code of Law, Title XIV, Chapter 5 (hereafter, "Title XIV"). A-48-137.

From 1994 to 2003 Teresa Mestek served as the Director of Health Information for the LCO-CHC. A-8. She then worked for another area hospital system before returning to the same position at the LCO-CHC in September 2013. A-8. During Mestek's second tenure, the LCO-CHC implemented a system called Greenway Intergy EHR (the

"Greenway System"), with the assistance of Michael Popp of MJP Healthcare Consulting. A-9-11. Implementation was completed in January 2017. A-11. According to Mestek, the Greenway System created billing errors, and she and others reported this issue to the LCO-CHC management, Popp, and the TGB. A-14, 20-23, 28-30. The problems leading to these alleged billing errors were not corrected over time, and Mestek's and other's efforts to report on the alleged resulting false claims escalated. A-18. In particular, she cooperated with James Walker of Manning & Walkers' Consulting Services, LLC, in an audit of 2017 billings, resulting in a formal report issued to the LCO-CHC management and the TGB. A-17-18, 20-21, 23.

On August 24, 2018, the LCO-CHC terminated Mestek's employment. A-23-24. Three years later, Mestek filed suit in federal court against the LCO-CHC, various tribal officials, including Tribal Chairman Louis Taylor, Health Director Jacqueline Bae, Medical Director Shannon Starr, Human Resources Director Sara Klecan, Information Technology Director David Franz (collectively, the "Tribal Officials" and with the LCO-CHC the "Tribal Defendants"), and consultant Michael Popp. A-3. Mestek alleged that the Tribal Defendants retaliated against her for whistleblowing in violation of the False Claims Act, specifically 31 U.S.C. § 3730(h) and separately alleged that all the Tribal Officials and Popp were interfering with her current and prospective contracts. A-27, 34, 35.

In lieu of an answer, the Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), arguing, among other things, that the Tribal Defendants are immune to Mestek's suit and that exercise of subject-matter jurisdiction over the supplemental state claim against Popp (the only person not immune to suit) would be inappropriate considering dismissal of all federal claims. Dkt. 22 at 8-14. The District Court for the Western District of Wisconsin, the Honorable William M. Conley presiding, granted the motion. SA-2, 16. The District Court held that the Tribal Defendants were immune to suit because the LCO-CHC is an arm of the Tribe and shares its sovereign immunity and the relief Mestek requested against the Tribal Officials was actually relief against the LCO-CHC or the Tribe. SA-8-15. Finally, the District Court dismissed the remaining discretionary supplemental jurisdiction state claim against Popp. SA-15-16.

This appeal follows.

Summary of Argument

I. On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a district court may consider the allegations in the complaint, exhibits to a complaint, and matters subject to judicial notice, accepting the allegations in the complaint as true, and drawing all reasonable inferences in favor of the plaintiff. Applying this framework, a district court must determine if a complaint states a plausible claim for relief.

Here, the District Court only considered the allegations in the complaint and two documents that were subject to judicial notice. In fact, it declined to consider other

exhibits specifically to ensure that its review under Fed. R. Civ. P. 12(b)(6) was proper. The District Court carefully assessed whether the allegations, which it accepted as true, aligned with the documents subject to judicial notice sufficed to make out plausible claims for relief. Thus, the District Court did not err in its application of Fed. R. Civ. P. 12(b)(6).

II. An Indian tribe possesses sovereign immunity from suit unless either Congress or it has unequivocally expressed otherwise. Furthermore, numerous Courts of Appeals have recognized that arms of Indian tribes share their sovereign immunity. And it has long been settled that tribal officials, acting in their official capacities, are immune from suit.

Here, Mestek has not argued (at least in any meaningful way) that the Tribe waived its, the LCO-CHC's, or the Tribal Officials' sovereign immunity. And the only federal statute at issue, Section 3730(h), lacks an unequivocal expression of congressional intent to abrogate tribal sovereign immunity. Thus, to the extent that the LCO-CHC and the Tribal Officials can assert sovereign immunity, it stands against Mestek's claims.

Turning to the LCO-CHC, numerous Courts of Appeals have agreed upon certain factors for determining whether an entity is an arm of an Indian tribe and therefore possessing sovereign immunity. Here, those factors weigh heavily in favor of the conclusion that the LCO-CHC is an arm of the Tribe and shares its sovereign

immunity. And while Mestek argues that she is entitled to discovery on this issue, she has not questioned the authenticity or correctness of Title II and Title XIV upon which the District Court relied in its analysis. Furthermore, she has not explained what type of discovery she would seek or how it might benefit her case. Thus, she has failed to argue any prejudice. Therefore, the District Court properly concluded that the LCO-CHC is immune to Mestek's claims.

Finally, courts recognize that tribal officials are immune to suit when acting in their official capacity. And in assessing this question, courts look to whether the sought relief would run against the tribal official or against the tribe itself. Here, the District Court noted that Mestek made no argument on the issue of the Tribal Officials' immunity in response to the Defendants' motion to dismiss. Despite recognizing the District Court's observation, Mestek has failed to identify how she properly raised this issue in her response to the Defendants' motion to dismiss. Therefore, the issue is not properly before this Court for review. Without waiving that point, as the District Court observed, the relief that Mestek seeks is largely against the LCO-CHC, and the Tribe. This is also true because Mestek's federal claims can only be brought against an employer, such as the LCO-CHC, not employees, such as the Tribal Officials. Therefore, Mestek's claims against the Tribal Officials must be treated as claims against them in their official capacities, and the District Court correctly concluded that they were immune to such claims.

III. When a district court dismisses all federal claims before trial, there is a presumption that it should not exercise supplemental jurisdiction over any remaining state claims. Here, the District Court properly dismissed all of Mestek's federal claims at the pleading stage of the case. Therefore, it acted within its discretion to dismiss Mestek's remaining state claim against Popp.

Standard of Review

This Court reviews "de novo a district court's grant of a motion to dismiss" for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Of course, in doing so, this Court must "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." *Id.* But it must also ensure that the complaint provides "enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through [its] allegations, *show that it is plausible, rather than merely speculative*, that [the plaintiff] is entitled to relief." *Id.* at 1083 (quotation omitted) (emphasis added).

This Court reviews a "district court's refusal to exercise supplemental jurisdiction over . . . state-law claims for an abuse of discretion." *Montano v. City of Chicago*, 375 F.3d 593, 601 (7th Cir. 2004).

Argument

I. The District Court correctly applied the Fed. R. Civ. P. 12(b)(6) standard because it considered—and accepted as true—the allegations in the complaint and two documents subject to judicial notice.

The Court correctly took judicial notice of the Tribe's Tribal Code of Law when granting the Tribe's motion to dismiss. As publicly available documents attached to Tribal Defendants' motion, the District Court was not required to convert the Fed. R. Civ. P. 12(b)(6) motion to a motion for summary judgment under Fed. R. Civ. P. 56. Further, Mestek mistakenly argues the District Court failed to accept as true the amended complaint's allegations. The Court addressed the solitary factual dispute presented on appeal and found it irrelevant to the questions of law that demanded dismissal.

A. The District Court did err by declining to convert the Defendants' motion to dismiss into a motion for summary judgment because it limited its review to the allegations in the complaint and two documents subject to judicial notice.

Mestek argues that the District Court erred by declining to turn the Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) into a motion for summary judgment under Fed. R. Civ. P. 56 because it considered matters outside of the complaint. Mestek is wrong.

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "courts must consider the complaint in its entirety, *as well as other sources courts ordinarily examine when ruling on a Rule 12(b)(6) motion to dismiss*, in particular, documents incorporated into the complaint

by reference, *and matters of which a court may take judicial notice*." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (emphasis added). This Court has expressly approved this approach time and again. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). "And taking judicial notice of matters of public record need not convert a motion to dismiss into a motion for summary judgment." *Fosnight v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022) (quotation omitted); *see also Radaszewski v. Maram*, 383 F.3d 599, 600 (7th Cir. 2004); *Peters v. Zhang*, 803 Fed. App'x 957, 958 (7th Cir. 2020).

When ruling on the Defendants' motion to dismiss, the District Court only considered the allegations in the complaint and two titles of the Tribal Code of Law.[1] As the District Court explained, these titles—the Sovereign Immunity Code of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Title II, Chapter 5 (hereafter, "Title II") and Title XIV—"are a matter of public record, allowing the court to consider [them] without converting the defendants' motion to dismiss to one for summary judgment." SA-10. The District Court was correct. Title II and Title XIV are both laws enacted by the Tribe and made publicly available on the Tribe's website, which contains a government-agency domain. Lac Courte Oreilles Law Library, *Lac Courte Oreilles*

[1] Although the Defendants included additional exhibits in their motion to dismiss, the District Court declined to consider them specifically to avoid the need to convert the Defendants' motion to dismiss into a motion for summary judgment. SA-9.

Tribal Code of Law, https://law.lco-nsn.gov/us/nsn/lco/council/code (current through Dec. 12, 2022).

Despite this Court's precedent on the issue, Mestek claims that the District Court erred by not converting the Defendants' motion to dismiss to one for summary judgment under Fed. R. Civ. P. 12(d) and 56. Specifically, Mestek claims that the District Court erred in concluding that it could consider Title II and Title XIV under Fed. R. Civ. P. 10(c) because they were not central and critical to her claims but instead only relevant to the Tribal Defendants' sovereign-immunity defense. Appellant's Br. at 25. There are two problems with Mestek's position. First, Mestek fails to recognize that the District Court did not only consider Title II and Title XIV because they are central and critical to her claims but also because they are subject to judicial notice. SA-9 ("While courts, including those in the Seventh Circuit, have narrowed [the Fed. R. Civ. P. 10(c)] exception to documents referred to in plaintiff's complaint and central to his claim, *a court may take judicial notice of documents in the public record without converting a motion to dismiss into a motion for summary judgment*." (quotations and citations omitted) (emphasis added)); SA-10 (noting that regardless of whether Title II and Title XIV are central to Mestek's claims, "the governing documents are a matter of public record, allowing the court to consider [them] without converting defendants' motion to dismiss to one for summary judgment'). At best, Mestek seems to suggest that a matter is only subject to judicial notice if it is central and critical to her claim. Appellant's Br. at 25.

But the central-and-critical inquiry only relates to documents attached to a complaint. *See* Fed. R. Civ. P. 10(c); *see also McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006) ("From [Fed. R. Civ. P. 10(c), we have concluded documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." (quotations omitted)). Mestek has cited no authority to the contrary. And as discussed above, this Court has repeatedly approved consideration of matters subject to judicial notice.

Notably, it was appropriate for the District Court to consider these matters at the motion-to-dismiss stage because the defense of sovereign immunity "bears the characteristics of immunity from trial and the attendant burdens of litigation," and is thus "a threshold ground for denying audience to a case on the merits." *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 822 (7th Cir. 2016) (quotations omitted). For this reason, the defense of sovereign immunity is regularly raised on motions to dismiss. *See, e.g.*, *id.* at 820, 827; *Genskow v. Prevost*, 825 Fed. App'x 388, 390 (7th Cir. 2020). Therefore, it was appropriate for the District Court to take judicial notice of Title II and Title XIV in order to address the Defendants' motion to dismiss.

Additionally, as the District Court explained, Mestek herself alleged that the Tribe's governance over the LCO-CHC was integral to her claims. SA-10. For instance, the District Court noted that Mestek "herself alleges that, '[d]uring the times relevant to this complaint including 2017 and 2018, LCO-CHC acted *de facto* as a business entity

independent of the LCO Tribe.'" SA-10 (quoting A-6). Mestek also expressly observed that the Tribal Defendants may be entitled to sovereign immunity. A-8, 33, 36. Ultimately, Mestek's claims were inextricably tied to the governance structure between the Tribe and the LCO-CHC and the ultimate question of the Tribal Defendants' sovereign immunity. *McCready*, 453 F.3d at 891. Thus, the Court correctly considered Title II and Title XIV under Fed. R. Civ. P. 10(c) in resolving the Defendants' motion to dismiss.

Next, Mestek seems to argue that that other, outside facts were considered by the Court in deciding the motion. Appellant's Br. at 25. This argument ignores the Court's express refusal to consider any other exhibits: "While defendants attached other exhibits to their briefing, given the fact that these other documents were *not* considered for purposes of this opinion and are closer calls as to whether the court should consider them at the motion-to-dismiss stage, the court will only take judicial notice of [Title II] and [Title XIV]." SA-9. The District Court did not rely on any other outside matters when granting the Defendants' motion to dismiss.

In summary, the District Court limited its review of the Defendants' motion to dismiss to the complaint and two documents that were subject to judicial notice: Title II and Title XIV. SA-9. Therefore, the District Court did not err by declining to convert the Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) to one for summary judgment under Fed. R. Civ. P. 56.

B. The District Court correctly applied the standard for a motion to dismiss for failure to state a claim because it accepted Mestek's factual allegations as true and drew all reasonable inferences in her favor.

"In reviewing a dismissal under [Fed. R. Civ. P. 12(b)(6)]," this Court accepts "as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff." *Parungao v. Cmty. Health Sys., Inc.*, 858 F.3d 452, 457 (7th Cir. 2017). To survive a motion to dismiss, the "complaint must state a claim to relief that is plausible on its face." *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 862 (7th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "But when it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law, dismissal is appropriate." *Parungao*, 858 F.3d at 457 (quotation omitted).

Mestek stresses on appeal that the District Court failed to take her allegation as true concerning which of the Tribal Officials signed her termination letter. Appellant's Br. at 28. Mestek argues that the District Court's failure stripped her of a *ultra vires* claim against Starr. Appellant's Br. at 29. In her Amended Complaint, Mestek alleged that Starr physically signed the termination letter over Bae's typed name. A-6-7. She claimed that Bae did not make the decision to fire her, and instead that Starr did so as an *ultra vires act* unapproved by the TGB. A-6-7. Mestek makes only the barest of reference to this allegation in her Amended Complaint. A-23-24, 35. Regardless, the District Court accepted this allegation as true: "Plaintiff . . . claims that Medical Director

Starr was actually the one who fired her, *but even if this were true (at least directly), Starr was required by the Tribal Code to 'report to the Health Director [Bae] on all matters regarding patient care and the supervision of medical personnel*.'" SA-12 (quoting A-60-61) (emphasis added). On appeal, Mestek manipulated this passage by omitting the emphasized language, *see* Appellant's Br. at 28-29, which clearly indicates that the District Court accepted Mestek's allegation as true.

Mestek also argued that the District Court erroneously relied on Title II and Title XIV to determine facts about the actual management of the LCO-CHC by the Tribe. *Id.* at 29. Mestek does not claim that Title II and Title XIV are inauthentic or incorrect, nor does she identify specifically how Title II and Title XIV is inconsistent with the allegations in her complaint or what other facts might contradict Title II and Title XIV. *See* Appellant's Br. at 29. In fact, Mestek's complaint contains numerous allegations that are consistent with Title II and Title XIV, notably that Mestek and others made numerous attempts to report erroneous billings to the TGB in order to ensure that they were addressed. A-6, 18, 23, 29, 30, 34. Even Mestek's decision to name Taylor, whose only role is as Chairman of the TGB, as a defendant in this case is consistent with the management structure outlined in Title II and Title XIV. A-5.[2]

[2] This issue is discussed further in Section II, *infra*.

In summary, the District Court accepted Mestek's allegations and true and drew all reasonable inferences in her favor. Therefore, it applied the correct standard when dismissing her claims under Fed. R. Civ. P. 12(b)(6).

II. The District Court did not err in determining that the Tribal Defendants could not be sued under Section 3730(h).

The district court dismissed Mestek's claims under the False Claims Act, specifically Section 3730(h), against the Tribal Defendants based on tribal sovereign immunity. Mestek brings numerous arguments for reversal of this decision, none of which have merit.

A. Section 3730(h) does not abrogate tribal sovereign immunity.

Section 3730(h) provides as follows:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

Mestek argues that this language is broad in its application because it does not use the term "person" or even "employer." Appellant's Br. at 38-40. Thus, Mestek argues, it applies to Indian tribes. *Id.* But Mestek misses the point. Whether or not Section 3730(h) applies to Indian tribes is an entirely separate question from whether Indian tribes are immune to suit under Section 3730(h). *See Kiowa Tribe v. Manufacturing Tech. Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand

compliance with state laws and the means available to enforce them."); *Meyers*, 836 F.3d at 827 (concluding that the question of whether a federal statute applies to an Indian tribe is different from the question of whether an Indian tribe is immune to suit under that federal statute); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (noting that "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions").

In fact, Mestek takes her misunderstanding so far, that she dedicates an entire section of her brief to "a question of first impression" that is not before this Court. *See* Appellant's Br. at 38-40. Specifically, she claims that the District Court concluded that Section 3730(h) does not apply to Indian tribes. *Id.* It did no such thing. Instead, it concluded that Section 3730(h) did not unequivocally express congressional intent to abrogate tribal sovereign immunity. SA-6-8. Indeed, the District Court highlighted an omission from Mestek's analysis of *Slack v. Washington Metropolitan Area Transit Authority*, 325 F. Supp. 3d 146 (D.D.C. 2018), to make this point. As the District Court observed, while the *Slack* court concluded that Section 3730(h) may apply to a sovereign (in that case, an interstate agency), it does not abrogate sovereign immunity. *Slack*, 325 F. Supp. 3d at 151-53. Even the heading for the District Court's analysis shows that its decision was based on sovereign immunity, not applicability of Section 3730(h) to sovereigns. SA-6. Thus, this Court need not address this "question of first impression"

because it was not a basis for the District Court's dismissal and is not properly before this Court.

Instead, the proper question is whether the District Court correctly concluded that Section 3730(h) does not unequivocally express Congress' purpose to abrogate tribal sovereign immunity. And while Mestek appears to have misunderstood this point, she nevertheless directs this Court to case law to suggest that she should be able to proceed with her claims under Section 3730(h), presumably based on an abrogation of tribal sovereign immunity. She is wrong.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As such, they possess and continue to exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). And among "the core aspects of [this] sovereignty . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014); *see also Citizen Band Potawatomi*, 498 U.S. at 509. This immunity is a "necessary corollary to Indian sovereignty." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

To be sure, Indian tribes are now treated as "domestic dependent nations," and remain subject to "plenary control by Congress." *Bay Mills*, 572 U.S. at 788. Thus, "Congress has always been at liberty to dispense with [tribal sovereign immunity] or

limit it." *Citizen Band Potawatomi*, 498 U.S. at 510. But, Congress has "consistently reiterated its approval of the immunity doctrine," reflecting its "desire to promote the goal of Indian self-government." *Id.* (quotation omitted).

Against this legal and policy backdrop, the Supreme Court has "treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization." *Bay Mills*, 572 U.S. at 789 (quotation omitted). And in delineating the standard for finding congressional authorization for suit against Indian tribes, the Supreme Court has spoken in no uncertain terms: "The baseline position … is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." *Id.* at 790 (emphasis added). In other words, an intent to abrogate "cannot be implied." *Martinez*, 436 U.S. at 58 (quotations omitted). "Congress' words must fit like a glove in their unequivocality." *Meyers*, 836 F.3d at 827. "That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. And it highlights the significance of the issue here: "Determining the limits on the sovereign immunity held by Indian tribes is a grave question . . . ." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

In rare instances, Congress has indeed "authorized limited classes of suits against Indian tribes." *Citizen Band Potawatomi*, 498 U.S. at 510. But in those

circumstances, it has unequivocally expressed that purpose by explicitly referencing Indian tribes in the relevant statutes. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe"); Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), 3002(10) (allowing garnishment proceedings against a "person," which includes "a natural person (including an individual Indian) . . . or an Indian tribe"). Here, no unequivocal expression of congressional intent to abrogate tribal sovereign immunity exists. One decision from this Court is instructive.

In *Meyers*, this Court was asked whether the Fair and Accurate Credit Transaction Act ("FACTA") abrogated tribal sovereign immunity. 836 F.3d at 819-21. Relevant to the case, FACTA provides that "[n]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction," 15 U.S.C. § 1681c(g)(1), and that a "person" means "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity," 15 U.S.C. § 1681a(b). The plaintiff argued that these provisions abrogated tribal sovereign immunity because "person" was defined as "any . . . government." *Meyers*, 836 F.3d at 826. This Court disagreed, noting that the plaintiff had "lost sight of the real question"

of "whether an Indian tribe can claim immunity from suit." *Id.* at 826-27. It went on to note that the answer to that question must be "'yes' unless Congress has told us in no uncertain terms that it is 'no.'" *Id.* at 827. And it explained that an abrogation "may not be implied" and "must fit like a glove in [its] unequivocality." *Id.*

Mestek impliedly asks this Court to look to *Wilkins v. St. Louis Housing Authority*, 314 F.3d 927 (8th Cir. 2002), for the proposition that Section 3730(h) expands its reach far enough to reach Indian tribes. Appellant's Br. at 38. But *Wilkins* involved application of Section 3730(h) to a municipal corporation, *Wilkins*, 314 F.3d at 928, which is not an entity entitled to sovereign immunity. *See Cassell v. Snyders*, 990 F.3d 539, 551-52 (7th Cir. 2021) ("In general, the Eleventh Amendment does not apply to counties and similar municipal corporations." (quotations omitted)). This Court should see *Wilkins* as inapposite and instead look to *Slack*, which as previously mentioned concluded that, while Section 3730(h) may be written broadly enough to reach a sovereign (in that case, an interstate agency), it did not abrogate sovereign immunity. 325 F. Supp. 3d at 151-53; *see also Monroe v. Fort Valley State Univ.*, 574 F. Supp. 3d 1307, 1314 (M.D. Ga. 2021) ("Simply put, § 3730(h) is devoid of any intent, much less unmistakably clear intent, to abrogate Eleventh Amendment immunity.").

Mestek also points this Court to *In re Coughlin*, 33 F.4th 600 (1st Cir. 2022). Appellant's Br. at 39-40. There are a variety of reasons why this Court should decline Mestek's invitation. First, the Supreme Court granted certiorari in *Coughlin*, calling into

question its correctness and finality. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 598 U.S. ___ , 2023 WL 178401 (2023). Second, the *Coughlin* court expressly rejected this Court's decision in *Meyers* "to the extent that the same logic" applied to the Sixth Circuit's decision in *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), which adopted the reasoning in *Meyers*. *Coughlin*, 33 F.4th at 608 n.8. Thus, *Coughlin* is at odds with prevailing precedent in this Court, and Mestek has not provided "a compelling reason" for this Court "to overturn [that] circuit precedent." *McClain v. Retail Food Emps. Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005). Third, while the Defendants disagree with the First Circuit's decision in *Coughlin*, the applicable statutes in that case presented a different question than the one here. *Coughlin* involved provisions of the Bankruptcy Code, which provided as follows:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set for in [Section 362, regarding violations of automatic stays in bankruptcy proceedings].

11 U.S.C. § 106

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27).

Collectively, these provisions at least reference an abrogation of sovereign immunity and some types of sovereigns. Thus, there is no question that an abrogation

of sovereign immunity exists. Instead, the question presented in that case is whether that abrogation applies specifically to Indian tribes.

Here, Section 3730(h) references neither an abrogation of sovereign immunity nor any type of sovereign and does not otherwise provide a hint of congressional intent to abrogate tribal sovereign immunity. Thus, put simply, "Congress' words" do not "fit like a glove in their unequivocality" as to whether it intended to abrogate tribal sovereign immunity under Section 3730(h). *Meyers*, 836 F.3d at 827. Put differently, this Court cannot say with "perfect confidence" that Congress intended to abrogate tribal sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). Under prevailing circuit precedent, and controlling Supreme Court precedent, this Court must conclude that Congress has not unequivocally expressed its purpose to abrogate tribal sovereign immunity under Section 3730(h).[3]

[3] In its statement of the case section of her brief, Mestek makes a passing reference to the LCO-CHC's acceptance of Medicare funds that she claims resulted in a waiver of its sovereign immunity. Appellant's Br. at 19. But Mestek cites no legal authority for this proposition and makes no argument on this point or other argument that the LCO-CHC waived its sovereign immunity in the argument section of her brief. This "underdeveloped, conclusory, and unsupported" assertion in the statement of the case section of her brief is therefore a forfeited argument on appeal. *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012). Without waiving the argument, the Defendants note that Mestek only argues that the act of accepting Medicare funds resulted in a waiver of its sovereign immunity, not that the LCO-CHC actually waived its sovereign immunity as part of an agreement to receive Medicare—nor did she allege such facts. *See* Appellant's Br. at 19; *see also* A-8. The Eighth Circuit has already addressed this type of argument, concluding that a contract between a tribal housing authority and the Department of Housing and Urban Development ("HUD") that required the tribal housing authority to comply with civil rights requirements did not constitute a waiver of sovereign immunity without some type of regulations "mandating a waiver of sovereign immunity when a tribal housing authority enters into an agreement with HUD." *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 584

B. The LCO-CHC is an arm of the Tribe and shares the Tribe's sovereign immunity.

Buried within various points of her brief, Mestek at least impliedly argues that the District Court erred by concluding that the LCO-CHC shares the Tribe's sovereign immunity at this stage of the case. Appellant's Br. at 26, 29 (arguing that the District Court's reliance on Title II and Title XIV led to it "incorrectly concluding . . . that the [LCO-CHC] acted as an arm of the [Tribe]"). The major premise underlying Mestek's argument is that the District Court erred by taking judicial notice of Title II and Title XIV. For the reasons discussed in Section I(a), *supra*, the District Court did not err by taking judicial notice of Title II and Title XIV. And for the reasons discussed below, the District Court reached the correct conclusion about the LCO-CHC's status as an arm of the Tribe.

This Court has "not yet had occasion to consider the application of the 'arm of the tribe' test." *Holtz v. Oneida Airport Hotel Corp.*, 826 Fed. App'x 573, 574 (7th Cir. 2020). But it has acknowledged that the prevailing view among courts is that tribal entities may share tribal sovereign immunity. *See, e.g., Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 n.7 (7th Cir. 2011) (noting that the parties'

(8th Cir. 1998); *see also Hagen v. Sisseton-Wahpeton Comm. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000). Mestek made no such allegation in her complaint, nor is it reasonable to infer such an allegation without some type of supporting facts. And as the Supreme Court has explained, "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58. Even if the LCO-CHC agreed to abide by federal law, the simple act of agreeing to abide by federal law itself cannot and does not constitute a waiver of tribal sovereign immunity. *See Dillon*, 144 F.3d at 584.

assumption that a tribal corporation shares the tribe's sovereign immunity "is compatible with the general assumption prevailing among courts and commentators").

For instance, in *Hagen* the Eighth Circuit concluded that a college "chartered, funded, and controlled by the Tribe to provide education to tribal members on Indian land" "serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity." 205 F.3d at 1043. Similarly, in *Dillon* the Eighth Circuit decided to treat "a housing authority, established by a tribal council pursuant to its powers of self-government," as a tribal agency, "rather than a separate corporate entity." 144 F.3d at 583; *see also Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986). And in *Pink v. Modoc Indian Health Project, Inc.*, the Ninth Circuit determined that an intertribal nonprofit corporation with which Indian Health Services entered an Indian self-determination contract to provide health services to tribal members was immune to suit as an arm of both tribes that formed it. 157 F.3d 1185, 1187-88 (9th Cir. 1998); *see also Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375-76 (10th Cir. 1986); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1124-26 (10th Cir. 1999) (concluding that housing authority shared the tribe's sovereign immunity because it was "an enterprise designed to further the economic interests of the . . . tribe, and the tribe [had] exclusive control over the appointment and removal of its decisionmakers"); *Thomas v. Choctaw Mgmt. Servs. Enter.*, 313 F.3d 910, at 911-12 (5th Cir. 2002) (stating that a tribal enterprise shared the tribe's sovereign

immunity because it was a "direct proprietary enterprise" of the tribe, "from which it is legally inseparable"); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) ("[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.").

Here, the District Court, observing that this Court has not laid out its own test for assessing when a tribal entity shares the Tribe's sovereign immunity, applied the Ninth Circuit's adaptation of a test first established by the Tenth Circuit:

> In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," we examine several factors including: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

White v. Univ. of Cali., 765 F.3d 1010, 1025 (9th Cir. 2014) (quoting *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).[4] Mestek does not argue that the District Court's reliance on these factors was error. And in fact they largely have been adopted by the Fourth, Ninth, and Tenth Circuits. *Breakthrough*, 629 F.3d at 1187 (establishing the five factors cited in *White*, as well as a sixth factor, "whether the purposes of tribal sovereign immunity are served by granting them immunity"); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019)

[4] Although the District Court specifically cited *White*, the Defendants refer to this as the *Breakthrough* test because of its origination and commonly referenced name.

(adopting the first five factors established in *Breakthrough* consideration of the sixth element throughout its analysis). And as the District Court found, these factors weigh in favor of concluding that the LCO-CHC is an arm of the Tribe and shares in its sovereign immunity.

Turning to the first factor, method of creation, the District Court concluded that the "LCO-CHC was organized through the Tribal Code of Law, which sets out LCO-CHC hiring, HR and management practices, among other things." SA-11 (citing A-48-137). Indeed, the LCO-CHC is a "public body established" by the Tribe "as a subordinate entity of the Tribe" under the Tribal Code of Law. A-58. In *White*, the Ninth Circuit weighed the tribes' creation of the tribal entity under their sovereign authority, as is the case here, as a factor supporting extending their sovereign immunity to the entity. 765 F.3d at 1025. And in *Breakthrough*, the Tenth Circuit found relevant that the tribe referred to the entities as a "subordinate entities of the Tribe" to "emphasize that they are . . . not separate corporations," again as the case here. 629 F.3d at 1192. Thus, the LCO-CHC's method of creation weighs in favor of a conclusion that it is an arm of the Tribe and shares in the Tribe's sovereign immunity.

Turning to the second factor, the purpose of the entity, the District Court concluded that the "express purpose of LCO-CHC is to 'provide confidential quality family oriented healthcare in an environment that is respectful and fosters innovation utilizing available resources to maximize services to improve the overall health of the

Tribal community.'" SA-11 (quoting A-53-54). Furthermore, the LCO-CHC strives to "provide excellence in compassionate health care, while educating the community utilizing an understanding of traditional Anishinaabe beliefs." A-53. In *Breakthrough*, the Tenth Circuit found relevant that a significant portion of the revenues generated by the economic entities were used to fund "tribal governmental functions, including programs such as education, *health care*, [and] cultural preservation." 629 F.3d at 1192 (emphasis added). It went on to highlight that the purpose of one of the economic entities, as memorialized in a memorandum of understanding between the tribe and local government, was "to promote the Tribal . . . self-sufficiency, self-determination, strong Tribal government, and the ability to provide services and benefits to Tribal members." *Id.* at 1193 (quotation omitted).

Here, the purpose and operation of the LCO-CHC is even more closely aligned with tribal self-determination than the entities in *Breakthrough*. Instead of generating revenues to fund essential governmental services, like healthcare, the LCO-CHC is the entity that directly provides those essential governmental services, including education, healthcare, and cultural preservation to tribal members. These services are "core to the notion of sovereignty. Indeed, the preservation of tribal cultural autonomy and preservation of self-determination, are some of the central policies underlying the doctrine of tribal sovereign immunity." *White*, 765 F.3d at 1025 (quotations omitted).

Thus, the purpose of the LCO-CHC weighs in favor of a conclusion that it is an arm of the Tribe and shares in the Tribe's sovereign immunity.

Turning to the third factor, the structure, ownership, and management of the entity, the relevant inquiries "are the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities." *Williams*, 929 F.3d at 182. Here, the District Court concluded as follows:

> Under the Tribal Code of Law, the Health Director, who at the time of the incident was Jacqualyn Bae, is "responsible for the planning, organization, and administration of all tribal health services and shall oversee all matters relating to program requirements including daily operations of the LCO-CHC." Title XIV, Section § 5.305. The Health Director also reports directly to the Tribal Governing Board. *Id.* Similarly, regarding hiring, "[t]he Health Director will notify the Tribal Governing Board who was hired for what position(s) and/or if a position(s) was reposted." Title XIV, Section § 5.411.

SA-11 (quoting A-58-59, 67).

The LCO-CHC is a "subordinate entity of the Tribe" and thus not separate from the Tribe. A-58. And the TGB possesses ultimate supervisory authority over the LCO-CHC. The LCO-CHC's policies and procedures are adopted and codified by the TGB. A-49, 53, 136-37. Only the Tribe, acting through the TGB, can consent to suit on behalf of the LCO-CHC. A-58. Furthermore, the TGB has established an advisory board and, as the District Court noted, a management position that operate under its supervision.

First, the LCO-CHC has a Health Advisory Board that serves "in an advisory capacity to the Tribal Governing Board . . . to promote comprehensive planning, delivery of health services and evaluation of health programs" and provides

recommendations regarding policies "as requested by the . . . Tribal Governing Board." A-58.

Second, the LCO-CHC is headed by a Health Director, who is "responsible for the planning, organization, and administration of all tribal health services" and overseeing "all matters relating to program requirements including daily operations of the LCO-CHC." A-59. But the Health Director is responsible to report to the TGB "regarding the management of all health care programs and personnel," advising the TGB "concerning matters affecting contracting, program activities, new initiatives, staffing and policy changes," directly reporting to the TGB regarding "progress in accomplishing activities," and carrying out "the mandate of the Tribal Governing Board pursuant to initiatives of the Tribe." A-59.

While the TGB has delegated day-to-day operations to an internal management team, it notes that it "possesses the inherent sovereign authority to delegate oversight and management responsibilities to program directors for the planning and daily operations of Tribal programs and entities." A-58. Furthermore, it has retained ultimate management authority by ensuring that the Health Director and the Health Advisory Board report directly to it. A-58-59. Finally, the TGB has exercised its ultimate oversight authority by adopting Title XIV and its predecessor versions. A-132-37. As in *Breakthrough*, where tribal council members served on the board of directors

for the entity, the circumstances here support a conclusion that the LCO-CHC is an arm of the Tribe and shares in the Tribe's sovereign immunity.

Turning to the fourth factor, whether the Tribe intended to confer its sovereign immunity on the entity, the District Court noted that Title XIV expressly provides that it shares the Tribe's sovereign immunity. SA-12 (quoting A-58). Title XIV states as follows:

> The Tribe is a sovereign nation, with inherent reserved rights recognized through federal treaties; as such the tribe exists within the geographical boundaries of the United States. Immunity from private lawsuits is one aspect of inherent tribal sovereignty. Pursuant to [Title II], mmunity from suit means that no private lawsuit can be maintained against the Tribe or any of its subordinate entities *such as the LCO-CHC*, unless the Tribe consents to the action. Nothing in this manual . . . constitutes a waiver of the Tribe's inherent sovereign immunity.

A-58 (emphasis added). As in *Breakthrough* and *Williams*, the Tribe's express intent for its sovereign immunity to extend to the LCO-CHC clearly weighs in favor of a conclusion that the LCO-CHC is an arm of the Tribe and shares in the Tribe's sovereign immunity. *See Breakthrough*, 629 F.3d at 1193-94; *Williams*, 929 F.3d at 184.

Turning to the fifth factor, the financial ties between the Tribe and the entity, the District Court found that the pleadings and Tribal Code of Laws did not provide enough information to weigh this factor for or against treating the LCO-CHC as an arm of the Tribe. SA-12. But it is worth noting that Mestek alleges that the LCO-CHC budget included some funding from the Tribe. A-6. Mestek goes on to note that the LCO-CHC was largely funded by federal grants and "reimbursements from Medicare

and Medicaid programs." A-6. But Mestek also acknowledges that that some of the LCO-CHC's funding came from the Tribe. A-6. And Title XIV requires the Health Director to "[m]anage the LCO-CHC's budget including approval of expenditures, formulation of program budget requests, modification of contract expendictures and providing necessary information to the Tribal Accounting Department." A-60. So there is at least some tie between the finances of the LCO-CHC and the Tribe.

And although the district court did not address the sixth factor identified in *Breakthrough*, it is worth noting that "the overall purposes of tribal sovereign immunity," would be "served by a conclusion that [the LCO-CHC has] such immunity" because it is "so closely related to the Tribe that [its] activities are properly deemed to be those of the [Tribe]." *Breakthrough*, 629 F.3d at 1195 (quotation omitted). As the *Breakthrough* court explained, it is only in cases where tribes form economic entities designed solely for their own business purposes without any declared objective to promote tribal needs that courts have refused to extend tribal sovereign immunity. *Id.* Here, the purposes of the LCO-CHC are clearly tied to promoting the needs of the Tribe and its members. Therefore, this factor weighs in favor of treating the LCO-CHC as an arm of the Tribe that shares in its sovereign immunity.

Mestek argues that she should have been entitled to reasonable discovery to support the position that the LCO-CHC is not an arm of the tribe. Appellant's Br. at 29-31. There are a few issues with Mestek's position. First, the District Court is required

to determine whether there is a *plausible* claim for relief. *Ashcroft*, 556 U.S. at 678. Mestek has not argued that the Tribal Code of Law is inaccurate. And her sole allegation regarding the relationship between the Tribe and the LCO-CHC is that the LCO-CHC "acted *de facto* as a business entity independent of the LCO tribe." A-6. This is nothing more than a bare conclusion. Yet, despite her deficient allegations, Mestek impliedly argues that the LCO-CHC was handling the day-to-day operations without the TGB's direct oversight. Appellant's Br. at 30-31 (arguing that the District Court resolved a fact issue regarding the "day-to-day management" of the LCO-CHC). But again, the TGB explained that it had "inherent sovereign authority to delegate oversight and management responsibilities to program directors for the planning and daily operations of Tribal programs and entities," and it did so as discussed previously. A-58. An Indian tribe's decision to delegate management of day-to-day operations of a tribal entity to a management team is not evidence that the Indian tribe is not managing the entity. *See Williams*, 929 F.3d at 183. Furthermore, Mestek's complaint supports a conclusion that the TGB possessed ultimate management and supervision of the LCO-CHC. Specifically, she alleges that she and others were trying to report the alleged billing errors to the TGB. A-18, 21, 23. And Mestek has named Taylor as a defendant, despite the fact that he is the Chairman of the TGB, not part of the LCO-CHC's management team. A-3, 5. These allegations, coupled with Title XIV, cannot support a

plausible claim that the LCO-CHC is not an arm of the Tribe that shares in its sovereign immunity.

Moreover, while Mestek argues that she should have been entitled to discovery on the issue of the LCO-CHC status as an arm of the Tribe, she has provided no explanation regarding what evidence she would seek or how that evidence might weigh against a conclusion that the LCO-CHC is an arm of the Tribe. *See generally* Appellant's Br. Without having established any prejudice from the District Court's decision to decide the Defendants' motion to dismiss without opening up discovery, she has not established error on the part of the District Court. *See Breakthrough*, 629 F.3d at 1190 (noting that an absence of argument regarding prejudice eliminated a basis for reversal).

Because all of the factors under the *Breakthrough* test weigh in favor of concluding that the LCO-CHC is an arm of the Tribe, the District Court did not err in concluding that it shares the Tribe's immunity. And because there has been no abrogation or waiver of that immunity, the District Court properly dismissed Mestek's claims against the LCO-CHC.

C. The Tribal Officials are entitled to sovereign immunity because they are being sued in their official capacity.

1. The Tribal Officials are sued in their official capacity because the relief Mestek seeks would run against the LCO-CHC (and the Tribe).

"[I]n the context of lawsuits against state and federal employees . . . , courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clark*, 581 U.S. 155, 161-62 (2017). That rule applies equally "in the context of tribal sovereign immunity," where a lawsuit is brought against a tribal employee. *Id.* at 163. And in applying the rule, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 162. Here, Mestek seeks relief against the sovereign, not its officials, as evidenced by naming the LCO-CHC as a defendant.

This District Court dismissed Mestek's claims against the Tribal Officials based on their sovereign immunity. SA-13-15. On appeal, Mestek argues that the District Court erred by concluding that she sued the Tribal Officials in their official capacity; but as an important preliminary matter, the District Court observed that Mestek "herself [made] no argument on the matter of sovereign immunity" for the Tribal Officials, giving them "the sole word on this issue." SA-14. The District Court was right.

"Generally, failing to bring an argument to the district court means that you waive the argument on appeal." *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 601

(7th Cir. 2020) (quotation omitted); *see also Hale v. Victor Chu*, 614 F.3d 741, 744 (7th Cir. 2010) (noting that it is "well-established that a party waives the right to argue an issue on appeal if [she] fails to raise that issue before the trial court"). On appeal, Mestek had the burden "to demonstrate that *the arguments below* adequately developed the legal basis for her claim . . . and that the court erred in holding otherwise." *Krebs v. Graveley*, 861 Fed. App'x 671, 673 (7th Cir. 2021); *see also Soo Line*, 965 F.3d at 601. She has failed to meet that burden.

Mestek acknowledges that the District Court "perceived [her] as asserting no argument or basis for concluding that the [Tribal Officials] lacked sovereign immunity." Appellant's Br. at 31. And indeed, throughout her response to the Defendants' motion to dismiss, Mestek made no developed argument that the Tribal Officials were not entitled to sovereign immunity. *See generally* Dkt. 25. Even on appeal, Mestek relies almost solely on her complaint and new arguments not presented to the District Court as the basis for error. Appellant's Br. at 31-37. She simply has not responded to the District Court's conclusion that she did not address the Tribal Officials' sovereign immunity in her response to the Defendants' motion to dismiss, Appellant's Br. at 34-37, nor has she or can she pinpoint a developed argument that she presented to the District Court in her response to the Defendants' motion to dismiss, *see generally* Dkt. 25. Furthermore, Mestek has provided this Court no reason (or legal authority) to take up this issue for the first time on appeal. *See generally* Appellant's Br.

Because Mestek failed to develop an argument regarding the Tribal Officials' sovereign immunity before the District Court in response to the Defendants' motion to dismiss—as the District Court noted—this Court should not review it on appeal. Without conceding this position, the Defendants will address Mestek's argument out of an abundance of caution.

In her complaint, Mestek seeks reinstatement, front pay, back pay, lost benefits, interest, special and compensatory damages, costs and attorneys' fees, and injunctive relief prohibiting the Tribal Defendants from future retaliation, blacklisting, or interference with business. A-36-37. The vast majority of this relief would run against the LCO-CHC. Notably, reinstatement would mean that the LCO-CHC would have to re-employ Mestek. And front and back pay, benefits, interest, costs and attorney fees would run against the LCO-CHC, and ultimately the Tribe.

Another important reason why the relief sought would run against the LCO-CHC is that this Court has at least twice recognized that Section 3730(h) only provides for relief against an employer, not its employees. In *O'Shell v. Cline*, the district court dismissed person-capacity claims against employees of a state agency under Section 3730(h), reasoning that "because the defendants in their personal capacities were no [the plaintiff's] 'employer,' within the meaning of the federal False Claims Act, they were entitled to judgment on the claim." 571 Fed. App'x 487, 489-90 (7th Cir. 2014). This Court affirmed "for the reasons that the district court gave." *Id.* at 492.

Years later, this Court addressed claims against employees of the Oneida Housing Authority for violation of 41 U.S.C. § 4712, which provided as follows:

> An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing . . . information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

Delebreau v. Danforth, 743 Fed. App'x 43, 44-45 (7th Cir. 2018). This Court explained that the employees in their personal capacities "cannot discharge, demote, or discriminate in employment," and therefore, the "statute does not reach them." *Delebreau*, 743 Fed. App'x at 44-45. In doing so, it analogized to its previous interpretation of Section 3730(h). *Id.* For this reason, the relief that Mestek seeks, including injunctive relief, would run against the LCO-CHC, not the Tribal Officials. Therefore, Mestek's claims against the Tribal Officials under Section 3730(h) cannot be claims against the Tribal Officials in their personal capacities because those claims can only apply to employers, in this case, the LCO-CHC.

Furthermore, because the relief sought against the Tribal Officials under Mestek's state claim overlaps the relief sought under Section 3730(h), specifically, front pay, back pay, benefits, and an injunction against future retaliation or blacklisting, that claim too would run against the LCO-CHC. The Tribal Officials were acting in their

official capacities when they allegedly engaged in the conduct about which Mestek complains, so, as the District Court concluded, "her claims and requested relief establish that the real party in interest is LCO-CHC, an arm of the Tribe. Thus, defendants Taylor, Bae, Starr, Klecan, and Franz are entitled to assert the LCO-CHC's sovereign immunity." SA-15.

In conclusion, the Tribal Officials share the Tribe's sovereign immunity. And for the reasons discussed in Section II(a), there has been no abrogation or waiver of that sovereign immunity here. Therefore, the District Court correctly dismissed Mestek's claims against them.

2. This Court should not review Mestek's argument that she pleaded a basis for prospective injunctive relief against the Tribal Officials because she did not adequately present it to the District Court.

Mestek also argues that the District Court erred in dismissing her claims against the Tribal Officials because she could have obtained injunctive relief against them. Appellant's Br. at 32-34. As previously discussed, the District Court observed that Mestek made no argument on the issue of the Tribal Officials' sovereign immunity. SA-15. And again, Mestek does not even attempt to address this conclusion or otherwise identify arguments that she raised in her response to the Defendants' motion to dismiss. Appellant's Br. at 32-34. At best she makes a broad reference to her entire response to the Defendants' motion to dismiss as preserving this argument. Appellant's Br. at 33 (citing the entirety of its response to the Defendants' motion to dismiss for the claim

that Mestek "also asserted the injunctive relief exception to sovereign immunity defense). But nowhere in her response to the Defendants' motion to dismiss did she develop a discernable argument on this point. *See generally* Dkt. 25. Throughout the entirety of her response to the Defendant's motion to dismiss, she made a passing distinction between damages and injunctive relief, jumbled with a disjointed reference to *ultra vires* acts. Dkt. 25 at 11. But "a conclusory argument that amounts to little more than an assertion does not preserve a question" for this Court's review. *Soo Line*, 965 F.3d at 601. Mestek absolutely has not met her burden of showing that this argument was properly developed below and that the District Court erred in not addressing it. Therefore, this Court should not review it. *Hale*, 614 F.3d at 744.

III. The District Court properly dismissed Mestek's state claim against Popp because it dismissed all of Mestek's federal claims at an early stage of the case.

Mestek argues that the district court erred in dismissing her state claim against Popp for lack of subject-matter jurisdiction because she successfully established federal-question jurisdiction through her federal claims. Appellant's Br. at 37. Mestek is wrong.

Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction over a claim when "the district court has dismissed all claims over which it has original jurisdiction." And as the district court observed, "When all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will

relinquish federal jurisdiction over any supplemental state-law claims." *See Al's Serv. Ctr. v. BP Prod. N. Am., Inc.*, 599 F.3d 720, 727 (7th Cir. 2010).

For the reasons discussed in the preceding sections, the District Court properly dismissed all of Mestek's federal claims. And this case is in an early stage, well before trial. Therefore, the District Court was well within its discretion to dismiss the supplemental state claim against Popp. *See Montano*, 375 F.3d at 601; *see also* 28 U.S.C. § 1367(c).

Conclusion

The District Court issued a well-reasoned decision that correctly applied the standards for Fed. R. Civ. P. 12(b)(6) in its assessment of this case. Because the District Court properly concluded that tribal sovereign immunity bars Mestek's claims against the Tribal Defendants and acted within its discretion to dismiss the supplemental state claim against Popp, this Court should affirm the judgment.

Date: January 23, 2023

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Dated: January 23, 2023

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Certificate of Service

I hereby certify that on January 23, 2023, the Brief of Defendants-Appellees was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Counsel for the parties in the case are registered CM/ECF users and service will be accomplished via the CM/ECF system. Paper copies will be mailed to the Court and to Plaintiff-Appellant's counsel once the brief is accepted by the Clerk of Court.

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