**RECORD NO. 22-2077**

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**ORAL ARGUMENT SCHEDULED FOR MARCH 27, 2023**

**In The**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**TERESSA MESTEK,**

***Plaintiff – Appellant,***

**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 -- Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

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# REPLY BRIEF OF APPELLANT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitution, Statutes, Rules, and Legislative History**

## ARGUMENT IN REPLY

### I. THE DISTRICT COURT ERRED IN FAILING TO CONVERT DEFENDANTS' MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT

In Ms. Mestek's Opening Brief, she argues that the District Court erred in failing to convert Defendants' Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment as required by Fed. R. Civ. P. 12(d), notwithstanding that the District Court considered facts outside the pleadings. Ms. Mestek argues that the District Court took judicial notice of two tribal code documents filed as exhibits to Defendants' Motion to Dismiss and then at least implicitly relied on those tribal code documents to establish facts that were contested by Plaintiff Mestek and that were contradicted by Mestek's well pleaded allegations in her Amended Complaint (facts that those exhibits could not possibly establish given their nature as tribal code – i.e. documents stating what should be done as a matter of policy, not documenting what actually was done in a particular case such as Ms. Mestek's). Ms. Mestek argued that this approach by the District Court was contrary not only to the procedure specified in the applicable rules, but also contrary to this Court's precedent, citing *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992).

In response, the LCO-CHC Defendants-Appellees argue that the District Court *actually did* accept all of the facts alleged in Ms. Mestek's Amended

Complaint as true, and *actually did* draw all inferences in her favor, therefore there was no reason for the District Court to convert Defendants' Motion to Dismiss to one for summary judgment. LCO-CHC Response Brief at pp. 8-15.

But this Defendants' argument fails to account for the fact that the tribal code documents judicially noticed by the District Court, while they may be judicially noticed for what they represent (what the tribal code says about policy – what should be sone), cannot, for example, be judicially noticed for the purpose of establishing other facts material to the case regarding what actually was done in Ms. Mestek's case without going beyond the facts alleged in the Amended Complaint.

When the District Court relied on those judicially noticed documents to establish facts related to the immunity issues, such as whether Medical Director Starr was acting ultra vires in terminating Ms. Mestek's employment by signing Health Director Bae's name to the termination notice notwithstanding that Bae had not made a decision to terminate Ms. Mestek's employment, the District Court was clearly going beyond the Amended Complaint and clearly not drawing all inferences in Ms. Mestek's favor. See Amended Complaint ¶¶ 17-20, 110-135.

The Amended Complaint alleges, *inter alia*, that during the times relevant to this complaint including 2017 and 2018, certain LCO CHC staff and consultants were engaged in a rogue operation of improper and false billing of federal

Medicare and Medicaid programs in the name of LCO CHC, which became the subject of Ms. Mestek's protected whistleblowing activities. The LCO Tribal Governing Board was unaware of this false billing of federal programs and had not knowingly approved the submission to federal programs of these false billings. Amended Complaint, Appx A-18, ¶¶ 24-25.

The Amended Complaint also alleges that on August 24, 2018, Ms. Mestek received a phone call from LCO CHC Human Resources (HR) requesting that she come down to the HR office during her scheduled lunch time. When Ms. Mestek arrived at the HR office, she was met by Defendant Dr. Shannon Starr seated in a chair alongside HR Director Klecan. Defendant Director Klecan was well aware of Ms. Mestek's protected activity, including her role in assisting Consultant Walker in identifying and stopping false claims, as Defendant Klecan, like Defendant Franz, had participated in multiple, regular meetings in which Ms. Mestek discussed her concerns about the false claims caused by the Intergy system. Defendant Starr handed Ms. Mestek a typed letter signed by Defendant Starr and stated that Ms. Mestek was to clean out her office and take all personal belongings home as soon as possible, because LCH CHC had determined that they no longer needed Ms. Mestek's services at the LCO CHC. The letter stated that Ms. Mestek was terminated because her duties overlapped with duties other staff members were performing, and that her position has therefore been eliminated. No conduct

or performance issues were identified in this termination notice letter. The letter was signed by Dr. Starr over Jacqueline Bae's typed name with no indication that Dr. Starr had Ms. Bae's approval to sign for her. Amended Complaint, Appx A-18, ¶¶ 117-122.

The Amended Complaint also alleges that at the time Ms. Mestek's employment was terminated, the letter noticing Ms. Mestek of the termination of her employment was physically signed by the LCO CHC Medical Director, Dr. Shannon Starr. Amended Complaint, Appx A-18, ¶ 18. Although the then-Health Director Ms. Jacqueline Bae's typed name appeared below Medical Director Starr's signature on this termination notice letter, upon Ms. Mestek's direct inquiry by phone with then-Health Director Bae, Ms. Mestek learned that the Health Director had not made the decision to terminate Ms. Mestek's employment but rather that the decision was made by Medical Director Starr. Amended Complaint, Appx A-18, ¶ 19.

After her termination, an LCO CHC employee informed Ms. Mestek that the real reason Ms. Mestek was terminated was that Ms. Mestek was considered a threat by LCO CHC and Defendant Starr because of Ms. Mestek's knowledge of and prior efforts to stop the coding and billing fraud that LCO CHC engaged in. The same employee explained how Defendant Starr had screamed at her for reviewing the documentation on diabetic patients to ensure they received their lab

work and foot exams and appointments, threatened her and directed her to "stay out of" the medical records alluding directly to what he called "trouble" caused by Ms. Mestek's review of such records. Amended Complaint, Appx A-18, ¶¶ 131-133. The decision to terminate Ms. Mestek's employment was an ultra vires act of LCO CHC Medical Director Shannon Starr that was not approved by the LCO Tribal Governing Board. Amended Complaint, Appx A-18, ¶ 20.

Defendants' argument here is simply not in touch with the realty of the facts alleged in the Amended Complaint, which they inexplicably mischaracterize as Ms. Mestek making only the barest of references to this *ultra vires* termination of her employment, and not in touch with the reality of the reasonable inferences that must be drawn from the alleged facts. There was no reasonable reading of these alleged facts and their associated favorable (to Plaintiff) inferences that would justify the District Court's explicit or implicit fact findings that Defendants, and specifically Starr, did not act *ultra vires* and therefore were protected by tribal sovereign immunity.

## II. THE DISTRICT COURT INCORRECTLY APPLIED THE STANDARD UNDER RULE 12(B)(6) BY FAILING TO TAKE AS TRUE THE FACTS ALLEGED BY MS. MESTEK

In Ms. Mestek's Opening Brief, she argues that the District Court incorrectly applied the standard under Rule 12(b)(6) for deciding a motion to dismiss by failing to accept all of the facts alleged in Ms. Mestek's Amended Complaint, and

all reasonable inferences that may be drawn from those alleged facts, as true. As a prime example, the District Court found as fact (on a motion to dismiss) that Health Director and CHC CEO Bae had signed the CHC letter terminating Ms. Mestek's employment when Ms. Mestek clearly alleged in her Amended Complaint that it was the Medical Director Starr who signed that termination decision notice (and who lacked authority to do so). Ms. Mestek again argued that this approach by the District Court was contrary not only to the procedure specified in the applicable rules, but also contrary to this Court's precedent, citing in this instance *Killingsworth v. HSBC Bank Nevada*, 507 F.3d 614, 618 (7th Cir. 2007); *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009).

In response, the LCO-CHC Defendants-Appellees argue as noted that in their view the District Court actually did accept all of Ms. Mestek's allegations as true as well as make all inferences from those facts in Ms. Mestek's favor. LCO-CHC Response Brief at 8-15.

But Defendants' argument fails to account for the fact that the District Court made explicit fact findings in its decision to grant Defendants' Motion to Dismiss that are in direct contradiction to specific facts alleged in Ms. Mestek's Amended Complaint, and failed to accept the allegation that Defendant Starr acted *ultra vires* in terminating Ms. Mestek's employment.. Although the Amended Complaint facts at issue were being considered (or ignored) by the District Court at this stage on

Defendants' motion to dismiss, to determine the applicability of a tribal sovereign immunity defense, this context does not change the applicability of the Rule 12(b)(6) requirement that all facts in the complaint be accepted as true, although Defendants in their Response Brief come close to suggesting it does. This Rule 12(b)(6) requirement applies even regarding facts related to issues of sovereign immunity. Sovereign immunity is not a jurisdictional issue in the 7th Circuit. *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). Consequently, no special jurisdictional fact finding procedure is available.

Although the District Court correctly noted, "dismissal under Rule 12(b)(6) is warranted only if no recourse could be granted under any set of facts consistent with the allegations." District Court Opinion, Appx A-5, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007), Ms. Mestek's allegations do articulate a plausible scenario where she would be entitled to relief on her Amended Complaint. In her Amended Complaint, she alleges that Medical Director Starr acted *ultra vires* in signing her termination decision without authority to do so. This allegation is sufficient, when all reasonable inferences are drawn therefrom, to articulate a plausible scenario where Starr was acting *ultra vires* (without approval from CEO Bae or the LCO governing board). Starr therefore would not have had the benefit of a sovereign

immunity defense. *See, e.g., Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Dugan v. Rank*, 372 U.S. 609, 621–22 (1963).

Tribal officials are not necessarily immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). When such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign. *Id.* at 59 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). When tribal officials act "beyond their authority, they lose their entitlement to the immunity of the sovereign." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F. 2d 1269, 1271 (9th Cir. 1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Allen v. Smith*, No. 12cv1668-WQH-KSC, at *13-14 (S.D. Cal. Mar. 11, 2013).

Defendants make the argument that Plaintiff did not preserve the issue of whether individual defendants acting ultra vires would not have tribal sovereign immunity, and also the issue of whether tribal sovereign immunity would not apply to a claim for prospective injunctive relief. See Defendants' Response Brief at 38-39. However, these issues were preserved below by Plaintiff. In Plaintiff's Opposition to Motion to Dismiss filed in the District Court, Plaintiff Mestek included the following arguments:

> 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 defendants2 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.**

**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 Defendants' motion.

**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 vires3 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**.

Plaintiff's Opposition to Defendants' Motion to Dismiss, at 11 (emphasis added). This was sufficient to have preserved these issues below, particularly in light of the fact that both the ultra vires exception to sovereign immunity and the rule that sovereign immunity does not apply to prospective injunctive relief are well established.

## III. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENDANTS HAD A SOVEREIGN IMMUNITY DEFENSE TO MS. MESTEK'S CLAIMS FOR INJUNCTIVE RELIEF AGAINST THE INDIVIDUAL DEFENDANTS

In Ms. Mestek's Opening Brief, she argues that the District Court erred in at least implicitly concluding that Defendants had a tribal sovereign immunity defense to Ms. Mestek's claims for injunctive relief against the individual defendants. Ms. Mestek, in her Opening Brief, cited *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999) (citing *inter alia Ex Parte Young*, 209 U.S. 123 (1908) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)) established legal principle that although the LCO tribe itself may be protected by tribal sovereign immunity from such claims, individual tribal officials are subject to claims for prospective injunctive relief, whether in a personal or official capacity.

In response, the LCO-CHC Defendants-Appellees argue that this issue was not preserved below by Plaintiff. LCO-CHC Response Brief at 38-39. However, as explained *supra*, this issue was preserved.

Otherwise, Defendants do not present any persuasive argument for why tribal sovereign immunity would apply to Plaintiff Mestek's claims for prospective injunctive relief. The law is well settled that individual tribal members and officials are not protected by tribal immunity *per se*. *See, e.g., Puyallup Tribe v. Washington Game Dept*, 433 U.S. 165, 171 (1977). And, tribal officials are not immune from suits for prospective declaratory and injunctive relief when sued in their official capacities to enjoin an alleged ongoing violation of federal law. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000).

> "Suits seeking prospective injunctive relief ordinarily may proceed against tribal officers sued in their official capacities under the doctrine of *Ex parte Young*. " *Jamul Action Comm.*, 974 F.3d at 994 (citations omitted). "That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." *Id.* (citation omitted).

*Oertwich v. Traditional Vill. of Togiak*, 29 F.4th 1108, 1121-22 (9th Cir. 2022).

## IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT MS. MESTEK'S AMENDED COMPLAINT DID NOT STATE CLAIMS AGAINST ANY DEFENDANTS (EXCEPT DEFENDANT POPP) IN THEIR PERSONAL CAPACITIES

In Ms. Mestek's Opening Brief, she argues that the District Court erred in concluding that Ms. Mestek's Amended Complaint did not state claims against any Defendants (except Defendant Popp) in their personal or individual rather than official capacities. Although the District Court notes that Plaintiff Mestek did "superficially" assert claims against the individual Defendants in their personal capacities, the District Court held that the Amended Complaint did not assert such claims sufficiently.

But as Ms. Mestek explained in her Opening Brief, it was not just the caption of the Amended Complaint that referenced the individual defendants and their individual conduct relevant to Ms. Mestek's asserted claims. The facts alleged throughout the Amended Complaint make clear that the assertion of claims against the individual defendants was more than *pro forma*. These claims against the individual defendants had substance.

Defendant Starr, the LCO CHC Medical Director, as an example, is alleged to have signed the termination letter over Health Director Bae's name, ending Plaintiff Mestek's employment, even though Health Director Bae was not involved in the decision to terminate Ms. Mestek. Ms. Mestek, in her Opening Brief argued that the District Court should have applied the Supreme Court's rule in *Lewis v.*

*Clarke*, 137 S. Ct. 1285, 1291 (2017) that in personal capacity suits "the real party in interest is the individual, not the sovereign." *Id*. Thus, even a money damages remedy is available against individual defendants in their personal capacities (in addition to prospective injunctive relief).

In response, the LCO-CHC Defendants-Appellees argue that the relief Plaintiff seeks is only relief that the Tribe can provide, directly or through its tribal arm LCO CHC. LCO-CHC Response Brief at 23-39. However, some of the relief Plaintiff sought, including an injunction against future blacklisting, damages from individual Defendants sued in their personal capacities, and forward looking reinstatement to cure an on-going violation are examples of relief that can be awarded without imposing on the Tribal coffers.

The District Court, in its Opinion, Appx A-14 – A-15, simply misread the Amended Complaint in concluding that Plaintiff Mestek sought relief that only the LCO or LCO CHC could provide. If one or more of the individual defendants was engaged in Blacklisting, for example, injunctive relief and damages could be ordered against each such individual defendant.

In *Maxwell v. County of San Diego*, — F.3d —, 10-56671, 2013 WL 542756 (9th Cir. Feb. 14, 2013), the Court of Appeals for the Ninth Circuit employed a remedy-focused analysis in concluding that the paramedic defendants there did not enjoy tribal sovereign immunity "because a remedy would operate against them,

not the tribe." *Id*. at *10. *And see, Allen v. Smith*, No. 12cv1668-WQH-KSC, at *14 (S.D. Cal. Mar. 11, 2013).

> The general bar against official-capacity claims ... does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities.... Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

*Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1296 (10th Cir. 2008).

That a suit implicates a tribal officer's official duties does not by itself establish that the tribe is the real party in interest and in suits for damages the general rule is that individual officers are liable when sued in their individual capacities. *Oertwich v. Traditional Vill. of Togiak*, 29 F.4th 1108, 1120 (9th Cir. 2022). In *Lewis v. Clarke*, —— U.S. ——, 137 S. Ct. 1285, 197 L.Ed.2d 631 (2017), addressing a negligence claim against a tribal employee, the Supreme Court emphasized that courts should consider individual capacity claims independent of tribal sovereign immunity. *Id*. at 1293. The Supreme Court held that "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Id*. at 1288.

The simple fact that an employee was acting within the scope of his employment at the time a tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. Rather a court must determine whether the remedy sought is truly against the sovereign. *Oertwich v. Traditional Vill. of Togiak*, 29 F.4th 1108, 1120-21 (9th Cir. 2022). Tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. *Id*.

> We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. We hold further that an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach. Accordingly, we reverse and remand.

*Lewis v. Clarke*, 581 U.S. 155, 158 (2017).

In light of this clear precedent, the District Court erred in not allowing Ms. Mestek's claims against individual defendants in their personal capacities, such as her claim against Mr. Starr for wrongful-retaliatory termination and her claim against Ms. Klecan for blacklisting, to proceed.

## V. THE DISTRICT COURT ERRED IN DISMISSING MS. MESTEK'S STATE LAW CLAIM AGAINST DEFENDANT POPP

In Ms. Mestek's Opening Brief, she argues that the District Court erred in dismissing Ms. Mestek's state law claim against Defendant Popp. Ms. Mestek's Opening Brief. The District Court, after concluding that all of Ms. Mestek's federal claims should be dismissed, determined that it had discretion to dismiss Ms. Mestek's supplemental jurisdiction based claim against Defendant Popp. Defendants restate this argument in their Response Brief. But as Ms. Mestek explained in her Opening Brief, at minimum Plaintiff Mestek's federal claims for injunctive relief against the individual Defendants should not have been dismissed on tribal sovereign immunity grounds, and therefore the District Court did have an obligation to hear and decide the supplemental jurisdiction-based state law claim against Defendant Popp. The same is true for Ms. Mestek's claims against the Defendants in their personal capacities, which also should have survived the motion to dismiss.

## VI. THE DISTRICT COURT ERRED IN CONCLUDING THAT LCO CHC, AS A TRIBAL ENTITY, COULD NOT BE SUED UNDER THE FEDERAL FALSE CLAIMS ACT'S BROAD ANTI-RETALIATION PROVISION

In Ms. Mestek's Opening Brief, she argues that the District Court erred in concluding that LCO CHC, as a Tribal Entity, could not be sued under the FCA anti-retaliation provision which does not limit liability to either "persons" or

"employers." This appears to be an issue of first impression for the Seventh Circuit.

In Ms. Mestek's Opening Brief, she requested that the Seventh Circuit adopt the position that even though the FCA's anti-retaliation provision does not explicitly reference tribes as potentially liable parties, because this provision is not limited to "persons" and is no longer limited even to "employers," that the intent of Congress is clear enough that all those who might retaliate against an FCA whistleblower should fall within the scope of this remedial provision, even Native American tribes.

Ms. Mestek offered as supporting authority *Wilkins v. St. Louis Hous. Auth*., 314 F.3d 927, 932 (8th Cir. 2002). The court in *Wilkins* held that if a municipal (or other) entity was not a "person" as that term is used under another provision of the FCA, 31 U.S.C. §3729(a)(1), the "qui tam" provision, that the term "employer" as used in the then operative version of the FCA anti-retaliation provision, 31 U.S.C. §3730(h) (since amended to remove the term "employer") is sufficiently broad to include such entities and such entities could be subject to a claim under that FCA anti-retaliation provision even though they might not be subject to suit under the FCA's qui tam provision.

Ms. Mestek also offered as supporting authority *In re Coughlin*, 33 F.4th 600, 604-608 (D.C. Cir. 2022). The court in *Coughlin* held that abrogation of tribal

immunity does not require explicit reference to tribes or any magic language if the statutory language is broad enough.

In response, the LCO-CHC Defendants-Appellees argue that even if the FCA whistleblower retaliation provision applies to tribes, it does not abrogate tribal sovereign immunity LCO-CHC Response Brief at 15-23. Defendants assert or imply that Plaintiff Mestek has only argued that this FCA provision applies to tribes but not that it abrogates tribal sovereign immunity. However, Ms. Mestek in her Opening Brief clearly references *In re Coughlin*, 33 F.4th 600, 604-608 (D.C. Cir. 2022) in support of an argument that tribal sovereign immunity has been abrogated by Congress in 31 U.S.C. §3730(h). Although, as Defendants state, there is a body of law in other contexts that state that any abrogation of tribal sovereign immunity should be by explicit reference to tribes in the relevant statute, and no doubt this would be a "best legislative practice," *In re Coughlin*, 33 F.4th 600, 604-608 (D.C. Cir. 2022) makes clear that there are exceptions where tribal sovereign immunity can be abrogated without such an explicit reference in statutory language. Appellant Mestek respectfully requests that this Court, on this issue of first impression, find that Congress has abrogated tribal sovereign immunity via 31 U.S.C. §3730(h).

## CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, because the District Court clearly erred in dismissing each of Ms. Mestek's claims, the District Court's May 18, 2022 Opinion and Order, and accompanying Judgment, dismissing Plaintiff's Amended Complaint should be reversed.

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**RULE 32(g)(1) CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7) because the brief contains only 5,408 words (total), as counted by Microsoft Word Microsoft Office software updated as of 2022, which is less that the 7,000 words allowed by this Court's Circuit Rule 32(c). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Microsoft Office software updated as of 2022, in Times New Roman 14 point.

/s/ Mick G. Harrison
MICK G. HARRISON

## CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023, I electronically filed the foregoing Appellant Mestek's Reply Brief with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. I also emailed copies of Appellant's Reply Brief to Defendants' counsel on this same date. Paper copies will be mailed to the Court and to Defendants' counsel within the time provided by the rules. The Defendants-Appellees' counsel to whom the above-described service was made and will be made are:

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