UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

United States of America
ex rel. Jesse Koenig, and
Jesse Koenig individually,

Plaintiffs,

-vs-

Keweenaw Bay Ojibwa Community College,
Lori Ann Sherman (President),
Beth Louise Vertanin (Dean of Instruction), & Robin Chosa
(Chairman of the Board) Individually and as
Representatives of Keweenaw Bay Ojibwa
Community College,

Defendants.
_____/

Case No. 2:23-cv-103
Hon. Paul L. Maloney
Magistrate: Maaten Vermaat

PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDUM OF LAW ON DEFENDANTS' MOTION FOR JUDGEMENT ON THE PLEADINGS

I. OVERVIEW

Defendants' Motion regarding sovereign immunity/qualified immunity should be rejected as the KBOCC/individual defendants, have already admitted subject-matter jurisdiction via a panoply of admissions in their Answers to the Complaint, interrogatories, admissions, documents, Orders, internal memos, and the failure to plead appropriate defenses. [*See Infra*].

It is a doctrine of longstanding that initial disclosures, answers to interrogatories, and other admissions are binding for summary judgment purposes. *See Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc.*, 780 F.2d 549, 550-51 (6th Cir. 1986). Otherwise, discovery and other pretrial devices would be meaningless. *In re Moore* 2023 WL 3854042 [E.D. MI, Northern Div.

(attached as 8)]. Likewise, judicial admissions are binding and "eliminate the need for evidence on the subject matter of the admission," as admitted facts are no longer at issue. *Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F.Supp. 1246, 1251 (E.D. Mo. 1976), aff'd, 561 F.2d 1275 (8th Cir. 1977). Once made, the subject matter of the admission should not be reopened in the absence of a showing of exceptional circumstances. *New Amsterdam Casualty Co. v. Waller,* 323 F.2d 20, 24 (4th Cir. 1963), *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964). The Sixth Circuit has explained, "[u]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." *Brown v. Tennessee Gas Pipeline Co.,* 623 F.2d 450, 454 (6th Cir. 1980) (citations omitted).

These truisms apply to subject matter jurisdiction and are particularly relevant herein. After making a series of admissions of fact, and in pleadings, the defendant in *Ferguson supra*, NHS, argued that its admission did not preclude it from challenging federal subject matter jurisdiction. Specifically, NHS argued, "no action of the parties can confer subject-matter jurisdiction upon a federal court". (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982).

The Sixth Circuit held:

> While NHS correctly quotes *Compagnie des Bauxites,* it overlooks the distinction between an admission that federal subject matter jurisdiction exists, and an admission of facts serving in part to establish federal subject matter jurisdiction. As the Supreme Court stated in an early case:
>
> Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission. *Railway Co. v. Ramsey,* 89 U.S. 322, 327, 22 Wall. 322, 22 L.Ed. 823 (1874); *United States v. Anderson,* 503 F.2d 420, 422 (6th Cir. 1974) (quoting *Ramsey*). *[other citations omitted]* [emphasis added].

The Defendants have admitted the existence of facts that show subject-matter jurisdiction. Defendants raise the KBIC name at every opportunity, despite KBIC not being part of this

litigation, and at least for purposes under the Higher Learning Commission's (HLC) accreditation process, a complete non-entity based on HLC criteria. [*See* Memo of Char Weingarten, Assessment and Accreditation Coordinator of KBOCC, to Defendant Sherman, attached as 1 and *see Infra*]. Defendants are silent regarding Defendant KBOCC's acknowledgments, acquiescence, and admissions that KBOCC was required to comply with all Federal Regulation, as a condition precedent to accreditation by the HLC, and access to federal financial aid (FFA). Without accreditation, KBOCC could not get FFA. Defendants intentionally withheld relevant documents regarding the HLC that are referenced in Attachment W (pages 6-37) to the Defendants' Judgment on the Pleadings. [ECF 69-26, PageID.1374-137]. Defendants ignore their own memo which indicates that the KBOCC be autonomous and independent from outside influence, including the KBIC. [*See* Weingarten memo, attached as 1].

In *Cooley Law School v. The American Bar Association et al,* 459 F.3d 705 (6th Cir. 2006), the Court was faced with a claim by Cooley Law School, that the ABA, the accrediting agency for law schools, denied it due process in failing to accredit two satellite programs. As a backdrop to this case, the Court pointed out the following:

> The Federal government does not directly accredit institutions of higher education. Rather, the secretary of education, approves accrediting agencies for different types of educational programs, and these accrediting bodies set independent standards for accreditation. Accreditation is important to school for a number of reasons, not the least of which is that it allows the students of the school to receive federally-backed financial aid. [Cooley @ 707].

A history of financial aid demonstrates that funding is, by and large, established by The Higher Education Act of 1965 (HEA). [20 USC §§1001 et seq]. The HEA establishes student financial aid programs and creates a comprehensive system for administering those programs. The Department of Education interprets the HEA to require that institutions desiring to participate in federal programs for student financial aid either receive or be about to receive accreditation from

a nationally recognized accrediting body, or show that credits earned by its students are accepted, upon transfer and enrollment, by at least three accredited institutions. *Beth Rochel Seminary v. Bennett,* 825 F.2d 478 (D.C. Cir. 1987). In exchange for funding, the college or university **consents** to abide by all statutory, regulatory, and program requirements necessary to obtain federal financial aid. *Bowling Green Jr. College, v. U.S. Department of Education,* 687 F. Supp. 293 (W.D. Ky. 1988) (emphasis added). Specifically, the college **consents** to the submission of periodic reports to the Secretary of Education and maintaining administrative and fiscal procedures and records to ensure proper administration of funds. [Id]. An educational institution which violates federal regulations pertaining to programs eligible for financial assistance may be required to reimburse the Department of Education for grants received by the institution and for defaulted student loans for students in the ineligible program. *Morgan Community College v Riley,* 968 F. supp. 1411 (D. Ct. Colorado 1997).

The HEA was enacted not to benefit educational institutions, but rather to benefit students; and it provides for enforcement through administrative action brought by the Secretary of the Department of Education. [*See Cooley supra,* p. 711]; *also see* 20 U.S.C. §1070(a); *CJS*, §34 Financial Aid/Scholarships]. In light of the fact that 40-62% of the student population of the KBOCC is non-Indian, subject matter jurisdiction to achieve the goals of Congress are all the more germane.

Title IX was enacted as an exercise of Congress' powers under the Spending Clause U.S. Const. Art. I, § 8, cl. 1. The Spending Clause gives Congress broad powers to "set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216, 142 S. Ct. 1562, 212 L.Ed.2d 552 (2022). Moreover, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients]

agree to comply with federally imposed conditions." [Id]. (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). *As with any contract, educational institutions cannot "knowingly accept" funds from the federal government unless they would "'clearly understand ... the obligations' that would come along with doing so.*" [Id. at 219, 142 S.Ct. 1562 (emphasis added, quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006))]; *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (providing that Congress must state the conditions of receipt of federal funds "unambiguously" so the states may "exercise their choice knowingly, cognizant of the consequences of their participation").

Though the Defendant withheld much of the 2012 correspondence between the HLC and KBOCC, many years before KBOCC actually obtained accreditation, KBIC understood KBOCC had to be separate and autonomous to obtain accreditation and be eligible for FFA. In the limited discovery that Koenig has been able to obtain, KBIC sought to have KBOCC independent and accredited so as to be able to access FFA. KBIC benefits by KBOCC getting accredited so it could reduce the financial burden on the KBIC – a burden that was totally eliminated by 2019, the year before Koenig was terminated, when KBIC ceased funding KBOCC. [*See Infra*].

The affirmative defenses of qualified immunity and exhaustion of tribal remedies have been waived by the failure to plead them. [*See Argument Infra*].

The following demonstrate that there is subject-matter jurisdiction for the KBOCC and that various other affirmative defenses were waived, (qualified immunity and exhaustion of remedies) and should result in the Defendants' Motion to be denied in all respects. The reasons to reject the motion include:

1. The defenses of qualified immunity and a requirement to exhaust tribal remedies are affirmative defenses that must be properly pled and proved, and Federal Rule of Civil Procedure 8(c) requires that they are pled and failure to do so results in waiver.
2. Defendants repeatedly claim that the actions of the individual defendants were discretionary tasks but ignore the *ultra vires* nature of Koenig's claims – something that would have defeated the qualified immunity defense even if properly raised.
3. In the Joint Status Order the Court Ordered the Defendant(s) shall indicate all objections to jurisdiction. [ECF No. 18, PageID.119-120]. In response to the Order, the Defendants' position on jurisdiction was as follows: The Defendants acknowledge this Court has jurisdiction over the claims in this case. [ECF No. 20, PageID.129] (emphasis added). Likewise, in their Answers to the Complaint, Defendants do not deny that the Court has jurisdiction. [ECF No. 17, PageID.93, ¶¶ 11-12].
4. Defendants failed to address a series of Admissions in their Answer to the Complaint, including, but not limited to, ¶23 where KBOCC admitted: "As a prerequisite to accreditation, and to qualify for FFA, the Defendant College agreed to be governed by criteria that is established by the Higher Learning Commissions (HLC) criteria for accreditation" and separately admitted that in ¶ 22, "by being recognized by the US Department of Education (USDE) as a gatekeeper agency, HLC, agrees to fulfill specific federally defined responsibilities within the accreditation processes". (emphasis added) [ECF 17, PageID. 96-97, ¶¶22-23].[1]

[1] Factual assertions in pleadings are considered judicial admissions that are conclusively binding on the party who made them. Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir.1988); see also *Barnes v. Owens–Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (quoting *Lacelaw*, 861 F.2d at 226) Moreover, the doctrine of Judicial admission is equally true for jurisdictional facts.

5. The Defendants ignored the metamorphosis of the original tribal college (then referred to Ojibway), that started in 1975, exclusively on the KBIC Reservation, and catered to a homogenous population of Native-American students. The transformation of Ojibway to the present day KBOCC, took over forty (40) years to obtain full accreditation by the HLC. In doing so, there was a slow and steady progression to a secular college, located off the Reservation, teaching a student population that is 40-62% non-Indian depending on the year. The KBOCC that Koenig worked for also included, on information and belief, approximately 73% on non-Indian professors teaching off the Reservation. [Koenig Affidavit attached as 5]. The conversion of tribal college to a secular college off the Reservation included a complete transformation. Originally being fully funded by KBIC, to having all financial assistance cut off by 2019, because of funding issues the Tribe was experiencing (and presumably the access to FFA). As noted in its Answers to the Complaint, KBIC ceased funding KBOCC as of 2019, and that as of the time of the Answer, "KBOCC currently operates independently from the KBIC tribe concerning its financial operations. [ECF 17, PageID.91, ¶¶ 6, 7].

6. That transformation started long before the KBOCC was able to get HLC accreditation. The Charter was revised and the name of the college was ultimately changed from Ojibway to KBOCC. The revision to the OCC Charter occurred in 1998. Section 3 of Article 4 provides: [The purpose of the corporation are as follows]:

   Section 3: **To make such agreements with, and to borrow money from any governmental agency (Federal, State, or local),** the KBIC or any other legal entity, or organization, **and to agree to, and perform any conditions attached thereto**. [ECF 69-6, Page ID 1200]. [emphasis added].[2]

[2] The Charter makes very clear the intent of the KBIC/KBOCC to relinquish and waive any potential sovereign immunity and perform **any** condition, under any Federal, State, or local law, even as early as 1998, so as to enable the KBOCC to be independently accredited and qualify for FFA. This achievement, obtained in 2016, allowed KBIC to completely stop funding the KBOCC by 2019 as admitted in KBOCC's Answer to the Complaint.

Article IV, Section 6, provides authority to purchase insurance against risks and hazards [Id.]. In supplemental answers it was admitted that there is insurance. [Attachment 7].

7. Contrary to the claims of sovereign immunity for KBIC, and financial hardship for the KBIC, Article X Section 3 of the revised Charter makes clear that the KBIC is not responsible for the obligations of the Corporation, (KBOCC) except as obligated in writing. As the KBOCC has insurance, and as the KBIC cannot be held liable for obligations of the KBOCC, the threat of any payment for Koenig, coming from the coffers of the KBIC is nil. [*See* ECF 69-6, PageID.1204]. KBOCC is autonomous from the KBIC, is not an arm of the KBIC, and the KBIC cannot possibly be responsible for any judgement.

8. Evidence demonstrates that, in September of 2020, when Koenig was trying to mediate his claim with KBOCC, (62% of the class) was non-Indian. [*See Infra*]. That since 2015/2016, no classes had been taught on the Reservation. [See Attachment 5 and ECF 44-3, PageID. 413-414, ¶¶ 13, 14, 22].

9. Defendants have admitted that the KBOCC is not an Indian Tribe. [ECF 44-3, PageID 414, ¶21].

10. The Defendants have cherry-picked documents. KBOCC withheld documents germane to its relationship with the HLC that Koenig has not been able to obtain in light of the Court's Stay in this matter. Defendants provided a 2012 document from the HLC to KBOCC entitled, "Report of a Comprehensive Evaluation Visit For Initial Accreditation". [Defendants' Attachment W, ECF 69-26, PageID.1375-1376]. Defendants provide the first five pages of the document but purposefully do not produce the remainder of the HLC Comprehensive Evaluation. [*See* Attachment W, ECF 69-26, PageID.1375-1378 and

discussion *infra*. (emphasis added)]. In all, over thirty pages of potentially very relevant documents are intentionally withheld.

11. Likewise, the documents referred to by Ms. Char Weingarten, in her memo on accreditation to Defendant Sherman, are not attached to that document, nor are they provided in the other documents provided to the Plaintiff. That memo further explains the mandatory independence of KBOCC as a condition of accreditation. [*See* Att. 1, KBOCC 000029-31].

The Defendants' Motion for Judgment on the Pleadings should be denied. Defendants' have waived any objection to subject matter jurisdiction for the aforementioned reasons. Moreover, the denial is justified since the KBIC, the Tribe, is not a named Defendant, and is not, and cannot, be responsible for any claims against KBOCC or against the three individual Defendants. They are not the real party in interest and any claim of sovereign immunity was waived.

II. STATEMENT OF FACTS

A. Jesse Koenig Had an Unblemished Record Prior to Reporting to the Higher Learning Commission (HLC) KBOCC's Failures to Adhere to the HLC's Strict Accreditation Requirements.

Koenig was hired by Defendant KBOCC on or about September 27, 2010. [ECF 44-2. 1 ¶19; PageID.95]. Shortly after his hire, Koenig was promoted to the Liberal Studies Department Chairmen. [ECF 44-3, Answers to Admissions #26, PageID.414]. Consistent with that quick promotion, Koenig was given annual reviews that showed exemplary performance. Koenig was found to be a valued and important member of the team, and played a significant role in meeting the high standards set by the college, and was a valuable asset. [*See* Attachment 2, documents

provided A2-3, A 42-47][3]. The record demonstrates, prior to reporting his concerns that the three named Defendants had committed fraudulent reporting to the HLC in the quest for continued accreditation and FFA, Koenig was considered an exemplary employee and had not received a single corrective action plan from the time of hire up to May 12, 2020, a period of almost ten years. [ECF No. 44-4, Answers to Interrogatories #8, PageID.421; *also see* internal documents that he was a valued and important member who brought the program assessment up to date; Answers to Interrogatories wherein the first write up or corrective action is after Koenig submits his 29-page report to the HLC. [ECF 44-4, PageID.421].

Dean Virtanen wrote on 3/4/20, two months before Koenig's report to the HLC, that Koenig's course organization was explicitly connected and "[v]ery well done". [Id. A-43]. Overall, an excellent evaluation as is reflected in being graded as "excellent" in 18 of 19 categories, an average score of 98.33%. [(Emphasis added)Att. 2 A-44-45].

B. After 2015/2016 Koenig Only Taught Off the Reservation at what was Previously Baraga Memorial Hospital.

Since 2012 there was a steady trend away from KBIC support. In 2012 KBIC started reducing financial support. [ECF 44-3, PageId.413, #17]. For the years 2016-2017, more than ½ of all of KBOCC's funding for students was provided by FFA. [ECF 44-3, NO. 29, Page ID.415-416, #29]. By 2019 Defendants admitted that "due to funding issues the tribe was experiencing, tribal funding of KBOCC was discontinued in 2019." ECF 17, PageID.91 (¶7)]. KBOCC admitted that it functioned independently from the Tribe concerning its financial operations. [Id. ¶6].

For the years 2015 through 2020, Koenig worked exclusively at the college located at 770 North Main Street, L'Anse, Michigan. [Att. 5]. Defendant has admitted that this location (the

[3] Letter description "A" etc. of documents attached correspond to Defendants' delineation of documents in response to Koenig's interrogatory/production requests.

satellite location) was off the Reservation. [ECF 44-3, #10 11, 12, 13, 14, 22, PageID.412-414]. KBOCC acknowledged that once the North Main address was opened, Koenig **never** taught a class on the Reservation. [Id. #14, Pg. ID 413].[4] Indeed, after the satellite campus was opened in 2015/2016, no substantive classes were taught on the Reservation. [Id., Attachment 5].

The KBOCC is housed in the building(s) that was formerly occupied by Baraga Memorial Hospital in L'Anse, Michigan. Koenig reviewed the declaration made by Ms. Haataja and submitted by Defendants. [ECF 69-17, PageID,1325-1326]. Haataja admitted that, in 2013, Baraga County Memorial Hospital was purchased and is not on Reservation land, but is "nearby." Ms. Haataja's allegation that Koenig worked at the Reservation during the course of his employment is misleading. Koenig never taught a class on the Reservation after the L'Anse facility was opened, as was already admitted by KBOCC. Every person he reported to was based at the L'Anse facility. [Att. 5]. Koenig provided schedules to the Attorney General that demonstrated where he taught.

Ms. Haataja's declaration about KBIC providing millions of dollars to KBOCC starting in 1975 is, again, misleading at best. At some point, those monies were provided to obtain accreditation so that the KBOCC could escape funding the KBOCC.

C. KBOCC Actively Promoted the College to the Non-Indian Community.

KBOCC went to great lengths to promote and advertise itself as a college that was independent of the KBIC Tribe. [ECF 44-3, ¶16, PageID.413; ECF 17, ¶5, Page ID.90-91].[5]

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[4] In looking at prior documents, Koenig believes that 2015 was the year that everything shifted to the L'Anse campus. *[Affidavit attachment 5].*

[5] As a requirement of accreditation, the KBOCC was required to be autonomous and have an independent governing board that was free from ownership interests or external parties. As Ms. Weingarten wrote to Defendant Sherman, "Though the Tribal Council and the KBIC are important external constituencies that have vested interest in the success of the College, KBOCC is an autonomous organization completely separate from its tribal founders." [Att. 1, KBOCC 000030 (emphasis added)].

KBOCC actively recruited students of all backgrounds. [Id. ¶ 24, PageID.414]. Defendants admitted KBOCC boasted and bragged of its autonomy from the Tribe and admitted to a certain amount of educational autonomy and independence from the Tribe. [Att. 1, ¶5; PageID.90-91]. That, resulted in as much as 62% of the students being Non-Indian. [Att. 4, IPEDS data, p. 67-68]. The attainment of Accreditation and FFA continued the expansion of KBOCC from being a small tribal college existing only the Reservation, to a fully operational college teaching a fully integrated student body. Documents show that from 2021-2024, the student population almost tripled by 79 to 222. [Att. 15, J, p. 10]. In addition to the student population being diverse, the teachers were overwhelmingly non-Indian. Mr. Koenig, to the best of his ability attempted to recreate who the teachers were at KBOCC when he last worked. Of those he can remember, he believes that 33 were not Indians, 9 were Indians, and he was not sure about a few others. Approximately 73% of the teaching staff were non-Indian. [Att. 5].

Integrated Postsecondary Education Data System (IPEDS) compiles data that reflect statistics necessary for accredited institutions that provide for post-secondary degree programs. IPEDS collected data for KBOCC starting in 2016 (year of accreditation). The 2018 IPED report, for fall 2017, demonstrated 53% of students enrolled at KBOCC were American Indian or Alaskan Native. [Att. 4, Documents E, p. 26]. The 2019 IPED report, for fall 2018, demonstrated 68% of students enrolled at KBOCC were American Indian or Alaskan Native. [Att. 4, Documents E, p. 38-39]. However, the 2021 IPED, for fall 2020, demonstrated that the number of students who were American Indian/Alaskan Native was now only 38%. [Id. p. 67-68]. While Koenig was trying to appeal his termination, the population of KBOCC was overwhelmingly non-Indian. [Att. 4, Documents E, p. 67-68].

Likewise, the named Defendants demonstrate the multicultural makeup of KBOCC. Defendant Vertanin is, admittedly, not an Indian and Defendant Sherman did not live on the Reservation. [ECF 44-3, PageID.416, ¶¶30-31].

D. Koenig Reports Wrongdoing Internally Within the KBOCC – Just as Dr. Rebecca Frost had done Before Him, and when KBOCC Defendants Sherman, Chosa, and Vertanin Refused to Take Any Action to Comply with HLC Accreditation Standards, Koenig Reported KBOCC to the HLC.

Similar to Dr. Rebecca Frost before him, Koenig believed the KBOCC was in serious breach of compliance standards that are a part of accreditation from the HLC and a pre-requisite to qualify for FFA. Koenig first tried to resolve the deficiencies internally. He wrote the President, Defendant Sherman, then the Chairman of the Board, Defendant Chosa, and then the Board itself. KBOCC admits he filed numerous internal complaints. [ECF 1, PageID.7, ¶35]. There were numerous failures of the KBOCC regarding the HLC. [ECF 1, PageID.7-9, ¶¶ 30-49].

Mr. Koenig contacted the HLC in a letter dated May 10, 2020, setting forth how the KBOCC and the named Defendants were undermining HLC standards. The 29-page letter specifically sets forth how the KBOCC and the individual defendants were undermining HLC requirements that would result in threatening the accreditation process and would literally make every dollar of FFA provided to KBOCC students monies that should be withheld pending satisfaction of HLC criteria. [ECF 1, PageID.9 ¶¶ 48-49; see letter that was provided to Attorney General, Attached as 9]. Indeed, KBOCC's fraud is a fraud on the United States, and the students who rely on the accreditation process. The intent of the named Defendants was to maintain accreditation and funding without adhering to the strict requirements of the HLC and undermining the intent of Congress in passing the HEA and mandating that certain accreditation criteria be used and achieved as a condition precedent to obtaining FFA. On May 18, 2020, the HLC responded

that Koenig's letter, raises "potential concerns." [Id. ¶¶50-51 PageID.10; HLC letter attached as 11]].

Defendants also admitted that Dr. Frost brought similar complaints to the KBOCC hierarchy. Dr. Frost complained that HLC standards were not being met. Plaintiff has alleged, and it will be independently corroborated through discovery by Dr. Frost, that she was ostracized and felt she was constructively discharged, or forced to resign, because of her complaints about the failure to meet HLC requirements. [ECF 44-3, PageID.416; ECF 44-2, ¶¶ 34-35, 37, PageID.392-393].

Koenig, like Frost, was immediately retaliated against after his report to the HLC, and shortly thereafter was advised that his contract would not be renewed. Specifically, within hours of Koenig advising the individuals that he filed with HLC, Koenig received three corrective action plans and those were the first corrective action plans he received in his ten years with KBOCC. [ECF No. 1, PageID.10, ¶¶ 52-53, ECF 44-3, PageID.416; ECF 44-2, ¶¶ 34-35, 37, PageID.392-393]. KBOCC in their Answers to the Complaint, have admitted that Koenig received three corrective action plans within hours of Koenig advising that he contacted the HLC, but deny "that these had anything to do with the Plaintiff's claim…There is no correlation between the two events." They, apparently, are just coincidences like Russian dissidents falling out of windows. [ECF 17, PageID. 109].

On July 20, 2020, while off on summer vacation, Koenig received a letter advising that he was being terminated and that his contract would not be renewed. [ECF 1, PageID.9-14, specifically paragraphs 48-52, 63, & 71; *also see* Att. 2, A33, A46, no renewal of contract signed by Defendant Sherman].

E. Koenig Attempts to File a Grievance/Appeal/Medication but is Thwarted by Illegal Retaliation as Demonstrated by KBOCC's Internal Documents.

Koenig attempted to file a grievance/mediate/appeal but did not receive, as was required, an "independent grievance committee" process the grievance. Rather, Defendant Sherman and the KBOCC just ruled against him. [ECF 1, PageID.10, ¶¶ 54-58, PageID.13, ¶¶64-74]. All internal grievance procedures were stymied in violation of the policy book that he was provided.[6] Contrary to the claims of Defendants, Koenig attempted to file grievances against KBOCC and the individual defendants. He did not, however, have his concerns heard by an independent grievance committee as outlined in the policy book. The facts demonstrate that Koenig repeatedly attempted to use internal remedies and avail the grievance procedure/appeal/mediation but was stonewalled at every attempt. [*See* grievance/appeal attempts as provided to Attorney General, ECF 44-6, PageID.437-466].

Correspondences in Koenig's limited discovery demonstrate that he repeatedly attempted to seek mediation/grievance/appeal of his termination/refusal to renew his contract. [*See* Emails, Attachment 3, Supplemental Answers J3, p. 106-111, 115, 118-119, 125-126]. On May 25, 2020, Defendant Sherman acknowledged that Koenig wanted his grievance heard by a grievance committee and that he did file a Complaint with the HLC. [Id. p. 126]. He contacted individuals at KBOCC, as well as Shannon Taylor, Program Manager, Mediation Services of the Upper Peninsula Commission for Area Progress. [Att. 3, July 16, 2020, p. 109-111]. In an e-mail correspondence dated July 19th by Defendant Sherman, "Jesse Koenig is requesting mediation again." [Id. p. 109]. On July 20, 2020, Defendant Sherman advised that Koenig had a prior attorney who threatened a lawsuit and quoted yet another KBOCC attorney, Joseph O'Leary, who

[6] The KBOCC has admitted that the only policy book that Koenig was ever given and for which he signed, was the policy book signed September 21, 2012. According to an excerpt of this 2009-2013 policy book, Koenig is clearly entitled to all sick leave benefits as alleged in the Complaint [ECF 44-4, PageID 422, (¶10f)]. [ECF 44-7, PageID.468-470]. [See infra].

merely claimed that KBOCC was **"an at will employer"** and faculty are under one-year contracts. There was no mention of sovereign immunity for KBOCC.

The e-mail chains demonstrate that Sherman quashed any mediation/grievances/appeal hearings. An e-mail correspondence from Chosa to Sherman states: "**This is on you Lori. We don't make that decision. You don't want to mediate, then don't."** [*See* Att. 3, Defendants' Production J3, p. 106-108 (emphasis added)]. Chosa, as Acting Chairman of KBOCC, was thereby complicit in the refusal to allow any type of grievance.

Defendant Sherman is identified as the person who made the decision to terminate Mr. Koenig and the person who signed the interrogatories. [ECF 44-4, PageID. 419-420].

Jill Hodges, was likewise concerned that it could move forward to a lawsuit without mediation, or even with. [Id. @108]. As late as October 2020, KBOCC was concerned Koenig would file a lawsuit. On October 16, 2020, Attorney O'Leary wrote Sherman that any attorney Mr. Koenig had might be filing because of his denial of appeal rights, but they would not realize that Koenig was **"at-will**." [See Att. 3, Defendants' J3, p. 125]. Never a suggestion that KBOCC had sovereign immunity.

In Defendants' Initial Disclosures, they represented there was no insurance. It has now been disclosed that Defendants do have insurance with coverage in the amount of $1,000,000.00 and an excess policy in the amount of $2,000,000.00. [Attachment 6, Supplemental Disclosures; and Attachment 7 Declaration Sheet]. Not only do the Defendants have insurance, but internal documents demonstrated that the KBIC cannot be liable for any judgment against the KBOCC.

F. The Quest for Higher Learning Commission Accreditation, the 2012 Report of HLC Regarding the Comprehensive Evaluation Visit for Initial Accreditation and Internal Memo of Assessment and Accreditation Coordinator, Char Weingarten.

Attachment W to the Defendants' Brief is the Report of a Comprehensive Evaluation Visit For Initial Accreditation. [ECF 69-26, PageID. 1375]. As noted, the complete document was not provided to the Court/Koenig. [Id. PageID. 1375-1378]. The sections purposefully withheld are titled: III. Context and Nature of the Visit; IV. Commitment to Accreditation; V. Fulfillment of the eligibility requirements; VI. Compliance with assumed practices within the Criteria; VII. Compliance with Federal Regulations; and VIII. Affiliation Status and all Appendices. [see contents not provided, ECF 69-26, PageID. 1376; (emphasis added)].

Defendants also withheld documents that are referenced in the Memo from Char Weingarten, to Lori Sherman. The memo explained that as part of HLC's accreditation the governing board of KBOCC **must be autonomous and independent**. Ms. Weingarten explained:

> "Having an **independent governing board** that possesses and exercises the necessary legal power to establish and review the basic policies that govern the institution **is an eligibility requirement of accreditation by the Higher Learning Commission (HLC). Furthermore, establishing an autonomous and independent relationship from KBIC and the tribal council was a critical aspect of achieving KBOCC's candidacy status in 2009 and eventual initial accreditation in 2012, as evidenced by the following (and attached)[7] governance documents and emphasized in the following accreditation documents throughout the process of applying for, achieving, and maintaining accreditation." [Emphasis Added]. [Att. 1, KBOCC 000029].**

- **Letter dated April 7, 2009**, (emphasis supplied) signed by tribal council, president, Warren C. Swartz, Jr., **acknowledging KBOCC's autonomy and responsibility for its own finances. (ID) [Document not produced by KBOCC].**

- **Board of Regents Bylaws** (revised March 23, 2020) [Document Not Provided by KBOCC]

  11.4. Grants authority in autonomy to the Board of Regents to approve the colleges, annual budget and authorize an annual audit, and oversee the use of funds. [Att. 1, KBOCC 000029].

[7] In over 5000 documents these documents were not attached to the discovery answers Koenig received and they were certainly not attached to this memo authored by Ms. Weingarten. In addition, while initial accreditation is referenced in 2012, accreditation is not fully achieved until approximately 2016.

- **Board of Regents Manual (revised July 18, 2016). [Document Not Provided by KBOCC] [Emphasis supplied and added].**

  Under Accreditation (p. 17), it states: Accreditation also required the board to protect the College from outside influence. An example would be if the tribal Council attempted to micromanage, the college would lose accreditation. Maintaining accreditation, keeps the college programs current, and requires proper ethical operation standards and practices. [Att. 2, KBOCC Supplemental Answers-KBOCC 000029-30].

Ms. Weingarten concluded:

> "**KBOCC is an autonomous organization, completely separate from its tribal founders**." [emphasis added]. [Att. 2, KBOCC Supplemental Answers-KBOCC 000030].

Koenig's Complaint presents three independent claims. The first is a *qui tam* lawsuit brought pursuant to the False Claims Act (FCA), 31 USCA §§3729(A)(1-3). The second, is that Koenig was retaliated against by the Defendants in violation of 31 U.S.C. §3730, and, third, Koenig is entitled to fringe benefits that he had accumulated when he was terminated, as per the only Policy book that he was ever given and Michigan law. [*See* Complaint].

ARGUMENT I

DEFENDANT KBOCC AND THE THREE NAMED INDIVIDUAL DEFENDANTS ARE NOT INDIAN TRIBES, ARE NOT ARMS OF THE KBIC, AND ARE NOT ENTITLED TO SOVEREIGN IMMUNITY WHERE THE KBOCC HAS ADMITTED IT HAD AGREED, CONSISTENT WITH THE DIRECTION OF THE KBIC, TO CONSENT TO BE GOVERNED BY THE REGUALTIONS OF THE HIGHER LEARNING COMMISSION (HLC) AND AGREED TO ADHERE TO ALL FEDERAL REGULATIONS AS PROMULGATED BY THE HLC AS A PREREQUISITE FOR ACCREDITATION, AND THE ABILITY TO OBTAIN FEDERAL FINANCIAL AID, AND WHERE THE KBOCC CONDUCTED CLASSES EXCLUSIVELY OFF RESERVATION, HAS A STUDENT POPULATION THAT IS 40-60% SECULAR, HAS AN INSTRUCTOR POPULATION THAT IS 73% NON-INDIAN, WHERE KBOCC RECEIVED NO TRIBAL MONIES AFTER 2019, AND WHERE KBOCC'S OWN INTERNAL MEMOS DEMONSTRATED THAT FOR KBOCC TO QUALIFY FOR HLC ACCREDITATION AND FEDERAL FINANCIAL AID, IT MUST BE INDEPENDENT AND AUTONOMOUS FROM THE KBIC.

Despite naming the KBIC at every opportunity, Defendants have admitted that KBOCC is not an Indian Tribe. [ECF 44-3, PageID. 414].

A. KBOCC Has Admitted that, as a Condition Precedent to Qualify for Federal Financial Aid, KBOCC Agreed to be Governed by the Criteria Established by the HLC as a Gatekeeper Agency for U.S. Department of Education.

Defendants admitted the allegations of ¶22 of the Complaint, which provided the following:

> According to the HLC's website, the Organization is a gatekeeper to ensure that standards are met as a requirement of getting Federal Financial Aid (FFA). It states in relevant part that:
>
> > "To serve the common good, HLC must create and maintain relationships with the federal government and other organizations with broader communities dependent on the quality of higher learning received in accredited colleges and universities. In most states in HLC's region, state legislatures have established governing or coordinating bodies to implement state policies meant to ensure that the citizens of the state have access to quality higher education.
> >
> > **The federal government has a distinct interest in the role of accreditation in assuring quality in higher education for the students who benefit from federal financial aid programs. By being recognized by the U.S. Department of Education (USDE) as a gatekeeper agency, HLC agrees to fulfill specific federally defined responsibilities within the accreditation processes**". [emphasis added]. [ECF 17, PageID. 96, ¶22].
>
> Defendants further admitted in ¶23 of the Complaint:
>
> > ¶23. **As a prerequisite to accreditation, and to qualify for FFA, the Defendant College agreed to be governed by criteria that is established by the Higher Learning Commission's (HLC) criteria for accreditation.**
>
> Defendants' Answer is "Defendants admit the allegations in this paragraph." [ECF No. 17, PageID.96-97; (emphasis added)].[8]

B. HLC Policies:

[8] In some cases, the HLC may require more of its institutions than the federal regulations, it is important that institutions write to HLC's requirements to ensure their compliance not only with the federal regulations but also with HLCs expectations. [Att. 14, "I" p. 696].

The policies of the HLC are too numerous to articulate in this brief. However, as a general overview, in order to maintain federal recognition by the U.S. Department of Education, the HLC assures that all member institutions are complying with all appropriate federal regulations. [see Policy No. FDCR.A.10.060; Federal Compliance Requirements, and Federal Compliance Program, Fraud and Abuse (all attached as 12)]. Specifically, HLC policy, regarding Federal Compliance, requires institutions to meet these requirements in order to "gain candidacy, gain initial accreditation, and to remain accredited." [Id].

C. Koenig's Good Faith Report to the HLC.

After his internal complaints were ignored, Koenig wrote a 29-page letter to the HLC chronicling the failures of the KBOCC. [Att. 9]. Koenig described how KBOCC failed to live up to the rules and regulations of the HLC, to gain/keep accreditation, and to qualify for FFA. Koenig's general complaints include, but are not limited to the following [Att. 9]:

A) Fraudulent Assurance Argument and not following accreditation criteria, no Assessment Coordinator [Att. 9, p. 59-60/359];[9]

B) Disregard of Previous HLC Team Findings/Undermining Assessment Efforts [Id. P. 61-62/359];

C) Removal of Faculty Council from Academic Governance [P. 62-64/359];

D) Unethical Practices [P. 78-81/359];

E) Misrepresenting the Campus where the Classes were taught (actually taught off Reservation) [P. 81/359];

F) Neglect of Student Services [P. 81-83/359];

G) Deprioritizing Higher Education [P. 83-84/359];

H) Neglect of Current Programs [P. 84-86/359].

In the letter to the HLC, Koenig concluded as follows:

[9] Page numbers reflect documents provided to the Attorney General.

> "KBOCC administration has a history of not following HLC visit teams' findings. The new administration willingly continues and elevates this pattern of disregard for HLC standards. Administrations comments and these many examples of their actions show that this administration has no intention of letting the Criteria of Accreditation guide its operations for the betterment of student learning. I believe that for administration, HLC, accreditation is only a means to get Federal Financial Aid and other benefits, and the Assurance Argument is a cover-up that I am once again being asked to participate in." [Att. 9, p. 87/359].

D. Cases Cited by the Defendants are Not Analogous to this Case.

The two cases cited by the Defendants, *McCoy v. Salish Kootenai College*, 334 F.3d 1116 (2018) and *Stathis v. Marty Indian Sch. Bd.*, 560 F.Supp. 3d (2021), are factually distinguishable.

Neither of these cases have the dispositive set of admissions that are present herein. Nevertheless, the two cases are readily distinguishable.

McCoy involved a former employee suing "a tribal college" for sex discrimination pursuant to Title VII. The college sat exclusively on the Reservation. The charter in *McCoy* did not proclaim that the college was to accept all federal regulation with the goal of seeking accreditation. The violations alleged in *McCoy* went to an extraneous claim, not the result of defrauding its students or the Federal Government. Indeed, pursuant to Title VII, Indian tribes are specifically excluded. [*See Infra*].

The fact that KBOCC is off the Reservation, is financially independent and reaches a largely Non-Indian population, demonstrates that *McCoy* is not factually similar to KBOCC.

Stathis v. Marty Indian Sch. Bd., 560 F. Supp.3d 1283 (2021), is likewise distinguishable. *Stathis* involved a wrongful discharge claim pursuant to Title VII. As noted in *Stathis*, Title VII specifically exempted litigation against Indian tribes.

It is well-settled that a tribal entity may be sued if the entity has waived its immunity. *Stathis* citing *Kiowa Tribe v. Mfg. Techs., Inc.* 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L.Ed.2d (1998). Certainly, based on the vast admissions of KBOCC, as to the 1998 Amendment to the

KBOCC Charter, as well as adherence to accreditation standards promulgated by the HLC, demonstrates that immunity, if any, was waived in this case. The evidence demonstrates that KBOCC is autonomous from KBIC control and that the KBIC cannot be liable for any judgment.

Secondarily, *McCoy* and *Stathis* have no relevance as to the three individual Defendants for unlawful retaliation pursuant to the FCA.

ARGUMENT II

DEFENDANTS' CLAIM THAT THE INDIVIDUAL DEFENDANTS ARE NOT EMPLOYERS UNDER THE FALSE CLAIMS ACT, §3730, IS WITHOUT MERIT.

The *prima facie* elements of the FCA, as cited in *Jones-McNamara v. Holzer Health Sys.* 630 F.Appx. 394, 398 (6th Cir. 2015) (attached as 13), are met. Koenig engaged in protected activity by submitting his report to the HLC (Att. 9), Defendants knew of the protected activity he reported. He copied Defendants Sherman, Chosa, and Vertanin. Within hours of his notification Koenig was written-up, put on a corrective action plan, and shortly thereafter had his employment terminated.

Defendants' assertion that the individual Defendants are "colleagues" is not true. [Defendant Br. ECF 69-1, PageID.1165-1166]. The Complaint identifies Sherman as the President of the KBOCC, Chosa as the Acting Chairman of the KBOCC Board, and Vertanin as the Dean of Instruction. [ECF 1, PageID.3, ¶¶ 8-10]. These are hardly the qualifications of "colleagues." Defendant ignores its admission that Defendant Sherman made the decision to terminate Koenig. [ECF 44-4, PageID.420]. Despite Defendant Chosa being aware that this was not proper, he did nothing. [See, Att. 3, p. 108-109].

There is no requirement in the FCA retaliation provision that the defendant has to actually be an employer. *Tibor v. Michigan Orthopaedic Institute*, 72 F. Supp 750 [E.D. MI. 2014]. In

Tibor, the defendant made the identical argument. The court rejected defendant's reasoning as follows:

> "The 2009 Amendments to section 3730(h) added 'contractors' and 'agents' to the description of persons within the scope of the Act's protections. Although the amendments did not define those terms, it is clear that the purpose was to ensure that the protections of the Act extended beyond a traditional employment relationship. The amendments sought to address court decisions that had concluded that persons who were not technically employees, such as independent contractors or doctors without traditional employment relationships with hospitals." [*Tibor supra*, p. 759].

In *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1062–63 (6th Cir.2014), the court discussed the misguided position of the Defendants herein. The Court acknowledged that a Fourth Circuit panel had dismissed claims against corporations for a whistleblower not being an "employee".

In rejecting the Fourth Circuit, the court declared:

> Examining the legislative history, the court reasoned that Congress amended the FCA to correct recent court decisions that denied FCA retaliation protection to persons in employment-like relationships that were not technically "employees" because Congress found the decisions unduly narrow. The court reasoned that Congress intended to " 'correct this loophole' " and extend protection to " 'individuals who [a]re not technically employees within the typical employer[-]employee relationship, but nonetheless have a contractual or agent relationship with an employer.' " (quoting S.Rep. No. 110–507, 110th Cong., 2d Session (Sept. 25, 2008), 2008 WL 4415147, at *26–27). Additional legislative history supports this interpretation. *See* 155 Cong. Rec. E1295–03, 2009 WL 1544226 (June 3, 2009) (statement of Rep. Howard L. Berman) (stating, as the House sponsor of the amendment, that the purpose was to "cover [ ] … retaliation against contractors and agents of the discriminating party who have been denied relief by some courts because they are not technically 'employees' " and to "protect persons who seek to stop [FCA violations] regardless of whether the person is a salaried employee, an employee hired as an independent contractor, or an employee hired in an agency relationship.") (emphasis added). [*Boegh supra, 1062-63*; some internal citations omitted].

ARGUMENT III

THERE WAS A VIOLATION OF THE FALSE CLAIMS ACT (FCA) AS KBOCC AND THE THREE NAMED DEFENDANTS ARE PERSONS UNDER THE FCA.

The FCA is a remedial statute designed to stymie fraud against the government. *Munson Hardisty LLC. V. Legacy Pointe Apartments, LLC*, 359 F. Supp 3d 546 (ED TN 2019). In an attempt to thwart fraud, the FCA makes liable any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" against the Government. 31 U.S.C. § 3729(a)(1)(A) (2006). The intent of the FCA is to combat all types of fraud, without qualification, that could result in financial loss to the Government. *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968).

The FCA is broad. A recipient of federal funds is liable whenever it knowingly misrepresents compliance with a "statutory, regulatory, or contractual requirement" when the representation is "material to the Government's payment decision." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 192, 136 S.Ct. 1989, 195 L.Ed.2d 348 (2016). A manufacturer is liable who "knowingly supplies nonconforming goods to the government, based on a belief that the nonconforming goods are just as good as the goods specified in the contract." *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998). This common-sense approach requires the conclusion that KBOCC and the three named Defendants are liable for a violation of the FCA when they knowingly violated HLC standards for fraudulent accreditation and the receipt of FFA.

The retaliation provisions of the FCA are separate from the *qui tam* provisions of the FCA. The *Tibor* court also explained, citing *Halasa v. ITT Educ. Svs., Inc.*,690 F.3d 844, 847 (7th Cir.2012), that it is also true that, based on the Amendments to the FCA, the statute now "protects two categories of conduct. First, like the prior version of the statute, it still protects actions taken in furtherance of an action under the False Claims Act (i.e. a *qui tam* action under § 3729). Second, the current version now protects "employees from being fired for undertaking 'other efforts to

stop' violations of the Act, such as reporting suspected misconduct to internal supervisors." *Id.* at 847–48. [*Tibor, supra* 761 (emphasis added)].

Koenig is protected under the retaliation provisions of the FCA as long as the report is made in good faith, regardless of whether fraud actually took place. As explained in *Jones-McNamara v. Holzer Health Sys.*, 630 F. App'x 394 (6th Cir. 2015), an employee's activity is protected from retaliation if: "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." [*Jones supra*, Attached as 13, at 399-400].

Based on the aforementioned facts, Koenig has presented two prima facie claims under the FCA. There is no evidence that Koenig acted in bad faith.

IV. THE FAILURE TO PLEAD QUALIFIED IMMUNITY AND EXHAUSTION OF TRIBAL REMEDIES AS AFFIRMATIVE DEFENSES CONSTITUTED A WAIVER.

An affirmative defense is defined as, "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* (10th Ed. 2014). The defenses of qualified immunity and exhaustion of tribal remedies are affirmative defenses.

Federal Rule of Civil Procedure 8(C) requires that affirmative defenses must be pled in the first responsive pleading or they may be waived. Specifically, 8(c) provides:

> **(c) Affirmative Defenses.**
>
> **(1)** ***In General.*** In responding to a pleading, a party **must** affirmatively state any avoidance or affirmative defense.

A. *Qualified Immunity is an Affirmative Defense that Must be Pled or it is Waived.*

Qualified immunity is an affirmative defense that must be placed and proved by the defendant. *Balderaz v. Porter*, 578 F.Supp. 1491 (S.D. Ohio 1983) [citations omitted]. The failure to plead qualified immunity results in waiver. *Summe v. Kenton County Clerk's Office,* 604 F.3d 257 (6th Cir. 2010), citing *Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009) (holding that the failure to raise qualified immunity before the reply brief constituted a waiver of that defense in summary judgment proceedings). A finding of waiver is appropriate "even without a showing of prejudice" when a defendant "has failed to show 'that it even made a good faith effort to comply with the standard procedure for raising affirmative defenses.'" *Hendricks v. Pickway Corr. Inst.*, 782 F.3d 744, 750-51, (6th Cir. 2015). When the defendant is unable to offer any reasonable explanation for its tardiness in presenting a defense, finding waiver is not an abuse of discretion. *Desai v. Charter Communications*, LLC 381 F. Supp 3rd 774 (W.D. Ky 2019), citing *Henricks supra* (emphasis added).

Qualified immunity protects government officials performing discretionary duties from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Morrison v. Board of Trustees of Green Tp.,* 583 F.3d 394, 399 (6th Cir.2009) Qualified immunity does not serve merely as a defense against liability during litigation, but rather, it offers "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Defendants did not plead the defenses and the defenses should be waived. [Answer to Complaint, ECF No. 17, PageID.116-117].

B. *Even had the Defense of Qualified Immunity Been Properly Pled, it Would not Protect the Three Named Defendants, as Their Actions were Ultra Vires.*

KBIC as an Indian Tribe possesses sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L.Ed. 894 (1940). Sovereign immunity of a tribe does

not extend to its individual members. *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 53 L.Ed.2d 667 (1977).

Defendants' claim that they stand in the shoes of governmental officials performing their discretionary functions. [*See* Defendants' Brief, ECF 69-1, PageID. 1168]. That said, the acts of a government officials are not protected under the qualified immunity doctrine, even if properly pled, where the official acts *ultra vires*.

A state official is said to act *ultra vires* when he/she acts without authority. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The test to determine whether a state official has acted *ultra vires*, is whether the state official had a "colorable basis for the exercise of authority."

In the Sixth Circuit, qualified immunity for government officials is accurately reflected by the Court's holding in *Whitney v. City of Milan*, 677 F.3d 292 (6th Cir. 2012). In *Whitney*, this Court declared as follows:

> Government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties, provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). We apply a two-pronged test to determine whether qualified immunity shields a government official from a § 1983 claim: (1) we inquire whether the facts, viewed in the light most favorable to the nonmoving party, "show the officer's conduct violated a constitutional right;" and (2) if so, then we determine whether the constitutional right was clearly established by asking whether "a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *abrogated in part by Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). *[Whitney supra* @ 296].

The same is true under Michigan law. In *Odom v. Wayne County*, 482 Mich 459, 461; 760 N.W.2d 217 (2008), the Court explained that governmental employees are entitled to qualified immunity if the defense meets the standard set forth in *Ross v. Consumer's Power Co., (On*

Rehearing) 420 Mich 459; 363 NW2d 641 (1984). For the governmental employee to garner qualified immunity, he/she first must establish that the acts were taken "during the course of … employment" and that the employee was acting, or reasonably believed he was acting within the scope of his authority. Indeed, "[t]his requirement ensures that the governmental employee will not be afforded immunity when committing *ultra vires* acts, outside the scope of the employee's authority." *Odom supra* 473, citing *Ross supra.*

In the instant case, it is incomprehensible that Defendants can claim that attempting to circumvent the various federal regulations which KBOCC intentionally acquiesced to in exchange for accreditation, and the ability to provide FFA for all of its students, is within the scope of their employment. Moreover, it is very clear that the three Defendants directly, or tacitly, agreed to usurp the grievance/appeal/mediation rights of Koenig. Koenig previously went through the various email exchanges where Sherman refused all grievance and mediation requests and Chosa, believing that it was incorrect, tacitly approved. [Att. 3, J-108-111].

Similarly, the sovereign immunity of the KBIC, which is totally separate and distinct from KBOCC and under HLC rules, does not transfer to Defendants. Most critically, these are agents of the KBOCC, fully autonomous from the KBIC for HLC purposes. Defendant Vertanin is not Indian, and all of them were working at the L'Anse campus with Koenig off the Reservation. [Att. 5, Koenig Affidavit].

In *Lewis et al v. Clarke*, 158, U.S. 155; 197 L.Ed. 2d 631 (2017), a motor vehicle driver and passenger brought suit against an Indian Tribe member in his individual capacity for injuries sustained in a motor vehicle accident. The limousine carrying the plaintiffs was owned by an Indian Tribe. The limousine was off the Reservation. The Indian Tribe had an indemnification agreement with the driver. The Connecticut Superior Court denied the driver's motion for

summary disposition based on sovereign immunity. The Connecticut Supreme Court reversed and dismissed the lawsuit based on sovereign immunity.

In reversing, the U.S. Supreme Court explained, if a suit brought against a tribal employee in his or her official capacity, for a tort in his/her individual capacity, the individual and not the tribe is the real party in interest. The Court further declared:

> 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, supra* @ 158.

The Ninth and Tenth Circuit Court of Appeals have held that tribal sovereign immunity never applies to a claim for damages against a tribal officer sued in his individual capacity. *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-97 (10th Cir. 2008).

In *Pistor supra*, the court explained:

> Individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of ... law," and that were taken in the course of his official duties. By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they "'generally represent [merely] another way of pleading an action against an entity of which an officer is an agent.'" For this reason, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, *qua* entity, may possess." An officer sued in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," cannot claim *sovereign* immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally." 791 F.3d 1104, 1112 (9th Cir. 2015).[10]

[10] As noted, the KBIC cannot be held liable for KBOCC liabilities. The revised Charter also provided for the procurement of insurance which has been obtained. It is impossible for the KBIC treasury to be impacted by any judgment against KBOCC or the three named Defendants.

The court concluded, "[t]hese same principles fully apply to tribal sovereign immunity." [Id]. The court stated that, "[a]lthough [t]ribal sovereign immunity extends to tribal officials when acting in their *official* capacity and within the scope of their authority, 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]. (internal quotation and citations omitted).

In *Maxwell v. County of San Diego*, 708 F.3d 1075, 1081, (9th Cir. 2013) the Court held that two paramedics employed by a Tribe, who allegedly provided grossly negligent care to a shooting victim, were not entitled to tribal sovereign immunity from a state tort action brought against them in their individual capacities.

Finally, the case of *Dahlstrom v. Sauk-Suiattle Indian Tribe*, 2017 WL 1064399 [W.D. WA; ECF 44-8, PageID. 472] with some significant differences, presents issues analogous to this case. In *Dahlstrom*, plaintiff filed a complaint under seal pursuant to the *qui tam* provisions of the False Claims Act, 32 USC §§3729-33. Of notable difference to this case, Dahlstrom filed claims against the actual Indian Tribe. In addition, Dahlstrom filed against individual defendants, CNM, a health clinic owned by Dr. Morlock, Mr. Morlock and Ms. Metcalf, collectively "individual defendants", who were the Director of Indian Health Services/Health Clinic of the Sauk-Suiattle Tribe.

Dahlstrom was hired as a case manager but, like Koenig, was promoted, to the Director position. Dahlstrom reported that the Defendants knowingly made false/fraudulent claims to the United States and the State of Washington. Essentially the same claims that Koenig makes herein.

In denying the dismissal of the individual defendants, the court relied on the Ninth Circuit's opinion in *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1125 (9th

Cir. 2007). In *Stoner*, the Ninth Circuit held that state employees may be sued under the FCA event for "actions taken in the course of their official duties." Consequently, the Court in *Dahlstrom* held as follows:

> "The court concludes that the reasoning in *Stoner* extends to permit suits against individual, tribal employees for actions taken in the course of their official duties. Individual defendants are those not immune from suit due to sovereign immunity." *Dahlstrom supra* PageID. 475 (citing *Stoner* 502 F.3d at 1125).

C. *The Defense of Tribal Exhaustion was Waived, However, Tribal Exhaustion is not Required Where the KBOCC, as a Quid Pro Quo for Accreditation and Federal Financial Aid, Has Agreed to Abide by All Relevant HLC and Federal Rules and Regulations.*

It is well-established that the defense of exhaustion is an affirmative defense that must be pled and proven by a Defendant. Exhaustion is not jurisdictional; rather, exhaustion is an affirmative defense that must be pleaded and proved by the defendants. *Jones v. Bock*, 549 U.S. 199, 166 L.Ed2 798 (2006).

Second, KBOCC, as demonstrated through the myriad of admissions set forth in the beginning of this brief, including the 1998 Charter and the various admissions about being bound by all Federal and State Regulations (including those of the HLC), have expressly waived any claim to an exhaustion defense. As noted, Congress can insist certain conditions precedent as a condition of obtaining federal monies. It is that waiver that has allowed KBOCC to become accredited and achieve financial independence as the result of FFA.

Third, Defendants get to the Tribal exhaustion question based on a faulty premise. That premise is that Koenig is suing the KBIC Tribe. Defendants claim that the KBOCC is on an Indian Reservation educating only tribal members is a complete fiction. The case cited by the Defendants, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), recognized that the policy of tribal exhaustion reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42

L.Ed.2d 706 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. [*Iowa Mutual* @ P. 14].

In this case KBOCC has waived any claim. Moreover, in this case, Koenig is not suing the KBIC. Koenig's claims are for actions were off the Reservation, and involved a very Non-Indian population. [*See* Att. 5].

ARGUMENT V

KOENIG IS ENTITLED TO HIS UNPAID SICK LEAVE THAT WAS GURANTEED VIA THE ONLY POLICY BOOK THAT HE WAS PROVIDED AND SIGNED FOR, WHERE THOSE BENEFITS WERE EARNED WORKING OFF THE RESERVATION.

Koenig's claims for fringe benefits lies against the KBOCC. Defendant is incorrect, however, where it asserts that KBOCC "is an educational institution of a Tribe on tribal land and state law does not apply. [ECF 69-1, PageID.1167]. Just as the Defendants routinely name the KBIC as the real party in interest, they repeatedly ignore that every class Koenig taught from 2015/2016 until the present was not taught on tribal lands, was not on the Reservation, was not funded by the KBIC, and had students that were 40-62% non-Indian.

In *The Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1973) the Court explained the error of KBOCC's argument:

> But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws, and applies as much to tribal ski resorts as it does to fishing enterprises. *See Organized Village of Kake, supra. [Mescalero supra 148-149; internal citations omitted].*

Indian tribes retain broad powers over intramural affairs. The tribes may determine tribal membership, may regulate domestic relations among members, prescribe rules of inheritance among members, and punish tribal offenders. *Montana v. United States,* 450 U.S. 544, 564, 101

S.Ct. 1245, 67 L.Ed.2d 493 (1981). That said, when a tribal government goes beyond matters of internal self-governance and enters into an off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest." *San Manuel,* 475 F.3d at 1312–13 (citing *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148–49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)).

Plains Commerce demonstrate that inherent tribal sovereignty at the periphery, the power to regulate the activities of non-members is constrained, extending only so far as "necessary to protect tribal self-government or to control internal relations." *See Montana v. United States,* 450 U.S. 544, at 564, 101 S.Ct. 1245 (1981). Tribal regulations of non-member activities must "flow directly from these limited sovereign interests." *Plains Commerce,* 554 U.S. at 335, 128 S.Ct. 2709. (2008).

[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero supra* @ 148, also *see NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F3d 537 (6th Cir. 537 (6th Cir 2015).

The Supreme Court has long been suspicious of tribal authority to regulate the activities of non-members and is apt to view such power as implicitly divested, even in the absence of congressional action. *See Plains Commerce,* 554 U.S. at 328, 128 S.Ct. 2709 ("[T]he tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing ... person[s] within their limits except themselves.' " (second and third alteration in original) (quoting *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 209, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

This is so because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes...." *Montana,* 450 U.S. at 564, 101 S.Ct. at 1258.

Similarly, in *Menominee Tribal Enters v. Solis*, 601 F.3d 669, 674 (7th Cir.2010) (holding that OSHA applied to tribe's operation of a sawmill and related commercial activities); Fla. *Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1128–30 (11th Cir.1999) (holding Title III of the Americans with Disabilities Act applied to tribe's restaurant and gaming facility); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 177–82 (2d Cir.1996) (holding that OSHA applied to Indian tribe's construction business which operated off of the Reservation.

A) The Only Policy Book Provided to Koenig Provided that He Is Owed the Value of his Fringe Benefits and Specifically Sick Leave.

KBOCC has admitted that the only policy book that was given to Koenig, and was signed for, was the 2009-2013 policy book. [*See* Answers to Interrogatories, ECF 44-4, PageID.422, ¶10(f)]. It provided:

> "**Sick Leave**"
>
> …"In case of dismissal, termination, or resignation, **employees will be paid for accumulated sick leave.** [See ECF 44-7, PageID.469].

Total available sick leave/personal leave accumulated is posted to Koenig's last check stub as 822 hours of sick leave and 24 hours personal time. [Id. PageID.470].

B. Michigan State Law Mandates That Koenig Be Paid His Benefits.

The relevant Michigan legislation is MCLA 408.473. MCLA 408.473 provides as follows:

> Sec. 3. An employer shall pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in the written contract or written policy.

The only written policy provided to Koenig says that the benefits will be paid accumulated sick leave. According to MCL 408.473, KBOCC shall pay the fringe benefits in accordance with the written policy.

VI. CONCLUSION:

Defendants' Motion should be denied in all respects.

Dated: February 28, 2025

HURLBURT, TSIROS & ALLWEIL, P.C.

By: */s/ Mandel Allweil*

MANDEL I. ALLWEIL (P34115)
Attorneys for Plaintiff
821 S. Michigan Ave./P.O. Box 3237
Saginaw, MI 48605
(989) 790-3221
(989) 792-2912 - Fax

CERTIFICATE OF COMPLIANCE

I, Mandel I. Allweil, counsel of record for Plaintiff, certify that the Plaintiff's Response to Defendants' Memorandum of Law on Defendants' Motion for Judgement on The Pleadings complies with the word limitation pursuant to Local Rule 7.2(b)(ii) and the countable words in the Brief, using Microsoft Word version 16.16.27, is 10,751 words.

/s/ Mandel I. Allweil
Mandel I. Allweil (P34115)

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2025 the foregoing paper was electronically filed with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Mandel I. Allweil mail@htalawyers.com and upon Jana M. Simmons at jana.simmons@ropers.com and there are not any non-ECF participants listed in this matter.

HURLBURT, TSIROS & ALLWEIL, P.C.

BY: */s/ Mandel I. Allweil*
Mandel I. Allweil (P34115)
821 S. Michigan Ave.
P.O. Box 3237
Saginaw, MI 48605
(989) 790-3221
mail@htalawyers.com