UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ex rel

Movant

Court of Appeals No. 25-1872
District Court Case No.: 2:23-cv-103

and

JESSE KOENIG

Plaintiff-Appellant

v.

KEWEENAW BAY OJIBWA COMMUNITY COLLEGE; LORI ANN SHERMAN, President, Individually and as Representatives of Keweenaw Bay Ojibwa Community College; BETH LOUISE VERTANIN, Dean of Instruction, Individually and as Representatives of Keweenaw Bay Ojibwa Community College; ROBIN CHOSA, Chairman of the Board, Individually And as Representatives of Keweenaw Bay Ojibwa Community College

Defendants-Appellees

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Rule 26.1 Corporate Disclosure Statement

There is no such corporation involved for the Plaintiff-Appellant, Jesse Koenig.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to 6th Circuit R. 34, Plaintiff- Appellant, Jesse Koenig, hereby requests oral argument. This case involves a fact intensive presentation and is of significant public importance. Koenig believes that oral argument may be of assistance to help the court understand the factual intricacies of the case, and specifically the metamorphosis of the Keweenaw Bay Ojibway Community College (KBOCC) from a small Tribal College on a Reservation providing educational services to only Native Americans, funded exclusively by the Tribe, to a local community college operating off the Reservation, whose student population is secular, with over 50% of the students being non-Native American, and approximately 75% of the academic staff being non-Native American. Equally enlightening is the complete elimination of Tribal funding whereas funding is now exclusively the result of Federal Financial Aide, the fraudulent procurement of which is the subject matter of Mr. Koenig's False Claims Act allegation that was unilaterally dismissed by the lower district court.

STATEMENT OF ISSUES INVOLVED

I.

WHETHER THE DISTRICT COURT ERRED WHERE IT FAILED TO ADDRESS KOENIG'S CLAIM THAT THE DEFENDANTS, KBOCC AND THE THREE INDIVIDUALLY NAMED DEFENDANTS, WAIVED CLAIMS TO QUASI-SOVEREIGN IMMUNITY THROUGH ITS ANSWERS TO THE COMPLAINT, ADMISSIONS, PLEADINGS, AND DOCUMENTARY EVIDENCE?

Plaintiff-Appellant says **"YES"**

Defendant-Appellee says **"NO"**

II.

WHETHER THE DISTRICT COURT ERRED WHERE IT HELD TRIBAL SOVEREIGN IMMUNITY EXTENDED TO INDIVIDUAL DEFENDANTS SHERMAN, CHOSA, AND VERTANIN, SUED IN THEIR INDIVIDUAL CAPACITY, FOR RETALIATION IN VIOLATION OF 31 USC § 3730 OF THE FALSE CLAIMS ACT, WHERE THE RELIEF SOUGHT DOES NOT COME FROM THE TRIBAL TREASURY?

Plaintiff-Appellant says **"YES"**

Defendant-Appellee says **"NO"**

III.

IS THE KBOCC AN ARM OF THE TRIBE UNDER THE FUNCTIONAL SOVEREIGN IMMUNITY TEST.

Plaintiff-Appellant says **"NO"**

Defendant-Appellee says **"YES"**

IV.

WHETHER KOENIG IS ENTITLED TO HIS UNPAID SICK LEAVE THAT WAS GUARANTEED IN THE KBOCC POLICY BOOK, PURSUANT TO MCL408.473, AND WHERE THOSE BENEFITS WERE EARNED WORKING OFF THE RESERVATION?

Plaintiff-Appellant says **"YES"**

Defendant-Appellee says **"NO"**

V.

SHOULD THIS COURT EMBRACE THE OPINIONS OF JUSTICES STEVENS, THOMAS, & GINSBURG IN *KIOWA TRIBE OF OKLAHOMA V. MANUFACTURING TECHNOLOGIES*, WHERE THE DISSENTING JUSTICES WOULD HAVE FOUND THAT THERE IS NO FEDERAL STATUTE OR AUTHORITY THAT SHOULD EXTEND THE JUDICIAL MADE DOCTRINE OF SOVEREIGN IMMUNITY TO PRE-EMPT AUTHORITY OF STATE COURTS FOR ACTIONS TAKEN OFF TRIBAL LANDS?

Plaintiff-Appellant says **"YES"**

Defendant-Appellee says **"NO"**

I. JURISDICTIONAL STATEMENT:

On August 28, 2025 The United States District Court, Western District of Michigan, Northern Division, issued an Opinion and Order granting the Defendants' motions to dismiss the Complaint for lack of subject matter jurisdiction and judgment on the pleadings for reasons cited within the opinion. [Opinion & Order, RE 80, Page ID# 1799-1813; Judgement, RE 81, Page ID# 1814].

Plaintiff-Appellant, Jesse Koenig, timely filed a Notice of Appeal in this matter on September 25, 2025. [RE 82, Page ID# 1815]. This appeal was assigned case number 25-1872. [Clerk Letter, RE 83, Page ID# 1817]. The case is now properly before this Court and Koenig files this brief in support of his appeal

II. STANDARD OF REVIEW:

This Court reviews *de novo* the district court's decision to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Lovely v. United States,*570 F.3d 778, 781 (6th Cir.2009) Moreover, "[w]here the district court does not merely analyze the complaint on its face, but instead inquiries into the factual predicates for jurisdiction, the decision on the 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's

finding for clear error." *Id.* at 781–82. But, of course, "review of the court's *application of the law* to the facts is *de novo*." *Id.* at 782.

In this claim some initial discovery took place as Koenig served interrogatories, admissions, and production requests with the Complaint. That resulted in Koenig getting partial answers and selected documents from the Defendants. Within the initial pleadings Defendants admitted: "**Defendants acknowledge this Court has Jurisdiction over the claims in this case**." [Joint Status Report, RE 20, Page ID# 129] (Emphasis added)

Upon review of documents produced, it became apparent that many documents were cherry picked and many documents were not produced. [*See Argument infra*]. Ultimately, the District Court did issue a "Stay of Proceedings." [Order 11/19/2024, RE 65, Page ID# 1124]. As addressed in Koenig's Brief in Opposition to the Defendants 12 (B)(1) motion to dismiss for lack of subject jurisdiction, many documents involving the Higher Learning Commission (HLC) and Federal Regulation as it pertained to the KBOCC were excluded.

There is clear error in this case and Koenig requests that the case be Remanded for the completion of discovery and trial.

III. STATEMENT OF THE CASE:

1. *BACKGROUND/OVERVIEW OF THE CASE.*

This case involves claims brought by Professor Jesse Koenig, pursuant to the False Claims Act (FCA), against Keweenaw Bay Ojibway Community College (KBOCC), and three named Defendants, Lori Sherman (Acting President) Beth Vertanin (Dean of Instruction), and Robin Chosa (Chairman of the Board) all in their individual capacity. [Complaint, RE 1, Page ID# 2-3].[1] Koenig brought this action on behalf of the United States against the Keweenaw Bay Ojibway College, and the three named Defendants, to recover all damages and penalties and/or any other remedy established and/or allowed pursuant to 31 USCA §§3729-3733, and Koenig claims entitlement to a portion of any recovery obtained by the United States as a *qui tam* plaintiff as authorized by 31 USCA 3730 as well as damages for retaliatory

[1] The District Court found KBOCC was a chartered college of the Keweenaw Bay Indian Community (KBIC). [Opinion & Order, RE 80, Page ID# 1799]. A more accurate description is that the KBIC chartered and established the Ojibway Corporation in 1975, to be known as the Ojibway Community College and Learning Center and was to "generally coordinate and regulate all higher education on the Keweenaw Bay Indian Reservation. [Ojibwa Charter 1975, RE 69-5, Page ID# 1194]. KBOCC did not come into existence until 1998 when the Charter was changed and Ojibway was changed to KBOCC, and KBOCC was recognized in Section 3 of the Charter, "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 agree to perform any conditions attached thereto. [KBOCC Charter 1998, RE 69-6, Page ID# 1200]. [Emphasis added].

discharge in violation of USC 3730(h). [Complaint, RE 1, Page ID# 4, 12-15, ¶¶ 15, 60-80].

The Higher Learning Commission (HLC) is an independent corporation, founded in 1895, and is one of six regional institutional accreditors of universities and colleges in the United States. [Complaint, RE 1, Page ID# 5 ¶21]. The HLC plays a pivotal role in accreditation for higher education and to ensure that students who qualify for Federal Financial Aid (FFA) are getting the type of education that the federal government requires in exchange for providing FFA. [*Id.* ¶22].

The essence of Koenig's claim is he reported to the HLC that KBOCC was perpetrating a fraud, via the *ultra vires* actions of Defendants Sherman, Vertanin, and Chosa, by misrepresenting its compliance with mandatory obligations for continued accreditation. This was done to maintain accreditation and the continued receipt of the life blood of the college, FFA. Once Koenig notified the HLC, he was immediately disciplined and shortly thereafter had his contract discontinued and terminated. [Complaint, RE 1, Page ID# 4, 12-16, ¶¶ 18, 60-80].

A. Before Reporting to the HLC, Koenig Sought Internal Resolution of the KBOCC's Reporting Deficiencies.

Koenig's predecessor at KBOC, Dr. Rebecca Frost, had similar concerns as Koenig. Frost was ostracized and forced out of her position. [Compliant, RE 1, Page ID# 7, ¶34,35) *and see* Admissions, RE 44-3, Page ID#. 416; Answer to Complaint,

RE 17, Page ID# 100-101, ¶ 34, 35, 37].[2] To resolve the concerns that both he and Dr. Frost shared, Koenig first sought internal resolution. He wrote President Sherman, Chairman Chosa, and then the Board itself. KBOCC admitted Koenig filed internal complaints. Koenig alleged that the KBOCC perpetrated numerous fraudulent acts in its filings with the HLC. [Complaint, RE 1, Page ID# 7-9, ¶ 30-49].

B. Koenig Reports Fraud to the HLC.

On May 10, 2020, Koenig sent a 29-page letter specifically setting forth how the KBOCC and the individual defendants were undermining HLC requirements and that the 2016 Assurance presentation was "a work of fiction." [Complaint, RE 1, Page ID# 9, ¶48] [Emphasis Added]. These revelations could result in a loss of accreditation and, ultimately, FFA. [*Id.*, ¶ 48-49; *Also see* Koenig's 29-page letter, RE 77-9, Page ID# 1686-1717]. KBOCC's fraud on the HLC is a fraud on the United States, and the students who rely on the accreditation process as was intended to ensure a quality education in exchange for continued FFA. On May 18, 2020, the

[2] Defendants admitted that Dr. Frost brought similar complaints to the KBOCC hierarchy. Frost complained that HLC standards were not being met. Plaintiff has alleged, and it would have been independently corroborated through discovery had the District Court not Stayed proceedings, that Frost was ostracized and had her authority diminished to the point she felt forced to resign [Admissions, RE 44-3, Page ID# 416; Answer to Complaint, RE 17, Page ID# 100-101, ¶ 34, 35, 37].

HLC responded that Koenig's letter, raises "potential concerns." [*Id.*, Page ID# 10, ¶50-51; HLC letter to Koenig, RE 77-11, Page ID# 1721]. [Emphasis Added].

C. Koenig had an Outstanding Record Before Reporting Fraud to the HLC and was Immediately Retaliated Against Because of His Protected Conduct.

1. Koenig's Excellent Employment History.

Koenig was hired by KBOCC on September 27, 2010, as a college professor. [Answer to Complaint, RE 17, Page ID# 89-117]. Koenig was quickly promoted to the Liberal Studies Department Chairmen. [Admissions, RE 44-3, Page ID# 414, no. 26]. Koenig was found to be an important member of the team and was a valuable asset. [Employee File Excerpt, RE 77-2, Page ID# 1639-1646]. From the time of hire up to May 12, 2020, a period of almost ten years, Koenig received no discipline. [Interrogatory Answers, RE 44-4, Page ID# 421]. Two months before Koenig's report to the HLC, Dean Vertanin found Koenig's course organization was "[v]ery well done". [Faculty Chair Annual Review, RE 77-2, Page ID. 1642]. Koenig was perceived to have performed in an "excellent" manner in 18 of 19 categories, scoring 98.33%. [*Id.*, Page ID# 1643].

2. Retaliation by Sherman, Vertanin and Chosa is Immediate in Response to Protected Conduct.

Within hours of Koenig advising the individuals that he filed with HLC,[3] Koenig received three corrective action plans and those were the first corrective action plans he received in his ten years with KBOCC. [Complaint, RE 1, Page ID# 10, ¶ 52-53; Interrogatories, RE 44-4, Page ID 421-422; Answer to Complaint, RE 17, Page ID# 100-101, ¶ 34, 35, 37]. KBOCC in their Answers to the Complaint admitted that Koenig received three corrective action plans within hours of Koenig advising that he contacted the HLC. Correspondingly, however, they denied any causal link. Apparently the first write-ups in ten years are just coincidences like Russian dissidents falling out of windows. [*Id.* Page ID 109].

On July 20, 2020, while on vacation, Koenig received notice he was being terminated and that his contract would not be renewed. [Complaint, RE 1, Page ID# 9-14, ¶ 48-52, 63, & 71; *also see*, Employee File Excerpt, RE 77-2, Page ID# 1639-1646, no renewal of contract signed by Defendant Sherman].

3. Koenig Attempted to Follow the Grievance Procedure but was Stonewalled Repeatedly by Sherman.

Koenig attempted to file a grievance/mediate/appeal but did not receive, as was required, an "independent grievance committee" to process the grievance.

[3] Koenig advised the three individual Defendants that after his concerns were not addressed, he was contacting the HLC. All were provided a copy of the 29-page letter.

Rather, Sherman and the KBOCC just ruled against him. [Complaint, RE 1, Page ID# 10-13, ¶¶ 54-58, 64-74]. Koenig repeatedly attempted to use internal remedies and avail the grievance procedure but was obstructed at every attempt. [*See* Grievance/Appeal Attempts, RE 44-6, Page ID# 437-466]. In very limited discovery, emails confirm he repeatedly attempted to seek appeal of his termination. [Emails, RE 77-3, Page ID# 1648-1658]. On May 25, 2020, Sherman acknowledged that Koenig wanted his grievance heard by a grievance committee and noted he filed a Complaint with the HLC. [*Id.* Page ID# 1658]. Koenig contacted Shannon Taylor, Program Manager, Mediation Services of the Upper Peninsula Commission for Area Progress [*Id.* Page ID# 1655-1656]. In an e-mail dated July 20, 2021 by Hodges, "Jesse Koenig is requesting mediation again." [*Id.* Page ID# 1650-1651]. The e-mail chain confirmed Sherman quashed any mediation/grievances/appeal hearings. An e-mail correspondence from Chosa to Sherman stated: "**This is on you Lori. We don't make that decision. You don't want to mediate, then don't.**" [*Id.* Page ID# 1650 (emphasis added)]. Chosa, as Acting Chairman of KBOCC, was thereby complicit in the refusal to allow any type of grievance. Sherman is also identified as the person who made the decision to terminate Mr. Koenig and the person who signed the interrogatories. [Interrogatory Answers, RE 44-4, Page ID# 419-420].

Jill Hodges was likewise concerned that it could move forward to a lawsuit without mediation, or even with. [Emails, RE 77-3, Page ID# 1650]. 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."** [*Id.*, Page ID# 1657]. Never a claim that KBOCC and/or Sherman had sovereign immunity.

2. *THE METAMORPHOSIS OF A KBIC TRIBAL COLLEGE, KNOWN AS OJIBWAY IN 1975, FROM PROVIDING EDUCATIONAL SERVICES EXCLUSIVELY TO NATIVE AMERICANS ON THE KBIC RESERVATION AND EXCLUSIVELY FUNDED BY THE TRIBE IN 1975, TO A SECULAR COLLEGE, LOCATED OFF THE RESERVATION WHOSE STUDENT BODY AND PROFESSORATE WAS MOSTLY SECULAR, WHERE THE KBOCC AS OF 2019, RECEIVED NO FINANCIAL ASSISTANCE FROM THE KBIC, AND WHERE THE KBIC COULD NOT BE FINANCIALLY RESPONSIBLE FOR CLAIMS AGAINST THE KBOCC AND INDIVIDUAL DEFENDANTS.*

A. The District Court Failed to Address the Metamorphosis that had Taken Place Within the Defendant College.

The original college (Ojibway), started in 1975, was exclusively on the KBIC Reservation, and catered to a homogenous Native-American population. It took over forty (40) years from the inception of Ojibway, for KBOCC to become an institution that was fully "accredited" (2016) by the HLC.

That transformation started in 1998 when the Charter was revised and the name of the college was ultimately changed from Ojibway to KBOCC. Section 3 of

Article 4 of the 1998 Charter revision provided: [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**. [KBOCC Charter 1998, RE 69-6, Page ID #1200]. [emphasis added].[4]

Article IV, Section 6, provided authority to purchase insurance against risks and hazards [*Id.*]. In supplemental answers it was admitted that there is insurance regarding officials and management [KBOCC Insurance, RE 77-7, Page ID# 1676-1678].

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 and contrary to the Opinion of the District

[4] 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. Accreditation, obtained in 2016, allowed KBIC to completely stop funding the KBOCC by 2019 as described herein.

Court that "the financial relationship between the Tribe and the KBOCC favors extension of sovereign immunity. [KBOCC Charter 1998, RE 69-6, Page ID# 1204; Opinion & Order, RE 80, Page ID# 1808]. Koenig submits that conclusion is clear error.

In 2012 KBIC started reducing financial support for KBOCC. [Admissions, RE 44-3, Page ID# 413-416]. By 2016-2017, greater than ½ of all of KBOCC's funding was provided by FFA. [*Id.* Page ID# 415-416, no. 29]. By 2019, KBIC funding of KBOCC "**was discontinued**." [Answer to Complaint, RE 17, Page ID# 91, ¶ 6, 7].[Emphasis added].

In 2013 KBOCC purchased the former Baraga Memorial Hospital in L'Anse, Michigan. This location, 770 North Main Street, L'Anse, Michigan, is off the Reservation. [Admissions, RE 44-3, Page ID# 412-414, No. 10-14, 22]. Once this opened, Koenig **never** taught a class on the Reservation. [*Id.*, Page ID# 413]. No substantive classes were taught on the Reservation after opening. [Koenig Affidavit, RE 77-5, page ID# 1666-1667 and Admissions, RE 44-3, Page ID# 413-414, ¶¶ 10, 11, 12, 13, 14, 22]. From 2015 through 2020, Koenig worked exclusively at the former Baraga Hospital, and off Reservation. [Affidavit, RE 77-5, Page ID# 1666-1667].

B. By 2019 the Student Body and Professorate was Transformed to a Secular College.

Evidence demonstrated in September of 2020, when Koenig was trying to mediate his claim with KBOCC, 62% of the class was non-Native. Defendants admitted that more than 40% were not members of the tribe in 2021/2022. [Admissions, RE 44-3, Page ID# 412, no. 7]. When Koenig last worked for the KBOCC, approximately 73% of the faculty was non-Native American and teaching off the Reservation. [Affidavit, RE 77-5, Page ID# 1666-1667]. KBOCC admitted that it actively advertised to the secular community that it was independent from the Tribe. [Admissions, RE 44-3, Page ID# 413, ¶16; Answers to Complaint, RE 17, Page ID# 90-91, ¶5].[5] KBOCC actively recruited students of all backgrounds. [*Id.*, Page ID# 414, ¶ 24]. The result was a dramatic increase in the secular student population. [*Id.*, ¶16, *also see* Answers to Complaint, RE 17, Page ID# 90-91, ¶5]. [IPEDS Data, RE 77-4, Page ID# 1660-1664]. The attainment of Accreditation and FFA resulted in a metamorphosis of KBOCC from small tribal college existing only on the Reservation, to a secular student body being taught off the Reservation.

[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." [Weingarten Memo, RE 77-1, Page ID# 1636 (emphasis added].

From 2021-2024, the student population almost tripled (79 to 222). [HLC letter to Sherman, RE 77-15, Page ID# 1753-1754].

C. The Defendants Intentionally Withheld Relevant Documents and the Lower Court's Stay Prohibited Koenig From Getting Those Documents.

Defendants withheld documents that are referenced in various submissions below. In a memo from Char Weingarten to Lori Sherman it was 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)[6] governance documents and emphasized in the following accreditation documents throughout the process of applying for, achieving, and maintaining accreditation."** **[Emphasis Added].** [Weingarten Memo, RE 77-1, Page ID# 1635].

- **Letter dated April 7, 2009**, (emphasis supplied) signed by tribal council, president, Warren C. Swartz, Jr., **acknowledging KBOCC's**

[6] 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.

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 [*Id.*].

- **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. [*Id.* page ID# 1636].

Ms. Weingarten concluded:

> "**KBOCC is an autonomous organization, completely separate from its tribal founders**." [emphasis added]. [*Id.*].

Attachment W to the Defendants' Brief is the Report of a Comprehensive Evaluation Visit For Initial Accreditation. [RE 69-26, Page ID# 1375]. As noted, the complete document was not provided to the Court/Koenig. [*Id.* Page ID# 1375-1378]. The sections purposefully withheld have intriguing titles and the actual content is unknown:

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. [*Id.*, Page ID# 1376; (emphasis added)].

It is Koenig's argument, that pursuant to the guidelines agreed to by the KBOCC, and purposefully withheld, the KBOCC understood and agreed to be in compliance with all Federal Regulations, as enunciated through the federal gatekeeper agency, the HLC, and as is reflected in the change to the KBOCC Chater in 1998 that proclaimed that the KBOCC agreed to perform any agreement and agree to perform those conditions attached to achieve accreditation and receive FFA. [RE 69-6, Page ID# 1200]. [*See argument infra*].

IV. SUMMARY OF ARGUMENTS

A. Argument I: Koenig argues the District Court failed to address a panoply of admissions made in Answer to the Complaint, Admissions, Interrogatory Answers, and in response to a Joint Status Order. For

example, in the Joint Status Order the Defendants admitted the District Court had jurisdiction. In Answer to the Complaint the Defendants acquiesced to jurisdiction and confirmed that KBOCC agreed that the HLC was a gatekeeper organization to ensure colleges met certain standard to be accredited and receive Federal Financial Aid. (FFA). Further the Court failed to examine of the metamorphosis of the KBOCC from a tribal college named Ojibway, operating exclusively on tribal lands, to the KBOCC whereby a change in the Charter that allowed the KBOCC to make any agreement, and perform any conditions thereto, with federal and state agencies to acquire accreditation and qualify for FFA. The Court ignored Congress' ability pursuant to its spending power to fix the terms upon which it will grant FFA.

B. Argument II: Koenig asserts that claims for wrongful retaliation in violation of the False Claims Act, brought against the three named Defendants in their individual capacity, is not barred by any claim of sovereign immunity. Specifically, immunity does not apply when an employee is sued in their individual capacity for personal acts, and in this case for acts that are *ultra vires*. The actions of the three defendants are, indeed, outrageous. After having an exemplary record for ten years, Koenig was disciplined within hours of reporting fraud to the HLC.

Within a couple of months he was advised his contract would not be renewed. A *prima facie* case of retaliation under the FCA. As the Supreme Court declared in *Lewis v. Clark*, (*see infra*) a suit brought against an employee in his individual capacity, even if the employee is acting in his/her official capacity (though in this case in an ultra vires manner) does not implicate the tribe and does not trigger sovereign immunity.

In the Ninth and Tenth Circuit tribal sovereign immunity never applies to a claim for damages against a tribal officer sued in his/her individual capacity.

The District Court's Opinion finding that a Koenig judgment would come from the tribe is clear error. The KBOCC Charter as of 1998 made clear that the "KBIC is not responsible for the obligations of the [KBOCC] except as obligated in writing." There is no such policy in writing. Moreover, as allowed by Charter the KBOCC purchased and has indemnity insurance for the illegal actions of its board members.

Finally, any claims of qualified immunity or tribal exhaustion were waived by failing to file the relevant affirmative defenses. Defenses that are not affirmatively alleged, are waived.

C. Argument III: The KBOCC is not an arm of the Tribe. Most clearly the KBOCC is not an arm of the Tribe where the District Court failed to properly analyze the current status of the Tribe. That is, the District Court only reviewed how the KBIC tribal college (Ojibway) was created in 1975. The Court failed to address the vast differences after the name change in 1998. The Court ignored that the KBOCC had its courses taught off Reservation since approximately 2015/2016. Did not deal with that the KBIC completely cut off funding in 2019. Did not address that the KBOCC catered and marketed itself to a secular audience with up to 62% of students being secular and 73% of the professorate was secular. Finally, it erred where it found that the Tribe would have to pay for judgments against the KBOCC and/or the individual defendants.

D. Argument IV: The plain language of Michigan Statute, MCL 408.473, is that if a policy book provides a guarantee of fringe benefits an employer is liable for those benefits. Koenig earned those monies off the Reservation. Koenig never taught on the Reservation since 2015/2016. The Opinion to the contrary is clear error.

E. Argument V: Koenig urges the Court to embrace the dissenting justices in *Kiowa Tribe v. Manufacturing Technologies (see infra)*. The dissenters set forth a tri-partite test of explaining why sovereign immunity should

not be granted to entities engaging in commercial activities off the Reservation. The rationale is that Congress had not spoken and provided for immunity off the Reservation and by granting immunity the Court was creating law; 2). The holding is anomalous as it provides greater projection for Tribes than comparable state governments; and 3) It's just unfair. This is especially true with respect toward victims who have no opportunity to negotiate for a waiver of sovereign immunity; Yet nothing in the court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct. [*Kiowa supra* p. 766, (emphasis added and *see infra*)].

ARGUMENT I

THE DISTRICT COURT ERRED WHERE IT FAILED TO ADDRESS KOENIG'S CLAIM THAT THE DEFENDANTS, KBOCC AND THE THREE INDIVIDUALLY NAMED DEFENDANTS, WAIVED CLAIMS TO QUASI-SOVEREIGN IMMUNITY THROUGH ITS ANSWERS TO THE COMPLAINT, ADMISSIONS, PLEADINGS, AND DOCUMENTARY EVIDENCE.

It is a doctrine of longstanding that, "[t]he issue of tribal sovereign immunity is [quasi-jurisdictional]." Because of the peculiar "quasi-sovereign" status of Indian tribes, the Tribe's immunity is not congruent with the Federal Government,

or the States. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 90 L. Ed. 2d 881 (1986). The Court has declared that immunity possessed by Indian tribes is distinguished from that of individual states as tribes were not at the Constitutional Convention. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.,* 523 U.S. 751, 140 L.Ed. 2d 981 (1998). Sovereign immunity's "quasi-jurisdictional ... nature," by contrast, means that "[i]t may be forfeited where the [sovereign] fails to assert it and therefore may be viewed as an affirmative defense." *Arizona v. Bliemeister (In re Bliemeister),* 296 F.3d 858, 861 (9th Cir. 2002).

Tribal sovereign immunity may be forfeited through failure to timely assert it or through conduct inconsistent with its preservation. *See C & L Enterprises,* 532 US 411, 418, 1149 L.Ed. 2d 623 (2001). In *C & L*, the Potawatomi Nation contracted with C & L to construct a building at an off-reservation location. The contract contained an arbitration provision incorporating the AAA Rules. That contract further contained a choice of law clause, providing for application of "the law of the place where the project is located." (*Id.*at 415). The Tribe breached, and C & L demanded arbitration. The Tribe asserted sovereign immunity. The arbitrator entered an award for C & L. The trial court confirmed the award. However, the judgment was reversed by the Oklahoma Court of Appeals finding that the Tribe had not waived its sovereign immunity with the requisite clarity. The Court Reversed and

held that an arbitration clause alone was sufficient to expressly waive sovereign immunity to a state court enforcement action.

Alternatively, a state, or in this case, a tribe, may waive sovereign immunity in exchange for federal benefits. There are two important exceptions to Eleventh Amendment immunity. First, a state may *waive* its immunity and consent to suit. Second, Congress may exercise its enforcement power under § 5 of the Fourteenth Amendment to *abrogate* a state's immunity without its consent. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999).

In this case the District Court ignored admissions, and acknowledgements that Plaintiff raised demonstrating Defendants' waiver of immunity, in part, because of the quest to obtain FFA.

A. Through Various Pleadings, Defendants' Acknowledged Jurisdiction of the District Court, the Functional Independence of KBOCC from KBIC, and the Recognition that KBOCC Submitted to Federal Oversight by the HLC as a Pre-condition to Receiving Federal Financial Aid (FFA) From the United States.

In this case any immunity that KBOCC, and/or the three individually named Defendants arguably possessed, was waived. The District Court did not address the Plaintiff's claims and only concluded, without analysis of Koenig's

specific arguments, "a waiver of sovereign immunity cannot be implied." [Opinion & Order, RE 80, Page ID# 1808.][7]

1. Defendants Admitted that the Federal District Court had Jurisdiction in the Joint Status Order and in Response to the Plaintiff's Complaint.

In the Joint Status Order the District Court Ordered the Defendant(s) "shall indicate all objections to jurisdiction." [Order 5/23/2024, RE 18, Page ID# 119-120]. The Defendants' response on jurisdiction was: **The Defendants acknowledge this Court has jurisdiction over the claims in this case.** [Joint Status Report, RE 20, Page ID# 129] (emphasis added).

Defendants did not deny the Court's jurisdiction. [Answer to Complaint, RE 17, Page ID# 93, ¶¶ 11-12]. In response to paragraph ¶23 of the Complaint, 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 in ¶ 22, "by being recognized by the US Department of Education (USDE) as a gatekeeper agency, HLC, agrees to fulfill specific federally defined responsibilities

[7] As the District Court issued a Stay of Discovery, the Plaintiff was prohibited from getting documents the Defendants purposefully withheld. Specifically, critical information from the HLC which were discussed above, including "Compliance with the Assumed Practices within the Criteria" and "Compliance with Federal Regulations" and the "Appendixes for the aforementioned Compliance." [Initial Accreditation Report, RE 69-26, Page ID# 1376]. The Defendants cherry picked pages 1-4 and withheld documents demonstrating federal acquiescence. [*Id.* Page ID# 1375-1378].

within the accreditation processes." (emphasis added) [*Id.*, RE 17, Page ID# 96-97, ¶¶22-23].

Factual assertions in pleadings are considered judicial admissions that are binding on the party who made them. Admissions in the pleadings 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). Nevertheless, the District Court did not address the Plaintiff's claims.

2. The District Court Failed to Address the Metamorphosis that had Taken Place Within the Defendant College.

The District Court did not discuss any of the claims raised in the factual overview of this case regarding secular enrollment, secular professorships. The transition to a secular college off the Reservation, including the truism that "**KBOCC currently operates independently from the KBIC tribe concerning its financial operations**" and Defendants admit …**tribal funding of KBOCC was discontinued in 2019**. [Answers to Complaint, RE 17, Page ID# 91, ¶¶ 6, 7 (Emphasis Added)].

The District Court ignored that a goal of the Tribe was to get HLC accreditation, and in turn qualify for FFA. The Charter was revised to allow the newly devised KBOCC to do the following:

> 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**. [KBOCC Charter 1998, RE 69-6, Page ID# 1200]. [emphasis added].[8]

Likewise, the District Court mis-analyzed any financial connection from KBOCC to the Tribe. 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.** There is no such 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. [KBOCC Charter 1998, RE 69-6, Page ID# 1204].

Answers to interrogatories, disclosures 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 [*Thor v. Moore*, RE 77-8, page ID# 1680-1684]. 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

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[8] 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. Accreditation, obtained in 2016, allowed KBIC to completely stop funding the KBOCC by 2019 as admitted above.

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). This Court 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)].

This Court 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 validate subject-matter jurisdiction. Defendants raised 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. [Weingarten Memo, RE 77-1, page ID# 1635-1637 and *see Infra*]. The Court was silent regarding Defendant KBOCC's acknowledgments, acquiescence, and admissions that KBOCC was required to comply with all Federal Regulations, 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. [Initial Accreditation Report, RE 69-26, Page ID# 1375-1378]. Defendants ignore their own memo which indicates that the KBOCC be autonomous and independent from outside influence, including the KBIC. [Weingarten Memo, RE 77-1, page ID# 1635-1637].

3. The KBOCC Should Not Be Entitled to Greater Protection Than Other Similarly Situated State Universities/Colleges that in Exchange for Funding, the College or University Consents to Abide by All Statutory, Regulatory, and Program Requirements to Obtain Federal Financial Aid.

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.[9] *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

[9] The HLC is the accrediting body in this case.

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* 20 U.S.C. §1070(a); *CJS*, §34 Financial Aid/Scholarships].

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common defense and general Welfare of the United States." Art. I, § 8, cl. 1. Consequently, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203,206, 107 S. Ct. 2793 (1987), *citing Fullilove v. Klutznick,* 448 U.S. 448, 474, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980)

Furthermore, Congress pursuant to the spending power, may fix the terms on which it shall disburse federal money to the States. *Pennhurst State Sch. & Hosp. v.*

Halderman 451 U.S. 1, 17 (1980) [internal citations omitted]. Legislation that is enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." *Pennhurst supra, @ 17, citing Steward Machine Co. v. Davis*, 301 U.S. 548, 585–598, 57 S.Ct. 883, 890–896, 81 L.Ed.2d 1279 (1937); [other citations omitted].

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." [Cummings v. Premier Rehab Keller, PLLC 596 U.S. 212. 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.")

The District Court never addressed these critical admissions in Answers to the Complaint, Admissions, and documentary documents that the Plaintiff was able to obtain prior to the District Court's Stay of Proceedings.

ARGUMENT II

THE DISTRICT COURT ERRED WHERE IT HELD TRIBAL SOVEREIGN IMMUNITY EXTENDED TO INDIVIDUAL DEFENDANTS SHERMAN, CHOSA, AND VERTANIN, SUED IN THEIR INDIVIDUAL CAPACITY, FOR RETALIATION IN VIOLATION OF 31 USC § 3730 OF THE FALSE CLAIMS ACT, WHERE THE RELIEF SOUGHT DOES NOT COME FROM THE TRIBAL TREASURY.

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 (1977). Tribal sovereign immunity does not apply when a tribal employee is sued in their individual capacity. *Lewis v. Clark*, 518 U.S. 155 (2017). Plaintiff alleged he was suing Defendants in their individual capacity, for illegal retaliation in violation of the FCA. [Complaint, RE 1, Page ID# 1-15].

A. KOENIG ESTABLISHED A PRIMA FACIE CASE PURSUANT TO THE FCA.

Koenig met the *prima facie* elements of a FCA retaliation claim as articulated by this Court in *Jones-McNamara v. Holzer Health Sys.* 630 F.Appx. 394, 398 (6th Cir. 2015). [*Jones*, RE 77-13, Page ID# 1730-1749]. Koenig's 29-page letter to the HLC constituted protected activity. [RE 77-9, Page ID# 1686-1717]. Defendants Sherman, Chosa, and Vertanin were copied. Within hours of his notification Koenig was wrote-up, put on a corrective action plan, and shortly thereafter was terminated. [Complaint, RE 1, Page ID# 12-15].

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 (E.D. TN 2019). 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, that could result in financial loss to the Government. *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959 (1968). Koenig's 29-page letter documents the false and/or fraudulent claims made in an effort to inappropriately obtain funds from the U.S. Government.

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, 195 L.Ed.2d 348 (2016). This common-sense approach requires the conclusion that 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 statute "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." [*Tibor v. Michigan Orthopaedics Institute, 72 F.Supp. 750,* 761 [ED MI 2014]. (emphasis added)].

Koenig is protected under the retaliation provisions of the FCA as long as the report is made in good faith. 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*, RE 77-13, Page ID# 1735-1737].

1. THE THREE NAMED DEFENDANTS RETALIATED AGAINST KOENIG FOR REPORTING FRAUD TO THE HLC.

The individual Defendants claimed that they stood in the shoes of governmental officials performing their discretionary functions. [Memorandum of Law, RE 69-1, Page ID# 1168]. That said, the acts of government officials are not protected under the qualified immunity doctrine where the official acts *ultra vires*.[10]

[10] Defendants did not file an affirmative defense of qualified immunity.

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, 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."

Qualified immunity for government officials is accurately reflected by this Court's holding in *Whitney v. City of Milan*, 677 F.3d 292 (6th Cir. 2012). This Court declared:

> 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." *[citations omitted].* 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." *[internal citations omitted] [Whitney supra* @ 296].

The limited evidence demonstrates Defendants terminated Koenig and then conspired to circumvent his grievance/appeal/mediation rights. Various email exchanges demonstrate Sherman refused all grievance and mediation requests and Chosa, knowing that it was procedurally incorrect, ultimately acquiesced. [Emails, RE 77-3, Page ID# 1648-1658]. Shortly thereafter, Koenig was informed his

contract would not be renewed and he was terminated. There is no colorable claim that this is anything but illegal retaliation.

2. IN A RETALIATION CLAIM AGAINST A TRIBAL MEMBER IN THEIR INDIVIDUAL CAPACITY, THE TRIBE'S SOVEREIGN IMMUNITY IS NOT IMPLICATED.

In *Lewis v. Clarke*, 581 U.S. 155; (2017), a married couple brought suit against a Tribal member in his individual capacity for injuries sustained in a collision. The limousine rear ending the plaintiffs was owned by Mohegan Indian Tribe. The accident occurred off Reservation. The 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 based on sovereign immunity.

In reversing, the 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.

Lewis supra is identical to the situation in this case. While the employee was acting in his official capacity (although *ultra vires* herein) the liability is brought against the employee individually. Koenig argued below that 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 response, the District Court found that Koenig was incorrect. Rather, the Court held, [s]uch a broad absolute rule doesn't exist. [Opinion & Order, RE 80, Page ID# 1812]. However, with all due respect, that is exactly what the Ninth and Tenth Circuits held. In *Pistor* the Court declared:

> 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. … 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." *Pistor supra* p. 1112 (9th Cir. 2015).[11]

The court concluded, "[t]hese same principles fully apply to tribal sovereign immunity." [*Id*]. "Although tribal 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).

The Tenth Circuit in *Native American Distribution*, supra @ 1296-97 held:

> Where, however, the plaintiffs' suit seeks money damages from the officer "in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself," sovereign immunity does not bar the suit "so long as the relief is sought not from the [sovereign's] treasury but from the officer personally." *Citing Alden v. Maine,* 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

Another FCA litigation is *Stoner v. Santa Clara Office of Education*, et al, 502 F.3d 1116 (9th Cir. 2007). In *Stoner* it was alleged that the various defendants had provided claims for falsely certified compliance with the Individuals With Disabilities Education Act to induce the government to disperse more money for

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[11] 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.

certain educational programs. Very analogous to Defendants herein, who falsely made representations to the HLC to keep the spigots of FFA open and fund the operations of the college. The lower court found that the state agencies were immune from suit. [*Stoner* supra @ 1121-1123].

However, in regard to the individual Defendants, the Ninth Circuit Reversed. The *Stoner* Court explained, "The plain language of the FCA subjects to liability any person who among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. [citing 31 U.S.C-§ 3729]. The Court further held:

> To state a claim against Wilcox, Fimiani, and Wong in their personal capacities, Stoner need show only that the individual employees "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Stoner's complaint alleged that Wilcox, Fimiani, and Wong knowingly presented or caused to be presented false or fraudulent statements to the United States Department of Education to obtain federal funds for various educational programs. If true, these allegations are sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1).

The *Stoner* Court went on to articulate support for its position in various Opinions of the Supreme Court:

> Our conclusion is supported by the Supreme Court's decision in *Hafer,* which rejected the argument that state officials may not be held personally liable under 42 U.S.C. § 1983 for actions taken in their official capacities. 502 U.S. at 27–31, 112 S.Ct. 358. The Court

> reasoned that to hold otherwise would, in effect, "absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Id.* at 28. The Court noted that such absolute immunity extends only to a very limited class of officials, "including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions." [internal citations omitted]. [*Stoner supra*, 1124].

The three named individual Defendants knowingly submitted false claim or causes to the HLC, the gatekeeper of accreditation and FFA from the United States. Their actions constituted a fraud on the United States, and their termination of Koenig violated the retaliation provisions of the FCA.

3. KOENIG'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS DOES NOT SEEK RELIEF FROM TRIBAL COFFERS.

The District Court found Koenig sought damages and that "[t]his requested relief would come from the KBOCC's coffers, not the individual Defendants. [Opinion & Order, RE 80, Page ID# 1812]. The Court determined that the Tribe, rather than the three employees are the real party in interest. [*Id.* Page ID# 1811]. The conclusion is incorrect.

Koenig's Complaint identifies the suit against Sherman, Chosa and Vertanin for wrongful and retaliatory termination in violation of the FCA. [RE 1, Page ID# 3, ¶¶8-10]. These are not claims against the offices of KBOCC. [Opinion & Order, RE 80, Page ID# 1811]. These three Defendants actions were grossly illegal, are

ultra vires, and contrary to any arguable official capacity claim. While they used their office to accomplish their *ultra vires* acts, the claims are against them individually.

A) The KBIC is Not Responsible for Payment of Koenig's Retaliation Claims Against the Individual Defendants.

The KBOCC Charter as of 1998 (change from Ojibway to KBOCC) made clear that the KBIC "is not responsible for the obligations of the Corporation (KBOCC) except as obligated in writing." [RE 69-6, Page ID# 1204]. [Emphasis added]. Even if there was an indemnification agreement the Court in *Lewis supra* held "an indemnification provision does not extend a tribes sovereign immunity where it otherwise would not reach" [*Lewis supra* @ 158]. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. [*Id.* @160]. "Under no circumstance, will an award against any of the three individual defendants affect the Tribe's ability to govern itself independently. [*Id.*].

B) KBOCC Obtained Insurance Coverage Further Insulating the KBIC From Any Claims.

In Supplemental Answers to Interrogatories the KBOCC admitted that it had procured various insurance for general liability, employee benefit liability, and Tribal Official and Management Liability in the amount of $1,000,000. [KBOCC Insurance, RE 77-7, Page ID# 1676-1678].

C) The Court in *Lewis* Declared Where a Suit is Brought Against a Tribal Employee in His or Her Individual Capacity, for a Tort Committed by the Employee within the Scope of His or Her Employment, the Employee, Not the Indian Tribe, is the Real Party and Interest in the Tribes Sovereign Immunity is not Implicated.

Just as the Defendant in *Lewis* was sued for his personal actions and responsibilities for rear ending the vehicle driven by Mr. and Mrs. Lewis, the Defendants herein are sued for their personal actions in retaliating against Koenig for his report of fraud to the Higher Learning Commission. Both actions are personal in nature and violative of existing laws.

This is a personal capacity suit against the three named defendants and seeks to impose individual liability upon them as government officers for actions taken under the color of state law. As the court in *Lewis* noted, "officers sued in their personal capacity come to court as individuals and the real party in interest is the individual not the sovereign." *See Lewis supra* @ 162-163, *citing Hafer v. Melo*, 502 US 21,27, 112 S. Ct. 358, 116 L.Ed.2d 301 (1991).

This lawsuit against the named individual Defendants seeks redress for the *ultra vires* actions of the three named individuals, namely the retaliatory termination of Koenig in response to his report of fraudulent wrongdoing to the HLC regarding the receipt of Federal Financial Aid under false pretenses. While they were employed by the KBOCC, as Clark was employed by the Mohegan Tribe, Koenig seeks damages as a result of the *ultra vires* actions of those three individuals. To extend

sovereign immunity merely because these three individuals illegally retaliated while in positions for the KBOCC, would extend sovereign immunity principles for tribal employees far beyond what common law sovereign immunity principles would recognize for either state or federal employees. *Lewis supra* @ 163-164 *citing Kentucky v. Graham*, 473 U.S. 159, 167-168.

4. DEFENDANTS SHERMAN, CHOSA, AND VERTANIN WAIVED ANY POTENTIAL DEFENSES OF QUALIFIED IMMUNITY AND EXHAUSTION OF TRIBAL REMEDIES BECAUSE THEY WERE NOT PROPERLY PLED AND THEREFORE ARE WAIVED.

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 affirmatively pled 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 defense and should be waived. [Answer to Complaint, RE 17, Page ID# 116-117]. Moreover, as the conduct of the individuals was *ultra vires*, qualified immunity should not provide them a safe harbor for these types of outrageous acts.

B. Exhaustion of Remedies is an Affirmative Defense that Must be Pled or it is Waived.

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, (2006). 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.

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 below, *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]. Koenig's claims are for actions were off the Reservation and involved a secular population and where the KBIC no longer provided funding. [Koenig Affidavit, RE 77-5, Page ID# 1666-1667 *and supra*].

ARGUMENT III

THE KBOCC IS NOT AN ARM OF THE TRIBE AND THEREFORE IS NOT ENTITLED TO SOVEREIGN IMMUNITY.

The KBOCC is not an Indian Tribe. Sovereign immunity extends only to the tribe itself and entities that function as an arm of the tribe. *Bay Mills Indian Community v. Michigan* 572 U.S. 782, 788 (2014). Whether an entity qualifies as an arm of the tribe is determined by a fact intensive functional inquiry not by formal labeling. *Breakthrough Mgmt Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1080-81 (10th Cir. 2010). The District Court enunciated what this Court looks to in determining whether an entity is an "arm of the tribe" using the Ninth Circuit's criteria detailed in *White v. Univ. of Cal.*, 765 F.3d 1010, 2015 (9th Cir. 2014).

In *White supra*, the Ninth Circuit adopted a five-factor test to determine whether an entity functions as an "arm of the tribe" such that it is entitled to sovereign immunity:[2]

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities. *White*, 765 F.3d at 1025 (quoting *Breakthrough, supra* 629 F.3d 1173, 1187(10th Cir. 2010) [Opinion & Order, RE 80, Page ID# 1804].

A. The District Court Erred in Its Analysis by Focusing Solely on the Method of Ojibway/KBOCC's Creation but Failed to Recognize How it Currently Operated.

Extensive effort has already been spent reviewing the transformation of the KBOCC from a tribal college, (Ojibway), operating exclusively on tribal lands, for tribal students, financed by the Tribe, to a secular off Reservation community college that is marketed towards non-Native Americans, attracts more secular students than Native Americans, and has the vast majority of its professors who are not Native Americans.

The Court erred where it exclusively examined the creation aspect of the Tribe. The Court failed to consider that the college that was created on the Reservation, "Ojibway," was not the same entity as the KBOCC that wrongfully terminated Koenig. The Court ignored statements of total autonomy, the lack of any

tribal funding, and admissions of independence. [Opinion & Order, RE 80, Page ID# 1804].

One needs to remember that Texas started out as part of the Spanish Empire. The KBOCC in 2020 was nothing like Ojibway in 1975. References to the KBOCC being on tribal lands or on the Reservation is clear error. The former Barage Hospital, the home of KBOCC, is not on the Reservation but, rather, in the heart of L'Anse MI.

B. The District Court Erred Where It Focused on the Purpose of Ojibway College, When Created in 1975, versus the Purpose of the KBOCC in 2020.

In 1975 the purpose of the KBIC in creating Ojibway on the Reservation would have supported a finding that Ojibway, at that time, was an "arm-of the-tribe." The focus on the past, clouded the Opinion of the District Court.

Ever since 1998, the purpose has been on expanding KBOCC to make such agreements as were necessary with all branches of secular government, "and to perform any conditions attached thereto" in a quest for accreditation and receipt of FFA. [KBOCC Charter 1998, 69-6, Page ID# 1200]. That truism, with admissions and answers to discovery demonstrated that in 2020 the KBOCC was independent of the Tribe, had entered into agreements with the HLC and admitted that they were required to adhere to the standards of the HLC as a gatekeeper for the U.S.

government in the determination of what entities qualify for FFA. The purpose of these other activities sparked marketing off the Reservation to secular students and staff. The metamorphosis of KBOCC demonstrates a change in purpose, from acting as merely a tribal college, to a multicultural college that drew students from multiple states and entertained a student population that at times was 62% secular and was fully funded by FFA and tuition. [*See supra*].

C. The District Court Erred Where It Held KBIC and KBOCC are Financially Interconnected.

Tribal immunity extends to Indian tribes and entities that function as arms of the tribe, but not to legally independent financial institutions. This Circuit has focused on whether immunity would protect tribal self-governance and the treasury of the tribe. The District Court in finding that the KBOCC and the KBIC are interconnected is, again, focusing on a bygone era. [Opinion & Order, RE 80, Page ID# 1808]. The evidence, as admitted, was that as of 2019 the KBIC provided no funding to KBOCC. [Answer to Complaint, RE 17, Page ID# 91].

When considering whether an entity is an arm of the tribe for purposes of tribal sovereign immunity, the entity's financial relationship with the tribe is of paramount importance. That is, if a judgment against it will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest.

In this case the KBIC is completely insulated from liability. Similarly, the revised Charter also provided for the acquisition of insurance, and the evidence demonstrates that the Insurance was procured.

The KBOCC functions as an independent federally funded educational institution. An institution, that agreed that it had to abide by the rules and regulations of the HLC. The extension of immunity to the KBOCC, and the individual Defendants is, in practice, a license to defraud the U.S. Government of tax payer dollars that are only supposed to go to accredited colleges. Extending immunity herein does not further the purposes underlying tribal immunity.

ARGUMENT IV

KOENIG IS ENTITLED TO HIS UNPAID SICK LEAVE, PURSUANT TO MCL408.473, THAT WAS GUARANTEED VIA THE ONLY POLICY BOOK THAT HE SIGNED FOR, AND WHERE THOSE BENEFITS WERE EARNED WORKING OFF THE RESERVATION.

Koenig's claims for fringe benefits lies against the KBOCC. The District Court essentially adopted Defendant's position that KBOCC "is an educational institution of a Tribe on tribal land and state law does not apply. [Memorandum of Law, RE 69, Page ID# 1167]. The lower court, in a footnote, explained, "[e]ven if Koenig requested prospective relief regarding his state law claim, it would be barred by sovereign immunity because the conduct occurred on Indian land." [Opinion & Order, RE 80, Page ID# 1810].

That conclusion ignores the plain facts of the case. Every class Koenig taught from 2015/2016 until his termination was not on the Reservation, was not on Tribal land, was not funded by the KBIC, and involved a secular group of students and professors who were overwhelming non-Native American. It ignores that the KBOCC marketed itself as autonomous and to a secular student population.

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

> 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." (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.

The Opinion below essentially leaves the vast majority of employees of the KBOCC, working off the Reservation, and overwhelmingly secular, without a remedy.

A) <u>The Only Policy Book Given to Koenig Provided He is Owed the Value of His Sick Leave.</u>

KBOCC has admitted that the only policy book that was given to Koenig, and was signed for, was the 2009-2013 policy book. [Interrogatory Answers, RE 44-4, Page ID# 422, ¶10(f)]. It provided:

"**Sick Leave**"

…"In case of dismissal, termination, or resignation, **employees will be paid for accumulated sick leave.** [*Dahlstrom v Sauk Suiattle Indian Tribe*] [Sick Pay, RE 44-7, Page ID# 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.* Page ID# 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. The Opinion below is clearly erroneous.

ARGUMENT V

THIS COURT SHOULD EMBRACE THE OPINIONS OF JUSTICES STEVENS, THOMAS, & GINSBURG IN *KIOWA TRIBE OF OKLAHOMA V. MANUFACTURING TECHNOLOGIES,* WHERE THE DISSENTING JUSTICES WOULD HAVE FOUND THAT THERE IS NO FEDERAL

STATUTE OR AUTHORITY THAT SHOULD EXTEND THE JUDICIAL MADE DOCTRINE OF SOVEREIGN IMMUNITY TO PRE-EMPT AUTHORITY OF STATE COURTS.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751, 118 S. Ct. 1700, (1998), the Court was faced with an issue where a federally recognized Indian Tribe was being sued for a promissory note for off reservation commercial activities. Similar to the KBOCC running a community college, off the reservation, actively competing and marketing itself against other non-tribal colleges and universities.

Both the majority and dissent agreed that "The doctrine of tribal immunity from judicial jurisdiction "developed almost by accident." The origins being attributed to two cases, initially *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109 (1919). Then a second case, *U.S. v. U.S. Fidelity & Guarantee Co.,* 309 U.S. 506, 60 S.Ct. 653 (1940). The former case involved a claim against Creek Nation, whose tribal government had been discontinued. [*Kiowa supra* @ 761]. Even the majority held this case provided only a "slender reed" of support for the doctrine even in federal court. [*Id*].

In *U.S. Fidelity*, *supra*, the federal government sought royalties due under executed coal leases. The holding that the government could not enforce the coal leases against the Indian Nation without Congressional authorization. [*Kiowa* 761].

However, the tripartite dissent cogently explains that the expansion of sovereign immunity beyond the borders of the Reservation, and for issues not directly dealing with tribal governances, is not based on precedent. Rather, Justice Stevens explained:

> "It is quite wrong for the court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from suit that has no meaningful Nexus to the tribes land or its sovereign functions."

Indeed, Justice Stevens sets forth a tri-partite test favoring judicial restraint in expanding off Reservation immunity. Concerns raised were:

1) By expanding sovereign immunity the Court was not just announcing a rule of comity for federal judges, "it is announcing a rule that pre-empts state power" and the rule against construing federal statutes should apply with added force when dealing with judge made rules [*Kiowa supra* 764] and That the Court is not deferring to Congress in holding that immunity exists but, rather, it is creating law [*Id.* @ 765]; and
2) "Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the states, the federal government, in foreign nations? Is a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities." *See*

Kiowa supra 765 citing 28 U.S.C. §§ 1346b, (Federal Torts Claim Act),1346(a)(2), 1491 (Tucker Act).

Finally, the third rationale given by Justice Stevens is the most compelling.

3) "Third, the rule is unjust. This is especially so with respect to toward victims who have no opportunity to negotiate for a waiver of sovereign immunity; Yet nothing in the courts reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct. [*Kiowa supra* p. 766, (emphasis added)].

This case is a quintessential example of a retaliatory termination. It is unconscionable that Koenig, working off the Reservation, on State of Michigan land, with the majority of students being non-Native American, funded by federal tax dollars, should not have a path to recovery. As noted by Justice Stevens there is no rational reason for the KBOCC to be treated differently from other States and/or other State Universities. [Also see cases cited in the prior section where tribes have been denied immunity in cases off the reservation that do not involve issues of tribal governance].

The finding of the District Court is unjust, anomalous, and is not consistent with *Lewis v. Clark, supra.* The three named Defendants, and especially Lori

Sherman, acted in an antagonistic and retaliatory manner to silence Koenig. A more clear-cut case of retaliation this counsel has not seen in 42 years. Against a similar *ultra vires* action against a Board Member of the University of Michigan, Koenig would have a viable claim. It is incomprehensible, anomalous, and unfair that these three are allowed to violate Federal law, violate State Law, and never be held accountable.

V. CONCLUSION:

Wherefore, Appellant Koenig requests that the Court Reverse and Remand the matter for further discovery and trial.

Dated: February 27, 2026

HURLBURT, TSIROS & ALLWEIL, P.C.

By: */s/ Mandel Allweil*

MANDEL I. ALLWEIL (P34115)

CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because: this brief u contains 12,859 words, excluding the parts of the brief exempted by FRAP 32(f), using "New Times Roman" in font size 14.

Respectfully Submitted,

/s/ Mandel I. Allweil

Dated: February 27, 2026

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th of February 2026, he caused to be served via CM/ECF e-filing Plaintiff-Appellant's Brief on Appeal by delivering it as provided under FRAP 25(d)(1)(B).

Respectfully Submitted,

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ADDENDUM - RELEVANT DISTRICT COURT DOCUMENTS

RE 77-9	Koenig's 29-page letter	1688-1716
RE 77-11	HLC letter to Koenig	1721-1722
RE 77-13	*Jones-McNamara v. Holzer Health Systems*	1730-1749
RE 77-15	HLC letter to Sherman	1753-1754
RE 80	Opinion & Order	1799-1813
RE 81	Judgement	1814
RE 82	Notice of Appeal	1815
RE 83	Clerk letter	1817-1819