18-2332

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAWN M. DELEBREAU,

Plaintiff-Appellant,

vs.

CHRISTINA DANFORTH, et al.,

Defendants-
Appellees.

Appeal from the United States District Court
For the Eastern District of Wisconsin
Case No. 1:17-cv-1221-WCG
Honorable William C. Griesbach, District Judge

RESPONSE BRIEF OF DEFENDANT-APPELLEES CHRISTINA DANFORTH, LARRY BARTON, MELINDA DANFORTH, AND GERALDINE DANFORTH

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court : 18-2332
Short Caption: Dawn M. Delebreau v. Christina Danforth, et al.

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

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

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

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

Not applicable

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

Not applicable.

Attorney's Signature: s/Kenneth R. Nowakowski Date: 8/24/2018
Attorney's Printed Name: Kenneth R. Nowakowski
Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Short Caption: Dawn M. Delebreau v. Christina Danforth, et al.

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

Not applicable

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Not applicable.

Attorney's Signature: s/Lisa M. Lawless Date: 8/24/2018
Attorney's Printed Name: Lisa M. Lawless
Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

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JURISDICTIONAL STATEMENT

The brief of Plaintiff-Appellant Dawn Delebreau ("Delebreau") filed on July 25, 2018 (Doc.10) contains a one-paragraph "Jurisdictional Statement." Delebreau's Jurisdictional Statement is not complete or correct.

Pursuant to Fed. R. App. P. 28(b)(1), Defendants-Appellees Cristina Danforth (improperly sued as "Christina" Danforth), Larry Barton, Melinda Danforth, and Geraldine Danforth (collectively, "Defendants-Appellees") hereby submit their Jurisdictional Statement. Defendants-Appellees previously provided a jurisdictional statement in their responsive Docketing Statement filed on July 3, 2018 (Doc.7) to Delebreau's Docketing Statement. (Doc.4).

A. Jurisdiction of the District Court

The Jurisdictional Statement in Delebreau's appeal brief does not state the bases for federal jurisdiction; her Docketing Statement identified the federal laws on which she premises jurisdiction. Accordingly, Defendants-Appellees' Jurisdictional Statement addresses the bases for federal jurisdiction asserted in Delebreau's Docketing Statement.

According to her Docketing Statement, Delebreau asserts subject matter jurisdiction of the federal courts based upon 28

U.S.C. § 1331. She identifies the following upon which she premises federal question jurisdiction:

- 29 U.S.C. § 651(b);
- 29 C.F.R. § 1975.4(b)(3); and
- "Reconstruction Era Civil Rights" laws, 42 U.S.C. §§ 1983, 1981, 1985.

(Doc.4: 1).

1. The Court Lacks Statutory Subject Matter Jurisdiction.

These cited provisions do not establish federal subject matter jurisdiction in this case over Delebreau's claims against Defendants-Appellees. The laws asserted in the Docketing Statement were not raised by Delebreau in the district court, either in the complaint or in her response to Defendants-Appellee's motion to dismiss. *See* (D. Ct. Doc.##[1] 1, 45, 48.) Delebreau asserts the identified laws for the first time in the Docketing Statement.

Further, the provisions are immaterial to this case and they do not assert a plausible claim corresponding to the allegations of the complaint. The federal laws asserted in the

[1] The district court has not yet filed the record with this Court. Documents in the district court record are cited by their docket numbers in that court, "D. Ct. Doc.#___."

Docketing Statement do not establish federal question jurisdiction in this case.

The first two provisions identified in the Docketing Statement, 29 U.S.C. § 651(b) and 29 C.F.R. § 1975.4(b)(3), are a statute and regulation, respectively, relating to the Occupational Safety and Health Administration ("OSHA") and the requirement to provide safe and healthful working conditions to employees of Indian tribes. Nothing in the complaint in this case alleges OSHA violations for which any of the individual Defendants-Appellees could be held liable. *See* (D. Ct. Doc.#1). Therefore, these laws do not establish subject matter jurisdiction here.

Nor do the other cited provisions, 42 U.S.C. §§ 1983, 1981, or 1985, establish federal subject matter jurisdiction in this case. For this claim, Delebreau asserts that a claim under the U.S. Constitution is established if an Indian tribe's constitution does not provide U.S. Constitutional rights to its citizens.

Again, this does not establish federal jurisdiction over the claims against Defendants-Appellees. First, an Indian tribe is not a defendant in this case. The Oneida Nation,[2] Delebreau's

[2] Delebreau refers to the Oneida Tribe in the complaint. The Oneida Tribe of Indians of Wisconsin is now known as the Oneida Nation. It is referred to as the "Oneida Nation" or the "Nation" in this brief.

former employer, is not a party to this case. Second, Delebreau has failed to state a claim under 42 U.S.C. § 1983 against Defendants-Appellees. (See Argument, part IV.B.1, below). Therefore, this statute provides no basis for federal jurisdiction. In addition, as shown in the Argument, there are no other claims stated against Defendants-Appellees under federal law.

2. Plaintiff Has No Standing Under Article III Against Defendants-Appellees.

The federal court also lacks jurisdiction over this action against Defendants-Appellees under Article III of the U.S. Constitution because Delebreau does not have standing to assert the alleged claims against those parties. The complaint fails to allege facts demonstrating that Delebreau suffered an injury in fact that is "fairly traceable" to alleged conduct of any one of the Defendants-Appellees and that the alleged injury will likely be redressed by a favorable decision. (See Argument, part III, below.)

3. Subject Matter Jurisdiction is Also Lacking on Frivolousness Grounds.

There is no federal claim asserted in the complaint upon which relief can be granted against any of the Defendants-Appellees. The complaint complains about the employment transfers and terminations of Delebreau within the Oneida Nation. However, the complaint fails to allege that any of the individual

Defendants-Appellees engaged in conduct towards Delebreau for which she can recover under federal law.

None of the federal laws cited in the complaint or Delebreau's Docketing Statements set forth a basis upon which she could recover against any of the Defendants-Appellees.

The complaint against Defendants-Appellees is frivolous on its face and therefore does not engage the jurisdiction of the federal courts. Accordingly, the federal courts lack subject matter jurisdiction over this action on that basis. *See Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir. 1988).

B. Jurisdiction of the Court Of Appeals

This appeal is taken from the final decision of the U.S. District Court for the Eastern District of Wisconsin entered on June 5, 2018 by the Honorable William C. Griesbach granting Defendants-Appellees' motion to dismiss the action for lack of federal jurisdiction. (D. Ct. Doc.#56.) Because the federal courts lack subject matter jurisdiction over this case and Delebreau lacks Article III standing for her complaint against Defendants-Appellees, the United States Court of Appeals does not have jurisdiction to decide this case. *See Büchel-Ruegsegger v. Büchel*, 576 F.3d 451, 453 (7th Cir. 2009) (If it is

determined that subject matter jurisdiction does not exist, the Court cannot reach the merits of the appeal.)

The Notice of Appeal was filed with the district court on June 15, 2018. (D. Ct. Doc.#58.)

C. Prior Related Appellate Proceedings.

On December 21, 2017, Plaintiff-Appellant filed a Notice of Appeal from a non-final order entered by the district court in this case. (D. Ct. Doc.# 28). On March 15, 2018, this Court dismissed that appeal for lack of jurisdiction. (D. Ct. Doc.#51).

D. Remaining Requirements Under Circuit Rule 3(c)(1).

This is a civil case with no criminal proceedings. There is no prior litigation in a district court that is related to this appeal that, although not appealed, (a) arises out of a criminal conviction, or (b) has been designated by the district court as satisfying the criteria of 28 U.S.C. § 1915(g).

STATEMENT OF THE ISSUES

Plaintiff-Appellant's brief identifies 15 issues in the Statement of the Issues. (App. at 6-10). Most of these issues were not argued in the district court and therefore cannot be argued on appeal. The issues in this appeal are:

1. Must the appeal be dismissed because Delebreau's appeal brief fails to comply with Fed. R. App. P. 28 or to explain what

holding of the district court was erroneous, with developed arguments supporting the claim of error?

2. Does the federal court lack subject matter jurisdiction over this action because Delebreau fails to assert any cognizable claim under federal law against Defendants-Appellees?

The district court dismissed the action for lack of federal jurisdiction on the ground that the complaint does not assert any claim against any of the Defendants-Appellees arising under the U.S. Constitution or federal law.

3. Does the federal court lack jurisdiction to hear this action on the ground that Delebreau has no standing under Article III of the U.S. Constitution to assert the alleged claims against Defendants-Appellees?

The district court did not address or decide this issue.

4. Should the complaint be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that it fails to state a claim upon which relief can be granted against Defendants-Appellees?

The district court did not reach this issue, although the court did hold the complaint failed to assert any claim arising under federal law against Defendants-Appellees.

5. To the extent Delebreau's claims are claims against the Oneida Nation, are those claims barred by tribal sovereign immunity?

The district court held that tribal sovereign immunity protects tribes from suit in their governmental and commercial activities absent express congressional authorization or a clear waiver by the tribe. The court held that Delebreau cites no federal statute or constitutional provision that overcomes the immunity of the Oneida Nation and its officers and employees to hire and fire tribal employees without outside interference.

STATEMENT CONCERNING ORAL ARGUMENT

In this appeal, oral argument is not appropriate under the criteria of Fed. R. App. P. 34(a) because the facts and legal arguments will be adequately presented in the parties' briefs and the record and the Court's decisional process would not be significantly aided by oral argument. Moreover, as shown in part I of the Argument, the appeal should be dismissed without reaching the merits because Delebreau's brief fails to comply with Fed. R. App. P. 28.

STATEMENT OF THE CASE

Delebreau's appeal brief does not contain a Statement of the Case that sets forth the facts relevant to the issues submitted for

review, with appropriate references to the record. Fed. R. App. P 28(a)(6). The allegations and assertions are throughout the appeal brief and are not supported by citations to the record. Further, the brief contains numerous allegations that are not found in the record whatsoever and were not alleged in the complaint.

A. The Complaint

As stated in Delebreau's pro se complaint, Delebreau filed this action against the individual defendants, employees of the Oneida Nation, to recover damages caused by "years of mental anguish, financial hardship, lack of employment, assaults to [her] personal integrity/character," and "disparaging remarks about me to my son/children on a continual basis." (D. Ct. Doc.#1: 1-2, 4). Delebreau also seeks changes to the laws applicable to the Oneida Nation. (D. Ct. Doc.#1: 4).

This requested relief is based upon events that allegedly occurred relating to Delebreau's employment with the Oneida Nation. The individual defendants Cristina Danforth, Larry Barton, Geraldine Danforth, and Melinda Danforth allegedly harmed Delebreau while performing their jobs working for the Oneida Nation. (D. Ct. Doc.#1: 1-2).

Specifically, Delebreau alleges:

From March 2009 to March 2013, Delebreau worked as an Administrative Assistant with the Oneida Housing Authority. (D.

Ct. Doc.#1: 3). In January 2013, Delebreau discovered purchase requisitions and invoices for materials for a home that was not within the Oneida Department of Housing and Urban Development ("HUD") housing sites process. The home was allegedly owned by Sarah Skenandore, an Oneida Nation employee not a defendant in this case, and Delebreau contacted Patrick Stensloff, another Oneida Nation employee also not a defendant. (*Id.*) Defendant Cristina Danforth allegedly asked to meet with Delebreau to discuss what she uncovered, along with Donna Christensen, another Oneida Nation employee not a defendant in this case. (*Id.*)

The complaint alleges that in June 2017, defendant Jay Fuss, the Superintendent of the Oneida Housing Authority,[3] was indicted for the misappropriation and theft of materials belonging to the Oneida Housing Authority for Oneida HUD housing sites,[4] which were allegedly for the construction of new homes and rehabilitation of existing homes under a HUD program. (*Id.*)

[3] Defendant Jay Fuss was served in this case. (D. Ct. Doc.#27). Fuss did not appear. Undersigned counsel does not represent Fuss.

[4] In *United States v. Jay Fuss*, Eastern District of Wisconsin Case No. 17-CR-92-WCG, on September 29, 2017 Jay Fuss pleaded guilty to embezzlement from an Indian Tribe, and his sentencing hearing was held on January 3, 2018 before the district court. (D. Ct. Doc.#39: 4 n.3).

On March 21, 2013, Delebreau was transferred from her Administrative Assistant position with the Oneida Housing Authority to an Insurance Clerk position in the Risk Management Department of the Oneida Nation, reporting to Bob Keck, Risk Management Director (not a defendant in this case). (*Id.*) The Risk Management Director allegedly reported to defendant Larry Barton, CFO of the Oneida Nation, who in turn allegedly reported to defendant Cristina Danforth, the Oneida Nation's Treasurer. (*Id.*)

The Administrative Assistant position with the Housing Authority was a "full time benefitted job," while the Insurance Clerk position with Risk Management was allegedly a "limited term employment contract." *See* (*id.*) When transferred to the Insurance Clerk position, Delebreau was allegedly promised that she would later be placed back in a full-time benefitted position within two years. (*Id.*) As Insurance Clerk, Delebreau worked in the "HRD building" located at 909 Packerland Drive in Green Bay. (*Id.*)

While working in the HRD building, Delebreau alleges that she was "confronted" by defendant Geraldine Danforth, "HRD Director," who allegedly "let[] [Delebreau] know" that "she was not liked nor was she wanted up there" and that Geraldine "didn't

approve that move for Dawn as she was a 'Whistle Blower.'" (*Id.*) This allegedly occurred during her employment as Insurance Clerk, between the end of March 2013 and early November 2013. (*Id.*)

Delebreau alleges that the environment in the Insurance Clerk position became a "very intimidating, unfriendly, uncooperative work environment." (*Id.*) The complaint does not allege who caused this environment, and does not allege that any of the individual defendants caused the environment to be this way.

On November 2, 2013, Delebreau allegedly was terminated from the Insurance Clerk position. (*Id.*) The complaint does not allege that any of the individual defendants terminated Delebreau's employment. Delebreau was later reinstated to limited term employment with the Oneida Nation. (*Id.*)

Rather than being restored to the Insurance Clerk position, on January 21, 2014 Delebreau was reassigned to the Oneida Museum as a Cultural Interpreter. (*Id.*) Delebreau was terminated from this position on September 18, 2014. (*Id.*). The complaint does not allege that any of the individual defendants terminated Delebreau's employment.

Delebreau claims that during the last "5 years," she has incurred "financial debt, mental and emotional hardship, and the

destruction of [her] personal integrity." (D. Ct. Doc.#1: 4). Delebreau contends that she was "eliminate[d]" as an Oneida Nation employee after disclosing the alleged "misappropriation and theft of HUD funds" and that unidentified persons retaliated against her for coming forward to protect others at the Oneida Nation. (*Id.*) Such persons being protected are not identified in the complaint. Delebreau alleges that it was "very hard" to find an attorney "willing to take on one of the richest tribes such as Oneida Nation for said principles." (*Id.*)

B. The Motion to Dismiss

On January 24, 2018, Defendants-Appellees filed a motion to dismiss the complaint. (D. Ct. Doc.#38). They moved to dismiss on various grounds, including lack of subject matter jurisdiction, lack of Article III standing, tribal sovereign immunity, and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (D. Ct. Doc.#39).

With respect to Article III standing, Defendants-Appellees showed that the complaint does not assert any injury in fact that is traceable to the actions of the individual Defendants-Appellees. (D. Ct. Doc.#39: 10-11). On the merits, Defendants-Appellees showed that the complaint fails to state a claim for: (1) violation of Title VII (D. Ct. Doc.#39: 17-21); (2) violation of the False Claims Act ("FCA") (D. Ct. Doc.#39: 21-22); (3) violation of the "No FEAR

Act" (D. Ct. Doc.#39: 23-24); and (4) for defamation under state law. (D. Ct. Doc.#39: 25-26).

Delebreau did not respond to the argument showing lack of Article III standing and that the complaint fails to allege any actionable conduct by the individual Defendants-Appellees giving rise to a claim under federal law. *See* (D. Ct. Doc.##45, 48). Nor did Delebreau respond to the showing that the complaint fails to state a claim under Title VII, the FCA, the No FEAR Act, or the state law of defamation. (*Id.*)

In her response Delebreau asserted another, new, ground for relief, for alleged retaliation based upon her whistle blowing under 41 U.S.C. § 4712. (D. Ct. Doc.##45: 1-2; 48: 1-2, 3-4). She also asserted, for the first time, a RICO violation against Defendants-Appellees. (D. Ct. Doc.##45: 4; 48: 2). In reply, Defendants-Appellees showed that the § 4712 claim fails to state a claim upon which relief can be granted (D. Ct. Doc.#49: 5-11), as does the RICO claim. (D. Ct. Doc.#49: 11-12).

C. District Court's Decision and Judgment

In a decision and order dated June 5, 2018, the district court granted Defendants-Appellees' motion to dismiss and also dismissed the complaint as to Jay Fuss *sua sponte*. (D. Ct. Doc.#56: 10). On that same day the court entered judgment dismissing the action. (D. Ct. Doc.#57).

The court held that the complaint fails to identify any provision of the U.S. Constitution or any federal statute on which the action is based. (D. Ct. Doc.#56: 4). It held that the complaint fails to assert any claim against Defendants-Appellees arising under federal law, and therefore dismissed the action for lack of federal jurisdiction. (*Id.*)

The complaint alleges violations of Delebreau's civil rights and "labor law rights." (D. Ct. Doc.#56: 5). On the civil rights theory, the court held that the complaint fails to state a claim under 42 U.S.C. § 1983. (*Id.*) Under that statute, an individual may be liable for actions taken under color of state law. However, the statute does not apply to individuals acting under color of tribal law. (*Id.*) Further, the court reasoned that the complaint makes no allegations that the four individual defendants took any actions against Delebreau. There is no allegation that those individual defendants deprived Delebreau of rights under the Constitution or federal laws. (D. Ct. Doc.#56: 6).

The court also held that the complaint fails to state a claim upon which relief can be granted against Defendants-Appellees under 5 U.S.C. § 2302, Title VII, or the FCA. (D. Ct. Doc.#56: 7-8). Delebreau does not assert claims under those provisions in her appeal brief.

In addition, the court considered Delebreau's asserted retaliation claim under 41 U.S.C. § 4712, raised for the first time in her dismissal opposition brief. (D. Ct. Doc.#56: 8). For that claim, the claimant must submit a complaint to the Inspector General of the relevant federal agency, and judicial review is contingent on exhaustion of administrative remedies. (*Id.*) The complaint does not allege such exhaustion or submission of a complaint to the Inspector General. Therefore, the court held, that claim likewise fails as a matter of law.

Although the complaint asserts that Delebreau was reassigned to positions within the Oneida Nation and ultimately her employment was terminated, none of those employment actions are associated with any of the individual defendants. (D. Ct. Doc.#56: 8-9). The district court held that the complaint does not state any cognizable claim for relief against any individual defendant. (D. Ct. Doc.#56: 8). At most, the complaint asserts that some of the Defendants-Appellees merely communicated with Delebreau. (D. Ct. Doc.#56: 9). However, the Defendants-Appellees themselves did not take the alleged employment actions against Delebreau.

These employment actions were undertaken by unidentified officers or employees of the Oneida Nation. (D. Ct. Doc.#56: 9). The court reasoned that federal law recognizes and promotes the

authority of sovereign Indian tribes to control their economic enterprises. (*Id.*) Tribal sovereign immunity protects Indian tribes from suits in their governmental and commercial activities, absent express congressional authorization or clear waiver by the tribe. (*Id.*) The court held that Delebreau cites no federal statute or constitutional provision that overcomes the immunity of the Oneida Nation and its officers and employees to hire and fire employees without outside interference. (*Id.*). The court held: "Consequently, Delebreau's complaint will be dismissed in its entirety." (*Id.*)

SUMMARY OF ARGUMENT

1. The appeal must be dismissed because Delebreau's brief fails to comply with Rule 28 of the Federal Rules of Appellate Procedure. The brief fails to point to any actual error in the district court's reasoning or, indeed, even discuss the court's decision. Rather, Delebreau argues the district court made certain holdings that it did not make. (For example, applying the tribal constitution of another Indian tribe and holding that whistle blower laws do not generally apply to Indian tribes.)

2. The district court properly dismissed the action for lack of federal jurisdiction under Fed. R. Civ. P. 12(b)(1). There is no

federal claim stated against Defendants-Appellees and thus no federal question jurisdiction.

3. The Court lacks jurisdiction over this action against Defendants-Appellees under Article III of the U.S. Constitution because Delebreau has no standing to assert the alleged claims. The complaint alleges no injury in fact that is fairly traceable to actionable conduct of any one of the individual defendants.

4. The judgment of the district court should be affirmed because the complaint fails to state a claim upon which relief can be granted against Defendants-Appellees. The Court need not reach this issue if it affirms dismissal on the grounds above.

5. The judgment of the district court should be affirmed because Delebreau's claims relating to her transfers and terminations of employment with the Oneida Nation are barred by tribal sovereign immunity.

ARGUMENT

I. The Appeal Must be Dismissed For Noncompliance With Fed. R. App. P. 28.

Rule 28 of the Federal Rules of Appellate Procedure requires an appellant to identify the issues on appeal and set forth the appellant's arguments with references to the record and legal authorities. The appeal brief must identify the errors in the district court's reasoning and set forth reasons for reversal. The

rule requires an appellant to provide information to clearly inform the Court and the opposing parties of the basis for the appeal. Specifically, an appeal brief must contain a statement concerning federal jurisdiction, identification of the issues on appeal, a statement of the case including facts supported by references to the record, and an argument demonstrating the purported error below, including appellant's legal contentions and supporting reasons as well as citations to legal authorities. Fed. R. App. P. 28(a).

These requirements apply to pro se litigants and represented parties alike. Although pro se filings will be construed liberally, the Court must be able to discern cogent arguments in an appellate brief, even a pro se litigant's brief. *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001). "Rule 28 of the Federal Rules of Appellate Procedure so requires—a brief must contain an argument consisting of more than a generalized assertion of error, with citations to supporting authority." (*Id.*) An appeal must be dismissed where the appellant "offers no articulable basis for disturbing the district court's judgment" and "simply repeats certain allegations of [appellant's] complaint." (*Id.* at 545-46.)

"Appellate briefs must contain an argument consisting of more than a generalized assertion of error." *Friend v. Valley View Cmty. Unit Sch. Dist. 365*, 789 F.3d 707, 712 (7th Cir. 2015), *reh'g denied*

(July 14, 2015), *cert. denied*, 137 S. Ct. 141 (2016). The rules require an appellant to explain how the district court erred in its judgment. (*Id.*)

A. The Appeal Brief Fails to Comply with Rule 28.

The Court has "previously warned that pro se litigants should expect that noncompliance with Rule 28 will result in dismissal of the appeal." *Anderson*, 241 F.3d at 545-56. "Complete failure to comply 'with Rule 28 will result in dismissal of the appeal.' " *Cole v. C.I.R.*, 637 F.3d 767, 773 (7th Cir. 2011).

The appeal brief fails to comply with Fed. R. App. P. 28. The jurisdictional statement is lacking all the information required by the rules and fails to set forth any basis for federal jurisdiction. (App. at 6). The statement of the issues for review on appeal includes 15 issues, most of which were not argued in the district court. (App. at 6-10). The statement of the case consists of arguments and assertions that are not found in the district court record and are alleged for the first time on appeal. (App. at 10-16). The various allegations throughout the brief are not supported by any citations to the record (*i.e.*, the complaint).

Delebreau makes numerous arguments that are raised for the first time on appeal and relies upon statutes and provisions that have not previously been raised in this case. Those statutes include 10 U.S.C. § 2049, 18 U.S.C. §§ 1512 and 1513, 25 U.S.C.

§ 2302, and 18 U.S.C. § 245. The appeal brief also argues the "Tuscarora Rule" extensively throughout and references the Constitution of the Oneida Nation, arguing that the district court erroneously applied law relating to another Indian tribe. Delebreau argues repeatedly that federal statutes concerning retaliation against whistle blowers are laws of "general application" and must apply against the Oneida Nation.

None of these authorities or arguments were raised in the district court. *See* (D. Ct. Doc.## 45, 48). Therefore, those arguments cannot be relied upon in this appeal and must be disregarded.

Delebreau's appeal brief makes numerous arguments, most of which were not previously raised in this case. Nor does Delebreau develop the argument that the district court erred in holding that no federal causes of action are established against the individual defendants. Rather, the appeal brief makes conclusory arguments and assertions concerning the policies underlying whistle blower laws generally and regarding Delebreau's alleged involvement in a separate criminal action against Jay Fuss, citing statutes concerning federal witnesses. Nothing in the appeal brief establishes a colorable federal claim against the individual defendants.

This appeal should be dismissed because Delebreau's brief fails to comply with Fed. R. App. P. 28. *See Cole*, 637 F.3d at 773.

B. The Appendix Does Not Comply with Rule 30.

In addition, the Appendix does not comply with the requirements for appendices, and is missing key documents such as the decision of the district court. Fed. R. App. P. 30. The Appendix consists of what appear to be tribal constitutions including that of the Oneida Nation. However, these documents were not filed or argued in the district court and they have no place in the consideration of this appeal.

II. The Complaint Was Properly Dismissed for Lack of Federal Jurisdiction.

"A motion to dismiss under Rule 12(b)(1) tests the jurisdictional sufficiency of the complaint, accepting as true all well-pleaded factual allegations and drawing reasonable inferences in favor of the plaintiffs." *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017). The Court reviews de novo a court's dismissal under Rule 12(b)(1). (*Id.*)

A. Arguments Raised for the First Time on Appeal Are Waived.

As noted above, Delebreau asserts a number of different federal statutes, many of which were not raised in the district court. She likewise raises arguments that are new to this case, including the "Tuscarora Rule" and arguments under the Oneida Nation

Constitution. These arguments are not available on appeal because they were not raised in the district court. *In re Veluchamy*, 879 F.3d 808, 821 (7th Cir. 2018) ("It is well established that a party waives the right to argue an issue on appeal if he failed to raise that issue before the lower court…."); *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 755 (7th Cir. 2017) (" 'The well-established rule in this Circuit is that a plaintiff waives the right to argue an issue on appeal if she fails to raise the issue before a lower court.' ")

Also, these arguments do not establish a claim against the individual Defendants-Appellees arising under federal law. The "Tuscarora Rule"[5] relates to whether a statute of general applicability – a statute applying to all persons – applies to Indian tribes. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). Contrary to Delebreau's arguments, the statutes providing for claims for retaliation against whistle blowing are not statutes of general applicability. They do not apply to all persons. Rather, those statutes apply to specific classes of actors and claimants. The *Morton* case, cited by Delebreau, is also immaterial here, as it held that a specific statute allowing Indian tribes to give

[5] The Tuscarora Rule and/or the argument that the laws in this case are ones of general applicability is raised throughout Delebreau's brief, *see* (App. at 1, 2, 5, 6, 8, 9, 20, 21, 40-43).

preference to their members is not controlled or nullified by a general statute, the Equal Employment Opportunity Act. *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974).

Delebreau also argues that the district court applied the tribal Constitution of the Fort Belknap Tribe rather than the Constitution of the Oneida Nation. (App. at 24-28, 31, 49-50). That is not true. No claims or arguments under the Oneida Nation Constitution were raised or decided below. Nor did the district court interpret or apply any tribal constitution whatsoever.

Delebreau repeatedly asserts the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 2302. (App. at 1, 25, 29, 31, 33, 43-33, 47, 52). Delebreau did not assert the ICRA against Defendants-Appellees in the complaint or otherwise raise it in the district court and it is therefore waived. Further, a claim under that statute cannot be asserted against tribe members in their individual capacities. *Bruette v. Knope*, 554 F. Supp. 301, 304 (E.D. Wis. 1983) (The ICRA, 25 U.S.C. § 2302, "provides rights only against the tribe and governmental subdivisions thereof and not against tribe members acting in their individual capacities."); *see also Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975) (§ 2302 "provides rights only against the tribe and governmental subdivisions thereof, and not against tribe members acting in their

individual capacities.") Further, ICRA cannot be used to create a cause of action against Indian tribes or their officers for deprivation of substantive rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). And the only remedy available from the federal courts under ICRA is a writ of habeas corpus under 25 U.S.C. § 1303. (*Id.* at 69–72); *see also Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) ("With the exception of petitions for habeas corpus relief, Congress did not intend in the ICRA to create implied causes of action to redress substantive rights in federal court.") Therefore, the arguments under § 2302 are simply inapplicable to Defendants-Appellees.

B. The Court Properly Dismissed the Complaint for Lack of Federal Jurisdiction.

The district court dismissed the action for lack of federal jurisdiction because the complaint fails to assert any claim against Defendants-Appellees arising under federal law. (D. Ct. Doc.#56: 4). The court found no federal claim asserted under Title VII or the FCA. (D. Ct. Doc.#56: 8). Delebreau does not raise those rulings as error in her appeal brief, and therefore they are conceded.

1. No Federal Claim is Stated Under § 1983 Against Defendants-Appellees.

The court found no federal claim established against Defendants-Appellees under 42 U.S.C. § 1983, as such claims are

unavailable against individuals acting under color of tribal law. (D. Ct. Doc.#56: 5). Delebreau does not show that such holding is erroneous. (It is not, see part IV.B.1, below.) The court also held that the complaint does not allege any deprivation of Delebreau's federal rights by the Defendants-Appellees. (D. Ct. Doc.#56: 6). In short, those individuals were not alleged to have undertaken any wrongful or actionable acts.

2. There is No Claim Under 41 U.S.C. § 4712.

The district court also found no federal claim stated against Defendants-Appellees under 41 U.S.C. § 4712 for adverse actions or discrimination against Delebreau for disclosing mismanagement of a federal contract or grant. (D. Ct. Doc.#56: 8). Such a claim requires exhaustion of administrative remedies including submission of the claim to the Inspector General of the pertinent federal agency. The complaint does not allege such exhaustion.

The appeal brief does not show that this ruling was error and does not establish a claim under § 4712 against Defendants-Appellees. See part IV.B.2, below. Although the appeal brief asserts this statute generally, it does not show how such a claim is stated against Defendants-Appellees. Delebreau's arguments under that statute are conclusory at best. *See* (App. at 13, 14, 20, 39, 42, 45, 46, 48, 51, 52).

3. The Complaint Asserts no Other Federal Claim Against Defendants-Appellees.

Assessing the complaint on its face, there is no federal question jurisdiction because the allegations assert no claims against Defendants-Appellees arising under the U.S. Constitution or the federal statutes. 28 U.S.C. § 1331. Delebreau fails to identify the provision of the United States Constitution or any federal statute involved in her action against defendants.

The complaint states that this case "falls under Office of Tribal Justice 28 CFR ch I (7-11) editions." (D. Ct. Doc.#1: 4). This does not assert any law under which Delebreau has a claim upon which to sue the individual defendants. "The Office of Tribal Justice (OTJ) was initially formed in response to requests from Tribal leaders for a dedicated point of contact for Indian country-specific legal and policy matters." *See https://www.justice.gov/otj.* Laws establishing the OTJ do not establish a claim for relief that can be asserted against the individual defendants.

The complaint also mentions laws or changes to the law that Delebreau would like to be enacted in the future and her desire concerning the handling of laws created by tribal governments. (D. Ct. Doc.#1: 4). Again, this does not assert a federal law under which Delebreau asserts a claim for relief against the individual defendants.

Nor do the allegations against defendants in substance assert claims under federal law. To establish federal question jurisdiction under section 1331, federal claims must "appear on the face of plaintiff's well-pleaded complaint." *U.S. Bank Nat'l Ass'n v. Collins–Fuller T.*, 831 F.3d 407, 410 (7th Cir. 2016); *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) ("[F]ederal jurisdiction generally exists 'only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' ").

There are no federal claims asserted against the individual defendants. To the extent Delebreau attempts to allege a federal claim arising from adverse employment actions such as her transfer in positions and/or the termination of her employment, the Oneida Nation was her employer – not any of the individual defendants.[6] Defendants-Appellees were not her supervisors and they did not transfer or terminate her employment with the Nation.

[6] Nor is defendant Jay Fuss alleged to have terminated Delebreau's employment or otherwise engaged in conduct toward Delebreau that gives rise to a claim under the federal statutes or U.S. Constitution.

4. Delebreau Shows no Federal Claim Against Defendants-Appellees and Raises New Arguments.

Delebreau's appeal brief shows no error in the district court's conclusions. The brief is full of conclusory arguments about violations of Delebreau's rights generally, but ultimately there is no allegation that the individual Defendants-Appellees did anything wrong. That is consistent with the complaint, which draws no connection between conduct of Defendants-Appellees and any claims for relief.

On the other hand, Delebreau argues wrongful conduct by unidentified officials of the Oneida Nation (App. at 10, 32, 37-38, 51, 53), accusing the Nation of engaging in "mafia-like" activity (App. at 10-13, 20, 39). Delebreau also asserts, with no basis in the record, that there are pervasive problems in the Oneida Nation and/or the Oneida Housing Authority relating to fraud and abuse. *See, e.g.*, (App. at 10-13, 17, 20, 39, 40). Those assertions are not found in the complaint and they are not made against the individual defendants. They establish no claim against Defendants-Appellees.

III. The Dismissal Should be Affirmed Also Because Delebreau Lacks Article III Standing Against Defendants-Appellees.

Defendants-Appellees also argued for dismissal because Delebreau has no Article III standing to assert claims against

Defendants-Appellees under the allegations of the complaint. (D. Ct. Doc.#39: 10-12). The district court did not reach this argument. The dismissal also can be affirmed for lack of Article III standing.

As the plaintiff, Delebreau has the burden of establishing the elements of Article III standing. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289 (7th Cir. 2016). Plaintiffs " 'must establish the district court's jurisdiction over each of their claims independently.' " *Segovia v. United States*, 880 F.3d 384, 389 n.1 (7th Cir. 2018) (quoting *Rifkin v. Bear Stearns & Co., Inc.*, 248 F.3d 628, 634 (7th Cir. 2001).)

Although the appeal brief mentions Article III standing in passing (App. at 32-34), it does not show the elements of standing as to each Defendant-Appellee. Delebreau argues that there is standing because there is "temporal proximity" and cause and effect between her involvement as a witness in the federal criminal action against Jay Fuss and the alleged adverse actions involving her employment with the Oneida Nation. (App. at 34-35, 48-49). However, that does not establish standing to assert any federal claims against Defendants-Appellees.

The complaint also lacks allegations establishing standing to assert claims against those defendants. To invoke the jurisdiction of the federal courts, the complaint must establish that plaintiff

has standing to assert claims against each of the individual defendants. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). "A party has standing only if he shows that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the conduct being challenged, and that the injury will likely be 'redressed' by a favorable decision." (*Id.*) "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

For an injury to be "fairly traceable," there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' " *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alteration in original) (quoting *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). This prong of the standing inquiry can be established if "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon*, 426 U.S. at 43.

The complaint does not allege any injury in fact fairly traceable to the conduct of the individual defendants. First, the complaint does not allege that Defendant-Appellee Melinda Danforth engaged

in any conduct whatsoever directed at Delebreau. Therefore, there is no injury alleged that could be connected to Melinda.

Second, the complaint does not allege that Defendant-Appellee Cristina Danforth engaged in any conduct causing injury to Delebreau for which she can recover in this case. It does not allege that Cristina was Delebreau's supervisor, for example, or that Cristina terminated her employment. There is no allegation that Cristina participated in the termination of Delebreau's employment with the Risk Management department, for example, or with the Oneida Museum.

Third, the complaint does not allege that Defendant-Appellee Larry Barton engaged in any conduct directed at Delebreau that caused her harm. It does not allege that Barton was Delebreau's supervisor, for example, that Barton terminated Delebreau's employment, or that Barton participated in the termination of her employment.

Finally, the complaint does not allege that Defendant-Appellee Geraldine Danforth engaged in any conduct against Delebreau that gives rise to a claim for relief under federal law. It does not allege that Geraldine was Delebreau's supervisor, for example, that she terminated Delebreau's employment, or that she participated in the termination of her employment.

The complaint alleges no injury in fact traceable to conduct of Defendants-Appellees Melinda Danforth, Cristina Danforth, Larry Barton, or Geraldine Danforth. The complaint did not point to any specific conduct by any individual defendant that caused her injury for which that defendant may be held liable. Delebreau complains about her job transfers and terminations when she was employed by the Oneida Nation. (D. Ct. Doc.#48: 5). However, the alleged injury from those events is not traceable to conduct of any of the individual defendants and no defendant can be held liable for the employment transfers or terminations. Therefore, Delebreau lacks standing under Article III to assert claims against Defendants-Appellees based upon the alleged retaliation.

The dismissal of this action should be affirmed for lack of Article III standing.

IV. The Complaint Fails to State a Claim Upon Which Relief Can be Granted Against Defendants-Appellees.

The district court held that the complaint fails to assert any claim arising under federal law against Defendants-Appellees and therefore dismissed this case for lack of federal jurisdiction under Fed. R. Civ. P. 12(b)(1). Defendants-Appellees also moved to dismiss this action because the allegations fail to state a claim upon which relief can be granted against Defendants-Appellees. The district court did not reach that ground for dismissal.

A. Standard for Dismissal Under Rule 12(b)(6)

This Court may affirm the dismissal of this action on the basis that the complaint fails to state a claim upon which relief can be granted against Defendants-Appellees. On appeal, the Court reviews a motion to dismiss the complaint de novo, *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). A dismissal should be affirmed if the complaint does not include allegations that "state a claim for relief that is plausible on its face." *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *accord Palka v. Shelton*, 623 F.3d 447, 451–52 (7th Cir. 2010). In reviewing the complaint, the court will accept as true the facts as pled by the plaintiff and will "draw all reasonable inferences in favor of the plaintiff." *Palka*, 623 F.3d at 451–52; *but see Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("Although for the purposes of [a] motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) ("[I]n considering the plaintiff's factual allegations, courts should

not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements.").

"Although a *pro se* complaint is to be liberally construed, a plaintiff can plead herself out of court by alleging facts that show she is not entitled to a judgment." *Benders v. Bellows & Bellows*, 515 F.3d 757, 767 (7th Cir. 2008) (citation omitted); *see also Smart v. Local 702 Int'l Broth. of Elec. Workers*, 562 F.3d 798, 810 (7th Cir. 2009) ("Because [plaintiff] … alleged facts in his complaint that necessarily preclude relief, he pleaded himself out of court, and the district court was correct to dismiss his claim."). For example, if a plaintiff pleads facts showing that his action is time-barred, "he has pleaded himself out of court." *Stuart v. Local 727, Int'l Broth. of Teamsters*, 771 F.3d 1014, 1018 (7th Cir. 2014).

The dismissal of this case should be affirmed on the basis of any and all of the grounds for dismissal asserted by Defendants-Appellees. *See Melton v. Tippecanoe Cty.*, 838 F.3d 814, 818 (7th Cir. 2016), *reh'g denied* (Nov. 10, 2016) (Because our review is de novo, "we may affirm on any ground supported in the record, so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue.") (citations omitted); *Rocha v. Rudd*, 826 F.3d 905, 909 (7th Cir. 2016) ("This court reviews a dismissal under Rule 12(b)(6) for

failure to state a claim de novo," and it "may affirm on any ground contained in the record.") (citation omitted).

B. The Complaint Fails to State a Claim Upon Which Relief Can be Granted Against Defendants-Appellees.

On appeal, Delebreau apparently argues for federal jurisdiction under federal statutes relating to witnesses in criminal proceedings, 18 U.S.C. §§ 1512 (tampering), 1513 (retaliation), as well as under the Indian Civil Rights Act, 25 U.S.C. § 2302. (App. at 17, 18, 20, 21, 30-33, 39, 45-49, 51-53); (App. at 25, 29-31, 33, 39, 47). These statutes were not raised in the district court and they cannot be raised for the first time on appeal. Moreover, Delebreau alleges no conduct by Defendants-Appellees that falls within these statutes. Rather, these statutes are raised generally with reference to the way Delebreau claims she was treated by the Oneida Nation and unnamed tribal officials. Delebreau alleges pervasive conduct within the Nation generally, but she alleges no actionable conduct by Defendants-Appellees. (App. at 5, 8, 10-13, 20, 29, 32, 36, 37-38, 42, 43, 51, 53).

The appeal brief also argues the district court erred in finding no claims against Defendants-Appellees under 41 U.S.C. § 4712 and 42 U.S.C. § 1983. (App. at 39, 42, 45, 46, 48, 51, 52); (App. at 25-26, 31). However, Delebreau does not establish that the

allegations state claims against Defendants-Appellees under these statutes.

The district court also held that no claim is stated against Defendants-Appellees under 5 U.S.C. § 2302, Title VII, or the FCA. (D. Ct. Doc.#56: 6-8). The appeal brief does not argue error in those holdings. Therefore, it is conceded no claims are stated against Defendants-Appellees under those theories.

The judgment should be affirmed on the ground that the complaint fails to state any claims for relief against Defendants-Appellees upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

1. The Complaint Fails to State a Claim Under § 1983.

The complaint does not assert claims under 42 U.S.C. § 1983 and does not mention that statute at all. Apparently because the complaint generally alleges violation of civil rights, the district court considered whether the allegations state a claim under § 1983. The court held the complaint fails to state a claim against Defendants-Appellees under § 1983.

(a) Section 1983 Does Not Apply to Persons Acting Under Color of Tribal Law.

Under 42 U.S.C. § 1983, an individual may be liable for actions taken under color of state law. Applying case law, the court held that section 1983 does not apply to individuals acting under color

of tribal law. (D. Ct. Doc.#56: 5) (citing *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) ("A § 1983 action is unavailable 'for persons alleging deprivation of constitutional rights under color of tribal law.' " (quoting *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir.1983)).)

These are established principles regarding the elements of a claim under § 1983: the plaintiff must prove that the defendant acted under color of "state" law, *i.e.*, the person was a state actor. Section 1983 is not extended to persons acting under color of "tribal" law. This is because "Indian tribes are separate and distinct sovereignties . . . and are not constrained by the provisions of the fourteenth amendment." *R.J. Williams Co.*, 719 F.2d at 982 (citations omitted).

The court held that the complaint refers to Cristina Danforth, Geraldine Danforth, Larry Barton, and Jay Fuss in their respective capacities as part of the Oneida Housing Authority or the Oneida Nation itself, meaning Delebreau could not recover from any of them under § 1983 because their alleged actions were under color of tribal law.[7] (D. Ct. Doc.#56: 6). (There is no allegation of any conduct whatsoever by Melinda Danforth.)

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[7] Likewise, Delebreau cannot assert a claim against Defendants-Appellees under 42 U.S.C. § 1985, conspiracy to interfere with (footnote continued)

The court's holding that no § 1983 claim may be stated against Defendants-Appellees is correct and consistent with the law. Delebreau argues that the district court erred in ruling that § 1983 does not apply to individuals acting under color of tribal law. (App. at 25-26). However, Delebreau misunderstands and misstates this holding, asserting the district court held that Delebreau "has no 42 U.S.C. § 1983 constitutional rights as an Oneida Nation citizen under tribal constitutional law." (App. at 25).

First, that was not the holding of the district court. There was no holding as to rights under the Oneida Nation Constitution. Nor are there any claims asserted under that Constitution. In the district court, Delebreau did not assert that Defendants-Appellees violated her rights under the Oneida Nation Constitution. The court made no ruling as to the scope of any rights under the Oneida Nation Constitution. Accordingly, Delebreau's arguments and assertions of error concerning the applicable tribal Constitution are inapplicable. (App. at 1, 3-5, 6, 8-10, 19-22, 25-28, 31, 49-50, 52). Contrary to Delebreau's arguments, the court did

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civil rights. Additionally, the other provision, 42 U.S.C. § 1981, regarding equal rights under the law, is not implicated by the allegations of the complaint and does not give rise to a claim against Defendants-Appellees.

not interpret or apply any constitution. That is simply not an issue in this case.

Second, Delebreau does not develop any argument or showing that the court was wrong in holding that § 1983 claims are unavailable against individuals acting under color of tribal law. Although she says the district court was wrong, Delebreau's argument is undeveloped on this point. The argument is therefore waived. *See Weinstein v. Schwartz*, 422 F.3d 476, 477 n.1 (7th Cir. 2005) (appellant's appeal was "waived for failure to adequately develop his argument"; "The failure to develop an argument constitutes a waiver."). *see also Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 964 n.1 (7th Cir. 2004) ("The absence of any supporting authority or development of an argument constitutes a waiver on appeal.").

(b) The Complaint Fails to Allege Any Deprivation of Rights by Defendants-Appellees.

The claim under § 1983 also fails because the complaint alleges no deprivation of rights by Defendants-Appellees. To establish a claim under § 1983, Delebreau must allege that each defendant deprived her of a right secured by the U.S. Constitution or laws and that the deprivation was done by a person acting under color of state law. (D. Ct. Doc.#56: 6). Delebreau does not argue error in the court's statement of the elements of that claim.

The court held that the complaint alleged no conduct by any of the Defendants-Appellees amounting to a deprivation of Delebreau's constitutional or civil rights. (*Id.*) The complaint makes no allegations concerning any conduct by Defendant-Appellee Melinda Danforth. As for the other Defendants-Appellees, "[n]othing about those allegations indicates any deprivation of Delebreau's rights." (*Id.*).

As the District Court explained, the complaint makes no allegations that any of the individual defendants took any actions against Delebreau, and makes no allegations against Defendant-Appellee Melinda Danforth:

> The complaint alleges that Cristina Danforth contacted Delebreau regarding misappropriated funds and explained the reason for her job transfer; that Geraldine Danforth told her she was unwelcome in her position as an insurance clerk; that Jay Fuss[8] orchestrated the beating of her son and was eventually indicted for the misappropriation of funds; and that Larry Barton supervised one of her supervisors and was involved in the appeal process that led to reinstatement of her employment. Nothing about those allegations indicates any deprivation of Delebreau's rights. Because Delebreau also makes no allegations against Melinda Danforth, the complaint fails to state a claim against any defendant for a deprivation of civil rights.

(D. Ct. Doc.#56: 6) (emphasis added.)

[8] The undersigned counsel do not represent Defendant-Appellee Jay Fuss. The District Court *sua sponte* dismissed the complaint against Fuss for the same reasons it dismissed the complaint against the other Defendants-Appellees.

Delebreau does not show any error in these holdings. There is no allegation that any of the Defendants-Appellees deprived Delebreau of a right secured by the Constitution or federal laws and that the deprivation was visited upon her by a person acting "under color of state law." The complaint therefore fails to state a claim under § 1983 upon which relief can be granted against Defendants-Appellees.

2. The Complaint Does not State a Claim Under 41 U.S.C. § 4712.

The district court held that the complaint failed to state a claim under 41 U.S.C. § 4712 against Defendants-Appellees. (D. Ct. Doc.#56: 8). Under that statute, certain persons cannot be discharged, demoted, or discriminated against as reprisal for disclosing to certain federal officials information evidencing gross mismanagement of a Federal contract or grant. (*Id.*)

The court held that a claim is not stated under § 4712 because exhaustion of administrative remedies – submission of a claim to the Inspector General of the pertinent federal agency – is required before filing the action. (D. Ct. Doc.#56: 8). There is no allegation of submission of such claim. Delebreau does not show that this conclusion is erroneous and does not assert submission of the claim to the Inspector General of HUD.

Delebreau argues that evidence from the criminal prosecution of Jay Fuss, a separate case, shows that she provided information for indictment concerning embezzlement of Oneida Housing Authority ("OHA") property or money. (App. at 37-38). (That information was not submitted to the court in this case and therefore is not in the record.) Delebreau claims she was subject to adverse employment actions and retaliation as a result. (App. at 45-46, 48, 51, 52).

These arguments do not support reversal of the dismissal. Defendants-Appellees are not alleged to have terminated or transferred Delebreau, and none of the defendants were her supervisor. The complaint does not allege that Defendants-Appellees retaliated against her. That connection is lacking from Delebreau's appeal argument as well. There has never been any basis to establish that Delebreau can sue these individuals for retaliation.

The complaint fails to state a claim against Defendants-Appellees upon which relief can be granted under 41 U.S.C. § 4712.

(a) A Claim for Prohibited Reprisals Under § 4712 Cannot be Asserted Against Employees.

The complaint also fails to state a claim upon which relief can be granted against the individual defendants under 41 U.S.C. § 4712 because there is no liability for individual employees under

the statute. The statute only applies to certain employers who are government contractors who allegedly engage in prohibited reprisals such as termination of employment or demotion.

By its terms, 41 U.S.C. § 4712 provides that an "employee of a contractor [or] grantee . . . may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing" information the employee believes is evidence of "gross mismanagement of a Federal contract or grant . . . ." 41 U.S.C. § 4712(a)(1). A private claim for a prohibited reprisal can be filed against a "contractor" with or "grantee" of the federal government.

After exhaustion of required administrative remedies under § 4712, the employee claiming a prohibited reprisal may bring an action "against the contractor or grantee" to seek damages under the statute. 41 U.S.C. § 4712(c)(2) (emphasis added). Specifically, the statute provides:

> **(2) Exhaustion of remedies.--**If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity **against the contractor or grantee** to seek compensatory damages and other relief available under this section in the

> appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(*Id.*) (emphasis added). *See also* 48 C.F.R. § 3.908-6 (b) (if the complainant exhausts all administrative remedies with respect to the complaint alleging prohibited reprisals by her employer, a government contractor, the complainant may sue in court "against the contractor" to seek damages and other relief under 41 U.S.C. § 4712).

Section 4712 provides only for filing of claims for prohibited reprisals "against the contractor or grantee." Courts look to other statutes in Chapter 47 of Title 41 to define terms within 41 U.S.C. § 4712. For the definition of "contractor" and "contract," courts apply the definitions found in 41 U.S.C. § 4705.[9] The term "contract" "means a contract awarded by the head of an executive agency" and "contractor" "means a person awarded a contract with an executive agency." 41 U.S.C. § 4705(a)(1), (2); *Armstrong*, 2017 W.L. 4236315, *8. The term "grantee" means the recipient of funds

[9] *Armstrong v. Arcanum Group Inc.*, 2017 W.L. 4236315, *8 (D. Colo.) (noting that the protections of §§ 4712 and 4705 apply to conduct involving disclosure of rule violations relating to contracts between the federal government and private contractors).

under a federal grant program.[10] *See, e.g.*, 24 C.F.R. § 1003.5 (Pursuant to CFR Title 24, HUD Development regulations, "[t]ribal organizations which are eligible under Title I of the Indian Self–Determination and Education Assistance Act may apply on behalf of any Indian tribe, band, group, nation, or Alaska native village eligible under that act for funds under this part," the "Community Development Block Grant" program for Indian Tribes.)

The remedies available under § 4712 include reinstatement of employment and payment of back pay and benefits. 41 U.S.C. § 4712(c)(1). Those are remedies that only may be provided by the employer, not an employee. *Cf. Aryai v. Forfeiture Support Assocs.*, 25 F. Supp. 3d 376, 387 (S.D.N.Y. 2012) (holding that FCA does not provide for liability of individual employees; reasoning that FCA provides for "remedies such as reinstatement," remedies "[that] a mere supervisor could not possibly grant in his individual capacity.") (quoting *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001)).

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[10] *See, e.g.*, *Dixson v. United States*, 465 U.S. 482, 487 (1984) (HUD "grantees" are recipients of federal grant funds from HUD); *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 166 (D. Mass. 2004) ("Nearly thirty federal agencies, in their regulations concerning cooperative agreements, include a standard definition that '[t]he grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.' ").

A claim for prohibited reprisal only may be filed against the "contractor." The statute does not provide for claims against employees of the contractor. Accordingly, a claim under 41 U.S.C. § 4712 cannot be asserted against defendants Larry Barton, Cristina Danforth, Geraldine Danforth, or Melinda Danforth because they are individual employees of the Oneida Nation.[11] They are not a "contractor" with the federal government subject to potential liability under § 4712. Rather, they are employees of the contractor, the Oneida Nation. For this reason, the complaint fails to state a claim under § 4712 against Defendants-Appellees.

Moreover, the complaint also fails to state a claim because it does not allege that any of the defendants personally engaged in reprisals prohibited by § 4712. The alleged claim under § 4712 is premised upon the termination of Delebreau's employment with the Oneida Nation, from positions in the Risk Management department and the Oneida Museum. The complaint does not allege that any of the individual defendants terminated that employment. None of the individual defendants were Delebreau's supervisor in those positions, or in her original position with the Housing Authority. The allegations do not suggest that any of the defendants terminated plaintiff's employment. (Nor could they.)

[11] This argument also applies to defendant Jay Fuss, a former employee of the Oneida Nation who did not appear in this case.

(b) Delebreau Did Not Exhaust Administrative Remedies.

Before a claim can be filed in federal court against a contractor for prohibited reprisals under 41 U.S.C. § 4712, a plaintiff must fully exhaust the administrative remedies set forth in the statute. *Moore v. University of Kansas*, 118 F. Supp. 3d 1241, 1253 (D. Kan. 2015) (section 4712 "require[s] the complainant to exhaust administrative remedies in the described ways prior to filing an action.").

The first required step is the filing of a complaint with the Inspector General of the federal agency with whom the employer has a government contract or from which it received a federal grant. 41 U.S.C. § 4712(b)(1). A person who believes she was subject to a prohibited reprisal must first file a complaint raising the alleged reprisal with the Inspector General of the executive agency administering the federal contract or federal grant. 41 U.S.C. § 4712(b)(1). The Inspector General must investigate and issue findings (*id.*) and then the head of the agency concerned must determine whether the contractor or grantee subjected the complainant to a prohibited reprisal and must either (a) deny relief, or (b) take action including ordering the contractor or grantee to abate the reprisal and/or to reinstate the employee and provide back pay and benefits. 41 U.S.C. § 4712(c)(1).

The remedies are deemed exhausted if the head of the executive agency issues an order denying relief under § 4712(c)(1) or has not issued an order within 210 days after the submission of the complaint to the Inspector General by the complainant. 41 U.S.C. § 4712(c)(2). If the remedies are exhausted then an action can be filed in federal court against the contractor or grantee to seek damages or other relief. (*Id.*)

To exhaust administrative remedies in this case, Delebreau was required to file a complaint raising the alleged reprisal with the Inspector General of HUD, as the complaint alleges that materials were stolen from HUD housing sites administered by the Oneida Nation's Housing Authority. (Doc.#1: 3). Delebreau does not allege that any complaint was filed with the Inspector General of HUD. The complaint instead alleges that a "whistle blower form" was filed online with "OSHA" and that Delebreau contacted a U.S. Senator's office. (D. Ct. Doc.#1: 4). Delebreau's brief in the district court asserted that she "disclosed" the alleged fraud, waste, and abuse to the HUD Inspector General. (D. Ct. Doc.#48: 3). However, Delebreau does not allege that she filed a complaint alleging prohibited reprisals with the HUD Inspector General.

Further, it is now too late to file such a complaint with the Inspector General of HUD. Such filing was required within "three

years after the date on which the alleged reprisal took place." 41 U.S.C. § 4712(b)(4). This step cannot occur because the alleged reprisals (transfers or terminations) occurred more than three years ago:

> (a) transfer from the Housing Authority, March 21, 2013, to Risk Management department;
>
> (b) termination from the Risk Management position on November 2, 2013;
>
> (c) assignment to Oneida Museum as Cultural Interpreter on January 21, 2014; and
>
> (d) termination from museum position on September 18, 2014.

See (D. Ct. Doc.#1: 3).

Delebreau did not exhaust the required administrative remedies and cannot do so now. Accordingly, the claim under 41 U.S.C. § 4712 cannot be asserted as a matter of law.

(c) Section 4712 Does Not Apply to the Alleged HUD Contract or HUD Grant.

The complaint alleges that there were housing sites being administered by the Oneida Nation's Housing Authority, for "HUD housing." (D. Ct. Doc.#1: 3). Delebreau alleges that in January 2013, she came across information suggesting that materials intended for use at the HUD housing sites were being stolen from the housing sites. (*Id.*)

Assuming on the motion to dismiss that the Oneida Nation had a contract with or grant from HUD, a federal executive agency, the contract or grant presumably was awarded prior to January 2013. If the contract or grant was awarded by HUD to the Oneida Nation prior to January 2, 2013, 41 U.S.C. § 4712 does not apply to the contract or grant unless it was modified to include a clause providing for the applicability of the amendment. The complaint does not allege that the purported contract or grant with HUD relating to the HUD housing sites was entered into or issued on or after January 2, 2013.

The statute, 41 U.S.C. § 4712, was enacted by the National Defense Authorization Act of 2013, Pub. L. No. 112-239, § 828(b)(1). Claims can be asserted under § 4712 only as to government contracts that were awarded on or after January 2, 2013. "The effects of Section 4712 extend only to 'contracts and grants awarded on or after [January 2, 2013]; … and …all contracts awarded before [January 2, 2013] that are modified to include a contract clause providing the applicability of such amendments.'" *Dimartino v. Seniorcare*, 2016 W.L. 3541217, *4 (D. Md. 2016) (complaint did not allege that contract was awarded to employer on or after 1/2/2013).

Accordingly, drawing the reasonable inference from the allegations that the alleged HUD contract or grant was awarded to the Oneida Nation prior to January 2, 2013, 41 U.S.C. § 4712 does not apply to the claims in this case as alleged in the complaint.

V. To The Extent The Claims Seek a Remedy Against the Oneida Nation, They Fall Within Tribal Sovereign Immunity.

Most of the arguments in the appeal brief rest on allegations against the Oneida Nation, accusing it of nefarious dealings and retaliation against Delebreau for her cooperation as a witness in a criminal prosecution against Jay Fuss for fraud in the management of OHA property and funds relating to HUD projects. Delebreau asserts widespread problems within the Nation. (App. at 5, 8, 10-13, 17, 20, 29, 32, 36-39, 40, 42-43, 51, 53). Most of these assertions are not alleged in the complaint and therefore must be disregarded on appeal. Moreover, the allegations identify no wrongdoing by Defendants-Appellees. Specifically, the complaint alleges that Delebreau was retaliated against by Oneida Nation officials and employees in the transfer and termination of her employment.

The district court held that those employment actions were due to the unspecified activities of several officers and employees of the Oneida Nation. (D. Ct. Doc.#5: 9). Claims relating to employment actions by the Nation fall within its sovereign immunity. (*Id.*)

The court held that Delebreau cited no authority that overcomes the immunity of the Nation and its officers and employees to hire and fire tribal employees. (*Id.*)

The appeal brief does not assert that these conclusions were erroneous. It merely asserts that Defendants-Appellees' conduct was outside the scope of their authority as tribal employees and they may be sued. (App. at 13, 39). However, Delebreau complains of employment transfers and terminations by the Oneida Nation, and not by the Defendants-Appellees.

To the extent Delebreau's claims against Defendants-Appellees arise from actions of the Oneida Nation, including the termination of her employment or transfers within the Nation, and claim damage from such actions, the claims are barred by tribal sovereign immunity. In the Seventh Circuit, the issue of sovereign immunity is technically not a "jurisdictional one." *Meyers v. Oneida Tribe of Indians of Wisconsin*, No. 15-CV-445, 2015 WL 13186223, at *1 (E.D. Wis. Sept. 4, 2015), *aff'd*, 836 F.3d 818 (7th Cir. 2016). The Court can decide the question of tribal sovereign immunity at the pleading stage under Fed. R. Civ. P. 12(b)(6) where, as here, "the immunity issue is clearly raised by the facts in the complaint." (*Id.*); *see also Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 823 (7th Cir. 2016), *cert. denied*, 137 S.

Ct. 1331 (2017)) (Courts may choose among different "non-merits threshold" grounds for dismissing an action, including tribal sovereign immunity; "a federal court has leeway to choose among threshold grounds for denying an audience on the merits, and our conclusion that the defendants have sovereign immunity resolves a non-merits threshold matter without further burden on the courts and parties . . . .").)

An "Indian tribe[] possesses 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Miller v. Coyhis*, 877 F. Supp. 1262, 1265 (E.D. Wis. 1995). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998) (emphasis added); *accord Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509 (1991) ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." (internal citation omitted)). The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as sovereign entities

under the Indian commerce clause. *See* U.S. Const. art. I, § 8. As the Supreme Court has indicated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Delebreau has sued only the individual defendants rather than the Oneida Nation apparently to plead around sovereign immunity. Delebreau indicates she is suing defendants "as individuals stemming from reckless and prohibited retaliatory action . . . ." (D. Ct. Doc.#18: 1); *see also* (*id.* at 2) (Defendants "are being sued punitively as individuals because of recklessness in engaging in prohibited retaliation.") Delebreau argues that her claims against defendants fall outside of sovereign immunity, citing *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). (D. Ct. Doc.#18: 2-3).

Lewis is a decision of the United States Supreme Court issued on April 25, 2017. In that case, a motor vehicle driver and passenger sued an employee of an Indian tribe in his individual capacity. The plaintiffs filed a negligence claim in state court seeking damages from an accident caused by the defendant when he was driving within the scope of his duties as an employee of the tribe. The Supreme Court held that "in a suit brought against a

tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis*, 137 S. Ct. at 1288. The Court applied the law governing sovereign immunity for state and federal employees, reasoning that it applies equally in the context of tribal sovereign immunity. (*Id.* at 1291). *Lewis* applies common law sovereign immunity principles to the question of sovereign immunity for claims asserted against tribal employees. (*Id.* at 1291-92).

Under those common law principles, courts must examine whether "the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." (*Id.* at 1290). Courts must look beyond the characterization of the parties in the complaint and determine if the remedy sought is really a claim against the sovereign. (*Id.*). If an action is in essence one against the sovereign even if the sovereign is not a named party, then the sovereign "is the real party in interest and is entitled to invoke" sovereign immunity. (*Id.*). As the Supreme Court explained:

> Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. *See, e.g., Ex parte New*

> *York*, 256 U.S. 490, 500–502, 41 S. Ct. 588, 65 L. Ed. 1057 (1921). If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection.

Lewis, 137 S. Ct. at 1290 (emphasis added).

If it is the actions of the Oneida Nation, not the individual defendants, that caused Delebreau's injury, then the claim falls within tribal sovereign immunity. *Miller*, 877 F. Supp. at 1267-68. Where, as here, it is the action of the Oneida Nation itself – the job transfers of Delebreau within the Oneida Nation and the termination of Delebreau's employment – that allegedly caused Delebreau's injury, the action will be viewed as a lawsuit against the Oneida Nation. (*Id.*)

This action was filed against individual defendants who are employees of the Oneida Nation. (D. Ct. Doc.#1: 1-2) (individual defendants "worked for Oneida Tribe of Wisconsin"). To the extent the complaint seeks reinstatement to employment with the Oneida Nation or seeks to change the law/policies of the Oneida Nation, those are claims against the Oneida Nation and fall within tribal sovereign immunity. *See* (D. Ct. Doc.#1: 4). Likewise, to the extent the action claims injury from the termination of Delebreau's employment with the Oneida Nation or her transfers of position, those too are claims against the Oneida Nation, not the individual

defendants. She asserts claims and seeks remedies against Oneida Nation, not against the individual defendants.

None of the individual defendants were Delebreau's supervisor and none of them are alleged to have terminated her employment. Thus, the employment-related allegations are claims against the Oneida Nation, not the individual defendants. As such, those claims fall within the Oneida Nation's sovereign immunity and they must be dismissed. *See Lewis*, 137 S. Ct. at 1290-91; *see also Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (the official action of the board of the tribe caused plaintiff's alleged injury, not the individually named defendants, who were members of the board; claims therefore fell within the tribe's sovereign immunity); *Brown v. Garcia*, 17 Cal. App. 5th 1198, 225 Cal. Rptr. 3d 910 (Ct. App. 2017) (defamation action by members of Indian tribe against current and former tribal officials encroached on tribe's sovereignty and thus was barred by doctrine of sovereign immunity, in case arising out of statements indicating members should be disenrolled from tribe, where defendants were tribal officials at time of alleged defamation and were acting within scope of tribal authority when they made the allegedly defamatory statements).

Delebreau claims to have suffered "emotional hardship," "financial debt," "lack of employment," "mental anguish," and harm to her "personal integrity." (D. Ct. Doc.#1: 4). This harm allegedly was caused by the transfers of employment within the Oneida Nation and the termination of Delebreau's employment with Oneida Nation. The complaint does not allege conduct by the individual defendants establishing a claim against defendants under any federal statute. As shown in parts II and IV, above, the complaint fails to state a claim under any federal statute upon which relief can be granted against defendants.

CONCLUSION

This appeal must be dismissed because Plaintiff-Appellant Dawn Delebreau has not explained why she believes the district court erred in dismissing the complaint on the basis of the arguments presented to that court on Defendants-Appellee's dismissal motion. Further, Delebreau's appeal brief does not contain all information required by Fed. R. App. P. 28 and her Appendix does not contain required documents and includes documents that are not in the district court record and were not submitted or argued to the district court.

The judgment of dismissal should be affirmed on the grounds of lack of federal jurisdiction, lack of Article III standing, and failure to state a claim upon which relief can be granted against

Defendants-Appellees. It also should be affirmed on tribal sovereign immunity grounds.

Dated this 24th day of August, 2018.

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

The undersigned counsel of record the Defendants-Appellees, furnishes the following in compliance with Fed. R. App. P. 32(g)(1):

I certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,446 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32 because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Word in 12 Point Century font.

Dated this 24th day of August, 2018.

HUSCH BLACKWELL LLP

By: s/Lisa M. Lawless
Lisa M. Lawless

CERTIFICATE OF SERVICE

I certify that on August 24, 2018, pursuant to the Court's Electronic Case Filing Procedures, I electronically filed the foregoing Response Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that duplicate paper copies will be mailed so that they will be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the electronic Brief.

Pursuant to Rule 25(d), I certify that on August 24, 2018, the foregoing Response Brief of Defendants-Appellees was sent via United States Mail to:

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