UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

TERESSA MESTEK, Plaintiff, v. LAC COURTE OREILLES COMMUNITY HEALTH CENTER, LOUIS TAYLOR, (in both his personal and official capacity) JACQUELINE BAE, Ph.D., (in both her personal and official capacity) SHANNON STARR, M.D., (in both his personal and official capacity) SARA KLECAN, (in both her personal and official capacity) DAVID FRANZ, (in both his personal and official capacity) and MICHAEL POPP, in his personal capacity, Defendants.	)	Civil No. 21-cv-541

DEFENDANTS' REPLY BRIEF

Introduction

Defendants Lac Courte Oreilles Community Health Center ("LCO-CHC"), Louis Taylor, Jacqueline Bae, Shannon Starr, Sara Klecan, David Franz, and Michael Popp (collectively, "Defendants") humbly request the Court to dismiss Plaintiff's action in accord with controlling federal law concerning tribal sovereign immunity. The Lac Courte Oreilles Band of Lake Superior Chippewa Indians' (the "Tribe") sovereign immunity affirmatively blocks Plaintiff's

federal False Claims Act ("FCA") anti-retaliation suit. Congressional abrogation of tribal sovereign immunity requires an unequivocally expressed intent to do so, for all statutes, including a broad statute of general applicability like the FCA. Because the FCA retaliation provision does not unequivocally abrogate tribal sovereign immunity, the Tribe's sovereign immunity shields all of the Defendants from this suit. Further, Defendants properly brought a motion to dismiss in compliance with evidentiary and pleading principles. Therefore, the Court must dismiss this case.

Argument

I. The FCA's Anti-Retaliation Provision Does Not Apply to the Tribe And Revokes this Court of Jurisdiction Over Plaintiff's Entire Suit

The Tribe is a federally recognized Indian tribe immune from suit absent Congress' unequivocal abrogation or a clear waiver by the Tribe. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014); *C&L Enters. Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001). As a governmental subdivision, LCO-CHC is afforded the Tribe's sovereign immunity protections from suit. *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F.Supp.3d 867, 876 (W.D. Wis. 2017). Tribal sovereign immunity also cloaks all of the individually named Defendants, because they were sued in their official capacities with Plaintiff effectively seeking relief from the Tribe. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291-1293 (2017).[1] For reasons stated *infra*, the FCA retaliation provision does not overcome the Tribe's sovereign immunity.

[1] Michael Popp is entitled to tribal sovereign immunity because Plaintiff seeks relief in the form of reinstatement, front pay, back pay, interest, special and compensatory damages, award for costs and attorneys' fees, and injunctive relief prohibiting Defendants from future retaliation, blacklisting, or interference with business, all of which amount to damages from and specific performance by LCO-CHC, and essentially, the Tribe. *See Lewis*, 137 S. Ct. at 1290; *Tamiami Partners v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-1226 (11th Cir. 1999). Plaintiff bootstraps the individually named Defendants in her effort to seek relief from the Tribe.

a. The broad language under 3730(h) does not unequivocally include Indian tribes

The logic and rationale barring the Tribe from being classified as a "person" under Section 3729 extends to the inapplicability of Section 3730(h) as applied to the Tribe. Section 3729(a) permits suits against "any person" who violates the FCA. 31 U.S.C. §§ 3729(a), 3730(b). The statute does not define "person." *See* 31 U.S.C. §§ 3729-3733. More broadly, the FCA anti-retaliation provision does not include an identifier of who can be sued for violating the statute. 31 U.S.C. § 3730(h). The anti-retaliation provision, like the entire FCA, does not include "Indian tribe." *See* 31 U.S.C. §§ 3729-3733. To overcome the lack of unequivocal congressional intent to abrogate the Tribe's sovereign immunity, Plaintiff erroneously points the Court to caselaw that strengthens the Defendants' position rather than Plaintiff's.

One case cited by Plaintiff in particular provides support for the Court to conclude tribal sovereign immunity bars Plaintiff's suit. Contrary to Plaintiff's argument that *Slack v. Washington Metropolitan Area Transit Authority* illustrates the wider reach of Section 3730(h), *Slack* held state sovereign immunity barred the retaliation claim against an interstate agency. *Slack v. Wash. Metro. Area Transit Auth.*, 325 F.Supp.3d 146, 155 (D.D.C. 2018). The court concluded while the interstate agency may fall within the retaliation provision's broad scope, the FCA did not clearly express Congress' intent to abrogate sovereign immunity. *Slack*, 325 F.Supp.3d at 153. The court dismissed the case, because the anti-retaliation provision lacked a clear abrogation of state sovereign immunity. *Id*. at 153. Furthermore, *Slack* dismissed arguments—similar to Plaintiff's—that the interstate agency waived its immunity by receiving federal funds. *Id*. at 154. There, as here, the plaintiff failed to show Congress conditioned receipt of federal funds on a waiver of sovereign immunity to FCA anti-retaliation claims. *Id.*; *Amended Complaint* ¶¶ 26-29, *Mestek v. Lac Courte Oreilles Community Health Center*, No.

3:21-cv-00541 (January 3, 2022), Dkt No. 19 ("*Amended Complaint*"). Here, Plaintiff cites a block quote of the *Slack* opinion without addressing the court's holding that Section 3730(h) does not abrogate sovereign immunity and that receipt of federal funds, without a conditioned waiver, did not confer federal court jurisdiction. *Id*. at 155. *Slack*, like *Stevens*, held the FCA does not clearly abrogate sovereign immunity. *Id*.; *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 780, 787-788 (2000). The logic of both *Slack* and *Stevens* should be extended to bar this FCA retaliation claim against LCO-CHC.

Furthermore, Plaintiff misconstrues other caselaw to argue Section 3730(h) applies to LCO-CHC. *United States ex rel. Felten v. William Beaumont Hospital* did not discuss who could be sued to enforce Section 3730(h), but rather the meaning of an "employee" that could bring a FCA suit. *U.S. ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 431 (6th Cir. 2021). Also, both *Satalich* and *Wilkins* involved retaliation claims against municipal entities, not states or state agencies. *U.S. ex rel. Satalich v. Los Angeles*, 160 F.Supp.2d 1092, 1094 (C.D. Cal. 2001); *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 928 (8th Cir. 2002). Plaintiff asserts these cases evidence the all-inclusive nature of Section 3730(h). However, these cases either are irrelevant (*Felten*) or illustrate various courts disdain for applying Section 3730(h) claims against sovereigns. *See Cook County, Ill. V. U.S. ex rel. Chandler*, 538 U.S. 119 (2003) (municipalities fell under the FCA definition of "person" because municipalities can be sued). Indian tribes, like states, possess inherent governmental authority and sovereign immunity from suit. *Bay Mills Indian Cmty.*, 572 U.S. at 788; *see also Red Cliff Band of Lake Superior Chippewa Indians v. Bayfield-County*, 432 F.Supp.3d 889, 890 (W.D. Wis. 2020) (recognizing another federally recognized Indian tribe's aboriginal sovereignty and immunities). Because the Tribe is a

sovereign—not a municipality under state law—the Court must extend sovereign immunity protections to LCO-CHC.

b. Plaintiff failed to survey Defendants' cited Indian law-FCA caselaw

Plaintiff dismisses Defendants' cited caselaw pertaining to the application of the FCA to Indian tribes. Particularly, Plaintiff claimed Defendants' arguments focused on *qui tam* claims and not retaliation claims. However, *Kendall v. Chief Leschi School, Inc.* involves a *qui tam* and a retaliation claim. *Kendall v Chief Leschi School, Inc.*, No. C07-5220, 2008 WL 4104021 (W.D. Wash. 2008); Defendants' Brief in Support of Their Motion to Dismiss at 6, *Mestek v. Lac Courte Oreilles Community Health Center*, No. 3:21-cv-00541 (January 18, 2022), Dkt No. 22 ("Defendants' Brief"). In that case, a *qui tam* plaintiff brought a 31 U.S.C. § 1730 claim and a Section 3730(h) claim against a tribal school. *Kendall*, 2008 WL 4104021, at *1. The court held *Stevens* applied and recognized the tribal school's sovereign immunity to bar the suit. *Id.* *Kendall* did not differentiate the retaliation claim from the *qui tam* claim. *Id.* Even more, the court was "not convinced that any amount of discovery into [the tribal sovereign immunity] issue will change this result." *Id.* Thus, contrary to Plaintiff's oversight of the case, the Court should look to *Kendall* for further support to dismiss this case in deference to tribal sovereign immunity.

II. Statutes of General Applicability Do Not Abrogate Tribal Sovereign Immunity without Unequivocal and Express Congressional Intent

The Court must "tread lightly in the absence of clear indications of legislative intent" before finding an abrogation of sovereign immunity. *Santa Clara Pueblo v. Martinez* , 436 U.S. 49, 60 (1978). Any statutory ambiguity must be interpreted in favor of sovereign immunity. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016) (citing *Dolan v. United States Postal Serv.*, 546 U.S. 481, 498 (2006)). "Congress' words must fit like a glove in

their unequivocality" to say with "perfect confidence" that Congress intended to abrogate tribal sovereign immunity. *Meyers*, 836 F.3d at 827 (citations omitted).

A key difference exists in statutes applying to Indian tribes versus the ability to enforce Indian tribes' compliance with them. "To the extent that application of a general statute to a tribe would expose the tribe to money damages, the tribe is immune from suit for such damages unless immunity is waived by Congress or the tribe itself." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.03 (Nell Jessup Newton Ed., 2017) [hereinafter, COHEN'S HANDBOOK].

In *Florida Paraplegic Association v. Miccosukee Tribe of Indians*, the Eleventh Circuit held that despite the American With Disabilities Act's ("ADA") general applicability, the Act did not abrogate tribal sovereign immunity to permit a suit against a tribe. *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1133 (11th Cir. 1999). The court recognized, "[w]hether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statue are two entirely different questions." *Florida Paraplegic Ass'n*, 166 F.3d at 1130. Thus, without an unequivocally expressed intention to abrogate tribal sovereign immunity, the ADA, a statute of general applicability, does not permit suits against Indian tribes. *Id.* at 1135. Similarly, in *Meyers*, the Seventh Circuit recognized that general applicability is assumed to apply to Indian tribes. *Meyers*, 836 F.3d at 827 (citing *Bolssen v. Unum Life Ins. Co. of Am.*, 629 F.Supp.2d 878, 881 (E.D. Wis. 2009)). There, the Fair and Accurate Credit Transaction Act ("FACTA") did not include "Indian tribe" in its definition of "person." *Meyers*, 836 F.3d at 820. The Seventh Circuit distinguished between the law applying to Indian tribes and the ability of plaintiffs to sue an Indian tribe for violating the law. *Id.* at 827 (citation omitted). *Meyers* held that the FACTA did not unequivocally abrogate tribal sovereign

immunity. *Id*. at 827. Thus, a law of general applicability must unequivocally abrogate tribal sovereign immunity to survive a motion to dismiss. *Id*. at 827.

Here, *Florida Paraplegic Association* and *Meyers* require the Court to find that the FCA retaliation provision does not unequivocally abrogate the Tribe's sovereign immunity. The FCA may apply to the Tribe, but the retaliation provision does not permit suits against the Tribe or any Indian tribes. *Florida Paraplegic Ass'n*, 166 F.3d at 1135; *Meyers*, 836 F.3d at 827. Plaintiff's argument that the FCA retaliation provision is an all-inclusive provision that implicitly strips the Tribe's immunity is in direct conflict with federal caselaw concerning sovereign immunity. The FCA retaliation provision is ambiguous at best which requires an interpretation in favor of sovereign immunity. *Meyers*, 836 F.3d at 824. The Court must dismiss the FCA retaliation claim because the statutory language does not abrogate tribal sovereign immunity with "perfect confidence." *Id*. at 827.

III. Dismissal of Plaintiff's FCA Claims Requires Dismissal of Plaintiff's Wisconsin Common Law Claims

The FCA retaliation provision does not unequivocally abrogate the Tribe's sovereign immunity from suit. The Tribe's Tribal Governing Board did not expressly waive its sovereign immunity to this suit as required by tribal law. Ex. 5 – 2 LCOTCL § 5.303. Without abrogation or tribal waiver, the Court lacks federal question jurisdiction over Plaintiff's FCA claim. Thus, the Court lacks supplemental jurisdiction over Plaintiff's Wisconsin common law claims. *Mains v. Citibank, N.A.*, 852 F.3d 669, 679 (7th Cir. 2017). Therefore, the Court must dismiss Plaintiff's state law claims, because the Court lacks subject matter jurisdiction under 28 U.S.C. § 1367.

IV. Defendants Properly Filed Appropriate Exhibits Because Defendants' Exhibits Are Referred to in Plaintiffs' *Amended Complaint* And Are Suitable for Judicial Notice.

The declaration and exhibits attached to Defendants' *Brief in Support of their Motion to Dismiss* are properly before this Court under judicial notice and Seventh Circuit caselaw. The court possess leeway to choose among threshold grounds for denying audience on the merits that may resolve a non-meritorious matter without further burden on the courts and parties. *Meyers*, 836 F.3d at 823. To decide a Rule 12(b)(6) motion, the court may consider plaintiffs' complaints, documents referenced in the complaints, documents critical to the complaints, and information subject to judicial notice. *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F.Supp.3d 867, 870 (W.D. Wis. 2017) (*citing Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)). Sovereign immunity is a threshold matter to deny audience on the merits of the case. *Meyers*, 836 F.3d at 822 (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). Sovereign immunity is a waivable defense that shields a sovereign from litigation and the burdens of litigation. *Meyers*, 836 F.3d at 822.

"Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). However, litigants cannot use this narrow exception to ignore the distinction between a motion for dismissal and one for summary judgment. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). Judicial notice is proper for adjudicative facts that are not subject to reasonable dispute. *See* Fed.R.Evid. 201(a), (b). A court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment. *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (citation omitted). Judicial notice of historical documents, documents contained in the public record, and reports of administrative

bodies is proper. *Thompson*, 161 F.3d at 456 (citation omitted) (allowed trial court's consideration of treaties and other historical documents). A court may take judicial notice of an Indian tribe's laws. *Bruguier*, 237 F. Supp. 3d at 872 n.1. Specifically, nontribal courts may take judicial notice of tribal sovereign immunity ordinances. *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357 (1st Dist. 2005); *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (1st Dist. 2002), as modified on denial of reh'g, (Feb. 6, 2002).

Here, Defendants' attached declaration and exhibits comply with judicial notice requirements and *Venture Associates Corp*. First, Plaintiff's Termination Letter (Ex. 1) is referenced in Plaintiff's *Amended Complaint* and is central to her retaliation claim. *Amended Complaint* at ¶¶ 120, 121, 122; *Venture Associates Corp.*, 987 F.2d at 431; *see* Ex. 1 – August 24, 2018 *Termination Letter*. Second, the Tribe's Sovereign Immunity Code (Ex. 5) and LCO-CHC Personnel Policies and Procedures (Ex. 6) are publicly available at https://www.lcotribalcourt.org/tribal-codes/. *Thompson*, 161 F.3d at 456; *Bruguier*, 237 F. Supp. 3d at 872 n.1. Third, Exhibits 2-4, detailing Plaintiff's invalid appeal and consent to the Lac Courte Oreilles Tribal Court ("Tribal Court") jurisdiction for all LCO-CHC employment disputes, are documents critical to her claims. *Bruguier v*, 237 F.Supp.3d at 870 (*citing Geinosky*, 675 F.3d at 745 n.1); *see* Ex.2 – August 28, 2018 *Plaintiff's Appeal Letter*; Ex. 3 – August 29, 2018 *Appeal Denial Letter*; Ex. 4 – September 5, 2013 *Consent to Grievance and Appeal Process*. Fourth, the Court should extend *Thompson* to take judicial notice of the Declaration of Tweed Shuman. *Thompson*, 161 F.3d at 456. The declarant is a tribally elected official that provides the Court with undisputable information regarding intratribal operations and governmental structure as background for the non-meritorious threshold issue of sovereign

immunity. *See* Shuman Dec. Thus, the Court may consider Defendants' declaration and exhibits without converting Defendants' *Motion to Dismiss* into a motion for summary judgment. *Thompson*, 161 F.3d at 456.

Additionally, Plaintiff erroneously relies on *Peckmann* to suggest she is deprived of the opportunity to refute factual disputes. Plaintiff's Opposition to Defendants' Motion to Dismiss at 10-11, *Mestek v. Lac Courte Oreilles Community Health Center*, No. 3:21-cv-00541 (February 8, 2022), Dkt No. 25 ("Plaintiff's Resp. Br.") (citing *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992)). There, a district court *sua sponte* entered summary judgment for the plaintiff before the defendants could present any factual evidence or affidavits in addition to their motion to dismiss. *Peckmann*, 966 F.2d at 297. The Seventh Circuit remanded for the district court to consider factual arguments and the merits of the case. *Id.* at 298. Here, the motion to dismiss in front of the Court goes to non-meritorious, threshold matters of sovereign immunity. Unlike *Peckmann*, Plaintiff is not being stripped of arguing the merits of her case, but is required to evidence how the Tribe's sovereign immunity does not apply to allow her to get to the merits. *Id.* at 298.

V. Plaintiff Failed to Adequately Plead Futility to Forgo Exhaustion of Tribal Remedies

For the first time in her *Response Brief*, Plaintiff argues that the exhaustion of tribal court remedies would be futile. Plaintiff's Resp. Br. at 13. In a footnote, *National Farmers* commented that the tribal exhaustion rule would not apply if an assertion of tribal jurisdiction is motivated by bad faith, violative of express jurisdictional prohibitions, or where exhaustion would be futile. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.251 (citations omitted). The futility exception generally applies only when the tribe does not have a functional court system. COHEN'S HANDBOOK § 7.04[3] (citing *Colombe v. Rosebud*

Sioux Tribe, 747 F.3d 1020, 1025 (8th Cir. 2014); *Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 572-72 (5th Cir. 2001); *Krempel v Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997)).

Here, Plaintiff incorrectly recounts Defendants' arguments for exhaustion. Plaintiff's Resp. Br. at 13. As Plaintiff is well aware, the Tribal Court exists and possesses jurisdiction over LCO-CHC employment suits. Although Plaintiff was not entitled to an appeal process for a disciplinary action, she was still obligated to bring any employment dispute to the Tribal Court. *See* Ex. 4. Plaintiff never did so. Instead, she filed a procedurally deficient appeal and brought her action to this Court. *See* Ex. 2, 3. Plaintiff never alleged futility in her *Amended Complaint* and cannot now argue futility without evidencing that she brought her employment dispute to the Tribal Court. Instead, she makes a broad leap to conclude futility even though she never brought a claim to Tribal Court or made reasonable attempts to do so.

Conclusion

Plaintiff cannot point to a Congressional abrogation or an express waiver provided by the Tribe that waives its sovereign immunity to allow this case to move forward. For these reasons, this Court should dismiss this action.

Dated: February 18, 2022

RESPECTFULLY SUBMITTED:

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