

1 ELIZABETH A. STRANGE
First Assistant United States Attorney
2 District of Arizona

3 PETER M. LANTKA
4 Assistant U.S. Attorney
Arizona State Bar No. 030678
5 Two Renaissance Square
6 40 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-4408
7 Telephone: (602) 514-7500
8 Facsimile: (602) 514-7693
E-Mail: peter.lantka@usdoj.gov
9 *Attorneys for the Defendant*

10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 Keith Goss,

13 Plaintiff,

14 v.

15 United States of America; Tuba City
16 Regional Health Care Corporation, an
Arizona corporation and self-governed
17 under the Indian Self-Determination
Education Assistance Act; Lynette Bonar;
18 *et al.*,

19 Defendant(s).

CV-18-08077-DGC

MOTION TO DISMISS

20 Comes now the Defendant, the United States of America, and pursuant to Rule
21 12(b)(1) and (6) requests that this Court (1) dismiss individual defendant Dr. Lynette Bonar
22 and the Tuba City Regional Health Care Corporation (TCRHCC) from Counts 1, 2, 3, and
23 6 and substitute the United States for those counts; and (2) dismiss all counts in which the
24 United States is a named Defendant.¹ In support of its Motion, the United States relies on
25
26

27 ¹ The United States has not waived its sovereign immunity for non-tort matters and does not
28 represent Dr. Bonar in her individual capacity. The Government therefore makes no
representation on Counts 4, 5, 7, or 8, since it is not a party to those allegations.

1 the following Memorandum of Points and Authorities with Exhibits and all matters of
2 record.²

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 This matter stems from an obviously broken working relationship between the
5 Plaintiff and his employer, the Tuba City Regional Health Care Corporation. Unfortunately,
6 this Court is not the proper forum for Plaintiff's dispute. As articulated below, the Federal
7 Tort Claims Act requires that the United States be substituted for Defendants TCRHCC and
8 Dr. Lynette Bonar for all tort claims in which the Government has waived sovereign
9 immunity; and moreover, those claims must be dismissed lack of jurisdiction.

10 Plaintiff's complaint raises the following counts.

Count	Named Defendant	USA Substituted
1 Negligence/Negligent Supervision	TCRHCC; USA	Yes, for TCRHCC
2 Constructive Discharge	TCRHCC	Yes, for TCRHCC
3 Intentional Infliction of Emotional Distress	Bonar; TCHCC	Yes, for Dr. Bonar and TCRHCC
4 Breach of Covenant of Good Faith and Fair Dealing	"Defendants"	No – No waiver of sovereign immunity
5 "Bivens" Wiretap	Bonar	No – No waiver of sovereign immunity
6 Negligent Supervision	Bonar; United States	Yes, for Dr. Bonar
7 State Whistle blowing Laws	TCRHCC; Bonar	No – No waiver of sovereign immunity
8 Federal Whistle Blowing	TCRHCC; Bonar	No – No waiver of sovereign immunity

24 The Government will address each issue in turn.

27
28 ² Pursuant to this Court's May 30, 2018 Order, the United States attempted to confer with Plaintiff, by letter, prior to filing its Motion to Dismiss.

1 **I THE UNITED STATES MUST BE SUBSTITUTED FOR DR. BONAR**
2 **AND/OR TCRHCC IN COUNTS 1, 2, 3, AND 6 UNDER THE FEDERAL**
3 **TORT CLAIMS ACT.**

4 In 1975, Congress enacted the Indian Self-Determination and Education Assistance
5 Act of 1975 (“ISDEAA”), Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1975). “The ISDEAA
6 created a system by which tribes could take over the administration of Programs operated
7 by the [Bureau of Indian Affairs].” *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1001
8 (9th Cir. 2014) (quoting *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729
9 F.3d 1025, 1033 (9th Cir. 2013)) (internal quotations omitted). Under the ISDEAA, a tribe
10 “receiving a particular service from the BIA may submit a contract proposal to the BIA to
11 take over the program and operate it as a contractor and receive the money that the BIA
12 would have otherwise spent on the program.” *Shirk*, 773 F.3d at 1001; *Gatling v. United*
13 *States*, CV-15-08070-PCT-SMM, 2016 WL 147920, at *1 (D. Ariz. Jan. 13, 2016).

14 In 1990, Congress extended the FTCA's waiver of sovereign immunity to claims
15 “resulting from the performance of functions...under a contract, grant agreement, or
16 cooperative agreement authorized by the [ISDEAA] of 1975.” 25 U.S.C. § 450(f); *see Shirk*,
17 773 F.3d at 1003. “The FTCA provides a waiver of the United States government's
18 sovereign immunity for tort claims arising out of the conduct of government employees
19 acting within the scope of their employment.” *Adams v. United States*, 429 F.3d 1049, 1051
20 (9th Cir.2005) (citing 28 U.S.C. § 1346(b)(1)). “The FTCA provides that the government
21 ‘shall be liable ... in the same manner and to the same extent as a private individual under
22 like circumstances’ ” *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir.1987) (quoting
23 28 U.S.C. § 2674).

24 In 1988, Congress enacted comprehensive legislation, titled the Federal Employees
25 Liability Reform and Tort Compensation Act, which makes the FTCA’s remedy against the
26 United States exclusive for torts committed by federal employees acting within the scope of
27 employment. 28 U.S.C. § 2679(b)(1). Pursuant to Section 2679(a), Title 28, the United
28 States is the only proper defendant for actions covered under the FTCA. *See, e.g., See*

1 *Kennedy v. U.S. Postal Service*, 145 F.3d 1077, 1078 (9th Cir. 1998); *Hartman v. United*
2 *States Customs and Border Protection*, CV14-2090-TUC-DCB, 2015 WL 5731618, *4 (D.
3 Ariz. June 30, 2015)(dismissal of individual defendants warranted where sole remaining
4 count was FTCA claim). Thus for tribal employees properly subject to a funding agreement
5 with the United States, the only proper Defendant in a tort case is the United States.

6 A two-part analysis is used when determining whether the actions or omissions of a
7 tribal employee are covered under the FTCA. The first inquiry is whether the tribal
8 employee is deemed a federal employee and focuses primarily on the scope of the ISDEAA
9 contract and whether the contract authorized the acts or omissions forming the basis of the
10 underlying claim. *Allender v. Scott*, 379 F.Supp.2d 1206, 1211 (D.N.M.2005). If the court
11 concludes that the claim at issue resulted from the performance of functions under the
12 ISDEAA contract and that the tribal employee should be deemed a federal employee, the
13 second inquiry examines whether the tribal employee was acting within the scope of his
14 employment. *Id.* at 1211, 1218. The scope of the employment is determined according to
15 the principles of *respondeat superior* of the state in which the tort occurred. *Lutz v. Secretary*
16 *of the Air Force*, 944 F.2d 1477, 1488 (9th Cir.1991).

17 The TCRHCC operates pursuant to a Tribal Self-Governance Compact and Funding
18 Agreement with the United States Indian Health Services (IHS). *See*, Dft. Exh. A. The
19 agreement permits TCRHCC to run the day to day operations of its facilities, including the
20 administration of programs services functions and activities [PSFAs] of the Indian Health
21 Services. *Id.* at 8. The agreement further incorporates FTCA coverage, with all inherent
22 limitations, by referencing 25 CFR Part 900, Subpart M. *Id.* at 18.³ *See also*, Dft. Exh. A at
23 24 (2012 funding agreement) (empowering the TCRHCC Chief Executive Officer to handle
24 the day-to-day management and administration of PSFAs by TCRHCC according to the
25 policies and procedures established by the TCRHCC Board of Directors).

26 _____
27 ³ Part 900, C.F.R., Title 25, elaborates on the boundaries of FTCA coverage for Indian
28 Tribes and Tribal Organizations under self-determination contracts, including claims arising
out of the performance of non-medical-related functions, such as those at issue in this case.
25 C.F.R. § 900.180(b).

1 The allegations within Counts 1, 2, 3, and 6 are within the scope of TCRHCC's
2 contract with IHS. Count 1 alleges negligent supervision of hospital employees, particularly
3 Dr. Bonor in her supervision of the day-to-day interactions between other employees and
4 the Plaintiff. Count 2 asserts a tort of constructive discharge, charging TCRHCC, through
5 Dr. Bonar, of improperly terminating Plaintiff's employment relationship. Count 3 alleges
6 that defendant Bonar and TCRHCC intentionally inflicted emotional distress upon the
7 Plaintiff by "placing Plaintiff on leave without naming any reasons and under the guise that
8 it was an investigation into the hospital, trying to force him to participate in interviews which
9 were designed not to gather information but make accusations, and retaliation for reporting
10 illegal conduct." Comp. at ¶ 36. Count 6 is a slight reiteration of Count 1, asserting negligent
11 supervision of another employee, Jason Watabe, when he allegedly recorded conversations
12 with the Plaintiff. These actions are within the scope of TCRHCC's funding contract with
13 IHS -- but for the contract, neither TCRHCC nor its employees would be in a position to
14 run a health care facility or interact with the Plaintiff as a fellow employee.

15 The allegations also satisfy the second prong necessary to substitute the United States
16 for tribal employees under the FTCA: the employees were acting in the scope of their
17 employment under Arizona law. Under Arizona law an employee is considered to be acting
18 within the scope of employment if he meets either of two related tests. The first, adopted
19 from section 228 of the Restatement (Second) of Agency, states that the act of an employee
20 is within the scope of employment only if: (1) it is typical of the kind of work the employee
21 was hired to perform; (2) it occurs within the authorized time and space limits; and (3) it
22 was intended at least in part to serve the master. *Anderson v. Gobeau*, 501 P.2d 453, 456
23 (Ariz. Ct. App. 1972). The second holds an employer liable for the negligence of an
24 employee if, at the time of the accident, the employee is: (1) subject to the employer's control
25 or right to control; and (2) acting in furtherance of the employer's business. *Robarge v.*
26 *Bechtel Power Corp.*, 640 P.2d 211, 214 (Ariz. Ct. App. 1982). In his complaint, Plaintiff
27 alleges that the actions of the named employees were within the scope of their employment.
28 *See*, Comp at ¶ 5; *See also, id.* at ¶ 27 (asserting that the negligence occurred while Dr.

1 Bonar “oversaw the employment of Plaintiff in his role as a medical provider...”); ¶ 36
 2 (discussing employment-related discipline); ¶ 50 (alleging further negligent supervision).
 3 Under the standard for *respondeat superior* liability in Arizona, the employees named in
 4 Counts 1, 2, 3, and 6 were acting within the scope of their employment.⁴ Under 28 U.S.C. §
 5 2679(b)(1), the United States, therefore, is the sole and exclusive defendant for those counts.
 6 Dr. Bonar and TCRHCC should therefore be dismissed from those counts.⁵

7 **II THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER ALL**
 8 **EMPLOYMENT-RELATED COUNTS, REGARDLESS OF THE NAMED**
 9 **PARTY**

10 For purposes of this Motion, the United States adopts the argument set forth in
 11 Section B of Co-Defendants Dr. Bonar and TCRHCC’s Motion to Dismiss. (Doc. 17 at 12-
 12 15). In addition to the authority set forth in Doc. 17, the Government provides that the FTCA
 13 excludes coverage for employment related matters among tribal employees and their
 14 employers. 25 C.F.R. 900.183(b)(3). “[T]he United States is immune from suit save as it
 15 consents to be sued ... and the terms of its consent to be sued in any court define that court’s
 16 jurisdiction to entertain the suit.” *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (citations
 17 omitted). The FTCA represents a limited waiver of sovereign immunity for certain *torts*
 18 committed by Federal employees. *See Vacek*, 447 F.3d at 1250. The FTCA is not a
 19 mechanism by which breach of contract claims may be brought against the United States.
 20 The Tucker Act, on the other hand, represents a limited waiver of sovereign immunity for
 21 breach of contract claims. Jurisdiction for such claims is in the Court of Federal Claims.
 22 District courts have concurrent jurisdiction only for Tucker Act claims that do not exceed
 23 \$10,000. *See* 28 U.S.C. § 1346(a)(2); § 1491.

24 _____
 25 ⁴ In making its Motion, the Government asserts only that the supervisory employees were
 26 acting within the scope of their employment. It explicitly does not make any representation
 27 that the actions of subordinate employees were either within the scope of their employment
 28 or acting pursuant to the funding agreement between TCRHCC and IHS.

⁵ TCRHCC should also be dismissed as a defendant in Counts 1, 2, and 3 because individual
 agencies cannot be held liable under the FTCA. *See Allen v. Veterans Admin.*, 749 F.2d
 1386, 1388 (9th Cir. 1984) (dismissing tort claim against the VA because “[i]ndividual
 agencies of the United States may not be sued” under the FTCA).

1 There is no jurisdiction under the Tucker Act for a breach of contract claim against
2 the United States, either in District Court or in the Court of Federal Claims. First, the United
3 States is not a party to the contract between Plaintiff and TCRHCC. Second, the ISDEAA
4 does not confer jurisdiction over a breach of contract claim. Pursuant to the ISDEAA, Tribal
5 employees are “deemed” Federal employees for purposes of FTCA tort liability only. *See*
6 25 U.S.C. § 450f note; 25 C.F.R. § 900.183(b)(3); *Snyder*, 382 F.3d at 896-97; *Wide Ruins*
7 *Community School, Inc. v. Stago*, 281 F.Supp.2d 1086, 1089 (D. AZ 2003) (only Federal
8 obligation is for claims within the scope of the Federal Tort Claims Act). This Court
9 therefore does not have subject matter jurisdiction over Plaintiff’s claims because they are
10 inseparable from his employment relationship with TCHRCC.

11 Nor can Plaintiff’s classification of his claims as generally-worded torts permit him
12 jurisdiction in this Court. The manner in which a plaintiff labels his claim is not dispositive.
13 *See, e.g., General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (“
14 Courts ... should not ... simply look at the surface of a complaint for the purpose of
15 ascertaining the true basis of an attack upon something the government has done.”). The
16 Court must “look beyond its characterization to the conduct on which the claim is based.”
17 *Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990); *Thomas-Lazear v.*
18 *Federal Bureau of Investigation*, 851 F.2d 1202, 1206-07 (9th Cir. 1988). The Court may
19 not permit a complaint’s artful pleading to do an “end run” around the United States’
20 sovereign immunity. *See Delta Savings Bank v. United States*, 265 F.3d 1017, 1024-26 (9th
21 Cir. 2001).

22 **III PLAINTIFF’S CLAIM FOR THE INTENTIONAL INFLICTION OF**
23 **EMOTIONAL DISTRESS (IIED) SHOULD BE DISMISSED FOR FAILURE**
24 **TO EXHAUST ADMINISTRATIVE REMEDIES [COUNT 3]**

25 To acquire jurisdiction to sue under the Federal Tort Claims Act, a claimant must
26 first submit the claim to the appropriate federal agency in order to provide the agency an
27 opportunity to resolve it. 28 U.S.C. § 2675(a); *Vacek v. U.S. Postal Service*, 447 F.3d 1248,
28 1250 (9th Cir.2006). The purpose of this requirement is to “ease court congestion and avoid

1 unnecessary litigation,” and to provide “for more fair and equitable treatment of private
2 individuals and claimants when they deal with the Government” *Warren v. United States*
3 *Dept. of Interior Bureau of Land Management*, 724 F.2d 776, 779 (9th Cir.1984) (internal
4 quotation marks and citation omitted).

5 Plaintiff submitted an administrative claim to the United States Bureau of Indian
6 Affairs on December 29, 2017. Dft. Exh. B. The administrative claim provides a two-page
7 recitation of Plaintiff’s allegations. The document reiterates Plaintiff’s narrative that he was
8 disciplined for voicing objections to his employer’s business practices. Plaintiff’s claim also
9 accuses TCRHCC staff of inadequately supervising subordinate employees.

10 The submission, however, does not allege the intentional infliction of emotional
11 distress, and fails to provide the agency with notice adequate to investigate Plaintiff’s
12 claim.⁶ An administrative claim must provide: “(1) a written statement sufficiently
13 describing the injury to enable the agency to begin its own investigation, and (2) a sum
14 certain damages claim.” *Blair v. I.R.S.*, 304 F.3d 861, 863-64 (9th Cir. 2002) (internal
15 citations and quotation marks omitted). Plaintiff’s claim relates to disputes over his
16 employment status and accusations against managerial negligence, not the intentional
17 infliction of emotional distress. Dft. Exh. B at Attach 1-2. Plaintiff’s failure to seek
18 administrative redress for his IIED claim therefore deprives this Court of jurisdiction over
19 Count 3. *See, Dettling v. United States*, 948 F. Supp. 2d 1116, 1127–28 (D. Haw. 2013)
20 (dismissing a claim for IIED for failure to exhaust administrative remedies).

21 **IV THE UNITED STATES CANNOT BE HELD LIABLE FOR THE**
22 **REMAINING COUNTS (COUNTS 4, 5, 7, AND 8)**

23 While not named in the Counts 4, 5, 7, and 8, the United States reiterates that it cannot
24 be substituted for TCRHCC employees in those matters. As stated above, the Federal
25 Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679, immunizes
26 federal employees from liability if they commit negligent or wrongful acts or omissions

27 _____
28 ⁶ Significantly, a careful reading of Plaintiff’s administrative complaint gives credence to
TCRHCC’s argument that the totality of Plaintiff’s claim is an employment-related matter.

1 while acting within the scope of their office or employment. This general rule that federal
2 officers are not liable for conduct arising within the scope of their employment, however,
3 “does not extend or apply to a civil action against an employee of the Government—(A)
4 which is brought for a violation of the Constitution of the United States, or (B) which is
5 brought for a violation of a statute of the United States under which such action against an
6 individual is otherwise authorized.” 28 U.S.C. § 2679(b)(2). This authority precludes
7 substitution of the United States for the *Bivens*, breach of covenant of good faith, and whistle
8 blowing allegations in Plaintiff’s Complaint.

9 **V CONCLUSION**

10 For the foregoing reasons, the United States respectfully requests that this Court (1)
11 substitute the United States as the sole defendant for Counts 1, 2, 3, and 6 and (2) dismiss
12 Plaintiff’s Complaint as to the United States inasmuch as Plaintiff’s claims are employment-
13 related matters.

14 Respectfully submitted this 5th day of June, 2018.

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16 ELIZABETH A. STRANGE
17 First Assistant United States Attorney
18 District of Arizona

19 s/Peter M. Lantka
20 PETER M. LANTKA
21 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Robert F. Gehrke, 006348
301 East Bethany Home Road Suite A-222
Phoenix, Arizona 85012
Attorney for Plaintiff

Paul E. Frye, #032743
William Gregory Kelly, #026843
Frye & Kelly, P.C.
10400 Academy Rd. NE, Suite 310
Albuquerque, NM 87111
Attorney for Defendants Tuba City Regional Health Care Corporation and Lynette Bonar

s/M.Finlon
U.S. Attorney's Office