Robert F. Gehrke, 006348
301 East Bethany Home Road Suite A-222
Phoenix, Arizona 85012
Phone: 602-230-9001
Facsimile: 602-277-4705
gehrkelaw@cox.net
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Keith Goss, Plaintiff, v. United States of America, et al Defendants.	Case No: 3-18-cv-08077-DCG **Response to Defendants TCRHCC and Bonar's Motion to Dismiss**

Plaintiff, by and through undersigned counsel, hereby responds to Defendants Tuba City Regional Health Care Corporation ("TCRHCC") and Lynette Bonar's Motion to Dismiss and asks that it be denied. This Response addresses only Counts 4, 5, 7, and 8 as the USA has substituted in for the Defendants on the other counts. "In a suit brought against a tribal employee in [her] individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631, 581 U.S. (2017). The *Lewis v. Clarke* case makes

it clear that the arguments espoused by the Defendants throughout are not sustainable and the Motion should be denied.

Factual Background

The following facts are as set forth in the Verified Complaint. Keith Goss is a podiatrist who worked for Tuba City Regional Health Care Corporation ("TCRHCC"). Lynette Bonar was an employee at TCRHCC. At the time of these allegations, with the exception of Jayson Watabe relating to illegal recording, Defendant Bonar was acting in her individual capacity under the color of law.

Dr. Keith Goss was hired to work as a podiatrist at the TCRHCC. TCRHCC was self- governed under P.L. 93–638, Approved January 4, 1975 (88 Stat. 2203), the Indian Self-Determination and Education Assistance Act. It became a private corporation in September 2002 when it became a 638 contract care facility giving complete administrative and fiscal control to local hospital governing board which was supposed to provide the highest level of self-determination where health care is concerned for its own native population.

Plaintiff has alleged that what transpired was a culture of largely non-Indian employees paying themselves large amounts of money, neglecting the care of tribal members, contracting with outside providers and retaliating against Plaintiff for reporting what was happening. Dr. Goss believed that the

care from TCRHCC overall that was given to the tribal members was inadequate and he made lawful attempts to bring these problems to the tribal leaders. As a result of his efforts, he was met with retaliation and a constant hostile working environment ending with an "investigation" that appeared to have a predetermined outcome.

Dr. Goss originally had a contract and management refused to modify it to be consistent with other employees. Dr. Goss worked countless overtime for the tribal members to provide quality care. Instead of being rewarded, others were paid overtime for doing minimal work and providing lower quality care. Dr. Goss had knowledge of pay-offs between employees and third parties to send contracts their way, to do things contrary to the best interests of the patients simply to bring in more money, and the hospital's funds declined as the management and their chosen workers profited. After reports surfaced that the problems of care and corruption within the hospital, Dr. Goss was placed on leave despite no prior disciplinary actions. He was told he wasn't under investigation yet it was clear that was precisely what was transpiring based on the witnesses sought, unlawful recordings made and allegations made to the public.

TCRHCC hired an outside attorney to "investigate" claims against the "hospital" yet it was Plaintiff who was placed on leave. The attorney wanted to

interview Dr. Goss under the guise that the investigation was about the hospital yet it was clear that was not the underlying purpose as the hospital stated in an August 6, 2017 letter- that the attorney was conducting an independent review related to complaints against the hospital and "statements made by Dr. Goss RELATIVE TO HIS EMPLOYMENT and conditions at the hospital."

The attorney, Scott Bennett also advised that there were "threats" by Dr. Goss which clearly showed they were going to his employment matter. The hospital's claim that the administrative leave was "non-adverse and non-disciplinary" was not true given the other statements made. Dr. Goss asserts that he was driven out of his job due to the TCRHCC's negligent supervision over the employees as well as the negligence of the individuals who used their positions to retaliate against him for reporting corruption and negligence within the hospital.

Dr. Goss was forced to resign due to this false administrative leave and the claims that the investigation was into the hospital yet clearly it was an attempt to establish his whistleblowing efforts due to the nature of the questions. He has lost numerous opportunities due to this constructive discharge. At the time of his employment, Dr. Goss was in a relationship with a member of the Navajo Nation. They have since married. Dr. Goss regularly stood up for the rights of the members of the Navajo Nation and his free speech

to address the concerns about their treatment was violated. Plaintiff suffered damages through the emotional distress, loss of reputation and loss of his earning capacity as well as the actions of the Defendants contributed to the forced resignation given the hostile environment and false accusations.

Legal Analysis

Subject Matter Jurisdiction

Under Rule 12, the Defendants are attempting to dismiss this matter claiming this Court lacks jurisdiction. However, the general defenses of claimed immunity or tribal authority and that the torts are "employment related" do not translate into legal authority that deprives this Court of jurisdiction. There could be no remedy in the tribal courts employment administrative process for damages for torts and no authority to do so is presented.

There are a plethora of cases that make it clear that torts in an employment situation do not fall only as employment matters subject to some administrative process. Under Defendants' theory, there could be no workplace torts contrary to law. See *Spinelli v. Gaughan,* 12 F.3d 853 (9th Cir. 1993) (categorizing retaliatory discharge — "a tort so widely accepted in American jurisdictions today ... that it has become part of our evolving common law" — as legal in nature and analogizing an ERISA section 510 claim to that common

law tort); "`Constructive discharge occurs when the employer's conduct effectively forces an employee to resign.'" *Ross v. Arizona State Personnel Bd.*, 185 Ariz. 430, 432 n. 1, 916 P.2d 1146, 1148 n. 1 (App. 1995), *quoting Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1244, 32 Cal. Rptr.2d 223, 876 P.2d 1022, 1025 (1994). The Ninth Circuit has held that a constructive discharge claim can be shown through a continuous pattern of discriminatory treatment over months and years. *See Satterwhite v. Smith*, 744 F.2d 1380, 1382-83 (9th Cir. 1984). Clearly this type of tort cannot be addressed in an employment administrative process.

As properly stated by the Vermont Supreme Court "mere termination of employment will not support a claim for intentional infliction of emotional distress." *Crump v. P & C Food Mkts.*, 154 Vt. 284, 576 A.2d 441, 448 (1990). "However, if the *manner* of termination evinces circumstances of oppressive conduct and abuse of a position of authority vis-a-vis plaintiff, it may provide grounds for the tort action." *Id.* (emphasis supplied). The manner of the end of the employment relationship as well as the manner of his treatment is what is at issue.

Immunity Claims

The official asserting absolute immunity has the burden of showing that immunity is justified for any particular function, and "[t]he presumption is that

qualified immunity is sufficient to protect government officials in the exercise of their duties." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n. 4, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993) (*citing Burns v. Reed*, 500 U.S. 478, 486-87, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)).

42 U.S.C.§ 233(a) only applies to actions resulting from the performance of medical, surgical, dental, or related function. Defendant Bonar was acting as an administrator or individual NOT performing medical functions as to these claims. It is no different than a judge acting as an administrator. "But the FSHCAA waives that sovereign immunity only 'for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his employment." *Gallagher v. PENOBSCOT COMMUNITY HEALTHCARE*, Civil No. 1: 15-cv-244-DBH (D. Me. Mar. 15, 2016) citing to 42 U.S.C. § 233(a). In *Mendez v. Belton*, 739 F.2d 15, 19 (1st Cir. 1984), a physician sued her colleague, a Public Health Service official, for civil rights violations under 42 USC §§ 1983 & 1985, on account of the revocation of her hospital staff privileges. The defendant official claimed the immunity from suit that section 233(a) provides for individuals (at the same time as it opens the United States to liability), and the district court granted

summary judgment in favor of the defendant official. Id. The First Circuit disagreed, holding:

> The statute protects Public Health Service officers or employees from suits that sound in medical malpractice. Dr. Mendez's action against Dr. Belton for alleged acts of intentional discrimination on the basis of race and sex occurring in the course of the professional peer review process is not the sort of malpractice claim that 42 U.S.C. § 233(a) . . . meant to protect against.

Id.

As cited by Defendants, *Hui v. Castaneda*, 559 U.S. 799 (2010), is misrepresented as the U.S. Supreme Court considered whether a *Bivens* claim could be brought against PHS employees in light of 42 U.S.C. § 233(a). The *Hui* case involved whether "immunity provided by § 233(a) precludes Bivens actions against individual PHS officers or employees for harms arising out of conduct described in that section." In fact, it cited to *Cuoco* as conflicting with the 9th circuit which "construed § 233(a) to foreclose Bivens actions against PHS personnel." The Hui case is SOLELY about whether section 233 precludes Bivens actions for medical malpractice: "As the Ninth Circuit recognized, its holding conflicts with the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2000), which construed § 233(a) to foreclose *Bivens* actions against PHS personnel. We granted certiorari to resolve this conflict. 557 U.S. ___, 130 S.Ct. 49, 174 L.Ed.2d 632 (2009)." The Court of Appeals for the Ninth Circuit had affirmed the District Court's judgment that § 233(a) does

not preclude respondents' Bivens claims. In *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2nd Cir.2000), the Court of Appeals for the Second Circuit concluded that under 42 U.S.C. § 233(a), members of the Public Health Services were absolutely immune from suit in a *Bivens* action if the injury for which compensation is sought resulted from the performance of a medical or related function while acting within the scope of their office or employment.

Here, the injuries are unrelated to the performance of medical functions as to Dr. Goss. They thus do not fall under the absolute immunity. It is no different that judicial immunity. "To determine when a non-judge is cloaked with judicial immunity, we examine the nature of the function entrusted to that person and the relationship of that function to the judicial process." *Burk v. State*, 156 P.3d 423, 426, 215 Ariz. 6,9 (Ct. App. 2007). A generalized connection to the judicial process does not confer immunity for all activities.

As to the general jurisdiction argument, in litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts have depended, absent a governing act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959); *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 96 S.Ct.

943, 47 L.Ed.2d 106 (1976); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir.1996) (OSHA has jurisdiction over a tribe-owned business because the "nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce — when viewed as a whole, result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters");

Regardless of any argument that the hospital may be intramural, TCRHCC is a corporation created and operating as a business obtaining contracts throughout the State of Arizona. The Defendants were **federal actors,** not tribal actors based on the certification to perform the federal hospital work, carrying out contracts, grants, or cooperative agreements pursuant to Public Law 93-638, the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 5321(d), 25 U.S.C. § 5396. Defendants fall squarely under that umbrella and are not immune from suit. They cannot obtain the benefits of the certification then deny responsibility.

Here, Plaintiff is not a member of the tribe and he was working at the hospital that employed many non-tribal members and registered as a corporation in Arizona and obtained numerous contracts and grants.

Jurisdiction is not exclusive with the tribal courts under 25 U.S.C. § 5321(d), 25 U.S.C. § 5396.

Count 4

The claim as to a breach of covenant of good faith and fair dealing is separate from a contract claim. The covenant of good faith and fair dealing is legally implied in every contract. *See Rawlings v. Apodaca,* 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). "The duty of good faith extends beyond the written words of the contract." *Wells Fargo Bank v. Arizona Laborers*, 38 P.3d 12, 201 Ariz. 474 (2002). A party may bring an action in tort claiming damages for breach of the implied covenant of good faith, but only where there is a "special relationship between the parties arising from elements of public interest, adhesion, and fiduciary responsibility." *Burkons v. Ticor Title Ins. Co. of Cal*., 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991); *McAlister v. Citibank (Arizona), a Subsidiary of Citicorp*, 171 Ariz. 207, 829 P.2d 1253 (App.1992) (a special relationship must exist in order to support a tortious breach of the implied covenant of good faith and fair dealing).

The supreme court in Dodge explained that "[t]he two most important factors" in determining whether a tort action for bad faith will lie "are (1) whether the plaintiff contracted for security or protection rather than for profit or commercial advantage, and (2) whether permitting tort damages will

`provide a substantial deterrence against breach by the party who derives a commercial benefit from the relationship.'" *Dodge v. Fidelity & Deposit Co. of Maryland*, 161 Ariz. 344, 778 P.2d 1240 (1989). Whether in contract or tort, Defendants can be held liable based on their actions which are outside the tribal laws. If there is found to be a special relationship and the count sounds in tort, the USA may want to substitute in. However, regardless, Plaintiff is entitled to pursue this Count.

Count 5

The argument by the Defendant Bonar on the *Bivens* claim is truly incomprehensible. She intentionally or otherwise tries to confuse the issues. Being a federal actor and acting in the scope of employment are two completely different matters. This court clearly has jurisdiction over a *Bivens* claim as Defendant Bonar was a federal actor. Individual capacity suits seek to impose personal liability upon a government official for actions he or she takes under color of state (or federal) law. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *see also Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 (9th Cir. 2007)

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an

implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Here, Defendant Bonar is clearly a federal actor due to the self-governed under P.L. 93–638, Approved January 4, 1975 (88 Stat. 2203), the Indian Self-Determination and Education Assistance Act.

"In a suit brought against a tribal employee in [her] individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631, 581 U.S. (2017). "Two issues require our resolution: (1) whether the sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees for torts committed within the scope of their employment; and (2) what role, if any, a tribe's decision to indemnify its employees plays in this analysis. We decide this case under the framework of our precedents regarding tribal immunity." *Id* @ 1291. "In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities. An indemnification statute such as the one at issue here does not alter the analysis. Clarke may not avail himself of a sovereign immunity defense." *Id*.@ 1295. Here, it is clear it is a personal

capacity claim and allegations of statutory and constitutional violations are set forth.

The claim that federal wiretap law does not apply is unconvincing. Here we have a non-tribal member on federal land surreptitiously tape recording a conversation. 18 U.S. Code § 2511. Plaintiff has also alleged constitutional violations including a First Amendment right to free speech when he thought he was discussing problems with the facility privately with another employee, even going so far as to go into a closet so it would not be public, as well as his Fourth Amendment Right to Privacy. The *Bivens* claim is clear and straight forward.

"Action is taken under color of state law when it involves a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Honaker v. Smith*, 256 F.3d 477, 484 (7th Cir. 2001).

Count 7

As this Count addresses intentional conduct under the State whistleblowing law, it is not subject to the FTCA but Defendants can still be liable given that they are federal actors or "individuals." Plaintiff has alleged that TCRHCC and Bonar acted intentionally in retaliating against Plaintiff for reporting of the illegal activities at TCRHCC to the Navajo Nation through the

employment investigation. As set forth above, simply because the claim relates to employment does not mean this Court does not have jurisdiction. *See Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993) (categorizing retaliatory discharge — "a tort so widely accepted in American jurisdictions today ... that it has become part of our evolving common law" — as legal in nature and analogizing an ERISA section 510 claim to that common law tort).

Count 8

A "protected disclosure" under Federal whistleblower protection law includes any disclosure of information that an employee, former employee, or applicant for employment reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety.

Plaintiff reported the safety, mismanagement and violations of rights for the patients to the Navajo Nation management. He was retaliated against by Defendants TCRHCC and Bonar in violation of the Whistleblower Protection Act and related acts.

The Claims are Not Employment Claims Subject to the Exclusive Jurisdiction of Navajo Forums

The claim that actions cannot be brought because an employee did not go through some employment administrative process is equally unsupported. Simply because there is a previous employment relationship does not mean

actions are forfeited when an employee quits based on the conduct against him. In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts have depended, absent a governing act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959); *Fisher v. District Court of Sixteenth Judicial District,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976).

As to some type of exhaustion claim, these are not employment claims in terms of remedies that can be addressed through that process. Courts have recognized four exceptions to even an arguable applicable exhaustion requirement: "where (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, (2) the action is patently violative of express jurisdictional prohibitions, (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction, or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule." *Burlington N.R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999). The very nature of the allegations takes this case out of tribal rule.

Conclusion

Based on the foregoing, the actions of the Defendants are not subject to immunity nor does the tribal government have exclusive jurisdiction. Nor does any administrative process have to be exhausted to pursue the violations set forth herein. This Court clearly has jurisdiction over these federal actors and therefore the Motion to Dismiss must therefore be denied.

RESPECTFULLY SUBMITTED this 4th day of July, 2018.

By: /s/ Robert F. Gehrke
ROBERT F. GEHRKE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 4, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. I further certify served the attached document by mail on the following parties:

Peter Michael Lantka
US Attorneys' Office
40 North Central Suite 1200
Phoenix, AZ 85004

William Gregory Kelly
Frye & Kelly, P.C.
10400 Academy N.E., Suite 310
Albuquerque, NM 87111
Counsel for Defendant Bonar

By:/s/ Robert F. Gehrke