

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

4 PETER M. LANTKA
5 Assistant U.S. Attorney
6 Arizona State Bar No. 03067
7 Two Renaissance Square
8 40 North Central Avenue, Suite 1800
9 Phoenix, Arizona 85004-4449
10 Telephone: 602-514-7500
11 Facsimile: 602-514-7760
12 Peter.lantka@usdoj.gov
13 *Attorneys for the United States of America*

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

11 Keith Goss,

12 Plaintiff,

13 vs.

14
15 United States of America; Tuba City
16 Regional Health Care Corporation, an
17 Arizona corporation and self-governed
18 under the Indian Self-Determination
19 Education Assistance Act; Lynette Bonar;
20 et al.,

21 Defendants.

Case No.: 18-cv-08077-DGC

22 UNITED STATES' REPLY IN
23 SUPPORT OF MOTION TO DISMISS

24 Comes now the Defendant United States of America and for its Reply in Support of
25 the Government's Motion to Dismiss provides the following Memorandum of Points and
26 Authorities.

27 **MEMORANDUM OF POINTS AND AUTHORITIES**

28 The parties stipulated to the United States' substitution as sole Defendant for Counts
1, 2, 3, and 6. (Doc. 24 at ¶ 3). Plaintiff, however, has failed to address the Government's
arguments in Sections II, III, or IV of its Motion to Dismiss. Pursuant to Local Rule 7.2(i),
Plaintiff has conceded those arguments, and all counts against the United States may be
dismissed summarily. LRCIV 7.2(i); *see also, e.g., Parker v. Shaw & Lines, LLC*, CV09-
2003-PHX-JAT, 2010 WL 1640963, at *3 (D. Ariz. Apr. 20, 2010).

1 In addition to Plaintiff's concession, the Government provides the following authority
2 to support its argument that the Navajo court system, not this tribunal, is the sole and
3 appropriate venue for Plaintiff's claims.¹

4 **I THE NAVAJO TRIBAL COURTS ARE THE SOLE JURISDICTION FOR**
5 **PLAINTIFF'S CLAIMS²**

6 Regarding the United States' substitution, Plaintiff states: "The Defendants were
7 federal actors, not tribal actors based on the certification to perform the federal hospital work,
8 carrying out contracts, grants, or cooperative agreements pursuant to Public Law 93-638, the
9 Indian Self-Determination and Education Assistance Act. *See* 25 U.S.C. § 5321(d), 25 U.S.C.
10 § 5396....They cannot obtain the benefits of the certification then deny responsibility."
11 (Resp. at 10).

12 Plaintiff is incorrect. Simply because Section 2679, Title 28 names the United States
13 as exclusive defendant in FTCA cases does not mean that all tort claims fall under the FTCA
14 or that all such claims may be heard in District Court. Federal employees are commonly
15 barred from bringing employment-related tort suits under the FTCA because those claims
16 must be properly litigated under other statutes or in other venues. *See, e.g., Rivera v. United*
17 *States*, 924 F.2d 948, 951 (9th Cir.1991) ("To permit FTCA claims to supplant the CSRA's
18 [Civil Service Reform Act] remedial scheme certainly would defeat that purpose."); *Lehman*
19 *v. Morrissey*, 779 F.2d 526, 527 (9th Cir.1985) ("[I]n enacting the 'CSRA' Congress meant
20 to limit remedies of federal employees bringing claims closely intertwined with their
21 conditions of employment to those remedies provided in the statute."); *see also, Brown v.*
22 *Gen. Servs. Admin.*, 425 U.S. 820, 820-21 (1976) (Title VII of the Civil Rights Act of 1964

23
24
25 ¹ The United States alerts this Court to the recent decision granting Defendants'
26 motion to dismiss in Plaintiff's parallel litigation, *Goss v. Bonor [sic], et al.*, CV-2018-0079
27 (Ariz. Sup. Ct., Maricopa Cty., July 19, 2018). A courtesy copy of the opinion is provided
28 as Dft. Exh. C. Specifically, the Court is directed to ¶¶ 8-12 and the Superior Court's
discussion of exclusive Tribal jurisdiction).

² This argument was addressed in the Government's Motion at p. 6-7.

1 “provides the exclusive judicial remedy for claims of discrimination in federal
2 employment.”); *White v. Gen. Servs. Admin.*, 652 F.2d 913, 916–17 (9th Cir.1981) (
3 “[A]llowing additional individual remedies would interfere with th[e] carefully devised
4 scheme [of Title VII] by permitting circumvention of administrative remedies.”); *Labtis v.*
5 *Paulson*, No. C 07–3333 RS, 2008 WL 2705004, at *3 (N.D.Cal. July 9, 2008) (applying
6 *Brown* and *White*; dismissing federal employee's tort and contract claims to the extent they
7 challenged race, color, religion, sex, or national original discrimination).

8 Plaintiff acknowledges that the actions set forth in his complaint stem from
9 employment disputes with the TCRHCC, not the provision of medical care to patients. *See*,
10 Resp. at 3-4:

- 11
12 • “TCRHCC hired an outside attorney to ‘investigate’ claims against the
13 “hospital”...it was clear that was not the underlying purpose as the hospital
14 stated in an August 6, 2017 letter that the attorney was conducting an
15 independent review related to complaints against the hospital and ‘statements
16 made by Dr. Goss RELATIVE TO HIS EMPLOYMENT and conditions at the
17 hospital.’ (*quotations and emphasis in original*);
- 18 • “The attorney...also advised that there were ‘threats’ by Dr. Goss which
19 clearly showed they were going to his employment matter. (*quotations in
20 original*);
- 21 • Dr. Goss asserts that he was driven out of his job due to the TCRHCC’s
22 negligent supervision over the employees as well as the negligence of the
23 individuals who used their positions to retaliate against him for reporting
24 corruption and negligence within the hospital.

25 Clearly, if Plaintiff had been a direct-federal employee, employed by HHS, the
26 Department of Veterans Affairs, or any other federal agency, his tort claims under the FTCA
27 would be dismissed. This argument is even stronger because Mr. Goss was employed by a
28 contractor for the Navajo Nation, not the federal government. The disputes with his

1 employer must therefore be adjudicated in Tribal, not Federal Court. *See*, (Resp. at 2)
2 (admitting that TCRHCC was a “private corporation.....[given] complete administrative and
3 fiscal control” over the hospital).

4 In *Pink v. Modoc Indian Health Project*, the Ninth Circuit upheld dismissal of an ex-
5 tribal employee’s complaint for employment discrimination and wrongful termination for
6 lack of subject matter jurisdiction. *Pink*, 157 F.3d 1185, 1189 (9th Cir. 1998). The factual
7 scenario in *Pink* is very close to the case at bar. In *Pink*, the plaintiff worked for Modoc
8 Indian Health Project, (“Modac”), a nonprofit corporation created and controlled by the
9 Alturas and Cedarville Rancherias, both federally recognized tribes. Modoc was “organized
10 for charitable, educational, and scientific purposes and such other related purposes ... relative
11 to the delivery of certain services pursuant to [the Indian Self-Determination Act].” Like
12 TCRHCC in this case, Indian Health Services, an agency of the United States Department of
13 Health and Human Services, awarded Modoc an Indian self-determination contract to
14 provide health services to tribe members. Like Mr. Goss, following her termination, Ms.
15 Pink filed an eleven-count complaint against her supervisor, IHS, and Modac under federal
16 law and state tort law. In dismissing the claim, the court reasoned that the United States had
17 never waived sovereign immunity to Ms. Pink’s claims and that the plaintiff “had no claim
18 against the United States independent of her claims against Modoc and [her supervisor].” *Id.*
19 at 1188.³

20 Similarly, in *Locklear v. Gila River Indian Community*, the plaintiff was terminated
21 from employment with a tribal agency and filed suit claiming several tort and constitutional
22 claims. *Locklear v. Gila River Indian Cmty.*, 2:12-CV-01798-SLG, 2013 WL 12125745, at
23 *2 (D. Ariz. Apr. 5, 2013), *aff’d sub nom. Locklear v. Mendoza*, 585 Fed. Appx. 402 (9th
24 Cir. 2014). This Court dismissed the plaintiff’s employment claims for lack of subject matter
25 jurisdiction. *Id.* at *4 (finding that neither the Indian Self-Determination and Educational
26

27
28 ³ The Plaintiff was not allowed to amend because doing so would be futile. *Pink*, 157
F.3d at 1189.

1 Assistance Act nor the FTCA gave the Court jurisdiction). Applicable here, the Court
2 addressed the lack of jurisdiction under the FTCA, stating that “tribal employees who engage
3 in activities covered by these [§ 638 self-determination] contracts are considered federal
4 employees and may be subject to liability under the FTCA. But that exception does *not* apply
5 in this case because the named defendants are not being sued with respect to their provision
6 of these government services. *Id.* at *3, citing 25 U.S.C. § 450f(c) (*emphasis added*).

7 The reasoning in *Locklear* requires dismissal in this case. Plaintiff’s claims do not
8 stem from the provision of medical services to the public, for which the FTCA provides
9 coverage. They are directly related to Mr. Goss’s employment by a Tribal employer and
10 cannot be heard in this Court. Like *Locklear*, “[t]his case is a dispute brought by a former
11 employee of the [TCRHCC] regarding events that took place on tribal land. As all of [Mr.
12 Goss’s] asserted bases of subject matter jurisdiction in federal court fail as a matter of law,
13 this action must be dismissed.” *Id.* at *4

14 Plaintiff cites to 42 U.S.C. § 233 in his Response, which undercuts his argument.
15 Section 233 permits cases against Public Health Employees under the FTCA, but only “for
16 damage for personal injury, including death, resulting from the performance of medical,
17 surgical, dental, or related functions, including the conduct of clinical studies or
18 investigation, by any commissioned officer or employee of the Public Health Service while
19 acting within the scope of his office or employment.” 42 U.S.C. § 233(a). (Resp. at 7). And
20 as Plaintiff admits, the TCRHCC employees at issue were “NOT performing medical
21 functions as to these claims.” (Resp. at 7) (*emphasis original*).

22 By Plaintiff’s own admission, the torts alleged in his Complaint are not related to the
23 provision of medical services; they are derived solely from his employment relationship with
24 TCRHCC. The case, in its entirety, is no more than an employment dispute between an ex-
25 tribal employee and his tribal employer. It is not the Federal Government’s place to
26 intervene, nor can it be heard by this Court. *See, Shoshone-Bannock Tribes v. Reno*, 56 F.3d
27 1476, 1482 (D.C. Cir. 1995) (a tribe cannot force the United States to participate in litigation
28 as trustee alongside the tribe unless a specific law or other restriction creates an obligation

1 for the United States to do so).

2 **II CONCLUSION**

3 Plaintiff has failed to respond to Sections II, III, and IV of the Government's Motion
4 to Dismiss, warranting summary dismissal. For that reason, those set forth above, and those
5 in Doc. 21, the United States respectfully requests that this Court dismiss Plaintiff's
6 Complaint as to the United States.

7 Respectfully submitted this 1st day of August, 2018.

8
9 ELIZABETH A. STRANGE
10 First Assistant United States Attorney
11 District of Arizona

12 s/Peter M. Lantka
13 PETER M. LANTKA
14 Assistant United States Attorney
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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