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ATTORNEYS FOR DEFENDANT
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

LEROY NOT AFRAID and GINGER GOES AHEAD, **Plaintiffs** **vs.** **UNITED STATES OF AMERICA, and LOUISE ZOKAN-DELOS REYES, in her official and individual capacity; and JO-ELLEN CREE, in her official and individual capacity,** **Defendants.**	**CV 19-100-BLG-SPW-TJC** **UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

Plaintiffs' arguments in their Response (doc. 20) do not sustain their claims.

Plaintiffs' tort claims (Counts II-VII) should be dismissed for lack of jurisdiction because (A) they are defamation claims barred by the FTCA's intentional torts exception and (B) the underlying government conduct is shielded by the discretionary function exception.

All of Plaintiffs' claims should be dismissed for failure to state a claim because (A) Plaintiffs' *Bivens* claims (Count I) are not cognizable; (B) the Individual Defendants are shielded from *Bivens* liability by qualified immunity; (C) Plaintiffs do not sufficiently allege duty, breach, or causation to establish their negligence-based claims (Counts II, III, V), and (D) Plaintiffs cannot make out prima facie claims for constructive fraud or breach of the implied covenant of good faith and fair dealing (Counts IV, VI).

ARGUMENT

I. Plaintiffs' tort claims should be dismissed for lack of subject-matter jurisdiction.

A. Plaintiffs' tort claims all arise out of defamation.

No matter how Plaintiffs style their tort claims, they are premised on the allegedly false or negligent statements contained in the Report and thus arise out of a theory of defamation. MONT. CODE ANN. § 27–1–802 (defining libel). "The government conduct that is alleged to have caused the injury determines the essential nature of the cause of action." *Edmonds v. U.S.*, 436 F. Supp. 2d 28, 35–

36 (D.D.C. 2006). Moreover, the intentional torts exception bars not only defamation claims, but all claims that "arise out of" libel and slander. 28 U.S.C. § 2680(h). Plaintiffs' tort claims all arise out of libel, and are therefore barred by the intentional torts exception.

Plaintiffs now argue (doc. 20, at 9) that Defendants owed them "various duties," but do not identify those duties. They point to *Block v. Neal*, in which the Supreme Court held that a homebuyer could not assert a claim against the FmHA for negligent misrepresentations, but could assert a negligence claim for failure to adequately supervise construction of the homebuyer's house. 460 U.S. 289, 297-98 (1983). In *Block*, however, the plaintiff suffered two distinct injuries

(a) pecuniary damages caused by her "misplaced reliance" on FmHA advice and inspection reports (*id.* at 298); and

(b) receiving a house with defects that FmHA did not identify for the builder (*id.* at 297-98)

due to FmHA's breach of two distinct duties

(a) "duty to use due care in communicating information" (*id.* at 297); and

(b) "duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects" (*id.*).

Here, by contrast, Plaintiffs allege a single injury (loss of employment) due to breach of a single duty (duty to use due care in communicating findings). Defendants' monitoring visit standing alone could not create a separate duty,

because in the absence of the Report, Plaintiffs would have suffered no harm. Thus, unlike *Block*, Plaintiffs allege only a single harm arising only from purportedly libelous statements.

Jefferson v. Harris and *Hoesl v. US* similarly do not support Plaintiffs' argument. In *Jefferson*, the court held only that a plaintiff's *Bivens* claims need not necessarily be turned into defamation claims. 170 F. Supp. 3d 194, 206 (D.D.C. 2016). It did not reach the issue here: whether Plaintiffs' tort claims (and not their *Bivens* claims) are defamation claims because they all arise out of the same duty and harm. Similarly, in *Hoesl*, the district court did not, as Plaintiffs assert, find plaintiff's claims to be defamation claims because "the plaintiff failed to allege a mistaken diagnosis followed by resulting improper treatment or injury." Doc. 20, at 12. Rather, the court found that, based on the factual setting, plaintiff *could* not plead a malpractice claim. The plaintiff's injury (termination) occurred because the defendant communicated an allegedly false diagnosis to plaintiff's supervisors, which "is the kind of conduct that gives rise to defamation actions." 451 F.Supp. 1170, 1174 (N.D. Cal. 1978); *Hoesl v. U.S.*, 629 F.2d 586, 587 (9th Cir. 1980). Plaintiffs likewise allege that the Defendants made false statements in a report that was delivered to the Tribe Chairman and Ethics Board, leading to their termination. These are defamation claims, and are

therefore barred by 28 U.S.C. § 2680(h).

B. Defendants' monitoring efforts were discretionary acts shielded by the discretionary function exception.

The discretionary function exception shields government acts "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." *Terbush v. U.S.*, 516 F.3d 1125, 1129 (9th Cir. 2008). Contrary to Plaintiffs' arguments (doc. 20, at 13), the U.S. Supreme Court has held the exception shields not only "high-level policy decisions," but also "day-to-day management" decisions. *U.S. v. Gaubert*, 499 U.S. 315, 325 (1991).

The alleged conduct here falls within the discretionary function exception. The Individual Defendants had to review existing controls and procedures to ensure proper tracing, accounting, and reporting of the Contract funds. 25 C.F.R. §§ 900.44; 900.45. These kinds of decisions require the application of significant discretion to determine whether Tribal organizations are meeting contractual obligations. *See Kellogg Brown & Root Servs., Inc. v. U.S.*, 102 F. Supp. 3d 648, 654 (D. Del. 2015) (holding audit to determine contractor compliance with government contract was shielded by discretionary function exception). They also necessitate various social and economic policy judgments, including assessing the costs and effectiveness of certain controls and determining whether funds are accomplishing Contract purposes. *See Sloan v. U.S. Dep't of Hous. & Urban*

Dev., 236 F.3d 756, 762–64 (D.C. Cir. 2001) (finding audit to determine whether abatement activities were in compliance with contract implicated public policy considerations).

Soldano and *Marlys Bear Medicine* do not support a different conclusion. In those cases, the defendants mechanically implemented policies that had already been made and did not exercise discretion that involved social, political, or economic judgment. *Soldano v. U.S.*, 453 F. 3d 1140, 1148-50 (9th Cir. 2006) (holding decision to set an unsafe speed limit inconsistent with national standards was a matter of "scientific and professional judgment" that did not involve social or economic policy considerations); *Marlys Bear Medicine v. U.S.*, 241 F.3d 1208, 1215 (9th Cir. 2001) (finding decision to implement safety precautions, rather than the decision as to which precautions to adopt, was not discretionary).[1]

This case presents the exact opposite scenario: Defendants had to determine whether the Tribal Court implemented sufficient internal controls and accounting procedures. The Contract did not prescribe the controls to be implemented, and Defendants had to exercise significant judgment to ensure

[1] Plaintiffs also cite *Indian Towing v. U.S.*, 350 U.S. 61 (1955) in support of their position, but overlook that the Court did not consider the applicability of the discretionary function exception in that opinion. *Id.* at 64. In any event, the facts of that case are very different: the Court held that the government could be held liable for negligently maintaining a lighthouse.

compliance with the Contract's terms and applicable regulations. 25 C.F.R. §§ 900.44, 900.45. This case is thus more like *Sloan*, in which HUD's inspectors conducted an audit of a government contractor's compliance with lead-based paint abatement requirements. 236 F.3d at 758. In that case, the court noted that the sifting of evidence and myriad decisions involved in the audit required judgments and choices that were necessarily covered by the discretionary function exception. *Id.* at 762, 764. Defendants' decisions here are of a similar kind, and are thus similarly shielded. Plaintiffs' tort claims should accordingly be dismissed for lack of jurisdiction.

II. Plaintiffs' claims should be dismissed for failure to state a claim.

A. Plaintiffs' *Bivens* claims arise in a new context and should not be recognized.

"[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). Post-*Abbasi*, courts must decide (1) whether a case is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court, and, (2) if so, whether special factors exist that counsel hesitation in recognizing a *Bivens* cause of action. *Vega v. U.S.*, 881 F.3d 1146, 1153 (9th Cir. 2018); *Rodriguez v. Swartz*, 899 F.3d 719, 738 (9th Cir. 2018).

This case presents a new context for *Bivens* claims. While Plaintiffs cite a

number of pre-*Abbasi* cases (doc. 20, at 19) to argue otherwise, under the Supreme Court's holding in *Abbasi*, those cases do not establish prior contexts.[2] Indeed, Plaintiffs point to no Supreme Court case that presents a context similar to this one.

Special factors also counsel against recognizing a *Bivens* cause of action here. Specifically, Plaintiffs have alternative remedies, including tort claims under the FTCA and the opportunity to file rebuttals to the Report's findings with the Tribal Chairman and the Tribe's Ethics Board. Docs. 4-3; 4-6. Additionally, recognition of a *Bivens* cause of action here would interfere with federal executive employees' execution of their duties, thus undermining separation of powers. *Abbasi*, 137 S. Ct. at 1857; *Cole v. FBI*, No. CV 09-21-BLG-SHE-TJC, 2019 WL 1102569, at *7 (D. Mont. Feb. 7, 2019). Accordingly, a *Bivens* cause of action is not appropriate under these circumstances.

The Ninth Circuit's ruling in *Lanuza v. Love* does not apply here. *See* doc. 20, at 20-25. The Court narrowly framed the context in that case to provide "a remedy on these narrow and egregious facts." 899 F.3d 1019, 1021, 1027 (9th

[2] The only Supreme Court case Plaintiffs cite is *Hartman v. Moore*, 547 U.S. 250 (2006). But, as the Eleventh Circuit recently explained, the Supreme Court only assumed the existence of a First Amendment *Bivens* claim in *Hartman*. *Johnson v. Burden*, 781 F. App'x 833, 836 (11th Cir. 2019). The Court has repeatedly confirmed since *Hartman* that it has not extended *Bivens* to First Amendment claims. *Id.*; *Vega*, 881 F.3d at 1153.

Cir. 2018) ("Lanuza's claim arises in the context of deportation proceedings where a federal immigration prosecutor submitted falsified evidence in order to deprive Lanuza of his right to apply for lawful permanent residence."). Here, this Court faces a different context, with different legal mandates, different officers, and different special factors. *See Abbasi*, 137 S. Ct. at 1859-60. Most importantly, this is not a case of forged evidence, as in *Lanuza*. Plaintiffs claim the assertions in the Report were "false," but those claims are based solely on Plaintiffs' interpretation of Crow law or their post-hoc justifications. *See* doc. 14, at 22-23. *Lanuza* therefore did not recognize a *Bivens* remedy in a similar context.

The special factors in *Lanuza* similarly raised different considerations. The *Lanuza* court concluded a *Bivens* remedy would not challenge a political policy because no policy allowed "forged government documents to thwart the integrity of immigration proceedings." 899 F.3d at 1029. The plaintiff also had no alternative remedies, and the court did not believe a *Bivens* remedy posed a threat to the decisions of other government branches. *Id.* at 1032. Here, allowing a *Bivens* remedy would effectively permit second-guessing of auditing decisions and challenge BIA's methods for monitoring self-determination contracts. Such subversion of the separations of powers is not justified, especially since Plaintiffs had the opportunity challenge the Report's findings and can assert claims under

alternative statutes. Accordingly, Plaintiffs' *Bivens* claims are not cognizable.

B. Plaintiffs do not identify any constitutional violation that would negate qualified immunity.

Plaintiffs assert violations of their First Amendment and procedural and substantive due process rights, but allege no facts to show how these rights were violated. With regard to procedural due process, Plaintiffs do not show any entitlement to employment, nor is it clear how they were deprived of due process since they were given the chance to respond to the Report's findings and present their own evidence. Doc. 4-3; *see also Pavel v. Univ. of Oregon*, 774 F. App'x 1022, 1024 (9th Cir. 2019). They similarly cannot establish a substantive due process violation because they allege no facts to show Defendants' actions deprived them of their interest in pursuing "common occupations or professions of life." *Di Martini v. Ferrin*, 990 F.2d 1257, at *3 (9th Cir. 1993). Finally, Plaintiffs' bald allegations of animus and conspiracy are insufficient to establish that Defendants retaliated against them for exercising their First Amendment rights. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009).

Again, *Lanuza* is inapposite. There, the court held qualified immunity would not shield an officer who "intentionally submits a forged document in an immigration proceeding in clear violation of 8 U.S.C. § 1357(b)." *Lanuza*, 899 F.3d at 1034. Here, Plaintiffs point to no forged evidence or criminal statute that

was violated. Based on Plaintiffs' allegations, therefore, the Individual Defendants did not violate a clearly established constitutional right and are entitled to qualified immunity.

C. Plaintiffs' allegations regarding duty, breach, and causation are neither legally nor factually sufficient to state a negligence claim.

With regard to duty, Plaintiffs cite no authority to show Defendants had a duty to act in any way other than they did. Plaintiffs' vague references (doc. 20, at 25-27) to the FTCA, the Constitution, and the government's trust relationship with the tribe supply no such duty. *Gros Ventre Tribe v. U.S.*, 469 F.3d 801, 810 (9th Cir. 2006) (holding trust relationship "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."); *Goldsmith v. Cate*, No. CIV. 2:13-943 WBS, 2014 WL 2930616, at *3 (E.D. Cal. June 27, 2014) ("the Constitution is not a freestanding 'font of tort law'"). The Contract similarly supplies no tort duty to Plaintiffs because (1) they did not act as agents in the execution of the Contract and (2) they are not suing in their capacity as agents of the Tribe. *See Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.*, 129 Cal. App. 4th 759, 765-767 (Cal. Ct. App. 2005) (holding agent *who acted on behalf of principal* could enforce arbitration agreement). At most, Defendants had a "duty to exercise the level of care that a reasonable and prudent person would" when they conducted the

monitoring visit. *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 606 (Mont. 2008).

A review of the Complaint shows that Defendants met their common law duty and committed no breach. As noted in the United States' initial brief, the only finding that could plausibly be alleged to have caused Plaintiffs harm is Finding (3) that Plaintiffs made loans to Tribal Court employees. Doc. 14, at 20. This was the only finding the Tribal Ethics Board relied upon, and it is not clear from Plaintiffs' allegations or the documents attached to the Complaint whether the Board relied on any other findings. But Finding (3) cannot be a breach because it was accurate as stated. Plaintiffs admit as much (doc. 4, ¶¶ 60-61) and point to no "exonerating evidence" to the contrary (doc. 20, at 28-29). Instead, they argue the loans were justified because of the Tribe Finance Department's troubles. Doc. 4, ¶61. No matter the justification Plaintiffs offer, an accurate statement in the Report cannot constitute a breach. *Larson v. United Nat. Foods W. Inc.*, 518 F. App'x 589, 591–92 (9th Cir. 2013). Furthermore, Plaintiff's conclusory assertions of conspiracy—without any allegations to establish how the Individual Defendants or the Report were connected to the conspiracy—is not sufficient to establish a breach. *LaForge v. Gets Down*, No. CV 17-48-BLG-BMM-TJC, 2018 WL 4375127, at *4 (D. Mont. May 4, 2018); *Glick v. Molloy*, No. CV 11-168-M-DWM-JCL, 2012 WL 252149, at *12 (D. Mont. Jan. 26, 2012).

Plaintiffs insist Defendants must accept their characterization of the Report findings as "false," but this misperceives the requisite assumptions at the motion to dismiss stage. Doc. 20, at 27-28. A court need only accept a plaintiff's "well-pleaded" allegations as true. *Shwarz v. U.S.*, 234 F.3d 428, 435 (9th Cir. 2000). It need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); Plaintiffs' legal conclusions, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); or "allegations that contradict facts that may be judicially noticed by the court," *Shwarz*, 234 F.3d at 435.

The Complaint and attached documents show that the illegal loans occurred. Regardless of how Plaintiffs label the Report's findings, they were accurate as to these loans and therefore could not constitute a breach.

Plaintiffs insist all of the Report's findings caused them harm, but even assuming this were true, none of the other findings could constitute breaches. Of the 12 deficiencies Plaintiffs identify, (1), (2), (5), and (7) are only allegedly false based on Plaintiff's interpretation of Crow law. As demonstrated by the analysis in Defendants' prior brief (doc. 14. at 21-23) and the Tribal Chairman's letter attached to Plaintiffs' Complaint (doc. 4-4), Plaintiffs' interpretation is incorrect, and this Court need not accept it as true. Furthermore, Plaintiffs offer no factual

support to show that findings (1), (2), (4), (5), (6), (7), and (9) are false. They simply maintain the underlying deficiencies were justified by other circumstances. Finally, Plaintiffs misconstrue Findings (8), (10), (11), and (12), framing them as statements of fact when in fact they were requests for clarification or highlighted issues of concern. Accordingly, Plaintiffs fail to show how any of the findings constituted breaches.

Plaintiffs also do not establish causation. Their terminations were caused by an Associate Judge who used the Report in an unforeseeable way. More importantly, because the Report's findings were accurate, they could not constitute a negligent cause of Plaintiffs' injuries. *Spaulding v. U.S.*, 455 F.2d 222, 227 (9th Cir. 1972). Moreover, Plaintiff's bald allegations of conspiracy do not provide the causal connection between Defendants' acts and Plaintiffs' harm. *LaForge*, 2018 WL 4375127, at *4; *Glick*, 2012 WL 252149, at *12. Plaintiffs accordingly fail to allege duty, breach, and causation, and their negligence-based claims should be dismissed.

D. Plaintiffs do not make out prima facie claims of constructive fraud or breach of the implied covenant of good faith and fair dealing.

In order to make out a claim for constructive fraud, Plaintiffs must show duty and that they detrimentally relied on misleading representations. *PNC Bank,*

Nat. Ass'n v. Wilson, No. CV 14-80-BUDWM-JCL, 2015 WL 3887602, at *6 (D. Mont. June 23, 2015). Plaintiffs allege neither duty nor reliance, and therefore cannot make out a claim. The case Plaintiffs cite, *Bixby v., KBR, Inc.*, does not apply. In that case, Plaintiffs asserted claims for fraud because *the plaintiffs* relied upon statements made to a third-party (the National Guard) to *the plaintiffs'* detriment. 893 F. Supp. 2d 1067, 1078 (D. Or. 2012). Here, Plaintiffs do not allege they relied on the allegedly misleading statements at all, but that the Tribe relied on the misleading statements.

Plaintiffs similarly cannot make out a claim for breach of the implied covenant of good faith and fair dealing because they had a relevant contractual relationship. *Morrow v. Bank of Am.*, 324 P.3d 1167, 1176 (Mont. 2014). Contrary to Plaintiffs' assertions (doc. 20, at 32-33), Plaintiffs allege no facts to show they acted as agents with respect to the execution of the Contract, and, in any event, they are not asserting their claims as agents of the Tribe. Plaintiffs apparently concede that they were not beneficiaries of the Contract under Montana law. MONT. CODE ANN. § 28-2-205. Plaintiffs accordingly have no basis for asserting a claim for breach of the implied covenant, and their claim must be dismissed.

CONCLUSION

Plaintiffs' tort claims should be dismissed for lack of jurisdiction under Rule 12(b)(1). All of their claims should be dismissed for failure to state a claim under 12(b)(6).

DATED this 31st day of January, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,244 words, excluding the caption and certificates of service and compliance.

DATED this 31st day of January, 2020.

/s/ Tyson M. Lies
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2020, a copy of the foregoing document was served on the following person by the following means.

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