

Kristian Beckett (Bar No. 14415)
BECKETT LAW FIRM
PO BOX 4
Kuna, ID 83634
Telephone: (801) 891-6404
Email: Kristian@Beckettlegal.com
Attorney for Plaintiff and Counterclaim Defendants
Skull Valley Health Care, LLC,
Skull Valley Health Clinic LLC, and
Victor Garcia

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Skull Valley Health Care, LLC, et. al.,

Plaintiffs,

v.

NorStar Consultants LLC, et. al.,

Defendants

Ashanti Moritz, an individual,

Counterclaim/Crossclaim Plaintiff

v.

Skull Valley Health Care, LLC, a tribal
entity; Candace Bear, an individual, Dwayne
Wash, an individual, and Victor Garcia, an
individual

*Counterclaim/Third-Party
Crossclaim Defendants*

**COUNTERCLAIM AND
CROSSCLAIM DEFENDANTS'
MOTION TO DISMISS
COUNTERCLAIMS AND
CROSSCLAIMS PURSUANT TO
FRCP 12(b)(1); 12(b)(6); 12(b)(7).**

Case No. 2:22-cv-00326-DAO

Judge: Daphne A. Oberg

MOTION

COMES NOW, Skull Valley Health Care LLC, and Skull Valley Health Clinic, LLC, together hereinafter referred to as “SVHC”, together with Victor Garcia and do hereby respectfully move this court for an order dismissing Ashanti Moritz’s counterclaims and crossclaims pursuant to FRCP 12(b)(1) due to lack of subject matter jurisdiction, FRCP 12(b)(6) for the failure to state a claim upon which relief can be granted, and FRCP 12(b)(7) failure to join a necessary party.

MEMORANDUM OF LAW IN SUPPORT OF MOTIONS

I. Statement of Facts

1. The Skull Valley Band of Goshute Indians are one of 574 federally recognized tribes. *Federal Register, Vol. 87, No. 19/Friday, January 28, 2022 / Notices.*
2. The Skull Valley Band of Goshute Indians are represented by the Executive Committee which consists of a Chairperson, Vice-Chairperson, and Secretary.
3. The Skull Valley Band of Goshute Indians Executive Committee is elected by the Skull Valley Band of Goshute Indians’ General Counsel.
4. The General Counsel is comprised of all of the adult members of the Skull Valley Band of Goshute Indians.
5. The Executive Committee is comprised of Chairwomen Candace Bear, Vice-Chairman Dwane Wash, and Secretary Lillith Court.
6. The Skull Valley Band of Goshute Indians entered into an agreement with the United States on July 25, 2018 pursuant to Public Law 93-638, Indian Self-Determination and Education Assistance Act, (“ISDEAA”) which is codified in 25 CFR Part 900 to provide healthcare services to its people and to the residents who reside within a specified geographic boundary within Tooele County, Utah.

7. The Skull Valley Band of Goshute Indians through its Executive Committee formed SVHC as a subordinate economic entities with the intention that the entities would act as the arm of the Skull Valley Band of Goshute Indians to provide medical services pursuant to its contract with the United States.

8. SVHC are tribal limited liability companies which are registered with the State of Utah.

9. SVHC are owned 100% by the Skull Valley Band of Goshute Indians;

10. All earnings generated by SVHC are the property of the Skull Valley Band of Goshute Indians, subject to the terms of its contract with the United States.

11. All assets possessed by SVHC belong to the Skull Valley Band of Goshute Indians.

12. SVHC are managed by the Skull Valley Band of Goshute Indians Executive Committee.

13. The Executive Committee directs the affairs of SVHC.

14. All management decisions SVHC are made by the Executive Committee.

15. All employment decisions are made by the Executive Committee.

16. The Executive Committee is not compensated for its work managing SVHC but are compensated for their roles as elected tribal leaders.

17. The responsibility of managing SVHC is a duty of the Executive Committee as an elected representative.

18. On or about April 2019 Skull Valley Health Clinic LLC did engage the services of a management company called Team Recovery Stewards (“TRS”) with the intention of establishing a residential drug and alcohol, rehabilitation center in Tooele, Tooele County, Utah.

19. Skull Valley Health Clinic, LLC, in coordination with TRS, did establish a drug and alcohol recovery treatment program under the d/b/a Warrior Spirit Recovery Center in Tooele, Tooele County, Utah.

20. Ashanti Moritz, (“Moritz”) was hired by TRS to perform community outreach services for Skull Valley Health Clinic, LLC on or about June 1, 2019, in the role of Business Development and/or Outreach Specialist.

21. Moritz was employed by SVHC in the role of Outreach Specialist until January 25, 2022 when she was terminated.

22. Victor Garcia is an employee of SVHC and is currently employed as the Clinic Administrator for Skull Valley Health Care LLC.

23. Victor Garcia is the direct supervisor over Community Development and Outreach for Warrior Spirit, and for the duration of her employment was the supervisor to whom Mortiz reported directly.

24. Victor Garcia is supervised by the Executive Committee in its role as SVHC sole member and manager.

II. Statement of Issues

- A. Whether the Federal Tort Claims Act (“FTCA”) applies to the Mortiz’s counterclaims and crossclaims.
- B. Whether the failure to comply with the FTCA requirements is a jurisdictional defect.
- C. Whether the United States is the proper party in interest.
- D. Whether the Skull Valley Band of Goshute Indians is a necessary party
- E. Whether a supervisor is liable under Title VII or the Utah Antidiscrimination Act.

F. Whether Moritz's claims should be dismissed for failure to exhaust administrative remedies.

III. Argument and Authority

A. The Federal Tort Claims Act is applicable to Moritz's claims

The Skull Valley Band of Goshute Indians is a federally recognized Indian tribe. *Indian Entities Recognized by Bureau of Indian Affairs*, 81 Fed. Reg. 4,636 (January 28, 2022). On July 25, 2018, the Skull Valley Band of Goshute Indians did entered into a contract pursuant to Title I of the Indian Self-Determination Act with the United States Department of Health and Human Services Indian Health Services. By way of background, Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA), currently codified at 25 U.S.C §§ 5301-5423, with the purpose of transferring to the Indian people the planning, conduct, and administration of programs and services previously dominated by the Federal Government in 1975. 25 U.S.C § 5302.

The Skull Valley Band of Goshute Indians contracted with the United States to provide medical care within Tooele County, Utah, pursuant to the terms of the ISDEAA contract. Thereafter the Skull Valley Band of Goshute Indians established SVHC as a tribal organization to advance the purpose of the ISDEAA contract with the United States. SVHC's sole purpose is to provide a vehicle for the Skull Valley Band of Goshutes Indians to put the ISDEAA contract into action, as intended by Congress, and more specifically to serve the health care needs of the Skull Valley Band of Goshutes Indians as well as the greater community of Tooele County. The Skull Valley Band of Goshutes Indians Self-Determination Contract Annual Funding Agreement identifies its authority and purpose as:

This Annual Funding Agreement (“AFA”) is executed by and between the Skull Valley Band of Goshute Indians of Utah, (“SVBG”) pursuant to a tribal resolution, and the Secretary of the Department of Health and Human Services, acting through the Indian Health Service (hereafter “IHS”), pursuant to Title I of the Indian Self-Determination and Education Assistance Act (P.L. 93-638, 25 U.S.C. § 5301 *et seq.*), as amended, (hereafter ISDEAA) and is incorporated into and governed by the ISDEAA Contract No. HHSI247202220003C (Contract) between SVBG and the IHS. Pursuant to the terms of this AFA, SVBG is authorized to plan, conduct, operate, and administer the programs, functions, services and activities (“PFSAs”) identified in the SVBG’s Scope of Work, attached hereto and referenced as “Attachment A”. All terms of his AFA shall be governed by the ISDEAA, and its implementing regulations. To the extent that any term in this AFA may be construed as being inconsistent with the ISDEAA or as exceeding the authority granted by the ISDEAA, the provisions of the ISDEAA shall govern.

Declaration of Candace Bear, Exhibit 1: ISDEAA AFA. Further, “SVBG will provide health care services to SVBG members and other IHS eligible beneficiaries in accordance with the ISDEAA, 25 U.S.C. § 1680c, 25 C.F.R. Part 900, 42 C.F.R. Part 136, and any other applicable law or regulation. SVBG may also provide medical services to ineligible persons in accordance with 25 U.S.C. § 1680c, and Resolution No. 2018-05A” *Id.* SVHC is the Skull Valley Band of Goshute Indian medical clinic operating pursuant to the ISDEAA Contract.

A tribal organization is defined under 25 CFR §900.6.

Tribal organization means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

(emphasis added). SVHC is a tribal organization as defined. SVHC is managed by the Executive Committee of the Skull Valley Band of Goshutes Indians who are elected, in part, to manage the affairs of SVHC. Further still, SVHC is a tribal contractor which is defined under 25 CFR 900.6 as “an Indian tribe or tribal organization to which a contract has been awarded.” SVHC is managed solely by Skull Valley Band of Goshutes Indians Executive Committee.

SVHC is both a tribal organization and a tribal contractor and therefore is deemed to be a part of the Indian Health Service in the Department of Health and Human Services while carrying the terms of an ISDEAA contract or agreement. 25 U.S.C. § 5321 note. “[A]ny civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States. *Id.* “Indian tribes, tribal organizations, Indian contractors, and their employees, may be deemed employees of the Federal Government when they are carrying out functions authorized in or under a self-determination contract.” *Colbert v. United States*, 785 F.3d 1384, 1389-1390 (11th Cir. 2015).

All tortious claims alleged to have been committed in the course of performance of the IDSEAA contract must first be submitted to the federal agency. *See* 28 U.S.C. §2675(a). “A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.” 28 U.S.C. §2401. All claims against SVHC are subject to a prelitigation review by the Federal agency which is alleged to have engaged in the tortious conduct. 28 U.S.C. §2672, *see also* 25 CFR §900.182; and 25 CFR 900.204.

Moritz asserts two separate causes of action in her crossclaim and counterclaims. First, Moritz claims that she was wrongfully terminated from employment. *Dkt. 5, pg. 27*. Second, Moritz claims that she was discriminated against and that the defendants caused or created a hostile work environment. *Dkt. 5, pg. 29*. Moritz claims against SVHC are more appropriately asserted against the United States pursuant to the FTCA.

B. This Court Lacks Subject Matter Jurisdiction Over the Counterclaims and Crossclaims

"The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993). Under the FTCA a claimant "must comply with several strictly construed prerequisites." *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999). "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). A plaintiff's failure to comply with the FTCA's requirement of first presenting the claim to the relevant federal agency precludes a federal court from taking up the claim in the first instance. *Johnson*. 189 F.3d 180, 189. "The burden is on the plaintiff to plead and prove compliance with § 2401(b)." *Id.*

The FTCA provides the exclusive remedy for tort actions against federal employees and does not serve as a broad waiver of the sovereign immunity of the United States. 28 U.S.C. §2679(a). ("The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive"). Moritz cannot bypass her obligations under the FTCA simply because her claims are brought in response to SVHC's action against her for her tortious conduct. Moritz has failed to

plead exhaustion of administrative remedies in her counterclaims and crossclaims. The requirement that the plaintiff plead exhaustion is a jurisdictional prerequisite. Because all claims asserted by Moritz are subject to the FTCA Moritz claims must be dismissed pending exhaustion of administrative remedies. This court lacks subject matter jurisdiction to hear her claims.

C. The United States is the Correct Party in Interest and failure to join under Rule 19(a) is fatal to Moritz's Claims

Where the exclusive remedy is found with the United States, the correct party in interest is the United States. *Levin v. United States*, 568 U.S. 503, 509 (2013). *See also* 28 U.S.C. § 2679(b)(1) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim"). Moritz alleges specific tortious conduct by Garcia, Bear, and Wash, all of whom were acting within their roles within SVHC. As an IDSEAA contractor SVHC and its employees are quasi federal employees and the exclusive remedy for Moritz is against the United States.

Because the exclusive remedy is against the United States only the United States is a necessary party to this action. *See Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) ("Based on Rule 19(a), we evaluate whether (1) complete relief is possible among the existing parties and (2) the absent party has a legally protected interest in the outcome of the litigation."). Because Moritz failed to join the United States, who is a necessary party pursuant to FRCP 19, her claims must be dismissed pursuant to FRCP 12(b)(7).

When presented with an issue of failure to join a necessary party the court must determine if a party is in fact necessary under Rule 19(a), whether the party can be joined, if the party cannot be joined whether the action can proceed without the necessary party. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278, (10th Cir. 2012). A party is necessary if (1) "in that person's absence, the court cannot accord complete relief among existing parties;" or (2) "disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FRCP 19(a)(1). If the action cannot proceed without the necessary party the action must be dismissed. *Northern Arapaho Tribe*, 697 F.3d at 1278-79.

The United States is the only party in interest. *Supra*. The United States is an indispensable party because all relief is exclusive with the United States. The failure to name, let alone join, the United States is fatal to Moritz claims. Dismissal is warranted pursuant to FRCP 12(b)(7).

D. The Skull Valley Band of Goshute Indians is a Necessary Party That Cannot be Joined

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). This immunity extends to on- or off-reservation activities. *Id.* at 760. "The issue of sovereign immunity is jurisdictional," depriving this court of jurisdiction if the tribe has not waived its immunity or Congress has not authorized the suit. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Skull Valley Band of Goshute Indians has not waived its sovereign immunity.

Moritz has asserted claims against Chairwomen Bear and Vice-Chairman Wash in a veiled attempt to bypass their relationship to the tribe. Specifically, Chairwomen Bear and Vice-Chairman Wash work as member managers of SVHC solely within their role as part of the Skull Valley Band of Goshute Indians Executive Committee. The Skull Valley Band of Goshute Indians is the real party in interest for the claims against Chairwomen Bear and Vice-Chairman Wash. While an elected tribal official may be sued in their individual capacity “courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1290, 197 L. Ed. 2d 631 (2017). “[T]ribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.” *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). Because Bear and Wash were acting within their official capacity as elected officials the real party in interest is the Skull Valley Band of Goshute Indians.

Moritz claims relate to her status as an employee of SVHC. Moritz does not claim employment status related to Bear or Wash. All claims asserted against Wash or Bear are claims in either their capacity as managers of SVHC or as Executive Committee representatives of the Skull Valley Band of Goshute Indians. Necessarily Moritz claims should be asserted against the United States, *supra*, or against SVHC as a tribal entity. If the action is to be preserved as against SVHC and not against the United States, the correct party in interest is not Bear or Wash but the Skull Valley Band of Goshute Indians.

FRCP Rule 19(a) requires certain parties to be joined in an action if feasible. Rule 19 subsection (a)(1) identifies parties that “must be joined.” Parties required to be joined by Rule 19 include a party that “claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party’s] absence may: (i) as a practical matter impair or

impede the [party's] ability to protect the interest." A party meeting these criteria is a "required party" under Rule 19. When a nonparty Tribe is assessed under Rule 19 "analysis must begin with an assessment of whether the nonparty Tribe[] [has] a legally protected interest" that is relating to the subject of the action. *Ramah Navajo Sch. Bd. v. Babbitt*, 318 U.S. App. D.C. 329, 87 F.3d 1338, 1351 (1996); FRCP Rule 19(a)(1). The "interest" held by a nonparty within the meaning of Rule 19 "should be determined from a practical, and not technical, perspective. *Aguilar v. L.A. Cnty.*, 751 F.2d 1089, 1093 (9th Cir. 1985).

In this matter Plaintiff is seeking a damages award from SVHC. Because The Skull Valley Band of Goshute Indians is the sole member and sole owner of SVHC any claims against SVHC are claims against the Skull Valley Band of Goshute Indians. Any judgement for damages against SVHC would be collected from the of the Skull Valley Band of Goshute Indians. To make this issue clear, SVHC is a subordinate economic entity and is an arm of the tribe.

Tribal sovereign immunity extends to the businesses and business activities of the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "The question is not whether the activity may be characterized as a business... but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Id.* In *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014), the Ninth Circuit developed a five-factor test to determine whether a business functions as an "arm of the tribe" entitled to sovereign immunity.

A district court must examine:

- (1) the method of creation of the economic entities;
- (2) their purpose;
- (3) their structure, ownership, and management, including the amount of control the tribe has over the entities;
- (4) the tribe's intent with respect to the sharing of its sovereign immunity; and
- (5) the financial relationship between the tribe and the entities.

Id. In *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, the Tenth Circuit acknowledges “[o]ne of the ways that Congress has promoted tribal sovereignty [is] through economic development[....]” 629 F.3d 1173, 1184 (10th Cir. 2010). The expressed purpose of PL93-638 promulgated under 25 CFR Part 900 states:

Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

25 C.F.R. § 900.03 1996. The contracts that are entered into between HHS and tribes are done so with the intention of allowing the tribe to act in its own self-governance. SVHC is the arm of the tribe as it relates to the services it provides.

The *White* and *Breakthrough* factors can, and should be, broken into three categories. Who owns the entity, who manages the entity, who profits from the entity. Whether an entity was formed under State, Federal, or Tribal law is irrelevant to meet the recognized standard of whether the activities are deemed those of the tribe. *Allen*, 464 F.3d at 1046. While there may be value in assessing a five- or six- part test in some cases this is not one of them. This case involves a wholly owned tribal entity that is providing services under a contract with the United States the analysis should stop there. However, in this case the Skull Valley Band of Goshute Indians manage SVHC and 100% of the profits revert to the tribe and will be spent as per the terms of the ISDEAA contract.

In assessing the standards outlined under *Breakthrough* and *White*, the entities in question were created to provide for the health and welfare of the Skull Valley Band of Goshute Indians. SVHC is a Tribal Entity, which as defined in Utah requires at least 51% ownership of a native

tribe. U.C.A. 48-3a-102(31). The structure, organization, and ownership is vested solely with the Skull Valley Band of Goshute Indians. *Declaration of Candace Bear*. The intention of the Band was to ensure that its sovereignty was shared by the entities. *Id.* All money that is earned by the entities is trust resource and may only be used in a manner consistent with the ISDEAA Contract or with approval from the United States. 25 C.F.R. §900.6. Every factor outlined in *White* and *Breakthrough* support a finding that SVHC is an arm of the tribe and entitled to its sovereign status.

A suit against SVHC, Chairwomen Bear, and Vice-Chairman Wash is a suit against the Skull Valley Band of Goshute Indians as the real party in interest. The Skull Valley Band of Goshute Indians is a necessary and indispensable party because the Skull Valley Band of Goshute Indians has a recognizable Rule 19 interest and they must be joined to this litigation.

After concluding a nonparty is a required party a court applying Rule 19 must then determine whether that nonparty can feasibly be joined. *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). The 10th Circuit has recognized that joinder of Indian tribes enjoying sovereign immunity is infeasible. *See Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (" Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. . . . As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991)). The Band is a federally recognized tribe and, as such, possesses sovereign immunity. SVHC is a Tribal organization as defined by 25 U.S.C. §5304 and is entitled to the tribal sovereignty. The Skull Valley Band of Goshute Indians cannot be joined.

The 10th Circuit has recognized that proceeding in a suit involving the interests of a Tribe in that Tribe's absence would "effectively abrogate the Tribe's sovereign immunity" by adjudicating that interest without the Tribe's consent. *Enter. Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). "When, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Id* (citing *Wichita & Affiliated Tribes v. Hodel*, 252 U.S. App. D.C. 140, 788 F.2d 765, 777 (1986)).

Joinder is necessary to accord full relief as to the claims against Chairwomen Bear and Vice-Chairmen Wash. Because the Skull Valley Band of Goshutes is immune from suit Moritz's counterclaims and crossclaims must be dismissed. FRCP 12(b)(7).

E. Moritz Fails to State a Claim Upon Which Relief Can be Granted

Claims against a supervisor in their individual capacity pursuant to Title VII are inappropriate and should be dismissed pursuant to FRCP 12(b)(6). *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996)("personal capacity suits against individual supervisors are inappropriate under Title VII."). Additionally, the claims presented by Moritz pursuant to the Utah Antidiscrimination Act as codified under U.C.A. §34A-5-101 *et. seq.*, against her supervisors are also inappropriate because the Act does not create an independent right of action. *See Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 16, 61 P.3d 989; *Darvish v. Labor Comm'n Appeals Bd.*, 2012 UT App 68, ¶ 23, 273 P.3d 953, 959. Moritz has failed to state a claim upon which relief can be granted as to Garcia, Bear, or Wash and the same should be dismissed pursuant to FRCP 12(b)(6).

In ruling on a motion to dismiss for failure to state a claim, the court must assume the truth of all well-pleaded facts in plaintiff's complaint and view them in the light most favorable

to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 118, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in reviewing the sufficiency of a complaint is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). There is no set of facts, as plead, which will entitle Moritz to relief against Mr. Garcia and the same should be dismissed forthwith.

F. Moritz Failed to Exhaust Administrative Remedies Therefore this Court Lacks Subject Matter Jurisdiction

Moritz failed to exhaust her administrative remedies under the Utah Antidiscrimination Act. The Utah Antidiscrimination Act requires a request for agency action to be filed within 180 days "after the alleged discriminatory or prohibited employment practice occurred." Utah Code Ann. § 34A-5-107(1)(c). As alleged, Moritz was terminated from her employment on January 25, 2022. Moritz failed to file her claims with the Utah Division of Antidiscrimination and Labor by July 25, 2022. Critically to this point is that Moritz has an affirmative duty to plead exhaustion of administrative remedies. Moritz failed to plead exhaustion thus her claims must be dismissed.

Further, Moritz failed to exhaust her administrative remedies under Title VII of the Civil Rights Act. Exhaustion of administrative remedies is pre-requisite to obtaining relief under Title VII of the Civil Rights Act. *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse*, 165 F.3d 1321, 1326 (10th Cir. 1997); *see also Beene v. Delaney*, 70 Fed. Appx. 486, 490 (10th Cir. 2003) (holding that while not a jurisdictional bar, failing to timely file her grievance with the Equal Employment Opportunity Commission ("EEOC") is still a bar to the plaintiff's suit in district court). To pursue a claim for discrimination a plaintiff must present her claims to

the EEOC as part of a timely filed EEOC “charge”. *Welsh v. City of Shawnee*, 1999 U.S. App. LEXIS 11251, 1999 WL 345597, *2 (10th Cir. 1999). A charge must be filed with the EEOC as per 29 CFR § 1601.8 and within 180 days of the alleged discrimination. 42 U.S. Code § 2000e-5(e)(1). Moritz has not plead compliance with the requirement to present her charge to the EEOC within 180 days of any alleged discriminatory action or within 180 days of her termination.

This court does not have jurisdiction over Moritz claims at this time where she has failed to exhaust administrative remedies in Utah or the EEOC. The failure to exhaust administrative remedies is fatal to this court’s exercise of jurisdiction in this matter.

CONCLUSION

SVHC is a Tribal Organization formed to fulfil the terms of the ISDEAA Contract between the United States and the Skull Valley Band of Goshute Indians. The United States is a necessary party and the rightful party in interest. All claims against SVHC should be made against the United States. Before claims can be asserted against the United States the claimant must first exhaust administrative remedies through the FTCA. Moritz did not exhaust administrative remedies under the FTCA therefore this court does not have jurisdiction.

All claims against SVHC, if not related to the performance of the ISDEAA Contract should be asserted against the Skull Valley Band of Goshute Indians as the party in interest. Skull Valley Band of Goshute Indians is entitled tribal sovereign immunity. SVHC is a tribal organization and is entitled to its parents sovereign status. All clams against SVHC should be dismissed for failure to join an indispensable party.

Moritz fails to state a cognizable claim against Garcia and her claims should be dismissed.

Moritz failed to plead exhaustion of state and federal administrative remedies under the EEOC and Utah Anti-Discrimination Act. Moritz failed exhaust administrative remedies. This court does not have subject matter jurisdiction over Moritz claims of discrimination and hostile work environment until Moritz exhausts her state and federal administrative remedies.

DATED this Tuesday, August 09, 2022.

THE BECKETT LAW FIRM

/s/ Kristian Beckett

Kristian Beckett, UTBN #14415
Beckett Law Firm
PO Box 4
Kuna Idaho 83634
Cell: (801) 891-6404
Fax. (425) 450-0728

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing MOTION was served or will be served to the following in the manner set forth below:

ATTORNEY FOR MORITZ:

Jerome H. Mooney, Esq.
Weston, Garrou & Mooney
12121 Wilshire Boulevard, Suite 525
Los Angeles, CA 90025
Tel.: 310-442-0072
Fax: 310-442-0899

Hand-delivery
 U.S. Mail
 Fax:
 Email: jerrym@mooneylaw.com
 ECF

SERVED THIS THE 9TH DAY OF AUGUST.

/s/ Kristian Beckett

Kristian Beckett