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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Keith Goss, Plaintiff vs. United States of America; Tuba City Regional Health Care Corporation, an Arizona Corporation and self-governed under the Indian Self-Determination and Education Assistance Act; Lynette Bonar, in her Individual capacity acting under color of law; and Jane/John Does all acting in her or his individual capacity under color of law, Defendants.	Case No. 18-cv-08077-DGC **REPLY OF DEFENDANTS TCRHCC AND BONAR TO PLAINTIFF'S RESPONSE TO THEIR MOTION TO DISMISS**

Defendants Tuba City Regional Health Care Corporation ("TCRHCC") and Lynette Bonar ("Bonar") hereby file their Reply to Plaintiff's Response to their Motion to Dismiss, filed pursuant to Fed. R. Civ. P. 12(b)(1). For the reasons set forth in their Motion to Dismiss (Doc. 17) and below, this Court lacks subject matter jurisdiction over the four remaining claims against TCRHCC and Bonar, and all such claims should be dismissed.

I. PROCEDURAL HISTORY AND RELEVANT FACTS

In his Complaint, filed April 5, 2018 (Doc. 1), Plaintiff Keith Goss ("Goss") alleges the following Counts: (1) a "negligence/negligent supervision" claim against the United States (the "Government") and TCRHCC; (2) a "constructive discharge" claim against TCRHCC; (3) an Intentional Infliction of Emotional Distress ("IIED") claim against Bonar and TCRHCC; (4) a "breach of covenant of good faith and fair dealing" claim, presumably against

all Defendants; (5) a *Bivens* claim against Bonar; (6) a "negligent supervision" claim, presumably against all Defendants; (7) a claim for violation of state whistleblowing laws, presumably against all Defendants; and (8) a claim for violation of federal whistleblowing laws, presumably against all Defendants.

On May 29, 2018, TCRHCC and Bonar filed their Motion to Dismiss on jurisdictional grounds. In Bonar's sworn declaration, Doc. 17, Ex. 1 ("Bonar Decl."), Bonar attested that at all times pertinent to this action she has served as an assistant administrator for TCRHCC or the TCRHCC Chief Executive Officer "CEO," and that all of her interactions with Goss have occurred within the scope of her employment as a TCRHCC supervisor, and as Goss's supervisor specifically. Doc 17, Ex. 1, Bonar Decl. ¶ 14; *see also* Doc. 1 ¶ 4.

On June 5, 2018, the Government filed its Motion to Dismiss (Doc. 21). In its Motion, the Government stated that the allegations within Counts 1, 2, 3, and 6 are within the scope of TCRHCC's contract with the Indian Health Service ("IHS"),[1] and that the employees named in those counts (specifically the supervisory employees, *i.e.*, Bonar) were acting within their scope of employment. Doc. 21 at 6; *see also id.* n. 4. Therefore, the Government urged that, pursuant to 28 U.S.C. § 2679(b)(1) of the Federal Tort Claims Act ("FTCA"), the United States is the sole and exclusive defendant for those counts, requiring TCRHCC's and Bonar's dismissal from those counts. Doc 21 at 6. After a subsequent stipulation filed by all parties, by text order entered June 12, 2018, the Court substituted the United States as the sole defendant on counts 1, 2, 3 and 6. Counts 4 (breach of covenant of good faith and fair dealing), 5 (Bivens), 7 (state whistleblowing), and 8 (federal whistleblowing) are now the only remaining counts against TCRHCC and Bonar in this lawsuit, and therefore the only counts

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[1]TCRHCC is designated by the Navajo Nation Council as a "tribal organization" under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*, and operates a former IHS hospital in Tuba City, Arizona, on the Navajo Nation, serving Native American patients pursuant to an ISDEAA compact and Funding Agreement with the Department of Health and Human Services ("HHS"), acting through IHS. Doc. 21, Ex. 1, Bonar Decl. ¶¶ 6-7.

addressed in this Reply. Goss filed his responses to the Government's and TCRHCC's and Bonar's Motions to Dismiss on July 4, 2018. Subsequent to filing his responses, a related lawsuit filed by Goss against Bonar and six other TCRHCC employees in Arizona Superior Court, Coconino County, alleging a violation of federal wiretap laws, a *Bivens* claim, and defamation claims, was dismissed by the Superior Court on July 19, 2018 on jurisdictional grounds and for Goss's failure to state a claim. *See* Gov't Reply (Doc. 32) n. 1; Doc. 32-1.

II. ARGUMENT

A. Goss Has Failed to Meet His Burden of Establishing This Court's Jurisdiction and TCRHCC's and Bonar's Motion to Dismiss Should Therefore Be Granted.

As the party invoking federal jurisdiction, Goss bears the burden of establishing its existence. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). Goss has not met his burden, this Court does not have jurisdiction over Goss's claims, and the four remaining counts against TCRHCC and Bonar should be dismissed.

1. Goss's discussion of the inapplicable Counts 2 and 3 should be disregarded; regardless, Goss did not exhaust his tribal remedies, requiring dismissal of all claims.

Goss begins his "legal analysis" in his Response to TCRHCC's and Bonar's Motion to Dismiss with a discussion of the torts of constructive/retaliatory discharge and IIED, *i.e.*, Counts 2 and 3 of the Complaint, urging that such claims cannot be addressed in tribal forums. Resp. at 5-6. But TCRHCC and Bonar are no longer defendants for such counts, and thus his arguments are relevant only to the Federal Defendants' motion to dismiss. *See*, *e.g.*, June 12, 2018 Order.

Regardless, assuming solely for the sake of argument that such torts could *not* be properly brought as part of a labor claim under the Navajo Preference in Employment Act ("NPEA") (which TCRHCC and Bonar deny), those claims could be brought in the Navajo district courts. *See* 7 N.N.C. (Navajo Nation Code) § 253(A)(3) (Navajo district courts are courts of general jurisdiction and can hear "[a]ll causes of action recognized in law, including

general principles of American law applicable to courts of general jurisdiction"); *see also id.* § 204(D) (state law where matter arose may be applied as a matter of comity).[2] And, as with all of Goss's claims, he was required to exhaust tribal remedies before arguing those claims here, whether before the Navajo Nation Labor Commission ("NNLC") under the NPEA, or in Navajo district court. *See Crawford v. Genuine Parts Co., Inc.,* 947 F.2d 1405, 1407-09 (9th Cir. 1991) ("[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory" and remanding a case arising on the reservation to dismiss or abstain in favor of tribal court proceedings), *cert. denied*, 502 U.S. 1096 (1992); *Window Rock Unified School District v. Reeves*, 861 F.3d 894, 906 (9th Cir. 2017) (requiring the exhaustion of tribal remedies under the NPEA), *cert. denied*, 138 S.Ct. 648 (2018).

Although Goss cites to the four exceptions to tribal exhaustion set forth in *Burlington N.R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000), Doc. 29 at 16, Goss does not apply the facts in this case to any of those exceptions. It is unclear which, if any, he believes apply to this case. His subsequent conclusory statement that "[t]he very nature of the allegations takes this case out of tribal rule," *id.*, must therefore be rejected. "A federal court must give the tribal court a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts." *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987)). "The Navajo Nation has a sophisticated judicial system with highly competent judges." *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222, 1229 (D.N.M. 1999). Goss has not shown how exhausting tribal remedies would be futile or otherwise fit any of the exceptions to the exhaustion requirement, Doc. 29 at 16; *see Red Wolf*, 196 F.3d at 1065, and exhaustion would be required if TCRHCC and Bonar were defendants in Counts 2 and 3, which they are not, *e.g.*, *Crawford*, 947 F.2d at 1407-09.

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[2]Available on Westlaw and on the Navajo Nation Council's website at http://www.navajonationcouncil.org/.

2. TCRHCC and Bonar have absolute immunity from Goss's claims under 42 U.S.C. § 233(a), requiring their dismissal.

TCRHCC operates a former IHS hospital serving Native American patients on the Navajo Reservation pursuant to an ISDEAA compact with HHS/IHS. *See* n.1, *supra*. Under ISDEAA, TCRHCC and Bonar are carrying out the functions of the Indian *Health* Service and specifically "deemed" a Public Health Service ("PHS") employee and/or entity under 42 U.S.C §233. 25 U.S.C. § 5321(d). *But for* TCRHCC "standing in the shoes" of IHS, TCRHCC and Bonar would not be named in this lawsuit. Thus, the absolute immunity conferred by § 233 requires dismissal of TCRHCC and Bonar from this lawsuit:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, 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 office or employment, *shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.*

42 U.S.C. § 233(a) (emphases added). "Section 233(a) grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment *by barring all actions against them for such conduct*. By its terms, § 233(a) limits recovery for such conduct to suits against the United States. The breadth of the words 'exclusive' and 'any' supports this reading, as does the provision's inclusive reference to *all* civil proceedings arising out of "the same subject-matter." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010) (emphases added). TCRHCC does nothing *but* medical and related functions under their ISDEAA compact with IHS, and TCRHCC and Bonar therefore have absolute immunity from Goss's claims.

Despite this controlling ruling from the U.S. Supreme Court, Goss relies on *Mendez v.*

Belton, 739 F.2d 15 (1st Cir. 1984), a First Circuit decision long preceeding *Hui*,[3] urging that the absolute immunity for PHS officials under 42 U.S.C.§ 233(a) is limited solely to malpractice claims, and misconstruing *Hui* as concerning a so-called "Bivens action *for medical malpractice*." Doc. 29 at 8 (emphasis added). There is no "*Bivens* action for medical practice." A *Bivens* action is for alleged violations of the United States Constitution by a federal actor. By contrast, a medical malpractice claim is a type of tort governed by state law. Moreover, the *Mendez* holding is doubtful even in the First Circuit. *See Pomeroy v. United States*, No. 17-cv-10211-DJC, 2018 WL 1093501, at *3 (D. Mass. Feb. 27, 2018) ("At minimum, the Court is unconvinced that *Mendez* limits viable [§ 233] claims in this Circuit to medical malpractice claims alone") (collecting cases broadly construing the absolute immunity conferred by 42 U.S.C. § 233).

Rather, as briefed in its Motion, since *Hui*, multiple courts have construed the absolute immunity conferred on PHS personnel and facilities under 42 U.S.C. § 233 as applying broadly to claims for functions related to the provision of medical services, including constitutional and statutory claims in addition to tort claims, and including claims against both care providers *and* administrative PHS personnel. *See* Doc. 17 at 8-10. Most importantly to this action, those decisions have included finding absolute immunity for claims based on the hiring and retention of doctors because "[t]he hiring and retention of [a PHS entity's] physicians is directly connected to its provision of medical care," and the entity's obligations "for vetting its physicians are inextricably woven into its performance of medical functions." *Brignac v. United States*, 239 F.Supp.3d 1367, 1377 (N.D. Ga. 2017) (internal quotations omitted).

Goss suggests that the Court should analogize the absolute immunity under Section 233 to "judicial immunity," citing a test under Arizona case law for applying judicial immunity to a "non-judge," *see* Doc. 29 at 9, citing *Burk v. State*, 156 P.3d 423, 426 (Ariz. Ct. App. 2007).

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[3]In their Motion, TCRHCC and Bonar alerted the Court to this case but mistakenly stated that *Belton* was decided sixteen years before *Hui*. Doc. 17 at 10 n. 4. It was actually decided *twenty six years* before *Hui.*

To the extent Goss's analogy has any relevance to an interpretation of the plain language of Section 233(a), *but see Hui*, 559 U.S. at 805 ("Our inquiry in this case begins and ends with the text of § 233(a)"), neither TCRHCC nor Bonar is the equivalent of a "non-judge" for purposes of Goss's test. Rather, they would be *the* "judge" for purposes of the immunity because they are expressly made PHS employees/entities pursuant to the ISDEAA. *See* 25 U.S.C. §§ 5396(a) and 5321(d); 25 C.F.R. § 900.191. Even assuming for the sake of argument that Goss's judicial immunity test were analogous, immunity would be conferred on TCRHCC and Bonar because a hospital vetting its physicians is "inextricably woven into its performance of medical functions." *Brignac*, 239 F.Supp.3d 1377; *compare Burk*, 156 P.3d at 426 (in applying the immunity doctrine, "we examine the nature of the function entrusted to that person and the relationship of that function to the judicial process").

The express language of 25 U.S.C. § 5321(d) places TCRHCC and Bonar under the protections of 42 U.S.C §233 because all of Goss's claims against TCRHCC and Bonar are based on their status as PHS employees/entities carrying out the medically related functions of hiring and retaining doctors under the ISDEAA Compact. TCRHCC and Bonar have absolute immunity under 42 U.S.C. § 233(a) and should be dismissed from this lawsuit.

3. The Court does not have jurisdiction over Bonar for purposes of the *Bivens* claim.

In enacting ISDEAA, Congress recognized that Indian tribal health contractors and their employees would require equivalent protection from tort claims as the IHS and its employees. So it provided FTCA coverage by "deeming" the contractors to be part of the Public Health Service and their employers to be "employees of the service." 25 U.S.C. § 5321(d). If those entities and employees were actually federal agencies and employees, there would have been no need for § 5321(d). Congress cannot be presumed to have enacted superfluous laws. *Jackson v. United States*, 557 F.2d 735, 740 (10th Cir. 1977). Thus, Defendant Bonar, TCRHCC's CEO, cannot be considered a federal employee or actor. She works for a corporation chartered by the Navajo Nation.

Nonetheless, Goss contends that Bonar is a "federal actor" for purposes of his *Bivens* claim. *See* Doc. 29 at 12-13. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 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." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001). But Goss admits that TCRHCC is a "private corporation," and that "Lynette Bonar was an employee at TCRHCC." Doc. 29 at 2. A *Bivens* action will not lie against privately employed personnel, like Bonar, working at a privately operated federal facility, like the TCRHCC hospital campus. *See Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (prisoner's *Bivens* claim against private prison guards at federal prison precluded; tort action under state law sole remedy).

Additionally, Bonar is "deemed" to be a federal actor *only* for purposes of FTCA coverage. *See* 25 U.S.C. § 5321(d) (employees of a tribal organization under an ISDEAA contract "are *deemed* employees of the Service while acting within the scope of their employment in carrying out the contract or agreement") (emphasis added); 25 C.F.R. § 900.191 ("*For the purpose of Federal Tort Claims Act coverage*, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are *deemed* a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract."). Yet there is no FTCA coverage for *Bivens* claims. 28 U.S.C. § 2679(b)(2) (removing constitutional and Federal statutory claims from the class of claims which can be brought against the United States under the FTCA). Because Bonar is deemed a federal actor only for purposes of FTCA coverage, and there is no FTCA coverage for a *Bivens* claim, Bonar cannot be a federal actor for purposes of a *Bivens* claim.

Lomando v. United States, 667 F.3d 363, 377 (3d Cir. 2011), involved volunteer physicians, who, like Bonar, were "deemed" pursuant to federal law to be PHS employees under 42 U.S.C. § 233. The Third Circuit explained that the plaintiff in that case "fundamentally misapplies the effect of the physicians' 'deemed' employee designation . . . the employee designation is a *legal construct* effective *only* for the purposes of section 233."

Lomando, 667 F.3d at 377 (emphases added) (rejecting argument that the volunteer doctors should be treated as federal employees for any other purpose). The extension of FTCA coverage under 42 U.S.C. § 233 to persons and entities "deemed" to be PHS employees does not make Bonar liable as a "federal actor" in an individual capacity lawsuit. To the contrary, Bonar is extended Federal *protection* from suit by section 233, not made individually liable for a *Bivens* claim. *See also Hui*, 559 U.S. at 801 (no *Bivens* action against PHS employee).

Finally, even for a *tribal law enforcement officer* funded under ISDEAA, such officer can be held liable in a *Bivens* action only if he or she is enforcing federal law pursuant to a federal badge during the alleged incident. *Valline*, *supra*, 597 F.Supp2d at1181; *accord Bob v. United States*, No. Civ. 07–5068, 2008 WL 818499, at *2 (D.S.D. March 26, 2008) (although tribal defendants may be deemed federal employees under the FTCA, they were not federal "investigative or law enforcement officers" where none held federal badge). Indeed, absent a federal badge, no *Bivens* liability attaches even for ISDEAA funded tribal law enforcement officers who are assisting on a federal task force in the execution of a federal search warrant. *See Dupris v. McDonald*, No. 08-8132-PCT-PGR, 2012 WL 210722, at *13-14 (D. Ariz. Jan. 24, 2012), *aff'd*, 554 F. App'x 570 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 356 (2014). Goss has not alleged that Bonar holds a federal badge under TCRHCC's ISDEAA compact, and she does not. Goss's *Bivens* claim should be dismissed.[4]

B. The Breach of Covenant of Good Faith and Fair Dealing Claim, and the State and Federal Whistleblowing Claims, Are All Employment-Related Claims Subject to the Exclusive Jurisdiction of the Navajo Nation Labor Commission or Navajo Courts.

The Breach of the Covenant of Good Faith and Fair Dealing Claim (in the purported employment contract, Doc. 1 ¶ 40) ("Breach of Contract Claim"), and the state and Federal

[4]Goss's reference to *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), Doc. 29 at 13, is misplaced. Bonar and TCRHCC have never asserted that they have sovereign immunity for purposes of Goss's claims, and *Lewis v. Clarke* is thus inapposite. Goss's reference to "color of state law,"citing a Seventh Circuit case, and apparently in support of application of *Bivens*, Doc. 29 at 14, is similarly inapposite.

whistleblowing claims (the "Whistleblowing Claims"), are all employment claims, *see* Doc. 17 at 14-15, and are therefore subject to the exclusive jurisdiction of Navajo forums under Navajo law. As extensively briefed in TCRHCC's and Bonar's Motion to Dismiss, *Tribal* labor laws, not federal or state labor laws, apply to ISDEAA contracts and compacts. *See* 25 U.S.C. § 5307(c) (formerly codified as § 450e(c)) ("with respect to any self-determination contract . . . the tribal employment or contract preference laws adopted by such tribe *shall* govern with respect to the administration of the contract.") (emphasis added); *id.* § 5396(a) (applying § 5307 to self-governance compacts with IHS); *Meadows v. Navajo Nation Labor Comm'n*, 9 Nav. R. 597, 600, 2012 WL 6102677 (Nav. Sup. Ct. Nov. 2, 2012) (NPEA is a comprehensive statutory scheme governing all employment relations on the Navajo Nation); *Staff Relief, Inc. v. Polacca*, 8 Nav. R. 49, 57 (Nav. Sup. Ct. 2000) (NPEA is a "general labor code" that must be read to apply to all employees, including non-Indians); *see also* NPEA, 15 N.N.C. § 601 *et seq.* (NPEA's broad protections apply to all employers and employees on the Navajo Nation, covering adverse action, prejudice, intimidation, and harassment.

Wide Ruins Comm. Sch. v. Stago, 281 F.Supp.2d 1086 (D. Ariz. 2003), specifically addressed the issue whether Navajo courts or Federal courts had subject matter jurisdiction over employment-related claims of employees of an ISDEAA tribal organization. *Id.* at 1087. The court held that such claims are outside the FTCA and that the authority for such claims rests solely in the Navajo legal system, and not in Federal courts. *Id.* at 1089. That decision comported with the Navajo Nation Supreme Court's decision eight months earlier in *Stago v. Wide Ruins Comm. Sch.,* 8 Nav. R. 259, 268, 2002 WL 34461286 (Nav. Sup. Ct. 2002) (Congress's intention for tribal employment statutes to govern tribal organizations in tribal court is only plausible reading of ISDEAA). The Breach of Contract Claim and the Whistleblowing Claims could be brought only in tribal forums, and they should be dismissed.[5]

[5]As an alternative, Goss suggests his breach of contract claim may be a tort claim. Doc. 29 at 11. Goss has not shown the "special relationship" necessary under the Arizona cases he cites for his claim to be a tort claim, but if it is a tort, then TCRHCC and Bonar

In any event, Goss is not a federal employee for purposes of the federal employment law governing whistleblowing, and, even assuming for the sake of argument he were a federal employee, he did not exhaust his administrative remedies, depriving this Court of jurisdiction. *See* 5 U.S.C. § 1221(a) (federal whistleblower who is retaliated against is required to first seek corrective action from the Merit Systems Protection Board ("MSPB") to exhaust administrative remedies); *id.* § 2105(a)(1) (definition of "employee" for purposes of § 1221(a)); Doc. 1 ¶¶ 54, 58 (alleging that Goss purportedly reported "illegal activities of TCRHCC" to the "Navajo Nation" and "Navajo Nation management [*sic*]," but not the MSPB); *Stella v. Mineta*, 284 F.3d 135, 142 (D.C. Cir. 2002) ("Under no circumstances does the [federal whistleblower statute] grant the District Court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance.").

Goss's state claim for violation of the Arizona employment statute governing whistleblowing, *i.e.*, A.R.S. § 23-1501 and § 41-1464, Compl. ¶ 54, is equally meritless. TCRHCC's purported contracts with Arizona businesses do not overcome the rule that State labor laws do not apply to employers operating on Indian reservations. *See Williams v. Lee*, 358 U.S. 217, 220 (1959); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); William Buffalo and Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Law to Indian Tribal Employers*, 25 U. Mem. L. Rev. 1365, 1398 (1995) ("state labor laws do not apply to employers operating on Indian reservations"); *cf.* Doc. 29 at 10.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in its Motion to Dismiss (Doc. 17), this Court should dismiss the remaining claims against Defendants TCRHCC and Bonar for lack of subject matter and personal jurisdiction, and dismiss both Defendants from this lawsuit.

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agree the Government should be substituted as the sole defendant. *See* Doc. 29 at 11-12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

/s/ William Gregory Kelly