THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *ex rel.* RAJU A.T. DAHLSTROM, *et al*., **Plaintiffs,** **v.** **SAUK-SUIATTLE INDIAN TRIBE of Washington, a Federally Recognized Indian Tribe, *et al*.,** **Defendants.**	**No. 2:16-cv-00052-JLR** **PLAINTIFF/RELATOR RAJU A.T. DAHLSTROM'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **RENOTED ON MOTION CALENDAR: July 8, 2019** **Request for Oral Argument**

"But one thing all federally recognized Tribes share is their status as sovereign governments with a duty to protect and advance the health, welfare and future prosperity of their citizens."[1]

I. INTRODUCTION AND RELIEF REQUESTED

Relator (hereinafter, "Plaintiff or Mr. Dahlstrom"), by and through his counsel of record, Richard L. Pope, Jr., *of Lake Hills Legal Services, P.C.*, file Plaintiff's Reply Opposing Motion

[1] See, ***Statement of AMICI CURIAE of 448 Federally Recognized Tribes, October 5, 2018, citing:*** "BRIEF AMICI CURIAE OF 448 FEDERALLY RECOGNIZED TRIBES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS TRIBAL CLAIMS," **In re**: IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION This document relates to: ***The Muscogee (Creek) Nation v. Purdue Pharma L.P***., et al. Case No. 1:18-op-45459, and ***The Blackfeet Tribe of The Blackfeet Indian Reservation v. AmerisourceBergen Drug Corporation, et al***. Case No. 1:18-op-45749. Case: 1:17-md-02804-DAP Doc #: 1026 Filed: 10/05/18. Page ID #: 24910. Accessible online at: https://images.law.com/contrib/content/uploads/documents/292/33950/Critical-Mass-Opioid-Tribal-Amicus-Brief.pdf.

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to Dismiss[2] (Dkt. # 64). Previously this Court has defeated Defendants' TRO efforts and FRCP 12(b)(6) motions respectively, connected with Plaintiff's **FCA** complain.[3] Additionally, in Plaintiff's parallel case pending before the Honorable Judge Robert S. Lasnik under the **FTCA**,[4] the United States of America has coincidentally filed a summary judgment motion with a reply by Plaintiff noted for July 8, 2019,[5] and once again demonstrated its distaste (and disdain) in accepting full responsibility over its trust relationship in safeguarding the Sauk-Suiattle Indian Tribe's children, and by extension assuming any culpability for the protection of the children, youth, and families throughout Native American country. Plaintiff ask this Court to not find in Defendants: Ronda Kay Metcalf, Christine Marie Jody Morlock, Robert Larry Morlock, and Community Natural Medicine, favor, and instead bound this instant FCA action to trail. (Since this Court's ruling on 03/21/2017 (Dkt. # 39), Defendant CNM has not been able to produce any evidence that they functioning as an arm of the Sauk-Suiattle Indian Tribe. See, Dahlstrom v. Sauk-Suiattle Indian Tribe, Slip Copy (2017) 2017 WL 1064399.

From 2015 through October 2018, Plaintiff Raju A.T. Dahlstrom has had to wage this FCA battle on his own. The United States, the State of Washington, the Skagit County Department of Health, and most importantly the Sauk-Suiattle Indian Tribe, which was in a far greater position to halt the most dangerous and fraudulent practices of Dr. Morlock, instead,

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[2] Plaintiff's claims under the False Claims Act (FCA), U.S.C. § 3729, et seq.

[3] See, ***Dahlstrom v. Sauk-Suiattle Indian Tribe of Washington***, No. C16-0052JLR, 2017 WL 413201, at *2 (W.D. Wash. Jan. 31, 2017) (citing ***New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co***., 434 U.S. 1345, 1347 n.2 (1977)) and ***Dahlstrom v. Sauk-Suiattle Indian Tribe***, No. C16-0053JLR, 2017 WL 1064399 (W.D. Wash. Mar. 21, 2017).

[4] "…Congress enacted the **Federal Tort Claims Act** of 1946 (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*., to waive immunity from tort suits involving agencies across the Government. See § 1346(b)(1) (waiving immunity from damages claims based on 'negligent or wrongful act or omission of any employee of the Government'). That statute carved out an exception for claims based on a federal employee's performance *1440 of a 'discretionary function.' § 2680(a). See, ***Thacker v. Tennessee Valley Authority***, 139 S.Ct. 1435 (2019).

[5] See also, "ORDER GRANTING IN PART THE UNITED STATES' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT" In re: ***Raju T. Dahlstrom, Plaintiff, v. United States of America, et al***., Defendants, Case No. C16-1874 RSL, 07/13/2018. Specifically, the Court ruled: "For purpose of the motion to dismiss, the United States; motion to dismiss *Dkt. # 68) is GRANTED in part and DENIED in part. The United States has not waived its sovereign immunity from liability for federal constitutional torts, whether asserted directly under the constitution or as a Bivens action. Claims One, IV, the retaliation portion of Claim VI, and the second Claim VII are hereby DISMISSED against the United States for lack of subject matter jurisdiction. The wrongful discharge portion of Claim VI may proceed. Slip Copy, 2018 WL 3417019. See also, Footnote 1, p.3 of Defendants' Motion for Summary Judgment confirming that the United States remains the only defendant in the FTCA case.

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protected her, paid her, provided her LRP program assistance, and an amazing salary, benefits, and other renumeration, while she actively and serially injecting Sauk-Suiattle Indian Tribe's children, youth and families, and/or other Tribal Medical Clinic patients (and CNM patients) with Vaccines for Children (VFC) deemed spoiled, expired or subject otherwise subject to quarantines or moratoriums, because of concerns for their overall concerns for their safety, efficacy, and stability due in part to extensive power outages experienced on the Sauk-Suiattle Indian Reservation.

Sadly, the **United States of America**,[6] has abandoned for four years (July 2014 through October 2018)[7] its trust responsibilities to protect the children of the Sauk-Suiattle Indian Tribe.

> "In permanently reauthorizing the Indian Health Care Improvement Act in 2010,[8] Congress cited the federal government's need to fulfill its "special trust responsibilities and legal obligations to Indians"[9] and declared that "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."[10] The trust responsibilities and legal obligations cited by Congress reflect the dual concepts of federal supremacy over Indian affairs and a general federal-tribal "trust relationship" that together provide the legal, moral, and political justification for numerous federal services and programs for Indians, from education to housing to health care to many others."[11]

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[6] See, Geoffrey D. Strommer, Starla K. Roels, & Caroline P. Mayhew, Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program, 21 J. Health Care L. & Pol'y 115 (). Available at: https://digitalcommons.law.umaryland.edu/jhclp/vol21/iss2/2.

[7] Timeline for Defendant Dr. Christine Marie Jody Morlock, ND (Naturopathic Doctor) employment with the Sauk-Suiattle Indian Tribe.

[8] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10221(a), 124 Stat. 119, 935– 36 (2010) (codified as amended at 25 U.S.C. § 1601 et seq. (Supp. IV 2016)).

[9] S. Res. 1790, 111th Cong. § 103 (2009) (enacted).

[10] Indian Health Care Improvement Act, Pub. L. No. 94-437, § 2, 90 Stat. 1400, 1400 (1976) (codified as amended at 25 U.S.C. § 1601 (Supp. IV 2016)).

[11] See, e.g., 20 U.S.C. § 7401 (Supp. IV 2016) ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); 25 U.S.C. § 4101(2), (4) (Supp. IV 2016) ("[T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people . . . the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition . . . ."'"); 25 U.S.C. § 1901(2)–(3) (Supp. IV 2016) ("Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe . . . ."); 25 U.S.C. § 3701(2) (Supp. IV 2016) ("[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes . . . .").

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Oddly, the State of Washington, accordingly, followed the lead of the United States and despite having controlling interest and jurisdiction to regulate, supervise, and other monitor Defendant Dr. Morlock did nothing to halt her dangerous, worthless, and deleterious fraudulent practices to the detriment of children, youth and their families, residing within and beyond the boundaries of the Sauk-Suiattle Indian Reservation, from on or about July 2014 through October 2018. Specifically, the ***Amici Curiae of 488 Federally Recognized Tribe***[12] overly generalized the State's traditional role in Indian country as a prophetic warning as follows:

> 'Equally imperative is that Tribes have their own "'seat at the table'' in the resolution of this massive litigation. Tribal interests are not represented by the States, which the Supreme Court once described as the Tribes" 'deadliest enemies' (See, ***United States v. Kagama***, 118 U.S. 375, 384 (1886))…Even today, States are often staunchly opposed to tribal interests and hostile to Tribes' independent sovereignty, particularly in the contexts of litigation and resource distribution. In the upcoming term of the Supreme Court, for example, States are opposing tribal interests in all four pending Indian rights cases (See ***Sturgeon v. Frost***, 872 F.3d 927 (9th Cir. 2017), cert. granted, 138 S. Ct. 2648 (2018); ***Murphy v. Royal***, 875 F.3d 896 (10th Cir. 2017), cert. granted, 138 S. Ct. 2026 (2018); ***Herrera v. Wyoming***, No. 2016-242 (Wyo. 4th Dist. Apr. 25, 2017), cert. granted, 138 S. Ct. 2707 (2018); ***Cougar Den, Inc. v. Wash. Dep't of Licensing***, 392 P.3d 1014. (Wash. 2017), cert. granted, 138 S. Ct. 2671 (2018).)…The claims of Indian Tribes and tribal organizations in this litigation must therefore be considered on a distinct basis, separate and apart from the States and the States" constituent cities and counties. As history has shown, if the opioid crisis is to be remedied and abated in Indian Country, it will be through empowering Tribes themselves to control and direct resources

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[12] The Sauk-Suiattle Indian Tribe has joined in the ***Amici Curiae of 488 Federally Recognized Tribe's*** efforts, In re: **NATIONAL PRESCRIPTION OPIATE LITIGATION**, through its active membership in NPAIHB. See also, ***Statement of Interest***: by the NPAIHB. Northwest Portland Area Indian Health Board Established in 1972, the Northwest Portland Area Indian Health Board (NPAIHB) is a tribal organization formed under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, representing the 43 federally-recognized Indian Tribes in Idaho, Oregon, and Washington on health care issues. Our 43 board members are tribal delegates appointed by their respective Tribes through the tribal resolution process. NPAIHB's mission is "to eliminate health disparities and improve the quality of life of American Indians and Alaska Natives (AI/ANs) by supporting Northwest Tribes in their delivery of culturally appropriate, high quality healthcare." The opioid epidemic has significantly impacted our Northwest Tribes and NPAIHB is committed to partnering with our Tribes to combat this epidemic. From 2006-2012, AI/AN age-adjusted death rates for drug and prescription opioid overdoses were nearly twice the rate for non-Hispanic white (NHW) in the region. From 2013– 2015 mortality rates that were 2.7 times higher than those of NHW for total drug and opioid overdoses and 4.1 times higher for heroin overdoses. Because of these data, as well as the lived experience and stories of Northwest Tribes, NPAIHB delegates have identified substance overuse – specifically increasing opioid dependence and overdoses – as a priority health issue in the Northwest Tribal communities. Currently, the NPAIHB Tribal Epidemiology Center has four funded projects to address the opioid epidemic both regionally and nationally. These projects focus on strengthening data, strategic planning, documentation of evidence-based and culturally responsive health systems interventions, innovative community-based strategies, development of an Indian Country Opioid/Addiction ECHO to increase the number of AI/AN patients receiving MAT and the number of DATA 2000-waivered providers who are actively prescribing buprenorphine to AI/AN patients. NPAIHB also plays a key role in supporting our delegates, and other Northwest Tribal leaders, in federal and state advocacy efforts on opioid policy and funding. Found at: Case: 1:17-md-02804-DAP Doc #: 1026 Filed: 10/05/18 177 of 236. PageID #: 25086.

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> as they deem appropriate, and to implement solutions that respond to the specific needs of their citizens and communities.' *Id.*[13]

Reprehensibly, the Sauk-Suiattle Indian Tribe ("SSIT) did nothing to protect its most vital resource, their children, youth, and families, from the barbaric reaches of Defendant Morlock (from on or about July 2014 through October 2018). Instead the SSIT leased its ***Sovereign Shield***s to protect Dr. Morlock while she dangerously and with reckless abandon violated the most sacred gift, their CHILDREN. Simply put, Dr. Morlock did not live by the precept of: "**DO NO HARM**!"

Strategically, missing in this instant **False Claims Act** litigation, however, is the entire 573 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.[14]

Additionally, the Skagit County Department of Health (SCDH), had fiduciary, legal, and moral obligation to safeguard the Vaccines for Children (VFC) resources, as SCDH was the responsible contractor for monitoring Dr. Morlock's administration and management of the Sauk-Suiattle Indian Tribe's VFC program. Instead the SCDH was not actively monitoring the activities of Dr. Morlock while she was violating the moratoriums on use of the tribal VFC vaccines –that was imposed by Dr. Stephen J. Morlock, MD., Director, Tribal Medical Clinic (TMC)/SSIT, Plaintiff, by recommendations of Dr. Thomas Weiser, MD., Epidemiologist at Portland Area – Indian Health Services. The moratorium on the use of the VFC was imposed between July 1, 2015 through October 22, 2015.

On or about February 24, 2014, the Office of Inspector General, with the U.S. Department of Health and Human Services submitted for immediate release:

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[13] Accessible online at United States District Court, for the Northern District of Ohio, Eastern Division, Multi-District 2804. National Prescription Opiate Litigation, Honorable Judge Dan Aaron Polster, Presiding: https://www.ohnd.uscourts.gov/mdl-2804.

[14] See, 1200 Federal Register / Vol. 84, No. 22 / Friday, February 1, 2019 / Notices. Accessible at: U.S. Government Publishing, at: https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00897.pdf.

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OIG Alerts Tribes and Tribal Organizations To Exercise Caution in Using Indian Self-Determination and Education Assistance Act Funds[15]

"Tribes[16] that enter into ISDEAA contracts and Title V Self-Governance compacts with IHS must protect IHS funds from misuse. Further, all tribes that receive Medicare, Medicaid, and Children's Health Insurance Program (CHIP) reimbursements must ensure that those funds are used in accordance with applicable Federal law, including the ISDEAA and the Indian Health Care Improvement Act (IHCIA).[17] Recent OIG investigations have revealed that some tribes and tribal organizations, or their officials, have not adequately protected these funds; as a result, the funds have been misappropriated or misused. In some cases, health care services for tribal members have been jeopardized.

Tribes may negotiate ISDEAA contracts with IHS, under which the tribes receive funds to provide health-care-related services directly to tribal members.[18] Similarly, qualifying tribes may sign Self-Governance compacts with IHS and thereby exercise even more flexibility to use the compact funding for those programs, services, and functions that the tribes have agreed to provide. Tribes must use ISDEAA funds only to carry out activities that are authorized by law and included in the contract, compact, or funding agreements entered into with IHS.[19] Use of ISDEAA funds for unallowable purposes is subject to disallowance by the Department of Health and Human Services (HHS). The Affordable Care Act reaffirmed authority for tribal health programs to seek direct reimbursement from Medicare, Medicaid, and CHIP for health care services provided to individuals who are also eligible for those programs.[20]5 Importantly, these reimbursements must be reinvested in health care services or facilities.[21] 6 With respect to compacts, Medicare and Medicaid reimbursements are to be treated as supplemental funding to the tribe's Self-governance compact.[22] Tribes that improperly use reimbursements may lose their authority to directly bill Medicare, Medicaid, and CHIP.[23]

Recent OIG investigations have uncovered instances in which tribes used ISDEAA funds to support unauthorized activities. In some cases, shared costs were not allocated correctly between IHS and other activities. In others, ISDEAA funds were "borrowed" to meet other tribal expenses. Sometimes Medicare or Medicaid reimbursements were not reinvested in activities furthering the purposes of the original contract or compact and were not even expended for health care services, but instead were used to cover general tribal deficits. In the most egregious cases, funds were converted to personal use, leaving the tribes with dangerous shortages in health care funding for its members. The purpose of the limitations on uses of ISDEAA funds and Medicare/Medicaid/CHIP reimbursement is to direct urgently needed funding to health care services for American Indians and Alaska Natives. Tribes should be mindful of these restrictions and take steps to ensure that the funding and reimbursements are properly invested in this vital purpose. Those who commit fraud involving HHS programs are subject to possible criminal, civil, and/or administrative sanctions.

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[15] Accessible online at: https://oig.hhs.gov/compliance/alerts/guidance/20141124.pdf.

[16] For purposes of this alert, we use the word "tribes" to encompass all recipients of Indian Self-determination and Education Assistance Act (ISDEAA) contracts and compacts with the Indian Health Service (IHS), including tribal organizations.

[17] 25 U.S.C. § 1601 et seq.

[18] ISDEAA funds are distributed pursuant to Public Law 93-638, codified at 25 U.S.C. § 450 et seq.

[19] 25 U.S.C. §§ 450j-1 and 458aaa-4. In limited circumstances, a tribe may obtain prior approval from IHS for additional uses. 25 U.S.C. §§ 450j-1(k) and 458aaa-15(a).

[20] Sections 1880 and 1911 of the Social Security Act and 25 U.S.C. §§ 1641(c) and (d).

[21] 25 U.S.C. § 1641(d)(2).

[22] 25 U.S.C. § 458aaa-7(j).

[23] 25 U.S.C. § 1641(d)(5).

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FALSE CLAIMS ACT

Relator, who is a former Director of the Health and Social Services (HSS) Department, within the Sauk-Suiattle Indian Tribe, from April 30, 2015 through December 8, 2015, brought *qui tam* action on behalf of the United States of America, *et al*., under False Claims Act (FCA), alleging fraud, waste, and abuse, under federally funded programs, and that Defendants filed or withheld exculpatory evidence of their FCA violations, and certifying compliance with federally funded grant or contract programs, pursuant under: The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301 *et seq.* (ISDEAA Act). Further, Plaintiff alleges that Defendants made false claims (and certified compliance with ISDEAA, CHS, CSC, VFC programs, and specifically FCA violations of: (1) Alleged transfer of properties, by leveraging ISDEAA Act funds as collateral; (2) Loan repayment program through Indian Health Services (IHS); (3) Dr. Morlock's position within the tribal clinic; (4) Alleged vaccine-related issues (fraud, waste, and abuse); (5) Alleged payment to Dr. Ryan C. Johnstun and (other ISDEAA --Contract Support Cost (CSC) and Contract Health Services (CHS funds); (6) Alleged investments in Tribal gaming; and (7) Community Natural Medicine PLLC ("CNM"). Further, a claim under the False Claims Act requires: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. Plaintiff certifies this requirement as the ISDEAA requires single audits annually on behalf of the Sauk-Suiattle Indian Tribe. Defendant Metcalf signs such single audits and/or alternatively is well aware of the certification.

And, while tribes and the agencies have the flexibility to negotiate any provision into a Title I contract that they wish, the Act requires that certain mandatory provisions be included in all contracts in order to strike a balance between Congress's policy of promoting tribal self-determination and maintaining reasonable federal oversight over how contracted responsibilities are carried out.[24] Contracting tribes are required to provide an annual audit, but any additional

[24] *See* Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, §108, 108 Stat. 4250, 4261 (1994) (codified as amended at 25 U.S.C. § 5329(c) (Supp. IV 2016)) (amending section 108(c) of the ISDEAA to set out a "model agreement" that must be included in or incorporated by reference into every Title I contract).

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reports must be justified by the agency and negotiated by the parties.[25][81] Additionally, an agency may unilaterally reassume a contracted program, but only if there is a violation of the rights or endangerment to the health, safety, or welfare of any person, or if a contractor mismanages trust funds or lands, or interests in such lands.[82] And, contracting tribes have the right to reallocate funds awarded in a contract, provided the reallocation does not "have an adverse effect on the performance of the contract,"[83] and to redesign any non- construction program, with agency approval, to better meet local conditions and

II. SUMMARY OF FACTS

A. Background

"On January 12, 2016, Mr. Dahlstrom filed a complaint under seal pursuant to the qui tam provisions of the False Claims Act ("FCA"), 32 U.S.C. §§ 3729-33, and the Washington State Medical Fraud and False Claims Act ("MFFCA"), RCW 74.66.005 et seq. (Compl. (Dkt. # 1).) The Sauk-Suiattle is a federally recognized Native American tribe in Darrington, Washington. (Id. ¶ 31; Gov't Mot. (Dkt. # 4) at 2.) CNM is a health clinic in Arlington, Washington, owned by Dr. Morlock and Mr. Morlock. (See Gov't Mot. at 2.) The complaint also lists Dr. Morlock, Mr. Morlock, and Ms. Metcalf (collectively, "Individual Defendants"), who is the Director of the Indian Health Service ("IHS") and the Health Clinic of the Sauk-Suiattle, as defendants. (See Compl. at 2; Gov't Mot. at 2.).

The Sauk-Suiattle employed Mr. Dahlstrom from 2010 through his termination on December 8, 2015. (Compl. ¶ 30.) The Tribe initially hired Mr. Dahlstrom as a Case Manager, but in April 2015, the Tribe promoted him to Director. (Id.; Gov't Mot. at 3.) Mr. Dahlstrom alleges that Defendants knowingly presented or caused to be presented false or fraudulent claims to the United States—and by extension, the State of Washington—by: (1) approving payments of cosmetic dentistry for two individuals; (2) allowing an individual to use vaccines specifically donated to the Sauk-Suiattle for that individual's own private business; (3) fraudulently certifying compliance with the IHS Loan Repayment Program; (4) using government funds to secretly purchase land originally meant for residential care for children, and after acquiring that land, dropping the programs for children; and (5) fraudulently using government resources designated for healthcare facility costs. (Id.; see generally Compl.).

*2 On September 26, 2016, the United States of America and Washington State notified the court of their decision not to intervene in the action. (Notice (Dkt. # 8) at 2 (citing 31 U.S.C. § 3703(b)(4)(B) and RCW 74.66.050).) Accordingly, on September 28, 2016, the court unsealed the case and ordered Mr. Dahlstrom to serve Defendants.(9/8/16 Order (Dkt. # 9).).[26] *See*, ***Dahlstrom v. Sauk-Suiattle Indian Tribe***, Slip Copy (2017). 2017 WL 1064399.

B. FCA and FTCA claims

[25] *See* 25 U.S.C. § 5305(f)(1)-(2) (Supp. IV 2016) (indicating that each tribal organization that receives or uses funds pursuant to a contract must submit a single agency audit report to the Secretary for each fiscal year the organization is part of that contract).

[26] *See*, ***Dahlstrom v. Sauk-Suiattle Indian Tribe***, Slip Copy (2017). 2017 WL 1064399.

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Plaintiff presently addressing both an FCA and a parallel case under the FTCA that is pending in the Honorable Judge Robert S. Lasnik's Court. See, fn., at SJM, p. 3 (Dkt. 3).

C. Plaintiff's Facts Mandating Trial

Plaintiff was employed as Director of the Health and Social services (HSS) from April 30, 2015 to December 8, 2015, within the Sauk-Suiattle Indian Tribe (SSIT), and responsible for carrying out an ISDEAA contract, until he was wrongfully discharged from his position for reporting fraud, abuse, waste of ISDEAA Act funds, IHS loan repayment program, VFC (Vaccines for Children) program administration and health violations, use of Contract Support Cost (CSC) estimates for fraudulent purposes, misuse of Contract Health Services (CHS) funds for cosmetic and other none-approved medical care. See Dahlstrom Decl., ¶¶ 124-136. Ex, 37.

Further, Plaintiff was never subjected to any disciplinary performance evaluations while he served admirably at HSS between April 30, 2015 to October 22, 2015, until he was wrongfully terminated for participating in protected activities and whistleblowing about fraud, waste, and abuse of: ISDEAA contract funds, VFC and other FCA violations, the CSC and CHS operations under ISDEAA, violations of HIPPA regulations; use of RPMS (penetration rates) to crowd the ACA mandate to fraudulently increase coverage, etc. See Dahlstrom Decl., ¶¶ 137. Ex. 39.

The **Indian Self-Determination and Education Assistance Act** ("ISDEAA"), 25 U.S.C. §§ 5301–5423, authorizes the federal government and Indian tribes to enter into contracts that permit the tribes to provide to their members federally funded services that the government would have otherwise provided itself. Pursuant to the ISDEAA, Plaintiff in this case, served to protect the limited resources of the Sauk-Suiattle Indian Tribe from subject to waste, fraud, or abused under the False Claims Act.

Plaintiff reported that (in or about October 10th – October 22nd) Defendant Metcalf and (The Honorable Norma Ann Joseph, Chairman of the Sauk-Suiattle Tribal Council) ordered him to payout expenses incurred from cosmetic dentistry and other non-covered medical and (eye) care expenses not otherwise covered by ISDEAA contract funds, under Contract Health Services or Contract Support Services (CSC) cost. Specifically, the CSC is governed by:

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> "…Applicable funding level," the ISDEAA explains, is made up of two general categories of money. The first category is what is often referred to as "the Secretarial amount," meaning the amount that "the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." Id. § 5325(a)(1). By requiring that the federal government provide no less than this amount, the ISDEAA ensures that the tribes receive funding equal to what the government would have spent if it provided the services at issue itself. Id. On top of this base amount, however, the Secretary must also provide a second category of funds: "**contract support costs**" ("CSCs"). *Id*. § 5325(a)(2). These are "the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which . . . normally are not carried on by the respective Secretary in his direct operation of the program . . . or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id*.
>
> The other category is indirect CSCs, which are "any additional administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program," id. § 5325(a)(3)(A)(ii). Indirect CSCs generally make up the majority of CSCs; they can include expenses for facilities, equipment, auditing, and other financial management services. See ***Cherokee Nation of Okla. v. Leavitt***, 543 US. 631, 635 (2005). The ISDEAA provides no specific procedure for determining the amount of indirect CSCs a tribal contractor will incur related to a particular program in a given year. The Act merely states, as noted above, that the costs must be "reasonable . . . to ensure compliance with the terms of the contract and prudent management," 25 U.S.C. § 5325(a)(2), and that they cannot duplicate any funding already included in the Secretarial amount, id. § 5325(3)(A). Normally, however, the CSC amount attributed to a particular program is calculated by applying an "indirect cost rate" to a base amount of funds already owed to the tribe. See 2 C.F.R. pt. 200, app. VII, § C; Cherokee Nation, 543 U.S. at 635. The same indirect cost rate is generally used across all of the tribal contractor's federal programs for two to four years, see 2 C.F.R. pt. 200, app. VII, §§ B.9, C.2.a, and it is determined through negotiations with the Interior Business Center ("IBC"), located within the Department of Interior."[27] *(Special emphasis added)*

Plaintiff is therefore deemed to be an employee of the United States of America --Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI) or the Indian Health Services (IHS) in the Department of Health and Human Services (DHHS) while carrying out the ISDEAA contract or agreement is deemed an employee of the BIA/IHS and it therefore afforded the full protection and coverage of the Federal Tort Claims Act.

1. **Alleged transfer of properties**.

During this period (2014-2015) Council Member Kevin Lenon confirmed to Plaintiff that ***ISDEAA funds*** was leveraged to buy the (YMCA) properties. Plaintiff informed Mr. Lenon and GM Metcalf he believed the properties where purchased illegal. See Dahlstrom Decl., ¶¶ 32-37.

2. **Loan Repayment program allegations**.

Plaintiff notified Indian Health Services in Washington D.C., by telephone and by face-

[27] See, **Seminole Tribe of Florida v. Azar**, 376 F. Supp.3d 100 (2019).

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to-face contact with Indian Health Services (Portland Area) informing that Dr. Morlock was not qualified for Loan Repayment Program (LRP) reimbursements, SSIT did not meet minimum qualifications for Health Professional Site Scores. Namely, Plaintiff informed IHS (in Washington D.C., and Portland Area offices) that SSIT had retained (Dr. Stephen J. Waszak, MD., Director of THC, and that Dr. Morlock's cost and expenses where not justified under the AFA (ISDEAA --Annual Funding Agreement, for FY: 2014-2017) as it was misuse of federal resources. See Dahlstrom Decl., ¶¶ 44-47. Ex. 5.

3. **Dr. Morlock's position within tribal Clinic**.

Plaintiff reiterated that Ex. 5 citied about speaks to his concerns that Dr. Morlock should not be approved for ISDEAA funding, as it was redundant to have a medical doctor at the TMC and (Naturopathic practitioner) has this position was not on the (higher priority list). Plaintiff as HSS Director did not authorize funding Dr. Morlock's position for FY: 2015-2017.

4. **Alleged vaccine-related issues**.

From May 1, 2015 to October 22, 2015, Plaintiff worked tiredly with Dr. Morlock in order to improve the Tribal Health Clinic's (THC) administration and management of the Vaccines for Children (VFC) program. Specifically, Dr. Morlock was in charge of the tribal VFC program from July 2014 (and continuing through October 2018).

Plaintiff **highlights** on some of the fraud, waste, abuse of the VFC by Defendants: Metcalf, Dr. Morlock, and Robert Morlock, as follows:

(a) ***Co-mingling of VFC Resources*****:** VFC vaccines were found co-mingled with in an unapproved refrigerator –containing foods in various stages of rot, at the THC;[28]

(b) ***Defendant Metcalf provides VFC to CNM***: VFC vaccines were removed by Dr. Morlock, from on or about July 2014 through May 2015 (for her use at CNM). Dr. Morlock stated that GM Metcalf give her the VFC for her private business uses so that they would not go to waste;[29]

(c) ***Continued Removals of VFC by Morlocks***: From (July 2014 through October 2018) Dr. Morlock and her husband continued to remove VFC vaccines and took them home with them for storage, safe keeping and use;[30] despite restrictions to the

[28] See, Dahlstrom Decl., p. 5., ¶¶ 12-14.
[29] See, Dahlstrom Decl., p. 5, ¶¶ 15-17.
[30] See, Pope Decl., p. 2, R. Morlock Dep., p. 17, *ll.,* 14-15, Ex. 6.

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contrary imposed by Plaintiff to not take any VFC's to an unapproved medical facility.

(d) ***Skagit County Health Department VFC coordinator confirming no knowledge of the status of VFC from 2013 to 2015):*** Amie Tidrington, RN., VFC Coordinator for Skagit County Health Department was unable to explain a 'major gap' (from November 2013 through March 2015)[31] of VFC related information or location of VFC vaccines for period in spanning nearly two years;

(e) ***Transporting VFC's off Reservation***: GM Metcalf denied VFC's were ever approved for transport of VFC's other than hospital;[32] contradicting in-part both Dr. Morlock and (Defendant Robert Morlock)'s sworn testimony –indicating regarding removing/taking VFC vaccines to their personal home or CNM;

(f) ***Efforts to Provide Guidance to Dr. Morlock Proves Unsuccessful***: Dr. Waszak, MD., Plaintiff, and Dr. Weiser, MD., Portland Area IHS Epidemiologist recommended halting use of VFC's exposed to wild temperature fluctuations;[33] (and Dr. Morlock's knowledge of the same, but still when ahead to administer VFC's that were subject of restriction from use) and efforts to continuing education to Dr. Morlock with respect to the overall sound management of the VFC resources was unsuccessful;[34]

(g) ***Implementation of VFC Moratorium***: From on or about May 2015 through October 22, 2015, Dr. Waszak, Plaintiff, and Dr. Weiser imposed recommendations and moratorium on VFC's usage at THC pending proper investigation into the safety, efficacy or viability of the VFC resource –due chronic power outage. Despite Dr. Morlock's on going knowledge of the moratorium she failed to comply with Dr. Waszak, Plaintiff's and Dr. Weiser's directives, and Defendant's knowledge of the same.[35] Specifically, Dr. Morlock[36] for her interrogatory **Question 4**, regarding the overall management of 10 criteria of VFC program management, she proffered the following answer: "…Subject to and without waiving the aforementioned objections, Defendant implemented the VFC program at t he SSIT in accordance with VFC protocols. Defendant did not provide vaccinations at CNM.

(h) ***VFC/HIPPA***: Breaches of Privacy/Violation of Moratorium by Dr. Morlock,[37] Sena Dailey and Angelina Joseph, SSIT Employees.[38]

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[31] See, Pope Decl., p.3, Tidrington Dep., p. 38, *ll.,* 19-25, Ex. 7.

[32] See, Pope Decl., p. 2, Metcalf Dep., p. 62, *ll.,* 19-22

[33] See, Pope Decl., p. 2, Dr. Morlock Dep., p. 12, *ll.,* 22-25.

[34] See, Dahlstrom Decl., p. 7, ¶¶ 12-29. See, Waszak Decl., p. 4,

[35] See, Dahlstrom Decl., p. 7, ¶¶ 28-29; See, Pope Decl., p. 2, Metcalf Dep., p. 65, *ll.,* 24-25;; Waszak Decl., p. 4, ¶¶ 5-8. Ex. 4, Documents A-Q; See, Pope Decl., p. 2, Dr. Morlock Dep., p. 10, *ll.,* 3-10.

[36] See, Pope Decl., p. 2, Defendant Dr. Morlock's Answers and Responses…p. 8, Answer, Ex. 2

[37] In complete and total derogation to the VFC protocols for safety, Dr. Morlock ignored Dr. Waszak's (reiterated) directive, dated September 1, 2015, to not use any VFC's, and requested a written documentation from the Washington State Department of Health –prior to resuming vaccinations. See, Dahlstrom Decl., p. 23, ¶ 74, Ex. 15.

[38] See, Dahlstrom Decl., p. 10, ¶¶ 27; p. Waszak Decl., ¶¶ 5-8. Ex. 4, Documents A-Q.

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From on or about July 1, 2015 through October 22, 2015, Dr. Morlock violated the moratorium on its use despite having previous and actionable knowledge that the VFC vaccines could be compromised.

> On or about May 5, 2017, at 7:34 p.m., Alisha Corral, Tribal Clinic Manager, at Tribal Medical Clinic, Sauk-Suiattle Indian Reservation, provided me *qui tam* (supplemental disclosures initially filed under seal) and subsequently provided to the United States Attorney's Office. Specifically, these (now) redacted FCA documents reveals massive breach of TMC patient files, in excess of 2,500 to 4,000 singular keystrokes conducted by Sena Dailey and Angelina Joseph, Receptionist and/or medical assistant entering into HIPPA-protected TMC (EMR) of over one hundred patients between March 2015 through January 2016. (See pages: 1-48; 50-78[1]; Additionally, these patient records were further compromised by Ms. Dailey and Ms. Joseph for non-medical base service, including, and not limited to entering information into patient charts; printing or downloading medical records; accessing these patient charts through accessing Dr. Christine Marie Jody Morlock's shared password codes; and examining records of patients for no cognizable basis. Both Sena Dailey and Angelina Joseph, Receptionist at THC, and documented negligent care by Dr. Morlock, worthless and or non-existent medical care or negligent administration of the VFC on innocent children, youth, and their families; and approximately estimated 90 percent of the medical ERM records have not been closed, signed or completed.[1] Specifically: (a) Pages: **1 through 162**;[1] represents HIPPA violations by Sena Dailey; (b) **163-247** represents Dr. Morlock's failure to sign-off on nearly 90% of her medical charts, demonstrating medical incompetence and at minimum no meaningful medical services under the ISDEAA contract, once-again exposing the United States to further financial fraud, and FTCA liability for negligent or no care provided to THC patients; (c) **Pages: 248-449** represents Dr. Morlock's failure to sign-off on nearly 90% of her medical charts, demonstrating medical incompetence and at minimum no meaningful medical services under the ISDEAA contract, once-again exposing the United States to further financial fraud, and FTCA liability for negligent or no care provided to THC patients; (d) Pages: **450-464** represents Sena Dailey entering into TMC patient records for no demonstrably no medical reasons to access these files, but committing more HIPPA violations; (e) Pages: **465-688** represents Dr. Morlock's failure to sign-off on nearly 90% of her medical charts, demonstrating medical incompetence and at minimum no meaningful medical services under the ISDEAA contract, once-again exposing the United States to further financial fraud, and FTCA liability for negligent or no care provided to THC patients; and (f) Pages: 389 (TMC Patients received VFC immunizations);[1] Pages: 392 (TMC Patients received VFC immunizations); Pages: 393 (TMC Patients received VFC immunizations on 9/15/2015); Pages: 393 (TMC Patients received VFC immunizations on 9/17/2015); Pages: 399 (TMC Patients received VFC immunizations on 9/22/2015); Pages: 405 (TMC Patients received VFC immunizations on 9/25/2015); Pages: 406 (TMC Patients received VFC immunizations on 9/28/2015); Pages: 407 (TMC Patients received VFC immunizations on 9/28/2015); Pages: 408 (TMC Patients received VFC immunizations on 9/28/2015); Pages: 421 (TMC Patients received VFC immunizations on 10/13/2015); Pages: 422 (TMC Patients received VFC immunizations on 10/13/2015); and Pages: 429 (TMC Patients received VFC immunizations on 10/26/2015). ***See also***: Dahlstrom Decl., p. 1387, ¶ 38, p. 48, ¶ 139. Ex. 44.

(i) ***Plaintiff notification to Human Resources Director Bailey about his formal Complain regarding VFC filed with Skagit County Health Department***:

On or about (and prior to October 22, 2015) Mr. Dahlstrom informed (via face-to-face, and while he was driving his vehicle –Mr. Bailey appeared very distressed, stating repeatedly Ronda (in reference to GM Metcalf –that she was going to be mad, while he hit his fist into the dash-board multiple times, concluding that Mr. Dahlstrom was going to also lose my job over

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this) HR Bailey that (Mr. Dahlstrom) made a trip to Ms. Amie Tidrington office at Skagit County Public Health on or about the week of October 19, 2015 (but prior to October 22, 2015) and that Mr. Dahlstrom filed a verbal complaint against Dr. Morlock's illegal and malpractice with respect to her handling of the THC's VFC program.[39]

5. ***Alleged payment to Dr. Ryan C. Johnstun & Refusal to Create False Documentation involving ISDEAA -Contract Support Cost (CSC)***[40]

(a) Defendant Metcalf contacts Plaintiff regarding non-Payment of CSC Funds

On or about October 7, 2015, GM Metcalf and Mr. Dahlstrom spoke by telephone five-minutes prior to my mother's[41] memorial services. GM Metcalf demanded to know why Mr. Dahlstrom had not signed the financial paperwork authorizing payment to Dr. Ryan Johnstun – dental related services, which at that point exceeded over several thousands of dollars. Mr. Dahlstrom reminded GM Metcalf that he had been directed by her not to authorize anything above $500.00 dollars without written authorization(s) from her. Specifically, Mr. Dahlstrom was asked by both GM Metcalf and SSIT's Human Resources Director Bailey to pay out two separate (cosmetic dentistry bills) from funds to be drawn from SSIT's CHS (Contract Health Services) accounts. Mr. Dahlstrom informed GM Metcalf that this was illegal and misuse of CHS's funding requirements.[42] Prior to ending this call, GM Metcalf stated she would address this issue as a disciplinary matter upon my return to the office for failing to endorse approximately **$26,000**. Mr. Dahlstrom informed GM Metcalf that the majority of the cost was not legally covered through CHS's funding. Additionally, Mr. Dahlstrom advised that SSIT had numerous discrepancies in their totaling of CHS's (estimated) cost in excess of (**$153,646.51** / Outstanding: **$180,582.77**), that still needed verification for fiscal year 2014 and 2015, and other expenses that needed to be reconciled through (3rd-party insurances).

(b) Plaintiff Declined Overtime to Create CSC (False) Documents

Concomitant to Mr. Dahlstrom appointment on October 5, 2015 (and continuing to the weekends of 10/09/2015 and/or 10/15/2015) he was asked by both Defendant Metcalf and Chairman Joseph to work one of those weekend shifts to assist the SSIT with Contract Support Cost (CSC) documentation to be provided to the Internal Revenue Services (IRS/IHS). Defendant Metcalf and Chairman Joseph specifically requested that he review unpaid (reimbursements) and ongoing unmet CSC cost -with the look-back of provision of over a decade, commencing from on/or about Fiscal Year 2004 to 2013. Chairman Joseph informed Mr. Dahlstrom that he would be paid from HSS budget or alternatively from "tribal hard dollars" for my overtime cost, so as to not place federal monies into the documentation scheme. Additionally, when Mr. Dahlstrom asked about where the documents for compiling the said CSC data, Chairman Joseph informed (and Defendant Metcalf) echoed that there were scant paper records available for review. At this point Defendant Metcalf suggested that the rest could just be created. At the conclusion of this discussion both Defendant Metcalf and Chairman Joseph stated that they needed this work completed prior to the end of October 2015 in order to make on time for submission to the IRS. When Mr. Dahlstrom pressed further how much ***CSC*** dollars were contemplated, Defendant Metcalf informed they would like him to produce a report reflecting in excess of **one million dollars** in owed CSC from the ISDEAA chronic underfunding to the Sauk-Suiattle Indian

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[39] See, Dahlstrom Decl., p. 33, ¶ 101, p. 34, ¶ 102. Ex. 25.

[40] See, Dahlstrom Decl., p. 28, ¶¶ 87-88. Ex. 19 and p. 29, ¶¶ 90-93.

[41] Cosette Marie Dahlstrom, BA, RN., a profound gift to me, my immediate and extended family and the World!

[42] Contract Health Services (CHS). CHS is now known as Purchased / Referred Care. Additionally, some uncovered care is provided through CHS, but as payor of last resort. ("CSC"). See also: Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, as amended, 25 U.S.C. § 450 et seq.

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Reservation. Unfortunately, Mr. Dahlstrom informed both Defendant Metcalf and Chairman Joseph that he would decline as an invitation as he believed it to be the providence of SSIT Financial Department to address. Further, Mr. Dahlstrom informed both Defendant Metcalf of Chairwoman Joseph –that although he did not have any quarrels with supporting the Sauk-Suiattle Indian Tribe's to recover the CSC dollars properly owned to them, Mr. Dahlstrom informed them that a more pressing issue was that the Contract Health Services (CHS) dollars were being misused and that the ongoing debt and unpaid monies to the vendors for proper or improper claims and other fiduciary matters not resolved were far more consequential.

(c) Plaintiff reiterate his refusal to produce false CSC documents

Defendant Metcalf immediately dismissed my concerns about the fraud, waste, abuse of vital CHS funds (i.e., uncovered cosmetic dentistry and prescription glasses for persons already made ineligible to access the CHS funds as it was payor of last resort, and that some of the TMC patients outstanding bills could be covered through SSIT's own employee insurance pool as some of these patients were gainfully employed, but gaming the CHS funding system). In concluding this discussion with Defendant Metcalf and Chairman Joseph Mr. Dahlstrom reiterated my opposition to creating any **FALSE** documents that would assist in further defrauding the United States or the state of Washington in the Sauk-Suiattle Indian Tribe's efforts to secure monies or compromise both the CHS and CSC reimbursement schemes.

(d) Plaintiff threatened with insubordination for refusing to produce false CSC:[43]

At the termination of the discussions with Defendant Metcalf and Chairwoman Joseph, Defendant Metcalf expressed her alarm and dismay in Mr. Dahlstrom's refusal to engage in fraud, and stated that she would considering further actions, including possible (***insubordination***) charges against me for refusal to participate in assisting the SSIT to recover in excess of one-million dollars from the CSC and hundreds of thousands of dollars from the CHS funds contemplated through the ISDEAA contract support regime. Mr. Dahlstrom remember Chairman Joseph smiled and walked out of the meeting room with Defendant Metcalf.

In her deposition testimony, Defendant Metcalf stated regarding (CSC vendors) "…A. Indian Health Services could care less where there a contract…" This clavier attitude clarifies effectively that she nor the SSIT is bound by the rules established by the Indian Health Services as it relates to the financial or fiduciary obligations she owes the SSIT or the federal government for that matter.[44]

(e) Plaintiff's Notification to GM Metcalf and Chairwoman Joseph regarding the OIG Alert.

Contemporaneous to Plaintiff's refusal to participate in the creation of false documentation for CSC recovery, he informed both Defendant Metcalf and the Chair that it was illegal to falsify or certify documents for reimbursement or payments for services through the ISDEAA Act reimbursement schemes.[45]

6. Alleged investments in Tribal gaming. Plaintiff has no responsive information.

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[43] See, Dahlstrom Decl., p. 31, ¶ 94.

[44] See, Pope Decl., p. 2, Metcalf Dep., p. 56, ll., 2-3.

[45] See Contract Health Services (CHS). CHS is now known as Purchased / Referred Care. Additionally, some uncovered case is provided through CHS, a but as a payor of last resort. ("CSC"). See also: Indian Self-Determination and Education Act (:ISDEAA"), Pub L. No. 93-638, as amended, 25 U.S.C.

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7. **Community Natural Medicine PLLC ("CNM"),** Plaintiff relies on his representation made to his declaration this matter contained at Dahlstrom Decl., p. 13, ¶ 47-49. Plaintiff's Declaration speaks for itself.

III. ISSUES PRESENTED

Plaintiff denies the scurrilous charges made against him while Defendants continue masquerading, engaging in invectives that the Court should not tolerate. Further, Defendants previous attempts to have the Court look the other way for dereliction of duty to protect the most vulnerable children from the hands of Dr. Morlock and Ms. Metcalf, who paraded throughout the Sauk-Suiattle Indian Reservation (now) claiming to be victims of "Vexatious lawsuit" while Dr. Morlock injected children with Vaccines for Children is alarming and her husband who was the head of the Human Resources Department at the Sauk-Suiattle Indian Reservation double-down to witness first-hand, Plaintiff Raju A.T. Dahlstrom be terminated from his employment as HSS Director because he was engaged in protected activity. The Sin Mr. Dahlstrom apparently committed was not choosing to look the other way…instead he became a Whistle-Blower, not a good career move… Res judicata principals are inapplicable in the FCA context, as Plaintiff's only reason for losing his employment at the Sauk-Suiattle Indian Tribe was due Dr. Morlock's shire breath and depth of incompetence, and a form of dangerous medicine that no tribal community in this Nation should be exposed to.

IV. ARGUMENT

A. Standard for Summary Judgment

A motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6). The standard for dismissal under Rule 12(b) remains well established. "All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." ***Hicks v. Small***, 69 F.3d 967, 969 (9th Cir. 1995). The complaint will not be dismissed unless it appears beyond doubt that the plaintiff can prove no facts sufficient to support a claim that entitles the plaintiff to relief. Id. A party must plead adequately claims under § 3729 of the FCA to satisfy the standards of both Rule 8 and Rule 9 of the Federal Rules of Civil Procedure. Universal Health Servs., Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989, 2003-04 n. 6 (2016). Rule 8(a)(2) requires that a plaintiff's complaint make a short and plain statement. ***Bell***

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Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Rule 8 similarly requires that the complaint contain "sufficient factual matter" that, taken as true, "state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009). A claim appears plausible when the pleading raises factual content sufficient to allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged." Id.

To prevail on summary judgment, the moving party must establish that there in "no" genuine dispute as to any material fact and the movant is entitle to judgment as a matter of law." The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." ***Tolan v. Cotton***, 134 S. Ct. 1861, 1863 (2014) (quoting ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 255 (1986)). The Ninth Circuit, and other courts, "have long recognized that summary judgment is singularly inappropriate where credibility is at issue." ***S.E.C. v M & AW., Inc***., 538 F.3d 1043, 1054-55 (9th Cir. 2008) (quoting SEC v. Koracorp Indus., Inc., 575 F.2d 692, 699 (9th Cir. 1978)); see also ***Michell v. City of Pittsburg***, No. C09-00794 SI, 2012 WL 331378, at * 11 (N.D. Cal. Aug. 12, 2012) ("Credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those a judge…ruling on a motion for summary judgment." See also, ***Lenz v. Universal Music Corp***., 815 F.3d 1145, 1150 (9th Cir. 2016) (quoting ***Warren v. City of Carlsbad***, 58 F.3d 439, 441 (9th Cir. 1995)). Here, therefore, we view the evidence in the light most favorable to Relator.

*2 An assertion of fraud or mistake requires a plaintiff to state "with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Courts recognize, however, that "knowledge, and other conditions of a person's mind may be alleged generally." Id. Plaintiffs may not "lump multiple defendants together." ***United States v. Corinthian Colleges***, 655 F.3d 984, 997-98 (9th Cir. 2011). Plaintiffs instead must "differentiate their allegations ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Id. Plaintiffs must also "identify the role of each defendant in the alleged fraudulent scheme," ***Swartz v. KPMG LLP***, 476 F.3d 756, 764-65 (9th Cir. 2007). This identification requirement forces Plaintiffs to set out the "who, what, when, where, and how" as to each defendant. Ebeid ex rel. ***U.S. v. Lungwitz***, 616 F.3d 993, 998 (9th Cir. 2010).

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Moreover, *4 A tribal government employee sued in his or her personal capacity stands, therefore, as a person who may be subject to liability for knowingly submitting false information to the United States for purposes of FCA liability. Stoner, 502 F.3d at 1125. This Court agrees that when a plaintiff seeks to hold a tribal government employee personally liable for their "knowing participation in the submission of false or fraudulent claims to the United States government, the [tribe] is not the real party in interest ... and [sovereign immunity] poses no barrier to such a suit." Id. (emphasis added). It is of no consideration that the Individual Defendants made the alleged fraudulent decision 'because of' their official tribal duties. See Hafer, 502 U.S. 21. A claim under the False Claims Act requires: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. The panel held that, under Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010), as relevant here, the falsity requirement could be satisfied either by express false certification or by implied false certification, which requires a showing that (1) the defendant explicitly undertook to comply with a law, rule, or regulation that was implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with the law, rule, or regulation. In ***Universal Health Servs., Inc. v. United States ex rel. Escobar***, 136 S. Ct. 1989 (2016), the Supreme Court held that a showing of implied false certification requires the satisfaction of two conditions: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." The panel held that under two post-Escobar Ninth Circuit cases, relators must satisfy Escobar's two conditions to prove falsity.

A reasonable trier of fact could conclude that Defendants' (Dr. Morlock, Ronda Metcalf, Robert Morlock, and CNM's (collectively, or individually) actions met the Escobar requirements for falsity. In Escobar, the Supreme Court also clarified that whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality requirement; therefore, even when a requirement is expressly designated a condition of payment, not every violation of

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that requirement gives rise to liability. Instead, materiality looks to the effect on the likely or actual recipient of the alleged misrepresentation, meaning the government.

The 9th Cir., recognizes that Escobar did not overrule ***United States ex rel. Hendow v. Univ. of Phoenix***, 461 F.3d 1166 (9th Cir. 2006), which held that, with regard to materiality, the question is whether the false certification was relevant to the government's decision to confer a benefit. Applying the Escobar standard of materiality, the panel concluded that a reasonable trier of fact could find materiality because as here in this instant case, the Defendants' caused to certify that there conduct satisfies (audit) conditions on annualize basis to continue receiving ISDEAA Act contract funds to carry the health and social services mission of the Sauk-Suiattle Indian Tribe. The False Claims Act imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). We articulated the four elements of a False Claims Act claim in ***United States ex rel. Hendow v. University of Phoenix***, 461 F.3d 1166 (9th Cir. 2006), another case that involved alleged violations of the incentive compensation ban. Under Hendow, a successful False Claims Act claim requires: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Id. at 1174. But Escobar has unsettled the state of this circuit's law with regard to two of those elements: falsity and materiality.

B. Implied False Certification

As relevant here, the falsity requirement can be satisfied in one of two ways. The first is by express false certification, which "means that the entity seeking payment [falsely] certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted." Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010). The other is by implied false certification, which "occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation [but does not], and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." Id. (emphasis added). In Ebeid, we clarified that, to establish a claim under the implied false certification theory, a relator must show that "(1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated

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in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation." Id. Thus, under Ebeid, a relator bringing an implied certification claim could show falsity by pointing to noncompliance with a law, rule, or regulation that is necessarily implicated in a defendant's claim for payment. The Supreme Court subsequently addressed implied false certification in Escobar. There, the Supreme Court held that [t]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Escobar, 136 S. Ct. at 2001 (emphases added). We have addressed Escobar in two cases that create uncertainty about the ongoing validity of Ebeid's test for falsity in implied false certification cases. First, in United States ex rel. ***Kelly v. Serco, Inc***., 846 F.3d 325, 332 (9th Cir. 2017), we considered only Escobar's two-part test in determining that the plaintiff's implied false certification claim failed; we did not consider whether the claim met the lower standard for falsity enunciated in Ebeid. Then, in United States ex rel. Campie v. Gilead Sciences, Inc., we noted that Escobar "'clarif[ied] some of the circumstances in which the False Claims Act imposes liability' under [an implied false certification] theory." 862 F.3d 890, 901 (9th Cir. 2017) (emphasis added) (quoting Escobar, 136 S. Ct. at 1995), petition for cert. filed, 86 U.S.L.W. 3519 (U.S. Dec. 26, 2017) (No. 17-936). But we then stated that the "Supreme Court held that although the implied certification theory can be a basis for liability, two conditions must be satisfied." Id. (emphasis added) (citing Escobar, 136 S. Ct. at 2000).

Were we analyzing Escobar anew, we doubt that the Supreme Court's decision would require us to overrule Ebeid. The Court did not state that its two conditions were the only way to establish liability under an implied false certification theory. But our post-Escobar cases—without discussing whether Ebeid has been fatally undermined—appear to require Escobar's two conditions, nonetheless. We are bound by three-judge panel opinions of this court. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). We conclude, therefore, that Relators must satisfy Escobar's two conditions to prove falsity, unless and until our court, en banc,

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interprets Escobar differently. On this record, a reasonable trier of fact could conclude that Defendant's actions meet the Escobar requirements for falsity. In the Federal Stafford Loan School Certification form, Defendant specifically represented that the student applying for federal financial aid is an "eligible borrower" and is "accepted for enrollment in an eligible program." Because Defendant failed to disclose its noncompliance with the incentive compensation ban, those representations could be considered "misleading half-truths." That is sufficient evidence to create a genuine issue of material fact and, therefore, to defeat summary judgment.

C. Materiality

Under the False Claims Act, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). In Hendow, we held that the relators had alleged adequately that the University of Phoenix "engaged in statements or courses of conduct that were material to the government's decision with regard to funding." 461 F.3d at 1177. In concluding that the alleged violations of the incentive compensation ban were material, we relied on the fact that the statute, regulation, and program participation agreement all explicitly conditioned payment on compliance with the incentive compensation ban. Id. We did not explicitly consider any other factors in determining that the relators properly pleaded the materiality of the university's violations. Id. We noted, with regard to materiality, that "the question is merely whether the false certification . . . was relevant to the government's decision to confer a benefit." Id. at 1173. In Escobar, the Supreme Court elaborated on what can and cannot establish materiality in the context of the False Claims Act. The Court clarified that "[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry." Escobar, 136 S. Ct. at 2001 (emphases added). Therefore, "even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability." Id. at 1996. Instead, the Court explained, "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," meaning the government. Id. at 2002 (internal quotation marks and brackets omitted).

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The Supreme Court then laid out three scenarios that may help courts determine the likely or actual behavior of the government with regard to a given requirement. First, "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." Id. at 2003. Second, the Court explained that, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." Id. (emphasis added). Third, "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." Id. at 2003–04 (emphasis added). The Court further noted that materiality "cannot be found where noncompliance is minor or insubstantial." Id. at 2003. Applying the Escobar standard of materiality to the facts here, we conclude that Defendant has not established as a matter of law that its violations of the incentive compensation ban were immaterial. A reasonable trier of fact could find materiality here because the U.S. Government's payment was conditioned on compliance with the incentive compensation ban, because of the Department's past enforcement activities, and because of the substantial size of the forbidden incentive payments.

C. Plaintiff made every attempt to not be the subject of suit via an FTCA claim a victim of Dr. Morlock's conduct and therefore he is entitled to seek the same relief as other victims –such as himself, a whistle-blower who stood to lose everything, his career that he loved very much. A high price to pay to ensure that the United States' trust responsibility is carried out.

D. Individual Defendants' (Dr. Morlock, Metcalf, Robert Morlock, and CNM) should all be held liable for their false claims act violations as they have threatened the very public policy mandates to protect the tribes vital resource, that is the protection of their most previous and vulnerable. By Defendants reckless acts, they have exposed the United States' treasury to FTCA claims for their illegal activities and retaliatory conduct toward Plaintiff. Apart from such jurisdictional questions, another important consideration for tribes is the extent to

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which they may self-regulate health care services and implement innovative new health care programs on tribal lands while still maintaining the many special federal benefits and protections available to tribes and tribal organizations implementing federal programs under the ISDEAA. These benefits and protections serve to maintain the federal government's trust responsibility to provide for health care to Indian people even as tribes themselves exercise more control over the design and implementation of specific programs and services. They also serve to assist tribes in addressing the chronic resource short- age that still exists throughout Indian Country today as a direct result of historical federal policies dispossessing tribes of resources as well as control over those resources that remained in tribal possession. One important benefit extended to tribal contractors under the ISDEAA is coverage under the Federal Tort Claims Act (FTCA).[46] In the FTCA, the United States waived its immunity[47] and consented to be sued for money damages for injury or loss of property caused by the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment.[48] So long as they are performing services under an ISDEAA contract or compact, the FTCA also covers a tribe's permanent or temporary employees, volunteers, and federal employees assigned to the contract to work for the tribe.[49] Coverage extends to individuals providing health services to the tribal contractor under personal ser- vices contracts in facilities operated under ISDEAA contracts or compacts,[50]and also to tribal employees paid from tribal funds other than those provided through the contract or compact, as long as the services or activities from which the claim arose were performed in carrying out the contract or compact.[51]For covered categories of claims, an FTCA claim against the United States is the exclusive remedy, meaning that any employee or personal services contractor for the tribe, acting within the scope of his or her employment in carrying out an

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[46] 25 U.S.C. § 5321(d) (Supp. IV 2016); 25 U.S.C. §5396(a) (Supp. IV 2016); 25 C.F.R.§ 900.180 (2018); 42 C.F.R. § 137.220 (2017).

[47] See: Geoffrey D. Strommer, Starla K. Roels, & Caroline P. Mayhew, *Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program*, 21 J. Health Care L. & Pol'y 115 ().
Available at: https://digitalcommons.law.umaryland.edu/jhclp/vol21/iss2/2.

[48] 28 U.S.C. § 1346(b)(1) (Supp. IV 2016). Pursuant to the FTCA, as amended by the Federal Employees Liability Reform and Tort Compensation Act, an action against the United States is the exclusive judicial remedy for such claims. 28 U.S.C. § 2679(b)(1) (Supp. IV 2016).

[49] 25 C.F.R. § 900.192 (2018); 25 C.F.R. § 900.206 (2018).

[50] 25 C.F.R. § 900.193 (2018).

[51] 25 C.F.R. § 900.197 (2018).

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ISDEAA contract, will be shielded from liability by the FTCA.[52] FTCA cover- age was extended to tribes under the ISDEAA because Congress recognized that the diversion of program funds to purchase liability insurance led to a decrease in funding for direct services, putting contracting tribes at a disadvantage and contravening the federal trust responsibility.[53] To state a claim against the Individual Defendants in their personal capacities, the Plaintiffs must show that the individual employees "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1); see Stoner, 502 F.3d at 1124. A relator in an FCA action need not identify representative examples of false claims to support every allegation. Ebeid, 616 at 998. The use of representative examples simply represents one means of meeting the pleading obligation. Id. It is sufficient to allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that false claims actually were submitted. Id.; see ***United States v. IASIS Healthcare LLC***, 2016 WL 6610675, at *5 (D. Ariz. Nov. 9, 2016).

V. CONCLUSION

For the aforementioned reasons, the Relator respectfully request this Court deny Defendants' motion for summary judgment.

DATED this 8th day of July 2019.

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[52] ''25 C.F.R. § 900.190 (2018); 25 C.F.R. § 900.204 (2018). FTCA coverage does not extend to: (1) claims against most subcontractors; (2) claims for injuries covered by workmen's compensation; (3) breach of contract (as opposed to tort) claims; or (4) claims resulting from activities performed by an employee that are outside the scope of employment. 25 C.F.R. § 900.183 (2018).

[53] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-00-169, FEDERAL TORT CLAIMS ACT: ISSUES AFFECTING COVERAGE FOR TRIBAL SELF-DETERMINATION CONTRACTS 6 (2000), https://www.gao.gov/new.items/rc00169.pdf.