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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JASON MATYASCIK,)	
)	
Plaintiff,)	
)	
v.)	
)	
ARCTIC SLOPE NATIVE)	
ASSOCIATION, LTD. d/b/a SAMUEL)	
SIMMONDS MEMORIAL HOSPITAL,)	Case No. 2:19-cv-00002-HRH
)	
Defendant.)	
)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
[Fed. R. Civ. P. 12(b)(1)]

Defendant Arctic Slope Native Association, Ltd. (“ASNA”) moves to dismiss this action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. ASNA is considered an Indian tribe by federal statute, and is a P.L. 93-638 inter-tribal consortium of federally-recognized Indian tribes protected by tribal sovereign

immunity.¹ As this Court recently explained, “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers,” which “extends to tribal governing bodies and to tribal agencies or entities” including organizations like ASNA that are “created by more than one tribe.”² Tribal sovereign immunity deprives a court of subject matter jurisdiction over an action, and protects a tribal entity not only from judgment but from the burdens of defending itself in litigation.

Plaintiff’s claims should also not be heard because ASNA is protected from tort claims under the Federal Tort Claims Act. Therefore, ASNA respectfully requests the Court dismiss this action in its entirety.

I. BACKGROUND

ASNA employed plaintiff Dr. Jason Matyascik as a physician at Samuel Simmonds Memorial Hospital in Utqiagvik, Alaska.³ His last employment contract with ASNA was

¹ 25 U.S.C. § 5381(b) (defining “Indian tribe” to include a P.L. 93-638 inter-tribal consortium); *see White v. Univ. of Cal.*, 765 F.3d 1010, 1023-24 (9th Cir. 2014); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *cf. Douglas Indian Ass’n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1176 (Alaska 2017) (“[F]ederally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court.” (citing *Atkinson v. Haldane*, 569 P.2d 151, 162-63 (Alaska 1977))); *see also Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (tribal sovereign immunity is properly raised in a 12(b)(1) motion to dismiss).

² *Barron v. Alaska Native Tribal Health Consortium*, No. 3:18-cv-00118-SLG, 2019 WL 80889, at *3 (D. Alaska Jan. 2, 2019) (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)).

³ *Affidavit of Marie Carroll*, May 16, 2019 at 5 ¶ 10 (*Carroll Aff.*). The Court can consider materials beyond the complaint in the Rule 12(b)(1) context without converting the motion

for a two-year term, between June 1, 2016 and May 30, 2018.⁴ Several weeks before the end of their employment relationship, the parties unsuccessfully attempted to negotiate a new contract.⁵ Plaintiff subsequently filed this suit, in which he seeks damages for breach of his expired employment contract, violations of the Alaska Uniform Residential Landlord Tenant Act (“AURLTA”) related to employee housing provided to plaintiff, conversion of his personal belongings that remained on ASNA property following the end of his employment term, violation of the Consolidated Omnibus Reconciliation Act of 1985 (“COBRA”)⁶ for failure to put him on notice of his health insurance election option, and breach of the covenant of good faith and fair dealing related to his expired employment contract.⁷

ASNA is a tribal organization established “for the express purpose of assisting in the development, protection and implementation of all rights vested in Alaska Natives, Alaska Native villages, Alaska Native groups or Alaska Native regions....”⁸ ASNA is entirely managed and controlled by the elected Tribal Councils of the eight federally-

to dismiss to a motion for summary judgment. *E.g., Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

⁴ *Carroll Aff.* at 5 ¶ 10.

⁵ *Id.*

⁶ Incorporated into the Employee Retirement Income Security Act (“ERISA”) at Subtitle I, Subchapter B, Part 6, 29 U.S.C. §§ 1161-1169.

⁷ *Complaint* at 4-5 ¶¶ 24-45.

⁸ *Carroll Aff.*, Ex. 4 at 1 Art. III (Articles of Incorporation).

recognized Tribes of the Arctic Slope Region, specifically the Alaska Native Villages of Anaktuvuk Pass, Atkasuk, Barrow, Kaktovik, Nuiqsut, Point Lay, Point Hope, and Wainwright. ASNA's Board of Directors has eight Village Directors, one elected by each Tribal Council of the represented Tribes, and one Director At-Large elected by the other Directors.⁹ ASNA offers health services to the residents of several Arctic Slope Region communities, and operates the Samuel Simmonds Memorial Hospital in Utqiagvik.¹⁰ It carries out these actions pursuant to, *inter alia*, the Act of November 2, 1921, 25 U.S.C. § 13 (the Snyder Act); Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 5301-5423, P.L. 93-638; the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. §§ 1601-1685, P.L. 94-437, as amended; and the Alaska Tribal Health Compact.¹¹

II. PROCEDURAL HISTORY

Plaintiff originally filed his complaint in the Utqiagvik Superior Court. On May 9, 2019, ASNA removed the case to this Court on three grounds establishing the Court's jurisdiction: (1) The Employee Retirement Income Act of 1974 ("ERISA") and the Federal Tort Claims Act ("FTCA") present federal questions;¹² (2) this lawsuit is in the nature of

⁹ *Id.*, Ex. 3 at 2-3 ¶ 3.2 (Corporate Bylaws).

¹⁰ *Id.* at 2-3 ¶ 4.

¹¹ *Id.* at 2-3 ¶¶ 3, 5, Ex. 2 (Alaska Tribal Health Compact).

¹² 28 U.S.C. § 1441(a); *see, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 221 (2004) ("Congress enacted ERISA to . . . [inter alia] provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." (citation and internal quotation marks omitted));

an action brought against the United States because of ASNA's unique role as a federal contractor carrying out federal health care programs for Alaska Natives and American Indians;¹³ and (3) diversity of citizenship.¹⁴

III. STANDARD

This motion is filed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. On a Rule 12(b)(1) motion, the court may go beyond the allegations of the complaint and consider facts presented to determine its jurisdiction without converting the motion to a Rule 56 summary judgment motion.¹⁵ In doing so, “[t]he court need not presume the truthfulness of the plaintiff’s allegations.”¹⁶ Plaintiff has

Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011) (“The FTCA vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees.” (citation and internal quotation marks omitted)).

¹³ 28 U.S.C. § 1442(a); 25 U.S.C. § 5321(d); *see, e.g., Barron v. Alaska Native Tribal Health Consortium*, No. 3:18-cv-00118-SLG, 2019 WL 80889, at *5 (D. Alaska Jan. 2, 2019) (holding that the Alaska Native Tribal Health Consortium, another tribal health consortium similar to ASNA is “a federal contractor and as such the Court has jurisdiction pursuant to 28 U.S.C. § 1442(a)”).

¹⁴ 28 U.S.C. § 1441(b).

¹⁵ *E.g., Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see also Douglas Indian Ass’n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1181 (Alaska 2017) (“Central Council properly filed a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Once the issue of the superior court’s jurisdiction was raised, the court was then required to determine whether it had subject matter jurisdiction before it could allow further litigation to proceed—regardless of whether the facts supporting jurisdiction were alleged in the complaint or established in other pleadings.” (citations omitted)).

¹⁶ *Safe Air for Everyone*, 373 F.3d at 1039.

the burden to prove jurisdiction.¹⁷ Specifically, “[i]n the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, ‘the party asserting subject matter jurisdiction has the burden of proving its existence,’ i.e. that immunity does not bar the suit.”¹⁸

IV. ARGUMENT

A. ASNA is Protected by Tribal Sovereign Immunity. Plaintiff’s claims against ASNA are barred for lack of subject matter jurisdiction and must be dismissed under Rule 12(b)(1). ASNA is a consortium of federally-recognized Indian tribes and, as noted above, provides health care and other services to Alaska Natives, American Indians, and other eligible individuals pursuant to the ISDEAA, IHCA and Alaska Tribal Health Compact. As such, ASNA is protected by tribal sovereign immunity. Dismissal under Civil Rule 12(b)(1) is therefore appropriate.¹⁹

¹⁷ *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

¹⁸ *Id.* (quoting *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013)).

¹⁹ See *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188-89 (9th Cir. 1998) (citations omitted) (holding that an entity comprised of representatives from a number of tribes which provides health care services to those tribes “was organized to control a collective enterprise” and was therefore entitled to sovereign immunity); *Douglas Indian Ass’n*, 403 P.3d at 1178 (“[W]hen a tribal defendant invokes sovereign immunity in an appropriate manner and the tribe is entitled to such immunity, our courts *may not exercise jurisdiction.*” (emphasis in original) (citations and quotation marks omitted)).

ASNA's immunity derives from its status as a P.L. 93-638 tribal organization. ASNA possesses "the rights and responsibilities" of an Indian tribe.²⁰ These rights include sovereign immunity from unconsented suit; indeed, the "common-law immunity from suit traditionally enjoyed by sovereign powers" is "[a]mong the core aspects of sovereignty that tribes possess."²¹ Tribal sovereign immunity is jurisdictional,²² its recognition is non-discretionary, and it bars suit against a tribe "irrespective of the merits" of the claims against that tribe.²³ Furthermore, tribal sovereign immunity protects ASNA not only against judgment, but provides immunity from the burdens of litigation:

²⁰ 25 U.S.C. § 5381(b).

²¹ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Pink*, 157 F.3d at 1188-89; *see also Douglas Indian Ass'n*, 403 P.3d at 1176 ("Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has authorized the suit or the tribe has waived its immunity. (citations and internal quotations omitted)); *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011) ("Because Ivanof Bay is a federally recognized tribe, it is entitled to sovereign immunity [and is] immune from suit in state court." (citation omitted)).

²² *Miller v. Wright*, 705 F.3d 919, 927 (9th Cir. 2013).

²³ *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418-19 (9th Cir. 1989) (citations omitted); *see also Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172-73 (1977); *Barron v. Alaska Native Tribal Health Consortium*, No. 3:18-cv-00118-SLG, 2019 WL 80889, at *5 (D. Alaska Jan. 2, 2019); *Douglas Indian Ass'n*, 403 P.3d at 1176 ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States. We have long held that federally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court." (citations and quotation marks omitted)); *Armijo v. Pueblo of Laguna*, 247 P.3d 1119, 1123 (N.M. Ct. App. 2010) ("[Tribal] sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation.... Rather [,] it presents a pure jurisdictional question." (citation omitted)).

“[T]ribal sovereign immunity ‘is an immunity from suit rather than a mere defense to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial.’”²⁴

Tribal sovereign immunity can only be waived by express waiver or abrogation by Congress.²⁵ A waiver of tribal sovereign immunity or Congressional abrogation may not be implied, “but must instead be unequivocally expressed.”²⁶ ASNA has not waived its tribal sovereign immunity, nor has its immunity been abrogated by Congress to allow this suit to proceed.

1. ASNA Has Tribal Sovereign Immunity as an Arm of its Member Tribes.

Federal law extends tribal sovereign immunity to tribal organizations and inter-tribal consortia such as ASNA that act “as an arm” of a tribe or tribes.²⁷ Sovereign immunity

²⁴ *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (quoting *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007)).

²⁵ *Bay Mills Indian Cmty.*, 572 U.S. at 788-89 (citations omitted); *Kiowa Tribe*, 523 U.S. at 754 (citations omitted); *Puyallup Tribe*, 433 U.S. at 172-73.

²⁶ *Santa Clara Pueblo*, 436 U.S. at 58-59 (citation omitted).

²⁷ *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (“Tribal sovereign immunity . . . extends to arms of the tribe acting on behalf of the tribe.... In determining whether an entity is entitled to sovereign immunity as an “arm of the tribe,” we examine several factors including: “(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.”) (first citing *Miller v. Wright*, 705 F.3d 919, 923–24 (9th Cir. 2013); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Bay Mills Indian Cmty.*, 572 U.S. at 790; then quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)).

extends to tribally-controlled entities that perform quintessentially governmental functions or promote self-governance.²⁸ Notably, the ISDEAA expressly states: “In any case in which an Indian tribe has authorized...an inter-tribal consortium or a tribal organization... to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf... [the] inter-tribal consortium[] or tribal organization... shall have the *rights* and responsibilities of the authorizing Indian tribe.”²⁹ Most recently, in *Barron v. Alaska Native Tribal Health Consortium* (“ANTHC”), this Court held that ANTHC, a tribal consortium and Alaska nonprofit corporation similar to ASNA, is immune from suit. Focusing on ANTHC’s role in carrying out tribal objectives, the Court considered how ANTHC “enable[s] the Tribe[s] to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe[s’] government[s] and governmental services and programs.”³⁰ This Court’s finding aligns with *Pink v. Modoc*

²⁸ *E.g.*, *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1074, 1080 (9th Cir. 2001) (tribal housing authority functioned as “arm of the tribal government” when it provided safe and affordable housing via funding received under the Native American Housing Assistance and Self-Determination Act, which, like ISDEAA and IHCA, is “particularly concerned with the right of Indian self-determination and tribal self-governance”) (internal quotations and citation omitted); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188-89 (9th Cir. 1998); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006).

²⁹ 25 U.S.C. § 5381(b) (emphasis added).

³⁰ No. 3:18-cv-00118-SLG, 2019 WL 80889, at *5 (D. Alaska Jan. 2, 2019) (quoting *Allen*, 464 F.3d at 1046-47). The Court also considered the *White* factors in determining that ANTHC has tribal sovereign immunity as “an arm of Alaska’s tribes” based on its creation under federal law in order to promote tribal self-sufficiency; receipt of federal funds to conduct activities for the benefit of tribal members; formation by Alaska Native tribes; provision of health care services under self-determination and self-governance agreements

Indian Health Project, Inc., in which the Ninth Circuit determined that a California nonprofit corporation similar to ASNA, providing health care services to tribal members and organized as a P.L. 93-638 tribal organization pursuant to ISDEAA, “served as an arm of the sovereign tribes, acting as more than a mere business” and had been “organized to control a collective enterprise” of its constituent tribes, which therefore entitled it to sovereign immunity from unconsented suit.³¹ The Ninth Circuit explained that the purpose of ISDEAA is “to aid tribal entities in their efforts to conduct their own affairs and economic activities with as much autonomy as possible.”³²

The State of Alaska courts also recognize that tribal health organizations possess sovereign immunity. In fact, the Alaska Superior Court previously dismissed an employment case against ASNA on sovereign immunity grounds in *Bekkum v. Samuel Simmonds Memorial Hospital*.³³ Additionally, in *Beversdorf v. Tanana Chiefs Conference*,

with IHS; board structure, which provides tribal representatives with control of ANTHC’s management; and purpose that is essential to tribal sovereignty. In these respects, this Court found that ANTHC fulfilled the five non-exclusive factors considered by the Ninth Circuit under *White*, 765 F.3d at 1025.

³¹ 157 F.3d at 1188.

³² *Id.* at 1188-89 (citation omitted); *see also Montella v. Chugachmiut*, 283 F. Supp. 3d 774, 778-79 (D. Alaska 2017) (extending tribal sovereign immunity to another tribal health consortium because “while [Chugachmiut] itself is not a tribe, it is nonetheless exempt under Title VII because it is a consortium organization controlled by its member tribes and operated to benefit those tribes”); Ex. A, Order (Summary Judgment), *Barnes v. Bristol Bay Area Health Corp.*, No. A92-459 CI (D. Alaska Apr. 22, 1993).

³³ Ex. B, Order on Motion to Dismiss [Civil Rule 12(b)(1)], *Bekkum v. Samuel Simmonds Mem’l Hosp.*, No. 2BA-15-97 CI (Alaska Super. Ct. June 19, 2015).

the Superior Court dismissed an employment contract claim against Tanana Chiefs Conference (“TCC”), another P.L. 93-638 tribal health organization, based on sovereign immunity.³⁴ TCC provides ISDEAA services to its forty-two member tribes in Interior Alaska and, like ASNA, is a signatory to the Alaska Tribal Health Compact and a member of the state-wide Alaska Native Tribal Health Consortium.

ASNA is an inter-tribal consortium and is legally indistinguishable with respect to tribal sovereign immunity from ANTHC in *Barron*, from TCC in *Beversdorf*, from Chugachmiut in *Montella*, from the Bristol Bay Area Health Corporation in *Barnes*, and from the Modoc Indian Health Project in *Pink*. ASNA is a consortium of tribes from across the Arctic Slope region formed expressly to carry out essential governmental functions of those constituent tribes, including the provision of health care and other social services to tribal members.³⁵ ASNA receives and manages its constituent tribes’ federal health care program funds; its Board of Directors is comprised of elected or appointed members from its constituent tribes; and it operates the Samuel Simmonds Memorial Hospital under the authority of a P.L. 93-638 Title V Agreement and the Alaska Tribal Health Compact.³⁶ For this exact reason, the Alaska Superior Court found tribal sovereign immunity barred an employment action against ASNA in *Bekkum*.

³⁴ Ex. C, Order Regarding Motion to Dismiss, *Beversdorf v. Tanana Chiefs Conference, Inc.*, No. 4FA-17-01911 CI (Alaska Super. Ct. Sept. 27, 2017).

³⁵ *Carroll Aff.* at 2 ¶ 3.

³⁶ *Id.* at 2-4 ¶¶ 4-6.

Sovereign immunity protects tribes and tribal organizations not only against judgment, but from litigation itself.³⁷ The costs of litigation and discovery “could be financially ruinous for many tribes as funds are shifted from critical programs and rural village economies to urban lawyers in Anchorage, Fairbanks, or Juneau” and “protecting tribal assets has long been held crucial to the advancement of the federal policies advanced by immunity.”³⁸ Responding to this suit has already required ASNA to expend resources that it could have otherwise used to provide services to tribal members.³⁹ ASNA’s tribal sovereign immunity therefore bars plaintiff from bringing this suit in the first instance.

Simply put, ASNA is a tribal organization “controlled[] [and] sanctioned...by [its member Tribes’] governing bod[ies],” formed for the express purpose of providing health care on behalf of its member tribes to their tribal members and ensuring “maximum participation of Indians in all phases of its activities.”⁴⁰ These member tribes’ sovereign

³⁷ *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (quoting *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007)); *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011).

³⁸ *Douglas Indian Ass’n v. Cent. Council of Tlingit and Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1179 (Alaska 2017) (citation omitted); see also *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995) (allowing a suit against a tribe to go to trial would render tribal sovereign immunity “meaningless”); *Price v. Unisea, Inc.*, 289 P.3d 914, 922-23 (Alaska 2012) (disallowing discovery related to claim that sovereign immunity had been waived because information that may have been revealed would not have “materially change[d] the court’s analysis”).

³⁹ *Carroll Aff.* at 4 ¶ 7.

⁴⁰ 25 U.S.C. § 5304(l) (ISDEAA definition of “tribal organizations”).

immunity extends to ASNA, and therefore this matter must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

2. ASNA Has Not Waived and Congress Has Not Abrogated Its Tribal Sovereign Immunity. Plaintiff has not alleged that ASNA or any of its member tribes have waived their tribal sovereign immunity, nor that Congress has abrogated ASNA's tribal sovereign immunity with respect to any of plaintiff's claims. This is for good reason, as neither has occurred.

It is ASNA's policy not to waive its sovereign immunity as to employment claims by current or former employees.⁴¹ Indeed, ASNA's tribal sovereign immunity is so important to its mission to be self-governing and provide the best health care services to its members possible that it is written into the very first page of its organizational bylaws:

1.4 Sovereign Immunity. The Corporation is a Tribal Organization within the meaning of 25 U.S.C. § [5304(I)]. The Corporation carries out federal health care programs and other programs for Alaska Natives, American Indians and other eligible individuals under authority of Title V of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § [5381] *et seq.*, as amended, as authorized by the Snyder Act of 1921, 25 U.S.C. § 13, and by the Indian Health Care Improvement Act, 25 U.S.C. § 1601, as amended, and as authorized and subject to the resolutions of the elected Tribal Councils of the sovereign, federally-recognized Tribes of the Arctic Slope Region. The Corporation is an arm of its member Tribes, is organized to carry out its member Tribes' essential governmental programs and goals, and is entitled to and shall in all matters assert and be protected by the sovereign immunity of its member Tribes from suit, judgment or execution in any forum or jurisdiction. The Board alone may, by clear and unequivocal resolution, waive the Corporation's sovereign immunity. Any

⁴¹ *Carroll Aff.* at 5-6 ¶ 11.

such waiver shall be strictly and narrowly construed to accomplish its stated purpose, and shall extend no further than necessary to do so.⁴²

The employment agreement between ASNA and plaintiff itself even specified that ASNA retained its full right to sovereign immunity, noting that

Nothing in this Agreement may be construed to limit or in any way prejudice ASNA's protections under the Federal Tort Claims Act and other protections, privileges or immunities applicable to ASNA, including sovereign immunity and all applicable federal and common law protection from suit.⁴³

ASNA's tribal sovereign immunity is essential to its operations; it allows ASNA to focus on providing the highest quality health care services possible to its members instead of wasting time and financial resources disputing matters in court. Plaintiff therefore does not and cannot demonstrate that ASNA waived its sovereign immunity, expressly or otherwise.

Plaintiff also does not and cannot allege that Congress abrogated ASNA's tribal sovereign immunity with respect to his claim related to the continuation of health care coverage. While ERISA may apply to tribes, it does not apply to ASNA, because ASNA provides health care to its employees under the Federal Employees Health Benefits Act ("FEHB").⁴⁴ Nowhere within the FEHB does Congress "unequivocally express" that the

⁴² *Id.*, Ex. 3 at 1 ¶ 1.4.

⁴³ *Id.*, Ex. 5 at 9 ¶ 13.2 (Physician Employment Agreement) (emphasis added).

⁴⁴ *Id.* at 6 ¶ 12.

law was intended to abrogate tribal sovereign immunity.⁴⁵ (As an aside, ASNA fully complied with the FEHB at the conclusion of plaintiff's contract.⁴⁶) Nor could any of the state laws under which plaintiff makes his remaining claims contain the express Congressional abrogation necessary to allow suit against ASNA. Plaintiff has therefore failed to meet his burden of establishing jurisdiction.

B. Plaintiff's Tort Claims are Barred by the Federal Tort Claims Act.

Plaintiff's Complaint asserts a claim for conversion, which may not be brought against ASNA. ASNA is deemed to be an agency of the Public Health Service and its officers and employees are deemed to be federal employees for purposes of tort liability, and are collectively covered by the FTCA when providing services under ASNA's ISDEAA Compact and Funding Agreements with the United States.⁴⁷ The FTCA is a limited waiver of the Government's sovereign immunity from suit. To the extent plaintiff asserts tort claims against ASNA or its officers and employees, those claims fall within the exclusive jurisdiction of the United States District Courts and may only be brought following proper

⁴⁵ See 5 U.S.C. §§ 8901-8914.

⁴⁶ *Carroll Aff.* at 6 ¶ 12; see also *id.*, Ex. 6 (Temporary Continuation of Coverage Notice Letter).

⁴⁷ See 25 U.S.C. § 5321(d); *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1003 (9th Cir. 2014) (Congress extended the FTCA to claims "resulting from the performance of functions ... under a contract... authorized by the [ISDEAA]" (quoting 25 U.S.C. § 5321 (note))).

exhaustion of administrative remedies:⁴⁸ “The requirement of an administrative claim is jurisdictional. Because the requirement is jurisdictional, it must be strictly adhered to.”⁴⁹ As plaintiff has not submitted his tort claims through the proper FTCA process, he cannot maintain them here.

All of plaintiff’s tort claims, including his claim for the conversion of his personal belongings that were left on ASNA property, result from the performance of ASNA’s Compact and Funding Agreements with the United States.⁵⁰ This includes its management and operation of the ASNA-owned quarters where plaintiff resided while working for ASNA pursuant to the Compact, which is governed by federal law and policy, rather than AURLTA or any other state law.⁵¹ As noted above, plaintiff’s employment agreement with

⁴⁸ 28 U.S.C. §§ 1346(b)(1), 2675(a); *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011) (“The FTCA waives the sovereign immunity of the United States for actions in tort and vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees. However, the Act further provides that before an individual can file an action against the United States in district court, [he] must seek an administrative resolution of [his] claim.” (internal quotation marks, citations, and emphasis omitted)); *see also* *McNeil v. United States*, 508 U.S. 106, 113 (1993) (exhaustion of administrative remedies required even after commencement of FTCA suit, as “strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law” (quotation marks and citation omitted)).

⁴⁹ *Chertoff*, 656 F.3d at 855.

⁵⁰ *Carroll Aff.* at 2-3 ¶¶ 3-5.

⁵¹ *Carroll Aff.*, Ex. 7 at §§ 3.3.2.9, 3.3.2.20 (Funding Agreement); 5 U.S.C. § 5911(b) (establishing IHS authority to provide quarters to employees); 25 U.S.C. § 1638a (describing a tribal organization’s authority to set rental rates for federally-owned quarters provided to employees); IHS Manual, Part 5, Chapter 13 (Quarters Management), <https://www.ihs.gov/ihs/pc/part-5/p5c13/>; IHS, Office of Environmental Health and

ASNA expressly retained all protections afforded to ASNA under the FTCA.⁵² Plaintiff's exclusive remedy for his tort claims are provided by the FTCA, and accordingly all tort claims must be dismissed on this basis.

C. Plaintiff's claims are without merit. Plaintiff's claims are meritless. For example, plaintiff alleges contract claims even though he never entered into a new employment contract with ASNA.⁵³ Moreover, when the employment relationship ended, ASNA provided plaintiff with timely notice of his right to elect Temporary Continuation of Coverage under the FEHB in compliance with the applicable law.⁵⁴ While the merits are not material to the motion at bar, they underscore the need for dismissal. Plaintiff has not met his burden of establishing jurisdiction, and ASNA therefore should not have to spend time or expense engaging in this litigation.

V. CONCLUSION

For the foregoing reasons, ASNA respectfully requests that this action be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

Engineering, Technical Handbook, Part 36 (Quarters Management), <https://www.ihs.gov/oehe/handbook/volume4/>.

⁵² *Id.*, Ex. 5 at 9 ¶ 13.2.

⁵³ *Id.* at 5 ¶ 10.

⁵⁴ *Id.* at Ex. 6.

DATED May 16, 2019, at Anchorage, Alaska.

SONOSKY, CHAMBERS, SACHSE,
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Certificate of Service

I certify that on May 16, 2019 a copy of the
foregoing document was served via U.S. Mail:

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By: /s/ Rebecca A. Patterson

Rebecca A. Patterson