THE HONORABLE ROBERT S. LASNIK

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

RAJU A.T. DAHLSTROM, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendants.**	**No. 2:16-cv-01874-RSL** **PLAINTIFF RAJU A.T. DAHLSTROM'S OPPOSITION TO DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT** **NOTED ON MOTION CALENDAR: July 8, 2019** **Request for Oral Argument**

WHAT IS A WHISTLE BLOWER TO DO?[1]

"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."[2]

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[1] "…The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right. The Tribe suggests that the proper mode of redress is for the Lundgrens—who purchased their property long before the Tribe came into the picture—to negotiate with the Tribe. Although the parties got off on the wrong foot here, the Tribe insists that negotiations would run more smoothly if the Lundgrens "understood [its] immunity from suit." Tr. of Oral Arg. 60. In other words, once the Court makes clear that the Lundgrens ultimately have no recourse, the parties can begin working toward a sensible settlement. That, in my mind at least, is not a meaningful remedy." UPPER SKAGIT INDIAN TRIBE, PETITIONER v. SHARLINE LUNDGREN, ET EL., ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON [May 21, 2018] Cite as: 584 U. S. ____ (2018).

[2] 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

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I. INTRODUCTION AND RELIEF REQUESTED[3]

Plaintiff (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 to Dismiss[4] (Dkt. # 98). The United States of America 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. 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, 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**,[5] has abandoned for four years (July 2014 through October 2018)[6] its trust responsibilities to protect the children of the Sauk-Suiattle Indian Tribe.

> "In permanently reauthorizing the Indian Health Care Improvement Act in 2010,[7] Congress cited the federal government's need to fulfill its "special trust responsibilities and legal obligations to

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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.

[3] All names identified Defendants in this instant action revert to the UNITED STATES HAS DEFENDANT.

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

[5] 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.

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

[7] 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)).

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> Indians"[8] 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."[9] 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."[10]

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***[11] overly generalized the State's traditional role in Indian country as a prophetic warning as follows:

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

[9] 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)).

[10] 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 . . . .").

[11] 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

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> '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 as they deem appropriate, and to implement solutions that respond to the specific needs of their citizens and communities.' *Id*.[12]

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 Dr. 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 FTCA 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.[13]

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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.

[12] 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.

[13] 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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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. Waszak, 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.

FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA): A plaintiff injured by a defendant's wrongful act may file a tort lawsuit to recover money from that defendant. To name a particularly familiar example, a person who negligently causes a vehicular collision may be liable to the victim of that crash. By forcing people who wrongfully injure others to pay money to their victims, the tort system serves at least two functions: (1) deterring people from injuring others and (2) compensating those who are injured. Employees and officers of the federal government occasionally commit torts just like other members of the general public. For a substantial portion of this nation's history, however, plaintiffs injured by the tortious acts of a federal officer or employee were barred from filing lawsuits against the United States by "sovereign immunity"—a legal doctrine that ordinarily prohibits private citizens from haling a sovereign state into court without its consent. Until the mid-20th century, a tort victim could obtain compensation from the United States only by persuading Congress to pass a private bill compensating him for his loss. Congress, deeming this state of affairs unacceptable, enacted the Federal Tort Claims Act (FTCA), which authorizes plaintiffs to obtain compensation from the United States for the torts of its employees. However, subjecting the federal government to tort liability not only creates a financial cost to the United States, it also creates a risk that government officials may inappropriately base their decisions not on socially desirable policy objectives, but rather on the desire to reduce the government's exposure to monetary damages. In an attempt to mitigate these potential negative effects of abrogating the government's immunity from liability and litigation, the FTCA limits the circumstances in which a plaintiff may pursue a tort lawsuit against the United States. For example, the FTCA contains several exceptions that categorically bar plaintiffs from recovering tort damages in certain categories of cases. Federal law also restricts the types and amount of damages a victorious plaintiff may recover in an FTCA suit. Additionally, a plaintiff may not initiate an FTCA lawsuit unless he has timely complied with a series of procedural requirements, such as providing the government an initial opportunity to evaluate the plaintiff's claim and decide whether to settle it before the case proceeds to federal court. Since Congress first enacted the FTCA, the federal courts have developed a robust body of judicial precedent interpreting the statute's contours. In recent years, however, the Supreme Court has expressed reluctance to reconsider its long-standing FTCA precedents, thereby leaving the task of further developing the FTCA to Congress. Some Members of Congress have accordingly proposed legislation to modify

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the FTCA in various respects, such as by broadening the circumstances in which a plaintiff may hold the United States liable for torts committed by government employees.[14]

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:

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

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[14] The Federal Tort Claims Act (FTCA): A Legal Overview, May 21, 2019. Congressional Research Service. R45732..

[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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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.

STATEMENT OF THE CASE

Federal Benefits and Protections for Tribal Health Programs Apart from such jurisdictional questions, another important consideration for tribes is the extent to 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.[24] 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 shortage 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).** [25] In the FTCA, the United States waived its immunity 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.[26] 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.[27] Coverage extends to individuals providing health services to the tribal contractor under personal services contracts in facilities operated under ISDEAA contracts or compacts,[28] 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.[29] 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 ISDEAA contract, will be shielded from liability by the FTCA.[30] FTCA coverage 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

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[24] See, e.g., Starla K. Roels & Liz Malerba, New Opportunities for Innovative Healthcare Partnerships with Indian Tribes and Tribal Organizations, HEALTH LAWYER, Oct. 2015, at 25–26, 29.

[25] 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).

[26] 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).

[27] 25 C.F.R. § 900.192 (2018); 25 C.F.R. § 900.206 (2018).

[28] 25 C.F.R. § 900.193 (2018).

[29] 25 C.F.R. § 900.197 (2018).

[30] 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).

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responsibility.[31] Other provisions applicable to tribal health care programs operated under the ISDEAA are specifically intended to supplement inadequate IHS funding by leveraging or providing access to other federal or private insurance funding. For example, tribal health programs operating under the ISDEAA are specifically authorized to seek reimbursements for services from Medicare, Medicaid, the Children's Health Insurance Program (CHIP), as well other third-party payors, such as private health insurance companies.[32] Under the authority of the Public Health Service Act, the IHCIA and other federal law and policy, tribal health programs billing for Medicare and Medicaid may collect at what is known as the IHS "encounter rate" (also called the "OMB rate"), which the Department of Health and Human Services publishes in the Federal Register each year, for certain inpatient and outpatient medical services.[33]179 Additionally, section 1905(b) of the Social Security Act provides that the Federal medical assistance percentage (in other words, the cost share paid by the federal government for Medicaid services) "shall be 100 per centum with respect to amounts expended as medical assistance for services which are received through an Indian Health Service facility whether operated by the Indian Health Service or by an Indian tribe or tribal organization[.]"[34] While not a direct benefit to tribal health providers per se, the federal

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[31] 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.

[32] Historically, the ability to collect Medicare and Medicaid depended in large part on provider type, facility type, and the program at issue, and before 1976, tribally operated health programs could not collect reimbursements from Medicare or Medicaid. After 1976, provisions under the Social Security Act and the IHCIA, as amended over several years, generally authorized certain "facilities of the IHS," whether operated by the IHS or by a tribe or tribal organization, to collect Medicare and Medicaid reimbursements. See, e.g., 42 U.S.C. §§ 1395qq, 1396j (Supp. IV 2016); 25 U.S.C. §§ 1641, 1642 (Supp. IV 2016). See also INDIAN HEALTH SERV. & HEALTH CARE FIN. ADMIN., MEMORANDUM OF AGREEMENT BETWEEN THE INDIAN HEALTH SERVICE AND THE HEALTH CARE FINANCING ADMINISTRATION (1996), https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TACenter/pdf/memorandum-of-agreement.pdf. [hereinafter 1996 MOA]. The Health Care Financing Administration is now called the "Centers for Medicare and Medicaid Services." H. REP. NO. 108-391, at 312–315 (2003). When the IHCIA was reauthorized in 2010, the new Section 401 of the Act significantly revised the old language regarding authority to collect such payments: Section 401(d) authorizes tribal health programs to elect to "directly bill for, and receive payment for, health care items and services provided by such programs for which payment is made under [Medicare, Medicaid and CHIP] . . . or from any other third party payor." 25 U.S.C. § 1641 (Supp. IV 2016); see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10221(a), 124 Stat. 119, 935–36 (2010), for specific Section 401 textual changes.

[33] 82 Fed. Reg. 5585, 5855 (Jan. 18, 2017). Under Section 1905(l)(2)(B) of the Social Security Act, outpatient health programs or facilities operated by a Tribe or Tribal organization under the ISDEAA are by definition Federally Qualified Health Centers (FQHCs) and thus may instead elect to bill Medicaid as FQHCs if they prefer. 42 U.S.C. § 1396d(l)(2)(B) (Supp. IV 2016); see also 1996 MOA, supra note 178, at 1–3 (affirming that tribal facilities could choose to be designated as an IHS provider, allowing them to collect at the IHS encounter rate for payment of Medicaid services provided to eligible Indian beneficiaries on or after July 11, 1996).

[34] 42 U.S.C. § 1396d(b) (Supp. IV 2016); see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1905(b), 124 Stat. 119, 284 (2010), for relevant amendments pertaining to section 1905(b). 181. Letter from Vikki Wachino, Director, Department of Health and Human Services, Center for Medicare & Medicaid Services, to State Health Officials, SHO #16-002 (Feb. 26, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/sho022616.pdf. A recent change to the Center for Medicare and Medicaid Service's interpretation of section 1905(b) increases that incentive. Id. Previously, CMS interpreted section 1905(b) to exclude services rendered by outside providers through the Purchased/Referred Care (PRC) program administered by the IHS and tribes. Id. In a February 26, 2016 letter to State Health Officials, however, CMS announced that it would update its interpretation of section 1905(b) to extend 100% FMAP to services rendered by a non-IHS or

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> government's promise to reimburse state Medicaid programs for 100% of services provided to IHS beneficiaries through the IHS or a tribal health facility provides an important incentive for states to work with Tribes to maximize the availability of Medicaid services to IHS beneficiaries served by tribal health programs.[35] Another example is access to pharmaceuticals for eligible Indian beneficiaries at a discount from the Federal Supply Schedule (FSS). Section 105(k) of the ISDEAA authorizes Indian tribes and tribal organizations to utilize the FSS for purposes of carrying out ISDEAA contracts and compacts and deems the tribes and tribal organizations to be part of the IHS and their employees to be federal employees for this purpose.[36]182 Section 105(k) specifically includes acquisitions from prime vendors: For purposes of carrying out such contract, grant or agreement [under the ISDEAA], the Secretary shall, at the request of an Indian tribe, enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or under any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.[37]

Plaintiff alleges that he was employed by the Sauk-Suiattle Indian Tribe as the Director of its Health and Human Services Department between April and December 2015. In that role, plaintiff alleges that he notified certain defendants that their scheme to encourage patients to apply for health coverage under the Affordable Care Act constituted illegal double dipping, that he refused to falsify ISDEAA contract documentation, that he lodged complaints regarding the safety and efficacy of the vaccination program offered by the tribal medical clinic, that he reported a fellow medical provider for working outside the scope of her license, and that he complained about violations of health and safety standards related to the lack of sinks in the medical clinics. Plaintiff further alleges that he was threatened with termination if he pursued his vaccine-related investigation and/or made complaints to tribal members or outside agencies. When he persisted, he was placed on paid administrative leave, then terminated.

Plaintiff specifically alleges that his whistle-blowing activities caused his termination.

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non-tribal provider so long as that care is provided pursuant to a care coordination agreement meeting certain requirements. Id. It is up to the IHS or tribal health program to enter into these care coordination agreements, which render the State eligible for 100% FMAP for Medicaid services provided thereunder. Id.

[35] 25 U.S.C. § 5324(k) (Supp. IV 2016); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 102, 108 Stat. 4250, 4255. Section 105(k) is specifically made applicable to Title V compacts and funding agreements by § 516(a) of Title V. Tribal Self–Governance Amendments of 2000, Pub. L. No. 106-260, § 516(a), 114 Stat. 711, 729 (codified as amended at 25 U.S.C. § 5396(a) (Supp. IV 2016)).

[36] 25 U.S.C. § 5324(k) (Supp. IV 2016); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 102, 108 Stat. 4250, 4255. Section 105(k) is specifically made applicable to Title V compacts and funding agreements by § 516(a) of Title V. Tribal Self–Governance Amendments of 2000, Pub. L. No. 106-260, § 516(a), 114 Stat. 711, 729 (codified as amended at 25 U.S.C. § 5396(a) (Supp. IV 2016)).

[37] . § 7, 114 Stat. at 732 (codified as amended at § 25 U.S.C. 5324(k) (Supp. IV 2016) (alteration in original) (emphasis added).

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"In Washington, the general rule is that an employer can discharge an at-will employee for no cause, good cause or even cause morally wrong without fear of liability." ***Ford v. Trendwest Resorts, Inc***., 146 Wn.2d 146, 152 (2002) (internal quotation omitted). "The tort for wrongful discharge in violation of public policy is a narrow exception to the at-will doctrine...To state a cause of action, the plaintiff must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy." ***Becker v. Cmty. Health Sys., Inc***., 184 Wn.2d 252, 258 (2015). In September 2015, the Washington Supreme Court issued three companion cases intending to clarify the formulation of this tort. See ***Rose v. Anderson Hay & Grain Co***., 184 Wn.2d 268 (2015); Becker, 184 Wn.2d 252; ***Rickman v. Premera Blue Cross***, 184 Wn.2d 300 (2015). The court explained that there are four scenarios giving rise to wrongful discharge in violation of public policy claims that can be "easily resolved" under the framework initially articulated in ***Thompson v. St. Regis Paper Co***., 102 Wn.2d 219 (1984). See Rose, 184 Wn.2d at 286–87; Becker, 184 Wn.2d at 258–59. These scenarios, one of which arises "when employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing," do not require much analysis because they implicate clear public policies. Rose, 184 Wn.2d at 286–87 (internal citation omitted); ***Karstetter v. King Cty. Corr. Guild***, 1 Wn. App.2d 822, 832 (2017). *4 Plaintiff has adequately alleged that he engaged in whistle-blowing activities in order to further the public good and that he was terminated for his continuing investigation of and complaints about Dr. Morlock's provision of vaccination services at the tribal medical center and fraud in the provision of contract services under the ISDEAA. The burden now shifts to the defendant to show that plaintiff's whistle-blowing allegations are false or that his dismissal was for other reasons. See ***Rose***, 184 Wn.2d at 287." See, RAJU T. DAHLSTROM, Plaintiff, v. UNITED STATES OF..., Slip Copy (2018). Slip Copy, 2018 WL 3417019. (*Special emphasis added).*

II. SUMMARY OF FACTS

A. Background under FTCA

(**Plaintiff's Participation in Protected Activities**) "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

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

B. FTCA claims

Plaintiff present before this Court is captioned primarily under the FTCA/FCA-framework so as to provide access to Plaintiff's treasure-trove of protected activities while employed by the Sauk-Suiattle Indian Tribe, as his present wrongful termination case as over 100% nexus to his claim for relief under the FTCA for wrongful termination in retaliation for Plaintiff's participation in protected activity, while carrying work under ISDEAA scope of work as HSS Director.[39]

C. Plaintiff's Facts Mandating Trial

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

[39] ***Colbert v. United States***, 785 F.3d 1384, 1390 (11th Cir. 2015) (citing 25 U.S.C. § 5321 note (Civil Action Against Tribe, Tribal Organization, etc., Deemed Action Against United States) ("[A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement.... [A]fter September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.")).

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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.

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) 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:

> "…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

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> 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."[40] *(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.[41]

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-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

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[40] See, **Seminole Tribe of Florida v. Azar**, 376 F. Supp.3d 100 (2019).
[41] Colbert v. U.S., 785 F.3d 1384 (2015)

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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 SSIT Employees 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;[42]

(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;[43]

(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;[44] despite restrictions to the 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)[45] 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;[46] 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

[42] See, Dahlstrom Decl., p. 5., ¶¶ 12-14.
[43] See, Dahlstrom Decl., p. 5, ¶¶ 15-17.
[44] See, Pope Decl., p. 2, R. Morlock Dep., p. 17, *ll.,* 14-15, Ex. 6.
[45] See, Pope Decl., p.3, Tidrington Dep., p. 38, *ll.,* 19-25, Ex. 7.
[46] See, Pope Decl., p. 2, Metcalf Dep., p. 62, *ll.,* 19-22

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recommended halting use of VFC's exposed to wild temperature fluctuations;[47] (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;[48]

(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.[49] Specifically, Dr. Morlock[50] 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,[51] Sena Dailey and Angelina Joseph, SSIT Employees.[52]

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]

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

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

[49] 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.

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

[51] 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.

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

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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 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.[53]

5. ***Alleged payment to Dr. Ryan C. Johnstun & Refusal to Create False Documentation involving ISDEAA -Contract Support Cost (CSC)***[54]

(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[55] 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

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

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

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

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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.[56] 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 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.

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[56] 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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(d) Plaintiff threatened with insubordination for refusing to produce false CSC:[57]

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.[58]

(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.[59]

6. **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. ARGUMENT

A. Standard for Summary Judgment

This Court "view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law." Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 989 (9th Cir. 2016).

In ***Chippewa Cree Tribe of Rocky Boy's Reservation, Montana***, 900 F.3d 1152 (2018), the United States Court of Appeals for the Ninth Circuit ruled:

> "This case is unlike those in which courts are "asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (quoting ****1158*** *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992)). The Americans with Disabilities Act, for example,

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

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

[59] 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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states only that an employee is an "individual employed by an employer." *Id.* (quoting 42 U.S.C. § 12111(4)). ERISA does the same. *See Darden*, 503 U.S. at 323, 112 S.Ct. 1344 (quoting 29 U.S.C. § 1002(6)). In the face of those "circular" descriptions, the Supreme Court has turned to the common-law definition of an employee to determine the statutes' coverage. *Id.* ARRA, in contrast, defines the term "employee" without reference to the verb "employed." *See* § 1553(g)(3)(A), 123 Stat. at 301. As a result, we can apply the statutory definition without resorting to the common law for guidance. The Tribe argues that St. Marks cannot be considered an employee because he was elected. But the Supreme Court has held that "[t]he mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee." *Clackamas,* 538 U.S. at 450, 123 S.Ct. 1673; *cf. Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) ("There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship."). And, in other statutes, Congress has expressly excluded elected officials from employee protections. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 630(f). ("[T]he term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof."); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(f) (same); Fair Labor Standards Act, 29 U.S.C. § 203(e)(2)(C)(ii) (I) (excluding from the definition of "employee" any individual who "holds a public elective office of [a] State, public subdivision, or agency"). Were it obvious that elected officials could never qualify as employees, as the Tribe argues, then Congress would not have needed to specify in those statutes that elected officials were excluded. And the fact that Congress did not exclude elected officials from ARRA even though it did so in other statutes suggests that Congress intended to include them within ARRA's whistleblower protections. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484–85, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996) (comparing two different statutes to conclude that the language in one did not encompass a particular remedy because the inclusion of that remedy in the other demonstrated that Congress "knew how to provide" such a remedy when it so desired).

STATE OF WASHINGTON WRONGFUL TERMINATION

Washington has been an "at-will" employment state since at least 1928. See Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 152, 43 P.3d 1223 (Wash. 2002) (referencing Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 688, 271 P. 878 (1928); see also Prescott v. Puget Sound Bridge & Dredging Co., 40 Wash. 354, 357, 82 P. 606 (1905) (Mount, C.J., dissenting) ("where [an employment] contract is general and for an indefinite time, it is terminable at will.")). According to this doctrine, an employer can discharge an at-will employee for no cause, good cause or even cause morally wrong without fear of liability. See Id., 43 P.3d 1223 (*citing* ***Thompson v. St. Regis Paper Co.***, 102 Wash.2d 219, 226, 685 P.2d 1081 (1984)) (internal quotations omitted). Conversely, an employee has the absolute right to quit his or her employment at-will. *See id.*, 43 P.3d 1223. However, there are three recognized exceptions to that general at-will employment rule: (1) The Statutory Exception (2) The Judicial

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Exception and; (3) The Contractual Exception. Plaintiff's focus remains appropriately with the Judicial Exception despite this Court's invocation of *Jenkins'* holdings.

THE JUDICIAL EXCEPTION: WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

Washington courts have recognized a narrow public policy exception to an employer's right to discharge an employee; this exception is commonly known as "wrongful termination in violation of public policy." *Id.*, 43 P.3d 1223 *(referencing* ***Smith v. Bates Technical Coll.***, 139 Wash.2d 793, 991 P.2d 1135 (2000) (public policy exception to "for-cause" Employees); ***Gardner v. Loomis Armored, Inc.***, 128 Wash.2d 931, 913 P.2d 377 (1996) (discharge of armored truck driver who abandoned post to prevent murder violated public policy)). Under this exception, an employer does not have the right to discharge an employee when the termination would frustrate a clear manifestation of public policy. *Id.*, 43 P.3d 1223. By recognizing this public policy exception, Washington State Supreme Court has expressed its unwillingness to shield an employer's action which otherwise frustrates a clear manifestation of public policy. *See id.* at 154, 43 P.3d 1223. This legal theory is known as a tort. A tort is a civil wrong, other than breach of contract, for which remedies may be obtained. In Washington State, there are typically two ways to prove the tort of wrongful termination in violation of public policy: (1) via the Four-Scenarios Framework; and (2) via the Perritt Framework.

THE FOUR-SCENARIOS FRAMEWORK

In ***Thompson v. St. Regis Paper Co.***, ... [the Washington State Supreme Court] adopted the tort of wrongful discharge in violation of public policy as a narrow exception to the at-will doctrine." ***Martin v. Gonzaga University***, 425 P.3d 837, 842-43, 191 Wn.2d 712 (Wash. 2018) (*citing* ***Thompson***, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984)). "[This tort] has generally been limited to four scenarios: [1] where employees are fired for refusing to commit an illegal act; [2] where employees are fired for performing a public duty or obligation, such as serving jury duty; [3] where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and [4] where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing." *Id.,* 191 Wn.2d 712 (*citing* ***Gardner v. Loomis Armored, Inc.***, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)) (internal citations and quotations marks omitted). "The elements of wrongful termination in violation of public policy were set

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forth in *Thompson* and refined in ***Wilmot [v. Kaiser Aluminum & Chemical Corp.***, 118 Wn.2d 46, 821 P.2d 18 (1991),]" as follows[:] [1] First, ... [the plaintiff] has the burden to show that his discharge may have been motivated by reasons that contravene a clear mandate of public policy ... [;] [2] Second[,] ... [t]he plaintiff [is required] to show that the public-policy-linked conduct was a significant factor in the decision to discharge the worker[:] [a] [t]he plaintiff must first establish a prima facie case by producing evidence that the public-policy-linked conduct was a cause of the firing, and may do so by circumstantial evidence[;] [b] [i]f the plaintiff succeeds in presenting a prima facie case, the burden then shifts to the employer to articulate a legitimate nonpretextual nonretaliatory reason for the discharge ... [;] [c] [i]f the employer articulates such a reason, the burden shifts back to the plaintiff either to show that the reason is pretextual, or by showing that although the employer's stated reason is legitimate, the [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to discharge the worker." ***Martin,*** 425 P.3d at 843, 191 Wn.2d 712 (internal citations and quotation marks omitted).

THE PERRITT FRAMEWORK

"In ***Gardner***, ... [the Washington State Supreme Court] adopted a four-part framework based on a treatise written by Henry Perritt *to resolve a wrongful discharge suit that did not fit neatly into one of those four recognized ...* [*scenarios*]." *Id.*, 191 Wn.2d 712 (*citing Gardner,* 128 Wn.2d at 941, 913 P.2d 377 (*citing* HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991))) (emphasis added). "The Perritt test has four factors:

> (1) The plaintiffs must prove the existence of a clear public policy (the clarity element).
> (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element).
> (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element).
> (4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element)." *Id.* (internal citations and quotation marks omitted).

THE BECKER-ROSE RULE

"[I]n ***Becker* and *Rose***, [the Washington State Supreme Court] ... clarified that the Perritt [F]ramework should not be applied to a claim that falls within ... [the Four-Scenarios Framework] of wrongful discharge in violation of a public policy." *Id.*, 191 Wn.2d 712 (*citing* ***Becker v. Cmty. Health Sys., Inc.***, 184 Wn.2d 252, 258-59, 359 P.3d 746 (2015) ("When

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the plaintiffs case does not fit neatly within one of these scenarios, a more refined analysis may be necessary, and the four-factor Perritt analysis may provide helpful guidance. But such detailed analysis is unnecessary here." (footnote and citation omitted)); ***Rose v. Anderson Hay & Grain Co.***, 184 Wn.2d 268, 277-78, 287, 358 P.3d 1139 (2015) ("We note that in other instances, when the facts do not fit neatly into one of the four above-described categories, a more refined analysis may be necessary. In those circumstances, the courts should look to the four-part Perritt framework for guidance. But that guidance is unnecessary here.")).

WASHINGTON LAW AGAINST DISCRIMINATION AND FRAMEWORK FOR HOLDING INDIVIDUAL EMPLOYEES LIABLE FOR RETALIATION AND WRONGFUL TERMINATION FOR WHISTLEBLOWING

The WLAD (framework) cannot serve its intended purpose without strong anti-retaliation protections, including for whistleblowing employees such as Plaintiff Raju A.T. Dahlstrom: Recognizing the clear and explicit intent of the Legislature, this Court has consistently interpreted the WLAD to provide the broadest possible protection against discrimination. *See, e.g.*, ***State v. Arlene's Flowers, Inc.***, 187 Wn.2d 804, 825, 389 P.3d 543 (2017)[60] ("[A]ll discriminatory acts, including any act 'which directly or indirectly results in any distinction, restriction, or discrimination' [on the basis of protected characteristics] . . . is an unfair practice in violation of the WLAD.") (quoting RCW 49.60.215); ***Blackburn v. State***, 186 Wn.2d 250, 257-59, 375 P.3d 1076 (2016) (emphasizing that the broad language of the WLAD and the compelling public policy interests served by it supported finding a remedy for the race-based discrimination at issue there); ***Marquis***, 130 Wn.2d at 108 ("[A] statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law."), 109 ("[A] plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority.") (citing ***Allison v. Housing Authority of City of Seattle***, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)); ***Kumar v. Gate Gourmet, Inc.***, 180 Wn.2d 481, 491, 325 P.3d 193 (2014) ("Where this court has departed from federal antidiscrimination statute precedent [in analyzing the WLAD] . . . it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do.")

[60] On June 28, 2018, the United States Supreme Court requested the Washington State Supreme Court to review its original decision. ***Also see***: ***State v. Arlene's Flowers, Inc.***, 187 Wn.2d 804, 389 P.3d 543 (2017), ***cert. granted, judgment vacated sub nom Arlene's Flowers v. State***, 138 S. Ct. 2671 (2018).

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& n.14 (collecting cases). The WLAD cannot serve its intended purpose without strong anti-retaliation protections, including for employees. As this Court has noted, "enforcement of this State's antidiscrimination laws depends in large measure on employees' willingness to come forth and file charges or testify in discrimination cases." *Allison*, 118 Wn.2d at 86. In order to encourage individuals to fulfill that crucial role, they must be protected against retaliation. *See, e.g.*, ***Mackay***, 127 Wn.2d at 309 ("Underlying this State's determination to insulate an employee from retaliation is its resolve to eradicate discrimination."). ***Without such protection, "[p]eople will be less likely to oppose discrimination by bringing claims or testifying," undermining the purpose of the WLAD. Allison, 118 Wn.2d at 94.*** See also: *Marquis*, 130 Wn.2d at 112-13. And the Court of Appeals has repeatedly relied on *Marquis* in holding that, as with claims of direct discrimination, an employer-employee relationship is not necessary to sustain a WLAD retaliation claim. *E.g.*, ***Sambasivan v. Kadlec Medical Center***, 184 Wn. App. 567, 591-92, 338 P.3d 860 (2014) (***holding that an independent-contractor plaintiff had a cause of action under the anti-retaliation provision despite the absence of an employer-employee relationship***) (citing ***Marquis***, 130 Wn.2d at 112-13); ***Currier v. Northland Services, Inc.***, 182 Wn. App. 733, 744, 332 P.3d 1006 (2014) ("The broad language of RCW 49.60.210(1) . . . supports the conclusion that the WLAD does not limit [retaliation] claims to those brought by employees against employers.") (citing ***Marquis***, 130 Wn.2d at 100-01), *rev. denied*, 182 Wn.2d 1006 (2015). Thus, ample authority—including the text, structure, and history of the WLAD, and the holdings of this Court and the Court of Appeals—demonstrates that in order for the WLAD to serve its intended purpose, the anti-retaliation provision must effectively protect those—including past, present, or prospective employees—who oppose illegal actions by individual defendants to be held accountable for Plaintiff's wrongful termination.

REQUESTED RELIEF AND CONCLUSION

Plaintiff urges the Court to hold that the alleged conduct of Defendant United States in this case supports a claim against it under the anti-retaliation provision of the tort of wrongful discharge in violation of public policy.

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DATED: 8th day of July 2019

Respectfully submitted,

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