Michael L. Rausch
Evan M.T. Thompson
BROWNING, KALECZYC, BERRY & HOVEN P.C.
Liberty Center, Suite 302
9 Third Street North
Great Falls, MT 59401
Phone: 406.403.0041
Fax: 406.453.1634
E-mail: mike@bkbh.com / evan@bkbh.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

TAMMY WILHITE, Plaintiff, v. PAUL LITTLELIGHT, LANA THREE IRONS, HENRY PRETTY ON TOP, SHANNON BRADLEY, and CARLA CATOLSTER, Defendants.	Case No. CV-19-20-BLG-SPW-TJC **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS RE: RES JUDICATA**

TABLE OF CONTENTS PAGE

TABLE OF AUTHORITIES PAGE

Cases

Other Authorities

Defendants, Paul Littlelight, Lana Three Irons, Henry Pretty On Top, Shannon Bradley, and Carla Catolster (collectively hereinafter "Defendants"), through counsel, having moved this Court to dismiss Plaintiff's Complaint because Plaintiff's claims are precluded by the doctrine of res judicata, hereby submit this Brief in Support of their Motion to Dismiss. As the following Brief demonstrates, Plaintiff's claim should be dismissed because her claim has previously been decided and is barred by res judicata (claim preclusion).

INTRODUCTION

Plaintiff's Complaint in this action ("Wilhite II") represents an end run around this court's dismissal of her identical claim in *Wilhite v. Awe Kualawaache Care Ctr.*, 2018 IER Cases 388820, 2018 WL 5255181, at *1 (D. Mont. Oct. 22, 2018) ("*Wilhite I*"). Plaintiff has simply utilized a creative pleading device in an attempt to elude the prior dismissal of her sole civil RICO claim. Such use of the legal system should not be condoned.

In *Wilhite I*, the Court properly determined that sovereign immunity divested it of subject matter jurisdiction over Plaintiff's claim against Defendants. *See Wilhite,* at *2-3. Relevant to this holding, the Court found that the alleged actions or omissions of Defendants were undertaken within the course and scope of their employment with then co-defendant, Awe Kualawaache Care Center ("Care

Center"), and that Plaintiff sought to recover from the Care Center's insurance policy for those actions or omissions. *See Wilhite*, at *2-3.

Plaintiff's Complaint in this action, with the exception of removing the Care Center as a defendant and inserting the term "individual capacity," is identical to Plaintiff's prior Amended Complaint in *Wilhite I*. *See* Dkt. No. 1; *compare Wilhite I*, Amended Complaint, Dkt. No. 11 (Jun. 21, 2018) (attached hereto as **Exhibit A**). Additionally, Plaintiff's sole claim in this action is the same as her single cause of action in *Wilhite I*, a civil RICO action. *See* Dkt. No. 1, ¶¶ 1, 29-35; *compare* Ex. A, ¶¶ 1, 30-36.

Plaintiff alleges in both *Wilhite I* and here, that she sustained alleged damages as a result of Defendants' alleged actions of terminating her employment and locking her out of her apartment in retaliation for Plaintiff reporting alleged abuse of a Care Center patient.[1] *See* Dkt. No. 1, ¶¶ 29-35; *compare* Ex. A, ¶¶ 30-36. Plaintiff has not alleged any additional culpable actions or omissions of Defendants in this action that were not previously alleged in *Wilhite I*. *See* Dkt. No. 1; *compare* Ex. A.

As Plaintiff admitted previously in *Wilhite I*, the sole source of recovery she is seeking for her RICO claim is the insurance policy maintained by the Care Center, a governmental agency of the Crow Tribe. *See Wilhite I*, Dkt. No. 30,

[1] Defendants contest these allegations but they are acknowledged only for purposes of Defendants' 12(b)(6) motions.

Plaintiff's Response to Second Rule 12 Motion to Dismiss, p. 9 (Sep. 4, 2018) (Wilhite "has limited her damages to the amount of any insurance coverage") (attached hereto as **Exhibit B**); *See also Wilhite I*, at *3.

Notably, Plaintiff previously argued in *Wilhite I* that her claim against Defendants, which was unspecified with regard to capacity, was intended to be brought against Defendants in their individual capacities. Plaintiff stated:

> Since the well pled allegations of the complaint are taken as true, the complaint should not have been dismissed as to the individuals named as defendants. It should also be noted that the Amended Complaint (Dkt. 11) never alleges that the individuals were acting in an official their [sic] capacity. The Amended Complaint *names the defendants first as natural persons* before citing their position with the Care Center (Dkt. 11, ¶¶ 5-9). When describing the acts constituting the RICO violations, *Plaintiff never alleged the acts were taken in an official capacity*.

See Wilhite I, Dkt. No. 42, Plaintiff's Brief in Support of Rule 59 Motion to Alter or Amend Judgment, pp. 2-3 (Nov. 13, 2018) (emphasis added) (attached hereto as **Exhibit C**). Plaintiff claimed that because of the Court's *"perceived ambiguity"* that Defendants had not been named in an individual capacity, she should have been "granted leave to amend to *clarify that the action [was] being brought against the Defendants in their individual capacities*" and suggested "that those [individual capacity] claims survive." Ex. C, p. 5 (emphasis added). Following Plaintiff's argument, the Court observed that "[e]ven if Wilhite stated she sought recovery strictly from the board of directors personally, it's no secret her aim was to recover from the Care Center's insurance policy. Thus, it makes little sense to

distinguish between cases based on whether a plaintiff cleverly plays dumb or candidly acknowledges the end game." *See Wilhite I*, Dkt. No. 45, Order, p. 4 (Dec. 20, 2018) (attached hereto as **Exhibit D**). The same holds true today.

After the Court issued its Order granting Defendants Motion to Dismiss in *Wilhite I*, it entered judgment in favor of Defendants and against the Plaintiff. *See Wilhite I*, Dkt. No. 40, Judgment in a Civil Case (Oct. 22, 2018) (attached hereto as **Exhibit E**). Plaintiff did not appeal the Order or the Judgment in *Wilhite I*.

Importantly, in *Wilhite I*, Defendants: (1) participated in the litigation; (2) understood that they potentially faced individual liability because the Complaint did not specify in what capacity they were being sued; (3) controlled the litigation on behalf of the Care Center as well as themselves with regard to the potential individual liability they faced; (4) were provided a defense, without a reservation of rights, by the same insurance carrier for the Care Center, as all alleged actions or omissions were within the course and scope of their employment for the Care Center. *See* Aff. of Paul Littlelight, ¶¶ 11-15 (May 30, 2019) (attached hereto as **Exhibit F);** Aff. of Lana Three Irons, ¶¶ 5-9 (May 30, 2019) (attached hereto as **Exhibit G);** Aff. of Carla Catolster, ¶¶ 3-7 (May 16, 2019) (attached hereto as **Exhibit H).**

Now, Plaintiff wishes to resurrect her claim from *Wilhite I* and take a second bite at the apple. To permit Plaintiff to use a thinly veiled pleading device to

pursue her identical claim, against identical parties or their privies, based on identical facts, would be improper under the doctrine of res judicata (claim preclusion). Due to the preclusive effect of the prior dismissal and judgment in *Wilhite I*, the Court should grant this Motion to Dismiss and dismiss Plaintiff's claim with prejudice.

STANDARD OF REVIEW

A district court's judgment based upon *res judicata* is a mixed question of law and fact in which legal issues predominate and is thus reviewed de novo. *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1051 (9th Cir. 2005). A 12(b)(6) dismissal may be affirmed "on any ground supported by the record, even if the district court did not rely on the ground." *United States v. Corinthian Colleges*, 655 F.3d 984, 992 (9th Cir. 2011) (citing *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir.2005)).

ARGUMENT

"The doctrines of claim preclusion and issue preclusion (sometimes referred to as res judicata and collateral estoppel, respectively) 'embody a judicial policy that favors a definite end to litigation, *whereby we seek to prevent parties from incessantly waging piecemeal, collateral attacks against judgments.*'" *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 18, 366 Mont. 78, 85, 285 P.3d 494, 499 (citing *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267)

(emphasis added); *cf. State v. Gilder,* 2001 MT 121, ¶ 10, 305 Mont. 362, 28 P.3d 488 (although the doctrines of law of the case and res judicata are not identical, they often work hand in glove; two important policies underlie and are common to both: judicial economy and finality of judgments)); *see also In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997).

"Under claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were *or could have been* raised in that action." *Brilz,* ¶ 18 (emphasis added); *see also F.T.C. v. Garvey,* 383 F.3d 891, 897 (9th Cir.2004); *Baltrusch,* ¶ 15 (claim preclusion bars the relitigation of a claim that the party has already had an opportunity to litigate)).

The doctrine of res judicata serves to conserve judicial resources, relieve parties of the expense and vexation of multiple lawsuits, and foster reliance on adjudication by preventing inconsistent decisions. *Brilz,* ¶ 18 (citing *Baltrusch,* ¶ 15; *Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 466 n. 6, 102 S.Ct. 1883, 1889 n. 6, 72 L.Ed.2d 262 (1982); *Taylor v. Sturgell,* 553 U.S. 880, 892, 128 S.Ct. 2161, 2171, 171 L.Ed.2d 155 (2008)); *see also Schimmels,* 127 F.3d at 881 (The application of res judicata is "central to the purpose for which civil courts have been established, *the conclusive resolution of disputes* within their jurisdiction." (emphasis added)) (quoting *Southern Pacific Railway Co. v. United States,* 168 U.S. 1, 49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897). ("a rule precluding parties from

the contestation of matters already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'")).

Applying res judicata to this matter is appropriate and warranted to satisfy the public policy promoting finality of litigation following a final judgment.

I. PLAINTIFF'S CLAIM IS BARRED BY RES JUDICATA.

By Plaintiff's Complaint, she seeks to relitigate her civil RICO claim against Defendants which was previously resolved in *Wilhite I.* Plaintiff simply omitted the Care Center and added language to specify, and reinforce her prior stance in *Wilhite I,* that she is again suing Defendants in an individual capacity. This is insufficient to escape the preclusive effect of the prior dismissal and judgment in *Wilhite I.*

"The doctrine of claim preclusion (res judicata) bars the relitigation of a claim that a party has already had an opportunity to litigate or that the party *could have* litigated in the first action." *Gibbs v. Altenhofen*, 2014 MT 200, ¶ 11, 376 Mont. 61, 65, 330 P.3d 458, 463 (citing *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 21, 366 Mont. 78, 285 P.3d 494) (emphasis in original)); *see also Schimmels*, 127 F.3d at 881. Thus, "a party may be precluded from litigating a matter that has never been litigated and that may involve valid rights to relief." *Gibbs,* ¶10 (citing *Brilz,* ¶ 21).

The elements of res judicata under the federal standard are: "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Headwaters Inc.*, 399 F.3d at 1052. In Montana, "the elements of claim preclusion are: (1) the *parties or their privies* are the same in the first and second actions; (2) the subject matter of the actions is the same; (3) the issues are the same in both actions, or are ones that *could have been raised in the first action*, and they relate to the same subject matter; (4) the capacities of the parties are the same *in reference to the subject matter and the issues between them*; and (5) a valid final judgment has been entered on the merits in the first action by a court of competent jurisdiction. *Gibbs*, ¶10 (citing *Brilz*, ¶ 22) (emphasis added). Under either approach, the elements of res judicata are satisfied and the doctrine should be applied to bar Plaintiff's reasserted RICO claim.

A. The Parties or Privies in Wilhite I Are the Same as in Wilhite II.

"As to the first element of whether the parties or their privies are the same in both actions, the concept of a privy in this context applies to one *whose interest has been legally represented in litigation*." *Gibbs, supra*, ¶ 11. "Privies are 'those who are so connected in estate or in blood or in law as to be identified with the same interest and, consequently, affected with each other by litigation.'" *Gibbs*, ¶ 11 (*citing Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 53, 341 Mont. 467, 178 P.3d 102). Privity exists where "two parties are so closely aligned in interest that

one is the virtual representative of the other...." *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir.1993); *see also United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir.1980) (EPA could not sue to enforce Water Pollution Control Act, where same issue had been litigated in state court by the Washington Department of Ecology). It has been observed that "privity is a '*factual determination of substance, not mere form' that requires a 'consideration of the realities of litigation.*'" *Denturist Ass'n of Montana v. State, Dep't of Labor & Indus.*, 2016 MT 119, ¶ 14, 383 Mont. 391, 395, 372 P.3d 466, 469–70 (citing *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Phillippe S.E. Schreiber*, 327 F.3d 173, 186 (2d Cir.2003); *National Fuel Gas Dist. Corp. v. TGX Corp.*, 950 F.2d 829, 839 (2d Cir.1991)).

Courts have deemed several relationships "sufficiently close" to justify a finding of "privity" and, therefore, preclusion under the doctrine of *res judicata:*

> First, a non-party who has succeeded to a party's interest in property is bound by any prior judgment against the party. Second, a non-party who *controlled the original suit* will be bound by the resulting judgment. Third, federal courts will bind a non-party whose *interests were represented adequately* by a party in the original suit.

In re Schimmels, 127 F.3d 875, 882 (9th Cir. 1997). In addition, privity has been found:

> where there is a 'substantial identity' between the party and nonparty; where the nonparty '*had a significant interest and participated* in the prior action;' and where the *interests of the nonparty and party are "so closely aligned as to be 'virtually representative.*' Finally, a relationship of privity can be said

> to exist when there is an '*express or implied legal relationship by which parties to the first suit are accountable to non-parties* who file a subsequent suit with identical issues.'"

In re Schimmels, 127 F.3d at 882-83 (internal citations omitted) (emphasis added); *see also ITT Rayonier, Inc.*, 627 F.2d a 1003 ("[A] 'privy' may include those whose interests are represented by one with authority to do so."); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) ("privity may exist if 'there is 'substantial identity' between parties, that is, when there is *sufficient commonality of interest*." (emphasis added)).

As the Ninth Circuit "made clear…**privity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases.**" *Tahoe-Sierra*, 322 F.3d at 1082 (emphasis added). "**The issue is one of substance rather than the names in the caption of the case**; the inquiry is not limited to a traditional privity analysis." *Tahoe-Sierra*, 322 F.3d at 1082 (citing *Alpert's Newspaper Delivery Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270 (2d Cir.1989) (emphasis added)); *see also ITT Rayonier, Inc.*, 627 F.2d at 1003 ("Courts are no longer bound by rigid definitions of parties or their privies for purposes of applying collateral estoppel or res judicata."); *Davis Wright & Jones v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 709 F. Supp. 196, 201 (W.D. Wash. 1989), aff'd sub nom. *Davis Wright & Jones v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 897 F.2d 1021 (9th Cir. 1990) (citing Wright, Miller, *supra*, § 4448 at

408–09) ("the determination of whether sufficient 'privity' exists for purposes of res judicata should be based on a functional analysis, on the reasons for holding a party bound by a prior judgment, *and not on labels and rigid rules*.") (emphasis added).

In determining whether privity exists, courts look to the status of the party against whom the preclusive effect of res judicata is asserted. *Hutchison v. California Prison Indus. Auth.*, No. 13-CV-04635-CW, 2015 WL 179790, at *3–4 (N.D. Cal. Jan. 14, 2015). In *Hutchison,* the court found that the plaintiff was "the party against whom *res judicata* [wa]s asserted [and] was the unsuccessful party" in the first action. *Hutchison,* *3. Despite the Plaintiff arguing there was no privity between government employees sued in their official capacity and the same employees sued in their individual capacity, the *Hutchison* court held "*privity is relevant with regard to the party against whom res judicata is being asserted*." *Id.* (emphasis added). The court thus concluded that because plaintiff was the unsuccessful party in the prior proceeding, "the relevant parties are the same." *Id.* The *Hutchison* court went further with its holding, concluding that even if *res judicata* law required the defendants in the suit to be in privity with the defendants in the prior suit, they were. *Hutchison,* *4. Central to the Court's determination of privity between the defendants was that they were "alleged to have engaged in the *same conduct* as that of the state court defendants and the defendants in both

cases are employees of same state agencies." *Id.* (emphasis added). For these reasons, the court held that "the *res judicata* requirement for privity [wa]s satisfied." *Id.*

Moreover, the Court in *Davis Wright & Jones v. Nat'l Union Fire Ins. Co.*, observed:

> Where different plaintiffs sue the same defendant in successive suits, many courts have questioned the fairness of invoking *res judicata* against the defendant unless a significant relationship can be found between the plaintiffs. *But where, as in this case, res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have, as indicated in the cases above cited, enlarged the area of res judicata beyond any definable categories of privity between the defendants.... We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results.*

Davis Wright, supra, 709 F. Supp. at 201–02 (citing *Bruszewski v. United States*, 181 F.2d 419, 422 (3d Cir.1950) (emphasis added); *accord, Gambocz v. Yelencsics*, 468 F.2d 837, 841 (3d Cir.1972) (court held that res judicata applies "where there is a close or significant relationship between successive defendants.")).

In *Davis Wright*, the Court ultimately concluded that if a party in the first action could have been held vicariously liable for the actions of an agent, that the agent could not be sued in subsequent action due to res judicata. *Davis Wright*, 709 F. Supp. at 202–03. In reaching the conclusion, the court observed that both the principal and agent's actions in connection with the alleged actions or

omissions had to be examined closely. *Davis Wright*, 709 F. Supp. at 202. The court concluded that sufficient "privity" or identity of parties existed between the principal and agent with regard to the previously litigated claims such that the plaintiff could not pursue a second action against the agent. *Davis Wright*, 709 F. Supp. at 203 (citing *Spector v. El Ranco, Inc.*, 263 F.2d 143, 145 (9th Cir.1959) ("[w]here ... *the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other*." (emphasis added); *Michelson v. Exxon Research and Engineering Co.*, 629 F.Supp. 418, 423 (W.D.Pa.1986) (plaintiff sought to hold an employer vicariously liable for its employee's allegedly defamatory statement. The court found an identity of parties between employer and employee because "[a]ny judgment involving an employee for these acts would apply to the employer, and vice versa" and "both are bound by a judgment involving either of them.")).

Additionally, in *Pedrina v. Chun*, 97 F.3d 1296, 1302, RICO Bus. Disp. Guide 9137, (9th Cir. 1996), a civil RICO action, the Ninth Circuit held that there was privity between individually named defendants in the second action with those of the corporate defendants in the prior RICO action. In *Pedrina*, the plaintiffs had previously instituted a civil action against corporate defendants in prior litigation,

alleging criminal activities resulting in damages. *Pedrina,* 97 F.3d at 1299. The corporate defendants initiated a separate lawsuit against the *Pedrina* plaintiffs and the plaintiffs counterclaimed, alleging among other things, RICO violations. *Id.* The counterclaims were dismissed. *Pedrina,* 97 F.3d at 1299.

The same *Pedrina* plaintiffs subsequently brought a direct civil RICO action against the same corporate defendants and also named individual corporate employees in an individual capacity. *Pedrina,* 97 F.3d at 1299. The defendants asserted res judicata as a defense based on the dismissals of the plaintiffs' claims in the two prior actions and the district court dismissed the RICO claims on that basis. *Pedrina,* 97 F.3d at 1300. The plaintiffs appealed form that determination.

On appeal, the Ninth Circuit affirmed the district court. *Pedrina,* 97 F.3d at 1300. The *Pedrina* court concluded that there was privity between the prior corporate defendants and the individual capacity defendants in the second action. *Pedrina,* 97 F.3d at 1302. In reaching this determination the court held that "[t]he fact that certain of th[e] defendants are being sued in their individual capacities does not weigh against a finding of privity with the corporation [in the former action], *as the allegations against them relate to actions taken in their official, rather than their individual, capacities*." *Id.* (emphasis added).

Similarly, in *Gibbs, supra,* one of the defendants, Nordtvedt, had originally filed an action in his capacity as trustee of a family trust to determine whether there

were any restrictions of the trust agreement which would bar his actions in selling property within the trust estate. *Gibbs*, ¶¶ 4-5. The plaintiffs filed cross-claims in the first action against Nordtvedt in his capacity as trustee, alleging, inter alia, breach of duties of loyalty, to administer the trust, to deal impartially with beneficiaries, and to avoid conflicts of interest. *Gibbs*, ¶ 5. The court in the first action ruled that Nordtvedt had authority to sell the property and entered judgment his favor and against the plaintiffs. *Id.* The plaintiff did not appeal this determination. *Id.*

The *Gibbs* plaintiffs ultimately filed a second lawsuit against, among others, Nordtvedt individually. *Gibbs*, ¶ 6. While the plaintiffs sued Nordtvedt in an individual capacity in the second action, the claims against him were premised on the same breaches of fiduciary duty allegedly owed to the plaintiffs as trustee. *Id.* As a result, Nordtvedt moved for summary judgment which the district court granted, "concluding that the plaintiffs were seeking to relitigate claims and issues that either were raised, or could have been raised, in the [earlier] litigation" and were thus "barred by the doctrines of issue preclusion, judicial estoppel, and claim preclusion." *Id.* From this determination, the plaintiffs appealed.

On appeal, the Supreme Court of Montana upheld the district court's determination that the *Gibbs* plaintiffs' claims against Nordtvedt were barred by res judicata. *Gibbs*, ¶¶ 11-12. In reaching this determination, the *Gibbs* court

determined that Nordtvedt as trustee and Nordtvedt in his individual capacity were the same party or in privity with one another. *Gibbs*, ¶ 11. The *Gibbs* court further held it was "*irrelevant that the Gibbs originally sued Nordtvedt in his capacity as trustee and now sue him individually; at issue in both lawsuits are actions he took as trustee*." *Id.* In reaching this conclusion, the court looked past the label that the plaintiff's had placed on Nordtvedt in the pleadings and instead looked to the substance of the allegations against him. *Id.*

Here, we are dealing with the same Plaintiff in both actions. The same is also true with regard to the individually named Defendants in both *Wilhite I* and Wilhite II. Importantly, Plaintiff agrees her intent was to sue Defendants in an individual capacity in both actions. Ex. C, p. 5. However, even if it is determined that Plaintiff did not name, or attempt to name, Defendants in an individual capacity in both actions, she certainly could have named them in an individual capacity in the prior action and there is still privity between them.

As noted above, the substance of Plaintiff's claim against Defendants in both actions remains the same in that she alleges Defendants committed a RICO violation through their alleged actions of terminating her employment and locking Plaintiff out of her apartment in retaliation for Plaintiff reporting alleged abuse of a Care Center patient. *See* Dkt. No. 1, ¶¶ 29-35; *compare* Ex. A, ¶¶ 30-36. Again, this issue common between *Wilhite I* and Wilhite II arises from alleged facts in

both actions which are identical. *See* Dkt. No. 1, ¶¶ 9-28; *compare* Ex. A, ¶¶ 10-29. It is important to note that in *Wilhite I*, the Court determined that the actions complained of were undertaken within the course and scope of their employment, as opposed to their individual capacity. *See Wilhite I*, at *2-3.

Defendants had a significant individual interest in *Wilhite I*, and participated in that litigation. The Amended Complaint in *Wilhite I* could have been read to assert individual claims against the Defendants. *See* Ex. A. In fact, Plaintiff made the argument in *Wilhite I* that she intended to name Defendants in an individual capacity in her Complaint. *See* Ex. C, p. 5. While the Court ultimately determined that the nature of the acts complained of in *Wilhite I* were undertaken within the course and scope of employment, and thus fell within their official capacity, it cannot be said that the Defendants did not participate, or did not have a significant interest in, the prior litigation.

At all times relevant to *Wilhite I*, Defendants (1) participated in the litigation; (2) understood that they potentially faced individual liability because the Complaint did not specify in what capacity they were being sued; (3) controlled the litigation on behalf of the Care Center as well as themselves with regard to the potential individual liability they faced; and (4) were provided a defense, without a reservation of rights, by the same insurance carrier for the Care Center, as all

alleged actions or omissions were within the course and scope of their employment for the Care Center. *See* Ex. F, ¶¶ 11-15; Ex. G, ¶¶ 5-9; Ex. H, ¶¶ 3-7.

Additionally, Defendants have, or will, assert the exact same defenses in both actions: (1) that all alleged actions or omissions were undertaken within the course and scope of their employment with the Care Center, a 638 Contractor, and thus, Plaintiff's claims are subject to the exclusive remedy provisions of the Federal Tort Claims Act ("FTCA"), and (2) that they enjoy sovereign immunity as tribal officials because they undertook all alleged actions or omissions were undertaken within the course and scope of their employment with the Care Center, an arm of the Crow Tribal Government, and the ultimate result of any finding of liability on behalf of Defendants in this litigation will impact tribal coffers. *See* Dkt. Nos. 4 & 5.[2] This bolsters the conclusion that Defendants' interests in both *Wilhite I* and here are identical in that they are relying on identical defenses to identical claims.

Under these circumstances, there is clearly commonality of interest between Defendants in both actions to apply res judicata to give Wilhite I preclusive effect. In *Wilhite I*, Defendants (1) *participated* in the action; (2) *controlled the litigation* with respect the Care Center and themselves with regard to potential individual

[2] Defendants have already filed a Motion to Dismiss on the basis of FTCA exclusivity. Defendants previously reserved the right, and reassert that reservation of the right, to rely on their sovereign immunity as a defense in this matter and intend to file a Motion to Dismiss on that basis, if needed.

liability, thereby representing their interests in both capacities in that litigation; (3) had a *significant interest in the litigation because they potentially faced individual liability*; and (4) utilized the same defenses for the same claim premised on the same alleged actions or omissions. Nothing has changed in this action in that they are participating, controlling the litigation, and have the same interest. This is precisely the commonality of interests that is necessary to satisfy the privity element.

Moreover, as the Care Center is the principal in the former action, and the Court previously determined that the actions or omissions alleged in both lawsuits were undertaken in Defendants' official capacity, the Care Center could ultimately be impacted by an adverse decision in this action. Specifically, the Care Center's insurance policy could be negatively impacted, thereby allowing Plaintiff to circumvent its sovereign immunity protections through a thinly veiled pleading device and impact tribal coffers. Moreover, in the event Defendants were found to be liable in this action, there could be a common law right of indemnification and contribution from the Care Center, as it was previously determined that the alleged actions and omissions at issue in both actions were undertaken in their official capacity as officials and employees of the Care Center. As the Court observed in *Wilhite I*, "it's no secret [Plaintiff's] aim [i]s to recover from the Care Center's insurance policy." *See* Ex. D, p.1. Thus, it again "makes little sense to distinguish

between cases based on whether a plaintiff cleverly plays dumb or candidly acknowledges the end game." *Id.*

There is an express or implied legal relationship between the agent Defendants and the principal Care Center creating a commonality of interest between the Care Center and Defendants in this litigation and in Wilhite I, thereby satisfying the element of privity in this regard as well. This provides further basis for a finding that the first element is satisfied in favor of claim preclusion.

B. The Subject Matter of *Wilhite I* and Wilhite II is the Same.

The subject matter in *Wilhite I* and this action is identical. "The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts.'" *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir.2000)).

It is indisputable that Plaintiff's sole claim in *Wilhite I* and Wilhite II is identical. In each action, Plaintiff alleges a single cause of action: a civil RICO claim against Defendants in which she alleges damages as a result of Defendants' alleged actions of terminating her employment and locking her out of her apartment in alleged retaliation for Plaintiff reporting alleged abuse of a Care Center patient. *See* Dkt. No. 1, ¶¶ 29-35; *compare* Ex. A, ¶¶ 30-36. This single cause of action in both matters arises out of the same nucleus of facts. *See* Dkt.

No. 1, ¶¶ 9-28; *compare* Ex. A, ¶¶ 10-29. Moreover, as noted above, Defendants are relying on the same defenses in both actions. It simply cannot be said that the subject matter differs between *Wilhite I* and this action. Thus, the subject matter element is also satisfied.

C. The Issues in *Wilhite I* and Wilhite II are the Same, or Involve Issues that Could Have Been Raised in *Wilhite I*.

There are no new issues raised in this action that were not present in *Wilhite I*. As the Court observed in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, "'Issue' must be understood broadly enough 'to prevent repetitious litigation of what is *essentially the same dispute.*'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1308, 191 L. Ed. 2d 222 (2015) (citing Restatement (Second) of Judgments § 27, Comment *c*, at 252–253 (emphasis in original); *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984) (applying issue preclusion where a party sought to "litigate twice ... an issue arising ... from virtually identical facts" because the "factual differences" were "of no legal significance")).

Plaintiff raised the same issue in both identical disputes: whether Defendants allegedly committed a RICO violation through their alleged actions of terminating her employment and locking Plaintiff out of her apartment in retaliation for Plaintiff reporting alleged abuse of a Care Center patient. *See* Dkt. No. 1, ¶¶ 29-35; *compare* Ex. A, ¶¶ 30-36. This issue common between *Wilhite I* and II arises

from identical alleged facts in both actions. *See* Dkt. No. 1, ¶¶ 9-28; *compare* Ex. A, ¶¶ 10-29. Moreover, any alleged "new" issues in this matter certainly *could have been raised* in *Wilhite I*. Defendants rely on the same defenses in both actions. The third element is again satisfied in favor of application of res judicata.

D. The Capacities of the Parties, in Reference to the Subject Matter and the Issues Between Them, are the Same in *Wilhite I* and Wilhite II.

With regard to the capacities element under Montana law, courts do not look to the capacities of the parties with regard to the underlying circumstances, but rather with regard to the capacities in the litigation as they relate to the subject matter and issues involved. *Gibbs, supra*, ¶ 13. In *Gibbs*, the court found that the plaintiffs sought damages relating to the construction of the trust and the propriety of Nordtvedt's actions as trustee. *Id.* This was the material finding in its holding that the fourth element of capacities was satisfied. *Id.* As you will recall from the discussion above, the *Gibbs* court expressly held it was "*irrelevant that the Gibbs originally sued Nordtvedt in his capacity as trustee and now sue him individually; at issue in both lawsuits are actions he took as trustee*." *Gibbs*, ¶ 11.

Here, there is no difference in the capacities of the parties between *Wilhite I* and Wilhite II with regard to the subject matter of this lawsuit and the issues involved. Wilhite remains the Plaintiff in both actions. *See* Ex. A; *compare* Dkt. 1. The named individuals remain the Defendants who allegedly committed a RICO violation within course and scope of employment with the Care center

through their alleged actions of terminating Plaintiff's employment and locking her out of her apartment in retaliation for Plaintiff reporting alleged abuse of a Care Center patient. *See* Dkt. No. 1, ¶¶ 29-35; *compare* Ex. A, ¶¶ 30-36. Here too, the fourth element under Montana law is satisfied.

E. A Valid Final Judgment Was Entered on the Merits in *Wilhite I*.

A final judgment for purposes of res judicata was reached in *Wilhite I*. After the Court issued its Order granting Defendants' Motion to Dismiss on the basis of sovereign immunity it issued a judgment in favor of Defendants and against Plaintiff. *See Wilhite I, supra;* Ex. E. Plaintiff did not appeal the Order or the Judgment and instead tried to resurrect her claim by filing a second action.

"[I]nvoluntary dismissal generally acts as a judgment on the merits for the purposes of res judicata...." *Owens*, 244 F.3d at 714 (citing *In re Schimmels*, 127 F.3d at 884; *Johnson v. United States Dep't of Treasury*, 939 F.2d 820, 825 (9th Cir.1991)). Here, not only were Plaintiff's claims dismissed, but a judgment was issued against her, from which she did not appeal. The final element of res judicata is satisfied. Accordingly, res judicata should bar Plaintiff from relitigating her previously failed civil RICO claim again in this matter.

//

CONCLUSION

For the reasons stated herein, Defendants respectfully request the Court dismiss Plaintiff's resurrected RICO claim on the basis of res judicata to satisfy the interest of justice and public policy favoring the finality of judgments.

DATED this 21st day of June, 2019.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By */s/ Evan M.T. Thompson*
Evan M.T. Thompson

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the above ***Defendants' Brief in Support of Motion to Dismiss Re: Res Judicata*** is double spaced, is a proportionately spaced 14 point typeface, and contains 5,898 words exclusive of the caption, this certificate of compliance and the certificate of service.

By */s/ Evan M.T. Thompson*
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2019, a true copy of the foregoing was served via ECF:

D. Michael Eakin
Eakin, Berry & Grygiel, PLLC
P.O. Box 2218
Billings, MT 59103

/s/ Evan M.T. Thompson
BROWNING, KALECZYC, BERRY & HOVEN, P.C.