IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MATTHEW MITCHELL Plaintiff	§	
vs.	§	CIVIL ACTION NO. 5:17-CV-00411-DAE
ORICO BAILEY and HOOPA VALLEY TRIBE, d/b/a AMERICORPS HOOPA TRIBAL CIVILIAN COMMUNITY CORPS Defendants	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDISCTION

Plaintiff, MATTHEW MITCHELL, files this Response in Opposition to the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternative Motion for Summary Judgment. As will be discussed herein, the Defendants' challenges to this Court's subject matter jurisdiction are devoid of merit and their F.R.C.P. Rule 12(b)(1) Motion to Dismiss and Alternative Motion for Summary Judgment should in all respects be DENIED.

I. BACKGROUND

"In motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the reviewing court must accept as true the allegations of the complaint."[1] While working as a volunteer at a federally–declared disaster site in Wimberley, Texas, San Antonio firefighter Matthew Mitchell was severely injured as a proximate result of Defendant Orico Bailey's

[1] *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001), *cert. denied,* 534 U.S. 1040, 122 S. Ct. 615, 151 L. Ed. 2d 538 (2001). *Accord, e.g., Saraw Partnership v. United States,* 67 F.3d 567, 569 (5th Cir. 1995).

negligently felling a tree with a chainsaw. Orico Bailey was working in Wimberley as a member of the AmeriCorps Hoopa Tribal Civilian Community Corps ("Hoopa Tribal CCC"), an arm of the northern California Indian tribe known as the Hoopa Valley Tribe. Defendants Orico Bailey and the Hoopa Valley Tribe have put forth three arguments to challenge this Court's subject matter jurisdiction.

First, despite the fact that their tortious conduct occurred in Texas, more than 2,000 miles from the Hoopa Valley Tribe's northern California reservation; the Hoopa Valley Tribe argues it is shielded from Matthew Mitchell's tort suit by "sovereign immunity."

Second, as a fallback position to the Tribe's "sovereign immunity" argument; Defendants assert the following: (a) At the time Matthew Mitchell was injured, Orico Bailey and the Hoopa Valley Tribe were acting as "deemed" employees of the United States; (b) as federal employees, their tortious conduct is covered by the Federal Tort Claims Act ("FTCA"); and (c) the United States must be substituted as Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679.

Third, Defendants challenge diversity jurisdiction of Orico Bailey and supplemental jurisdiction of the Hoopa Valley Tribe while impermissibly ignoring this Court's *federal question* jurisdiction, which emanates from the Defendants' seeking Westfall Act relief.[2]

As will be discussed herein, the Defendants' challenges to this Court's subject matter jurisdiction are without merit.

II. NEITHER OF THE DEFENDANTS IS PROTECTED BY SOVEREIGN IMMUNITY

At the outset it must be understood that even in those instances where an Indian tribe might enjoy sovereign immunity, that immunity **does not** shield tribal officials, employees, or agents from lawsuits pertaining to their ***off-reservation*** activities. Thus Orico Bailey cannot rely

[2] *See Gutierrez De Martinez v. Lampagno,* 515 U.S. 417,433, 115 S. Ct. 2227, 2236, 132 L. Ed. 2d 375, 390 (1995) ("Whether the employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum.").

on a claim of Indian sovereign immunity as a bar to Matthew Mitchell's tort suit.

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-149; 93 S. Ct. 127, 1270-1271; 36 L. ed. 2d 114, 119 (1973).

The Supreme Court repeatedly has held Indian sovereign immunity does not shield the employees, officials, or agents of Indian tribes from civil or criminal suits concerning their ***off-reservation*** activities.[3] With respect to his negligently injuring Matthew Mitchell in Wimberley, Texas, Orico Bailey is subject to Texas' tort laws, and this Court has subject matter jurisdiction of Matthew Mitchell's tort claims against Orico Bailey.

As will be discussed more fully, *infra,* the U. S. Supreme Court has never held an Indian tribe is immune from suit for damages for personal injuries or death resulting from a tribe's ***off-reservation*** activities. All of the Supreme Court's decisions that hold Indian tribes enjoy sovereign immunity from suit regarding their off-reservation activities involve commercial causes of action, not torts. There is a reason for this distinction. The Supreme Court has recognized and admonished that when persons and entities choose to do business with an Indian tribe, they can protect themselves from the nonfeasance or malfeasance of the tribe by building protections into their contracts--such as their obtaining waiver of the tribe' sovereign immunity regarding legal enforcement of the contract or their obtaining agreement that any dispute regarding the contract can be litigated in court. The tort victim of a tribe's off-reservation activities, who has not chosen to interact with a tribe, has no such vehicle to protect himself.

---

[3] *See, e.g., Lewis v. Clarke,* 137 S. Ct. 1285, 197 L. Ed.2d 631 (2017) (off-reservation collision involving Tribe's limousine; held Tribe's sovereign immunity **did not** bar plaintiffs' tort action against Tribe's employee); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035; 188 L. Ed.2d 1071, 1087 (2014) (held tribal sovereign immunity did not bar Michigan from bringing suit for injunctive relief or criminal prosecution against tribal officers and employees concerning their off-reservation gambling activities); *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (held Puyallup Tribe's sovereign immunity did not deprive Washington state courts of subject matter jurisdiction concerning State's claims against 41 tribal members for their off-reservation fishing activities).

A discussion of Indian sovereign immunity merits a background discussion of the legal status of Indian tribes in the United States. The U.S. Supreme Court has stated that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority ***over their members and territories***." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509; 111 S. Ct. 905, 909; 112 L. Ed. 2d 1112, 1119 (1991), *quoting Cherokee Nation v. Georgia,* 30 U.S. 1, 5 Pet. 1, 17 cc (1831) (emphasis added). This tribal "sovereign authority" does not derive from the United States Constitution or from Congressional enactment. Rather, it exists due to a series of pronouncements by the U.S. Supreme Court, which repeatedly has emphasized that Indian tribes' sovereignty is of a *limited* nature and is subject to plenary control by Congress.

> The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.' [citation omitted]. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. [citation omitted]. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws. Indian tribes are, of course, no longer 'possessed of full attributes of sovereignty.' [citation omitted]. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. …The sovereignty that the Indian tribes retain is of a unique and ***limited*** character. It exists only at the sufferance of Congress and is subject to complete defeasance. …In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, ***or by implication as a result of their dependent status***. *United States v. Wheeler,* 313 U.S. 313, 322-323; 98 S. Ct. 1079, 1086; 55 L. Ed. 2d 303, 312-313 (1978) (emphasis added).

Pursuant to English common law, which is the bedrock of American jurisprudence, one aspect of sovereignty is the sovereign's common-law immunity from suit. Given their contact with the nation that surrounds their reservations, it was inescapable that the question would arise whether the "limited sovereignty" retained by Indian tribes included common-law immunity from suit.

In a series of decisions, the Supreme Court has undertaken to articulate the extent to which Indian tribes enjoy sovereign immunity from suit. As the Supreme Court candidly has admitted, it was "with little analysis" and "almost by accident" that the Court pronounced the

"limited sovereignty" retained by Indian tribes includes the doctrine of sovereign immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 756; 118 S. Ct. 1700, 1703; 140 L. Ed. 2d 981, 986 (1998). The Court admitted in *Kiowa* that *Turner v. United States,* 248 U.S. 354, 39 S. Ct. 109, 63 L. Ed. 291 (1919) repeatedly and erroneously has been cited by the Court as the foundation for its recognition of Indian sovereign immunity. The Court stated that *Turner* "simply does not stand for that proposition" and, instead, "is, at best, an assumption of [Tribal] immunity for the sake of argument, not a reasoned statement of doctrine." *Kiowa,* 523 U.S. at 756, 757; 118 S. Ct. at 1703, 1704; 140 L. Ed. 2d at 986. The Court stated that "*Turner's* passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit" and later cases reiterated the doctrine "with little analysis." *Id.*

In *Kiowa,* the Supreme Court for the first time was faced with the question whether the Indian sovereign immunity it previously had recognized "with little analysis" should insulate a Tribe from suit on a promissory note that was executed by the Tribe off of its reservation and that was payable by the Tribe in Oklahoma City, off of the Tribe's reservation. Despite its expressly reciting there "are reasons to doubt the wisdom of perpetuating the doctrine [of Indian sovereign immunity]," the Court in a 6-3 opinion held Indian sovereign immunity would extend to suits against Indian tribes for their off-reservation commercial transactions. *Kiowa,* 523 U.S. at 758; 118 S. Ct. at 1704; 140 L. Ed. 2d at 987.

When the Court revisited the issue whether Indian sovereign immunity should extend to Tribes' off-reservation commercial activities in *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); in a 5-4 decision the Court again held it does. In *Bay Mills,* the state of Michigan brought suit to enjoin a Tribe's operation of an off-reservation gambling casino. In holding that the Tribe enjoyed sovereign immunity from Michigan's suit for an injunction, the majority stated the Court was bound by the precedent of *Kiowa* and sought to

soften that harsh pronouncement by observing Michigan was not without a remedy because it could shut down the Tribe's casino by pursuing injunctive relief against and criminal prosecution of the Tribe's officers, employees, and customers, who were not protected by sovereign immunity concerning their illegal off-reservation gambling activities. The majority in *Bay Mills* majority also undertook to justify its ruling insulating the tribe from a suit for injunctive relief by blaming Michigan for the position in which it found itself. The majority observed that Michigan had entered into a gaming compact with the Tribe pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.,* and had failed to include language in the compact expressly authorizing Michigan to bring suit against the Tribe to enjoin the Tribe's engaging in off-reservation gaming activities, which were prohibited in the compact.

Two members of the *Kiowa* majority, Justices Scalia and Alito, switched positions and dissented in *Bay Mills*. Justice Scalia forcefully explained his change in position:

> In *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,* [citation omitted], this Court expanded the judge-invented doctrine of tribal immunity to cover off-reservation commercial activities. [citation omitted]. I concurred in that decision. For reasons given today in Justice Thomas' dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below. *Michigan v. Bay Mills Indian Community,* 134 S. Ct. at 2045, 188 L. Ed. 2d at 1099.

The four dissenting Justices in *Bay Mills* were unimpressed by the majority's argument that Michigan could have protected itself from the dilemma in which it found itself by adding additional terms to its contract with the Tribe. The dissenters pointed out that the extension of sovereign immunity to tribes' off-reservation activities could harm those who are unaware they are dealing with an Indian tribe, who do not know of tribal immunity, and those who have no choice in the matter—"**as in the case of tort victims**." *Michigan v. Bay Mills Indian Community,* 134 S. Ct. at 20149, 188 L. Ed. 2d at 1101 (emphasis added).

Apparently stung by the dissent's comments about Indian sovereign immunity's potential for leaving tort victims without a remedy, the majority expressly addressed the dissenters' concern by stating in a footnote the Court never has held Indian sovereign immunity extends to suits against tribes concerning their off-reservation torts.

> Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See *supra* at 188 L. Ed. 2d at 1087-1088 [discussing Michigan's right to seek injunctive relief and/or criminal prosecution of the Tribe's officers, employees, and customers--who are not protected by tribal sovereign immunity]. We need not consider whether the situation would be different if no alternative remedies were available. *We have never*, for example, *specifically addressed* (nor, so far as we are aware, has Congress) *whether immunity should apply in the ordinary way if a* ***tort victim***, or other plaintiff who has not chosen to deal with a tribe, *has no alternative way to obtain relief* for [a Tribe's] off-reservation commercial conduct. *Michigan v. Bay Mills Indian Community,* 134 S. Ct. at 2036, 188 L. Ed. 2d at 1089, footnote 8 (emphasis added).

Matthew Mitchell's claim against the Hoopa Valley Tribe falls squarely within footnote 8 of *Bay Mills*. Mitchell is suing the Tribe for its ***off-reservation tortious conduct***—a suit the *Bay Mills* majority expressly stated the Court never has held to be barred by Indian sovereign immunity.

The Defendants' allegation that Supreme Court precedent immunizes Indian tribes from suits for ***off-reservation torts*** is without legal support. A similar allegation recently was rejected by the Alabama Supreme Court in *Wilkes v. PCI Gaming Authority,* 2017 Ala. LEXIS 105, 2017 WL 4385738 (Ala. 2017). In *Wilkes,* an intoxicated employee from an Indian tribe's casino was involved in a vehicular collision 8 miles off of the Tribe's reservation. In the ensuing tort suit against the Tribe, its wholly owned casino, and the casino's employee; the trial court granted the defendants' motion to dismiss predicated on Indian sovereign immunity. The Alabama Supreme Court reversed the dismissal and expressly held Indian tribes *do not* enjoy sovereign immunity with respect to their *off-reservation tortious conduct*. The Court observed that the tort case before it "presents precisely" the scenario that was referenced in footnote no. 8 of *Bay Mills*--the Alabama tort victims in *Wilkes* would have no way to obtain relief if the doctrine of tribal

sovereign immunity extended to the Tribe's off-reservation tortious conduct.

A judicial ruling that sovereign immunity immunizes the Hoopa Valley Tribe from Matthew Mitchell's tort claim would be an affront to the sovereignty of the state of Texas and would deprive Matthew Mitchell of a fundamental right guaranteed by the "Due Process" clause of the Texas Bill of Rights, which provides as follows: "[E]very person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The Hoopa Valley Tribe is asking this Court to rule that its limited tribal sovereignty trumps Texas' sovereignty. It is asking this Court to rewrite the Due Process clause of the Texas Constitution to read as follows:

> [E]very person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law--***except when an Indian tribe injures a person, in which case this Constitutional guarantee shall be of no force and effect.***

Such holding would violate every legal norm. When an Indian tribe leaves its reservation, travels 2,000 miles across the United States to a State (Texas), avails itself of the protections afforded by the host State's laws, and then negligently injures a citizen of the host State—that tribe cannot be heard to state its "sovereignty" trumps the sovereignty of the host State, leaving the host State powerless to protect its citizens and leaving the host State's citizens bereft of the protections guaranteed by the host State's Constitution. That cannot be the law of sovereignty—yet that is the very low of sovereignty the Hoopa Valley Tribe would have this Court recognize.

The cases cited by the Defendants for the proposition that Indian tribes enjoy immunity from suit for their *off-reservation* tortious conduct actually involve *on-reservation* torts not *off-reservation* torts.[4] It is without dispute that Indian tribes enjoy sovereign immunity regarding

---

[4] *See Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians,* 259 F. Supp. 3d 713 (W.D. Mich. 2017) (slip-and-fall *on tribe's reservation*); *Furry v. Miccosukee Tribe of Indians of Florida,* 685 F.3d 1224 (11th Cir. 2012) (dram shop case; sale of alcohol *in tribe's casino*); *Muhammad v. Comanche Nation Casino,* 2010 WL 4365568 (W.D. Okla. 2010) (slip-and-fall *in tribe's casino*); *Doe v. Oneida Indian Nation of N.Y.,* 278 A.D.2d 564 (N.Y. App. Div. 2000) (injury from hypodermic needle left *in tribe's hotel*); *Gallegos v. Pueblo of Tesuque,* 132 N.M. 207 (N.M. 2002) (injury *in tribe's casino*); *Maynard v. Narragansett Indian Tribe,* 984 F.2d 14 (1st Cir. 1993) (*boundary*

torts committed *on Indian reservations*. Individuals who enter Indian reservations do so at their peril just as individuals who travel to another country such as Mexico do so at their peril.

III. THE HOOPA VALLEY TRIBE WAIVED SOVEREIGN IMMUNITY

Even if one were to assume for the sake of argument that tribal sovereign immunity extends to tort claims arising from Indian tribes' off-reservation activities; the Hoopa Valley Tribe has waived its claimed sovereign immunity concerning Matthew Mitchell's tort claims.

The Supreme Court has recognized that an Indian tribe can contractually waive its sovereign immunity from suit with respect to its off-reservation commercial activities and can do so without expressly referencing "waiver" or "sovereign immunity."[5] In *C & L Enterprises*, the Potawatomi tribe contracted with a roofing company to install a roof on a building that was located off of the Tribe's reservation. The contract contained an arbitration clause that provided all disputes between the Tribe and the roofing company would be decided by arbitration and that judgment on the arbitrator's award could be entered by any court having jurisdiction. When the Tribe breached the contract, the roofing company submitted a demand for arbitration. The Tribe asserted sovereign immunity and refused to participate in arbitration. The roofing company went forward with arbitration without the Tribe's participation and obtained a favorable damages award from the arbitrator. The roofing company then filed suit in Oklahoma state court to obtain judicial confirmation of the arbitration award. The Tribe filed a motion to dismiss based on its claim of sovereign immunity. After a protracted appellate history that included two trips to the U. S. Supreme Court, the Supreme Court ultimately held the Tribe had waived its sovereign immunity from the roofing company's suit to confirm the arbitration award. The Court reasoned

---

dispute between Indian tribe and adjacent landowner); *Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968) (injured while swimming in Colorado River adjacent to Tribe's reservation).

[5] *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

that the roofing contract's arbitration clause would be meaningless if it did not constitute waiver by the Tribe of its sovereign immunity concerning suits to confirm arbitration awards. *C & L Enterprises, Inc.,* 532 U.S. at 422, 121 S. Ct. at 1596, 149 L. Ed. 2d at 633.

The Hoopa Valley Tribe likewise contractually waived any claims of sovereign immunity with respect to its activities in Wimberley, Texas. As will be discussed in greater detail, *infra*, the Hoopa Tribal CCC was in Wimberley pursuant to a contract (the "Disaster Response Cooperative Agreement" or "DRCA") between the Hoopa Tribal CCC and a federal agency, the Corporation for National & Community Service ("CNCS").

CNCS was established in 1994 pursuant to the National and Community Service Trust Act of 1993, 42 U.S.C. §§ 12601, *et seq*. CNCS makes financial grants for the creation of AmeriCorps chapters around the country, including the AmeriCorps Hoopa Tribal CCC.

After undergoing the requisite training, an AmeriCorps chapter can apply to CNCS for eligibility to enter into a DRCA with CNCS. If selected and allowed to enter into a DRCA, the AmeriCorps chapter becomes an AmeriCorps Disaster Response Team ("A-DRT") and thereby becomes eligible to be deployed by CNCS to federally-declared disaster sites, where the A-DRT provides disaster relief services. *See* the CNCS publication at Appendix 1.

Attached at Appendix 2 is a copy of the Hoopa Tribal CCC's formal application to enter into a DRCA with CNCS. The first several pages of the application form contain information concerning CNCS' disaster response program and the eligibility requirements each AmeriCorps chapter must meet to become eligible to enter into a DRCA with CNCS. As is reflected on page MM0119 of the DCRA application form, the applicant must have liability insurance that covers injuries and damages the "members/participants [of the AmeriCorps chapter] may inflict upon the community in the provision of their [disaster relief] services." Page MM0126 of the DRCA

application form directed the Hoopa Tribal CCC to attach documents "verifying the liability coverage provided to your members and program." In accordance with this directive, the Hoopa Tribal CCC attached to its completed DRCA application a copy of the Hoopa Valley Tribe's Certificate of Liability Insurance (see page MM0136 at Appendix 2).

Relying on the information provided by the Hoopa Tribal CCC, including certification that it carried the required liability insurance coverage, CNCS allowed the Hoopa Tribal CCC to enter into the DRCA with CNCS that is attached at Appendix 3.

In Article VIII, page 9 of the attached DRCA, the Hoopa Tribal CCC agreed to maintain a liability insurance policy that would cover its program staff and members with respect to their CNCS disaster response deployments. In Article IX.B, page 11 of the DRCA, the Hoopa Tribal CCC agreed that its maintaining liability insurance would be a pre-requisite to its receiving CNCS disaster response deployments. Liability insurance was crucial because the Hoopa Tribal CCC's members were youths ages 17-24, who were earning a stipend of only $5,550, plus room and board, for their nine months of AmeriCorps service. *See* AmeriCorps Hoopa Tribal CCC's program description at Appendix 4. CNCS required its A-DRT's to have liability insurance because it knew the A-DRT's young members would lack the personal financial resources to respond in damages for harm they might cause during their disaster response deployments.

In summary, the Hoopa Valley Tribe contractually agreed with the federal government (CNCS) that it would carry liability insurance for injuries/damages its AmeriCorps chapter and its members/participants might inflict upon others in connection with the Hoopa Tribal CCC's disaster response deployments. This agreement waived any sovereign immunity the Tribe might otherwise claim concerning tort claims arising from the Hoopa Tribal CCC's disaster response deployments. If the Tribe's agreement to carry liability insurance did not constitute waiver of sovereign immunity for disaster-deployment related tort claims, the Tribe's agreement to carry

liability insurance would be meaningless because a *liability* insurance policy provides coverage only if the policyholder (Hoopa Valley Tribe) could be found *liable* for the injured party's damages. If the Hoopa Valley Tribe retained sovereign immunity with respect to disaster-deployment related tort claims, such immunity would make a farce of the liability insurance coverage mandated by CNCS—the liability insurance the Hoopa Tribal CCC agreed to carry.

Just as the Potawatomi Tribe's agreement to arbitrate constituted a waiver of the Tribe's sovereign immunity in *C & L Enterprises, Inc.*; the Hoopa Valley Tribe's agreement to carry liability insurance constituted a waiver of sovereign immunity concerning torts committed by the Hoopa Tribal CCC in its disaster response deployments. If its agreement to carry liability insurance did not constitute a waiver of sovereign immunity, Mitchell would be left with no remedy for the injuries he suffered due to the negligence of Orico Bailey and his supervisors.

In an ultimate bait and switch, the Hoopa Valley Tribe did not carry the liability insurance it told CNCS it would carry. Instead, the Tribe's liability insurance policy, which is attached at Appendix 5, contains a "sovereignty endorsement" that was not revealed to CNCS when the Tribe submitted its application to enter into a DRCA. *Compare* the Certificate of Insurance the Tribe provided to CNCS (page MM0136 at Appendix 2) with the "Sovereignty Endorsement" contained in the Tribe's liability insurance policy (page HVT001072 at Appendix 5). Pursuant to this sovereignty endorsement, the insurance company cannot make payments to a tort victim if the Tribe claims sovereign immunity—which the Tribe is doing in this case.

IV. THE DEFENDANTS WERE NOT EMPLOYEES OF THE UNITED STATES AND MATTHEW MITCHELL'S TORT CLAIMS ARE NOT COVERED BY THE FTCA

The Defendants erroneously represent they were performing disaster relief activities in Wimberley pursuant to the following contracts with the U.S. Department of the Interior: (1) The Compact of Self Governance Between the Hoopa Valley Indian Tribe and the United States of America (the "Compact," which is attached as Exhibit A to Defendants' Motion to Dismiss); and

(2) the Hoopa Valley Tribe's 2009 Annual Funding Agreement ("AFA") with the U. S. Department of the Interior (which is attached as Exhibit B to Defendants' Motion to Dismiss). The Defendants have injected the Compact and AFA into this case in a misguided effort to argue Orico Bailey and his Hoopa Tribal CCC supervisors were acting as "deemed" employees of the United States pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301, *et seq.* (the "ISDEAA") at the time Matthew Mitchell was injured. Contrary to Defendants' representations, the Compact and AFA have nothing to do with the Hoopa Tribal CCC or its disaster response activities in Wimberley, Texas.

The ISDEAA was passed by Congress in 1975 to provide a mechanism for Indian tribes to assume responsibility for conducting activities previously performed *for the Indian tribes* by the United Stated Department of the Interior (through the Bureau of Indian Affairs or "BIA") **and** by the United States Department of Health and Human Services ("DHHS") (through the Indian Health Service or "IHS"). *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as 25 U.S.C. §§ 450, *et seq.*, which subsequently was renumbered and transferred to 25 U.S.C. §§ 5301, *et seq.* The ISDEAA authorizes the Secretary of the Department of the Interior and the Secretary of DHHS to enter into contracts with Indian tribes, at the tribes' request, which provide for the tribes' *assuming control* of programs, functions, services, and activities previously provided to or for the tribes by these two federal Departments. *See* discussion of ISDEAA in *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell,* 729 F.3d 1025, 1028 (9th Cir. 2013).

In 1990, the ISDEAA was amended to provide that in those situations where an Indian tribe enters into a self-determination contract with DHHS and assumes responsibility for providing *health care services* previously provided by the IHS, the Tribe and its employees will be "deemed" to be employees of the United States with respect to the assertion of health care liability claims against them and those claims will be covered by the FTCA. *See* 25 U.S.C. §

5321(d). Subsequently, in 1994, federal regulations were promulgated that extended FTCA coverage to tort claims concerning functions, functions, services, and activities ***assumed*** by the tribes in their self-determination contracts with the Department of the Interior. *See* 25 CFR § 900.180(b).

Fatal flaws in the Defendants' erroneous argument that the Hoopa Tribal CCC and Orico Bailey were acting as deemed federal employees include the following: (a) the Defendants' disaster relief activities in Wimberley were performed pursuant to the DRCA with CNCS--***not*** pursuant to a self-determination contract with the Department of the Interior; (b) these disaster relief activities ***were not*** activities that previously had been performed *for the Hoopa Valley Tribe* by the Department of the Interior; and (c) the funding for these disaster relief activities was provided by CNCS—***not*** by the Department of the Interior.

The Hoopa Tribal CCC was created pursuant to a grant of money by CNCS—**not** pursuant to the Compact or AFA between the Hoopa Valley Tribe and the Department of the Interior. *See* Notice of Grant Award by CNCS to Hoopa Valley Tribe at Appendix 6. The Hoopa Valley Tribe has no illusion regarding the origin of the Hoopa Tribal CCC. In a publication on its web site promoting the Hoopa Tribal CCC to potential AmeriCorps applicants, the Hoopa Valley Tribe states the following: "AmeriCorps Hoopa Tribal Civilian Community Corps (Tribal CCC) *is a program of the Corporation for National and Community Service*." (emphasis added). A copy of this publication by the Tribe is attached at Appendix 4. In the Hoopa Valley Tribe's "Welcome Guide" for the Hoopa Tribal CCC's new members, the Tribe has included a depiction of the chain of command for the "AmeriCorps Hoopa TCCC" that clearly shows it is a program of CNCS. A copy of this chain of command is attached at Appendix 7. Nowhere in the Tribe's various publications regarding the Hoopa Tribal CCC is there any statement or representation that the Hoopa Tribal CCC is a program funded by or

related in any manner to the U.S. Department of the Interior—those erroneous representations appear for the first time in the Defendants' Motion to Dismiss.

Attached at Appendix 8 is a copy of the Tribe's Application to CNCS for funding to continue operation of the Hoopa Tribal CCC over the time frame 09/01/2014 through 08/31/2016, which time frame encompasses the Hoopa Tribal CCC's providing disaster relief services in Wimberley. On page HVT000740 of the Tribe's funding application, the Tribe represented to CNCS that "TCCC [the Hoopa Tribal CCC] would not exist without CNCS funding." On page HVT000747 of the Tribe's funding application, the Tribe represented to CNCS that Hoopa Tribal CCC members "are required to wear uniforms that display the AmeriCorps logo." The AmeriCorps name and logo are registered service marks of CNCS and must prominently be displayed by AmeriCorps chapters on their websites, gear, and uniforms. (*See* CNCS publication attached at Appendix 9)

The funding of the Hoopa Tribal CCC's disaster relief activities in Wimberley was provided by CNCS--**not** the Department of the Interior. Attached at Appendix 10 is a copy of the pre-deployment budget submitted by the Hoopa Tribal CCC to CNCS when it applied for disaster deployment to Texas in June of 2015. Attached at Appendix 11 is a copy the Hoopa Tribal CCC's post-deployment request to CNCS for reimbursement of the expenses it incurred in connection with its disaster response deployment to Wimberley. Attached at Appendix 12 is verification that CNCS reimbursed the Hoopa Tribal CCC for its disaster deployment expenses.

V. THE FTCA IS INAPPLICABLE TO MATTHEW MITCHELL'S TORT CLAIMS

The AmeriCorps programs funded by CNCS include the following: (1) AmeriCorps Vista, a program focused on fighting poverty; (2) the AmeriCorps National Civilian Community Corps, a full-time residential program for men and women ages 18-24, which combines practices of civilian and military service; and (3) AmeriCorps chapters created by "States, subdivisions of

States, territories, ***Indian tribes***, public or private nonprofit organizations and institutions of higher education" with CNCS funding provided under the AmeriCorps State and National Program.[6] Congress passed legislation providing that the members of the AmeriCorps National Civilian Community Corps and AmeriCorps VISTA are deemed to be employees of the United States for purposes of the FTCA. *See* 42 U.S.C. § 12620 (AmeriCorps National CCC) and 42 U.S.C. § 5055 (AmeriCorps VISTA). With respect to the AmeriCorps chapters established under the AmeriCorps State and National grant program, which includes the AmeriCorps Hoopa Tribal CCC; Congress has not passed legislation deeming these AmeriCorps chapters to be employees of the United States. For that reason, each CNCS grantee under the AmeriCorps State and National grant program is required by CNCS to obtain liability insurance coverage "for the organization, employees and members, including coverage of members engaged in on- and off-site project activities." *See* p. 12 of 2014 AmeriCorps State and National Grant Provisions, effective June 1, 2014, attached hereto as Appendix 13.

The Defendants have attached as Appendix E to their Motion to Dismiss the Declaration of Brandy Morton, the Hoopa Valley Tribe's Chief Financial Officer. The Defendants have proffered this Declaration as allegedly supporting their erroneous representation that the Compact and AFA provide funds that are utilized to operate the AmeriCorps Hoopa Tribal CCC. A review of Brandy Morton's "Declaration" reveals that the Tribe's CFO merely states the Tribe has chosen to use some of the funds provided by the Department of the Interior to defray some of the operational expenses of the AmeriCorps Hoopa Tribal CCC—an entity that is not mentioned in the Compact or AFA. If the claimed diversion of funds actually took place, the Tribe's use of Department of the Interior funds to pay some operational expenses of the Hoopa Tribal CCC

[6] *See* 42 U.S.C. § 12572; AmeriCorps National Civilian Community Corps Member Handbook, on web site of CNCS; "2015 Terms and Conditions for AmeriCorps State and national Grants, effective May 1, 2015", on CNCS website; and CNCS publication, "AmeriCorps Reaches One Million Members," taken from CNCS website.

does not make the Hoopa Valley Tribe and the Hoopa Tribal CCC's program participants "deemed employees" of the United States with respect to the Hoopa Tribal CCC's disaster relief activities in Texas and it does not make the United States liable for the Defendants' tortious conduct in Texas. A hypothetical underscores this fact. Suppose an Indian tribe were to use (divert) some of the funds provided by the Department of the Interior pursuant to a self-determination contract or an ASA to defray some of the operational expenses of the tribe's casino—an activity (gaming) not covered by the Compact or ASA with the Department of the Interior. The tribe's decision to shift Department of the Interior funds to the operation of its casino does not *ipso facto* bring the tribe's activities and tortious conduct in the operation of the casino within the ISDEAA; it does not make the tribe or the casino's employees "deemed employees" of the United States under the ISDEAA; and it does not make the United States amenable to suit under the FTCA for torts occurring in the operation of the tribe's casino. This legal reality is underscored by the various ISDEAA cases cited in the Defendants' Motion to Dismiss, especially *Shirk v. United States,* 773 F.3d 999 (9th Cir. 2014) and *Colbert v. United States,* 785 F.3d 1384 (11th Cir. 2015).

Shirk (which involved tort claims asserted against the United States concerning off-reservation policing activities of two tribal police officers) and *Colbert* (which involved a Tribal attorney's involvement in an off-reservation vehicular collision) demonstrate that in order for a Tribe or its members to be entitled to FTCA coverage as deemed employees of the United States, there must be proof of the following: (1) A self-determination contract (a "638" contract) between the Tribe and the Department of the Interior pursuant to which the Tribe has "stepped into the shoes" of the Department of the Interior and assumed responsibility and managerial control "of services and programs previously administered by" the Department of the Interior's BIA for the Tribe, (2) the defendant must have been performing functions under the 638 contract

at the time of his alleged tortious conduct; and (3) the defendant must have been acting in the scope of the 638 contract. None of these requirements can be met with respect to the Hoopa Tribal CCC's disaster relief activities in Wimberley. Therefore, the ISDEAA has no applicability to Mitchell's tort claims; Orico Bailey and his supervisors are not a deemed employees of the United States; and the United States is not answerable under the FTCA.

VI. THERE IS A PROCEDURAL DEFECT THAT PRECLUDES THE COURT'S GRANTING DEFENEDANTS' REQUEST FOR WESTFALL ACT RELIEF

If the Court were inclined to entertain the Defendants' request that the United States be substituted as Defendant, Plaintiff objects that the United States has not made an appearance in this cause and has not been afforded an opportunity to be heard regarding the Defendants' request for Westfall Act relief as required by 28 U.S.C. § 2679(d)(3). *See, e.g., Gutierrez De Martinez v. Lamagno,* 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995). Due to the absence of the United States, there currently is a procedural defect that precludes the Court's ordering the United States to be substituted as Defendant under the Westfall Act.

VII. THIS COURT HAS FEDERAL QUESTION JURISDICTION OF THIS CASE

From the time they filed their initial pleading (Dkt. No. 7), the Defendants have alleged they were acting as deemed employees of the United States and the Defendants have sought to have the United States substituted as Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679. The Supreme Court has expressly held requests for Westfall Act relief clothe the federal courts with federal question jurisdiction under 28 U.S.C. § 1331.

> Whether the employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. (Citation omitted). Because a case under the Westfall Act thus "raises [a] question of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III." (citation omitted). In adjudicating the scope-of-federal-employment question "at the very outset," the court inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee. (citation omitted). "Considerations of judicial economy convenience and fairness to litigants," (citation omitted), make it reasonable

> and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest. *Gutierrez De Martinez v. Lamagno,* 515 U.S. 417, 436-437, 115 S. Ct. 2227, 2237, 132 L. Ed. 2d 375, 390 (1995).

This Court has federal question jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 2679.

VIII. THIS COURT HAS DIVERISTY JURISDICTION RE BAILEY AND SUPPLEMENTAL JURISDICTION RE THE HOOPA VALLEY TRIBE

Even if one were to ignore this Court's federal question jurisdiction, this Court has diversity jurisdiction of the tort claims asserted by Texas citizen Matthew Mitchell against California citizen Orico Bailey pursuant to 28 U.S.C. § 1332. Bailey is a citizen of the United States and of California, where he resides. *See* U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401; *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 n. 10, 94 L. Ed. 2d 18, n. 10, 107 S. Ct. 971, n. 10 (1987) (stating Indians are citizens of the State where they reside). In his AmeriCorps application, which is attached at Appendix 14, Orico Bailey represented that he was born in California and resides in California. Bailey was served with citation at his residence in California. (Dkt. No. 6).

Plaintiff relied on this Court's supplemental jurisdiction under 28 U.S.C. § 1367 to join the Hoopa Valley Tribe as a defendant—*not* diversity jurisdiction. Inexplicably, the Defendants ignore this fact and attack *diversity jurisdiction* of the Tribe by citing numerous inapposite cases for the proposition that Indian tribes are "stateless" entities and will not support diversity jurisdiction. The Defendants did not cite a single case that stands for the proposition this Court lacks *supplemental jurisdiction* of Plaintiff's claims against the Hoopa Valley Tribe.

In cases where a federal court has diversity jurisdiction of claims by at least one plaintiff against one defendant, 28 U.S.C. § 1367 authorizes the court to exercise *supplemental jurisdiction* over the claims of other plaintiffs and/or *supplemental jurisdiction* over claims against other defendants in the same Article III case or controversy, even if those other claims

would not themselves meet the requirements for diversity jurisdiction—provided the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. 267, 3 Cranch 257, 2 L. Ed. 435 (1806) is met and no plaintiff is a citizen of the same state as a defendant.[7] Supplemental jurisdiction is available to join the Tribe as a defendant because the Tribe is not a citizen of Texas and thus the complete diversity requirement of *Strawbridge v. Curtiss* is not violated. The Hoopa Valley Tribe is a stateless entity—all of whose Tribal members are citizens of California, where the Tribe's reservation is located. Plaintiff properly invoked the Court's supplemental jurisdiction to join the Hoopa Valley Tribe as a defendant.

This Court has supplemental jurisdiction over Matthew Mitchell's tort claims against the Hoopa Valley pursuant to 28 U.S.C. § 1367 because those claims are so related to the bodily injury claims he is asserting against Orico Bailey that they clearly form part of the same case or controversy under Article III of the United States Constitution. Additionally, Mitchell's claims against the Hoopa Valley Tribe do not predominate over his claims against Orico Bailey.

IX. CONCLUSION

Neither the Hoopa Valley Tribe nor Orico Bailey can rely on tribal sovereign immunity, unfounded claims of federal employment, or meritless challenges to diversity jurisdiction to dispossess this Court of its subject matter jurisdiction to entertain Matthew Mitchell's tort claims against the Defendants. The Defendants' challenges to the subject matter jurisdiction of this Court are devoid of merit. Plaintiff respectfully requests the Court to DENY in all respects the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternative Motion for Summary Judgment.

---

[7] *See Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928 (7th Cir. 1996); *Free v. Abbott Labs*, 51 F.3d 524 (5th Cir. 1995, *aff'd by an equally divided court sub nom.*, 545 U.S. 333, 146 L. Ed. 2d 306, 120 S. Ct. 1578 (2000) (per curiam).

Respectfully submitted,

STEPHEN F. LAZOR
Texas State Bar Number: 12069600

TINSMAN & SCIANO, INC.
10107 McAllister Freeway
San Antonio, Texas 78216
Telephone: (210) 225-3121
Facsimile: (210) 225-6235
E-mail: slazor@tsslawyers.com

ATTORNEYS FOR PLAINTIFF
MATTHEW MITCHELL

Certificate of Service

I do hereby certify that on this the 1st day of June, 2018, a true and correct copy of the above and foregoing pleading and its Appendices were forwarded to counsel for the Defendants, to-wit:

Mary Holmesly
Tribble Ross
6731 Richmond Ave.
Houston, Texas 77057

Via E-mail: mholmesly@tribblelawfirm.com

ATTORNEY FOR DEFENDANTS,
ORICO BAILEY and HOOPA VALLEY TRIBE,
d/b/a AMERICORPS HOOPA TRIBAL
CIVILIAN COMMUNITY CORPS

Stephen F. Lazor