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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Skull Valley Health Care, LLC, et. al.,
Plaintiffs,

v.

NorStar Consultants LLC, et al.,
Defendants

Ashanti Moritz, an individual,
Counterclaim/Crossclaim Plaintiff,

v.

Skull Valley Health Care, LLC, a tribal entity; Candace Bear, an individual, Dwayne Wash, an individual, and Victor Garcia, an individual
Counterclaim/Third-Party Crossclaim Defendants

OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS AND CROSSCLAIMS

Case No. 2:22-cv-00326-TC

Judge: Tena Campbell

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COMES NOW, Defendant/Cross Plaintiff, Ashanti Moritz ("Moritz"), and responds to Plaintiff/Counterclaim Defendant and Cross Defendant Garcia's Motion to Dismiss as follows:

I. Statement of Facts

1. Counterclaim and Crossclaim Defendants properly point out that the Skull Valley Band of Goshutes Indians ("Goshute Tribe"), who is not a party to this action, is a federally recognized Indian tribe.

2. In 2018, the Goshute Tribe entered into an Indian Self Determination and Education Assistance Act Contract ("ISDEAA Contract") with the United States Department of Health and Human Services ("DHHS") and Indian Health Services ("IHS").

3. The Goshute Tribe created Skull Valley Health Clinic, LLC ("SVHC") under Utah law as a Utah Limited Liability Company in August 2018. It was converted to a Utah limited liability company in October 2019 and finally to a Utah Tribal Limited Liability Company in September 2021. All in accordance with the laws of the State of Utah.

4. SVHC operates from facilities located within the county of Tooele Utah but not on the Goshute Tribe reservation.

5. As found by the court in *Medesimo Tempo, LLC v. Skull Valley Health Care, LLC*, Third Judicial District Court, Tooele County, Utah Case No. 210301424 Order of May 31, 2022, SVHC provides services to patients that are predominately not member of the Goshute Tribe.

6. The monies from the services rendered by the Goshute Tribe are restricted for specific purposes as identified under 25 USC 46 § 5325(k) and as such cannot go to the general treasury of the Goshute Tribe.

7. Moritz was hired to provide services to SVHC by Team Recovery Stewards.

8. Thereafter in August of 2021, Moritz was hired as a direct employee of SVHC.

9. SVHC provided Employees with an Employee Handbook. A copy was attached as Exhibit 1 to Counterclaim [Docket 2-26] ("Employee Policy").

10. Moritz worked under the supervision of Cross Defendant Victor Garcia ("Garcia") from August of 2021 until she was dismissed in January of 2022.

11. Moritz was terminated January 25, 2022.

II. Background

1. In March 2022, Plaintiff SVHC and Skull Valley Health Care, LLC filed suit against Moritz in the Third Judicial District Court for Tooele County, Utah. Case No. 220300382.

2. Moritz answered the Complaint and filed the counterclaim and cross claims that are the subject of the instant motion on May 5, 2022.

3. SVHC removed the matter to this Court.

III. Argument

A. SVHC is a Subordinate Economic Entity Not Entitled to Sovereign Immunity.

SVHC is organized and exists under the laws of the State of Utah. Utah Code Annotated § 48-3a-901(4)(b) specifically provides that "[i]f a tribal limited liability company elects to apply for authority to transact business in the state, for purposes of this chapter, the tribal limited liability company shall be treated in the same manner as a foreign limited liability company formed under the laws of another state." *See Somerlott v. Cherokee Nation Distributors, Inc.,* 686 F.3d 1144, 1149-50 (10th Cir 2012).

Having elected to avail itself of the advantages of being a Utah economic entity, SVHC may not now attempt to invoke immunity.

B. SVHC is not Entitled to the Protection of Sovereign Immunity.

In order for any of SVHC or Garcia's arguments to be considered they must first meet the threshold question of whether SVHC as a separate legal entity formed under Utah law is

sufficiently tied to the Goshute Tribe to be considered an "arm-of-the-tribe" and thus inherit its sovereign immunity.

The Tenth Circuit Court of Appeals has established a six-factor test for the determination of whether a tribally formed entity is an "arm-of-the-tribe." *Breakthrough Mgmt Group, Inc., v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173, 1184 (10th Cir. 2010), *Somerlott supra at* 1149.

The six factors, which are very fact based, are considered in turn:

1. The method of creation of the economic entity.

As set forth above SVHC is organized and exists under the laws of the State of Utah. In fact, it was initially created as a regular Utah limited liability company and only recently converted to a Utah Tribal limited liability company under UCA § 48-3a-904(4)(b). SVHC made the choice to register under the laws of the state of Utah and thus operates under Utah law. See UCA § 48-3a-901(4)(a).

2. The purpose of the entity.

SVHC provides medical related services, although its patients are predominately NOT members of the Goshute Tribe. In addition, although created by the Goshute Tribe, money from the operation of the clinic does not go to the general treasury of the Goshute Tribe.

3. The structure, ownership, and management, including the amount of control the tribe has over the entity.

SVHC was created by the Goshute Tribe, but it was created as a Utah limited liability company under the laws of the State of Utah.

4. The tribe's intent with respect to the sharing of its sovereign immunity.

There is no document or statement of intent on behalf of the Goshute Tribe demonstrating any intent to extend its sovereign state to include SVHC. While the question may seem simple at

first glance, i.e., why not? *Somerlott* advises that an entity created under tribal law only and holding to its protections as such is likely to find that it enjoys its immunity at the expense of others who will not then be willing to do business with it. If anything, the conscious decision to register and create SVHC under the laws of the State of Utah and not leave it just under its tribal state, speak to the desire to enter the commercial world as an independent economic entity as recognized in UCA § 48-3a-901(4)(a). SVHC should not be allowed to present itself to the world as a normal LLC, then try to hide behind tribal immunity.

5. The financial relationship between the tribe and the entity.

Again, while SVHC was created by the Goshute Tribe there is no direct financial relationship that benefits the general treasury of the Goshute Tribe.

6. The policies underlying tribal sovereign immunity and its connection to tribal economic development.

Here again, the choice to create SVHC under the laws of the State of Utah cuts against allowing it to claim sovereign immunity.

Looking at all six factors, they weigh against SVHC being found to be an arm-of-the-tribe.

C. SVHC has Waived Sovereign Immunity – Limited and Pursuant to the ISDEAA.

Even assuming arguendo that the Court determines that SVHC meets the six-factor test under *Chukchansi* and qualifies as an arm-of-the-tribe, SVHC has effectively waived sovereign immunity, at least on a limited basis in this case. Under the express provisions of the ISDEAA Contract, the Secretary for the United States DHHS is required to obtain or provide liability insurance or equivalent coverage for tribal organizations and tribal contractors carrying out contracts under the Act. See 25 U.S.C § 5321(c). Moreover, any policy of insurance obtained or provided by the Secretary must include a provision "that the insurance carrier shall waive any right

it may have to raise as a defense the sovereign immunity of an Indian tribe from suit[.]" *Id.* at § 5321(c)(3)(A). While such waiver is limited to "the coverage or limits of the policy of insurance," this waiver must apply to Moritz' claim in this case under the ISDEAA Contract even if the Court determines that the SVHC is an arm-of-the-tribe.

Furthermore, allowing SVHC to assert sovereign immunity would be especially egregious in this case. First, SVHC voluntarily subjected itself to the jurisdiction of this Court by first filing this case against Moritz in Utah state court and then by removing the case to the Federal Court. At least in part, SVHC's claims assert claims against Moritz that arose specifically from her claimed actions as an employee of SVHC. Yet now they want to eviscerate any potential offset or other recovery by Moritz for their own wrongdoing as an employer.

Additionally, SVHC failed to provide any notice to Moritz or any of its other employees that their employment was or would be subject to either the tribe's sovereign immunity or to the Federal Tort Claim Act (FTCA). Rather, SVHC has either intentionally or recklessly mislead Moritz, and its other employees, into the belief that they would be protected, like any private employees in the State of Utah by state and federal law.

The Employee Policy provides:

> Hiring policies will be in accordance with the "Americans with Disabilities Act of 1990, as amended, or such other legally protected status as may, from time to time, be recognized by applicable federal or state law." *Id.* Section 2 at page 7.
>
> "Employees of SVHC are categorized as 'exempt' or 'non-exempt' for purposes of determining their eligibility for the payment of overtime wages and accrual of PTO." *Id.* Section 2 at page 8.
>
> "Pursuant to the Fair Labor Standards Act (FLSA) and applicable state laws, exempt employees are those who perform in executive, administrative, learned professional, outside sales personnel, or as a computer related employee. Exempt employees are not eligible for overtime pay." *Id.* Section 2 at page 8.

> "In accordance with the U.S. Department of Labor's Fair Labor Standards Act, all non-exempt employees **must** receive overtime pay for hours worked in excess . . ." *Id.* Section 12 at page 41, emphasis added.

Although the Employee Policy states that employment is subject to applicable federal and state law, SVHC did fail to post the required labor law and employee rights posters that advise employees of their rights. However, at no time and in none of the information provided by SVHC to Moritz, and its other employees, does SVHC provide any notice that employment is subject to either the tribe's sovereign immunity or the FTCA.

Critically, there is nothing in the Employee Policies that states or even addresses that employment with SVHC will be subject to the tribe's sovereign immunity or to the FTCA. Rather, the Employee Policies expressly invokes the Americans with Disabilities Act as well as applicable federal or state law and requires new hires to complete an I-9 and W-4, communicating to any reasonable employee the belief that they would – like any other employee in the State of Utah, be covered under the protections of state and federal law. See Employee Policy [Docket 2-26], Sec. 2A, p. 7 and Sec 2DII, p. 9.

The most likely conclusion is that in creating its employment structure SVHC never intended to move the relationship with its employees outside of state and federal law.

Regardless, as SVHC has effectively waived its sovereign immunity pursuant to the ISDEAA Contract and voluntarily subjected itself to the jurisdiction of this Court, Moritz should be allowed to seek offset and/or other damages as a counterclaim to SVHC's claims in this matter. Accordingly, this Court should deny SVHC's Motion to Dismiss and allow Moritz to pursue her claims.

D. <u>The Procedural Requirements of the Federal Tort Claims Act Do Not Apply to Moritz' Counterclaims and Crossclaims.</u>

SVHC asserts that Moritz claims should be dismissed because she has not exhausted her administrative remedies under the FTCA. Generally, however claims arising from employment are not cognizable under the FTCA. See 2 L. Jayson, Handling Federal Tort Claims Sec. 212.03, at 9-24 (1989); see also *Young v. United States*, 498 F.2d 1211 (5th Cir. 1974), (upholding the dismissal of a tort claim based on breach of an implied employment contract but expressly declined to comment on whether a cause of action under the FTCA could ever arise in the employment context); and *Schuler v. United States*, 628 F.2d 198 (D.C. Cir. 1980) (*en banc*), (declining to address whether a complainant could sustain an FTCA claim for wrongful termination). While federal courts have stopped short of determining that a claim arising in the employment context may never fall under the FTCA, SVHC has failed provide any legal basis or support for why the FTCA should apply to Moritz' claims in this case.

But even assuming that the Court determines that the FTCA applies to Moritz' claims, the procedural bar requiring exhaustion of administrative remedies does not apply to counterclaims or crossclaims that are brought in accordance with the Rules of Civil Procedure. The provisions of the FTCA can be found at 28 U.S.C. § 1346(b), § 1402(b), § 2401(b), and §§ 2671-2680. As an initial matter, Moritz agrees with SVHC that under and pursuant to the FTCA:

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."
> 28 U.S.C. § 2675.

However, under the express language of the FTCA, the mandatory requirement for a claimant to exhaust their administrative remedies do not "apply to such claims as may be asserted

under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." *Id*. See also *United States v. Dailey*, Case No. 2:13-cv-722-DB, Doc 34, pp. 7-9 D. Utah, Jan 26, 2015. Here it is indisputable that Moritz' claims have been brought as counterclaims and crossclaims in accordance with Rule 13 of the Utah and Federal Rules of Civil Procedure. Thus, entirely contrary to SVHC's assertions, even if the FTCA applies to Moritz' claims, she was not required to exhaust her administrative remedies prior to filing her counterclaims and crossclaims in this case.

Further, federal courts have consistently held that a party cannot submit itself to the jurisdiction of the court and then preclude the defendant from asserting counterclaims for damages arising out of the same factual circumstances. *Id*. at p. 9, see also *United States v. S. Pac. Co*., 210 F. Supp. 760, 762 (N.D. Cal. 1962); *United States v. Capital Transit Co*., 108 F. Supp. 348 (D.D.C.1952); and *United States v. Shainfine*, 151 F. Supp. 586, 587 (E.D. Pa. 1957). As Moritz' claims are plainly brought as counterclaims and crossclaims that arise from the same relationship that is the basis for Plaintiff's Complaint, there is no legal basis for the Court in this case to dismiss Moritz' claims based on the allegation that she has not exhausted her administrative remedies under the FTCA.

E. <u>The United States is Not an Indispensable Party at this Time</u>.

SVHC asserts that the United States is the "only party in interest" with regard to Moritz' claims and that Moritz' claims should be dismissed because the United States has not been joined. SVHC however, fails to explain in its Motion that while the ISDEAA provides that a tribal organization may be deemed to be part of the Public Health Service in the DHHS, this is only true for claims of "personal injury, including death, resulting from the performance . . . of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28 [the FTCA]." 25 U.S.C. § 5321(d). Moritz' claims are not

based on personal injury and SVHC has failed to provide any evidence or argument why the FTCA would apply to claims arising from her employment with SVHC.

Furthermore, even if Moritz' claims do fall under the FTCA, there is a process that must be followed before the United States becomes the de facto party in interest. It is not automatic. Under the FTCA, the Attorney General must first certify whether SVHC (and the other defendants) were working within their scope of their employment. Thereafter, the United States would simply be substituted as the Defendant (seemingly for all parties that are working within the scope of employment) by the Court. See *Gutierrez de Martinez v. Lamagno*, 515 US 417, 430 (1995), (stating "[t]he certification, removal, and substitution provisions of the Westfall Act, 28 U. S. C. §§ 2679(d)(1)–(3), work together to assure that, when scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court."), see also *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.")), see also *Kvasnikoff v. US, Dist. Court*, D. Alaska 2018 (generally).

Here, SVHC has provided no evidence or information concerning whether it has notified the DHHS or the Attorney General about this action, let alone asked them for a determination. Regardless, without a determination and certification by the Attorney General that SVHC and the other defendants were acting within the scope of the ISDEAA Contract, there is no basis at this time to join the United States as a party to this action. Unless or until such certification occurs, the United States is not the correct party in interest in this case. Furthermore, SVHC's failure to notify the Attorney General and seek a certification does not give rise to dismissal of Moritz' claims. Rather, if and when the Attorney General certifies that SVHC was acting within the scope of the ISDEAA Contract, the United States would simply be substituted as the party in interest and the action could proceed based on the insurance provider's limited waiver of sovereign immunity.

F. <u>The Goshute Tribe is not an Indispensable Party</u>.

Under federal law, an indispensable party is determined by applying Rule 19 of the Federal Rules of Civil Procedure. *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999). In relevant part, Rule 19 provides that a party is necessary only if:

> (A) in that person's absence, the court cannot accord complete relief among the existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> i. as a practical matter impair or impede the person's ability to protect the interest; or
>
> ii. leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> Fed. R. Civ. P. 19(a).

SVHC presents no evidence or argument why the Goshute Tribe meets any of the criteria as a necessary party under the factors outlined under Rule 19. Rather, SVHC simply focuses on the claim that SVHC is an arm-of-the-tribe and the sovereign immunity of the Goshute Tribe

applies to SVHC. These arguments however are irrelevant as to whether the Goshute Tribe is an indispensable party.

SVHC status of a wholly owned entity of the Goshute Tribe does not defeat or even affect the Court's ability to accord complete relief among the current parties to this case, Furthermore, the Goshute Tribe has every ability and opportunity, as the sole owner of SVHC, to ensure that the tribe's interests are fully protected. Finally, there is no risk of the Goshute Tribe incurring double, multiple, or inconsistent obligations under this lawsuit.

Moritz' claims are solely claims against SVHC, her employer, and the identified Managers of the limited liability company. Candace Bear and Dwayne Wash's status as tribal leaders is irrelevant to this action. They are named because they identified themselves as Managers of SVHC with the Utah Department of Commerce and they acted as the Managers of the clinic. Moritz makes no claim against the Goshute Tribe and the tribe will have no part in these proceedings. No judgment or order would or could be sought against the Goshute Tribe, and enforcement of any judgment would be solely against the assets of SVHC.

Furthermore, the Goshute Tribe's sovereign immunity is also irrelevant as to whether the tribe is an indispensable party. Either the SVHC is not an arm-of-the-tribe as argued in section B above and therefore not protected by the Goshute Tribe's sovereign immunity, or SVHC is a tribal organization covered under the liability protection and limited waiver of sovereign immunity of the ISDEAA Contract. In either case, Moritz has an ability to proceed with her claims. Consequently, there is no basis for the Court to determine that the Goshute Tribe is an indispensable party in this case.

G. <u>Count II of the Counterclaim and Crossclaim should be Dismissed</u>.

Moritz' stipulates that Count II of the Counterclaim and Crossclaim for Discrimination and Hostile Work Environment should be dismissed.

H. <u>If the Procedural Bar of the FTCA Applies then this Matter should be Stayed or Alternatively Count I of the Counterclaim and Crossclaim should be Dismissed Without Prejudice.</u>

If the Court finds that Moritz' was required to exhaust her FTCA administrative remedies prior to filing her counterclaim and crossclaim, then Moritz respectfully requests that the case in its entirely be stayed until she can prosecute her administrative remedies.

Alternatively, as the deficiencies raised by Cross/Counterclaim Defendants are jurisdictional, and procedural in nature, the appropriate remedy is to dismiss both the Cross Complaint and the Counterclaim without prejudice to allow Moritz to cure any defects and return to this Court once done.

IV. CONCLUSION

For the reasons set forth above Plaintiff and Cross Defendant's motion to dismiss should be denied. In the alternative, if it is found that this Court lacks jurisdiction to hear Moritz' claims at this time, her claims should be stayed or dismissed without prejudice.

DATED this 21st day of October, 2022.

WESTON, GARROU & MOONEY

/ s / Jerome H. Mooney
Jerome H. Mooney
Attorneys for Defendants and
Counterclaim/Crossclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing OPPOSITION was served or will be served to the following in the manner set forth below:

ATTORNEY FOR Skull Valley Health Care, LLC:

Kristian Beckett (Bar No. 14415) **BECKETT LAW FIRM** PO BOX 4 Kuna, ID 83634 Telephone: (801) 891-6404	[ ] [ ] [ ] [X] [X]	Hand-delivery U.S. Mail Fax: Email: Kristian@Beckettlegal.com ECF

Served this 21st day of October, 2022

/ s / Jerome H. Mooney
Jerome H. Mooney

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