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 6 **Attorneys for Defendant**  
 7 Holy Cross Hospital, Inc.

8 **IN THE UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 ASHLEY CERVANTES, a single woman,

NO. 4:16-CV-00334-CKJ

11 Plaintiff,

**DEFENDANT HOLY CROSS  
 HOSPITAL, INC.’S JOINDER  
 IN DEFENDANT QUANTUM  
 PLUS, L.L.C.’S MOTION FOR  
 SUMMARY JUDGMENT**

12 vs.

**Oral Argument Requested**

13  
 14 UNITED STATES OF AMERICA;  
 15 UNITED STATES CUSTOMS AND  
 BORDER PROTECTION AGENT  
 16 SHAMEKA LEGGETT and “JOHN  
 17 DOE” LEGGETT; UNKNOWN UNITED  
 STATES CUSTOMS AND BORDER  
 18 PROTECTION AGENTS; HOLY CROSS  
 HOSPITAL, INC.; PATRICK F.  
 19 MARTINEZ AND “JANE DOE”  
 20 MARTINEZ; QUANTUM PLUS, INC.,  
 dba TEAMHEALTH WEST; JOHN  
 21 DOES 1-5; JANE DOES 1-5; XYZ  
 CORPORATIONS 1-5; ABC  
 22 PARTNERSHIPS 1-5,

*(Assigned to  
 The Hon. Cindy K. Jorgenson)*

23 Defendants.

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1 Defendant Holy Cross Hospital, Inc., by and through undersigned, hereby joins  
2 in and adopts as its own the arguments as set forth in Defendant Quantum Plus, L.L.C.  
3 (fka Quantum Plus, Inc.) dba TeamHealth West’s Motion for Summary Judgment,  
4 Statement of Facts attached thereto, as well as Holy Cross’s own Statement of Facts  
5 submitted herewith, all of which are incorporated by reference.  
6

7 **I. Factual Background**

8 Plaintiff brought a Complaint against the United States, U.S. Customs and  
9 Broder Protection Agents, Dr. Patrick Martinez, and Holy Cross Hospital claiming  
10 violations of *Bivens*, § 1983, and negligent hiring. Separate Statement of Facts  
11 (“SSOF”) ¶ 1.  
12

13 Dr. Martinez is an independent contractor and not an employee of Holy Cross  
14 Hospital, however, as with TeamHealth, Plaintiff is also asserting he was an agent of  
15 the hospital. SSOF ¶ 10.  
16

17 Holy Cross Hospital filed a Motion to Dismiss as to the *Bivens* and § 1983  
18 claims as neither allows recovery for vicarious liability. SSOF ¶ 2. Plaintiff stipulated  
19 to dismissal of the *Bivens* claims as to Holy Cross Hospital. SSOF ¶ 3.  
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21 Plaintiff’s sole claim against Holy Cross Hospital is a state tort claim for  
22 Negligent Hiring, Training and Supervision in Count Seven of the Complaint.  
23 SSOF ¶ 4.  
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1 Plaintiff alleges that the Court has jurisdiction over Holy Cross Hospital  
2 pursuant to 28 U.S.C. §1367a) because “the claims asserted against those Defendants  
3 are so related to claims in the action within such original jurisdiction that they form  
4 part of the same case or controversy under Article III of the United States Constitution.  
5 SSOF ¶ 5.

6  
7 Plaintiff’s only alleged underlying tortious conduct for her negligent  
8 supervision claim is that, because the hospital did not train its employees or agents on  
9 the constraints of the Fourth Amendment, Plaintiff was subject to an unconstitutional  
10 search. Plaintiff has affirmed throughout litigation that her claim is predicated on  
11 these federal constitutional violations. As Plaintiff has made it completely clear,  
12 Plaintiff is claiming that Dr. Martinez and/or the hospital staff committed a *Bivens*  
13 violation. SSOF ¶ 6 and 7.

14  
15 Plaintiff has specifically alleged and maintained throughout this litigation that  
16 Holy Cross Hospital is liable for having negligently failed to train its employees on  
17 “conducting law enforcement searches” and on “the constraints the Fourth  
18 Amendment places on searches.” Plaintiff is likewise maintaining that the negligent  
19 failure to train on these issues caused the violation of the Plaintiff’s federal rights.  
20 SSOF ¶ 8.

21  
22 Plaintiff’s claims against Quantum Plus, L.L.C. and Holy Cross Hospital are  
23 virtually the same, and Plaintiff’s counsel acknowledged, “Vicarious liability is  
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1 inapplicable to *Bivens* and § 1983 claims. As such, it is legally [impossible] for a  
2 *Bivens* claim to be pursued against your client...[your client] is named in Count Seven  
3 only.” See Defendant Quantum Plus, L.L.C./TeamHealth’s SSOF ¶ 6.  
4

5 The deadline for the “addition of parties or amending the complaint” was April  
6 17, 2017. SSOF ¶ 11.

## 7 **II. Legal Argument**

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9 When analyzing state court claims brought in federal district court based on  
10 supplemental jurisdiction, the court applies federal law in analyzing procedural issues  
11 and applies the legal rules that would be applied by the state court when analyzing  
12 substantive issues of law. *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 101  
13 L.Ed.2d 123 (1988) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct.  
14 1464, 89 L.Ed. 2079 (1945)) (“Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct.  
15 817, 82 L.Ed. 1188 (1938), when a federal court exercises diversity or pendent  
16 jurisdiction over state-law claims, ‘the outcome of the litigation in the federal court  
17 should be substantially the same, so far as legal rules determine the outcome of a  
18 litigation, as it would be if tried in a State court.’ ”). Plaintiff’s sole claim against  
19 Holy Cross Hospital is an Arizona state tort claim for “Negligent Hiring, Training and  
20 Supervision” for which this court has supplemental jurisdiction pursuant to 28 U.S.C.  
21 § 1367. SSOF ¶ 4. Therefore, the analysis of Plaintiff’s claim against Holy Cross  
22 Hospital is as if it were being tried in an Arizona Superior Court.  
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1           In addition to the positions set forth by TeamHealth that: 1. allowing Plaintiff  
2 to assert a negligent hiring claim based on *Bivens* is contrary to the well-established  
3 purpose of *Bivens* actions; 2. *Bivens* and its progeny was intended to impose liability  
4 only on individual officers and using it to impose liability on a corporation would  
5 “mean the evisceration of the *Bivens* remedy”; and 3. that Plaintiff’s negligent hiring  
6 claim is an attempt to circumvent well-established restrictions to *Bivens* causes of  
7 actions, Holy Cross also contends that Plaintiff’s claim also fails because the  
8 underlying tort, *Bivens*, is not recognized by Arizona state law and, therefore, there is  
9 no underlying tort for which the principal could be held liable.  
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11

12           Specifically, Plaintiff’s claim against Holy Cross Hospital requires proof of two  
13 tiers of tortious conduct – the underlying tort of the agent/employee, and the negligent  
14 conduct of the principal/employer. In order for an employer to be liable for negligent  
15 hiring, training or retention of an employee, the employee must have committed an  
16 underlying tort recognized under Arizona state law. *See Kuehn v. Stanley*, 91 P.3d  
17 346, 353 (App. 2004). “If the theory of the employee’s underlying tort fails, an  
18 employer cannot be negligent as a matter of law for hiring or retaining the employee.”  
19 *Id.*, *citing Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App.  
20 1990). Furthermore, in order to establish negligent supervision, hiring or training,  
21 Plaintiff is required under Arizona law to prove, “by means of expert testimony, (1)  
22 the standard of care that applied to [the employer/principal] in supervising [the  
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1 employee/agent], and (2) that [the employer/principal] breached the standard of care.”  
2 *St. George v. Plimpton*, 241 Ariz. 163, ¶15, 384 P.3d 1243, 1246 (App. 2016), *citing*  
3 A.R.S. §12-563; *Barrett v. Samaritan Health Servs. Inc.*, 153 Ariz. 138, 141, 735 P.2d  
4 460 (App. 1987). This failure to supervise must be the cause of the Plaintiff’s injury.  
5 *Humana Hosp. Desert Valley v. Superior Ct.*, 154 Ariz. 396, 400, 742 P.2d 1382 (App.  
6 1987). The breach of the standard of care must be established through the requisite  
7 expert witness testimony. *Barrett*, 153 Ariz. at 141 (App. 1987). Thus in order to  
8 prove a claim of negligent supervision, hiring, or training, Plaintiff is required to  
9 establish: 1) that an agent/employee of Holy Cross Hospital committed a predicate tort  
10 *recognized under Arizona law*; 2) that Holy Cross Hospital breached the standard of  
11 care in supervising, hiring or training the agent/employee; and 3) that the failure to  
12 adequately supervise, hire or train the agent/employee caused the Plaintiff’s alleged  
13 injury.  
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17 For the following reasons, there is no genuine issue as to any material fact, and  
18 Plaintiff’s Negligent Hiring, Training and Supervision claim against Holy Cross  
19 Hospital fails as a matter of law.  
20

21 ***A. Plaintiff cannot meet her burden in establishing a predicate tort***  
22 ***recognized under Arizona law.***

23 To succeed on her claim against Holy Cross Hospital, Plaintiff must establish  
24 that an agent or employee of the hospital committed an underlying tort recognized  
25 under Arizona law. *Kuehn, supra; Felder, supra*. Plaintiff’s Complaint alleges that  
26

1 Holy Cross was “negligent in hiring, training and supervising their agents/employees  
2 who dealt with Ashley in that those agents/employees were not trained on conducting  
3 law enforcement searches nor on the constraints the Fourth Amendment places on  
4 searches.” SSOF ¶ 8. However, Plaintiff is unable to establish that any employee or  
5 agent of Holy Cross Hospital committed an underlying tort recognized under Arizona  
6 law.  
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8  
9 *i. Plaintiff cannot cite a federal Bivens claim as an underlying tort for her  
10 state-based negligent supervision, hiring and training claim.*

11 Plaintiff’s only alleged underlying tortious conduct for her negligent  
12 supervision claim is that, because the hospital did not train its employees or agents on  
13 the constraints of the Fourth Amendment, Plaintiff was subject to an unconstitutional  
14 search. SSOF ¶ 6. In fact, Plaintiff has affirmed throughout litigation that her claim is  
15 predicated on these federal constitutional violations. SSOF ¶ 7. As Plaintiff has made  
16 it completely clear, Plaintiff is claiming that Dr. Martinez and/or the hospital staff  
17 committed a *Bivens* violation. SSOF ¶ 7.  
18

19 However, a *Bivens* action is a **federal** tort claim not recognized under Arizona  
20 law. The *Bivens* claim has its genesis in *Bivens v. Six Unknown Fed. Narcotics*  
21 *Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). In that claim, the United States Supreme  
22 Court held that the Fourth Amendment of the United States Constitution implies a  
23 cause of action for an individual whose Fourth Amendment rights under the United  
24 States Constitution had been violated by a federal actor. Since *Bivens*, the United  
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1 States Supreme Court has refused to allow *Bivens* causes of actions in cases where the  
2 aggrieved party has an adequate remedy under state law. See *Minneci v. Pollard*, 565  
3 U.S. 118, 132 S.Ct. 617 (2012); *Correctional Services Corp. v. Malesko*, 534 U.S. 61,  
4 62, 122 S.Ct. 515, 516 (2001). Thus, by definition, *Bivens* claims are exclusively  
5 *federal* remedies.  
6

7 Further undermining Plaintiff's claim is the undeniable fact that Arizona courts  
8 have not recognized a cause of action against private state actors for violations of  
9 similar provisions under the Arizona Constitution, as Plaintiff is attempting to do in  
10 this case. In *Cluff v. Farmers Ins. Exch.*, the plaintiff attempted to bring a private  
11 cause of action against a private individual based on Article II, Section 8 of the  
12 Arizona Constitution, which states:  
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15 "No person shall be disturbed in his private affairs, or his home invaded,  
16 without authority of law."

17 Ariz. Const., Art. II, Sec. 8. Though the Arizona Supreme Court noted that this  
18 provision of the Arizona Constitution was intended by the framers to have "the same  
19 effect as the Fourth Amendment of the Constitution of the United States," the court  
20 held that the provision was "not intended to give rise to a private cause of action  
21 between private individuals, but was intended as a prohibition on the State..." *Cluff*,  
22 10 Ariz.App. 560, 563 (App. 1969).  
23

24 Plaintiff has specifically alleged that Holy Cross Hospital is liable for having  
25 negligently failed to train its employees on "conducting law enforcement searches"  
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1 and on “the constraints the Fourth Amendment places on searches.” SSOF ¶ 7.  
2 Plaintiff is likewise maintaining that the negligent failure to train on these issues  
3 caused the violation of her federal rights. SSOF ¶ 7. However, because Plaintiff is  
4 alleging an exclusive federal cause of action to be the underlying tortious conduct,  
5 Plaintiff’s state tort claim fails as a matter of law. For the foregoing reasons, Plaintiff  
6 should not be permitted to get through the back door what she is not permitted to get  
7 through the front. Holy Cross Hospital respectfully requests summary judgment be  
8 granted in its favor.  
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11 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of November, 2017.

12 MAC BAN LAW OFFICES, P.A.  
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14  
15 By /s/ Laura V. Mac Ban  
16 Laura V. Mac Ban  
17 Attorneys for Defendant Holy Cross Hospital, Inc.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2017, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants:

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Copy of the foregoing hand delivered to The Hon. Cindy Jorgenson this 16<sup>th</sup> day of November, 2017.

/s/Karen Norton