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TeamHealth West

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ASHLEY CERVANTES, a single woman,

Plaintiff,

v.

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

Defendants.

Case No.: 4:16-CV-00334-CKJ

DEFENDANT QUANTUM PLUS, LLC.’S MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Cindy K. Jorgenson)

(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 56, Defendant Quantum Plus, LLC (f/k/a Quantum Plus, Inc.) dba TeamHealth West (hereinafter “Quantum Plus” or “Defendant”), through

1 undersigned counsel, hereby moves for summary judgment. Summary judgment is
2 appropriate because Plaintiff cannot assert a negligent hiring/training/supervision (“negligent
3 hiring”) claim based solely on a *Bivens* claim against an agent. This would essentially allow
4 a separate *Bivens* cause of action against a private corporation in violation of *Correctional*
5 *Services Corp. v. Malesko*.

7 This Motion is supported by the following Memorandum of Points and Authorities, the
8 attached Separate Statement of Facts filed herewith, and the entirety of the record.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

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13 Plaintiff brought a Complaint against the United States, US Customs and Border
14 Protection Agents, Dr. Patrick Martinez, and Holy Cross Hospital claiming violations of
15 *Bivens*, §1983, and negligent hiring. Separate Statement of Facts (“SSOF”) ¶1. Holy Cross
16 filed a Motion to Dismiss as to the *Bivens* and §1983 claims as neither allows recovery for
17 vicarious liability. SSOF ¶ 2. In response, Plaintiff filed her 1st Amended Complaint
18 dropping the *Bivens* and §1983 claims against Holy Cross and adding a claim against
19 Quantum for negligent hiring. SSOF ¶ 3.

22 However, the 1st Amended Complaint still listed that Dr. Martinez was acting “in the
23 course and scope of his employment.” SSOF ¶ 4. As a result, undersigned counsel sought
24 assurances that no vicarious liability claims were being brought against Quantum Plus. SSOF
25 ¶ 5. In response, Plaintiff’s counsel stated “Vicarious liability is inapplicable to *Bivens* and §
26 1983 claims. As such, it is legally [impossible] for a *Bivens* claim to be pursued against your

1 client. . . [your client] is named in Count Seven only.” SSOF ¶ 6. Therefore, the only cause
2 of action brought against Quantum Plus is one for negligent hiring of their agents/employees
3 based on those employees alleged *Bivens* violation. SSOF ¶ 7.
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5 **II. ALLOWING PLAINTIFF TO MAKE A NEGLIGENT HIRING CLAIM**
6 **BASED ON A *BIVENS* CAUSE OF ACTION WOULD RUN CONTRARY TO**
7 **THE WELL-ESTABLISHED PURPOSE OF *BIVENS* ACTIONS.**

8 Summary judgment is appropriate when there is no dispute as to a material fact and the
9 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Here, there is no
10 factual dispute as to the claims being brought against Quantum Plus. Those claims are for
11 negligent hiring of employees or agents relating to a law enforcement search and the restraints
12 of the 4th Amendment on those searches. There are no other state law claims. Quantum Plus
13 is entitled to judgment as a matter of law as Plaintiff may not assert negligent hiring when the
14 only tortious conduct alleged against the employee is a *Bivens* claim. This would go against
15 the well-established purpose of the *Bivens* claim and essentially allow a *Bivens* claim against
16 a private corporation.
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20 **A. *BIVENS* AND ITS PROGENY WAS MEANT TO IMPOSE LIABILITY**
21 **ONLY ON INDIVIDUAL OFFICERS AND USING IT TO IMPOSE**
22 **LIABILITY ON A CORPORATION “WOULD MEAN THE**
23 **EVISCERATION OF THE *BIVENS* REMEDY”**

24 In *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, the
25 Supreme Court inferred a new cause of action for money damages against individual officers
26 who violated the Fourth Amendment of the Constitution. 403 U.S. 388, 397 (1971). Since
then, the holding in *Bivens* has only been extended to the Due Process Clause of the Fifth

1 Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment.
2 *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67 (2001). Otherwise, the Court has
3 refused to extend the holding in *Bivens*. See *Id.* (Declining to extend *Bivens* to create a cause
4 of action against private corporations.); See also *FDIC v. Meyers*, 510 U.S. 471 (1994)
5 (Declining to extend *Bivens* to create a cause of action against administrative agencies); See
6 also *Bush v. Lucas*, 462 U.S. 367, 378 (1983)(Declining to extend *Bivens* to First Amendment
7 violations).
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10 The Supreme Court has consistently held that the purpose of the *Bivens* cause of
11 action is to deter individual officers from acting unconstitutionally. Additionally, the High
12 Court has stressed that allowing *Bivens* to become the basis for liability for an agency or
13 corporation would destroy this purpose. In *Meyers*, the Court stated: “If we were to imply a
14 damages action directly against federal agencies . . . there would be no reason for aggrieved
15 parties to bring damages actions against individual officers.” *Meyers*, 510 U.S. at 485. The
16 Court stated this “would mean the evisceration of the *Bivens* remedy, rather than its
17 extension.” *Id.* When faced with a similar question of implying a cause of action against a
18 private corporation the Court stated “[t]his case is, in every meaningful sense, the same [as
19 *Meyers*]. . . For if a corporate defendant is available for suit, claimants will focus their
20 collection efforts on it, and not the individual directly responsible for the alleged injury.”
21 *Malesko*, 534 U.S. at 71. Further, the Court has held that vicarious liability is inapplicable to
22 *Bivens* suits. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, (2009). This is likely because a “*Bivens*
23 action is not “a proper vehicle for altering an entity's policy. *Ziglar v. Abbasi*, 137 S. Ct.
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1 1843, 1860 (2017)(citation omitted).

2 **B. PLAINTIFF’S NEGLIGENT HIRING CLAIM IS AN ATTEMPT TO**
3 **CIRCUMVENT WELL-ESTABLISHED RESTRICTIONS TO *BIVENS***
4 **CAUSES OF ACTIONS.**

5 Arizona law is clear a claim for negligent hiring, training, or supervision requires the
6 employee to have committed a tort. *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799
7 P.2d 15, 18 (Ct. App. 1990). If the theory of the employee's underlying tort fails, an
8 employer cannot be liable for negligent hiring. *Id.* The issue then becomes, can a *Bivens*
9 claim be the basis for such a negligent hiring claim when a corporation cannot be directly or
10 vicariously liable under *Bivens*? The Court should hold it cannot because this would amount
11 to the creation of a new *Bivens* cause of action against a private corporation, which is
12 specifically prohibited by the *Malesko* Court.

13 *Bivens* did not create a new cause of action against corporations. It follows then
14 that—unless a claim could stand against a private corporation without a *Bivens* claim—that
15 cause of action fails. Here, Plaintiff’s claim completely relies on *Bivens* to create any liability
16 for Quantum. As stated above, Arizona law requires Plaintiff to prove the underlying tort
17 before liability for negligent hiring can be imposed. Plaintiff’s First Amended Complaint
18 alleges Quantum Plus was “negligent in hiring, training and supervising their
19 agents/employees. . . on conducting law enforcement searches nor on the constraints of the
20 Fourth Amendment places on those searches.” Plaintiff’s First Amended Complaint, pp.14-
21 15 ¶ 68. From the plain language of the Complaint, the negligent hiring claim is entirely
22 based on the *Bivens* claims in Counts One, Two, Four, and Five. Put another way, the
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1 negligent hiring claim could not stand against Quantum without the *Bivens* claim. This is
2 tantamount to a new cause of action against a private corporation under *Bivens*.

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4 Allowing this claim to go forward against Quantum would have the same effect the
5 *Malesko* Court attempted to avoid. If a negligent hiring claim is allowed, then every time an
6 individual officer allegedly acts in an unconstitutional way, Plaintiff will assert a negligent
7 hiring/retention/training/supervision claim against the private corporation. This will shift the
8 focus away from the individual officer who actually acted unconstitutionally towards the
9 more deeper pockets of the private corporation. As the *Malesko* Court attempted to avoid
10 “the deterrent effects of the *Bivens* remedy would be lost.” It would become a vehicle
11 altering entity policies rather than deterring individual misbehavior. This should not be
12 allowed.
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15 **III. CONCLUSION**

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17 Plaintiff’s cause of action is entirely based on *Bivens*. Therefore, allowing the
18 negligent hiring claim based on “a law enforcement search and the restraints of the 4th
19 Amendment on those searches” would be tantamount to creating a new *Bivens* cause of action
20 against a private corporation. This would go against the purpose of *Bivens* and the *Malesko*
21 court’s specific prohibition against such new causes of action. Therefore, Quantum
22 respectfully requests the Court grant its Motion for Summary Judgment.
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RESPECTFULLY SUBMITTED this 10th day of November, 2017.

HOLDEN & ARMER, P.C.

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/s/ Cassi Trish _____