Case No. S242250

SUPREME COURT
FILED
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Deputy

IN THE SUPREME COURT OF CALIFORNIA

REBECCA MEGAN QUIGLEY,
Plaintiff and Appellant,

v.

GARDEN VALLEY FIRE PROTECTION DISTRICT, et al.,
Defendants and Respondents.

Court of Appeal of the State of California, Third Appellate District
2nd Civil No. C079270
Superior Court of the State of California, County of Plumas
Case No. CV1000225
The Honorable Janet Hilde, Judge Presiding

# APPELLANT'S MOTION FOR JUDICIAL NOTICE, DECLARATION, AND POINTS AND AUTHORITIES

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## REQUEST FOR JUDICIAL NOTICE

Pursuant to California Rules of Court, rules 8.252(a) and 8.54 and Evidence Code sections 452, 453, and 459, Plaintiff and Appellant Rebecca Megan Quigley ("Appellant"), requests that this Court take judicial notice of the following official acts of the executive and judicial departments of the United States and/or records of a court of record of the United States, copies of which are attached to this motion as Exhibits A and B:

Exhibit A: Defendants' and Respondents' Further Status Update Regarding Individual Defendants' Request for U.S. Attorney General's Certification of Federal Employment

Exhibit B: United States District Court for the Eastern District of California's Order Granting Plaintiff Quigley's Motion to Lift the Court's Stay of Proceedings and Plaintiff's Motion to Remand

This motion for judicial notice is based on the memorandum of points and authorities, the Declaration of Jay-Allen Eisen and such further documents as this court might consider in ruling on this request for judicial notice.

DATED: April 16, 2018

JAY-ALLEN EISEN LAW CORPORATION
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731

By: _____
JAY-ALLEN EISEN
Attorneys for Plaintiff and Appellant
REBECCA MEGAN QUIGLEY

## MEMORANDUM OF POINTS AND AUTHORITIES

### A. Introduction.

This motion seeks judicial notice of official two documents from the file of a court of record of the United States and an official record of an act of the executive and department of the United States. The documents of which judicial notice is requested are:

> Exhibit A, Further Status Update Regarding Individual Defendants' Request For U.S. Attorney General's Certification of Employment filed by respondents in the present case on April 24, 2013 in *Rebecca Megan Quigley v. Atpos/La Selva Fire Protection District, et al.*, United States District Court for the Eastern District of California, No. 2:12-CV-02779-LKK-CMK;
>
> Exhibit B, Order filed May 22, 2013 in the same action granting the motion of plaintiff Rebecca Megan Quigley to remand.

### B. Authority for Judicial Notice.

Evidence Code section 459 permits the reviewing court to take judicial notice of "any matter specified in Section 452." (Evid. Code, § 459(a).) This Court has the same power as the trial court to take judicial notice of matters properly subject to judicial notice. (*See* Evid. Code, § 459; *see also* Cal. Rules of Court, rule 8.252(a).) Although these materials were not presented to the trial court for judicial notice, they are relevant to statements in Respondents' Answer Brief on the Merits and proper subjects of judicial notice.

Judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).) In addition, subdivision (d) of section 452, states that judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Judicial notice of matters specified in

section 452 is mandatory when a proper request is made. (*See* Evid. Code, §§ 453, 459; *see also* Cal. Rules of Court, rule 8.252(a).)

Taking judicial notice of official acts of the executive and judicial departments of the United States and records of a court of record of the United States is the appropriate procedure for bringing these materials before this Court. (*See, e.g., Pearson v. State Social Welfare Bd.* (1960) 54 Cal.2d 184, 210 ["This court can take judicial notice . . . of the official acts and regulations of a department of the United States."]; *People v. Johnson* (2006) 38 Cal.4th 1096, 1103 [granting defendant's request for judicial notice of federal court documents in case where remand ordered]; *Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1113 n.1 [taking judicial notice of pleadings and documents contained in record of related federal action].)

**C. The Materials Are Relevant to the Issue on Appeal.**

The documents of which judicial notice is requested are relevant to the question whether Respondents, through their litigation conduct, waived immunity under section 850.4. The documents bear on the assertions in Respondents' Answer Brief on the Merits that respondents did not raise immunity under Government Code section 850.4 until after trial had commenced because there was uncertainty whether the individual respondents were employees of the government entity respondents until shortly before trial.

## CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this motion for judicial notice.

DATED: April 16, 2018

DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731

By: _____
JAY-ALLEN EISEN
Attorneys for
Plaintiff and Appellant
REBECCA MEGAN QUIGLEY

## DECLARATION OF JAY-ALLEN EISEN IN SUPPORT OF APPELLANT'S MOTION FOR JUDICIAL NOTICE

1. I am an attorney duly admitted to practice in all of the courts of the State of California and a Certified Appellate Specialist so certified by the State Bar of California, Board of Legal Specialization. I am an Outside Counsel at the law firm of Downey Brand LLP and I am an attorney of record for Plaintiff and Appellant Rebecca Megan Quigley. The facts set forth herein are of my own personal knowledge, and if sworn I could and would competently testify thereto.

2. Attached as "Exhibit A" is a true copy the Further Status Update Regarding Individual Defendants' Request for U.S. Attorney General's Certification of Federal Employment, which Respondents filed in the United States District Court for the Eastern District of California, Case No. 2:12-CV-02779-LLK-CMK. It includes the United States Attorney General's denial of certification of respondents Frank DelCarlo, Michael Jellison and Jeff Barnhart as federal employees entitled to immunity from tort claims under federal law.

3. Attached as "Exhibit B" is a true copy of the United States District Court for the Eastern District of California's Order Granting Plaintiff Quigley's Motion to Lift the Court's Stay of Proceedings and Plaintiff's Motion to Remand in Case No. 2:12-CV-02779-LLK-CMK.

4. The materials that are the subject of this motion for judicial notice were not presented to the courts below.

5. These materials are relevant to the question whether Respondents waived immunity under Government Code section 850.4 by their litigation conduct. The documents address the assertions in Respondents Answer Brief on the Merits that they did not raise section 850.4 immunity before trial because of uncertainty whether the individual defendants were employees of the respondent fire protection districts or independent contractors. These assertions include:

(a) "[T]hroughout the action, the firefighter defendants were not certain whether the State of California, the federal government, or the fire districts employed DelCarlo, Jellison, and Barnhart in their roles regarding the Silver Fire, or whether they acted as independent contractors." (ABM at p. 20.)

(b) "Thus, the case was removed to federal court for the district court to determine whether DelCarlo, Jellison and Barnhart acted as federal employees. Following application to the United States Attorney General, the district court determined the three were not federal employees, but rather independent contractors." (*Ibid.*)

6. My office obtained a copy of these materials through the United States District Court for the Eastern District of California's Case Management/Electronic Case Files (CM/ECF) or Public Access to Court Electronic Records (PACER) database. The materials attached hereto are true and correct copies that my office downloaded from PACER.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Sacramento, California on April 16, 2018.

DATED: April 16, 2018

JAY-ALLEN EISEN

# EXHIBIT A

# EXHIBIT A

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| REBECCA MEGAN QUIGLEY,<br><br>Plaintiff,<br><br>vs.<br><br>APTOS/LA SELVA FIRE PROTECTION DISTRICT, ET AL.,<br><br>Defendants. | CASE NO. 2:12-CV-02779-LKK-CMK<br><br>**FURTHER STATUS UPDATE REGARDING INDIVIDUAL DEFENDANTS' REQUEST FOR U.S. ATTORNEY GENERAL'S CERTIFICATION OF FEDERAL EMPLOYMENT**<br><br>Trial Date: None Set |

Defendants JEFF BARNHART, MIKE JELLISON, FRANK DELCARLO and DAVE KIRSTE (the "Individual Defendants") hereby provide an updated status regarding their pending and recently responded to application seeking the United States Attorney General's certification of federal employment:

In response to the applications that were submitted on behalf of each of the Individual Defendants, the United States Attorney General provided a four (4) page written opinion letter dated April 18, 2013. A copy of Defendants' application and the written opinion letter have been collectively attached to this status update at Tab "A".

Upon receipt and due consideration of the Attorney General's written opinion, Defendants have sought reconsideration based on existing and additional evidence that each contends supports a finding of federal employment. A copy of Defendants' April 24, 2013 correspondence in this regard has been attached at Tab "B".

Accordingly, Defendants plan on submitting additional evidence and declarations to the Attorney General in support of their pending applications on or before May 10, 2013.

DATED: April 24, 2013

JOSEPH A. SALAZAR JR.
CHARLES E. COLEMAN
LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ Charles E. Coleman
Charles E. Coleman
Attorneys for Defendants GARDEN VALLEY FIRE PROTECTION DISTRICT, JEFF BARNHART, CHESTER FIRE PROTECTION DISTRICT, MIKE JELLISON, FRANK DELCARLO and DAVE KIRSTE

# A

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December 27, 2012

File No.
29048.46

Office of General Counsel
United States Forest Service
33 New Montgomery Street, 17th Floor
San Francisco, CA94105

Re: Quigley v. Aptos, et al.

To Whom It May Concern:

This correspondence is sent on behalf of our clients Jeff Barnhart, Mike Jellison, Frank DelCarlo, and Dave Kirste (collectively the "Individual Defendants"), each of whom has been named as a defendant in the matter of Quigley v. Aptos/La Selva Fire Protection District, et al. originally filed in Plumas County Superior Court, Case No.: 10-00225 (the "state action"). The operative First Amended Complaint seeks damages for personal injuries allegedly caused, in part, by the Individual Defendants while served as members of the United States Forest Service's Incident Management Team (the "IMT") for the Silver Fire (the "subject fire") which occurred in September 2009 and was burning on National Forest land located in Plumas County California. At all relevant times pertaining to the subject fire the Individual Defendants were acting under the authority, control, and direction of the United States Forest Service ("USFS").

On or about November 9, 2012, the state action was removed to the United States District Court for the Eastern District of California on the basis that the state court lacked subject matter jurisdiction on account of defendant's federal employment during and pertaining to the subject fire. Subsequently, plaintiff has filed a motion seeking to remand the matter back to state court contesting defendants' federal employment status. A hearing on plaintiff's motion to remand is scheduled to be heard on January 14, 2013.

This letter is sent on behalf of defendants pursuant to 28 U.S.C. § 2679(c) and 28 C.F.R. § 15.2. These sections require a putative federal employee, in order to invoke the statutory provisions of 28 U.S.C. § 2679, to deliver significant process to whomever is designated by the federal agency to receive such papers. See, 12 U.S.C. 2679(c); 28 C.F.R. 15.2. Based on discussions with the Department of Justice and your office we have

confirmed that such request and application must be directed to your attention as a designated federal government agent for this purpose.

Upon receipt of such a request and papers, the federal agency is to submit a report addressing whether the putative employees were, in fact, acting within the scope of their employment with the Federal Government to the United States Attorney for the district where the action is brought and to the Branch Director of the Torts Branch, Civil Division, Department of Justice. 28 C.F.R. 15.3. The US Attorney and the Branch Director each have authority to make statutory certification that the putative employees were acting within the scope of employment with the Federal Government. Id. at § 15.4.

Under the Federal Tort Claims Act, the exclusive remedy for personal injuries caused by acts of employees of the United States government during the course of employment is against the United States. See 28 U.S.C. § 2679(b)(1). A federal employee includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation . . . ." 28 U.S.C. § 2671. This definition includes so-called "loaned servants," over whom the federal agency exercises detailed control regarding the individual's physical performance. See United States v. N. A. Degerstrom, Inc., 408 F.2d 1130, 1133 (9th Cir. 1969).

This matter is more fully detailed in the accompanying court filings attached as Exhibit "A" (see below) to this request seeking statutory certification of defendants' federal employment. Quigley is suing the Individual Defendants (among other parties) for alleged personal injuries occurring after being run over by a water truck while sleeping at the fire's base camp. Plaintiff alleges that her injuries were caused in part by the negligent acts and/or omissions of the Individual Defendants while they acted as USFS IMT members for the subject fire. Plaintiff was an employee of the USFS and her crew engaged the subject fire in September 2009 as it was burned on National Forest land. Each of the individual Defendants upon assignment to the subject fire was a "loaned servant," and an employee performing work on behalf of and under the supervision and authority of the USFS and the federal government.

Pursuant to the relevant statutory and regulatory authority outlined above, please find the accompanying available pleadings and other relevant papers pertaining to plaintiff's claims alleged against the Individual Defendants attached collectively as Exhibit "A": operative First Amended Complaint, Individual Defendants' Answer to First Amended Complaint, defendants' previously filed and yet to be ruled upon Motion for Summary Judgment, and the Notice of Removal.

We appreciate your prompt attention to this important matter. Should you require any additional information or have any questions, please contact me at your earliest convenience. Otherwise, we look forward to receiving statutory certification of defendants' federal employment status at the time of the subject fire in the near future.

Very truly yours,

Charles E. Coleman of
LEWIS BRISBOIS BISGAARD & SMITH LLP

CEC:lcm
Encls.

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Counsel of Record for Applicants JEFF BARNHART, MIKE JELLISON, FRANK DELCARLO, and DAVE KIRSTE

**APPLICATION SEEKING CERTIFICATION OF FEDERAL EMPLOYMENT STATUS**

## I. Introduction

Applicants Jeff Barnhart, Mike Jellison, Frank DelCarlo, and Dave Kirste (collectively the "Individual Defendants") hereby present their supplemental application seeking statutory certification of federal employment. The Defendants were members of the Nor Cal 1 Incident Management Team ("IMT"). In September 2009 the IMT was ordered and established by the United States Forest Service (the "USFS") for the Silver Fire (the "subject fire") that was burning in the Plumas National Forest. The IMT was under the full command, authority, and jurisdiction of the USFS.

## II. Basis for Application & Applicable Authority

This application is submitted pursuant to 28 U.S.C. § 2679 and 28 C.F.R. §§ 15.2 and 15.4. These sections require a putative federal employee to submit an application to the designated federal agent for this purpose. See, 12 U.S.C. 2879(c); 28 C.F.R. 15.2. Based on prior discussions, we have confirmed that the request and application must be directed to the United States Attorney General for the Eastern District of California as the designated agent of the Federal Government.

Pursuant to 28 C.F.R. 15.3, the Individual Defendants hereby request a report determining whether they were acting within the scope of their employment with the Federal Government. We further understand that the U.S. Attorney and its Branch Director each have authority to make this

statutory certification that the Defendants were acting at the request of, and within the scope of their employment with the USFS. See, Id. at § 15.4.

Under the Federal Tort Claims Act, the exclusive remedy for personal injuries caused by acts of employees of the United States government during the course of employment is against the United States. See 28 U.S.C. § 2679(b)(1). A federal employee includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation . . . ." 28 U.S.C. § 2671. This definition includes so-called "loaned servants" or borrowed personnel over whom the federal agency exercises detailed control (or command) regarding the individual's performance. See *United States v. N. A. Degerstrom, Inc.*, 408 F.2d 1130, 1133 (9th Cir. 1969).

III. **Procedural History**

The Individual Defendants have been named as defendants in the matter of Quigley v. Aptos/La Selva Fire Protection District, et al. originally filed in Plumas County Superior Court, Case No.: 10-00225 (the "state lawsuit"). The state lawsuit alleges tort causes of action against Defendants sounding in negligence. Plaintiff, Rebecca Quigley a USPS employee, was run over by a water/sanitation truck while sleeping at the subject fire camp on the evening of September 21, 2009. A more detailed summary of the operative pleadings, alleged claims, and relevant facts will be provided below beginning on page three (3) within the section entitled *Supplemental Information Supporting Application: Part A. Summary of Pleadings and Subject Claims.*

Based on the filing of Defendants' prior motion for summary judgment asserting the state court's lack of requisite subject matter jurisdiction, the state lawsuit was removed to the United States District Court for the Eastern District of California on November 9, 2012. The removal was based upon Defendants' federal employment status while each acted as an IMT member for the benefit of the USFS while under its full and exclusive command with regard to the subject wildfire. The removal occurred prior to the state court's ability to rule on Defendants' motion for summary judgment.

Subsequently, plaintiff filed a motion seeking to remand the matter back to state court. A hearing on plaintiff's motion to remand was heard on January 14, 2013. Following briefing and

argument the court ruled that the matter is stayed pending the determination of the Individual Defendants' federal employment status to be determined by this application.

IV. **Supplemental Information Supporting Application**

This matter was more fully detailed in our previously submitted December 27, 2012 letter application and attachments thereto. Following receipt of that letter, your office requested that we prepare a supplemental application.

A. **Summary of Pleadings and Subject Claims**

The First Amended Complaint ("FAC") was filed on or about December 3, 2010 in the County of Plumas Superior Court State of California. The FAC alleges three causes of action against the Individual Defendants for negligence, dangerous condition of public property, and failure to warn. In addition to the Individual Defendants plaintiff named other personnel and fire districts as defendants.

On or about December 22, 2010 the Individual Defendants filed an answer. As is the case in litigation, pleadings will be amended as facts are uncovered to satisfy court pleading requirements. To the extent necessary the Individual Defendants intend to amend their answer once the proper court is determined.

At all relevant times the Individual Defendants were acting as federal employees. Defendants' employment while acting as IMT members for the Silver Fire was at the request of, for the benefit of, and under the direction, command, and authority of the USFS. Their employment status gives rise to legally proscribed immunity serving as an absolute bar against the exact type of claims that have been alleged against them.

Accordingly, Defendants respectfully request the appropriate certification of their federal employment status.

B. **Summary of Relevant Facts Confirming Individual Defendants' Federal Employment Status**

The FAC alleges that the Individual Defendants are responsible for plaintiff's alleged personal injuries resulting from being run over by a water/sanitation truck owned and operated by Plumas Sanitation. This incident occurred when plaintiff purposefully slept away from her crew

and other fire fighters at the fire camp so that she could freely speak with her boyfriend by cell phone prior to falling asleep. Plumas Sanitation had previously contracted directly with the USFS for wastewater removal. These services were planned, arranged for, and coordinated by the USFS directly with Plumas Sanitation.

Plaintiff alleges that her injuries were caused in part by the negligent acts and/or omissions of the Individual Defendants while they acted as IMT members for the subject fire. At all relevant times, plaintiff was an employee of the USFS and a firefighter and member of the Salmon River Hotshots. Her crew engaged the subject fire in September 2009 as it burned in the Plumas National Forest. The USFS was and remains a federal public entity and part of the United States Department of Agriculture ("USDA"), an agency of the United States Government administering the National Forests. Under the USFS's full command and authority over the Silver Fire, the Incident Command Post (ICP) and fire camp were established and maintained at the Plumas County Fairgrounds located in Quincy, California.

At the time of the subject fire, the Individual Defendants had been employed as experienced fire fighters by California local public entities: the Garden Valley Fire Protection District ("Garden Valley") or the Chester Fire Protection District ("Chester"). This employment was distinct and independent from their role as members of the Nor Cal 1 IMT. Both Garden Valley and Chester had previously entered into cooperative fire protection agreements with the Federal Government building upon the core principles contained within the California Master Cooperative Wildland Fire Management and Stafford Act Response Agreement (the "Master Agreement") [R5 Agreement#08-FI-11052012-110; DUNS #92-9332484]. This agreement promotes and facilitates interagency cooperation by anticipating and allowing for the lending by hire of available resources, expertise, and personnel on a requested temporary need basis.

Neither of the local public entities had any direct role, involvement, responsibility, or any command over the Silver Fire or fire camp at issue. Pursuant to the National Incident Management System (NIMS) as a point of contact, each received a dispatch from the USFS seeking the services of the pre-selected Individual Defendants. Those identified reported for duty at the subject fire for the USFS. Upon the USFS's requested assignment to the subject fire, each

of the Individual Defendants was a "loaned servant," and a borrowed temporary employee by hire asked to perform work for and at the direction of the USFS and the Federal Government.

**1. Background of the Silver Fire & the Individual Defendants' IMT Involvement**

The Silver Fire began on September 19, 2009 at about 3:00 p.m. in the Plumas National Forrest. The Plumas National Forest consists of approximately 1.1 million acres under the exclusive control and jurisdiction of the USFS. As a result, the USFS and Federal Government had full command and authority over the Silver Fire including all requested personnel who reported for duty and assisted with the engagement of the subject fire burning on federal land.

On the same date, the USFS selected the Plumas County Fairgrounds as the designated base camp. Due to the size and complexity of the fire, an incident management team was ordered. By the morning of September 20, 2009, Nor Cal IMT 1 had been requested by the USFS and had reported for duty. By that time, the fire had grown to over 300 acres resulting in the USFS's closure of various campgrounds and roads located within the National Forrest.

Upon reporting for duty, Nor Cal IMT 1 served as the IMT for the subject fire and provided the USFS with a better means of command, control, and infrastructure for its fire suppression efforts. Upon arrival to any requested assignment, the designated Incident Commander (IC) meets with local IC, if any exist, to transfer command. The IC who was in charge of the Silver Fire was Kent Swartzlander, a USFS employee of the Six Rivers NF. Deputy Incident Commander and second in command was Paul Whitcome. Mr. Whitcome was also a federal employee working for the Bureau of Land Management.

Pursuant to the nationally established Incident Command System, the IC is the individual responsible for all fire incident activities, including the development of strategies and tactics and the ordering and release of all fire resources. The IC has full authority and responsibility for conducting incident operations and is responsible for the management of all participating personnel. The Individual Defendants were members of the USFS's ordered IMT operating under the command, management, and direct supervision of Swartzlander and Whitcome.

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**2. Nature of Type I IMT**

Type 1 IMTs are federally certified fire crews and the most robust with regard to training and experience. There are (16) Type 1 IMTs in existence and they operate through interagency cooperation involving federal and state emergency management agencies. The National Incident Management System (NIMS) requires that such teams adopt and follow the Incident Command System. All pre-selected members who serve on such IMTs must meet specific training requirements and strict standards. The NIMS is a system of mandated HSPD-5 that provides a consistent national approach allowing for borrowed personnel, assistance by hire, and temporary employment for and on behalf of the USFS and Federal Government on an as needed and requested basis.

**3. Jurisdiction & Command Over the Silver Fire**

As noted above, the Silver Fire burned on National Forest land under the exclusive jurisdiction of the USFS. Such jurisdiction is confirmed by The California Master Cooperative Wildland Fire Management and Stafford Act Response Agreement ("Master Agreement") entered into between California and the five federal regulatory agencies responsible for managing forest fire response involving 676 million acres of federal land (including the Plumas National Forest). The contracting federal agencies include: The United States Department of Interior (Bureau of Land Management, National Park Service, Bureau of Indian Affairs, and United States Fish and Wildlife Service) and the United States Department of Agriculture (through the USFS).

Specifically, the government agency that has requisite jurisdiction over a wildfire is the one having "overall land and resource management and/or protection responsibility for a specific geographic area or functional area by federal or state law". (See Master Agreement, paragraph 23). Therefore, wildfire suppression activities become the responsibility of the jurisdictional agency (Id. at paragraph 41). Accordingly, the USFS had full jurisdiction and control over the land upon which Silver Fire occurred, and as a result, it assumed full command. (Id. at paragraph 25 B and D).

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**4. Significance of Designated Protecting Agency, Recognized Temporary Employment, Assistance By Hire, and Confirmed Payment for the Work Performed by Silver Fire's IMT**

National fire policy relies upon the use of "temporary employment" of others (here the Individual Defendants serving as IMT members) by a requesting agency possessing jurisdictional control (the "protecting agency" – here the USFS) as an effective means to meet wildfire events falling under the agency's jurisdictional control. In fact, "assistance by hire" provisions contained within the Master Agreement discussed above establish that resources and personnel requested by an agency on a need basis will be fully paid for by the requesting agency. By way of such access and understanding, the USFS can and often does request and obtain the services of the most experienced fire personnel across the country on a temporary employment basis when the need to protect Federal land arises. That is exactly what occurred with regard to the Silver Fire and the assistance by hire provided by the Individual Defendants on the USFS's behalf.

A "protecting agency" is defined as the agency responsible for providing direct incident management and services to a given area pursuant to its jurisdictional responsibility as specified by state or federal law. (Id. at paragraph 23 B).

The protecting agency for the Silver Fire was the USFS. As designated protecting agency, the USFS paid for all expenses incurred by and on behalf of the IMT members while working at the fire. The expenses paid included all wages earned by the Individual Defendants as well as their transportation and equipment costs and all necessary insurance premiums required of the temporary employment for the Federal Government.

**5. Processing of Third Party Claims**

The Master Agreement discussed above also clearly states that "Third Party Claims" filed against any individual acting under the terms or pursuant to the agreement "will be processed by the protecting agency" (Id. at Paragraph 72). Here plaintiff has erroneously named the Individual Defendants as parties to a civil action despite evidence establishing that they were acting under the command, control, and jurisdiction of the USFS and Federal Government. Since the USFS was the protecting agency, any claim against Defendants while acting on its behalf, should have been presented to the Federal Government.

C. **Argument and Controlling Authority Regarding Application of Federal Law**

1. **Federal Courts Have Exclusive Jurisdiction Over Claims Brought by Plaintiffs Against and/or Involving the Alleged Negligence of Federal Employees Acting Within The Scope of Their Employment**

The Federal Tort Claims Act ("FTCA") grants federal district courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for . . . personal injury . . . 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 . . . ." 28 U.S.C. § 1346(b)(1); Jacobson v. Tahoe Regional Planning Agency, 566 F. 2d 1353, 1362 (9th Cir. 1977) aff'd in part and rev'd in part on other grounds, 440 U.S. 391 (1979) ("[A]lthough Congress . . . waived sovereign immunity for certain claims and granted jurisdiction over them to federal district courts and the Court of Claims, it did not subject the United States to suit in a state court."); Martinez v. Seaton, 285 F.2d 587, 589 (10th Cir. 1961) ("State courts do not have jurisdiction of claims under the [FTCA] and jurisdiction is not obtained by removal even though the action might properly originate in federal court.").

Further, the FTCA expressly preempts "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate . . . ." 28 U.S.C. § 2679(b)(1).

The effect of the FTCA's exclusivity/preemption clause clearly establishes that the state court lacked jurisdiction over the claims alleged by Plaintiff against the Individual Defendants arising from their work performed as IMT members for the Silver Fire. Therefore, the issue of Defendants' employment status is a federal issue, and this application seeking certification of their federal employment is appropriate and should be granted.

2. **The Individual Defendants Were at All Relevant Times Acting as Employees of and Under the Exclusive Control & Jurisdictional Authority of the USFS, a Federal Public Entity and Part of an Agency of the United States Government**

For purposes of the FTCA, an "'[e]mployee of the government' includes . . . persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation . . . " 28 U.S.C. § 2671. The

source of an employee is immaterial as a "loaned servant" constitutes an employee of the government when the government has sufficient power to control the servant. United States v. N. A. Degerstrom, Inc., 408 F.2d 1130, 1133 (9th Cir. 1969) ("The critical factual inquiry in determining whether this doctrine should be applied is the location of the power and ability to control the servant."); United States v. Orleans, 425 U.S. 807, 814 (1976) (quoting Logue v. United States, 412 U.S. 521, 528 (1973)) ("A critical element is the power of the Federal Government 'to control the detailed physical performance of the contractor.'").

In Degerstrom, the Ninth Circuit Court of Appeals affirmed a district court's finding that an operator of a piece of heavy equipment, both of which were leased to the United States to be used for "flood emergency work," was a loaned servant and, therefore, an employee of the government. Id. at 1130. Specifically, the district court found that "the Government actively participated in the operation of the loader and exerted detailed control over [the operator's] operations at the work site." Id. at 1133. The Court of Appeals reasoned that "[i]t would follow from such a finding that the operator was a loaned servant (and thus considered an employee) at the time of the accident." Id.

The available evidence demonstrates that the Individual Defendants were requested and subsequently employed by the USFS to serve as members of the IMT for the Silver Fire. The USFS possessed full command and control over all fire fighting activities. The USFS was in charge and held exclusive authority and managed all personnel working on its behalf, including the Individual Defendants.

Accordingly, the Individual Defendants provided the USFS with assistance by hire, and in doing so they acted as temporary employees of the USFS and the Federal Government.

**3. Plaintiff's Exclusive Remedy Premised Upon the Individual Defendants' Alleged Work Related Negligence Lies With Presentation of Her Claims to the Federal Government.**

When a plaintiff's injury arises out of the negligence of those acting as federal employees within the scope of such employment, a plaintiff's only potential viable suit for recovery is against the United States. A plaintiff cannot bring a suit for damages against individual employees in state

court or even federal court for claims arising out of a federal employee's negligent or wrongful acts. Specifically, the FTCA provides, in pertinent part:

> The remedy against the United States provided by [the FTCA] for . . . personal injury . . . arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of **any other civil action or proceeding for money damages by reason of the same subject matter against the employee** whose act or omission gave rise to the claim or against the estate of such employee. **Any other civil action or proceeding for money damages** arising out of or relating to the same subject matter against the employee or the employee's estate **is precluded** without regard to when the act or omission occurred.
>
> 28 U.S.C. § 2679(b)(1); see also *Jackson v. Kotter*, 541 F.3d 688, 693 (7th Cir. Ind. 2008) ("The only proper defendant in an FTCA action is the United States.").

The First Circuit Court of Appeals explained the policy behind the exclusivity provision in § 2679:

> Federal employee tort immunity has a public, not a private, objective, namely the need for public employees faithfully to discharge their duties. It aims at avoiding exposure to personal liability in order to prevent a substantial diminution in the vigor of Federal law enforcement and implementation.
>
> *Wood v. United States*, 995 F.2d 1122, 1126 (1st Cir. Mass. 1993) (citing H.R. Rep. No. 700, 100th Cong., 2d Sess. 3, reprinted in 1988 U.S.C.C.A.N. at 5947.).

Factoring in the above, plaintiff's only recourse to seek money damages alleged to have arisen from the negligent conduct of the Individual Defendants while acting as IMT members may be against the United States. The previously referenced Master Agreement requires plaintiff to present her alleged claims against Defendants to the protecting agency (here the USFS). The fact that Plaintiff filed suit against the Individual Defendants in state court is improper and inadequate. Plaintiff cannot be allowed to ignore controlling federal law and undermine the strong public policy forming the basis for interagency cooperation and the national wildfire system. It is essential for the maintenance of interagency cooperation that fire fighters such as the Individual Defendants that perform work for the Federal Government be protected from lawsuits arising from their dutiful performance within the scope of such employment.

///

V. **Closing**

Pursuant to this submitted application, the Individual Defendants respectfully request written certification of their federal employment status while they acted as IMT members for the Silver Fire.

DATED: January 28, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By:

Charles E. Coleman
Counsel of Record for Applicants JEFF BARNHART, MIKE JELLISON, FRANK DELCARLO, and DAVE KIRSTE

**U.S. DEPARTMENT OF JUSTICE**

*United States Attorney*
*Eastern District of California*

*Benjamin B. Wagner*
*United States Attorney*

501 I Street, Suite 10-100
Sacramento, CA 95814

Phone 916/554-2700
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April 18, 2013

Via E-mail and U.S. Mail

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re: *Quigley v. Aptos/ La Selva Fire Protection District, et al.*
No. 12-cv-2779 LKK-CMK (E.D. Cal.)

Dear Mssrs. Coleman and Garthe:

This responds to the requests for immunity under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2679 ("FTCA"), by Defendants Jeff Barnhart, Frank DelCarlo, Michael Jellison, Dave Kirste, and Richard Rubin (collectively, "Local Firefighter Defendants") for the lawsuit filed by Plaintiff Rebecca Quigley. The United States Attorney has considered those requests and hereby denies them.

On July 27, 2010, Plaintiff Rebecca Quigley filed a complaint in Plumas County Superior Court, case number CV 10-00225, against Plumas Sanitation, Steven Siler, Plumas County, El Dorado County, the Aptos/ La Selva Fire Protection District, the Chester Fire Protection District, the Garden Valley Fire Protection District, Barnhart, DelCarlo, Jellison, Kirste, and Rubin. According to the First Amended Complaint, Plaintiff was a United States Forest Service firefighter who helped fight the September 2009 Silver Fire in the Plumas National Forest. On the evening of September 21, 2009 while Plaintiff was sleeping in a sleeping bag on the ground of the base camp, a Plumas Sanitation truck driven by Defendant Siler ran over Plaintiff twice. The sanitation truck was at the base camp to remove gray water from the shower units. Defendants Barnhart, DelCarlo, Jellison, Kirste, and Rubin were members of the interagency Incident Management Team ("IMT") that managed the Silver Fire. Defendant Barnhart was a Garden Valley firefighter; Defendants DelCarlo, Jellison, and Kirste were Chester firefighters; and Defendant Rubin was an Aptos/ La Selva firefighter.

The First Amended Complaint includes four separate causes of action for: (1) negligence; (2) dangerous condition of public property; (3) failure to warn; and (4) driving while intoxicated as to Defendant Siler only. The parties litigated in state court for two years, including briefing and arguing a demurrer filed by Defendants Chester Fire Protection District, Garden Valley Fire Protection District, Barnhart, DelCarlo, Jellison, and Kirste; amending the pleadings; conducting written discovery; and taking depositions. Trial was scheduled to begin in state court on February 5, 2013. On October 12, 2012, less than four months before trial, Defendants Chester Fire Protection District, Garden Valley Fire Protection District, Barnhart, DelCarlo, Jellison, and Kirste moved for summary judgment on multiple grounds, including that the state court lacked subject matter jurisdiction because the local firefighters were federal employees while fighting the Silver Fire and as such, the district court had exclusive jurisdiction over the tort claims under the FTCA. This was the first time this FTCA argument was raised.

On November 9, 2012, Defendant Plumas Sanitation removed the suit pursuant to 28 U.S.C. § 1441 based on this FTCA argument. Removal was improper because it occurred before the individual defendants were certified as federal employees acting within the scope of their employment. *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) ("However, the Westfall Act gives the named defendant no right to remove an uncertified case. That right is accorded to the Attorney General only." (internal citation omitted)). At the time of removal, no defendant had even submitted a request for certification. Defendants Barnhart, DelCarlo, Jellison, and Kirste did not request certification until December 27, 2012, and this request was supplemented on January 28, 2013. Defendant Rubin did not request certification until February 15, 2013, in response to our office's inquiry regarding certification.

The Attorney General has delegated to the United States Attorney the authority to certify that a defendant was a federal employee acting within the scope of his or her office or employment. 28 U.S.C. § 2679(d); 28 C.F.R. § 15.4; *Ward v. Gordon*, 999 F.2d 1399, 1401 n.1 (9th Cir. 1993). A federal employee has absolute immunity from tort claims arising out of acts undertaken within the course of his office or employment and the United States is substituted in as the party defendant for the employee. 28 U.S.C. § 2679. "Prompt" delivery is required of the pleadings and process to the United States Attorney, the Attorney General, and the head of the Federal agency. 28 U.S.C. § 2679(c); 28 C.F.R. § 15.2.

Our office has carefully considered the certification requests and has conducted multiple interviews over two months, including interviews of the IMT Incident Commander and the Deputy Incident Commander. We find that Defendants Barnhart, DelCarlo, Jellison, Kirste, and Rubin were not federal "employees," a determination governed by federal law. *See Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); 28 U.S.C. § 2671.

The Local Firefighter Defendants were not federal "employees" because the Forest Service did not control the detailed physical performance or substantially supervise the day-to-day operations of the Local Firefighter Defendants. *See United States v. Orleans*, 425 U.S. 807,

814-15 (1976); *Logue v. United States*, 412 U.S. 521, 526-28, 530 (1973). In addition, the Forest Service could not and did not hire or fire the Local Firefighter Defendants from employment; discipline the Local Firefighter Defendants; directly pay the Local Firefighter Defendants; or control whether the Local Firefighter Defendants were even permitted to report to the Silver Fire. The Aptos, Chester, and Garden Valley Fire Protection Districts maintained this control and authority.

Defendants Barnhart, DelCarlo, Jellison, and Kirste rely heavily on the California Master Cooperative Wildland Fire Management and Stafford Act Response Agreement ("CFMA") in support of their certification request. This reliance is misplaced. The CFMA was entered between the California Department of Forestry and Fire Protection ("CAL FIRE") and five federal agencies, including the Forest Service. The Aptos/ La Selva, Chester, and Garden Valley Fire Protection Districts are not signatories to the CFMA. Instead, the Aptos/ La Selva, Chester, and Garden Valley Fire Protection Districts each entered into a Cooperative Agreement with the Forest Service. These Cooperative Agreements govern here and provide that the local firefighters remain subject to the laws, regulations, and rules of their home employer and are not entitled to any benefits other than those provided by their home employer:

> 21. EMPLOYMENT POLICY Employees of the parties to this Agreement shall at all times be subject only to the laws, regulations, and rules governing their employment, regardless of incident location, and shall not be entitled to compensation or other benefits of any kind other than specifically provided by the terms of their employment.

The Cooperative Agreements do not create an employment relationship between the Forest Service and the Local Firefighter Defendants.

The Local Firefighter Defendants also assert that the IMT was a "Forest Service IMT." This is incorrect. Beginning in 2009, the Forest Service no longer managed the Type 2 level IMTs. The California Wildland Fire Coordinating Group ("CWCG"), an interagency group with members representing federal, state, and local agencies, took over management of the Type 2 level IMTs in California.

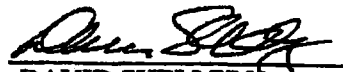
Lastly, if the Local Firefighter Defendants are certified and the United States is substituted in as the party defendant, the United States remains immune from this lawsuit because 1) Plaintiff's injuries arose during her Forest Service employment and therefore the Federal Employees' Compensation Act is Plaintiff's exclusive remedy against the Forest Service; and 2) Plaintiff never submitted an administrative claim to the Forest Service for her injuries, which is a jurisdictional requirement under the FTCA that cannot be equitably tolled. When the United States remains immune after certification, the Supreme Court has noted that this creates an incentive for the government to certify the defendant. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-28 (1995) (litigating the certification issue consumes "precious

litigation resources" of the local United States Attorney). Here, certification is denied despite this incentive.

Defendants Barnhart, DelCarlo, Jellison, Kirste, and Rubin are hereby denied immunity and certification under the FTCA in the above-referenced lawsuit filed by Rebecca Quigley.

Sincerely,

BENJAMIN B. WAGNER
United States Attorney

By: 
DAVID SHELLEDY
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Assistant U.S. Attorney

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# B

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April 24, 2013

File No.
29048.46

VIA ELECTRONIC AND
FIRST CLASS MAIL

Chi Soo Kim
U.S. Department of Justice
501 I Street, Suite 10-100
Sacramento, CA 95814

Re: Quigley v. Aptos/La Selva Fire Protection, et al. No. 12-cv-2779 (E.D. Cal.)
Pending Application Seeking Certification of Federal Employment

Dear Ms. Kim:

We are in receipt of Mr. Shelledy's letter of April 18, 2013 pertaining to our clients' application seeking certification of federal employment. We respectfully do not believe that the available evidence and controlling law supports the conclusion that defendants Barnhart, DelCarlo, Jellison, and Kirste were not acting as federal employees while serving as Incident Management Team ("IMT") members at the Silver Fire.

Apart from the fact that such IMTs are referred to as federal IMT, the request for defendants to report for duty as IMT members for the subject fire was made solely by the United States Forest Service ("USFS"). Further, the USFS was the protecting agency and possessed full jurisdiction over that fire that was burning in the Plumas National Forest. Upon reporting for duty the USFS had to and did provide a delegation of authority upon which Mr. Swartzlander, a federal employee, and his supervised IMT assumed command over the fire. As a result, the IMT was at all times subject to the USFS's complete jurisdictional and supervisory control. There exists no evidence supporting that the local fire departments possessed or maintained any control and authority over the IMT with regard to the Silver Fire.

Accordingly, defendants contend that the potential denial of certification of federal employment is contrary to the available facts, controlling law, mischaracterizes well

established custom and practice as evinced by controlling interagency agreements, and ignores the strong public policy underlying the very existence of interagency fire protection in the state of California. By way of this correspondence we hereby challenge the written opinion and request your formal reconsideration.

Due to the negative and long term public policy implications arising from such a determination and including matters of federal law, the issue is properly before the United States District Court - Eastern District of California. However, we request your reconsideration of defendants' pending applications to ensure that your investigation in this regard has included the full consideration of all available and relevant evidence.

For this purpose and to ensure a complete record should judicial review in fact be required, we can and will gather the available and relevant evidence on an expedited basis. We will be in a position to present such additional evidence and declarations to you by no later than May 13, 2013. We have also provided the District Court with a further status update, including a copy of this letter.

In the interim, should you have any questions or concerns, I remain available at your convenience. Thank you for your attention to this matter.

Very truly yours,

Charles E. Coleman of
LEWIS BRISBOIS BISGAARD & SMITH LLP

CEC:lcm

cc: All Counsel via First Class Mail

# EXHIBIT B

# EXHIBIT B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REBECCA MEGAN QUIGLEY,

Plaintiff,

v.

APTOS/LA SELVA FIRE PROTECTION DISTRICT, et al.,

Defendants.

/

NO. CIV. S-12-2779 LKK/CMK

O R D E R

This action arises from injuries Plaintiff Rebecca Quigley, a former firefighter with the United States Forest Service, suffered when she was allegedly run over by a Plumas Sanitation truck at the Silver Fire Base Camp.

Presently before the court is Plaintiff's motion to lift the court's stay of Plaintiff's previously filed motion to remand. See Pl's Mots., ECF No. 27 (Motion for Relief of Stay), 9 (Motion to Remand). For the reasons provided herein, the court GRANTS Plaintiff's motion to lift the stay of proceedings and GRANTS Plaintiff's motion to remand.

////

## I. BACKGROUND

On December 3, 2010, Plaintiff filed the operative complaint in Plumas County Superior Court. See Pl's First Am. Compl., ECF No. 1, Att. 1., at 9-19.[1] Plaintiff asserted causes of action against all Defendants for negligence, dangerous condition of public property, and failure to warn. Id. at 13-18. Plaintiff also asserted a cause of action against Defendant Steven H. Siler for the intentional tort of driving while intoxicated. Id. at 18-19. Plaintiff sought compensatory damages, punitive damages, prejudgment interest, and the costs of suit. Id. at 19. Plaintiff did not name the United States Forest Service ("USFS"), the Department of Agriculture, or the United States Government as defendants in the action. See generally id.

On October 12, 2012, Defendants filed a motion for summary judgment in the Plumas County Superior Court, arguing that Defendants Rich Rubin, Mike Jellison, Frank DelCarlo, and Dave Kirste were functionally employees of the USFS at all times mentioned within Plaintiff's First Amended Complaint and, therefore, the state court lacked subject matter jurisdiction over the matter, pursuant to 28 U.S.C. § 1346(b)(1). See Defs' Mot. Summary Judgment, ECF No. 1, Att. 1, at 38-41.

On November 9, 2012, Defendant Plumas Sanitation, with consent of all other Defendants, removed the action to this court,

[1]Page numbers cited herein refer to the court's electronic pagination system, as opposed to the page numbers provided by the parties.

asserting that the action falls "within the original jurisdiction of this Court and [is] properly removed under 28 U.S.C. §§ 1346, 1441, and 1446" because "the Individual Defendants were federal employees." Notice of Removal, ECF No. 1, at 4.

**A. Plaintiff's Motion to Remand**

On December 7, 2012, Plaintiff filed a motion to remand the action to state court. Pl's Mot., ECF No. 9. Plaintiff argued, inter alia, that: (1) it remains a disputed question of fact as to whether Defendants were federal employees or contractors; (2) the Defendants at issue did not raise federal employment as an affirmative defense in their answers and failed to seek certification from the U.S. Attorney General for their defense, pursuant to 28 U.S.C. § 2679, and instead, only raised federal immunity as an affirmative defense in their motion for summary judgment; and (3) the court lacks derivative jurisdiction over federal employees on removed cases. Id. at 4-12.

Defendant Plumas Sanitation, joined by the remaining Defendants, opposed Plaintiff's motion to remand. See Defs' Mots., ECF Nos. 12-16. Defendants argued, in part, that it was "premature to make a determination with regard to whether defendants were federal employees, as further information must be gathered" and "[u]ntil that determination is made, this Court has jurisdiction over the matter." Def's Mot., ECF No. 13, at 2. Defendants further asserted that, on or about December 27, 2012, "a formal written request to the federal government's designated agent was made on behalf of the Individual Defendants seeking statutory

certification of their federal employment status at the time of the subject fire" and that the Defendants "presently await the Federal Government's and Attorney General's certification of their federal employment" status. Coleman Decl., ECF No. 16, Att. 2, at 2; see also Defs' Req., ECF No. 16, Att. 2, at 7-9.

On January 15, 2013, this court stayed resolution of Plaintiff's motion to remand, pending a response by the Attorney General as to Defendants' request for certification of their federal employment status at the time of the incident alleged. Order, ECF No. 23.

**B. Plaintiff's Motion for Relief of Stay**

On April 24, 2013, Defendants notified the court that their application seeking certification by the Attorney General of their federal employment status was denied, but that Defendants have sought reconsideration of the Attorney General's written opinion. See Defs' Status Update, ECF No. 26.

The Attorney General's written opinion, dated April 18, 2013, provides, inter alia, that: (1) Defendants' removal of the suit to district court "was improper because it occurred before the individual defendants were certified as federal employees acting within the scope of their employment"; (2) upon careful consideration of the certification requests and "multiple interviews" conducted "over two months, including interviews of the IMT Incident Commander and the Deputy Incident Commander," the United States Attorney has determined that "Defendants Barnhart, DelCarlo, Jellison, Kirste, and Rubin were not federal 'employees,'

a determination governed by federal law"; and (3) the U.S. Forest Service "did not control the detailed physical performance or substantially supervise the day-to-day operations of the Local Firefighter Defendants," and "the Forest Service could not and did not hire or fire the Local Firefighter Defendants from employment," "discipline the Local Firefighter Defendants," "directly pay the Local Firefighter Defendants," or "control whether the Local Firefighter Defendants were even permitted to report to the Silver Fire." Id. at 21-23.

In light of the Attorney General's written opinion, Plaintiff Rebecca Quigley moves the court to "lift the previously imposed stay, decide the motion, and enter its order remanding the case to the Plumas County Superior Court on the basis that removal under the circumstances of this case was improper." Pl's Mot., ECF No. 27. Defendants oppose. See Def's Opp'n, ECF No. 28; Joinders, ECF Nos. 29, 30, 31.

**II. STANDARD FOR A MOTION TO REMAND**

A defendant may remove any civil action from state court to U.S. district court if the latter would have original jurisdiction "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1331, 1441(a). The removal statute is strictly construed, and the court must reject federal jurisdiction if there is any doubt as to whether removal was proper. See Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996) (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)). The availability of removal is thus limited by the well-pleaded complaint rule,

which permits removal only when a federal question is presented on the face of a properly pleaded complaint. See Franchise Tax Bd. of State of California v. Construction Laborers Vacation Trust for S. California, 463 U.S. 1, 9-10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). A defendant bears the burden of proving the propriety of removal. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

An action raising a defense based in federal law does not create federal question jurisdiction "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd., 463 U.S. at 14. Plaintiff "is the master of his or her complaint and may avoid federal jurisdiction by exclusive reliance on state law." Easton v. Crossland Mortgage Corp., 114 F.3d 979, 982 (9th Cir. 1997). However, "[a] plaintiff may not avoid federal jurisdiction by omitting from the complaint federal law essential to his or her claim or by casting in state law terms a claim that can be made only under federal law." Id.

**III. ANALYSIS**

In 1988, Congress adopted the Federal Employees Liability Reform and Tort Compensation Act, commonly referred to as the Westfall Act, to "remove the potential personal liability of federal employees for common law torts committed within the scope of their employment" by providing that the "exclusive remedy for such torts is an action against the United States under the Federal Tort Claims Act." Billings v. United States, 57 F.3d 797, 799 (9th Cir. 1995) (citing H.R.Rep. No. 700, 100th Cong., 2d Sess. 4

(1988)).

The Westfall Act grants the Attorney General authority to certify that a defendant employee named in a tort action was acting within the scope of his or her federal employment at the time in question. 28 U.S.C. § 2679(d)(1), (2). If the action is launched in a state court, and the Attorney General certifies that the employee "was acting within the scope of his office or employment at the [relevant] time," the action "shall be removed" to the appropriate federal district court, and the United States must be substituted as the defendant. § 2679(d)(2). "Th[e] certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). That is, for purposes of establishing a forum to adjudicate the case, § 2679(d)(2) renders the Attorney General's certification dispositive. Osborn v. Haley, 549 U.S. 225, 241, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007); see also Billings, 57 F.3d at 800 ("Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless challenged.").

Because the Attorney General's decision regarding certification of the employment status of the Individual Defendants in this case is dispositive for purposes of establishing forum, and the Attorney General has denied Defendants' request to be certified as federal employees acting within the scope of their employment in accordance with 28 U.S.C. § 2679(d), Defendants' argument that

the case should be removed to federal court based on their status as federal employees fails. Furthermore, because Plaintiff has presented no federal question on the face of her complaint, removal of this action to federal court was not proper.

The court rejects Defendants' argument that it should retain jurisdiction over the matter while their application for reconsideration of the Attorney General's decision is pending. The Attorney General's written opinion denying certification appears to be based on a thorough consideration of the particular facts before it. The court sees no reason to further stall these proceedings based on Defendants' application for reconsideration.

**IV. CONCLUSION**

Accordingly, the court GRANTS Plaintiff's motion to lift the stay of proceedings filed on January 15, 2013. Pl's Mot., ECF No. 27. Plaintiff's motion to remand, ECF No. 9, is GRANTED. This action is REMANDED to the Plumas County Superior Court.

The hearing on Plaintiff's motion for relief of stay, currently set for May 28, 2013 at 10:00 A.M. is VACATED.

IT IS SO ORDERED.

DATED: May 21, 2013.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

## PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On April 16, 2018, I served the within document(s):

**APPELLANT'S MOTION FOR JUDICIAL NOTICE, DECLARATION, AND POINTS AND AUTHORITIES**

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ **BY E-MAIL:** by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

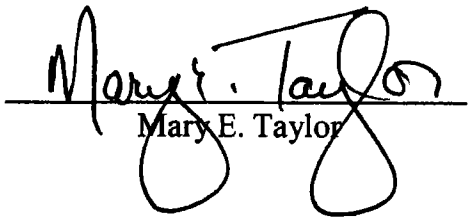
☐ **BY PERSONAL DELIVERY:** by causing personal delivery by **a reputable courier service** of the document(s) listed above to the person(s) at the address(es) set forth below.

***See attached Service List***

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 16, 2018, at Sacramento, California.



Mary E. Taylor

## SERVICE LIST

| Party | Attorney |
|---|---|
| Rebecca Megan Quigley : Plaintiff and Appellant | **BY MAIL**<br><br>Russell Reiner<br>Todd E. Slaughter<br>Law Offices of Reiner & Slaughter, LLP<br>2851 Park Marina Drive, Suite 200<br>P. O. Box 494940<br>Redding, CA 96049-4940 |
| Garden Valley Fire Protection District : Defendant and Respondent<br><br>Chester Fire Protection District : Defendant and Respondent<br><br>Jeff Barnhart : Defendant and Respondent<br><br>Frank DelCarlo : Defendant and Respondent<br><br>Mike Jellison : Defendant and Respondent | **BY MAIL**<br><br>Jeffry Albin Miller<br>Jonna D. Lothyan<br>Lewis Brisbois Bisgaard & Smith LLP<br>701 B Street, Suite 1900<br>San Diego, CA 92101-8198 |