

Case No. S242250

SUPREME COURT
FILED

APR 17 2018

Jorge Navarrete Clerk

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**

Jay-Allen Eisen, Outside Counsel
(Bar No. 42788)
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Telephone: 916.444.1000
Facsimile: 916.441.2400
Email:
truefilings_jeisen@downeybrand.com

Russell Reiner (Bar No. 84461)
Todd E. Slaughter (Bar No. 87753)
REINER, SLAUGHTER,
McCARTNEY & FRANKEL, LLP
2851 Park Marina Dr., Suite 200 P.
P.O. Box 494940
Redding, CA 96049-4940
Telephone: 530.241.1905
Facsimile: 530.241.0622
Email:
reiner@reinerslaughter.com
Email:
tslaughter@reinerslaughter.com

Attorneys for Plaintiff and Appellant
REBECCA MEGAN QUIGLEY

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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

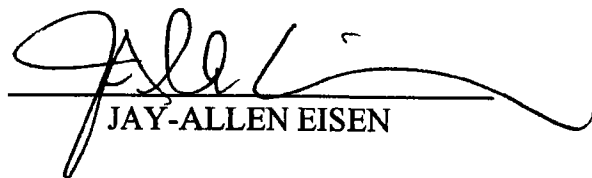

JAY-ALLEN EISEN

EXHIBIT A

EXHIBIT A

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
JOSEPH A. SALAZAR JR., SB# 169551
2 E-Mail: jsalazar@lbbslaw.com
CHARLES E. COLEMAN, SB# 200668
3 E-Mail: ccoleman@lbbslaw.com
2850 Gateway Oaks Drive, Suite 450
4 Sacramento, California 95833
Telephone: 916.564.5400
5 Facsimile: 916.564.5444

6 Attorneys for Defendants GARDEN VALLEY
FIRE PROTECTION DISTRICT, JEFF
7 BARNHART, CHESTER FIRE PROTECTION
DISTRICT, MIKE JELLISON, FRANK
8 DELCARLO and DAVE KIRSTE

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
11

12 REBECCA MEGAN QUIGLEY,
13

14 Plaintiff,

15 vs.

16 APTOS/LA SELVA FIRE PROTECTION
DISTRICT, ET AL.,

17 Defendants.
18

CASE NO. 2:12-CV-02779-LKK-CMK

**FURTHER STATUS UPDATE
REGARDING INDIVIDUAL
DEFENDANTS' REQUEST FOR U.S.
ATTORNEY GENERAL'S
CERTIFICATION OF FEDERAL
EMPLOYMENT**

Trial Date: None Set

19
20 Defendants JEFF BARNHART, MIKE JELLISON, FRANK DELCARLO and DAVE
21 KIRSTE (the "Individual Defendants") hereby provide an updated status regarding their pending
22 and recently responded to application seeking the United States Attorney General's certification of
23 federal employment:

24 In response to the applications that were submitted on behalf of each of the Individual
25 Defendants, the United States Attorney General provided a four (4) page written opinion letter
26 dated April 18, 2013. A copy of Defendants' application and the written opinion letter have been
27 collectively attached to this status update at Tab "A".
28

4813-7101-5699.1

**FURTHER STATUS UPDATE REGARDING INDIVIDUAL DEFENDANTS' REQUEST FOR U.S. ATTORNEY
GENERAL'S CERTIFICATION OF FEDERAL EMPLOYMENT**

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

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

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10 DATED: April 24, 2013

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

11

12

13

By: /s/ Charles E. Coleman

14

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

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A

**LEWIS
BRISBOIS
BIGAARD
& SMITH LLP**
ATTORNEYS AT LAW

2850 Gateway Oaks Drive, Suite 450
Sacramento, California 95833
Telephone: 916.564.5400
Fax: 916.564.5444
www.lbbsslaw.com

CHARLES E. COLEMAN
DIRECT DIAL: 916.846.8222
E-MAIL: CCOLEMAN@LBBSSLAW.COM

December 27, 2012

File No.
29048.46

Office of General Counsel
United States Forest Service
33 New Montgomery Street, 17th Floor
San Francisco, CA 94105

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 DeCarlo, 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. 2879(c); 28 C.F.R. 15.2. Based on discussions with the Department of Justice and your office we have

Office of General Counsel
December 27, 2012
Page 2

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.

Office of General Counsel
December 27, 2012
Page 3

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.

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

JOSEPH A. SALAZAR JR., SB# 169551

2 E-Mail: jsalazar@lbbalaw.com

CHARLES E. COLEMAN, SB# 200668

3 E-Mail: cooleman@lbbalaw.com

2830 Gateway Oaks Drive, Suite 450

4 Sacramento, California 95833

Telephone: 916.564.5400

5 Facsimile: 916.564.5444

6 Counsel of Record for Applicants JEFF BARNHART,

MIKE JELLISON, FRANK DELCARLO,

7 and DAVE KIRSTE

8

9

APPLICATION SEEKING CERTIFICATION

10

OF FEDERAL EMPLOYMENT STATUS

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I. Introduction

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Applicants Jeff Barnhart, Mike Jellison, Frank DeCarlo, and Dave Kirste (collectively the

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"Individual Defendants") hereby present their supplemental application seeking statutory

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certification of federal employment. The Defendants were members of the Nor Cal 1 Incident

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Management Team ("IMT"). In September 2009 the IMT was ordered and established by the

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United States Forest Service (the "USFS") for the Silver Fire (the "subject fire") that was burning

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in the Plumas National Forest. The IMT was under the full command, authority, and jurisdiction

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of the USFS.

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II. Basis for Application & Applicable Authority

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This application is submitted pursuant to 28 U.S.C. § 2679 and 28 C.F.R. §§ 15.2 and

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15.4. These sections require a putative federal employee to submit an application to the

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designated federal agent for this purpose. See, 12 U.S.C. 2879(c); 28 C.F.R. 15.2. Based on prior

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discussions, we have confirmed that the request and application must be directed to the United

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States Attorney General for the Eastern District of California as the designated agent of the

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Federal Government.

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Pursuant to 28 C.F.R. 15.3, the Individual Defendants hereby request a report determining

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whether they were acting within the scope of their employment with the Federal Government. We

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further understand that the U.S. Attorney and its Branch Director each have authority to make this

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

4817-7326-8754.1

APPLICATION SEEKING CERTIFICATION OF FEDERAL EMPLOYMENT STATUS

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

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

11 **III. Procedural History**

12 The Individual Defendants have been named as defendants in the matter of *Quigley v.*
13 *Aptos/La Selva Fire Protection District, et al.* originally filed in Plumas County Superior Court,
14 Case No.: 10-00225 (the "state lawsuit"). The state lawsuit alleges tort causes of action against
15 Defendants sounding in negligence. Plaintiff, Rebecca Quigley a USPS employee, was run over
16 by a water/sanitation truck while sleeping at the subject fire camp on the evening of September 21,
17 2009. A more detailed summary of the operative pleadings, alleged claims, and relevant facts will
18 be provided below beginning on page three (3) within the section entitled *Supplemental*
19 *Information Supporting Application: Part A. Summary of Pleadings and Subject Claims.*

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

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

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

3 **IV. Supplemental Information Supporting Application**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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4817-7326-8754.1

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APPLICATION SEEKING CERTIFICATION OF FEDERAL EMPLOYMENT STATUS