

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

MATTHEW MITCHELL	§	
Plaintiff	§	
	§	
	§	
vs.	§	CIVIL ACTION NO. 5:17-CV-00411-DAE
	§	
	§	
ORICO BAILEY and HOOPA VALLEY	§	
TRIBE, d/b/a AMERICORPS HOOPA	§	
TRIBAL CIVILIAN COMMUNITY CORPS	§	
Defendants	§	

ORICO BAILEY and HOOPA VALLEY	§	
TRIBE	§	
Petitioners	§	
	§	
vs.	§	CIVIL ACTION NO. 5:17-CV-00411-DAE
	§	
	§	
UNITED STATES OF AMERICA	§	
Respondent	§	

**DEFENDANTS’ REPLY TO RESPONDENT’S RESPONSE TO  
PETITION FOR CERTIFICATION UNDER 28 U.S.C. § 2679(d)(3) AND TO  
SUBSTITUTE THE UNITED STATES AS A PARTY**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants/Petitioners, ORICO BAILEY and the HOOPA VALLEY TRIBE, d/b/a AMERICORPS HOOPA TRIBAL CIVILIAN COMMUNITY CORPS, to file this Reply to Respondent’s Response to Petition for Certification Under 28 U.S.C. § 2679(d)(3) and to Substitute the United States as a Party [Doc. No. 46]. In support thereof, Defendants respectfully show as follows:

## I. ARGUMENT AND AUTHORITY

1. Respondent, United States of America, contends that the Petition for Certification Under 28 U.S.C. § 2679 [The Westfall Act] is premature because the “Defendants in this case have not provided information to the U.S. Attorney’s Office that they have submitted any request for certification with an appropriate Federal Agency.” Doc. No. 46 at 2. For reasons unbeknownst to Defendants, Respondent appears to have ignored the request for certification attached to Defendants’ Petition as Exhibit A [Doc. No. 35-1] as well as the response from the Department of Interior attached to Defendants’ Petition as Exhibit B [Doc. No. 35-2], which appears to deflect this issue to the Court and advises that the Department of Interior “will not be taking any further action on this claim.” *Id.* Thus, contrary to the contentions of Respondent, Defendants/Petitioner have clearly complied with this “prerequisite” and submitted the request for certification to the Department of Interior.

2. Interestingly, Respondent cites *Sullivan v. Freeman*, 944 F.2d 334, 337 (7<sup>th</sup> Cir. 1991) in support of its contention that Defendants’ Petition [for Certification of Federal Employment] must fail because Defendants allege no such request was made. *Sullivan*, in relevant part, states: “For the [Westfall] Act to kick in, the employee must notify the Attorney General of the suit; the Attorney General must certify that the defendant employees were acting within the scope of their employment when the tort occurred; and, if he refuses to so certify, the employees must petition the district court.” 944 F.2d at 337. Defendants *have* notified the Attorney General of this suit with the filing of their Petition for Certification. *See* Doc. No. 35. Defendants even served the Attorney General with process of this suit. *See* Doc. No. 43. Thus, Respondent’s Response can only be construed as a refusal to certify and this matter is properly before the Court under the case law cited by Respondent.

3. The failure of any federal agency, the U.S. Attorney, or the Attorney General to act with respect to Defendants' request to certify cannot now be held against Defendants. Based on Respondent's argument, the entire federal government can sit on its hands while Plaintiff's suit against Defendants proceeds, contrary to the statutory and common law requirements that Respondent stand in the stead of Defendants in this case.

4. However, out of an abundance of caution, and in an effort to satiate Respondent's contentions regarding the alleged deficient prerequisites for certification of federal employment, Defendants have re-submitted their request for certification to any and all potentially "appropriate" federal agencies, with hopes that one of them will forward the alleged necessary "report" to the Attorney General. *See* Exhibit A attached hereto. To be clear, it is Defendants' contention that they submitted their request for certification of federal employment to the Department of Interior on December 8, 2017. *See* Doc. 35-1. It is also Defendants' contention that the Department of Interior declined to take "any further action on this claim" effectively denying Defendants' request for certification of federal employment. *See* Doc. 35-2. Regardless, Defendants have now re-submitted their request to several federal agencies with the expectation that at least one of them will provide the Attorney General with the "report" Respondent contends is necessary.

5. Accordingly, Defendants hereby contend that this matter is properly before the Court for certification of federal employment, or, alternatively, Defendants request an additional 90 days prior to the Court ruling on this matter, which should be sufficient time for the appropriate federal agency to send the alleged requisite "report" to the Attorney General for certification.

## II. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Orico Bailey and the Hoopa Valley Tribe pray that the Court Order the Attorney General of the United States to defend the civil action for personal injuries and money damages that has been brought by Matthew Mitchell

against Orico Bailey and the Hoopa Valley Tribe; that the Court Order substitution of the United States of America as Defendant; that the Court Order dismissal of Orico Bailey and the Hoopa Valley Tribe as Defendants in this lawsuit; or alternatively, refrain from ruling on this matter for 90 days, until the appropriate federal agency sends the alleged requisite “report” to the Attorney General for certification, such that the defects of which Respondent claims can be cured. Defendants further pray that the Court grant such other and further relief to which Orico Bailey and the Hoopa Valley Tribe show themselves to be justly entitled.

Respectfully submitted,

**TRIBBLE | ROSS**

*/s/ Mary Holmesly*

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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

On November 26, 2018, I hereby certify a true and correct copy of this notice has been served upon each attorney of record in accordance with the Federal Rules of Civil Procedure.

*/s/ Mary Holmesly*

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Mary Holmesly