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DALE ALLAN WALKER

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RUBEN BARRIENTOS, JR.,

Plaintiff,

v.

DALE ALLAN WALKER and DOES 1-20,

Defendants.

Case No. 1:23-cv-01432-SAB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MR. WALKER'S MOTION TO CERTIFY EMPLOYMENT UNDER THE FTCA, SUBSTITUTE UNITED STATES AS DEFENDANT, AND DISMISS MR. WALKER

Judge: Hon. Jennifer L. Thurston
Magistrate Judge: Hon. Stanley A. Boone

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OTHER AUTHORITIES

Defendant Dale Allan Walker ("Defendant" or "Mr. Walker") hereby submits the following Memorandum of Points and Authorities in support of his Motion to Certify Employment Under the Federal Tort Claims Act, Substitute the United States as Defendant, and Dismiss Mr. Walker ("Motion"), requesting this Court to certify that he was acting within the scope of his employment as a federal employee at the time of the incident at issue in this case:

I. INTRODUCTION

Plaintiff Ruben Barrientos, Jr. ("Plaintiff") filed a Complaint against Mr. Walker and the Tule River Indian Tribe of California ("Tribe"), a federally recognized Indian tribe, in the Tulare County Superior Court of California ("State Court") in April 2022. In the Complaint, Plaintiff seeks to recover for injuries and damages he allegedly sustained on September 2, 2020 when Mr. Walker purportedly caused a collision with Plaintiff's vehicle during the course of Mr. Walker's employment with the Tribe (the "Alleged Incident"). Due to the Tribe's sovereign immunity, the State Court dismissed the Tribe with prejudice from this action.

After filing his Complaint, Plaintiff submitted a claim to the U.S. Department of Health and Human Services ("DHHS") under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA") regarding the same Alleged Incident. The Tribe, on behalf of itself and Mr. Walker, also submitted notification of Plaintiff's action to the United States per the FTCA. The State Court permitted a limited stay of the action while the United States considered administratively whether the FTCA applied. Subsequently, the U.S. Attorney General refused to certify Mr. Walker's employment under the FTCA and, as a result, DHHS denied Plaintiff's FTCA claim.

Because the Attorney General refused to certify employment under the FTCA, Mr. Walker may, at any time before trial, petition to certify that he was acting within the scope of his employment. 28 U.S.C. § 2679(d)(3). Trial was set in State Court for May 20, 2024. Mr. Walker petitioned State Court to certify employment under the FTCA on September 20, 2023. Dkt. No. 1-2. The United States subsequently removed

this action to this Court on October 3, 2023. Dkt. No. 1. Mr. Walker may, at any time before trial, petition this Court to certify he was acting within the scope of his employment. 28 U.S.C. § 2679(d)(3). Trial in this Court is not set. Upon certification, the United States must be substituted as the party defendant. *Id.*

Certification is appropriate here because the Tribe entered into a Memorandum of Agreement Between the Indian Health Service ("IHS") (DHHS) and the Tribe (the "MOA") in February 2018. The MOA is a self-determination contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* ("ISDEAA") and as such, the Tribe is deemed a federal agency and Mr. Walker is deemed a federal employee for purposes of the FTCA. Mr. Walker was acting within the course and scope of his employment with the Tribe, as determined under California law, because he was picking up supplies for the MOA at the request of his supervisor at the time of the Alleged Incident. Thus, Mr. Walker respectfully requests this Court to find and certify that he was acting within the scope of his employment under the FTCA, to substitute the United States as the party defendant in this action, and to dismiss him from the action.

II. BACKGROUND[1]

A. The Tribe and the MOA with IHS

The Tribe is a federally recognized Indian tribe, occupying the Tule River Indian Reservation near Porterville, California. McDarment Decl. ¶ 3, Exh. A at 5; U.S. Dep't of Interior, Bureau of Indian Affairs, *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 88 Fed. Reg. 2112, 2114 (Jan. 12, 2023). In February 2018, the Tribe entered into the MOA with IHS. Whitten Decl. ¶ 3, Exh. J at 113. As indicated in the MOA, the Tribe requested financial and other assistance from IHS under Public Law 86-121 (July 31,

[1] The facts contained herein are based upon the Declaration of Charmaine A. McDarment ("McDarment Decl.") and Exhibits A–I ("Exh.") attached thereto as well as the Declaration of Gary Whitten ("Whitten Decl.") and Exhs. J–M attached thereto, filed in support of this Motion.

1959), 42 U.S.C. § 2001 *et seq.* (the "Sanitation Act" and together with the ISDEAA, the "Acts") with constructing wastewater disposal facilities, and the Tribe was to carry out construction of the facilities through its employees. Whitten Decl. ¶ 3, Exh. J, at 114–17 (describing project proposal/letter submitted by Tribe requesting assistance under Sanitation Act to serve the community in the construction of wastewater disposal facilities). Under the MOA, DHHS agreed to pay for the Tribe's employees to construct wastewater supply and disposal facilities for tribal members (the "Sewer Project"). Whitten Decl. ¶ 3, Exh. J, at 116–17, 119.

B. Mr. Walker's Employment with the Tribe Pursuant to the MOA

Mr. Walker was an employee of the Tribe and was hired on January 15, 2019, to oversee construction operations of the wastewater treatment plant and sewer main collection as part of the Sewer Project pursuant to the MOA. Whitten Decl. ¶¶ 5, 6, Exhs. K–L. Mr. Walker was an hourly employee and was paid with funds from DHHS under the MOA for his work at the time of the Alleged Incident that is the subject of this action. *Id.* ¶ 4. Work under the MOA was not completed until November 2, 2021, which is after the Alleged Incident took place. *Id.* ¶ 7, Exh. M.

C. The Alleged Incident

Plaintiff alleges that he suffered injuries as a result of a collision with Plaintiff's vehicle on September 2, 2020, while Mr. Walker was "acting in the course and scope of his employment" for the Tribe. Dkt. No. 1-1 at 5. At the time of this Alleged incident, Mr. Walker was on his way to pick up supplies for the Sewer Project under the MOA. Whitten Decl. ¶ 8.

D. The FTCA Claim Based on the Alleged Incident and the FTCA Notification

On August 30, 2022, Plaintiff filed his FTCA claim by submitting a Form SF95 Federal Tort Claim to the U.S. Attorney for the Eastern District of California, claiming to have suffered damages as a result of the same Alleged Incident at issue in this action. McDarment Decl. ¶ 4, Exh B.

On September 1, 2022, as required by the FTCA and implementing regulations (28 U.S.C. § 2679(c), 25 C.F.R. § 900.188(b)), the Tribe submitted notification on behalf of itself and Mr. Walker of Plaintiff's State Court claims in this action to the DHHS, the U.S. Attorney General, and the U.S. Attorney for the Eastern District of California. McDarment Decl. ¶ 5, Exh. C.

E. The State Court's Dismissal of the Tribe and Stay of the Action

The State Court dismissed the Tribe with prejudice from this case on June 2, 2023 due to the Tribe's sovereign immunity and pursuant to the parties' stipulation. *Id.* ¶ 6, Exh. D. The State Court also granted a limited stay of the action in order for the United States to consider the FTCA claim and certification of Mr. Walker. *Id.* ¶ 7, Exh. E.

F. The United States' Denial of FTCA Certification, the State Court Motion to Certify, and Removal

On December 21, 2022, the U.S. Attorney General, through U.S. Attorney Phillip A. Talbert, denied FTCA certification. *Id.* ¶ 8, Exh. F. In this denial, the United States alleged that the MOA had to explicitly reference the ISDEAA in order for it to constitute a self-determination contract under the ISDEAA, that the Tribe claimed responsibility for tort claims under the MOA, and that the claim was not for damages resulting from the performance of "medical, surgical, dental, or related functions" or "the operation of an emergency vehicle." *Id.* ¶ 8, Exh. F at 47 (quoting 25 U.S.C. § 5321(d)). On January 9, 2023, DHHS denied Plaintiff's FTCA claim, noting that the Attorney General had determined that the acts or omissions alleged were not covered by the FTCA. *Id.* ¶ 9, Exh. G.

The Tribe, on behalf of itself and Defendant, requested reconsideration of the denial on March 1, 2023, arguing, as relevant here, that the MOA is a self-determination contract, the FTCA applies to medical and non-medical related claims alike, and the United States cannot contractually disclaim congressionally-mandated FTCA liability. *Id.* ¶ 10, Exh. H at 53–58. The Attorney General denied certification

again on June 5, 2023, for the same reasons and, as relevant here, for the additional reasons that the MOA does not contain the mandatory terms prescribed under 25 U.S.C. § 5329(a) and (c). *Id.* ¶ 11, Exh. I at 110–11.

Under the FTCA, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3). "Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." *Id.* If the petition is filed in state court, "the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending." *Id.*; *see also Allender v. Scott*, 379 F. Supp. 2d 1206, 1209, 1211 (D.N.M. 2005) (granting motion to certify after United States' denial; noting defendants moved to certify in state court and United States removed to federal court upon receiving notice of motion). Defendant filed a motion to certify employment under the FTCA, substitute the United States as defendant, and dismiss the case in State Court on September 20, 2023. Dkt. No. 1-2. Subsequently, the United States removed the action to this Court on October 3, 2023. Dkt No. 1.

III. LEGAL DISCUSSION

A. The MOA is a Self-Determination Contract Under the ISDEAA, and as such, the Tribe is a Federal Agency and Mr. Walker is a Federal Employee for Purposes of the FTCA and the Alleged Incident.

The ISDEAA provides that, for purposes of the FTCA, the Tribe is deemed to be a part of the Public Health Service in DHHS, when the Tribe is carrying out a self-determination contract (*i.e.*, the MOA). *See* 25 U.S.C. § 5321(d).

At the time of the Alleged Incident that is the subject of this action and the FTCA claim (September 2, 2020), the Tribe was carrying out the 2018 MOA, which is a self-determination contract under the ISDEAA and which ended in 2021 after the Alleged Incident. Whitten Decl. ¶¶ 3, 7, Exhs. J, M. Under the express terms of the

MOA, DHHS agreed to pay for the Tribe's employees to construct the wastewater supply and disposal facilities as part of Sewer Project for tribal members. *Id.* ¶ 3, Exh. J.

Additionally, at the time of the Alleged Incident that is the subject of this action and the FTCA claim, Mr. Walker was acting within the scope of his employment for the Tribe under the MOA, and is therefore an employee of the Public Health Service in the DHHS pursuant to the ISDEAA and FTCA. 25 U.S.C. § 5321(d). Specifically, Mr. Walker (i) was expressly hired by the Tribe to oversee construction operations of the wastewater treatment plant and sewer main collection projects as part of the Sewer Project pursuant to the MOA (Whitten Decl. ¶¶ 5, 6, Exhs. K, L), (ii) was paid with funds from DHHS under the MOA for his work as an hourly employee (*id.* ¶ 4), and (iii) was on his way to pick up supplies for the Sewer Project under the MOA at the request of his supervisor, Mr. Whitten, and therefore clearly acting within the scope of his employment at the time of the Alleged Incident (scope of employment is addressed in more detail in Section III.B, *infra*). *Id.* ¶ 8. The MOA Sewer Project was not completed until after the Alleged Incident, in November 2021. *Id.* ¶ 7, Exh. M.

Because the Tribe is deemed a federal agency and Mr. Walker is deemed a federal employee under the ISDEAA, the FTCA applies to Plaintiff's claims based upon the Alleged Incident. 25 U.S.C. § 5321(d). As such, this Court should certify that Defendant was acting within the scope of his employment under the FTCA, substitute the United States as the defendant, and dismiss Mr. Walker from this action. 28 U.S.C. § 2679(d)(3).

1. *The Plain Text of the ISDEAA and Sanitation Act Clearly Establish that the MOA is a Self-Determination Contract.*

The MOA is a "self-determination contract" under the ISDEAA. Both the ISDEAA and Sanitation Act contain provisions authorizing agreements; however, the ISDEAA explicitly requires the Secretary to enter a self-determination contract when, as here, a Tribe requests to plan, conduct, or administer programs, or portions thereof,

under the Sanitation Act.

Regarding the Sanitation Act, it provides that "the Surgeon General is authorized . . . to make such arrangements and agreements . . . with the Indians to be served . . . regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof." 42 U.S.C. § 2004a(a)(3) (emphasis added).

However, rather than merely "authorizing" the Secretary to enter agreements as the Sanitation Act does, the ISDEAA expressly **directs** the Secretary to enter into a "self-determination contract" when a tribe requests to plan, conduct, or administer programs (or portions thereof) under the Sanitation Act:

> The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . . (C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.]

25 U.S.C. § 5321(a)(1)(C) (emphasis added).[2]

A self-determination contract is defined under the ISDEAA as "a contract (or grant or cooperative agreement utilized under section 5308 of this title [25]) entered into under subchapter I of this chapter [25 U.S.C. § 5321–32] between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." *Id.* § 5304(j).

The ISDEAA's plain text is clear that the Secretary **must** enter a self-determination contract when a tribe requests to plan, conduct, or administer programs, or portions thereof, provided under the Sanitation Act. Here, the Tribe requested to construct wastewater disposal facilities on behalf of the federal government with the

[2] "Secretary" is defined as "unless otherwise designated, [] either the Secretary of Health and Human Services or the Secretary of the Interior or both." *Id.* § 5304(i). The ISDEAA requires the Secretary to enter into self-determination contracts with tribes to carry out programs under "the Act of August 5, 1954 . . . as amended"; P.L. 86-121/the Sanitation Act amended the Act of August 5, 1954.

Tribe's employees under the Sanitation Act. Whitten Decl. ¶ 3, Exh. J at 114–17 (describing project proposal/letter submitted by Tribe requesting assistance under the Sanitation Act to serve the community in the construction of wastewater disposal facilities). As such, the MOA, which is the contract entered into subsequent to the Tribe's request, is a self-determination contract under the ISDEAA.

The United States essentially asserts that the federal government ***may, but need not***, enter a "self-determination contract" under the ISDEAA for programs planned, conducted, or administered by tribes under the Sanitation Act. However, when interpreting statutes, courts "must give effect, if possible, to every clause and word of a statute." *See Loughrin v. United States*, 573 U.S. 351, 358 (2014). As such, if the Secretary need not enter a "self-determination contract" under the ISDEAA when requested by a tribe for planning, conducting, or administering programs (or portions thereof) provided under the Sanitation Act, and could instead enter into a **non**-self-determination contract, this language in the ISDEAA would be entirely superfluous and meaningless, which is to be avoided under statutory interpretation principles. *Id.*

Because the Tribe requested to enter a contract to plan, conduct, or administer programs (or portions thereof) under the Sanitation Act by constructing wastewater disposal facilities on behalf of the federal government using the Tribe's employees, the Secretary was required to enter a self-determination contract, which is the MOA.

To the extent there are any ambiguities in the ISDEAA on this point, the ISDEAA explicitly instructs that such ambiguities must be "liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. § 5321(g). The ISDEAA should be construed here as requiring that the MOA constitute a self-determination contract thereby extending FTCA coverage to the Tribe, consistent with Congress's intent in enacting the ISDEAA and the FTCA provisions of the ISDEAA as discussed in more detail in Section III.A.2, *infra*.

The United States asserted in its June 5 refusal to certify that the MOA is not a

self-determination contract because the ISDEAA requires each self-determination contract to contain, or incorporate by reference, the provisions of the model agreement. *See* 25 U.S.C. § 5329(a), (c). However, the federal government drafted the MOA and had the superior bargaining position. Therefore, if there is any ambiguity as to whether the MOA is a self-determination contract or contained or incorporated by reference the model agreement, such ambiguity must be interpreted against the federal government. *See, e.g.*, *Hunt Wesson Foods Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987) ("Another fundamental rule of contract interpretation is that where language is ambiguous the court should construe the language against the drafter of the contract."). Moreover, the federal government's supposed failure to follow the ISDEAA's statutory requirements of drafting or incorporating by reference the model agreement into the MOA does not mean the MOA is not a self-determination contract under the plain text of the ISDEAA. Further, if the federal government could simply disclaim FTCA liability by declining to draft or incorporate by reference the model agreement, there would be no incentive to follow such statutory requirement, because failing to follow this requirement would rid the federal government of FTCA liability, which cannot have been Congress's intent in drafting the ISDEAA and providing FTCA protections to tribes.

2. *If the Plain Text of the ISDEAA and Sanitation Act are Somehow Ambiguous, the Legislative History of the Acts Establishes that the MOA Must Be a Self-Determination Contract.*

If the plain text of the ISDEAA and Sanitation Act is somehow unclear, the legislative history of the Acts supports the conclusion that the MOA must be a self-determination contract.

a. Congress Enacted the ISDEAA to Address Vague and Inconsistent Procedures and Policies and Provide Native Americans with an Effective Voice in Planning and Implementing Programs for their Benefit.

As of 1958, American Indians had a relatively short life expectancy and were suffering from diseases of the digestive tract at rates seven times higher than the

general U.S. population. Albert H. Stevenson, *Sanitary Facilities Construction Program for Indian and Alaska Natives*, 76 Public Health Reports 317 (April 1961). The conditions across Indian Country, including a lack of safe, accessible water supply and improper preparation and storage of foods, were the cause of many of these issues. *Id*. Initially, the federal government focused its efforts on small, home-to-home educational programs. *Id*. at 319. Despite significant Native American participation, the programs failed to address sanitary concerns stemming from a lack of appropriate infrastructure. *Id.* The Sanitation Act was a response to the failure of these efforts. *Id*.

Sanitation efforts in Indian Country began as the United States Department of Interior ("DOI")'s responsibility. The DOI was able to exercise functions not directly related to sanitation (*i.e.*, cooperative arrangements and land acquisition) under its broad authority to regulate federally supported programs for American Indians. *Bills to Provide for Improvement of Indian Sanitation Facilities: Heating Before H. Comm. On Interstate and Foreign Comm*, 86th Cong., 6 (report of Health, Edu., and Welfare Dept. on H.R. 849). The Act of August 5, 1954 transferred responsibility from the DOI to the Public Health Service, but the Public Health Service's authority to conduct similar activities was an "area of uncertainty." *Id*. As a result, Congress was overwhelmed with identical bills seeking approval of sanitation projects across Indian Country. The purpose of the Sanitation Act was to provide legislative authority for the Public Health Service to adequately implement sanitation facilities so that Congressional authority was not required for each individual project. *Id*. at 12 (joint statement of Rep. Joseph Montoya and Rep. Thomas Morris).

Subsequently, in hearings to enact the ISDEAA years later, one of the ISDEAA's sponsors cited "vague" and "inconsistent" administrative procedures and policies regarding contracting and Indian input, which necessitated the ISDEAA, especially with regard to education programs under the Johnson O'Malley Act of 1934. *Indian Self-Determination and Education Program: S. 1017 and Related Bills:*

Hearing Before the S. Subcomm. on Indian Affairs, 93rd Cong., 1-2 (1973) (statement of Sen. James Abourezk). The Johnson O'Malley Act of 1934 is a parallel to the Sanitation Act under the ISDEAA provision that requires entering into a self-determination contract when requested by the tribe. *Compare* 25 U.S.C. § 5321(a)(1)(A) (ISDEAA requiring Secretary to enter self-determination contract if tribe requests to plan, conduct, and administer programs under Johnson O'Malley Act), *with id.* § 5321(a)(1)(C) (same regarding Sanitation Act).

The purpose of the ISDEAA, as noted in its text, was to promote tribal input in and control over federal programs for the benefit of Native people:

> The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—(1) **the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people** and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and **has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities**.

Id. § 5301(a) (emphasis added). Thus, whereas the Secretary is merely "authorized" to make agreements under the Sanitation Act, the Sanitation Act provides no explicit requirement that the Secretary do so. In contrast, the ISDEAA is clear that the Secretary must enter a self-determination contract when a tribe requests to plan, conduct, or administer programs (or portions thereof) under the Sanitation Act. The ISDEAA also provides specific reasons for the Secretary to decline to enter such an agreement, setting parameters for when declination to enter such a contract is warranted, but the Sanitation Act does not. *Compare* 25 U.S.C. § 5321(a)(2), *and* Public Law 93-638, Section 103(a) (Jan. 4, 1975) (directing Secretary to enter self-determination contract when requested by tribe but permitting Secretary to decline entering such contracts in express limited circumstances), *with* 42 U.S.C. § 2004a(a)(3) *and* P.L. 86-121 (authorizing Secretary to enter agreements, but setting no parameters for declining to enter such contracts).

Further, the ISDEAA, as of 1994, provides a model for self-determination contracts, including extensive and detailed statutory provisions for such contracts, but the Sanitation Act does not. *See* 25 U.S.C. § 5329(a), (c); 42 U.S.C. § 2001 *et seq*.

This legislative history demonstrates that Congress passed the ISDEAA to require the Secretary to enter self-determination contracts when tribes requested to perform all or a portion of the government's duties under the Sanitation Act and parameters for when the Secretary may decline to do so.[3] But the Court need not reach this issue because the text of the Acts is plain that when, as here, a tribe requests to plan, conduct, or administer programs, or portions thereof, under the Sanitation Act, the Secretary must enter a self-determination contract under the ISDEAA.

b. Congress's Reasons for Enacting the FTCA Provisions of the ISDEAA Support Coverage Here.

The FTCA provisions of the ISDEAA were enacted because, through the ISDEAA, tribes take over federal obligations, and as such, federal liability should attach. A primary purpose of Congress's extension of FTCA coverage to tribal contractors was to reduce their insurance costs and prevent using scarce program resources to pay for private insurance.[4] Because the Tribe here is carrying out the

[3] The language of the ISDEAA as originally enacted through P.L. 93-638 in 1975 is substantially similar to the language in the ISDEAA today in Section 5321(d). For example, Section 103(a) of P.L. 93-638 provides the Secretary "is **directed**, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5,1954 (68 Stat. 674), as amended." (emphasis added).

[4] In 1987, the ISDEAA was amended to extend FTCA coverage to tribal health contractors for medical claims due to the high cost of medical malpractice insurance. P.L. 100-202 (Dec. 22, 1987); *see also* H.Conf. Rep. 100-498, at 918, H.Rep. 100-171 , at 95–96, and S.Rep. 100-165, at 112. In 1988, through P.L. 100-472 (Oct. 5, 1988), the ISDEAA was amended to make the Secretaries of DHHS and DOI responsible for "obtaining or providing liability insurance or equivalent coverage on the most cost-effective basis." 25 U.S.C. § 450f(c)(1); *see also* S.Rep. 100-274, at 9, 26–28 (1987) *reprinted in* 1988 USCCAN at 2645-2647. In 1989, Congress extended FTCA for general liability claims against tribal contractors for one year only—FY1990. P.L. 101-121 (Oct. 23, 1989). The Departments were directed to provide information on insurance alternatives for tribal contractors, but they did not do so. Thus, in 1990, FTCA extension to tribal contractors was made permanent in order to meet the liability insurance provisions in the ISDEAA. P.L. 101-512 (Nov. 5, 1990). This language was further amended in 1993 to ensure that ISDEAA self-governance compactors were included in the coverage provided. P.L. 103-138 (Nov. 11, 1993). *See also*

federal government's duties under the Sanitation Act through the ISDEAA to provide sanitation services to tribal members, and because the Tribe would otherwise have to pay for this claim against its employee, the reasons for enacting the FTCA provisions of the ISDEAA support finding that it should apply to the circumstances here.

3. *FTCA Coverage Under the ISDEAA Applies to Medical and Non-Medical Claims Alike.*

In denying FTCA coverage, the United States asserted that the FTCA provisions of the ISDEAA did not cover non-medical claims. McDarment Decl. ¶ 8, Exh. F at 47. In doing so, the United States cited 25 U.S.C. § 5321(d), which provides for FTCA coverage of claims involving "personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions," or "for personal injury, including death, resulting from the operation of an emergency motor vehicle." This is the medical claim provision, which was later extended by amendment in 1990 to the ISDEAA to include non-medical related claims. The following statutory language was added to the ISDEAA in 1990 to permanently extend FTCA tort coverage to tribes and is not limited to medical claims (*see* footnote 4, *supra*, explaining history of amendments):

> With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter . . . under a contract, grant agreement, or any other agreement or compact authorized by the [ISDEAA], an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement.

P.L. 101-512, Section 314 (referenced in 25 U.S.C. § 5321, Statutory Notes and Related Subsidiaries). As the Attorney General in 1998 discussed, the 1987

Attorney General, *Coverage Issues Under the Indian Self-Determination Act*, at 71 (Apr. 22, 1998), *available at* https://www.justice.gov/file/19686/download (examining legislative history of ISDEAA amendments adding FTCA coverage for tribes).

amendment to the ISDEAA included coverage for only medical claims, but the 1990 amendment "grew out of an earlier provision (the medical-claim provision)" to provide broader coverage for general FTCA torts. Attorney General, *Coverage Issues Under the Indian Self-Determination Act*, at 71 (Apr. 22, 1998), *available at* https://www.justice.gov/file/19686/download (emphasis added).

Additionally, a subsection of ISDEAA regulations expressly addresses "nonmedical related claims." 25 C.F.R. §§ 900.204–210. Case law further establishes that FTCA applicability is not limited to medical claims. For example, in *Farmer v. United States*, the U.S. District Court for the Eastern District of Washington allowed an FTCA claim to proceed against the United States, holding that a tort victim could assert non-medical related claims against the United States under the FTCA for injuries sustained due to a tribe's employee's actions under an ISDEAA contract. (E.D. Wash. Oct. 22, 2014) No. CV–13–0251–LRS, 2014 WL 5419637, at *4. Similarly, in *Goss v. United States*, the U.S. District Court for the District of Arizona rejected the DOJ's implication that FTCA liability under the ISDEAA is limited to claims arising out of the provision of medical care. (D. Ariz. 2018) 353 F. Supp. 3d 878, 884. The court stated that such an argument is inconsistent with the ISDEAA regulations mentioned above, specifically 25 C.F.R. § 900.204, which provides that claims "based upon performance of nonmedical-related functions under a self-determination contract . . . must be filed against the United States under the FTCA."

As such, the FTCA provisions in the ISDEAA apply to medical and non-medical claims alike.

4. *The United States Cannot Disclaim Congressionally-Mandated FTCA Liability by Contract.*

In denying FTCA coverage, the United States asserted that a provision in the MOA, providing that the Tribe would be responsible for torts, prohibited coverage under the FTCA. McDarment Decl. ¶ 8, Exh. F at 47; Whitten Decl. ¶ 3, Exh. J at 118. However, this language does not mean the Tribe has assumed FTCA

responsibility. DHHS cannot contractually disclaim FTCA liability when tribes are deemed part of DHHS and tribal employees are deemed federal employees by congressional act (the ISDEAA) and the FTCA is the exclusive remedy for personal injury claims against federal employees. Congress specified that the ISDEAA "was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act." S.Rep. 100-274 (emphasis added). This principle is consistent with case law holding that "regulation or contract cannot displace the liability Congress has authorized" under the FTCA. *See, e.g.*, *Aretz v. United States*, 604 F.2d 417, 430–31 (5th Cir. 1979) ("The Army cannot by regulation or contract displace the liability which Congress has authorized."). Interpreting this MOA provision in this way does not render the provision meaningless because not all tort claims fall under the FTCA. For example, subcontractors are not covered by the FTCA; as such, the Tribe would be responsible for those tort claims under the MOA. *See* 25 C.F.R. § 900.189 ("Subcontractors or subgrantees providing services to a Public Law 96-638 [(ISDEAA)] contractor or grantee are generally not covered [by the FTCA].").

B. Mr. Walker Was Acting Within the Scope of His Employment Under the FTCA By Picking Up Materials from a Supplier for the Tribe.

The scope of employment under the FTCA is governed by the state law where the incident occurred. 28 U.S.C.§ 1346(b)(1). Here, California's law of *respondeat superior* governs, given that the Alleged Incident is claimed to have occurred in California. *See Williams v. United States*, 350 U.S. 857, 857 (1955) (per curiam) ("This case is controlled by the California doctrine of *respondeat superior*."); *see also* Dkt. No. 1-1 at 5. Under California law, Mr. Walker was acting within the scope of his employment at the time of the incident.

In California, "[t]he doctrine of *respondeat superior* imposes vicarious liability on an employer for the torts of an employee acting within the scope of his or her employment, whether or not the employer is negligent or has control over the

employee." *Jeewarat v. Warner Bros. Ent. Inc.*, 177 Cal. App. 4th 427, 434 (2009).

There are two common tests in California to determine the scope of employment under the doctrine: "1) the act performed was either required by or 'incident to his duties;' or 2) the employee's misconduct could be reasonably foreseen by the employer in any event." *Carroll v. United States*, No. 06CV0666 IEG (JMA), 2006 WL 8455441, at *4 (S.D. Cal. Oct. 30, 2006) (internal citations omitted). Foreseeability in this context means "an employee's conduct is not so unusual or startling [in the context of the particular enterprise] that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 11 Cal. 4th 992, 1003 (1995).

Under the "going and coming" rule, an employee going to and from work is generally considered outside the scope of employment. *Halliburton Energy Servs., Inc. v. Dep't of Transportation*, 220 Cal. App. 4th 87, 95–96 (2013). There are several exceptions to the going and coming rule, however. As is relevant here, one exception is "[w]hen an employee is engaged in a 'special errand' or a 'special mission' for the employer," in which case the employee will be held to be within the scope of employment. *Jeewarat*, 177 Cal. App. 4th at 431, 436 (holding employee's regular commute home after attending out-of-town business conference constituted special errand exception to going and coming rule). "For the special errand exception to the going and coming rule to apply, the employer must have requested or invited the employee to embark upon the errand or mission." *C.L. Pharris Sand & Gravel, Inc. v. Workers' Comp. Appeals Bd.*, 138 Cal. App. 3d 584, 594 (1982). Under the special errand exception, the errand is not concluded when the employee intends to drive "his regular commute route" home after the errand is completed. *Jeewarat,* 177 Cal. App. 4th at 431. The errand is concluded when the employee arrives at home or deviates from the errand for personal reasons. *Id.; see also Felix v. Asai*, 192 Cal. App. 3d 926, 933 (1987) (finding special errand not met when employee left post office after employee was asked to take mail to post office and was told he could then go home,

but employee went to parents' house after post office and visit to parents' house was purely personal). Here, at the request of his supervisor, Gary Whitten, Mr. Walker was driving to pick up supplies at the time of the Alleged Incident. Whitten Decl. ¶ 8. Thus, the special errand/mission exception applies and Mr. Walker was acting within the scope of his employment at the time of the Alleged Incident.

Another exception to the going and coming rule is if the trip furnishes an "incidental benefit" to the employer. *State Farm Mut. Auto. Ins. Co. v. Haight*, 205 Cal. App. 3d 223, 241 (1988). For example, an employee driving a company vehicle while off-the-clock is acting within the scope of employment if the employee's act involves an incidental benefit to the employer and the act was foreseeable by the employer. In one case, an off-work employee driving a company vehicle home after work had a car accident after stopping at a store in the opposite direction of his regular commute. *Lazar v. Thermal Equip. Corp.*, 148 Cal. App. 3d 458, 461 (1983). The Court held that the employer derived a special benefit from the employee's commute, because the employee used a company vehicle in case the employee received after-hours calls. *Id.* at 459. The Court further held that the employee's deviation from his regular commute—visiting an out-of-the-way store—was foreseeable. *Id.* at 465. From a policy standpoint, the court pointed out that the purpose of assigning liability to employers is that "[they are] better able to absorb [costs], and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large." *Id.* at 464. Here, Mr. Walker was driving a company vehicle to pick up supplies for his employer at the request of his supervisor, which conferred an incidental benefit on the employer. Whitten Decl. ¶ 8. Additionally, Mr. Walker was supplied with the company vehicle so that he could pick up parts before or after work, which supports finding that his use of the vehicle conferred a foreseeable incidental benefit to the employer sufficient to show that he was acting within the scope of his employment. *Id.* ¶ 9.

IV. CONCLUSION

For the reasons stated above, Defendant Mr. Walker respectfully requests the Court to grant his Motion to certify employment under the FTCA, substitute the United States as the party defendant, and dismiss the action as to Mr. Walker.

DATED: November 1, 2023

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