No. 13-834C
(Chief Judge Patricia Campbell Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIALSUMMARY JUDGMENT
AND DEFENDANT'S CROSSMOTION FOR SUMMARY JUDGMENT

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-834C
	)	(Chief Judge Patricia Campbell-Smith)
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIALSUMMARY JUDGMENT
AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC) and this Court's order dated April 1, 2016, defendant, the United States, respectfully submits this response to plaintiffs' motion for partial summary judgment, and cross-motion for summary judgment. Because there exists no issue of material fact precluding judgment on a dispositive motion, the Court should grant the Government's cross-motion for summary judgment, deny plaintiffs' motion for partial summary judgment, and enter judgment in the Government's favor.

STATEMENT OF THE ISSUES

(1) Whether the Government violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*., by not paying excepted employees a minimum wage on their next regularly scheduled payday for work performed during the first week (October 1 through 5) of the partial Government shutdown that occurred from October 1 to 16, 2013 (the shutdown), when the U.S. Constitution, Art. I § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq*., expressly prohibit such payments in the absence of appropriations for those purposes.

(2) Whether the plaintiffs should be awarded liquidated damages for the Government's delay in paying excepted employees' basic wages when Federal officials held a good faith belief that the Anti-Deficiency Act precluded payment of wages in the absence of appropriations, and that belief was reasonable.

(3) Whether the plaintiffs should be awarded liquidated damages for the Government's delay in paying excepted employees' overtime wages when the Anti-Deficiency Act precludes a finding of an FLSA violation, and the Federal agencies could not otherwise arrange for the payment of overtime wages in the absence of appropriations for that purpose.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiffs are current or former Federal employees that were classified as excepted employees by their employing agency and worked during the first week of the shutdown. Plaintiffs brought this action alleging that the Government violated the FLSA, by not paying plaintiffs the statutory minimum wage for that work on their next regularly scheduled pay day. Am. Compl. ¶¶ 1-2. Plaintiffs also assert that the Government violated the FLSA by not paying excepted employees the statutorily required overtime rate for overtime work performed during the first week of the shutdown. Am. Compl. ¶ 34. Plaintiffs brought this action as a collective action pursuant to 29 U.S.C. § 216(b), and the Court approved this collective action definition:

> Federal employees (a) identified as of October 1, 2013 for purposes of the [FLSA] as employees, pursuant to 29 U.S.C. § 203(e)(2)(A); (b) classified as "non-exempt" under the FLSA as of October 1, 2013; (c) declared "Excepted Employees" during the October 2013 partial government shutdown; (d) worked at some time between October 1 and October 5, 2013, other than to assist with the orderly shutdown of their office; and (e) not paid on their regularly scheduled payday for that work between October 1 and October 5, 2013.

ECF Dkt. No. 46. In March 2015, the Government began the process of notifying more than 300,000 potential collective action members that the employing Federal agencies identified as meeting the collective action definition of their right to join this lawsuit. By the opt-in date of October 9, 2015, 24,444 potential collective action members had submitted the required consent to join form. ECF Dkt. No. 144-1.

Although the Government paid all wages due as soon as practicable once funds had been appropriated for that purpose, plaintiffs seek as damages statutory liquidated damages, prejudgment interest, attorney fees and costs. Am. Compl. at 14.

II. **Statement Of Facts**

Because of a lapse in appropriations, the Federal Government ceased certain non-excepted operations and services during the shutdown. *See* Stipulations of Fact Not in Dispute (SoF) ¶ 1; Appendix. Certain Government employees funded through annual appropriations were designated as excepted employees for purposes of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, *et seq*., and were required to work during the shutdown because they would provide services that involve "the safety of human life or the protection of property." *Id*. (citing 31 U.S.C. § 1342).

The Government understood that during a lapse in appropriations, the Anti-Deficiency Act prohibited payment of wages for work performed during the shutdown until funds had been appropriated for that purpose. SoF ¶ 2. The agencies that advise the Federal Government on the implementation of the FLSA did not prior to the shutdown consider whether requiring employees designated as "non-exempt" under the FLSA and as excepted for purposes of the shutdown to work during the shutdown without paying them minimum or overtime wages on their regularly scheduled paydays for work performed during the first week of the shutdown would violate the

FLSA. SoF ¶ 3. Prior to the shutdown, the Government did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-Deficiency Act and the FLSA as to employees designated as "non-exempt" under the FLSA and excepted for purposes of the shutdown who were required to work during the shutdown. SoF ¶ 4.

The Government did not pay employees who worked during the first week of the shutdown on the employees' next regularly scheduled payday for that work. SoF ¶ 7. After the shutdown ended, the Government retroactively paid all such employees their basic wages for regular, non-overtime work performed during the first week of the shutdown, on or before the employees' next regularly scheduled payday. SoF ¶ 8.

After the shutdown ended, plaintiffs brought this action alleging that the Government violated the FLSA by not paying plaintiffs on their next regularly scheduled payday for work performed during the first week of the shutdown. The Government asked the Court to dismiss for failure to state a claim, which the Court denied-in-part and granted-in-part. ECF Dkt. No. 38. In denying the motion, the Court concluded that, under the FLSA's "prompt payment" requirement, payment for work performed must be conferred to the employee on his or her next regularly scheduled payday, *id*. at 7-12, and "the government's payment to employees two weeks later than the Scheduled Paydays for work performed during the October 2013 budget impasse constituted an FLSA violation." *Id*. at 13. Concluding that an FLSA violation had occurred, the Court advised that "[d]efendant has not had the opportunity to present evidence of its good faith and the reasonable grounds permitted under the FLSA. Going forward, defendant might elect to do so." *Id*. at 22-23. The Court observed that Department of Labor (DOL) regulation 29 C.F.R. § 778.106, waives the "usual rule" for the payment of overtime wages "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay

period . . . ." ECF Dkt. No. 28 at 18. The Court explained that "[w]hether the government could not determine, compute, or arrange for the payment of overtime compensation during the October 2013 shutdown is a factual question that might be explored further by the parties during the next phase of litigation." *Id.* Finally, the Court observed that "[n]either party has addressed in any detailed manner whether the Anti-Deficiency Act operates to relieve the government of its responsibility for the legal violations that might occur in the absence of Congressional appropriations." *Id.* at 22.

SUMMARY OF ARGUMENT

The Constitution's Appropriations Clause, and the Anti-Deficiency Act's prohibitions against making payments in the absence of appropriations, precludes a finding that the Government violated the FLSA in this case. The Appropriations Clause and the Anti-Deficiency Act barred Federal agencies from paying excepted employees on their next regularly scheduled payday for work performed during the shutdown. It cannot be argued that the Appropriations clause could be displaced by a statute. Moreover, nothing in the FLSA demonstrates a clear congressional intent that the court-constructed "prompt payment" requirement for payment of wages should trump the Anti-Deficiency Act's express mandate barring adherence to that rule during a lapse in appropriations. Nothing suggests that, when making the FLSA applicable to the Federal Government, Congress intended to attach penalties to the political appropriations process in the form of liquidated damages payable to excepted employees who work during a lapse in appropriations. For this reason, the Court should enter judgment in the Government's favor.

In the alternative, the Court should not award liquidated damages because the undisputed facts establish that the Government held a good faith belief that the Anti-Deficiency Act

prohibited payment of wages during a lapse in appropriations, and that belief was reasonable. Unlike the typical case, no ambiguity in the law exists regarding the Anti-Deficiency Act's prohibitions, and no avenue to FLSA compliance was available for Federal agencies in the absence of appropriations. Plaintiffs' arguments that the law was clear going into the shutdown rely upon authorities addressing state budget impasses wherein the doctrine of preemption controlled. No court or administrative body has previously addressed whether the FLSA's requirements would displace contrary requirements imposed by another Federal statute. It cannot be disputed that Federal agencies correctly interpreted the Anti-Deficiency Act as prohibiting the payment of wages in the absence of appropriations and, therefore, such interpretation was reasonable.

Finally, the Court should not award liquidated damages for delayed payment of overtime wages because there was no FLSA violation upon which to make such an award. If the Court were to conclude that a violation did occur, then an award would remain inappropriate because the Government could not arrange for the payment of overtime wages on plaintiffs' regularly scheduled payday in the absence of appropriations for that purpose.

For these reasons, which will be more fully set forth below, the Court should enter judgment in the Government's favor.

ARGUMENT

I. Standard Of Review

"A moving party is entitled to summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Griffin & Griffin Exploration, LLC v. United States*, 116 Fed. Cl. 163, 172 (2014) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). "A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"An issue is genuine if it 'may reasonably be resolved in favor of either party.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 250)).

"The moving party bears the initial burden of showing that there are no genuine issues of material fact." *Id.* (citing *Celotex Corp.*, 477 U.S. at 323). "The burden then shifts to the nonmoving party to show that there are genuine issues of material fact for trial." *Griffin & Griffin*, 116 Fed. Cl. at 172 (citing *Celotex Corp.*, 477 U.S. at 324).

> Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Id. (quoting RCFC 56(c)(1)).

II. The Government Did Not Violate The FLSA By Not Paying Excepted Employees On Their Next Regularly Scheduled Payday Because The Anti-Deficiency Act Barred Such Payments Until Appropriations For That Purpose Had Been Made

In ruling on the Government's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Court concluded that the Government had violated the FLSA by not paying plaintiffs on their next regularly scheduled payday for work performed during the first week of the shutdown. *See* ECF Dkt. No. 38 at p.7 of 23 ("A Violation of the FLSA Occurred When Plaintiffs Were Not Paid 'On Time.'"). The Government respectfully submits that resolving this question of liability when deciding a motion to dismiss is not the appropriate juncture at which to dispose of that component of the litigation. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) ("The issue [in a Rule 12(b)(6) motion] is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the

claims" (internal quotation omitted)); *White v. Williams*, 179 F. Supp. 2d 405, 417 (D.N.J. 2002) ("A motion to dismiss does not resolve the ultimate question of liability in a matter; rather, its purpose is to determine whether the plaintiff will be entitled to move forward with discovery."). We therefore first address whether the Anti-Deficiency Act precludes a conclusion that the Government violated the FLSA by not paying excepted employees on their next regularly scheduled pay day for work performed during the first week of the shutdown. *See* ECF Dkt. No. 38 at p. 22 of 23 ("Neither party has addressed in any detailed manner whether the Anti-Deficiency Act operates to relieve the government of responsibility for the legal violations that might occur in the absence of Congressional appropriations.").

The shutdown placed two seemingly irreconcilable requirements upon Federal agencies: pay excepted employees on their next regularly scheduled payday, and make no such expenditures in the absence of appropriations for that purpose. Courts are required whenever possible to interpret statutes in a manner that avoids conflict and allows their coexistence. Nothing in the FLSA demonstrates a clear congressional intent that the "prompt payment" requirement for payment of wages should trump the Anti-Deficiency Act's express prohibition against making payments in the absence of appropriations. The statutes can coexist because the Appropriations Clause and Anti-Deficiency Act's prohibitions displace the "prompt payment" requirement during a lapse in appropriations. The Anti-Deficiency Act requirement is express and unequivocal, whereas the FLSA does not contain a time limit and the "prompt payment" requirement is court-constructed for statute of limitations purposes.

The FLSA and the Anti-Deficiency Act appear to impose two conflicting obligations upon Federal agencies: the FLSA mandates that the agencies "*shall pay* to each of [its] employees" a minimum wage, 29 U.S.C. § 206(a) (emphasis added), which has been interpreted

by the courts to include a requirement that the minimum wage be paid on the employees' next regularly scheduled pay day, *see Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n. 20 (1945); *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993), and the Anti-Deficiency Act mandates that "[a]n officer or employee of the United States Government . . . *may not* . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . . ." 31 U.S.C. § 1341(a)(1)(A) (emphasis added). Thus, when Federal agencies are faced with a lapse in appropriations and cannot pay excepted employees on their next regularly scheduled payday, the question arises of which statutory mandate controls.

In its opinion on our motion to dismiss, the Court discussed the Ninth Circuit's decision in *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), in which the circuit court ruled that California had violated the FLSA's prompt payment requirement even though a state anti-deficiency provision precluded payments to plaintiffs during a state budget impasse. ECF Dkt. No. 38 at p. 10 of 23. In discussing that case, the Court observed that it involved "facts strikingly similar to the facts in the case at bar." There is, however, a significant difference that is relevant to this case: *Biggs* involved the interplay between a state anti-deficiency law and the FLSA, with the latter trumping the state law based upon the doctrine of preemption. *See* 1 F.3d at 1544 (holding that, under the "plain statement rule," Congress clearly intended "to preempt the historic powers of the States" because "the FLSA clearly applies to state employees."). This case involves the interplay of two Federal statutes and, as explained below, the FLSA's "prompt payment" requirement does not displace the Anti-Deficiency Act's specific prohibition against making payments in the absence of appropriations.

To begin with, it is axiomatic that a constitutional provision trumps any contrary statutory requirement. *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 724 F.3d 230,

239 (D.C. Cir. 2013) (dissent) ("The rule of priority contained in the Supremacy Clause is straightforward: The Constitution trumps those statutes and treaties which are inconsistent with it."). The Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I § 9, cl. 7. The Constitution therefore clearly displaces any requirement in the FLSA that Federal agencies pay excepted employees at a particular time when no appropriations have been made for that purpose. Moreover, the Anti-Deficiency Act, which implements the Appropriations Clause, displaces the FLSA's "prompt payment" requirement during a lapse in appropriations.

"[I]t is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *California ex rel. Sacramento Metropolitan Air Quality Management Dist. v. United States*, 215 F.3d 1005, 1012-13 (9th 2000); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981) (stating that when two statutes conflict, "[we] must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). The FLSA does not contain a "clearly expressed congressional intention" that employees should be paid at a particular time, much less an intention that the "prompt payment" requirement for the payment of wages should trump the Anti-Deficiency Act during a lapse in appropriations, thereby rendering the Government potentially liable for liquidated damages.

The Anti-Deficiency Act's express prohibition against making payments on a next regularly scheduled payday in the absence of an appropriation for that purpose displaces the court-constructed "prompt payment" requirement, which is not stated anywhere in the FLSA. As

the Court observed, "no explicit timeline for the payment of wages is set forth in either the FLSA or in the relevant regulations." ECF Dkt. No. 38 at p. 8 of 23. The requirement for "on time" payment was read into the statute by the Supreme Court, which did so on the basis that timely payment of the minimum wage was necessary to ensure a "minimum standard of well-being." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945). The "prompt payment" requirement – *i.e.*, that the minimum wage must be paid at a particular time – was adopted by the courts as a further refinement of the "on time" requirement in order to establish when an FLSA violation occurs for statute of limitations purposes. *See, e.g., Biggs*, 1 F.3d at 1540; *see also* 29 C.F.R. 790.21(b) (stating that "[t]he courts have held that a cause of action under the [FLSA] for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends"). Because the "prompt payment" requirement was read into the statute, it is not a "clearly expressed congressional intention" that payment on the next scheduled payday should trump the Anti-Deficiency Act's express prohibition against paying wages at that time in the absence of an appropriation for that purpose.

The fact that Congress made the FLSA applicable to the Federal Government does not demonstrate that Congress expressly intended the FLSA to trump the Anti-Deficiency Act. It remains that nothing in the statute establishes an explicit timeline for the payment of minimum wages – whether by the Federal Government or private employers. The "prompt payment" requirement, which plaintiffs contend the Government violated, remains a court-constructed test for statute of limitations purposes that is not based upon express statutory language. Moreover, nothing in the statute suggests that, by making the FLSA applicable to the Federal Government, Congress intended to attach penalties to the political appropriations process in the form of

liquidated damages payable to excepted employees if appropriations are not made in time to allow payment of wages in accordance with the court-constructed "prompt payment" requirement.

Accordingly, there is nothing in the FLSA that shows that Congress intended that Federal agencies' compliance with the Anti-Deficiency Act would render the Government liable for liquidated damages.

The FLSA and Anti-Deficiency Act can be read in a manner that allows the statutes to coexist. The "prompt payment" requirement was crafted by the courts to establish when an FLSA violation occurred, because "[t]o hold otherwise would create sufficient uncertainty as to when a violation occurred, and statutory enforcement would prove unworkable." ECF Dkt. No. 38 at p. 12 of 23. The enforcement concern that the "prompt payment" requirement addresses does not resurface by giving effect to Congress' express prohibition against making payments in the absence of an appropriation. Once appropriations become available for paying excepted employees' wages, and Federal agencies are no longer barred from making payments to excepted employees, agencies should abide by the FLSA and pay employees on their next payday after such appropriations were made.

Finally, to the extent that any conflict between the FLSA's "prompt payment" requirement and the Anti-Deficiency Act remains, the specific mandate of the Anti-Deficiency Act should apply. "[I]t is a commonplace of statutory construction that the specific governs the general . . . and this is ordinarily true where two statutes irreconcilably conflict." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (internal quotation and citation omitted). The Anti-Deficiency Act contains a specific requirement: Federal agencies cannot make a payment in excess of an appropriation for that purpose. The FLSA's "prompt payment" requirement, on the

other hand, does not appear in the statute itself and was created by the courts for statute of limitations purposes. The Anti-Deficiency Act's specific prohibition against payments in the absence of appropriation must therefore apply in the face of any conflict with the FLSA.

For these reasons, the Court should conclude that the Government's delay in paying excepted employees did not violate the FLSA.

III. In The Alternative, Liquidated Damages Should Not Be Awarded Because The Government Held A Good Faith Belief That The Anti-Deficiency Act Prohibited The Payment Of Wages During A Lapse In Appropriations, And That Belief Was Reasonable

The FLSA states that "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). In this case, it is not disputed that, once the shutdown ended and appropriations became available, Federal agencies paid their excepted employees their basic wages for work performed during the first week of the shutdown. SoF ¶ 8. Plaintiffs do not allege that the Government has not paid excepted employees for any overtime worked during the first week of the shutdown. The issue, then, is whether the Court, if it finds that an FLSA violation occurred, should award plaintiffs liquidated damages.

The Court may award no, or a lesser amount of, liquidated damages, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. "Under 29 U.S.C. § 216(b), the presumption is that plaintiffs are entitled to liquidated damages." *Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012). "'The burden rests on the government to establish its good faith and the reasonable

grounds for its decision.'" *Id*. (quoting *Adams v. United States*, 350 F.3d 1216, 1226 (Fed.Cir.2003)).

A. The Government Held A Good Faith Belief That The Anti-Deficiency Act Precluded On Time Payment Of Wages, And There Existed No Avenue For Federal Agencies To Comply With The FLSA In The Absence Of Appropriations

"Courts have found that the term 'good faith,' as used in section 260, means 'an honest intention to ascertain what the FLSA requires and to act in accordance with it.'" *Astor v. United States*, 79 Fed. Cl. 303, 320 (2007) (quoting *Bull v. United States*, 68 Fed. Cl. 212, 275 (2005)). Whether an honest intention existed involves a subjective inquiry by the court. *Id*. In the typical case, compliance with the law is within the employer's control, as a course of action resulting in compliance was available, and the court examines whether the employer made sufficient attempts to ascertain that course of action. *See, e.g*., *Angelo v. United States*, 57 Fed. Cl. 100, 105 (2008) (examining whether the U.S. Border Patrol's decision to classify certain employees as FLSA-exempt was made in good faith); *Reich v. S. New England Telecommunications Corp.*, 121 F.3d 58, 61 (2d Cir. 1997) (examining whether employer acted in good faith to determine whether its lunch break policy for certain workers complied with FLSA overtime requirements.).

1. FLSA Compliance Was Beyond Federal Agencies' Control, And The Anti-Deficiency Act Foreclosed Any Avenue To Compliance

The facts of this case are markedly different from those cases in which the courts analyze whether an employer made a good faith attempt to comply with the FLSA. In this case, no course of compliance was available to Federal agencies; it was impossible for Federal agency officials to comply with both the FLSA and Anti-Deficiency Act during the shutdown. Although the Anti-Deficiency Act does not cancel properly created Government obligations, and allows Federal agencies to create obligations during a lapse in appropriations by accepting the services

of employees who are necessary to ensure "the safety of human life or the protection of property," 31 U.S.C. § 1342, the law places an express bar on Federal officials from making expenditures in excess of appropriations. The statute mandates that "[a]n officer or employee of the United States Government . . . *may not* . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund for the expenditure . . . ." 31 U.S.C. § 1341(a)(1)(A) (emphasis added). A Federal official making an expenditure in excess of an appropriation faces serious consequences: "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990); *see* 31 U.S.C. § 1350 ("[a]n officer or employee of the United States Government . . . knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."); *United States v. Nave*, 733 F. Supp. 1002, 1003 (D. Md. 1990) (stating that Government officials who violate the statute "could conceivably be open to criminal prosecution . . . , a situation that might mildly amuse some, but which ought to be avoided, if possible.").

It is not disputed that, going into the shutdown, the Government understood that the Anti-Deficiency Act barred Federal agencies from paying excepted employees for work performed during the shutdown until funds had been appropriated. SoF ¶ 2. This fact necessarily included an understanding that Federal agencies could not pay wages on an excepted employee's regularly scheduled payday if funds had not been appropriated by that date. Any attempt to ascertain a compliance course of action would have been futile if complying with the FLSA required paying excepted employees on their regular pay day in the absence of an appropriation for that purpose,

which would violate section 1341 and subject Federal employers to imprisonment under section 1350.

2. Plaintiffs' Reliance Upon Court Rulings From The California Budget Impasse Is Without Merit Because They Ignore The Doctrine Of Preemption

Plaintiffs do not contend, nor can they, that a course of action existed for Federal agencies to comply with the FLSA's prompt payment requirements in the absence of appropriations to pay excepted employees. In their motion, plaintiffs assert that agencies "could have furloughed all employees," but even plaintiffs recognize that this was not a choice because doing so would have "raised concerns about health and safety." Pls. Br. at 26-27. Furthermore, there was no authority for agencies to furlough employees who were allowed to work under the Anti-Deficiency Act's exceptions to the bar on obligations in the absence of appropriations. Next, plaintiffs contend that the agencies could have proposed legislation to Congress to ensure that excepted employees were paid on time. *Id*. at 27. This assertion is without merit because Federal agencies had no control over the process giving rise to the shutdown or the effect of the shutdown on the Federal workforce. As discussed above, the cases in which courts have found that employers did not act in good faith involved scenarios in which compliance with the law was ultimately in the employer's control. In making its argument, plaintiffs recognize that the agencies had no control over the shutdown because "[o]bviously, it is impossible to know what Congress would have done if legislation had been proposed . . . ." *Id.* Finally, plaintiffs argue that Federal agencies "could have accepted that [they] would have to pay liquidated damages to employees required to work." *Id*. This tautological assertion is without merit because entitlement to liquidated damages is an issue determined during litigation after an FLSA

violation has been found, whereas the present inquiry is whether Federal agencies acted in good faith prior to that violation.

Plaintiffs further argue that the Government cannot demonstrate that it acted in good faith when the shutdown was precipitated by Congress, a branch of the Government. Pls. Br. at 27-30. The fact that the shutdown occurred, however, is relevant to the issue of whether an FLSA violation occurred, because the lapse in appropriations was the precipitating event to plaintiffs not being paid on time. Plaintiffs' argument is no different than asserting that an employer cannot demonstrate a good faith effort to comply with the FLSA because the employer, in fact, misclassified a worker as FLSA-exempt. The present issue is not whether a violation occurred, but whether the Government acted in good faith prior to the alleged violation. Moreover, as explained above, nothing in the FLSA indicates that, by making the FLSA applicable to the Federal Government, Congress intended to attach penalties to the political appropriations process in the form of liquidated damages payable to excepted employees if appropriations are not made in time to allow payment of wages in accordance with the "prompt payment" requirement.

In any event, in support of their argument, plaintiffs rely upon court decisions in FLSA cases arising from the 1991 and 1992 California budget impasses. *Id*. at 28 (citing *Biggs v. Wilson (Biggs I)*, 828 F. Supp. 774 (E.D. Cal. 1991); *Biggs v. Wilson (Briggs II)*, 1 F.3d 1537 (9th Cir. 1993); *Caldman v. State of California*, 852 F. Supp. 898 (E.D. Cal. 1994)). In *Caldman*, the district court ruled that the state could not demonstrate that it acted in good faith leading up to the 1992 budget impasse because a court had previously held that the state's failure to pay employees on time for work performed during the 1991 budget impasse violated the FLSA. 852 F. Supp. at 901-02. The district court stated that "[a]n employer's failure to heed administrative rulemaking or precedent with respect to the FLSA deprives the employer of the

good faith defense." Pointing to this decision, plaintiffs assert that "[t]he presence of statutory provisions prohibiting payments in the absence of an appropriation, and the resultant need for legislative action in order to pay employees timely, should no more shield the United States from a lack of good faith determination in this case than they shielded California from a lack of good faith determination in *Caldman*." Pls. Br. at 29. This case, however, is distinguishable from *Caldman* because, prior to the shutdown, no court or administrative body had opined on the issue of whether the FLSA's prompt payment requirements would trump the Federal Anti-Deficiency Act during a Government shutdown.

In their brief, plaintiffs emphasize that, prior to the shutdown, DOL had taken the position that the FLSA's requirements would apply despite any state anti-deficiency law during a state budget impasse. *Id*. at 30-32. It is not disputed that DOL had so advised, but that advice was not applicable guidance for the Federal agencies because it was rooted in the rule of preemption, which means, of course, that "a federal law supersedes or supplants an inconsistent state law or regulation." *United States v. Zadeh*, 2016 WL 1612754, at *2 (5th Cir. Apr. 21, 2016). In *Biggs I*, the district court held that "the lack of a budget does not overcome the operation of the supremacy clause of the United States Constitution, Art. VI, § 2. If this requirement of prompt payment under the FLSA is in conflict with California state law the FLSA must prevail." 828 F. Supp. at 778; *see also Biggs II*, 1 F.3d at 1544 (holding that, under the "plain statement rule," Congress clearly intended "to preempt the historic powers of the States" because "the FLSA clearly applies to state employees."). The issue presented in this case, however, is the inter-play between two Federal statutes – the FLSA and the Anti-Deficiency Act. DOL has not opined on whether the FLSA's prompt payment requirements would remain during a lapse in appropriations for the Federal Government. Neither has the Office of Personnel

Management, which is responsible for ensuring Federal agency compliance with the FLSA. *See* 29 U.S.C. § 204(f).

3. The Government Acted In Good Faith By Complying With The Anti-Deficiency Act's Express Prohibitions Against Making Expenditures In The Absence Of Appropriations

"The 'good faith' referred to in section 260 means 'an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.'" *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981) (quoting *Addison v. Huron Stevedoring Corp*., 204 F.2d 88, 93 (2d Cir. 1953), *cert. denied* 346 U.S. 877, 74 S. Ct. 120, 98 L. Ed. 384 (1953)). "Whether an honest intention existed, necessitates a subjective inquiry." *Id*. (citing *Addison*, 204 F.2d at 93, and *Laffey v. Northwest Airlines, Inc*., 567 F.2d 429, 464 (D.C. Cir. 1976)). Compliance with the FLSA's "prompt payment" requirement required paying excepted employees on their next regularly scheduled payday for work performed during the first week of the shutdown. It is not disputed that, going into the shutdown, the Government believed that the Anti-Deficiency Act barred Federal agency officials from paying excepted employees on their regular payday. SoF ¶ 2. The Court should therefore conclude that the Government acted in good faith by complying with the Anti-Deficiency Act's express prohibition against making payments to excepted employees in the absence of appropriations for that purpose.

B. The Government Reasonably Believed That The Anti-Deficiency Act Precluded On Time Payment Of Wages Because No Court Or Administrative Body Had Concluded That An FLSA Violation Would Occur During A Lapse In Appropriations

The Court has held that "'[p]roof that the law is uncertain, ambiguous or complex may provide reasonable grounds for an employer's belief that he is in conformity with the Act, even though his belief is erroneous.'" *Havrilla v. United States*, 125 Fed. Cl. 454, 467 (2016) (quoting *Adams v. United States*, 350 F.3d 1216, 1226 (Fed. Cir. 2003)). The undisputed facts

demonstrate that the Federal agencies reasonably believed that, in the absence of an appropriation, the Anti-Deficiency Act barred payment of wages to excepted employees on their next regularly scheduled payday. It is not disputed that the Government held this belief, SoF ¶ 2, and plaintiffs acknowledge in their brief that the Anti-Deficiency Act "'imposes limitations upon the Government's own agents . . . ." Pls. Br. at 35 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)). In *Biggs I*, the district court declined to assess liquidated damages against California:

> [T]he State had reasonable grounds for believing that its conduct complied with the Act because neither statutes, the applicable regulations nor the cases directly address the issue of prompt payment in the face of a state budget impasse. This case appears to be one of first impression. Therefore, in the exercise of its discretion the court would decline to award liquidated damages in this case.

828 F. Supp. 774, 779 (E.D. Cal. 1991). Likewise in this case, the issue of whether the FLSA's prompt payment requirements would displace the Anti-Deficiency Act's prohibition against payments in the absence of appropriations is an issue of first impression. The Government therefore reasonably believed that the Anti-Deficiency Act precluded paying plaintiffs on their regularly scheduled pay day for work performed during the first week of the shutdown because appropriations for that purpose had not been made.

Plaintiffs assert that by 2013, DOL and other courts had held that the FLSA's prompt payment requirements would apply during a budget impasse and any belief to the contrary would be unreasonable. Pls. Br. at 32-36. However, as demonstrated above, those holdings and administrative guidance addressed state budget impasses and were founded upon the doctrine of preemption, which is not applicable in this case. In their brief, plaintiffs argue that the preemption distinction does not matter because Congress made the FLSA applicable to the

Federal Government. Pls. Br. at 33. It is not disputed that the Federal agencies are subject to the FLSA; however, Congress also made agencies subject to the express prohibitions of the Anti-Deficiency Act, which implements the Constitutional prohibition against expenditures in excess of appropriations. The issue of whether or how the FLSA's "prompt payment" requirement – which, as explained in Section II above, is not in the statute but is a court-crafted rule – applies during a Federal budget impasse when Federal agencies are constrained by the express restrictions of the Constitution and the Anti-Deficiency Act, has never before been addressed by a court or administrative body.

Plaintiffs further argue that the preemption distinction is not applicable because the Supreme Court has ruled that the Anti-Deficiency Act does not cancel the Government's obligations under the FLSA. Pls. Br. at 34-36. Relying upon *Salazar v. Navajo Chapter*, 132 S. Ct. 2181 (2012), plaintiffs assert that "'[a]n appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money [e]ntrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.'" Pls. Br. at 35 (*quoting Ferris*, 27 Ct. Cl. at 546). We do not disclaim the Government's obligation to pay excepted employees for work performed during a shutdown. The issue, however, is whether Federal agencies reasonably believed that the Anti-Deficiency Act barred *payment* (as opposed to *obligations*) in the absence of appropriations. Plaintiffs concede that the statute "imposes limitations upon the Government's own agents." Plaintiffs do not dispute, nor can they, that a Federal official who issues payment to an excepted employee in the absence of appropriations would violate the Anti-Deficiency Act. When plaintiffs speak of an "obligation to make timely payments," they are not using the term "obligation" consistent with its meaning in Federal appropriations law. Under Federal

appropriations law, an "obligation" is a debt and is distinct from a "payment." The Anti-Deficiency Act provides exceptions under which an agency may incur obligations during a lapse in appropriations, but it provides no exceptions for making payments during such a lapse.

Whether the FLSA's prompt payment requirement trumps an express prohibition against such payments in the Constitution and in another Federal statute has never before been addressed. The Court, therefore, should conclude that Federal employers reasonably believed that they could not pay excepted employees on their regularly scheduled pay day in the absence of an appropriation for that purpose.

C. The Court Should Not Award Any Amount Of Liquidated Damages Upon A Conclusion That The Government Acted In Good Faith And With A Reasonable Belief Regarding The Legal Constraints Caused By A Lapse In Appropriations

Because no course of action leading to compliance with the FLSA was available to, and within the control of, Federal agencies, and the agencies reasonably believed that the Anti-Deficiency Act precluded paying plaintiffs on their regularly scheduled payday for work performed during the first week of the shutdown in the absence of an appropriation for that purpose, the Court should exercise its discretion under 29 U.S.C. § 260 and not award any liquidated damages. "[T]he finding of good faith does not automatically remit the liquidated damages; the court still must exercise its discretion as to whether to remit the damages in whole or in part." *Bertrand v. Orkin Exterminating Co.*, 454 F. Supp. 78, 82 (N.D. Ill. 1978). It is the usual outcome that, when the Court concludes that the Government's actions were taken in good faith and with a reasonable belief of its legal obligations, the Court does not assess liquidated damages against the Government. *See, e.g., Astor v. United States*, 79 Fed. Cl. 303, 320 (2007) (denying to award liquidated damages when Federal agency acted in good faith and with a reasonable belief that its treatment of plaintiff was in compliance with FLSA). In their brief,

plaintiffs do not identify a case wherein a court concludes that the employer acted in good faith and with a reasonable belief of compliance, but assessed liquidated damages anyway.

It cannot be disputed that, but for the lapse in appropriations – an event completely outside of the control of the Federal agencies – Federal officials would have timely paid plaintiffs for the work performed during the first week of the shutdown. It is not disputed that, after the shutdown ended, the Government retroactively paid all plaintiffs their basic wages for regular, non-overtime work performed during the first week of the shutdown on or before the plaintiffs' next regularly scheduled payday. SoF ¶ 8. Such facts weigh in favor of not awarding liquidated damages in this case.

D. Plaintiffs Are Not Entitled To Liquidated Damages For Delayed Payment Of Overtime Wages Because There Was No FLSA Violation, And The Government Could Not Otherwise Arrange For The Payment Of Overtime Wages In The Absence Of Appropriations For That Purpose

Plaintiffs are not entitled to liquidated damages for not being paid overtime wages on their next regularly scheduled payday for overtime worked during the first week of the shutdown because, as explained in Section II above, the court-constructed "prompt payment" requirement does not trump the Constitution's and the Anti-Deficiency Act's express prohibition against making payments in the absence of an appropriation for that purpose. Accordingly, there is no FLSA violation from which to award liquidated damages.

If the Court were to conclude that, even in the absence of an express congressional intent in the FLSA, the "prompt payment" requirement trumps the Constitution and the Anti-Deficiency Act, the Court should not award plaintiffs liquidated damages for the late payment of overtime wages. As with regular wages, the FLSA does not contain an express requirement that overtime wages be paid within a certain amount of time. DOL has issued an interpretive bulletin advising that,

> When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

29 C.F.R. § 778.106. "[T]he regulations contemplate overtime to be computed and paid on a pay period by pay period basis unless it is impractical to do so." *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 332 (N.D. Ill. 2000). "Where practical considerations require departure from [the usual rule], the Secretary has interpreted the Act to mandate prompt payment once the amount can be calculated and the mechanics of the payment arranged . . . ." *O'Brien v. Town of Agawam*, 350 F.3d 279, 298 (1st Cir. 2003). "An exception [to the usual rule] exists, however, when the employer has a legitimate reason for delaying payments. *See* 29 C.F.R. § 778.106. In the event of 'natural disasters or similar events wholly beyond the control of the employer,' an employer does not violate the statute when it makes late payments." *Ortega v. Due Fratelli, Inc.*, 2015 WL 7731863, at *7 (N.D. Ill. Dec. 1, 2015) (quoting *Dominici v. Bd. of Educ. of City of Chicago*, 881 F. Supp. 315, 320 (N.D. Ill. 1995)).

In this case, an event wholly beyond the control of the Federal agencies occurred that prevented the payment of overtime wages in accordance with the "usual rule." Specifically, the agencies were unable to arrange for the payment of overtime compensation to plaintiffs for overtime worked during the first week of the shutdown because of the lapse in appropriations and the attendant legal prohibitions placed upon the agencies by the Anti-Deficiency Act – *i.e.*, there was no money available to pay the employees. Once appropriations were made available,

the agencies acted to pay overtime worked during the first week of the shutdown. Plaintiffs do not contend otherwise.

In their brief, plaintiffs argue that the exception to the "usual rule" for overtime payments should not apply because the delay "was caused by the Government itself in the form of a budgetary disagreement." Pls. Br. at 39. This assertion is without merit because the fact of the shutdown was beyond the control of the Federal agencies, which were responsible for computing and arranging for the payment of overtime wages. Plaintiffs further point out that all but three agencies had the necessary human resources personnel available during the shutdown to compute plaintiffs' overtime hours in time for timely payment to be made. *Id.* at 39-40. This assertion is without merit because, even with necessary employees being available, the agencies could not arrange for the payment of the wages in the absence of an appropriation for that purpose.

CONCLUSION

For these reasons, we respectfully request that the Court grant the Government's motion for summary judgment, deny plaintiffs' motion, and enter judgment in defendant's favor.

Respectfully submitted,

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May 20, 2016

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APPENDIX

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-834C
	)	(Chief Judge Patricia Campbell-Smith)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

JOINT MOTION TO ENTER STIPULATIONS OF FACT

Pursuant to Appendix A, paragraph 17 of the Rules of the United States Court of Federal Claims, the parties respectfully request that the Court enter the attached stipulations of fact into the record of this action.

Respectfully submitted,

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March 31, 2016

ATTACHMENT

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-834C
	)	(Chief Judge Patricia Campbell-Smith)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

STIPULATION OF FACTS NOT IN DISPUTE

Pursuant to Appendix A, paragraph 17 of the Rules of the United States Court of Federal Claims, plaintiffs, Donald Martin, Jr., Patricia Manbeck, Jeff Roberts, Jose Rojas and Randall Sumner, and defendant, the United States, stipulate to the following facts, which stipulations the parties agree may be used only for purposes of this case.

STIPULATED FACTS

1. Because of a lapse in appropriations, the Federal Government ceased certain non-essential operations and services from October 1 through October 16, 2013 (the 2013 Government shutdown). Certain Government employees funded through annual appropriations were designated as "excepted" employees for purposes of the Anti-deficiency Act, 31 U.S.C. § 1341, *et seq*., and required to work during the 2013 Government shutdown because they would provide services that involve "the safety of human life or the protection of property." 31 U.S.C. § 1342.

2. The Government understood that during a lapse in appropriations the Anti-Deficiency Act, 31 U.S.C. § 1341(a), prohibited payment of wages for work performed during the 2013 Government shutdown until funds had been appropriated.

3. Based upon the information received from relevant personnel and review of the relevant documents, the agencies that advise the Federal Government on the implementation of labor law and policy did not prior to or during the 2013 Government shutdown consider whether requiring employees designated as "non-exempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., and as "excepted" for purposes of the shutdown to work during the shutdown without paying them minimum or overtime wages on their regularly scheduled paydays for work performed during the first week of the shutdown would violate the FLSA. Based upon the information described above, defendant is not aware of any other agency that considered the issue prior to or during the 2013 Government shutdown.

4. The Government did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-deficiency Act and FLSA as to employees designated as "non-exempt" under the FLSA and as "excepted" for purposes of the shutdown who were required to work during the shutdown.

5. The Wage and Hour Division (WHD) of the Department of Labor administers the wage and hour provisions of the FLSA with respect to private employment, State governments and political subdivisions of a State.

6. Since at least 1998, the WHD has interpreted the FLSA as follows:

   a. The failure to pay employees of State government required minimum wage and overtime premiums when due – *i.e.*, on the regularly scheduled payday for the work performed – constitutes a violation of the FLSA;

   b. The prompt payment requirement applies to State governments during a budget impasse, whether or not there is a provision of state law that limits expending non-appropriated funds; any such provision provides no defense to this requirement.

c. Employees may recover liquidated damages pursuant to 29 U.S.C. §§ 216(b) and 260 as a result of a state or local government's failure to pay them minimum wages and overtime wages for work performed during a pay period on their regularly scheduled payday for that period.

7. The Government did not pay employees who were designated as "non-exempt" under the FLSA and as "excepted" for purposes of the 2013 Government shutdown for work performed between October 1 and October 5, 2013, on their regularly scheduled paydays for that work.

8. After the 2013 Government shutdown ended, the Government retroactively paid all such employees their basic wages for regular, non-overtime work performed between October 1 and October 5, 2013, on or before the employees' next regularly scheduled payday, but did not pay them any liquidated damages, attorney fees or expenses.

9. Paul DeCamp, who signed the letter Bates stamped by the Government as US_Martin0000309-10, was the Administrator of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor on August 14, 2007. The statements made in this letter were within the scope of the duties of Mr. DeCamp on August 14, 2007. This letter was in fact sent to the addressee, the Honorable John R. Gordner, who is identified in the letter as the Chairman of the Labor and Industry Committee of the Senate of the Commonwealth of Pennsylvania.

10. Steven J. Mandel, who was shown as the person responsible for the letter Bates stamped by the Government as US_Martin0000311-12, was on August 26, 2009, the Associate Solicitor for Fair Labor Standards of the U.S. Department of Labor. The person who signed the letter for him was authorized to do so. The statements made in this letter were within the scope of Mr. Mandel's duties on August 26, 2009. This letter was in fact sent to the addressee, Frank A.

Fisher, Chief Counsel of the Commonwealth of Pennsylvania. The letter states that it was sent in response to a letter from Mr. Fisher (see paragraph 20 below).

11. The letter Bates stamped by the Government as US_Martin0000313-14 was in fact sent to the addressee, Daniel P. O'Meara of the law firm of Montgomery, McCracken, Walker & Rhoads, LLP. The statements made in this letter were within the scope of Mr. Mandel's duties on August 26, 2009. The letter states that it was sent in response to a letter from Mr. O'Meara (see paragraph 21 below).

12. The Wage and Hour Division of the U.S. Department of Labor issued the document stamped by the Government as US_Martin0000315-18 and entitled "Fact Sheet 70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues" in November 2009. The Wage and Hour Division still makes the fact sheet available to the public and has not modified any of its responses to questions 1, 2, 9, 10 and 11.

13. Corlis R. Sellers, who signed the opinion letter Bates stamped by the Government as US_Martin0000367-68, was an employee of the Government assigned to the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor on July 20, 1998. John R. Fraser, on whose behalf the letter was signed, was on July 20, 1998, the Acting Administrator of the Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor. The statements made in this opinion letter were within the scope of the duties of Mr. Fraser on July 20, 1998. This is a copy of the opinion letter referenced in the documents discussed in paragraph 16 below, except that the name of the original recipient of the letter has been deleted.

14. Alfonso Gristina, who wrote the emails Bates stamped by the Government as US_Martin0000535-37, was an employee of the Government assigned to the Wage and Hour

Division of the U.S. Department of Labor on July 14, 2009, as the Wilkes Barre, Pennsylvania District Director. The references to "LDs" in the phrase "+ an equal amount in LDs" in the penultimate line of text in the email is to potential liquidated damages. The statements made in this email were within the scope of the duties of Mr. Gristina in July 2009, but were preliminary estimates, pre-decisional, internal, and limited to the case at issue in the email because field office employees are not authorized to make general policy statements for DOL; the statements do not necessarily reflect the official position or policy of the Wage and Hour Division, or the Department of Labor.

15. George Ference, who wrote the email Bates stamped by the Government as US_Martin0000538, was an employee of the Government assigned to the Wage and Hour Division of the U.S. Department of Labor on July 20, 2009, as a Deputy Regional Administrator. The reference to "LDs" in the phrase "$42,412,500 + an equal amount in LDs" toward the bottom of the email is to potential liquidated damages. The statements made in this email were within the scope of the duties of Mr. Ference on July 20, 2009, but were preliminary estimates, pre-decisional, internal, and limited to the case at issue in the email because field office employees are not authorized to make general policy statements for DOL; the statements do not necessarily reflect the official position or policy of the Wage and Hour Division, or the Department of Labor.

16. John L. McKeon, who sent one of the emails in the chain stamped by the Government as US_Martin0000539-41, was the Deputy Administrator of the Wage and Hour Division of the U.S. Department of Labor on September 1, 2009. Corlis Sellers, a recipient of one of the emails in the chain, was the Wage and Hour Regional Administrator of the U.S. Department of Labor for the Northeast Region on September 1, 2009. Mark Watson, Jr., another recipient of one of

the emails in the chain, was the Director of Enforcement for the Northeast Region of the Wage and Hour Division of the U.S. Department of Labor on September 1, 2009. The Wilkes Barre, Pennsylvania District Director at the time, who is referred to as “WBDD” in this document, was Alfonso Gristina. Robert V. O’Brien, who is referred to on the page stamped as US_Martin0000539, is identified as the Executive Deputy Secretary of Labor & Industry for the Commonwealth of Pennsylvania. Laura MacDonald, who sent another one of the emails in the chain, was the Chief of Staff of the Office of Congressional and Intergovernmental Affairs of the U.S. Department of Labor. The email states that the information compiled by Mr. McKeon in the email that begins on the page stamped as US_Martin0000539 was intended for use by the U.S. Secretary of Labor, who was then Hilda L. Solis, in a call with Edward Rendell, the then-Governor of the Commonwealth of Pennsylvania. The statements made in this email chain were within the scope of the duties of the authors of the emails during the summer of 2009, but were preliminary estimates, pre-decisional, and internal. The statements made by the field office employees are limited to the case at issue in the email chain. The statements made in this email chain do not necessarily reflect the official position or policy of the Wage and Hour Division, or the Department of Labor.

17. John L. McKeon, the addressee of one of the emails from George Ference stamped by the Government as US_Martin0000561-63, was the Deputy Administrator of the Wage and Hour Division of the U.S. Department of Labor on July 15, 2009. Mr. Ference, the author of the email to Mr. McKeon, states in the email that he summarized the information in the articles pasted into his email during July 2009. His summary of the information in the articles was part of his duties, but was pre-decisional, internal, and limited to the case at issue in the email because field office employees are not authorized to make general policy statements for DOL; it does not necessarily

reflect the official position or policy of the Wage and Hour Division, or the Department of Labor.

18. The statements made by Mr. Gristina in the email dated July 17, 2009, and Bates stamped by the Government as US_Martin0000566-67, were within the scope of the duties of Mr. Gristina on July 17, 2009, but were pre-decisional, internal, and preliminary estimates, limited to the case at issue in the email because field office employees are not authorized to make general policy statements for DOL; they do not necessarily reflect the official position or policy of the Wage and Hour Division, or the Department of Labor.

19. The questions and answers stamped by the Government as US_Martin0000568-69 were prepared by employees of the Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor in or about July 2009. The statements made in this document, which was prepared as a draft, were within the scope of the duties of the Wage and Hour Division in July 2009, but were pre-decisional, internal, and preliminary and limited to the case at issue; they do not necessarily represent the official position or policy of the Wage and Hour Division, or the Department of Labor.

20. The letter stamped by the Government as US_Martin0000572-73 is the letter to which the letter from Steven J. Mandel Bates stamped as US_Martin0000311-12 states that it responds (see paragraph 10 above).

21. The letter stamped by the Government as US_Martin0000574-78 is the letter to which the letter from Steven J. Mandel stamped as US_Martin0000313-14 states that it responds (see paragraph 11 above).

Respectfully submitted,

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