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

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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DEFENDANT'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Pursuant to Rules 12(b)(1) and 56 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests this Court to dismiss, or in the alterative, to grant summary judgment on, the claims of 211 unidentified plaintiffs and 2,199 plaintiffs that are ineligible for damages. *See* Dkt. No. 202.[1]

ISSUES PRESENTED

1. Whether plaintiffs who remain unidentified and whose employee-employer status remains unverified have established Article III standing.

2. Whether plaintiffs who do not meet all of the criteria to be a member of this collective action have established Article III standing.

3. Whether the Government is entitled to judgment as a matter of law as to all unidentified plaintiffs and ineligible plaintiffs because they lack Article III standing.

[1] In the parties' recent joint status report, the Government explained that it intended to seek dismissal of 1,049 duplicative claims. Dkt. No. 202 at 2 (Nov. 2019 JSR); *see also* Dkt. No. 204 at 1. One additional individual has been added to that list of duplicative claims, and plaintiffs' counsel has consented to the dismissal of all 1,050 claims. The Government intends to file a stipulation of dismissal of those claims shortly. And accordingly, those duplicative claims are not addressed in this motion.

STATEMENT OF FACTS

This case arose from the October 2013 Federal lapse in appropriations and resulting partial Government shutdown. The underlying facts in this case are set forth in the Court's February 24, 2017 Opinion and Order granting plaintiffs' partial motion for summary judgment and denying the Government's motion for summary judgment. *Martin v. United States*, 130 Fed. Cl. 578 (2017) (Opinion). Plaintiffs are current and former Government employees who allege that they were not timely compensated for work performed during the 2013 lapse in appropriations in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19. *Id.* at 580; Dkt. No. 29-1 (2nd Am. Compl.) ¶ 1.

In its Opinion, the Court held that the Government's failure to timely pay plaintiffs during the 2013 lapse in appropriations violated the FLSA, and that, as a result, the Government is liable for liquidated damages. *Martin*, 130 Fed. Cl. at 582-86. The Court ordered plaintiffs to calculate the amount of liquidated damages due, "delineated either by individual class member or by relevant categories of class members." *Id*. at 558. The Court also ordered that the parties confer and discuss the calculations by March 31, 2017, and file a joint status report by April 7, 2017, reporting the results of both the conference and the calculations. *Id.* at 588.

On March 9, 2017, the parties filed a joint motion to suspend the Court's schedule related to damages calculations, to allow sufficient time for the parties to engage an expert consultant, develop a calculation methodology, and calculate the amount of liquidated damages due to each collective action member in accord with the Court's Opinion. Dkt. No. 162 at 1-2. The Court granted the parties' request, and ordered the parties to file a joint status report by April 28, 2017, and every 30 days thereafter, until the parties were able to provide the damages calculations to the Court, or until the Court ordered otherwise. Dkt. No. 163. The Government subsequently

hired Chess Consulting to assist with calculating the liquidated damages. Attachment A (Declaration of Rodney J. Bosco and David J. Ottenbreit (Consultant Decl.)) at ¶ 5.

Since the Court's order, the parties, in conjunction with the Government's consultants, have worked to calculate the amount of liquidated damages due to each collective action member, defined by the Court as,

> Federal employees (a) identified as of October 1, 2013 for purposes of the Fair Labor Standards Act ("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.

Martin, 130 Fed. Cl. at 581; *see also, e.g.*, Consultant Decl. at ¶ 7(c).

Because plaintiffs' allegations relate to time worked during a lapse in appropriations, defendant's consultants reviewed the "earnings and leave statements and time and attendance data in order to develop a methodology for calculating the amount of damages [due] *each plaintiff*[.]" Dkt. No. 164 (Apr. 2017 JSR) (emphasis added); *see* Dkt. No. 166 (May 2017 JSR) (same). As reported on the parties' October 24, 2019 joint status report, a total of 25,251 individuals have consented to join the collective action. Dkt. No. 201 at 1. These individuals comprise four main groups: (1) those that meet the Court's definition of a collective action member and are therefore eligible to receive damages, if the calculations determine that any damages are owed; (2) those who do not meet the definition of a collection action member for one or more reasons and are therefore ineligible to receive damages; (3) those for whom the Government could not confirm employment or damages eligibility; and (4) those who submitted more than one consent to join, *i.e.* submitted duplicate joinder consent forms.

As explained in the parties' November 2019 joint status report, the Government intended to file a motion to dismiss during the week of December 16, 2019, for individuals in categories two, three, and four. *See* Nov. 2019 JSR at 2. Upon request from plaintiffs' counsel in early December 2019, the Government delayed filing its motion until January 8, 2020, to permit plaintiffs' counsel further time to gather information on the plaintiffs for whom the Government could not verify employment or damages eligibility. *See* Dkt. No. 204 at 1 n.1. Since December 6, 2019, plaintiffs' counsel has not provided the Government with further information on any of the individuals subject to this motion. On December 30, 2019, plaintiffs' counsel consented to the dismissal of the duplicate claims, encompassing individuals in the fourth category. Further detail regarding the 2,410 plaintiffs who are the subject of this motion are set forth below.

A. Unidentified Plaintiffs

Certain joinder consent forms provided insufficient identifying information to identify any individual employed by the Government. *See, e.g.*, Dkt. No. 172 (Aug. 2017 JSR); Dkt. No. 174 (Sept. 2017 JSR); Dkt. No. 185 (July 2018 JSR); Dkt. No. 189 (Nov. 2018 JSR). Without proper identifying information—such as a full and correct name, agency, and work location—the Government cannot identify and obtain payroll data from the cognizant Federal agencies. *See* Dkt. No. 180 (Feb. 2018 JSR).

Over the last two years, the Government has repeatedly requested further information from plaintiffs' counsel regarding those joinder consent forms that provided insufficient identifying information. As explained in the parties' February and March 2019 joint status reports, despite receiving payroll information from agencies for the vast majority of claimants, 195 putative claimants still could not be identified, and plaintiffs' counsel continued to work to provide the Government with further information on those plaintiffs. Dkt. Nos. 192, 193; *see*

also Dkt. No. 194 (Apr. 2019 JSR); Dkt. No. 195 (May 2019 JSR). The number of individuals for whom the affected Federal agencies could not confirm employment increased from 195 unidentified claimants to 243 unidentified claimants. Dkt. No. 200 (Sept. 2019 JSR). Government counsel identified the additional joinder consent forms with insufficient identifying information to plaintiffs' counsel on September 6, 2019, and again on October 7, 2019.

On December 3, 2019, plaintiffs' counsel provided the Government with additional information on 67 of these unidentified individuals, comprising mostly updated address information. *See* Consultant Decl. ¶ 14. Counsel for the Government provided this updated information to the affected Federal agencies and has provided to the consultants any further information provided by the agencies. *Id.* at ¶¶ 14-15. There remain 211 individuals for whom the Government cannot confirm employment or verify whether they meet the collective action definition. *Id.* at ¶ 16, Ex. B. For clarity in this motion, the Government refers to these remaining 211 unidentified individuals as "Unidentified Plaintiffs." These Unidentified Plaintiffs are set forth at Exhibit B to the Consultant Declaration.

B. Individuals Who Are Ineligible For Damages

As reflected in the parties' September 24, 2019 joint status report, defendant's consultants have concluded that more than 2,000 of the individuals who submitted joinder consent forms are ineligible for damages. Sept. 2019 JSR at 1; *see* Oct. 2019 JSR (same); *see* Consultant Decl. ¶ 17. That number increased to 3,271 individuals, as identified in the parties' November 25, 2019, joint status report, "based upon verified data by the consultant or upon information provided by the various agencies that the consultant verified by what he considers to be a statistically significant sampling." Nov. 2019 JSR at 1.

The 3,271 ineligible individuals referred to in the November 25, 2019 joint status report included two main categories of individuals. The first category comprises the 1,050 individuals[2] who submitted duplicate claims. Nov. 2019 JSR at 1; *see* Consultant Decl. ¶¶ 11-12. As explained above, since filing the November 24, 2019 joint status report, counsel for plaintiffs has agreed to the dismissal of all 1,050 duplicate claims and the Government intends to file a stipulation of dismissal for those 1,050 duplicate claims in the near future.

The second category comprises individuals who do not meet the definition of a putative collective member for one of four reasons: (1) they were not employed by a an eligible Federal agency during the shutdown; (2) they were exempt from coverage by the FLSA; (3) they did not work for more than 4 hours between October 1-5, 2013, *i.e.* did not work in excess of the allotted time for an orderly shutdown; or (4) they received their paycheck for work performed during the lapse in appropriations on their regularly scheduled paydays.[3] Nov. 2019 JSR at 2; Consultant Decl. ¶ 17; *see Martin*, 130 Fed. Cl. at 581. The number of plaintiffs in this second category now totals 2,199. The consultants have verified the eligibility for these putative opt-ins in several ways, including by reviewing the data provided by the affected Federal agencies, and by conducting a statistically-significant sampling of further data provided by the affected Federal agencies, at the request of plaintiffs. Consultant Decl. ¶¶ 17-20. For purposes of clarity in this motion, the Government refers to these 2,199 individuals collectively as the "Ineligible Plaintiffs." These "Ineligible Plaintiffs" are set forth in Exhibit C to the Consultant Declaration.

[2] The Government's consultants subsequently determined, following information provided by plaintiffs' counsel on December 3, 2019, that one of the previously unidentified plaintiff had actually filed a duplicate joinder consent form, and he was moved to the duplicate plaintiffs category.

[3] Numerous plaintiffs are eligible for damages, but their damages calculation totals $0. The Government does not move to dismiss the claims of these plaintiffs; they will simply not receive any damages.

SUMMARY OF THE ARGUMENT

Each individual who submits a consent to join an FLSA collective action has "party status" and is treated as if he or she were a named plaintiff in the complaint. Consequently, each plaintiff in an FLSA collective action must individually satisfy Article III standing requirements. For a defendant to be liable under the FLSA, the defendant must have an employer-employee relationship with the plaintiff, predicating Article III standing in an FLSA collective action on each individual plaintiff's employee-employer relationship with the defendant.

Plaintiffs filed their consent forms in September and October 2015. *See* Dkt. No. 125 at 5. Based upon identifying information provided by plaintiffs' counsel for these 25,251 opt-in plaintiffs, the affected Federal agencies have compiled time and attendance data and payroll data, which has been reviewed by the Government's consultants to determine eligibility for liquidated damages. Of those opt-in plaintiffs, 211 are Unidentified Plaintiffs and 2,199 are Ineligible Plaintiffs. Neither the Unidentified Plaintiffs nor the Ineligible Plaintiffs can satisfy Article III standing requirements in this case because they have failed to allege or to provide specific facts demonstrating an injury-in-fact traceable to, and likely redressable by, the Government. For the reasons set forth in more detail below, the Court should grant our motion to dismiss or, in the alternative, our motion for summary judgment as to these plaintiffs.

ARGUMENT

I. Unidentified Plaintiffs And Ineligible Plaintiffs Cannot Satisfy Article III Standing Requirements And This Court Lacks Jurisdiction Over Those Claims

a. RCFC 12(b)(1) Standard Of Review

The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Taylor v. United States,* 303 F.3d 1357, 1359 (Fed. Cir. 2002); *Demes v. United States,* 52 Fed. Cl. 365, 368 (2002). "If the court determines at any time that it lacks subject-

matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3). A party may raise a 12(b)(1) objection "at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *Cent. Pines Land Co. v. United States*, 99 Fed. Cl. 394, 399 n.3 (2011). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.* at 506-07 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). "In deciding a motion to dismiss pursuant to RCFC 12(b)(1), the court may consider evidentiary matters outside the pleadings." *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985).

"Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Standing has three minimum requirements that must be satisfied: (1) "there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not 'conjectural' or 'hypothetical,'" *id.* at 103 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); (2) "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant," *id.*; and (3) "there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.*

An "injury-in-fact" must be "a concrete and particularized, actual or imminent invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560). "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete'" which means "it must actually exist." *Id.*

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

b. Article III Standing Requirements Apply To Each Opt-In Plaintiff In An FLSA Collective Action

To invoke this Court's jurisdiction, a plaintiff must satisfy Article III standing requirements. *See Lujan*, 504 U.S. at 560-61. Each plaintiff must allege an (1) injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) that is redressable by the defendant. *Steel Co.*, 523 U.S. at 103.

In addressing the issue of standing, FLSA collective actions are different from Rule 23 class actions. *Cf. Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) ("Rule 23 actions are fundamentally different from collective actions under the FLSA."). In a Rule 23 class action, Article III standing need be satisfied by only the plaintiffs named in the complaint; unidentified members of the class need not individually satisfy Article III standing requirements. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 n. 20 (1976); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 365 (3d Cir. 2015). By contrast, in an FLSA collective action, individuals file notices providing their written consent to participate in the collective action pursuant to 29 U.S.C. § 216(b). This "opt-in" requirement for collective actions "means that every plaintiff who opts in to a collective action has party status, whereas unnamed class members in Rule 23 class actions do not." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2016); *see Boggs v. United States*, 139 Fed. Cl. 375, 378 (2018) (FLSA collective action members become "parties" to the collective action).

As a result of these differences, "[a] collective action is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases—capitalizing on efficiencies of scale, but without necessarily permitting a specific, named representative to control the litigation, except as the workers may separately so agree." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018) (emphasis in original). And because plaintiffs in a collective action have "party status," each plaintiff must satisfy the requirements of Article III standing as if they were "named plaintiffs." *See id.* at 1104 (quoting *Halle v. W. Penn Allegheny Health Sys. Inc*., 842 F.3d 215, 225 (3d Cir. 2016) ("The FLSA leaves no doubt that 'every plaintiff who opts in to a collective action has party status.'")); *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003) ("[B]y referring to them as 'party plaintiff[s],' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as the named plaintiffs.").[4]

Consistent with these principles, courts have held that, in the context of Article III standing in an FLSA collective action, a "plaintiff's injuries are only traceable to, and redressable by, those defendants who are deemed by law to have employed her." *Cavallaro v. UMass Mem'l Health Care, Inc*., 971 F. Supp. 2d 139, 146 (D. Mass. 2013); *Lucas v. BMS Enters., Inc.*, No. 3:09-CV-2159-D, 2010 WL 2671305, at *3 (N.D. Tex. July 1, 2010) (holding that "a named plaintiff in a collective action has adequately pleaded standing against a particular defendant only if the plaintiff has alleged an injury that the defendant caused to him.");

[4] *See Campbell*, 903 F.3d at 1104 (explaining how the FLSA makes no distinction between original and opt-in plaintiffs, whereas, in class actions, class members' interests are litigated by the named plaintiff); *Reinig v. RBS Citizens, N*.A., 912 F.3d 115, 123 n. 1 (3d Cir. 2018) (same); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (discussing Congress's 1947 amendments to the FLSA, which were intended to "free[] employers of the burden of representative actions.").

Crumbling v. Miyabi Murrells Inlet, LLC, 192 F. Supp. 3d 640, 644-45 (D.S.C. 2016) (for defendant to be liable under the FLSA, defendant must have an employer-employee relationship with plaintiffs, which means that plaintiffs could not "trace their injuries" to, and their harm was not "redressable by," defendant employers that did not actually employ the plaintiffs).

Article III standing is predicated on the employee-employer relationship between the plaintiff and the defendant in an FLSA collective action. In this case, each plaintiff must establish an injury both traceable to and redressable by the Federal Government *vis a vis* that plaintiff's employee-employer relationship status with an eligible Federal agency. As demonstrated below, there are 211 Unidentified Plaintiffs for which the Government cannot confirm the employer-employee relationship because the joinder consent forms contained blank, illegible, or otherwise insufficient identifying information. Further, there are 2,199 Ineligible Plaintiffs who are ineligible for damages because they do not satisfy the criteria to be eligible to join the collective. These plaintiffs have failed to satisfy Article III standing requirements and must be dismissed.

i. The Unidentified Plaintiffs Have Failed To Show That They Have An Employer-Employee Relationship With Defendant And, Therefore, Lack Article III Standing

Because the Unidentified Plaintiffs have failed to show that they have an employer-employee relationship with any Federal agency, those plaintiffs lack standing and their claims must be dismissed.

To determine whether any individual plaintiff is entitled to recover in this case, the Government's consultants first reviewed the joinder consent forms and the spreadsheet provided by plaintiffs' counsel containing the plaintiffs' identifying information. Consultant Decl. ¶¶ 5, 9-10. Based upon this information, Government counsel contacted the affected Federal agencies

and requested that the affected Federal agencies (1) confirm whether each individual who allegedly worked at that agency met the definition of a collective action member, and (2) if so, provide both time and attendance data and payroll data for those individuals who may be eligible for damages. Government counsel then provided information from the affected agencies to the Government's consultants, for their use to calculate damages. *See, e.g., id*. at ¶ 5.

After reviewing the information provided by the affected Federal agencies in conjunction with the information provided by plaintiffs and plaintiffs' counsel, the Government's consultants determined that 211 plaintiffs could not be confirmed as Federal Government employees during the 2013 shutdown because their opt-in forms contained insufficient identifying information. Consultant Decl. ¶¶ 7(b), 13-16, Ex. B. In some instances, the name of the opt-in was blank, illegible, or contained only initials. *Id*. at ¶ 13. In other instances, the agency lacked any record of an employee with the name provided. *Id.*

These Unidentified Plaintiffs, who have failed to provide sufficient identifying information so as to allow the Government to determine whether they meet the definition of a collective action member, have failed to show that they have an injury traceable to, and redressable by, the United States. The Unidentified Plaintiffs have thus failed to demonstrate the threshold showing of standing demonstrating an employer-employee relationship with any Federal agency.

Plaintiffs' have failed to provide necessary additional information on the Unidentified Plaintiffs sufficient for the Government to confirm their employment. *See, e.g.,* Aug. 2017 JSR; Feb. 2018 JSR; Feb 2019 JSR; Oct. 2019 JSR. Indeed, the Government has requested this information on multiple occasions. Because plaintiffs have failed to provide sufficient information for the Government to identify these plaintiffs as Government employees—years

after filing the opt-in forms—the Unidentified Plaintiffs, as set forth in Exhibit B to the Consultant Declaration, should be dismissed from this case for failure to establish Article III standing.

ii. Plaintiffs Who Are Ineligible To Join The Collective Have Necessarily Failed To Show That They Have Article III Standing

Claimants who have submitted complete opt-in forms, but who are ineligible to join the collective, have likewise failed to satisfy Article III standing requirements. Only similarly-situated plaintiffs can be parties to a collective action. *See Doe No. 1 v. United States*, 143 Fed. Cl. 113, 115 (2019*).* "[A]n opt-in plaintiff to the FLSA collective action must still meet the requirements to *opt-in*." *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385, 391 (N.D.N.Y. 2011) (emphasis in original); *see Lucas*, 2010 WL 2671305, at *3 ("But in a *collective* action, a plaintiff only becomes a member of the class if he fits the criteria of the class and affirmatively opts in." (emphasis in original)).

To be eligible for liquidated damages in this case, claimants must be,

> Federal employees (a) identified as of October 1, 2013 for purposes of the Fair Labor Standards Act ("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.

Martin, 130 Fed. Cl. at 581.

After reviewing the consent to join forms, and data and information provided by affected Federal agencies through Government counsel (including data following a statistically significant sampling at the request of plaintiffs' counsel), the Government's consultants determined that

2,199 claimants are ineligible for damages, Consultant Decl. ¶¶ 7(c), 17-20, Ex. C, comprised of the following breakdown.

First, 29 plaintiffs were not Federal employees pursuant to 29 U.S.C. § 203(e)(2)(A). *See* Consultant Decl. ¶ 17(a), Ex. C at rows 1-29. For example, several employees list the United States Postal Service (USPS) as their employer. *See, e.g., id.* at Ex. C rows 6-7. But employees of the USPS are specifically carved out of § 203(e)(2)(A), and are instead listed in § 203(3)(2)(B). Section 203(e)(2)(A) also lists only executive branch agencies, as defined in 5 U.S.C. § 105, and certain judicial branch units, rather than any section of the legislative branch. Thus, those employees who list, for example, the U.S. Capitol Police (legislative branch agency) or the Architect of the Capitol (same) do not meet the collective definition. *See, e.g., id*. at Ex. C rows 8-9. Finally, several individuals list non-Federal agencies as employers, such as "PA Depart of Correction" and "pride industries." *See, e.g., id.* at Ex. C rows 21, 26.

Second, the affected Federal agencies, based upon their internal reviews of records, identified 853 plaintiffs who were classified as Exempt from the FLSA during the shutdown. Consultant Decl. ¶ 17(b), Ex. C rows 30-882. Third, based upon the consultants' review of the payroll and time entry data provided by the affected Federal agencies, 729 additional opt-in plaintiffs were identified as FLSA Exempt. *Id*. at ¶ 17(c), Ex. C rows 883-1,611.

Fourth, the affected Federal agencies, based upon their internal reviews of records, identified 59 opt-in plaintiffs who did not work during the shutdown. Consultant Decl. ¶ 17(d), Ex. C rows 1,612-1,670. Fifth, based upon the consultants' review of the payroll and time entry data provided by the affected Federal agencies, 133 additional opt-in plaintiffs did not work during the shutdown. *Id*. at ¶ 17(e), Ex. C rows 1,671-1,803.

Sixth, the affected Federal agencies, based upon their internal reviews of records, identified 231 opt-ins who were paid on their regularly scheduled paydays. Consultant Decl. ¶ 17(f), Ex. C rows 1,804-2,034. Seventh, based upon the consultants' review of the payroll and time entry data provided by the affected Federal agencies, 165 additional opt-in plaintiffs were paid on their regularly scheduled paydays. *Id*. at ¶ 17(g), Ex. C rows 2,035-2,199.

Claimants who (1) are FLSA-exempt, (2) did not work during the lapse in appropriations, or (3) were paid on their regularly scheduled paydays, did not suffer an "injury-in-fact" as a result of the Government's failure to pay excepted employees on their regularly scheduled payday during the 2013 lapse in appropriations. The absence of a "concrete" injury means that these ineligible plaintiffs lack standing and must be dismissed. *See Spokeo,* 136 S. Ct. at 1548 ("An injury in fact must also be 'concrete'" which means "it must actually exist."). And those claimants who do not meet the definition of Federal employee pursuant to the Court's definition of eligible collective action members must similarly be dismissed for lack of standing. Accordingly, the Ineligible Plaintiffs, as set forth in Exhibit C to the Consultant Declaration, should be dismissed.

II. The Government Is Entitled To Summary Judgment On Claims Brought By Unidentified And Ineligible Claimants

a. RCFC 56 Standard Of Review

A court should grant a motion for summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). Only disputes over "facts that might affect the outcome of the suit" will preclude the granting of summary judgment, not disputes that are "irrelevant or unnecessary." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Mere denials, conclusory statements, or evidence that is simply colorable or not significantly probative are insufficient by themselves to force a case to

trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1323 (Fed. Cir. 2009) (citing *Anderson*, 477 U.S. at 252) (stating that "a mere scintilla of evidence" is an insufficient basis to deny summary judgment).

The moving party bears "the initial responsibility of informing the [court] of the basis for its motion, and identifying those portions of [the record that] it believes demonstrates the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once the movant makes this showing, the burden shifts to the nonmoving party to identify specific facts demonstrating that material facts are in dispute. *Id*. at 324. All permissible inferences that can be "drawn from the underlying facts" must be viewed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Corp*., 475 U.S. 574, 587 (1986) (quotation omitted). In addition, if a party's motion under RCFC 12(b)(6) or 12(c) requires the Court to consider matters outside the pleadings, then the motion may be treated as an RCFC 56 motion for summary judgment.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.*

b. The Government Has Provided Evidence That There Is No Genuine Dispute Of Material Fact That Unidentified And Ineligible Plaintiffs Lack Standing

The Government has provided evidence showing (1) that 211 plaintiffs could not be confirmed as Federal Government employees during the 2013 shutdown because their opt-in forms contained insufficient identifying information, and (2) that 2,199 claimants are ineligible

for damages and, therefore, cannot join the collective action in this case. Consultant Decl. ¶¶ 13-20, Exs. B, C. Accordingly, the Government has provided proof that 211 Unidentified Plaintiffs and 2,199 Ineligible Plaintiffs have failed to provide "specific facts" showing that they have suffered an injury-in-fact traceable to, and redressable by, the Government.

Plaintiffs' have been provided the opportunity to meet with and request further information from the consultants. *See, e.g.,* Consultant Decl. ¶ 18. They have raised no specific objection to the consultants' methodology for determining whether any particular opt-in plaintiff is ineligible for damages. Rather, upon request by plaintiffs' counsel, the consultants conducted a statistically significant sampling of the data for the opt-in plaintiffs whom Federal agencies deemed ineligible, by reviewing data subsequently provided by those Federal agencies. *Id.* Plaintiffs' counsel was presented with the results of that sampling at a meeting in September 2019. Further, plaintiffs have had more than four years to confirm the Article III standing of each of the plaintiffs in this lawsuit yet have failed to do so.

Because the Government has provided proof that 211 Unidentified Plaintiffs and 2,199 Ineligible Plaintiffs have failed to provide "specific facts" showing that they have suffered an injury-in-fact traceable to, and redressable by, the Government, the United States is entitled to judgment as a matter of law as to the Unidentified Plaintiffs and the Ineligible Plaintiffs, each of whom is set forth at Exhibits B and C, respectively, to the Consultant Declaration.

CONCLUSION

For these reasons, the Court should grant our motion to dismiss or, in the alternative, our motion for summary judgment, the claims of the 211 Unidentified Plaintiffs, as set forth in Exhibit B to the Consultant Declaration, and the claims of the 2,199 Ineligible Plaintiffs, as set forth in Exhibit C to the Consultant Declaration.

Respectfully submitted,

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January 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January, 2020, a copy of the foregoing "DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT" was filed electronically. This filing was served electronically to all parties by virtue of the Court's electronic filing system.

/s/ Erin K. Murdock-Park
ERIN K. MURDOCK-PARK