IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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ISSUES PRESENTED

1. Is the Government challenging this Court's subject matter jurisdiction when it contests whether about 10% of the Plaintiffs meet all the elements for asserting a claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, but does not contest this Court's jurisdiction over claims against it brought by federal employees under the FLSA?

2. Is the Government entitled to summary judgment against 15 of 29 Plaintiffs who supposedly worked for agencies not subject to the FLSA when those agencies are "independent establishments" of the Government or are legislative agencies within the collective action definition in the complaint?

3. Is the Government entitled to summary judgment against Plaintiffs whom it contends were FLSA exempt during the 2013 partial Government shutdown when it has the burden of proof and has not supported its contention with any admissible evidence?

4. Is the Government entitled to summary judgment against Transportation Security Officers ("TSOs") whom it contends were FLSA exempt when the Government treats TSOs as covered by the FLSA's minimum wage and overtime laws?

5. Is the Government entitled to summary judgment against other Plaintiffs whom it contends were FLSA exempt when 14 of these Plaintiffs have submitted evidence that they were non-exempt, 14 worked in a job that has been determined to be non-exempt, and 21 had job titles identical to other Plaintiffs whom the Government is not challenging as exempt?

6. Is the Government entitled to summary judgment against Plaintiffs who it contends cannot be located in its employment records when it has not explained what steps it took to identify these Plaintiffs other than ask Plaintiffs' counsel and when most of these Plaintiffs have submitted information that is facially sufficient to be located in the records?

7. Is the Government entitled to summary judgment against Plaintiffs challenged on grounds other than FLSA exemption and inability to locate them in the Government's records when it has not identified the types of evidence that Plaintiffs supposedly would be unable to offer to create genuine issues of fact?

8. Is the Government entitled to summary judgment against all 192 Plaintiffs who it contends did not work more than four hours between October 1 and October 5, 2013 when 38 of these Plaintiffs have submitted evidence that they worked during this period?

9. Is the Government entitled to summary judgment against all 396 Plaintiffs who it contends were paid on their regularly scheduled paydays during the shutdown when its designations of those Plaintiffs are inconsistent and when 6 of those Plaintiffs have submitted evidence that they were not paid on their regularly scheduled paydays?

The answer to each of these questions is "no."

STATEMENT OF THE CASE

As stated in the Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, In the Alternative, Motion for Summary Judgment ("Motion" or "Mot."), Plaintiffs claim in this collective action that the Government violated the FLSA by failing to pay federal employees minimum wages and overtime pay during the partial Government shutdown in October 2013. ECF No. 29-1 at ¶¶ 1-2, 4 (Sec. Am. Cmplt.) (hereafter "Complaint"). In an Opinion and Order dated February 24, 2017, the Court held that the Government was liable for liquidated damages. ECF No. 161. The Government engaged Chess Consulting (the "Consultants") to assist with calculating the liquidated damages for the 24,201 opt ins.[1] Attach. A to Govt's Mot. (Declaration of Rodney J. Bosco and David J. Ottenbreit ("Consultant Decl.")) at ¶ 5.

[1] The parties agree that there were 25,251 opt-in forms after initial attempts at de-duplication (Mot. at 3) but 1,050 were duplicates (Mot. at 6), leaving a total of 24,201.

The Government seeks dismissal of or summary judgment against 2,410 Plaintiffs (about 10%) on the grounds that they supposedly were not employed by an eligible federal agency during the shutdown, are unidentified, were exempt under the FLSA, did not work more than four hours during the first five days of the shutdown (October 1-5, 2013), or were paid for their work during those first five days on their regularly scheduled paydays. Mot. at 6. The table below summarizes each of the Government's grounds for the Motion, the number of Plaintiffs subject to the Motion for each basis, and the number of those Plaintiffs identified by the employing agency and by the Consultants:

Basis for Motion	**Pls. Subject to Motion**	**Identified by Agency**	**Identified by Consultants**
Agency Not Part of Class	29	n/a	n/a
Exempt	1,582	853	729
Unidentified	211	n/a	n/a
Worked 4 Hours or Less	192	59	133
Timely Paid	396	231	165
Total	2,410	1,143	1,027

SUMMARY OF THE ARGUMENT

The Government conflates jurisdiction with the merits in wrongly asserting that this Court lacks subject matter jurisdiction over the claims of the 2,410 Plaintiffs subject to its motion. Because the Government has a valid jurisdictional challenge only to Plaintiffs who are not its employees, its jurisdictional challenge is limited to five Plaintiffs who appear on the face of their submissions to have not been employees of the Government and a handful of Plaintiffs who did not submit sufficient information to determine whether they were employees. As to the nearly 2,400 Plaintiffs for whom the Government does not contest an employment relationship existed, the Government merely contends that each of them did not meet one of the elements to assert a viable FLSA claim in this case. This does not demonstrate that the Court lacks subject matter

jurisdiction over their claims. Rather, the Government's motion must be treated as a summary judgment motion.

The only evidence the Government has submitted in support of its summary judgment motion is the Consultant Declaration. It is inadmissible. The Consultants did not explain what the agencies that employed a total of 1,143 Plaintiffs did to conclude that each of them did not satisfy an element to assert a claim in this case. Thus, summary judgment as to those 1,143 Plaintiffs is improper. But even if they had reported on the alleged basis for excluding each of these Plaintiffs, the Consultants would not have been doing so based on personal knowledge as required under RCFC 56(c)(4). The Government cannot circumvent the personal knowledge requirement by arguing that the Consultants are experts who can opine about the agencies' conclusions based on a sample of the data for 118 Plaintiffs because the Government has provided none of the information necessary to qualify the Consultants as expert witnesses under RCFC 26(a)(2)(B) and Fed. R. Evid. 702 and any opinions also are inadmissible for substantive reasons under Fed. R. Evid. 703.

The Government also has not offered any admissible evidence with respect to the 1,027 Plaintiffs who the Consultants concluded could not satisfy one of the elements for asserting an FLSA claim. Because the Consultants cannot provide expert testimony, their opinions can be admissible only under Fed. R. Evid. 701 as opinions of lay witnesses. But Rule 701 premises admissibility on testimony being "helpful to clearly understanding the witness's testimony or to determining a fact in issue," *id.* 701(b), not "meaningless assertions which amount to little more than choosing up sides." *Id.* (advisory committee note). The Consultants' Declaration merely "choos[es] up sides"; it does not identify the information and analyses from which the Consultants concluded that 1,027 Plaintiffs did not have viable claims.

A movant for summary judgment must come forward with supporting evidence on any issues on which it would bear the burden at trial, including whether Plaintiffs are exempt. Because the Government has not offered any admissible evidence, the Motion must be denied as to the 1,582 Plaintiffs whom it claims to be exempt.

In addition to the absence of any supporting evidence, the Motion should be denied as to large numbers of supposedly exempt employees for four other reasons. (A) Adjudicators have determined that 14 Plaintiffs really were non-exempt during October 2013. (B) Congress has not excluded 205 Plaintiffs who were Transportation Security Officers, i.e. screeners, with the Transportation Security Administration from minimum wage and overtime protections under the FLSA. (C) 14 other Plaintiffs have submitted evidence reflecting that they were non-exempt.

As the entity with superior access to employment records, the burden of proof also is on the Government with respect to the 211 Plaintiffs whom the Government claims it cannot identify, except for the small number of Plaintiffs who did not provide their full name, agency, component and job title information. The Government is not entitled to summary judgment as to 172 of them because it has failed to explain what it has done to try to locate information about these individuals other than request more information from Plaintiffs. But Plaintiffs have provided the same types of information as to these 172 Plaintiffs as they have for other Plaintiffs; the Government has not shown that what was sufficient for 99% of Plaintiffs is insufficient for the other 1%.

The Government also is not entitled to summary judgment for the other categories of Plaintiffs who it seeks to dismiss even though they would bear the burden of proof at trial. Merely identifying Plaintiffs who it contends did not work October 1-5 or were paid on the Plaintiff's regularly scheduled pay does not suffice. The Government must identify the types of evidence Plaintiffs supposedly will be unable to produce.

But even if the Government had identified the missing evidence, it would not be entitled to summary judgment against many of the 192 Plaintiffs who it claims did not work more than four hours during the October 1-5 period. 35 of the 192 Plaintiffs have created issues of fact by submitting declarations and/or documents indicating that they did work during those five days. Plaintiffs also have presented evidence that all Bureau of Prisons employees who worked in the prisons were "excepted" from furlough. Similarly, 5 of the 396 Plaintiffs who the government claims were paid on their regularly scheduled paydays have submitted evidence creating factual disputes as to that contention.

Plaintiffs have appended a table identifying the objections to the Government's motion applicable to each Plaintiff. Ex. 2 (List of Ineligible Plaintiffs).

ARGUMENT

I. The Court Has Jurisdiction Over the Claims Of All But The under 60 Plaintiffs Whose Filings Reflect That They Were Not Government Employees Or Are Insufficient To Determine Whether They Were Government Employees.

A. The Court Has Jurisdiction Over the Claims of Plaintiffs Who Were Government Employees.

The Government argues that the Court lacks subject matter jurisdiction over the claims of all 2,410 Plaintiffs subject to the Motion because they cannot establish the three requirements for standing: they suffered an injury, the injury was caused by the defendant's conduct that is the subject of the Complaint, and the requested relief will redress the injury. Mot. at 8 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). According to the Government, these Plaintiffs without standing include 211 Plaintiffs "for which the Government cannot confirm the employer-employee relationship because the joinder consent forms contained blank, illegible, or otherwise insufficient identifying information" and 2,199 Plaintiffs "who are ineligible for damages because they do not satisfy the criteria to be eligible to join the collective." Mot. at 11.

Plaintiffs agree that courts lack jurisdiction over FLSA claims of plaintiffs who lack an employment relationship with the defendant. Mot. at 10-11 (quoting *Cavallaro v. UMass Mem'l Health Care, Inc.*, 971 F. Supp. 2d 139, 146 (D. Mass. 2013) (citing *Lucas v. BMS Enters., Inc.*, No. 3:09-CV-2159-D, 2010 WL 2671305, at *3 (N.D. Tex. July 1, 2010)); *Crumbling v. Miyabi Murrells Inlet, LLC*, 192 F. Supp. 3d 640, 644-45 (D.S.C. 2016)). Five Plaintiffs identify employers that are not part of the Government. Ex. 2 at lines 12, 21, 22, 25, 26. At the time of the Motion, 30 of the 211 Plaintiffs whom the Government classifies as Unidentified had not provided usable names or identified their Government agencies, and nine Plaintiffs whom the Government classifies as Unidentified appear from their opt-in information not to be federal employees at all. *See Supra* Part III. Plaintiffs since have provided the Government with additional information, primarily full social security numbers, as to 155 of the 211, including some of the 30. Plaintiffs hope that the Government now will be able to identify all of these 155 Plaintiffs, in addition to any others of the 211 who were federal employees, which will negate the argument that they were Unidentified.

The Government, however, has not cited a single decision holding that a court lacks subject matter jurisdiction over the FLSA claim of an employee merely because the employer contends that the plaintiff cannot meet one of the statutory elements of an FLSA claim. The lack of judicial support is unsurprising because the case law is exactly the opposite. Indisputably, Government employees may bring claims against it under the FLSA's minimum wage and overtime provisions in the Court of Federal Claims. *See, e.g.*, *Abbey v. United States*, 745 F.3d 1363, 1368-72 (Fed. Cir. 2014). In *Abbey*, the appellate court explained that "[t]he Tucker Act grants the court [of Federal Claims] jurisdiction over a nontort monetary claim 'against the United States founded … upon … any Act of Congress.'" *Id.* at 1368-69 (citing 28 U.S.C. § 1491(a)(1)). This jurisdiction

"applies to a claim against the government under the monetary-damages provision of the FLSA, 29 U.S.C. § 216(b)." *Id*. at 1369.

The Government's jurisdictional motion also is at odds with its prior concession in this case. On March 11, 2014, the Government filed a RCFC 12(b)(1) motion to transfer that challenged this court's jurisdiction and a RCFC 12(b)(6) motion that challenged the sufficiency of the Plaintiffs' claims. ECF No. 23 at 1 (Mot. to Transfer and Mot. to Dismiss). After the Federal Circuit's decision in *Abbey*, the Government withdrew its 12(b)(1) motion, recognizing that the Federal Circuit "rejected defendant's argument that the Court of Federal Claims does not have jurisdiction over Fair Labor Standards Act cases." ECF No. 38 at 4 n.5 (Opinion and Order).

The Government tries to evade *Abbey* and its prior concession by suggesting that the Court has jurisdiction over the FLSA claims of Plaintiffs who satisfy all the statutory elements and all the definitional elements in the Order approving the collective action (ECF No. 46), but not over the claims of Plaintiffs who do not satisfy all those elements. Mot. at 13. Such a challenge to compliance with all statutory elements of a claim over which this Court clearly has jurisdiction is properly made pursuant to Rule 12(b)(6) instead of 12(b)(1) at the pleading stage. As one court explained in rejecting a 12(b)(1) motion, "if a defendant were permitted to attack a plaintiff's standing based solely on the whether the plaintiff has sufficiently pleaded the elements of its claims, Rule 12(b)(6) would effectively be swallowed by Rule 12(b)(1)." *Crown Energy, Inc. v. OCS American Capital, LTD.*, No. 13-cv-02076-MSK-KMT, 2014 U.S. Dist. LEXIS 80034, at *3 (D. Colo. June 12, 2014). The analysis should be no different merely because the parties now have access to evidence. In *Kennedy Heights Apts. Ltd. I v. United States*, 63 Fed. Cl. 731 (2005), the Court held that it had jurisdiction because the plaintiff was suing the Government for monetary

damages under a statute, in that case the Multifamily Mortgage Foreclosure Act ("MMFA"), 12 U.S.C. §§ 3701 et seq. *Kennedy Heights*, 63 Fed. Cl. at 735.

Similarly, courts do not lack jurisdiction over the FLSA claims of federal employees because they did not offer sufficient evidence to prove one or more elements of their claims. Paraphrasing *Crown Energy*, "if a defendant were permitted to attack a plaintiff's standing based solely on the whether the plaintiff has presented sufficient evidence establishing each of the elements of its claims, the summary judgment process would effectively be swallowed by attacks on subject matter jurisdiction.

B. Five of the 29 Plaintiffs Worked for Agencies Within the Collective Definition.

The Government wrongly asserts that the Court lacks jurisdiction over the claims of Plaintiffs who worked for agencies outside the collective action definition contained in the Order of October 16, 2014 (ECF No. 46). As explained above, the Court has jurisdiction over their claims, regardless of whether the claims are meritorious.

Moreover, the Government is wrong that five of the 29 Plaintiffs worked for agencies outside the definition. The definition includes employees within the meaning of 29 U.S.C. § 203(e)(2)(A), which in turn encompasses employees of any executive agency as defined in 5 U.S.C. § 105. Section 105 includes employees of "an Executive department, a Government corporation, and an independent establishment."

Three challenged Plaintiffs worked at the Smithsonian. Ex. 2 at lines 4, 23, 28. The Smithsonian is an "independent establishment" of the Government. *See Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289, 296 (D.C. Cir. 1977) (the Smithsonian's "function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an 'independent establishment of the United States,' within the 'federal agency' definition"); *Scherer v. Ripley*, No.

77-1856, 1982 U.S. Dist. LEXIS 17081, at *5-6 (D.D.C. Feb. 11, 1982) (holding that Smithsonian "is an executive agency of the United States within the meaning of 5 U.S.C. § 105"). Hence, these employees have claims under the FLSA and the collective action definition.

A fourth Plaintiff worked for the Export-Import Bank. Ex. 2 at line 18. The Bank "operates as an independent agency of the U.S. Government" with a Board of Directors consisting of "a President and Chairman, a First Vice President and Vice Chair, and three other Directors, all [of whom] are appointed by the President with the advice and consent of the Senate." Fed. Reg., "Export-Import Bank," at https://www.federalregister.gov/agencies/export-import-bank (last visited May 5, 2020). The D.C. Circuit treats the Bank as an independent establishment. *See Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999) (holding that "government corporations such as the Export-Import Bank, must adhere to 42 U.S.C. § 2000e-16: "All personnel actions affecting employees … in executive agencies as defined in section 105 of Title 5 … shall be made free from any discrimination").

The listing for the fifth Plaintiff states that he worked for the "EEOC" in "ICE." Ex. 2 at line 11; Ex. 62 (K. Kelley – Email). The EEOC is an "executive department" within the meaning of 5 U.S.C. § 105 and hence subject to the FLSA under 29 U.S.C. § 203(e)(2)(A)(ii).

C. Nine Plaintiffs Who Worked for Legislative Agencies Are Part of this Case.

The Government correctly asserts that nine Plaintiffs who worked for the Capitol Police and the Architect of the Capitol are not encompassed within the collective action definition[2]. Ex. 2 at lines 1, 3, 8, 9, 10, 13, 16, 19, 27. But that does not mean they should be excluded from the case.

[2] The other ten Plaintiffs whom the Government challenges as employed by an agency not part of the action worked for the U.S. Postal Service. These employees were paid on their regularly scheduled paydays pursuant to an independent source of funding. As such, Plaintiffs have no grounds to oppose their dismissal.

Although the FLSA originally did not cover employees of legislative agencies, "[t]he Congressional Accountability Act [2 U.S.C. § 1313(a)(1)] extends to covered employees the protections of the FLSA codified at 29 U.S.C. §§ 206(a)(1), 206(d) [minimum wage], 207 [overtime], 212(c)." *Macon v. Office of Compliance*, 694 Fed. Appx. 789, 793 (Fed. Cir. 2017). Employees of the Capitol Police and the Architect of the Capitol are "covered employees." 2 U.S.C. § 1301(a)(3)(D), (F).

The Complaint and the two amended complaints (ECF Nos. 1, 13, 29-1, respectively) did not limit the collective to employees within the meaning of 29 U.S.C. § 203(e)(2)(A). Instead, they defined the collective as all federal employees who were excepted during the shutdown and met certain other restrictions. Two of the nine Plaintiffs employed by legislative agencies joined the action prior to certification of the collective on October 16, 2014. They were covered by the FLSA and met the definitions in the then-operative complaints. As the Government itself emphasizes, by opting in they acquired party status. Mot. at 9 (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1807 (3d ed. 2016)). Nothing in the certification Order purported to or did strip them of that status.

The Court-approved notice also did not prevent the other seven legislative agency employees from joining the case. "The purpose of issuing notice in the context of an action under 29 U.S.C. § 216(b) is to provide potentially affected employees the opportunity to 'make informed decisions about whether to participate,' which benefits the judicial system by promoting efficient resolution of 'common issues of law and fact arising from the same alleged discriminatory activity.'" *Crawley v. United States*, 145 Fed. Cl. 446, 450 (2019) (quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). The notice facilitates joinder by recipients; it does not prevent joinder by non-recipients. The legislative agency employees found out about the case

outside the notice. They were covered by the definition of the collective in the operative complaint. They are properly part of the action.

II. The Government's Motion for Summary Judgment Should Be Denied As To The 1,582 Plaintiffs It Claims Are FLSA Exempt Because The Government Has Not Met Its Burden To Prove That These Employees Are Exempt.

A. The Government Must Offer Admissible Evidence to Meet Its Burden of Proof as to Plaintiffs It Claims Are Exempt

The Government's motion for summary judgment should be denied unless the Government can establish that "there is no genuine dispute as to any material fact" and it "is entitled to judgment as a matter of law." *See* RCFC 56(a). In resolving a motion for summary judgment, "[a]ny evidence presented by the opponent is to be believed and all justifiable inferences are to be drawn in its favor." *Baca v. United States*, 29 Fed. Cl. 354, 358 (1993).

A party that bears the burden of proof at trial must support its motion for summary judgment with admissible evidence sufficient to prove that it is entitled to judgment as a matter of law. *See, e.g., Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368-69 (Fed. Cir. 2006). If it fails to meet this burden the motion must be denied, as the burden does not shift to the non-moving party to provide evidence demonstrating a factual dispute. As the Federal Circuit explained:

> A non-movant need not always provide affidavits or other evidence to defeat a summary judgment motion. If, for example, the movant bears the burden and its motion fails to satisfy that burden, the non-movant is "not required to come forward" with opposing evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, … (1970) (citing the advisory committee's note to Fed.R.Civ.P. 56(e)). As the leading commentator on federal procedure puts it, "[i]f the motion is brought by a party with the ultimate burden of proof, the movant must still satisfy its burden by showing that it is entitled to judgment as a matter of law even in the absence of an adequate response by the nonmovant." 11 James Wm. Moore et al., *Moore's Federal Practice* ¶ 56.13[1] (3d ed.2005).

Saab Cars USA, Inc. v. United States, 434 F.3d 1359, 1368 (Fed. Cir. 2006).

The Government bears the burden of proof for each of the 1,582 Plaintiffs it seeks to exclude as FLSA exempt because "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974); *see Astor v. United States*, 79 Fed. Cl. 303, 307 (2007) ("The employer bears the burden of proving by clear and convincing evidence that an employee meets the criteria for an FLSA exemption."); *King v. United States*, 119 Fed. Cl. 277, 283 (2014) ("An employer defending against an FLSA suit seeking unpaid overtime may raise an exemption as an affirmative defense, and the employer has the burden of proving by clear and convincing evidence that the employee meets the criteria for an exemption."), *aff'd*, 627 F. App'x 926 (Fed. Cir. 2016). "Only employees that plainly and unmistakably fall 'within the terms and spirit of the exemption[s]' constitute exempt employees, who are denied FLSA overtime benefits." *Baca v. United States*, 29 Fed. Cl. 354, 359-60 (1993) (citing 5 C.F.R. § 551.202(a)). "[T]o establish that an employee is exempt under the FLSA, defendant, in effect, must overcome a presumption of nonexempt status." *Id.* at 360 (citations omitted).

The Government cannot carry its burden by relying on legal conclusions in a declaration. *See, e.g., Beres v. United States*, 143 Fed. Cl. 27, 66 (2019) ("The court will not consider a declaration purporting to support a motion for summary judgment if the declaration contains statements that are legal conclusions …."). Thus, the Government cannot meet its burden to prove that the 1,582 Plaintiffs are exempt from FLSA coverage by relying on a declaration that merely expresses the conclusion that those plaintiffs are exempt but does not provide the factual basis to demonstrate that they fall within an applicable FLSA exemption. *See, e.g., Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1174 (Fed. Cir. 2017) ("A 'conclusion[] of law' in a declaration 'cannot be utilized [i]n a summary-judgment motion.'") (quoting 10B CHARLES ALAN WRIGHT &

ARTHUR R. MILLER, FED. PRAC. & PROC. § 2738 (4th ed. 2016) (additional citations from five federal courts of appeal omitted); *Berg v. Newman*, 982 F.2d 500, 503 (Fed. Cir. 1992) (reversing holding that employees were FLSA exempt where the Government relied on affidavits that contained conclusory statements that the employees were exempt but did not provide any "factual basis for their conclusions").

Moreover, the Government must rely on admissible evidence to carry its burden. *See, e.g.*, *Beres v. United States*, 143 Fed. Cl. at 66 ("The court will not consider a declaration purporting to support a motion for summary judgment if the declaration contains statements … not based on the declarant's personal knowledge, or [that] would otherwise be inadmissible as evidence."). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." RCFC 56(c)(4). As the court explained in *Bannum, Inc. v. United States*, 59 Fed. Cl. 241 (Fed. Cl. 2003):

> Although evidence presented by a non-movant in relation to a summary judgment motion need not be admissible at trial, *Celotex Corp. [v. Catrett*, 477 U.S. 317,] 324 [(1986)], the Court may not grant summary judgment to a moving party based solely on evidence that arguably may not be adduced and admitted at trial. *Conoco, Inc. v. Department of Energy*, 99 F.3d 387, 393-95 (Fed. Cir. 1997) (vacating a grant of summary judgment based on inadmissible evidence). "Since the burden is on the party moving for summary judgment to demonstrate that there is no genuine issue of material fact, the movant also must show that the content of his affidavits would be admissible at trial." 10B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2738 at 342 (1998).

Bannum, 59 Fed. Cl. 241, 244 (Fed. Cl. 2003).

B. The Government Has Not Submitted Any Admissible Evidence to Meet its Burden to Prove that 853 Plaintiffs Whom the Agencies Supposedly Identified as Exempt Are in Fact Classified as Exempt Employees.

Government agencies, not the Consultants, supposedly identified 853 Plaintiffs as FLSA exempt. But the Government does not explain who made these determinations or what facts they

relied upon. The Government states only that unidentified persons made undisclosed "representations" to the Department of Justice ("DOJ") that 853 Plaintiffs were exempt and that DOJ sent these "representations" to the Consultants. The Government has provided no information regarding the content of these "representations", the person who made them, or the factual bases for the "representations". Not one declaration from an employee of any agency explains how he or she identified which Plaintiffs supposedly were exempt, and the Government provides no documents, declarations, or evidence of any kind regarding the factual basis demonstrating that these Plaintiffs were in fact exempt. No agency employees explain whether they came to their opinions based on personal knowledge concerning the Plaintiffs, whether they reviewed documents, or both. If they reviewed documents, no agency employees identify the types of documents reviewed, the critical information gleaned from these documents, or how that information caused them to conclude that the Plaintiffs were exempt.

The Government has submitted only one piece of evidence in support of its motion: the Consultant Declaration. To support summary judgment, that declaration would have to "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." RCFC 56(c)(4). On its face, the Consultant Declaration does not meet these requirements. The Consultants do not aver that they have personal knowledge of how any of the agencies, let alone all of them, made their determinations. They merely provide a list of the subject Plaintiffs and state the total number of Plaintiffs deemed to be ineligible "according to representations made by the affected Federal agencies, which were sent to us by DOJ." Consultant Decl. ¶ 17.b, d, f. If the Consultants tried to testify at trial about the agency conclusions, their testimony would be excluded as at least double

hearsay[3] because the undisclosed "representations" came to them from an unidentified person at the Department of Justice, who in turn apparently got them from unidentified persons at various the agencies.[4] In sum, the Government has not offered any declaration or other testimony containing admissible evidence.

C. The Consultants' Sample Does Not Provide Evidence to Meet the Government's Burden to Prove that the 853 Plaintiffs Whom the Agencies Supposedly Identified as Exempt Are in Fact Exempt Employees.

The Government cannot gain backdoor admission of the agencies' opinions through the sample that the Consultants performed of information about 118 Plaintiffs. Mot. at 5, 6, 13, 17; Consultant Decl. ¶¶ 18-20 (referring to sample). Based on a communication from the Government's counsel received on May 11, 2020, it appears that under 2/3 of the sample, *i.e.*, under 80 Plaintiffs, were persons who the Government contends were exempt. For the Consultants' reports about the agencies' identifications of 853 Plaintiffs as exempt to be even arguably admissible, the Consultants' discussion of their sample must be admissible. And for the discussion of the sample to be admissible, the Consultants must be able to testify as experts, not as lay witnesses. *See, e.g.*, *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 900 (C.D. Ill. 2017) (explaining that plaintiffs "needed expert testimony or some other competent evidence to show that the information about the [sample] could be applied generally to [the universe]"), *aff'd in part & vac'd in part on other grounds,* 2020 U.S. App. LEXIS 9443 (7th Cir. Mar. 26, 2020); *Long v. Trans World Airlines, Inc*., 761 F. Supp. 1320, 1330 (N.D. Ill. 1991) ("requir[ing]

[3] It is "at least" double hearsay because the Government does not reveal whether the persons who transmitted the conclusions from the agencies to the DOJ were the persons who did the work and reached the conclusions about Plaintiffs' eligibility.

[4] The conclusions also make the tables accompanying the Consultant Declaration inadmissible as summaries of voluminous records under Fed. R. Evid. 1006. *See* Section II.C below.

expert testimony … as to the sample size necessary in order to allow a reasonably accurate determination").

But the Government has not met the procedural requirements for the Consultants to qualify as sampling experts. The Consultants have not: presented the facts or data that they considered in designing the sample from which they opined that they had confirmed the agencies' judgments, RCFC 26(a)(2)(B)(ii); presented any exhibits to support their analysis other than the spreadsheet that comprises Exhibit C, which contains no information about the documents or other facts reviewed, RCFC 26(a)(2)(B)(iii); or presented any qualifications for engaging in sampling or "a list of all publications authored in the previous 10 years," RCFC 26(a)(2)(B)(iv), "a list of all other cases in which, during the previous 4 years, the [Consultants] testified as an expert at trial or by deposition," RCFC 26(a)(2)(B)(v), or "a statement of the compensation to be paid for the study and testimony in the case," RCFC 26(a)(2)(B)(vi). The normal sanction for failure to comply with Rule 26(a)(2) disclosure requirements is exclusion of the testimony of the proffered expert. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 221, 226 (2010); *see Childers v. United States*, 116 Fed. Cl. 486, 598-99 (2013) (excluding expert testimony at trial that consisted of opinion that had not been disclosed as required by Rule 26(a)(2)). Indeed, one of the Consultants, Rodney Bosco, has been excluded as an expert when a party failed to make the required Rule 26(a) disclosures by the deadline. *Roberts v. Scott Fetzer Co*., No. 4:07-CV-80 (CDL) 2010 U.S. Dist. LEXIS 116035, at *29 (M.D. Ga. Sep. 7, 2010).

The Government also has not met the substantive requirements for expert testimony. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a party must show that the methodology of its expert is sufficiently reliable. As the Federal Circuit explained in *Terran ex rel. Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1316 (Fed. Cir. 1999):

"The *Daubert* factors for analyzing the reliability of testimony are: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error and whether there are standards for controlling the error; and, (4) whether the theory or technique enjoys general acceptance within a relevant scientific community." *Id.* at 1316. In particular, a sample "must be based on competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole." *In re Chevron U.S.A.*, 109 F.3d 1016, 1020 (5th Cir. 1997); *see CRA Holdings US, Inc. & Subsidiaries v. United States*, No. 15-CV-239W(F), 2017 U.S. Dist. LEXIS 11068, at *20 (W.D.N.Y. Jan. 26, 2017) (rejecting plaintiff's proposed sampling process "in the absence of an affidavit from one qualified to advise the court on a competent sampling technique for this case").

Here, because the Government has not explained what theory or technique the Consultants used to form their sample, it cannot possibly satisfy, and has not even attempted to satisfy, the four general *Daubert* standards for admissibility or the particular standards set out in *Chevron*. There is thus no basis for the Court to find that the Consultants' methods are sufficiently reliable for their conclusions to be admissible as expert testimony.

D. The Government Has Not Submitted Any Admissible Evidence to Meet its Burden to Prove That 729 Plaintiffs Whom the Consultants Identified as Exempt Are in Fact Exempt Employees.

The Consultants also stated that they identified 729 Plaintiffs who were exempt. However, as in *Berg*, the Consultant Declaration provides only their conclusion that certain Plaintiffs were exempt without any "factual basis for their conclusions that appellants fit within the exemption." *Berg*, 982 F.2d at 503. The declaration states that the Consultants reviewed payroll and time entry data but does not describe what information they identified on these documents or how that

information caused them to conclude that the Plaintiffs were exempt. Without such basic facts, the Consultant Declaration provides nothing more than legal conclusions without any factual basis, which the Federal Circuit has made clear is not sufficient to meet the moving party's burden of proof at summary judgment on the issue of whether employees are FLSA exempt. *See, e.g.*, *Berg*, 982 F.2d at 503.

Moreover, the Consultant Declaration does not provide admissible evidence regarding these 729 Plaintiffs. The Consultants cannot testify from first-hand knowledge, as required by RCFC 56(c)(4), as they do not claim to have first-hand knowledge of the facts relevant to determine whether the 729 Plaintiffs were exempt or non-exempt.

The Consultants also cannot testify as expert witnesses for multiple reasons. As explained above, the Government did not meet the disclosure requirements of Rule 26(a). Moreover, the Government has not explained what techniques or methodology the Consultants used to form their conclusions and has offered no evidence demonstrating that those techniques meet the requirements for admissibility under the *Daubert* factors. More fundamentally, for expert testimony to be admissible under Fed. R. Evid. 702, it must be "beyond the knowledge of the average lay person." *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 7 (2007). The Consultants stated that they formed their conclusions by reviewing payroll and time entry data. That does not require any special expertise, as an average lay person can understand the data. Moreover, even if the Government had satisfied these requirements for its Consultants to provide expert testimony, they could not provide their legal conclusions in the guise of expert testimony, as it is well established that "federal courts have found expert testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible." *Beres*, 143 Fed. Cl. at 66 (quoting *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 7 (2007)). "Expert testimony that

testifies about what the law is or directs the finder of fact how to apply law to facts does not 'assist the trier of fact to understand the evidence or to determine a fact in issue' within the contemplation of Fed. R. Evid. 702." *Beres*, 143 Fed. Cl. at 66 (quoting *Stobie Creek Invs., LLC v. United States*, 81 Fed. Cl. 358, 360 (2008)).

Next, the Consultants' opinions cannot be offered under Rule 701. To be admissible under Fed. R. Evid. 701, the lay opinions must be "helpful to clearly understanding the witness's testimony or to determining a fact in issue." The Advisory Committee Notes indicate that lawyers generally will want a witness to provide the factual bases for lay opinions because "the detailed account carries more conviction than the broad assertion," but if "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by [Rule 701]." Instead of offering testimony that "merely tell[s] the jury what result to reach," *United States v. Rea*, 958 F.2d 1206, 1215-16 (2d Cir. 1992), the witness also has to offer testimony establishing the factual basis for the lay opinion. *See United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006) (holding that testimony describing in detail financial analyst's review of and conclusions concerning over 7000 financial documents, including time records, was admissible under Rule 701). The Government has not offered any such testimony about the bases for the Consultants' conclusions.

Finally, the Consultants' conclusions cannot be admitted as a summary of voluminous records under Fed. R. Evid. 1006 for two reasons. First, "the original or copies of the summarized writings must be made available to the opposing party." *Bannum*, 59 Fed. Cl. at 244–45; *see* Fed. R. Evid. 1006 ("The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place."). The Government has failed to do this. Second, "the proposed summary (or chart or calculation) must accurately summarize (or

reflect) the underlying document(s) and only the underlying document(s)." *Bannum*, 59 Fed. Cl. at 244–45; *see Bath Iron Works Corp. v. United States*, 34 Fed. Cl. 218, 233 (1995) (holding that worksheets are inadmissible as summaries of voluminous writings partly because they "incorporated the subjective judgments or conclusions of the estimators"). Here, conclusions that certain Plaintiffs are exempt are the only information the table contains; nothing reflects the information actually contained in the voluminous documents. Thus, the Consultant Declaration does not purport to be, and it clearly is not, a summary of voluminous documents.

For all these reasons, the Government has failed to provide admissible evidence demonstrating that the 729 Plaintiffs whom the Consultants identified are in fact FLSA exempt. Accordingly, the Government has failed to meet its burden to prove that these employees are exempt and its motion must be denied as to these Plaintiffs.

E. While They Have No Obligation To Do So, 231 of the 1,582 Plaintiffs Have Introduced Legal Arguments or Facts Indicating that They Were Non-Exempt in October 2013

As explained above, because the Government has failed to meet its burden of proof, its Motion should be denied as to the 1,582 Plaintiffs the Government asserts are exempt even if none of those Plaintiffs offered a shred of evidence that they were in fact non-exempt in October 2013. *See Berg*, 982 F.2d at 503 ("Because the Government did not meet its burden of proof, the sufficiency of appellants' evidence is irrelevant"). Nonetheless, a large percentage of the 1,582 Plaintiffs have provided legal arguments or factual evidence directly challenging the Government's unsupported assertion that they are FLSA exempt. Unquestionably, the Government's Motion must be denied as to these Plaintiffs.

1. Fourteen Teachers Employed by the Federal Bureau of Prisons at FCC Coleman and FCC Victorville Were Non-Exempt in October 2013 Pursuant to Labor Arbitration Decisions

Thirteen Plaintiffs were teachers employed by the Federal Bureau of Prisons ("BOP") at the Federal Correctional Complex in Coleman, Florida ("FCC Coleman"). *See* Ex. 2 at lines 914, 973, 1,021, 1,037, 1,279, 1,281, 1,341, 1,387, 1,410, 1,425, 1,427, 1,437, 1,467. In 2015, the union representing the teachers at FCC Coleman filed a grievance alleging that the teachers were non-exempt and entitled to overtime under the FLSA throughout the period covered by the grievance, which extended from 2012 through the date the grievance was resolved.[5] *See* Ex. 4 (Grievance).

In a decision dated September 3, 2017, Arbitrator Alan Lunin concluded that the teachers were not exempt employees because they did not spend most of their time "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge." *See* Ex. 5 (Decision and Award, FMCS No.15-56820-3) at 22. Rather, the arbitrator found that the FCC Coleman teachers spent most of their time performing "'custody-officer type duties' rather than teaching." *Id.* at 23. Accordingly, Arbitrator Lunin concluded that the teachers "are non-exempt and covered by the overtime pay provisions of the [Fair Labor Standards] Act." *Id.*

Similarly, one Plaintiff, Scott Ronney, was a teacher employed by BOP at the Federal Correctional Complex in Victorville, California ("FCC Victorville"). *See* Ex. 2 at line 1,453. In a decision dated November 5, 2009, Arbitrator Ruth Carpenter concluded that the teachers at FCC Victorville were not exempt employees. *See* Ex. 6 (*FCC Victorville and AFGE Local 3969*, FMCS Case No. 09-596071 (Nov. 5, 2009), aff'd, 65 FLRA 539 (Feb. 17, 2011)). The arbitrator explained that they spent only a "few hours a week" teaching and that the teaching responsibilities should not "govern[] the classification and qualification for [the teachers] to be exempt." She

[5] The grievance states that the recovery period begins three years prior to the date the grievance was filed. *See* Ex. 4.

concluded, "The Agency has failed to satisfy the primary duty test to make the Teachers FLSA exempt." *Id.*

The arbitrators' decisions clearly raise at least a genuine factual dispute regarding whether the Plaintiffs employed by BOP as teachers at FCC Coleman and FCC Victorville were non-exempt in October 2013, and as explained in Section II.B-C above the Government has offered no evidence to meet its burden of proving that the teachers at FCC Coleman and FCC Victorville were exempt from the FLSA. Accordingly, the Government's motion should be denied as to these 14 Plaintiffs.

2. The National Weather Service Has Admitted That Meteorological Interns Are Non-Exempt

The Government seeks to exclude one Plaintiff, Kevin Kraujalis, who indicated that he was a meteorological intern for the National Oceanic and Atmospheric Administration (NOAA). However, in response to a 2009 grievance filed on behalf of 236 meteorological interns, NOAA acknowledged that meteorological interns "are not exempt from the FLSA" because they did not qualify for the professional exemption. *See* Ex. 7 (Nov. 25, 2009 Letter Re: Union Grievance regarding FLSA status of 236 Meteorological Interns). The agency admitted that the meteorological interns were non-exempt and entitled to overtime under the FLSA. *Id.*

The agency's 2009 admission clearly raises at least a genuine factual dispute regarding whether Mr. Kraujalis was non-exempt, and as explained in Section II.B-C above the Government has offered no evidence to meet its burden of proving that he falls within any FLSA exemption. Accordingly, the Government's motion should be denied as to this Plaintiff.

3. 205 Transportation Security Officers Are Entitled to Timely Pay of Overtime When They Work More than 40 Hours in a Week

The Government contends that 205 Plaintiffs were Transportation Security Officers ("TSOs") – security screeners – who were exempt under the FLSA. The Government places all TSOs in the FLSA exempt category despite job duties that clearly are non-exempt. The Consultants Declaration indicates that the Government is relying on *Jones v. United States*, 88 Fed. Cl. 789 (2009). *See* Consultants' Decl. at ¶ 17.b.

The *Jones* plaintiffs challenged the Transportation Security Administration's ("TSA") adoption of an overtime compensation policy that calculated overtime pay at 150% of their straight time rate for each overtime hour worked even when they had worked premium shifts, whereas the FLSA requires that premium rates be credited toward overtime compensation. *See* 29 U.S.C. § 207(h). The Court held that because Section 111(d) of the Aviation and Transportation Security Act gave the agency discretion to establish levels of compensation for security screeners "notwithstanding any other provision of law," TSA could establish overtime compensation policy in conflict with the FLSA and that policy would supersede conflicting provisions of the FLSA. *Id.* at 792. The court explained that "Section 111(d) must be interpreted as precluding application of any other ***conflicting*** provisions of law." *Id.* at 792 (emphasis added).

The claims in *Jones* thus were dismissed not because the TSOs were exempt from FLSA coverage but because TSA had exercised its discretion to promulgate an overtime compensation policy that superseded conflicting provisions of the FLSA. This holding does not preclude the claims of TSA plaintiffs in this case because there is no conflict between the FLSA claims asserted here and the compensation scheme adopted by TSA.

In fact, TSA has adopted the FLSA with some modifications. *See* MD 1100.55-8 and Handbook 1100.55-8. The Handbook states that TSA employees may be classified as "FLSA

Exempt" or "Non-Exempt." Handbook § A.17. It provides that minimum wage and overtime provisions apply to TSA employees determined to be FLSA non-exempt, and that a position "is considered non-exempt if it does not meet the exemption criteria defined in Section B3 of this handbook." *Id.* § A.32. The TSA classifies TSOs as "FLSA Non-Exempt." Ex. 65 (Sample TSO SF-50). The Handbook also sets the rate at which overtime will be paid to nonexempt employees consistently with the FLSA, except for the issue litigated in *Jones*. *Id*. § C.3(b). Nothing in the policy or the handbook suggests that the TSA would break with the FLSA requirement that minimum wages and overtime pay be paid on TSOs' regularly scheduled paydays.

The Government cannot evade this result by contending that the TSA did not have to extend the FLSA to TSOs. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Supreme Court established the principle that government agencies must follow policies that they have adopted, even if, in the absence of the policy, they would have had unfettered discretion. In *Accardi*, the Court granted a writ of *habeas corpus* when the Attorney General disregarded applicable procedures for the Board of Immigration Appeals' suspension of deportation orders, explaining that, while internal procedures were in effect, "the Attorney General denies himself the right to sidestep the Board or dictate its decision." *Id.* at 267; *see Vitarelli v. Seaton*, 359 U.S. 535 (1959) (requiring agency to engage in "scrupulous observance of departmental procedural safeguards" in deciding whether to dismiss a government employee on loyalty or security grounds); *Service v. Dulles*, 354 U.S. 363, 373 (1957) (vacating a Foreign Service officer's national security discharge for its failure to follow internal regulations even though the agency had not been obligated to adopt the "rigorous substantive and procedural safeguards" by which it was now bound).

Accordingly, TSOs do not fall within any FLSA exemption and should not be precluded from participating in this case.

4. Eleven Plaintiffs Whom the Government Asserts Were Exempt Have Introduced Facts Indicating that They Were Non-Exempt

Eleven Plaintiffs have introduced evidence through documents, declarations or both indicating that the Government classified them as non-exempt in October 2013, as reflected in the first five columns of the table below:

Plaintiff					**Other Plaintiffs with Same Agency, Component & Job Title**	
Name	**Row**	**Evidence**	**Agency & Component**	**Title**	**Name**	**Row**
Beth Hern	1,161	SF-50 (Ex. 8)	DOJ-FBI	Biometric Images Examiner		
Hsuan Chen	178	Declaration with SF-50 (Ex. 1)	DHS-CBP	Customs & Border Protection Officer	Gerald P. Corrigan Juan P. Gonzalez Nickolas D. Nelson Heath Vanderheck John Larris Samuel Chavez Carl Eadie Robert C. Harer, Jr. Christopher Pike Jose Vidaurri Jon Alexaitis Nazario Baez-Zamorano Robert Magni Robert Williamson Francis T. Lackie Brian Layne Baker Nicholas Rice Anne Rothrock Burke Kirby Xavier Carson Pierre M. Printemps	202 322 577 1,550 1,234 177 253 352 626 1,557 37 60 512 851 460 61 664 138 165 642

Pierre Printemps	642	SF-50 (Ex. 9)	DHS-CBP	Customs & Border Protection Officer	See above	
Anne Rothrock Burke Kirby	138	Declaration (Ex. 10)	DHS-CBP	Customs & Border Protection Officer	See above	
Xavier Carson	165	Declaration (Ex. 11)	DHS-CBP	Customs & Border Protection Officer	See above	
Sarah Allison-Armstrong	898	SF-50 (Ex. 12)	DOJ-BOP	Secretary		
Michael Kurtz	1,228	Declaration with SF-50 (Ex. 13)	DOJ-BOP	Inventory Management Specialist		
Elliott, Lila	1,077	SF-50 (Ex. 14)	DOJ-BOP	Drug Treatment Specialist		
Daniel Carnow	162	SF-50 (Ex. 15)	Commerce-NOAA	Enforcement Officer		
Kevin Kraujalis	1,226	Declaration (Ex. 16)	Commerce-NOAA	Meteorological Intern		
Rhys Michael	553	Declaration (Ex. 17)	DOD-Army	Human Resources Specialist	Alauna Fizer Vance Penn	287 619
Berg, Matthew	1,275	Position Description (Ex. 67)	DOJ-BOP	Chaplain Trainee		
Lozano, Hector	1,275	Position Description (Ex. 68)	DOJ-BOP	Medical Tech	Philip Manfre	1,266
Seese, Billinda	1,455	Declaration (Ex. 71)	DOJ-BOP	Financial Program Specialist	Julie Perkins	1,378

The first column shows the Plaintiff's name and the second indicates the row in the Appendix in which their information appears. The third column states whether the Plaintiff's

evidence is a Standard Form 50 (SF-50), which identifies in box 35 whether the Government classifies the employee as FLSA exempt or non-exempt, or a declaration. The column also identifies the Plaintiff's exhibit number assigned to the SF-50 or declaration. The fourth and fifth column state the Plaintiffs' agency and component and job title, which are the same as appear in Exhibit C to the Consultant Declaration.

The last two columns identify any other Plaintiffs who share the same agency, component and job title, both by name and the row in the Appendix in which their information appears. The Government generally gives the same FLSA classification to all employees in the same agency, component and title. *See* Ex. 1 (Chen Decl.); Ex. 10 (Rothrock Decl.) ¶ 6 (attaching email from HR stating that all CBP Officers are non-exempt). This evidence thus precludes granting the Government's motion by raising a genuine factual dispute as to the exemption status of not only the Plaintiffs who made the declarations or were the subject of the SF-50s but also of the other Plaintiffs who were employed in the same job title at the same agency.

III. The Motion for Summary Judgment Should Be Denied As To 172 Of The 211 Plaintiffs The Government Claims Are Unidentified Because It Has Not Met Its Burden To Prove That These Employees Are Unidentifiable.

The Motion describes an iterative process in which Government agencies seek to identify Plaintiffs based on information provided when they opted in to the case, the Government's lawyer asks Plaintiffs' counsel for additional information about Plaintiffs whom the agencies cannot identify, Plaintiffs' counsel provides as much of the requested information as they can, and the cycle repeats. Mot. at 4-5. The Government claims that, at the time of filing, it or its agencies had been unable to identify 211 Plaintiffs and moved to dismiss or for summary judgment against them.

As a preliminary matter, Plaintiffs provided additional information in May 2020 to the Government for an additional 168 Plaintiffs subsequent to the filing of the Motion.[6] Except in a very few circumstances, this was social security number information beyond the name, organization, location, and job title information that 172 of the 211 Plaintiffs already had provided. Name, organization, location and job title were sufficient for the Government to identify the great majority of Plaintiffs. The Government, not the Plaintiffs, has access to information about the adequacy of the searches that its agencies have performed to attempt to identify these 172 Plaintiffs. It thus would have the burden of proof at trial to establish that these Plaintiffs are unidentifiable based on the provided information. It has failed to provide any information with which to establish the sufficiency of its searches in support of its Motion. The request for summary judgment therefore should be denied.

The burden of proof at trial with respect to an issue generally is placed on the party with superior access to the relevant information. *See, e.g.*, *Medina v. California*, 505 U.S. 437, 455 (1992) (explaining that in deciding on which party the burden of proof should be placed in criminal proceedings, the Court considers, among other factors, "whether the government has superior access to evidence"); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof."). This Circuit adheres to

[6] Initially, the Government identified hundreds of Plaintiffs who it claimed it could not identify. Prior to the filing of the Government's motion, Plaintiffs' counsel provided additional information for many of those individuals so that only 211 remained on the list. On May 8 and May 13, 2020, Plaintiffs' counsel provided additional information to the government for an additional 168 Plaintiffs. Thus, Plaintiffs have provided full social security numbers for the vast number of the 172 Plaintiffs as well as for some of the 39 other Plaintiffs the Government claims it cannot identify because they did not provide names or agencies, or did not work for the federal government. It is Plaintiffs' counsels' understanding that the Government is using this information to identify employment information for these Plaintiffs.

that principle. *See Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 397 (Fed. Cir. 1996) (placing burden on Government partly because it "presumably has superior access to information regarding its negotiations with [two of plaintiff's competitors]"); *Indus. Fasteners Group v. United States*, 710 F.2d 1576, 1582 n.10 (Fed. Cir. 1983) (placing burden on party that "possessed (or could gather) the necessary facts" rather than on opposing party).

Here there is no reason why the burden should not have been on the Government to explain why it could not find records for these 172 Plaintiffs despite being able to do so for the other Plaintiffs who provided the same information. Because the Government made no effort to meet this burden by offering admissible evidence describing the agencies' efforts to identify the 172 Plaintiffs, its motion for summary judgment should be denied as to them as well as to the additional Plaintiffs for whom Plaintiffs have provided the government full social security numbers.

IV. The Court Should Deny Summary Judgment as to the 192 Plaintiffs Who Supposedly Did Not Work During the Shutdown

A. The Government's Motion Should Be Denied Because the Government Failed to Identify its Bases for Contending that Certain Plaintiffs Supposedly Did Not Work During the Shutdown

If this case proceeds to trial, Plaintiffs will have the burden to show that they worked during October 1-5, 2013. Because Plaintiffs will have the burden of proof, the Government was not required to offer any evidence in support of its Motion, and as explained above, it did not. It was required, however, to do more than simply state that certain Plaintiffs supposedly did not work during the shutdown (other than possibly up to four hours) and whether the employing agency or the Consultants identified the supposed deficiency. Instead, the Government was required to identify its basis for its contention as to each Plaintiff so challenged.

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court explained that a moving party that would not bear the burden of proof at trial still "bears the initial responsibility

of informing the district court of the basis for its motion, and ***identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact***." *Id.* at 323 (emphasis added). Justice White, whose concurrence carries special weight because he provided the fifth vote for the majority, added, "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." *Id.* at 328 (White, J., concurring).

While holding that the movant in *Exigent Tech. v. Atrana Solutions, Inc.*, 442 F.3d 1301 (Fed. Cir. 2006), a patent infringement case, had met this minimal standard, the Federal Circuit indicated that it took seriously the *Celotex* requirement that the movant identify the portions of the record that indicated the absence of a genuine issue. The appeals court explained that the alleged infringer's motion must minimally state "that the patentee had no evidence of infringement and ***point[] to the specific ways in which accused systems did not meet the claim limitations***." *Id.* at 1308-09. In that case, the movant met its burden through detailed allegations about the evidence of infringement that the movant would not be able to establish. *Id.* at 1309. In this case, the Government was required to do more than list in a conclusory manner that certain Plaintiffs did not work during the shutdown or were paid timely. Rather, it had to at least point to the specific types of evidence that Plaintiffs would not be able to proffer to show that they worked or were not paid on their regularly scheduled paydays. See *Eon-Net LP v. Flagstar Bancorp*, 249 Fed. Appx. 189, 194 (Fed. Cir. 2007) (reversing summary judgment when basis of grant of motion was different than basis stated in motion). This the Government failed to do.

B. 38 Plaintiffs Have Introduced Facts Particular to Them Indicating that They Worked During the Shutdown

Even though it is unnecessary because the Government did not make the showing necessary for Plaintiffs to respond to its Motion, 38 of the 192 Plaintiffs who, according to the Government, did not work during the Shutdown have submitted evidence – through declarations, documents, or both – that they worked more than four hours between October 1 and October 5, 2013. Some of them even supported their declarations with declarations from other people with personal knowledge that they worked during this period. The table below summarizes the evidence:

Plaintiff				
Name	**Row**	**Evidence**	**Agency & Component**	**Title**
Dena McMillian	1,644	Declaration (Ex. 18)	Treasury-IRS	Accounts Manager/ICT
Tyrone English	1,627	Declaration (Ex. 19)	Treasury-IRS	Staffing Assistant
Sharon Otey	1,650	Declaration (Ex. 20)	Treasury-IRS	IT Specialist
Tulan Hu	1,728	T&A Records and Emails (Ex. 56)	Treasury-IRS	Lead IT Specialist
Janet Ruszkowski	1,772	Declaration (Ex. 21); Supporting Declaration (Ex. 22)	FDA-Agricultural Marketing Service	Legislative & Regulatory Assistant
Jose Cerda	1,690	Declaration (Ex. 23); Supporting Declaration (Ex. 34)	FDA-APHIS PPQ	Purchasing Agent
Anthony Rivera	1,768	Declaration (Ex. 24)	DOJ-BOP	Senior Correctional Officer
James Drinkard	1,708	Declaration (Ex. 25)	DOJ-BOP	Inmate Counselor
Edward Drew Pearce	1,759	Declaration (Ex. 26)	DOJ-BOP	Gardener Supervisor
Christopher Barton	1,680	Declaration (Ex. 27)	DOJ-BOP	Special Investigative Technician
Patrick Reeves	1,766	Declaration (Ex. 28)	DOJ-BOP	Pipe Fitter Supervisor

Sandra Davis	1,703	Declaration (Ex. 29)	DOJ-BOP	Administrative Assistant
Rita Sackett	1,773	Declaration (Ex. 30)	DOJ-BOP	Case Manager
Joseph Adams	1,671	Declaration (Ex. 31)	DOJ-BOP	Recreation Specialist
Damien Nicholson	1,755	Declaration (Ex. 32)	DOJ-BOP	Cook Supervisor
Jorge Rivera	1,769	Declaration (Ex. 33)	DOJ-BOP	Paint Shop Supervisor
Jacqueline Daniel	1,700	Declaration (Ex. 35)	DOJ-BOP	Cook Supervisor
Kenneth Lowe	1,741	T&A Records (Ex. 36)	DOJ-BOP	Corrections System Officer
Robert Nichols	1,754	Declaration (Ex. 37)	DOJ-BOP	Senior Officer
Michael Anderson	1,674	Supporting Declaration (Ex. 38)	DOJ-BOP	Correctional Officer
Richard Lund	1,742	Declaration (Ex. 39)	DOJ-BOP	Senior Officer Specialist
Timothy Hunnell	1,723	Declaration (Ex. 40)	DOJ-BOP	Correctional Officer
Mark Vandenburg	1,790	Declaration (Ex. 41)	DOJ-BOP	Electronics Technician Trainee
Scott Cusick	1,699	Earnings and Leave Statement (Ex. 58)	DOJ-BOP	Senior Correctional Officer
Brenda Hutchison	1,730	Declaration (Ex. 59)	DOJ-BOP	Correctional Counselor
Sean Farrell	1,628	Declaration (Ex. 42)	Library of Congress-Congressional Research Service	Congressional Relations Specialist
Betty Lupinacci	1,642	Declaration (Ex. 43)	Library of Congress-Law Library	Library Technician
Agnieszka Pukniel	1,652	Declaration (Ex. 44)	Library of Congress-Law Library	Library Technician/Messenger
Mary Schmitz	1,774	Declaration (Ex. 45)	USDA-FSIS	Consumer Safety Inspector
Benny Douglas	1,707	Declaration (Ex. 46)	USDA-FSIS	Consumer Safety Inspector
Robert Moore	1,645	Earnings and Leave Statement (Ex. 57)	USDA-FSIS	Consumer Safety Inspector
Deborah Winograd	1,800	Declaration (Ex. 47)	FDA-APHIS PPQ	Biological Technician

Christine Bishkoff	1,681	Declaration (Ex. 48)	DHS-FEMA	Disaster Assistant
Michael Chavful	1,692	Declaration (Ex. 49)	DHS-ICE	Deportation Officer
Dione Gray	1,720	Declaration (Ex. 50)	DOD-Army Corps of Engineers	Supervisory Contract Specialist
Simon, Anthony	1,781	Declaration (Ex. 60)	DOJ-BOP	Case Manager
Terrones, Robert	1,789	Supporting Declaration (Ex. 69)	DOJ-BOP	Senior Officer Specialist/Correctional Officer
Morris, Melody	1,751	Declaration (Ex. 70)	DOJ-BOP	Exec./DCA Secretary

This evidence creates disputed issues of fact, precluding summary judgment as to these 38 Plaintiffs.

C. Plaintiffs Also Have Established Genuine Issues of Fact as to Numerous Plaintiffs at the Federal Bureau of Prisons

Even if the Government's Motion meets the minimal standard enunciated in *Exigent*'s interpretation of *Celotex* – which it does not for the reasons set out in Section IV.A above – the Government's failure to introduce any admissible evidence in support of the Motion makes it relatively easy for Plaintiffs to establish the existence of genuine issues of material fact and thereby defeat the Motion for employees in the Federal Bureau of Prisons. In resolving a motion for summary judgment, the Court "must view the evidence in the light most favorable to the nonmovant" and "draw all reasonable inferences in favor of the nonmovant." *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 202 (Fed. Cir. 1992). "The burden on the nonmoving party is not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. The nonmovant does not need to show that the dispute as to material facts will be resolved in its favor[.]" WRIGHT & MILLER, *supra* § 2727.2 (4th ed.). Because the Government has presented no evidence in support of its assertions, Plaintiffs do not need to overcome any evidence to "present a genuine issue worthy of trial."

Plaintiffs need not engage in the virtually impossible task of presenting direct evidence concerning each of the Plaintiffs whom the Government is challenging. As one district court explained in ruling on a summary judgment motion, "to the extent that evidence is representative of each non-stayed plaintiff's work, the Court will consider it as being relevant to said plaintiff's claims. To the extent the evidence is not representative, though, it will only be considered as relevant to the specific plaintiff to whom it applies." *Sanchez v. Simply Right, Inc.*, No. 15-cv-00974-RM-MEH, 2017 U.S. Dist. LEXIS 77513, at *19 (D. Colo. May 22, 2017).

Plaintiffs' evidence is sufficient to create a genuine issue regarding whether each of the 94 Plaintiffs employed by the Department of Justice's Bureau of Prisons whom the Government challenges as not working between October 1 and October 5 actually did work. Nineteen of them were among the Plaintiffs who have submitted declarations. Shortly before the shutdown began, the DOJ announced that all BOP employees at the prisons (as opposed to regional and headquarters employees) were "excepted" from the furlough:

> All staff at the Federal prisons, including Public Health Service Officers necessary to provide medical care of inmates, are considered excepted since they have direct daily inmate custody responsibilities.… Regional and headquarters support will be maintained only to the extent necessary to support excepted operations. BOP's Buildings and Facilities, Prison Industries and Commissary accounts have multi-year authority and should have adequate carry over funding to meet expenses during a lapse in appropriations.

Todd A. Bussert, "Government Shutdown and the BOP," (Oct. 1, 2013), at https://www.federalprisonblog.com/government-shutdown-bop (last accessed May 3, 2020); *see also* Nat'l Public Radio, "Federal Prison Workers Dismayed By Government Shutdown," (Oct. 9, 2013), at https://www.npr.org/2013/10/09/230639677/federal-prison-workers-dismayed-by-government-shutdown (last accessed May 3, 2020) ("Our federal prison employees, for instance, all have to go into the facilities and work with inmates during this time."). Plaintiff declarations

confirm that in 2013 the Government designated BOP employees at the prisons as excepted and required them to work. Ex. 61 (Parr Decl.) ¶ 3.

Their work locations reflect that almost all of the 94 Plaintiffs worked in the prisons rather than BOP's regional or headquarters offices. It is, of course, likely that a few Plaintiffs assigned to the prisons were on medical leave or for other reasons did not work between October 1 and October 5, 2013. The information from documents and declarations submitted by the 19 Plaintiffs, however, refute any hypothesis that all of the 94 BOP employees were on leave or for other reasons did not work; each of the declarants did work between October 1 and October 5. As discussed above, the Court must draw all justifiable inferences in Plaintiffs' favor at this stage of the case. Until the Government presents evidence to the contrary, it is justifiable to infer that each of these 94 Plaintiffs were excepted and worked between October 1 and October 5.

In sum, many of the 192 "did not work" Plaintiffs have provided evidence, either directly or through representational evidence, that they worked October 1-5, 2013. Even if the Government met its minimal obligations under *Celotex* and *Exigent* – which Plaintiffs dispute – it at most is entitled to summary judgment against only the Plaintiffs who supposedly did not work during these five days.

V. The Court Should Deny Summary Judgment as to the 396 Plaintiffs Who the Government Claims Were Paid on Time During the Shutdown

A. The Government's Motion Should Be Denied Because the Government Failed to Identify its Bases for Contending that Certain Plaintiffs Were Paid on Their Regularly Scheduled Payday During the Shutdown

If this case proceeds to trial, Plaintiffs will have the burden to show that they were not paid on their regularly scheduled payday for their work performed October 1-5, 2013. As explained in Section IV.A above, because Plaintiffs will have the burden of proof, the Government did not have to offer evidence in support of its Motion, but under *Celotex* and *Atrana* it did have to do more

than simply state that certain Plaintiffs supposedly were paid timely during the shutdown and whether the employing agency or the Consultants identified the supposed deficiency. And just as it failed to satisfy this minimal burden with respect to Plaintiffs who supposedly did not work during those five days, so too it failed to meet its obligations with respect to the 396 Plaintiffs who supposedly were paid on time. For this reason, summary judgment should be denied as to all 396 Plaintiffs.

B. 6 Plaintiffs Have Introduced Facts Particular to Them Indicating that They Worked During the Shutdown

6 of the 396 Plaintiffs who, according to the Government, were paid on their regularly scheduled payday for their work performed October 1-5, 2013 have submitted evidence that they actually were not paid then for that work. The table below contains the same types of information as the table for Plaintiff challenging the assertion that they did not work:

Plaintiff				
Name	**Row**	**Evidence**	**Agency & Component**	**Title**
Name	**Row**	**Evidence**	**Agency & Component**	**Title**
Michael Vicars	2,191	Declaration (Ex. 51)	HHS-Admin. for Children & Families	Program Manager
Robert Della Vecchia	2,190	Declaration (Ex. 52)	HHS-Centers of Medicare & Medicaid Servs.	IT Specialist
Debra Jones	1,907	Declaration (Ex. 53)	DOD-DLA Dep't	Customer Supply Specialist
Karen Buchanan	1,826	Declaration (Ex. 54)	DOD-USAF	Closed Microphone Court Reporter
Mona Chaney	2,056	Declaration (Ex. 55)	USDA-FSIS	Food Inspector
Williams, Leslie	1,798	Supporting Declaration (Ex. 66)	DOJ-BOP	Correctional Officer

Three other Plaintiffs who the Government contends were paid on time were, like Ms. Chaney, food inspectors at USDA-FSIS. Agencies were forbidden by law to pay employees except

in certain narrow circumstances that clearly did not apply to her.[7] This creates a reasonable inference that these employees also were not paid on time. Again, this type of evidence creates disputed issues of fact, precluding summary judgment as to these 9 Plaintiffs.

CONCLUSION

The Government's motion to dismiss and for summary judgment is seriously flawed both procedurally and substantively. Plaintiffs have identified one or more reasons to deny the Motion for almost all Plaintiffs as identified in Exhibit 2. The Court should deny the Motion as to at least all those Plaintiffs.

If, however, the Court is inclined to grant summary judgment to the Government, Plaintiffs request that they be allowed 90 days to conduct discovery prior to dismissal. The Government and its Consultants have had over two years to prepare the Motion. Plaintiffs would be in a far better position to oppose the Motion with access to the documents on which the Government relied and, perhaps, to conduct several depositions.

[7] They are Javier Garcia (row 2,081), Wanda Patten (row 2,149), and Alicia Rodgers (row 2,158).

Respectfully submitted,

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May 21, 2020

CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I served a copy of Plaintiff's Opposition to Defendant's Motion to Dismiss via electronic mail to the Agency's representative:

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