IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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Pursuant to this Court's orders dated May 26, 2020, Dkt. No. 224, and August 20, 2020, Dkt. No. 229, defendant, the United States, respectfully submits this reply in support of its motion to dismiss or, in the alternative, motion for summary judgment. *See* Dkt. No. 205.

ARGUMENT

I. Introduction

As relevant to this motion, on October 16, 2014, the Court found that the United States had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219,[1] when it failed to pay its employees on their regularly scheduled paydays during the 2013 lapse in appropriations. Dkt. No. 46 at 1, 2. The parties jointly proposed, Dkt. No. 45-1 at 1, and the Court adopted, the following definition of the FLSA collective action in this case:

> 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

[1] In various orders and filings, the Court and the parties refer to either the "collective" or "class" definition in this case. *See, e.g.*, Dkt. No. 25 ¶ 1. Although the United States primarily refers to the "collective," it uses the terms interchangeably.

> scheduled payday for that work between October 1 and October 5, 2013.

Dkt. No. 46 at 1, 2 (italics added); *see Martin v. United States*, 130 Fed. Cl. 578, 581 (2017).

The Court instructed the United States to identify individuals who met all elements of the collective, and to inform the Court of those who met that definition, including identifying agencies or components that contended that they had no employees who fit the definition. Dkt. No. 46 at 3-4. The United States did so, and in the manner explained by the Government's status reports, various agencies and components issued notice to the putative members of the collective in early 2015. *See* Dkt. Nos. 50, 54, 56, 58, 59, 61, 63, 66, 72, 76, 89.

On February 13, 2017, the Court found the United States liable for FLSA liquidated damages for both minimum wages and overtime wages. Dkt. No. 160 at 8; *see Martin*, 130 Fed. Cl. at 588. The Court ordered *plaintiffs* to "calculate the amount due from the defendant, delineated either by individual class member or by relevant categories of class members," and then to "submit a draft of their damages calculations to defendant" for discussion. Dkt. No. 160 at 13. The parties jointly requested an extension and agreed to engage a "consultant with expertise in calculating FLSA damages" to perform these calculations. Dkt. No. 162. Further, as the parties explained, the United States had "identified a consultant with such expertise who is acceptable to counsel for plaintiffs," *id.* at 1: Chess Consulting (Chess). *See, e.g.*, Rev. Chess Decl. ¶ 6 (explaining that the United States retained Chess in March 2017); Dkt. No. 164 (April 2017 status report). Since March 2017, the parties have utilized Chess to determine damages eligibility and to calculate liquidated damages. *See id.*; *see also* Dkt. No. 216.[2]

[2] "Mot. _" refers to the United States' motion, and "Chess Decl." refers to the declaration of Chess Consulting attached thereto. Dkt. Nos. 205, 205-1. "Def. Ex. _" refers to the exhibits attached to this reply, and "Rev. Chess Decl." refers to the updated Chess declaration, also attached as Exhibit A; Chess's declaration exhibits are referred to as "Rev. Chess Decl. Ex.__."

In its motion to dismiss or, alternatively, for summary judgment, the United States requested dismissal or summary judgment against 2,410 individuals who had filed a consent to join this action: 211 Unidentified Plaintiffs[3] and 2,199 Ineligible Plaintiffs. *See generally* Mot. In advance of filing its motion, counsel for the United States engaged plaintiffs' counsel in extensive discussions regarding the opt-ins covered by the United States's motion, attempting to avoid disturbing the Court with its motion at all. The United States repeatedly tried to reach agreement with plaintiffs to dismiss questionable opt-ins absent further Court involvement so that Chess could finalize its damages calculations; but for the possible inclusion of the opt-ins subject to the motion, damages calculations are now complete.

On several occasions, the United States has presented Chess's damages calculations to plaintiffs, and aside from limited questions and clarifications that the United States addressed, plaintiffs have not contested the calculations. After including into damages the claims of the opt-ins subject to its motion for whom plaintiffs provided sufficient further information in their response, the United States has reached what it considers to be the final damages amount in this case. On August 28, 2020, the United States presented that amount to plaintiffs.

In their response, plaintiffs provide, for the first time, adequate additional information on only 116 opt-ins sufficient for the United States to either (1) confirm an employment relationship with the opt-in or (2) to reconsider whether that opt-in is eligible for damages. *See* Rev. Chess

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Similarly, "Resp. _" refers to plaintiffs' opposition to defendant's motion, and "Resp. Ex. _" refers to the exhibits attached thereto. Dkt. Nos. 222, 222-1.

[3] The United States uses the same definitions of Unidentified Plaintiffs and Ineligible Plaintiffs that were used in its motion, but we have updated the number of opt-ins who either (1) provided identifying information sufficient for the United States to confirm an employment relationship or (2) provided information sufficient to challenge their exclusion from damages calculations. *See* Mot. 4-6; Rev. Chess Decl. ¶¶ 8, 19-25, Exs. A-D. As the United States explained in its motion, however, just because a plaintiff is eligible for damages, does not mean that he or she will receive any damages; the calculated damages may be none. *See* Mot. 6 n.3.

Decl. ¶¶ 23-25, Ex. D. Plaintiffs, however, do not acknowledge that their dilatoriness and inability to properly identify all opt-ins who filed consent forms with the Court necessitated this entirely avoidable motion. Instead, plaintiffs make frenetic attempts to forestall the dismissal of the 2,319[4] opt-ins that remain subject to our motion, comprising 134 Unidentified Plaintiffs and 2,183 Ineligible Plaintiffs. *See id*. ¶¶ 19-25, Exs. B, C, D. As set forth below, the claims of these Unidentified Plaintiffs and Ineligible Plaintiffs should be dismissed.

First, in its motion, the United States respectfully requests the Court to dismiss 211 Unidentified Plaintiffs. In response, plaintiffs provided no information at all as to 57 of the unidentifiable opt-ins, and at a minimum, those opt-ins must be dismissed as unidentifiable. Plaintiffs provided, for the first time, further information for 153 of those opt-ins.[5] The United States duly sought to verify the employment status of these 153 Unidentified Plaintiffs by requesting data from their self-identified agencies, and in some cases, was able to verify employment. Of the 76 Unidentified Plaintiffs whose employment status was confirmed, 56 were added to the damages calculations and 20 were moved to Ineligible Plaintiff status. Rev. Chess Decl. ¶¶ 21(a), 24(a), (c). There are now 134 Unidentified Plaintiffs[6] (0.01 percent of all

[4] This 2,319 number also includes two duplicates previously listed as Unidentified Plaintiffs, who were identified as duplicates after Chess received their full social security numbers. Rev. Chess Decl. ¶ 21(c). The parties previously jointly moved to dismiss 1,050 duplicate claims, Dkt. No. 208; *see* Rev. Chess Decl. ¶¶ 18, Ex. A, and the United States informed plaintiffs of these additional duplicate entries on August 20, 2020. Although the United States continues to respectfully request the dismissal of those two duplicates from this case, it does not provide further argument on their inclusion in this motion, and instead adds them to the total number of opt-ins for whom it requests dismissal.

[5] Plaintiffs assert in their response that they provided to the United States additional information on 155 of those opt-ins. Resp. 7. Based upon the two spreadsheets sent to the United States in May 2020, however, they provided additional information on only 153 of the Unidentified Plaintiffs. Rev. Chess Decl. ¶ 20 n.1.

[6] The United States added one Unidentified Plaintiff and two Ineligible Plaintiffs. Rev. Chess Decl. ¶¶ 22 n.3, 23(c) n.5. If the Court determines that adding these opt-ins to this reply is

opt-ins) that we respectfully request the Court to dismiss because they fail to demonstrate that they have Article III standing and that the Court has jurisdiction over their claims.

Despite having been afforded multiple opportunities to do so, these individuals who filed consents to join this action have not established, and apparently cannot establish, the most basic of the five elements of the collective as ordered by the Court: that they were Federal employees in October 2013. Plaintiffs' legal argument for the inclusion into the collective of these 134 Unidentified Plaintiffs is effectively that, because each filed a consent to join form, they necessarily are members of the collective, supposedly shifting the burden to the United States to produce evidence to the contrary. But *plaintiffs* bear the burden to demonstrate that each opt-in had an employment relationship with the United States and that they meet all defining elements of the collective; the United States does not bear the burden to prove these most fundamental aspects of plaintiffs' case. Because plaintiffs fail to produce any declarations or documents supporting the claims of these 134 Unidentified Plaintiffs, they fail to meet their threshold burden of establishing their membership in the collective and should be dismissed.

Second, in its motion, the United States respectfully requests the Court to dismiss 2,199 Ineligible Plaintiffs. In response, plaintiffs do not provide any support for the claims of 2,067 of these Ineligible Plaintiffs, and at a minimum, those opt-ins should be dismissed for failing to have established that they belong within the collective. Plaintiffs raised various legal arguments and attached information in support of the claims of no more than 132[7] of those individuals.

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inappropriate, the United States will file a separate motion to dismiss their claims. Plaintiffs can address these three additional op-ins in their sur-reply, which the Court has granted them permission to file, and thus are not prejudiced. Dkt. No. 229.

[7] By counting the entries in the "Plaintiffs' Counsel Challenge Based On" column in plaintiffs' response exhibit two, the United States determined that 132 plaintiffs (5.5 percent of the plaintiffs subject to the motion) were identified as included within one of plaintiffs' exhibits.

After reviewing the information provided by plaintiffs and seeking further data from agencies, as well as moving 20 Unidentified Plaintiffs into this category and adding two other opt-ins, there are 2,183 Ineligible Plaintiffs (8.5 percent of all opt-ins) that we respectfully request the Court to dismiss. Rev. Chess Dec. ¶¶ 23, 24(c). Because these 2,183 Ineligible Plaintiffs cannot meet each element of the collective, this Court lacks jurisdiction over their claims. They include:

1. 30 opt-ins who were not Federal employees pursuant to 29 U.S.C. § 203(e)(2)(A), contrary to element (a) of the collective;
2. 1,588 opt-ins who were FLSA exempt or not covered by the FLSA at all as of October 1, 2013, contrary to element (b) of the collective;
3. 167 opt-ins who did not work for more than four hours between October 1-5, 2013, contrary to element (d) of the collective; and
4. 398 opt-ins who were paid on their regularly scheduled paydays for work performed between October 1-5, 2013, contrary to element (e) of the collective.

See Rev. Chess Decl. ¶¶ 23-25.

Plaintiffs' arguments attempting to forestall dismissal of these Ineligible Plaintiffs raise no genuine question of material fact. Many of plaintiffs' arguments instead center around requesting that the Court amend the definition of the collective that plaintiffs jointly proposed to the Court and that the Court adopted in 2014—including adding to the collective definition those opt-ins excluded from section 203(e)(2)(A), as well as those opt-ins who were not, on October 1, 2013, classified as FLSA non-exempt. Plaintiffs, however, waived their opportunity to broaden the collective definition when jointly proposing to the Court a narrower definition than they proposed in their original and amended complaints, and the Court should not expand the definition now. Nor should the Court permit plaintiffs to amend their complaint to add to this case dissimilarly situated opt-ins. Further, much of the information provided as attachments to plaintiffs' response is unpersuasive and should not be considered to raise any genuine factual

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Of those, only 67 plaintiffs (2.8 percent of those subject to the motion) introduced facts particular to their claims. *See* Resp. §§ II(E)(1), (2), (4), IV(B), V(B).

dispute for multiple reasons; rather, if the information provided demonstrated that an opt-in was similarly situated and damages eligible, he or she was added to the damages model. The Court should find plaintiffs' arguments on the inclusion of these 2,183 Ineligible Plaintiffs meritless.

Finally, plaintiffs' arguments on the evidence that the United States presents are unavailing. Plaintiffs wrongly insinuate that the United States acted improperly when gathering the underlying data, and they attack Chess's analysis as invalid, despite agreeing to use Chess for these purposes and having had full opportunity to examine and to discuss with Chess the approach and analysis that the parties, jointly, have been using for years. In an attempt to skirt their failure to provide information rebutting the United States's analysis and evidence, plaintiffs also assert that Chess's summarization and analysis of the data collected by the United States, presented through declaration, is hearsay. But plaintiffs must prove, or at least for the purposes of this motion, provide some evidence, that they belong within the collective and are eligible for damages. The United States need not prove the negative, that plaintiffs do not belong or are ineligible for damages, and the United States may carry its burden by establishing the lack of evidence to support plaintiffs' claims. In any event, the United States acted in good faith to collect data from affected agencies, and Chess's declarations are subject to several hearsay exceptions, making them admissible. With the exception of the opt-ins who were added to the damages calculations, plaintiffs failed to provide sufficient rebuttal evidence.

Implicit in plaintiffs' challenge is that, despite their full participation in this years-long damages calculations process, they desire to start over and to take a different approach to calculating damages because the United States has determined that not all individuals who filed opt-in consent forms properly belong within the defined collective. But plaintiffs' actions, and inactions, have resulted in their waiver of challenges to Chess's conclusions on the Unidentified

Plaintiffs and the Ineligible Plaintiffs. On several occasions, the United States presented to plaintiffs Chess's analysis, and made no attempt to hide its data collection efforts or methods. Rather, plaintiffs knew how and why Chess determined individuals to be unidentified or ineligible for damages, and had only to ask the United States for the underlying data to review it. But plaintiffs effectively absented themselves from the damages calculations effort. Despite numerous requests for them to do so, plaintiffs repeatedly failed to provide requested information on the Unidentified Plaintiffs. Likewise, despite ample opportunity to do so, plaintiffs raised no specific challenges to the categorization of particular Ineligible Plaintiffs. They should not be permitted to do so now. Alternatively, plaintiffs should be equitably estopped from challenging Chess, because the United States reasonably relied upon plaintiffs' actions and inactions. The Government would suffer extreme prejudice if—three-and-a-half years into conducting this analysis—plaintiffs, through their own inattention, get to restart the process. Moreover, plaintiffs have not demonstrated what they would, or even could, do differently. Considering that plaintiffs refused to voluntarily dismiss the opt-ins subject to our motion from the case, the United States was left with no choice but to seek relief from the Court to dismiss their claims.

Because plaintiffs fail to raise any genuine question of material fact with respect to the 2,319 opt-ins subject to the United States's motion, their claims should be dismissed.

II. 134 Unidentified Plaintiffs Do Not Show That They Have An Employment Relationship With The United States Or That They Meet Any Element Of The Collective Definition

A total of 134 Unidentified Plaintiffs do not demonstrate that they have an employment relationship with the United States, nor that they meet any of the five elements of the collective, and therefore their claims must be dismissed.

To establish the Court's jurisdiction to hear their claims, plaintiffs must first meet the threshold constitutional requirement of demonstrating Article III standing for *each* opt-in plaintiff. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016); *Argentum Pharm. LLC v. Novartis Pharm. Corp.*, 956 F.3d 1374, 1376 (Fed. Cir. 2020); *see* Mot. 10-11. If a plaintiff fails to establish Article III standing, the Court lacks jurisdiction over the plaintiff's claim. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (court may not decide cause of action before resolving whether it has Article III jurisdiction); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause."); *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (explaining that standing is a threshold jurisdictional issue).

To establish Article III standing in an FLSA case, plaintiffs must show (1) employment by the defendant and (2) an injury-in-fact caused by the defendant: "[u]nder the FLSA, alleged employees' 'injuries are only traceable to, and redressable by, those who employed them.'" *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 404 (N.D. Cal. 2017), *aff'd*, 932 F.3d 905 (9th Cir. 2019) (citing *Roman v. Guapos III, Inc.*, 970 F. Supp. 2d 407, 412 (D. Md. 2013)). "[T]he question of a plaintiff's standing turns on whether she has sufficiently alleged that she was 'employed' by defendants, as that concept is interpreted in the context of the FLSA." *Cavallaro v. UMass Mem'l Health Care, Inc.*, 971 F. Supp. 2d 139, 146 (D. Mass. 2013); *see also Crumbling v. Miyabi Murrells Inlet, LLC*, 192 F. Supp. 3d 640, 644 (D.S.C. 2016) ("[T]he Court must conduct an employer analysis to determine whether Plaintiffs may trace their injuries to each Defendant."). Because the 134 Unidentified Plaintiffs have failed to establish an employee-employer relationship with the United States, they must be dismissed for lack of standing. *See* Mot. 11-13; Rev. Chess Decl. ¶¶ 19-22, Ex. B.

In addition to establishing Article III standing, plaintiffs also bear the burden of establishing a plausible claim under the FLSA, and showing that *each opt-in plaintiff* actually meets the requirements to opt-in. *See Colozzi v. St. Joseph's Hosp. Health Ctr.*, 275 F.R.D. 75, 93 (N.D.N.Y. 2011) ("an opt-in plaintiff to the FLSA collective action must still meet the requirements to *opt-in*." (italics in original)). In other words, each FLSA opt-in plaintiff must demonstrate that they are "similarly situated" to show that they meet the elements of the court-established collective before they can show eligibility for damages. *See* 29 U.S.C. § 216(b) ("[a]n action . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1258 (11th Cir. 2008) (recognizing that only similarly situated employees may affirmatively opt-in to FLSA collective actions); *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 226 (3d Cir. 2016) ("[T]he named plaintiffs bear the burden of showing that the opt-in plaintiffs are 'similarly situated' to them for FLSA purposes."); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006) (explaining "[s]imilarly situated persons are permitted to 'opt into' the [FLSA collective action] suit."). Because individuals who do not meet the collective definition are not "similarly situated" to members of the collective, they are not part of the collective and should not have opted-in. Thus they must be dismissed.

In response to our arguments as to why the Unidentified Plaintiffs should be dismissed from this case, plaintiffs provided limited support for their claims. Plaintiffs explain that they provided to the United States "additional information, primarily full social security numbers, as to 15[3] of the 211" Unidentified Plaintiffs. Resp. 7; *see* Rev. Chess Dec. ¶¶ 20 n.1. As a threshold matter, plaintiffs concede that they provided no further information to support the claims of 58 of these Unidentified Plaintiffs, and thus their claims should be dismissed. Indeed,

some of those consents filed with the Court fail to provide any recognizable Federal agency or even a full name, and there is no conceivable basis by which the United States could even confirm an employment relationship. *See, e.g.*, Resp. Ex. 3 at 81, line 2 (showing no employing agency); *id*. at 82, line 38 (listing no first or last name).

To determine whether the United States had an employment relationship with any of the 153 Unidentified Plaintiffs for whom plaintiffs provided additional information, the United States contacted the agencies identified as having employed those individuals in October 2013. Only 76 of these Unidentified Plaintiffs could be confirmed as Federal employees, Rev. Chess Decl. ¶ 21(a), n.2; of those, 56 were added to the damages calculations, and 20 were added to the Ineligible Plaintiffs. *Id.* at ¶¶ 24(a), (c). Two Unidentified Plaintiffs who provided additional information in the form of full social security numbers were determined to be duplicates. *Id*. ¶ 21(c). No Federal employment relationship could be found, however for the other 77 Unidentified Plaintiffs for whom plaintiffs provided some additional information. *Id*. ¶¶ 21(b). With the addition of the one opt-in who was added after his employment could not be confirmed, *id* ¶ 22 n.3; *see* page 5 n.6 above, there are 134 Unidentified Plaintiffs. Rev. Chess Decl. ¶ 22.

Plaintiffs incorrectly contend that the United States has somehow improperly failed to demonstrate its methods of trying to verify the employment relationship of all Unidentified Plaintiffs, arguing that "Plaintiffs have provided the same types of information as to these [Unidentified] 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%." Resp. 5. Of course, this is a fallacious argument on its face. The quality or quantity, or both, of the information provided by a consent form does not in and of itself establish an employment relationship. If two individuals provide the same type and quantity of information about themselves, and for one a

record of Federal employment is found and for the other no record of Federal employment can be found, the second has not established Federal employment despite having provided the same type of information as the first. Moreover, each plaintiff bears the burden of establishing a Federal employment relationship; the United States does not bear the burden of proving the existence or the absence of the employment relationship. Nevertheless, a brief explanation of the data collection process in this case is illustrative as to why plaintiffs' insinuations as to the data collection in this case are wrong.

After receiving from plaintiffs the list containing the 25,251 opt-ins, the Department of Justice (DOJ) contacted the affected agencies and requested that the agencies determine whether the plaintiffs who self-identified as working for that agency were eligible for damages, *i.e.* that the opt-in met all of the criteria of the collective. *See, e.g.*, Dkt. No. 162 at 2. If an opt-in was not eligible, the agencies were to inform DOJ as to why; if an opt-in was eligible, then the agency was to send both payroll and time and attendance data directly to DOJ. When DOJ received the agencies' data, it forwarded that data directly to Chess, without alteration. *See, e.g.*, Rev. Chess Dec. ¶¶ 10-14; Dkt. Nos. 166, 169, 172. And if, after reviewing the data, Chess determined that it needed supplementation, Chess requested that DOJ obtain the needed additional records, which DOJ requested from the affected agencies. Rev. Chess Decl. ¶ 13; *see, e.g.*, Dkt. No. 176. This cycle continued until Chess received sufficient information to conduct a preliminary damages assessment, and through August 2020. *See, e.g.*, Dkt. Nos. 166, 169, 172.

The data collection cycle between DOJ, the agencies, and Chess was both painstaking as well as voluminous. Lead counsel for the United States has personally exchanged well more than 3,000 emails with various agencies, plaintiffs, and Chess in furtherance of providing notice, collecting data, and assessing damages. Other DOJ personnel have likewise exchanged hundreds

of emails to facilitate the same process—in addition to the likely thousands of emails and data exchanges that occurred within DOJ and the agencies. In total, the United States provided to Chess over 68,000 files of data for analysis, consisting of more than eight gigabytes of data, comprising Excel spreadsheets, printouts, and other agency records that contain the identifiable opt-ins' time and attendance and payroll data. Rev. Chess Decl. ¶ 14; *see also id.* ¶¶ 12-13.

With one exception in August 2018, explained further in section IV(A) below, plaintiffs did not question the United States's data collection or seek to amend its collection methods, despite meeting with the United States and Chess on multiple occasions in order to review Chess's analysis and to obtain answers to questions on the collection of data. *See, e.g.*, Rev. Chess Decl. ¶¶ 15-17; Dkt. Nos. 187, 200. Rather, the United States has repeatedly and proactively requested information for the Unidentified Plaintiffs for more than three years, starting shortly after Chess began its analysis. *See* Def. Ex. C. at 1-6 (requesting data in August 2017), at 54-61 (same, in March 2018), at 134-170 (same, in November 2018), at 171-181, 210-211 (same, in September 2019); *see also, e.g.*, Dkt. Nos. 172, 174, 176-190, 192-197, 199-202, 204. As demonstrated by the United States's efforts to facilitate—and conclude—data collection in this case, the United States has always been willing to include into its damages calculations any opt-in who can demonstrate that they (1) have an employment relationship with the United States and (2) meet all five Court-established elements of the collective. These 134 Unidentified Plaintiffs have shown neither. Instead, plaintiffs failed entirely to provide the United States with sufficient information on these opt-ins such that the United States could collect data or compute damages.

There does not exist some sort of universal database that lists every current and former Federal employee from every agency that can be searched in any conceivable manner, as

plaintiffs insinuate must be possible. *See* Resp. 5. Rather, employing agencies are responsible for maintaining information on current employees, and individuals' electronic personnel records are maintained by the National Archives and Records Administration (NARA), as well as with agencies. *See, e.g.*, Privacy Act of 1974, 77 Fed. Reg. 73,694 (Dec. 11, 2012). If an opt-in provided incomplete or incorrect information on his or her opt-in consent form, such as the wrong social security number, the United States cannot simply guess that opt-in's real identity and then gather data to compute damages. Without a Federal agency to confirm employment, the United States has no place to start requesting data that can be used to calculate damages. That is why plaintiffs bear a threshold burden to provide the United States with accurate information that can be used to verify an employment relationship. Plaintiffs did not do so here. Rather, because these 134 Unidentified Plaintiffs can demonstrate neither Article III standing nor that they meet every element of the defined collective, their claims must be dismissed.

III. None Of The 2,183 Ineligible Plaintiffs Demonstrate That They Meet All Elements Of The Collective Or Are Similarly Situated Such That They Are Eligible For Damages In This Case

As explained above, in Argument, Section I, after considering all of the information provided by plaintiffs in their response, 2,183 Ineligible Plaintiffs do not demonstrate that they have met each of the five elements of the collective to establish that they are similarly situated for purposes of inclusion in this case. On October 16, 2014, the Court approved the following definition of the collective, proposed jointly by the parties:

> 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.

Dkt. No. 46 at 2; *see also Martin*, 130 Fed. at 581; Dkt. No. 45 (proposing collective definition).

To show that they are eligible for damages, the Ineligible Plaintiffs must each demonstrate that they are similarly situated by establishing that they meet all five elements of the defined collective. 29 U.S.C. § 216(b); *Morgan*, 551 F.3d at 1258; *Comer*, 454 F.3d at 546. In its motion, the United States produced evidence that 2,199 Ineligible Plaintiffs do not meet all five elements of the collective. *See* Chess Dec., Ex. C. Yet with the exception of the 132 opt-ins subject to one or more of the exhibits produced by plaintiffs with their response, plaintiffs have produced no evidence to rebut the United States's evidence and analysis. Thus, at a minimum, the 2,067 Ineligible Plaintiffs for whom plaintiffs have produced no evidence to establish their eligibility should be dismissed.

In addition, for at least 2,153 of the Ineligible Plaintiffs—comprising (1) 1,588 opt-ins who were classified as FLSA exempt in October 2013, (2) 167 opt-ins who did not work during October 1-5, 2013, and (3) 398 who were paid on their regularly scheduled paydays—plaintiffs have failed to satisfy Article III standing requirements because they cannot show an "injury-in-fact" resulting from the United States's failure to pay them on their regularly scheduled paydays for work performed between October 1-5, 2013, sufficient to make them eligible for FLSA liquidated damages as found by the Court. *See* Rev. Chess Decl. ¶ 23. Because those opt-ins cannot demonstrate a "concrete" injury similar to those within the defined collective, they lack Article III standing and their claims must be dismissed. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see* Mot. 13-15.

In addition, because all 2,183 Ineligible Plaintiffs' failed to provide "specific facts" showing that they meet the elements of the defined collective, the United States's summary

judgment motion must be granted. "In response to a summary judgment motion . . . the plaintiff can no longer rest on [] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" to support the plaintiff's claim. *Lujan*, 504 U.S. at 561. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986) (italics in original).

In one or more of the exhibits produced by plaintiffs with their response, plaintiffs provided additional information as to 132 opt-ins that we had identified as Ineligible Plaintiffs. Otherwise, plaintiffs have entirely failed to rebut the United States's evidence and to demonstrate that the other opt-ins identified as Ineligible Plaintiffs meet each of the five elements of the collective. Further, of these 132 opt-ins for whom plaintiffs provided additional information, only 38 of those were moved into the damages calculations, while the other 94 remained as Ineligible Plaintiffs (with 14 moving to a different ineligibility category). Rev. Chess Decl. ¶¶ 24(b), (d), 25. The 2,183 Ineligible Plaintiffs are comprised of the 2,199 Ineligible Plaintiffs included in our motion, less 38 opt-ins moved to damages, plus 20 opt-ins moved from Unidentified Plaintiffs, plus two additional opt-ins. *See* Rev. Chess Decl. ¶¶ 23-25, Ex. C. None of these 2,183 Ineligible Plaintiffs can demonstrate that they are similarly situated and eligible for damages, and will be addressed by separate category. *See* page 6 above.

Plaintiffs raise blanket assertions in their response that the Court has jurisdiction over their FLSA claims; that the United States's arguments should be made under RCFC 12(b)(6); and that *Abbey v. United States*, 745 F.3d 1363, 1368-72 (Fed. Cir. 2014), demonstrates this Court's jurisdiction and ends any inquiry into whether the opt-ins subject to our motion should remain in the case. Resp. 6-9. Plaintiffs are incorrect. The threshold burden in an FLSA

collective action is demonstrating that a plaintiff is similarly situated, *i.e.* meets all elements of the collective. 29 U.S.C. § 216(b); *see, e.g.*, *Guillen v. Marshalls of MA, Inc.*, 841 F. Supp. 2d 797, 801 (S.D.N.Y. 2012) (explaining that plaintiffs could not "ignore[] the requirement that plaintiff show he is similarly situated to the employees he proposes to include in the collective action" with respect to his claims (underlining in original)); *Doe No. 1 v. United States*, 143 Fed. Cl. 113, 115 (2019). Plaintiffs' argument, if correct, would render the Court's definition of the collective meaningless. That is contrary to law and, as a matter of common sense, simply wrong.

The FLSA collective action *Colozzi v. St. Joseph's Hospital Health Center*, 275 F.R.D. 75, 93 (N.D.N.Y. 2011), is instructive as to why the claims of the 2,183 Ineligible Plaintiffs in this case should be dismissed. In *Colozzi*, the defendants requested partial summary judgment to dismiss certain opt-in plaintiffs who did not qualify for the case under the court's collective definition; defendant submitted credible evidence showing that those plaintiffs did not work and therefore were ineligible for damages. 275 F.R.D. at 80. As plaintiffs do in this case, the *Colozzi* plaintiffs argued that they were entitled to discovery prior to dismissal. *Id.* But, as the Court should find in this case, the court in *Colozzi* disagreed. *Id*. The *Colozzi* court reasoned that, once the defendant demonstrated an absence of a genuine issue of material fact, the plaintiffs were required to respond with specific facts showing that a genuine issue for trial existed in order to stave off dismissal; failing to do so, their claims could not survive. *Id.* at 80-81. And similar to plaintiffs' untimely misclassification arguments in this case, the plaintiffs in *Colozzi* also attempted to avoid dismissal by claiming that the opt-in plaintiffs could allege different FLSA violations than those raised in the complaint. *Id*. at 81. But, as the Court should similarly do in this case, the court in *Colozzi* rejected that argument as well, explaining that plaintiffs' complaint governed which FLSA claims could be raised. *Id.*

As explained in more detail below, the 2,183 Ineligible Plaintiffs cannot establish that they meet all elements of the collective and thus their claims should be dismissed. First, 30 opt-ins were not Federal employees pursuant to 29 U.S.C. § 203(e)(2)(A), contrary to element (a) of the collective. Second, 1,588 opt-ins were FLSA exempt as of October 1, 2013, contrary to element (b) of the collective. Third, 167 opt-ins worked for less than four hours between October 1-5, 2013, contrary to element (d) of the collective. And fourth, 398 opt-ins were paid on their regularly scheduled paydays for work performed between October 1-5, 2013, contrary to element (e) of the collective. *See* Mot. 15-16; Rev. Chess Decl. ¶ 23, Ex. C.

A. 30 Opt-Ins Were Not Federal Employees Under 29 U.S.C. § 203(e)(2)(A)

A total of 30 Ineligible Plaintiffs were not covered by 29 U.S.C. § 203(e)(2)(A) and must be dismissed because they do not meet element (a) of the collective. In our motion, we demonstrated that 29 opt-ins were not covered by section 203(e)(2)(A); that number increased to 30 after plaintiffs provided additional information on one of the Unidentified Plaintiffs reflecting that she worked at a state agency. Rev. Chess Decl. ¶¶ 23(a), n.4, 25(a).

Public agencies under section 203(e)(2)(A) include military departments, "any executive agency (as defined in section 105 of [Title 5, United States Code])," any unit of the judicial branch of the Government which has positions in the competitive service, a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, the Library of Congress, or the Government Publishing Office. 29 U.S.C. § 203(e)(2)(A). The term "executive agency" pursuant to 5 U.S.C. § 105 "means an Executive department, a Government corporation, and an independent establishment," 5 U.S.C. § 105; section 101 contains an exhaustive list of "executive departments" as defined by section 105. *Id*. at § 101; *see Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) ("The Executive Residence is not included in Title 5's exclusive list

of Executive departments."). In turn, independent establishment means "an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment," as well as the Government Accountability Office. 5 U.S.C. § 104.

Plaintiffs who worked at agencies not covered by section 203(e)(2)(A) are not eligible for damages in this case because they do not meet element (a) of the collective. Further, agencies not covered by section 203(e)(2)(A) did not send notice. *See, e.g.*, Dkt. No. 59. Some of those agencies that did not send notice because they are not covered by section 203(e)(2)(A) include certain agencies from whom 30 opt-ins seek inclusion into the collective, including opt-ins who worked at (1) the U.S. Capitol Police, (2) the Architect of the Capitol, (3) the United States Postal Service (USPS), (4) the Smithsonian, (5) the Export Import Bank, and (6) the Equal Employment Opportunity Commission (EEOC). *See* Rev. Chess Decl. ¶ 23(a), Ex. C rows 1-30. In addition, numerous opt-ins from private and state employers seek inclusion into the collective. *Id*. Plaintiffs did not object to the exclusion of these agencies, or of the private and state employers, from notice or the collective in 2014, and cannot do so now. Further, plaintiffs' legal arguments against the dismissal of any of these opt-ins are meritless. *See* Resp. 9-12.

First, plaintiffs seek to discard the very collective that they jointly proposed and the Court adopted in September 2014, by requesting that the Court abandon its prior decision and instead adopt the rejected and more expansive definition set forth in plaintiffs' original and amended complaints. Resp. 11; Dkt. Nos. 45, 46. Plaintiffs concede that the nine opt-ins who work at the legislative agencies of the U.S. Capitol Police and the Architect of the Capitol are not Federal employees covered by section 203(e)(2)(A). Resp. 10. Nevertheless, they argue that, even

though they are "not encompassed within the collective action definition[,] that does not mean they should be excluded from the case." *Id*.; *see id*. at 11-12.

Plaintiffs' argument is absurd. That plaintiffs in a collective must be similarly situated is a basic requirement of an FLSA collective action. *See Anderson*, 488 F.3d at 953 (reasoning that if plaintiffs are permitted to circumvent "the similarities necessary to maintain a collective action under § 216(b)," "it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse." (quoting *White v. Osmose, Inc*., 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002))). And their argument fails on its face: including plaintiffs who do not meet the collective definition negates the purpose of defining a collective, which establishes the basis for determining who is "similarly situated" as required by the statute.

In support of their argument, plaintiffs assert that "notice facilitates joinder by recipients; it does not prevent joinder by non-recipients." Resp. 11. Although notice certainly facilitates joinder, notice does not establish that all who file a consent to join, whether a recipient of notice or not, are similarly situated and eligible to join. In 2014, the United States took extensive steps to ensure that eligible individuals received notice. If employees of an entire agency were excluded from the collective because that agency was not covered under section 203(e)(2)(A), like these legislative agencies, then those employees appropriately did not receive notice and their filing a consent to join does not make them eligible to be included within the collective. An individual is not similarly situated for purposes of a collective action simply because he or she receives notice or submits a consent form, and it is plaintiffs' burden, at the outset, to determine whether an individual meets the collective's requirements. *See, e.g.*, *Hamelin*, 274 F.R.D. at 391. These nine opt-ins do not establish that they are Federal employees covered by section 203(e)(2)(A), as they admit, and they are not eligible members of the collective.

Nor is it uncommon for employers to challenge inappropriate opt-in plaintiffs through a motion for decertification once discovery is closed. *See, e.g., Anderson*, 551 F.3d at 1261; *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018). Although we do not seek to decertify the collective, the United States seeks to enforce the plain terms of the defined collective, similar to such a decertification motion, and to dismiss individuals who opted in but are not similarly situated to the plaintiffs defined by the collective. Further, not challenging these opt-ins would result in the United States's assent to plaintiffs' incorrect argument: essentially, that any Federal employee should be permitted to opt-into this case and to receive FLSA liquidated damages. Although plaintiffs' desired outcome may indeed be that every Federal employee should be eligible for damages, that outcome is expressly contrary to the Court-determined collective that limits damages recovery in this case to only Federal employees covered by section 203(e)(2)(A). This Court should not disregard the collective that it established in 2014, jointly requested by plaintiffs at the time, and now expand the collective's definition. *See Strauch v. Comput. Scis. Corp.*, No. 14-956, 2019 WL 7602150, at *3 n. 1 (D. Conn. Aug. 6, 2019) (agreeing that a collective definition "cannot be expanded" post-trial). And expanding the collective definition now would be extremely prejudicial to the United States, plus contrary to representations made by plaintiffs to the Court in 2014. *See Delpin Aponte v. United States*, 83 Fed. Cl. 80, 93 (2008) (holding that expanding the FLSA collective action "after several years of discovery" and dispositive motions, would unduly prejudice the United States).

Second, the 16 opt-ins who worked at the USPS or for state or local employers are not included in section 203(e)(2)(A). Although USPS is separately delineated in section 203(e)(2)(B), private and state employers cannot conceivably be "Federal employees." *See*

Resp. 9-12. None of these opt-ins received notice, nor did plaintiffs present any evidence demonstrating that any are eligible for damages. They do not meet element (a) of the collective.

Third, plaintiffs assert that the five individuals who worked for the Smithsonian, the Export-Import Bank, and the EEOC each worked for agencies covered by section 203(e)(2)(A). Resp. 9-10. As a matter of law, plaintiffs are wrong that these agencies are encompassed within section 203(e)(2)(A). The EEOC is not an executive department within the meaning of section 105, contrary to plaintiffs' contentions, Resp. 10; Resp. Ex. 62, and it is not listed in section 101's exhaustive list of section 105 executive departments. 5 U.S.C. § 101; *see, e.g.*, *Haddon*, 43 F.3d at 1490; *Jones v. United States*, 17 Cl. Ct. 78, 82 (1989) ("[T]he EEOC is not listed under § 101 of Title 5. . . . it is [] not an executive department."). Nor is the EEOC, part of the Department of Labor, an independent establishment, which cannot be an "Executive department . . . or part thereof. . . ." *See* 5 U.S.C. § 101 (listing the Department of Labor as an executive department); *id*. at § 104 (excluding from independent establishments parts of an executive department). The EEOC opt-in must be dismissed.

Plaintiffs likewise incorrectly assert that the Smithsonian is an independent establishment. Resp. 9-10. But the Smithsonian is not an independent establishment of the Executive branch because "nine of the seventeen members of its governing Board of Regents are appointed by joint resolution of Congress, 20 U.S.C. § 43, and six of the remaining eight are members of Congress, 20 U.S.C. § 42." *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997). As the D.C. Circuit reasoned in *Dong*, the Smithsonian does not answer to the President, administer Federal statutes, prosecute offenses, promulgate rules and regulations, or otherwise engage in Executive activity; therefore it is excluded from section 203(e)(2)(A). *Id*. Plaintiffs cite *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289,

296 (D.C. Cir. 1977) (*en banc*) in support of their argument, because the appellate court held that the Smithsonian is an independent establishment of the United States for purposes of the Federal Tort Claims Act (FTCA). Resp. 9. The Court in *Dong* correctly distinguished *Expeditions Unlimited*, however, recognizing that Title 5 uses narrower language than does the FTCA. *Dong*, 125 F.3d at 880. Smithsonian employees are not covered by section 203(e)(2)(A).

Finally, the Export-Import Bank is not an independent establishment, as plaintiffs also incorrectly argue. Resp. 10. In support, they cite to *Brown v. Brody*, 199 F.3d 446, 449 (D.C. Cir. 1999), *abrogation recognized by Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008), although the case does not hold that the Export-Import Bank is an independent establishment. And, like the Smithsonian, positions at the Export-Import Bank must be approved by the Senate, *see* Resp. 10, with Congress providing authority for the bank's functions through its statutory charter, for a time period of Congress' choosing. *See* 12 U.S.C. § 635; *see also, e.g., Dong*, 125 F.3d at 879-80 (explaining that the Smithsonian is not an independent establishment because it answers to Congress). Further, the Export-Import Bank Act does not define the Bank as an Executive agency under section 105, unlike the explicit provision in the statute that created the independent Consumer Financial Protection Bureau (CFPB). *Compare* 12 U.S.C. § 5491(a) with *id*. at § 635. If section 105's statutory text encompassed all independent Federal agencies, Congress would not need to separately delineate the CFPB's inclusion as an Executive agency. And plaintiffs' argument that the Bank operates as "an independent agency" cuts against any plausible argument that it is an Executive agency under section 203(e)(2)(A) in any event. *See* Resp. 10.

B. 1,588 FLSA Exempt Opt-Ins Must Be Dismissed

A total of 1,588 individuals who, on October 1, 2013, were classified as FLSA exempt, opted in and must be dismissed because they do not meet element (b) of the defined collective.

In its motion, the United States demonstrated that a total of 1,582 Ineligible Plaintiffs were classified as FLSA exempt as of October 1, 2013. Mot. 14. There are now 1,588 Ineligible Plaintiffs who do not meet element (b). Rev. Chess Decl. ¶¶ 23(b), (c), 25(b), Ex. C, rows 31 – 1,618. The increase of six opt-ins from the original 1,582 subject to the United States's motion is due to the following: two opt-ins moved into the damages calculations; one opt-in moved into the ineligibility category of paid on time per data received; five Unidentified Plaintiffs moved into the category; two opt-ins moved into the category from the ineligibility category paid on time per data received; and two opt-ins moved into the category from the ineligibility category did not work per agency. *Id*. at ¶ 25(b), Ex. D. Plaintiffs' arguments on the inclusion of these FLSA exempt individuals can be broken into three groups: (1) the 214 opt-ins who worked in Transportation Security Administration (TSA) in jobs excluded from the FLSA; (2) the 14 opt-ins who raise untimely misclassification claims; and (3) the 38 opt-ins for whom plaintiffs provided some measure of additional information in support of their claims. With the exception of their challenges as to these 266 opt-ins, plaintiffs do not raise specific challenges that any other FLSA exempt Ineligible Plaintiffs should remain in this case. Thus, at a minimum, the Court should dismiss the 1,322 FLSA exempt Ineligible Plaintiffs for whom no specific effort is made to establish that they belong in the collective. Plaintiffs' arguments for the inclusion of the 266 individuals in these three groups discussed below fail.[8]

[8] Four of these opt-ins worked for agencies that did not have any FLSA non-exempt employees who worked between October 1-5, 2013: the American Battle Monuments Commission, the Export-Import Bank (also excluded from section 203(e)(2)(A), as shown above), the Merit System Protections Board, and the National Transportation Safety Board. *See* Dkt. Nos. 50 at 1-2; 54 at 1-2; 59 at 4-5. Plaintiffs' failure to raise any particular challenge to the claims of these opt-ins six years ago means that they should be dismissed for this reason as well.

i. 214 Opt-Ins Who Work In Jobs Excluded From The FLSA Should Be Dismissed

Plaintiffs incorrectly assert that the 214 opt-ins who worked for the TSA as Transportation Security Officers (TSOs) or "screeners," in jobs that are excluded from the FLSA, are encompassed within the collective's element (b).

As an initial matter, plaintiffs identify 205 TSOs in their response whom plaintiffs assert should be included in the collective. Resp. 24-26. In its motion, the United States identified "over 180 [TSOs] and others who are considered to be 'screeners' from the [TSA], who are not subject to the FLSA." Mot. 14; Chess Decl. ¶ 17(b). TSA explains that in 2013, the job titles of employees who screened "people, property, and cargo at the nation's federalized airports" included, among other positions, TSO, Lead TSO, Expert TSO, Master TSO/Behavior Detection Officers, and Master TSO/Coordination Center Officers; Supervisory TSOs were screeners and also supervised screening employees. Def. Ex. D ¶¶ 9-10. There are a total of 214 opt-ins who self-identified as holding a TSA screener position and who are, therefore, subject to the United States's motion and should be dismissed. *See* Rev. Chess Dec. ¶ 23(b), Ex. C rows 31-878.

On no less than three separate occasions beginning in November 2014, the United States explained that "[TSOs] of the [TSA], . . . are not subject to the FLSA, and, therefore, the Government does not intend to send Notice to the TSO employees of the TSA." *See* Dkt. Nos. 58 at 4 n.2; 59 at 4 n.3; *see also* Dkt. No. 54 at 3 n.2 (referring to the exclusion of the entire TSA). In support, the United States cited *Jones v. United States*, 88 Fed. Cl. 789 (2009), which holds that section 111(d) of the Aviation and Transportation Security Act (ATSA) "unambiguously vests TSA with complete discretion in setting compensation levels for security screeners 'notwithstanding any other provision of law.'" 88 Fed. Cl. at 790 (citing 49 U.S.C. § 44935 (note)). Based upon the plain language of this statutory authority, the Court concluded

"that TSA need not comply with the FLSA." *Id.* at 792. Plaintiffs raised no challenge to the exclusion of screeners from notice or the collective in 2014, despite addressing what they considered to be other deficiencies in the United States's notice-related filings. *See* Dkt. No. 87. The Court should not allow plaintiffs to challenge the exclusion of TSOs now.

Nevertheless, plaintiffs assert that no FLSA exemption applies to TSOs and that TSOs "should not be precluded" from this case, arguing that TSA utilizes "the FLSA with some modifications." Resp. 24-26. In support, they provide a partial citation to an irrelevant TSA handbook, and to what they assert is a "[s]ample TSO SF-50."[9] *Id.* But plaintiffs concede that the TSA utilizes the ATSA, and neither document supports their claims. Plaintiffs' argument instead underscores that screeners are ineligible for damages, by explaining that TSA pays its employees pursuant to a payment scheme authorized by the ATSA, that does not incorporate the FLSA. *Id*. TSA explains that screeners are not paid "under the FLSA's provisions because TSA utilizes its own compensation scheme as permissible under ATSA generally, and Section 111(d) in particular (codified at 49 U.S.C. § 114(n))." Def. Ex. D ¶ 4; *see also id.* at ¶¶ 5, 6, 11, 15. Just as this Court found in *Jones*, that the ATSA provides that TSA need not comply with the FLSA because the ATSA sets the terms of screener compensation, the Office of Personnel Management (OPM) also recognizes that the ATSA "gave the TSA Administrator exclusive control over personnel and compensation actions involving TSO's." OPM File Number 16-0071, 2017 OPM Dec. LEXIS 23, *2-3 (Oct. 31, 2017). Moreover, in making their argument, plaintiffs, again, request that the Court include dissimilarly situated individuals into the case, *i.e.* those not covered by the FSLA. The Court should not find persuasive plaintiffs' attempts.

[9] An employee's standard form (SF)-50 is "the government's official record for personnel matters." *Feldheim v. Turner*, 743 F. Supp. 2d 551, 555 (E.D.V.A. 2010).

The documents that plaintiffs provide in support of their argument are also faulty. The SF-50 to which plaintiffs cite as a "sample" TSO SF-50 actually reflects the position of "CBP Officer" at U.S. Customs and Border Protection. Resp. Ex. 65 at boxes 15, 22. This "sample SF-50" thus provides no support for the claims of TSOs. Further, as the TSA explains, the agency may select only "exempt" or "non-exempt" for box 35 of an employee's SF-50, even though TSA does not utilize the FLSA. Def. Ex. D ¶ 12-16. Rather, any TSA screener whose SF-50 reflects "non-exempt" is eligible for *ATSA* overtime, not for FLSA overtime. *See id*. Supervisory TSOs whose SF-50s reflect "exempt" are not eligible for overtime in the same manner, *id*. ¶¶ 10, 12, thus excluding them from this case for two reasons.

Plaintiffs also provide in support of their claims Revision #7 of the TSA Premium Pay Handbook, revised on January 8, 2017. Resp. 24-25. Revised in 2017, this version of the handbook was not in effect during October 1-5, 2013, and is inapplicable. *See* Def. Ex. D ¶¶ 6-8. Plaintiffs also fail to provide TSA's Management Directive 1100.55-8 (Premium Pay), which provides the agency's policy on premium pay. *See id.* ¶ 5. As this directive explains, TSA's authority for premium pay comes from the ATSA; the directive does not reference the FLSA. *Id*. ¶ 4. The contemporaneous 2013 handbook comes from this directive, and as a result, also receives its authority from the ATSA. *Id*. ¶¶ 5-6. TSA also explains that, although the 2013 handbook refers to FLSA "non-exempt" positions, that means no more than eligibility for *ATSA* overtime. *Id.* ¶¶ 5-8, 11. Because TSA does not utilize the FLSA, the 214 screeners are not covered by the FLSA's terms and they therefore do not meet element (b) of the collective.[10]

[10] One other plaintiff worked for AmeriCorps NCCC, and is likewise excluded from the FLSA. *See* Rev. Chess Decl. ¶ 23(b), Ex. C at line 31; *Murray v. Am. Red Cross Capital Area Chptr*, No. 4:07-cv-161, 2008 U.S. Dist. LEXIS 112052, *6-7 (N.D. Fla. Jan. 1, 2008). Plaintiffs raised no specific argument regarding her inclusion, and her claims fail for this reason as well.

ii. *14 Opt-Ins Who Raise Misclassification Arguments Should Be Dismissed*

Plaintiffs next erroneously argue that the 14[11] opt-ins who claim that they were misclassified as FLSA exempt as of October 1, 2013 should remain in this case.

Although element (b) requires that, to be similarly-situated, an opt-in must have been "*classified* as 'non-exempt' under the FLSA as of October 1, 2013," *Martin*, 130 Fed. Cl. at 581 (italics added), plaintiffs nonetheless attempt to collaterally attack the Court-defined collective by asserting that those who *should have been* classified as FLSA non-exempt should also be included in the collective. Resp. 22-23. In support, plaintiffs attach a 2017 arbitration decision purportedly affecting 13 opt-ins, and a 2017 letter (attaching a separate 2011 decision) that purportedly applies to the 14th opt-in. *Id*. at Exs. 5, 6. This is not, and never has been, a misclassification case, however, and plaintiffs raised no misclassification allegations in their original or amended complaints. *See generally* Dkt. Nos. 1, 29. The Court should deny plaintiffs' attempts to implicitly amend their complaint and to expand the collective now.

This Court has denied comparable attempts by plaintiffs to expand the scope of the United States's liability when misclassification claims were first raised in the damages phase of litigation. For example, in *Adams v. United States*, 48 Fed. Cl. 602 (2001), the plaintiffs attempted to challenge the Government's classification of certain overtime hours as administratively uncontrollable during damages calculations. 48 Fed. Cl. at 611. When denying their request, the Court explained that reclassifying plaintiffs' hours worked was not a claim implicit in plaintiffs' complaint, and thus the United States was not on notice of potential liability to pay these additional hours. *Id.* at 612. The Court should similarly so find in this case because,

[11] Opt-in Kevin Kraujalis was moved to the damages model. *See* Resp. 23; Def. Ex. B.

as with *Adams*, permitting plaintiffs to amend their claims now would be prejudicial to the United States.

Moreover, the United States does not bear the burden of establishing an affirmative defense of an FLSA exemption at this stage, as plaintiffs assert. Resp. 13. Rather, plaintiffs must still demonstrate that they are similarly situated, even if, had a misclassification claim been properly raised, the United States would have ultimately borne the burden at trial of proving exemption. *See, e.g.*, *Smith v. United States*, No. 13-161C, 2014 WL 3940494, *3 n.2 (Ct. Fed. Cl., Aug. 11, 2014). The Court should reject plaintiffs' attempts to recast this case as one that requires the United States to prove every aspect of plaintiffs' claims, particularly considering that the question currently before the Court is a straightforward application of the collective definition to the opt-ins. *See, e.g.*, *Anderson v. Cagle's, Inc*., 488 F.3d 945, 953 (11th Cir. 2007) (discussing generally how, after discovery, the Court must make factual determinations on the "similarly situated question" if the issue is raised by the defendant).

Further, when 13 of these opt-in filed their 2015 misclassification grievance (represented by the same counsel that represents them in this case), they did so despite having opted into this case and certifying through their consent forms that they were classified as FLSA *non-exempt* as of October 1, 2013. *Compare, e.g.*, Resp. at 39 *with* Resp. Ex. 5 at 1 (showing representation by the same counsel); *see, e.g.*, Dkt. No. 63 at 7 (sample consent to join form). Thus, these opt-ins, or their counsel, should have been aware that they were not similarly situated under the defined collective because they were classified as FLSA exempt as of October 1, 2013, and did not qualify for damages in this case. Notwithstanding the same representation by counsel in both cases, this misclassification claim was not raised to the United States in June 2015, when the grievance was filed; nor in September 2017, when the grievance was decided; nor in September

2018, when the United States presented to plaintiffs its list of Ineligible Plaintiffs, including FLSA exempt opt-ins. *Compare, e.g.* Resp. Ex. 2 at line 914 *with* Def. Ex. C at 68, line 38 (showing PX ID 745 in both). Likewise, no later than September 2018, the other purportedly misclassified opt-in was determined to have been classified as FLSA exempt as of October 1, 2013, but was never identified to the United States as misclassified. *Compare* Resp. Ex. 2 at line 1,453 *with* Def. Ex. C at 78, line 418 (showing PX ID 20424 in both). The Court should deny plaintiffs' attempts to recast their complaint now and include these opt-ins into the collective. *See, e.g., Driessen v. United States*, 116 Fed. Cl. 33, 38 (2014) (finding it improper to raise new claims in response to a motion to dismiss); *Crest A Apts., Ltd. II v. United States*, 52 Fed. Cl. 607, 613 (2002) (refusing to consider a new claim asserted in a summary judgment motion because the new issues raised could prejudice the defendant).

iii. Plaintiffs' Additional Information On 14 FLSA Exempt Opt-Ins Does Not Raise Any Genuine Question Of Material Fact

Plaintiffs produced information for 14[12] Ineligible Plaintiffs who were classified as FLSA exempt, Resp. 26-28, none of whom the United States moved to the damages analysis. *See* Rev. Chess Ex. ¶ 30 (moving one challenger to the paid on time per data received ineligibility category), Ex. D. Plaintiffs also argue that "other Plaintiffs who were employed in the same job title at the same agency" as some of those 14 opt-ins should be presumptively assumed to be FLSA non-exempt as well. Resp. 26-28. Thus, plaintiffs purport to have produced information to challenge the exclusion of 38 opt-ins who were classified as FLSA exempt. *Id.*

Plaintiffs' supporting documentation does not establish the FLSA non-exempt status for 11 of the 14 opt-ins who themselves provide such information, much less for additional opt-ins

[12] Plaintiffs' response heading identifies 11 opt-ins who introduced evidence regarding their FLSA exemption status, but the accompanying table includes 14 opt-ins. Resp. 26-27.

as well. *See* Rev. Chess Decl. ¶¶ 30-31, Ex. D. For example, plaintiffs assert that the documents supporting the claims of four opt-ins—Hsuan Chen, Pierre Printemps, Anne Rothrock Burke Kirby, and Xavier Carson—actually support finding that a total of 24 opt-ins are FLSA non-exempt. Resp. 26-28. Each of those four opt-ins was FLSA exempt on October 1, 2013, however. Def. Ex. E ¶¶ 4-11; *see also* Def. Ex. B.[13] In fact, the very language used in two of plaintiffs' supporting declarations demonstrates their FLSA exempt status: Mr. Chen and Mr. Carson attest to working abroad between October 1-5, 2013, *see* Resp. Exs. 1, 11, and the FLSA excludes individuals who work abroad from the FLSA minimum wage and overtime provisions. 29 U.S.C. § 213(f); 5 C.F.R. 551.212; *see* Def. Ex. E ¶¶ 4-5, 10-11. Because these opt-ins' documentation does not support their claims, it should not be attributed to other opt-ins either. Conversely, the additional evidence presented by the United States demonstrates that these opt-ins were classified as FLSA exempt as of October 1, 2013. Rev. Chess Decl. ¶¶ 23(b)-(c), 25(b), 30-31, Exs. C, D; Def. Ex. F; Def. Ex. G ¶¶ 7-18; Def. Ex. H ¶¶ 6-7; Def. Ex. L ¶¶ 4-5; Def. Ex. M ¶¶ 4-5. And as explained above, plaintiffs cannot now pursue a claim to challenge their FLSA classification. These 38 opt-ins, like the other FLSA exempt opt-ins, should be dismissed.

C. 167 Opt-Ins Who Did Not Work For More Than Four Hours Between October 1-5, 2013 Must Be Dismissed

A total of 167 opt-ins did not work for more than four hours between October 1-5, 2013, and must be dismissed because they do not meet element (c) of the collective.

In its motion, the United States demonstrated that a total of 192 opt-ins did not work for more than four hours between October 1-5, 2013. Mot. 14. In response, plaintiffs produced

[13] For the Court's convenience, the United States' Exhibit B contains a chart setting forth plaintiffs' exhibits and the United States's corresponding evidence, including whether the opt-in's claims were moved to the damages calculations.

additional information for 39 opt-ins who assert that they worked more than four hours during this time. Resp. 32-36; *see* Rev. Chess Decl. ¶ 28, and n.6. Of those 39 opt-ins, Chess confirmed that 21 did not work, and the other 18 were moved to damages. *Id*. ¶¶ 28-29. There are now 167 Ineligible Plaintiffs who do not meet element (d). *Id.* at ¶¶ 23(d)-(e), 25(c), Ex. C, rows 1,619 - 1,785. This change from the 192 opt-ins subject to our motion is due to the following: 32 were moved from this category to damages; two were moved to the ineligibility category of FLSA exempt; seven Unidentified Plaintiffs moved into the category; and two opt-ins were added. *Id.* at ¶ 25(c), Ex. D. Of the 192 opt-ins identified in the United States's motion, plaintiffs have provided no information to challenge the exclusion from this case as to 153 of them, and the Court should dismiss those Ineligible Plaintiffs.

The additional information that plaintiffs provided for 39 opt-ins largely does not present any specific fact showing that there is a genuine issue for trial, as is plaintiffs' burden. *Celotex*, 477 U.S. at 324 (citing to Rule 56). Of the exhibits attached to their response, 26 consist of declarations of opt-ins asserting only that they "remember" working between October 1 and 5, 2013. *See* Resp. Exs. 11, 13, 19, 21-29, 31-34, 40, 48-50, 52-55, 59, 71; *see also* Ex. 18, 30; Def. Ex. B. These self-serving affidavits, created nearly seven years after the relevant events occurred, do not manufacture a genuine issue of material fact. *See Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 164 (Fed. Cir. 1985) ("[M]ere allegations by declaration or otherwise do not raise issues of fact needed to defeat a motion for summary judgment."). Rather, these opt-ins could have provided official time and attendance data rebutting the United States's evidence if it existed, but they did not do so. *See Doe v. United States*, 58 Fed. Cl. 479, 483 (2003), aff'd, 112 F. App'x 54 (Fed. Cir. 2004) (granting summary judgment to the United States when plaintiff presented no evidence beyond his own affidavit).

Two of these exhibits did attach other documentation, although not official time and attendance data. One declarant claims both that she "remembers working" and purports to attach Facebook messages from the relevant time period. Resp. Ex. 18. Yet the declarant does not actually attach a printout of those Facebook messages; rather, she attaches what appears to be a Microsoft Word document created on March 11, 2020. *Id*. Another declarant attaches a staff schedule of shifts assigned to each employee over the course of three months—from September 15, 2013 to December 21, 2013. *Id*. at Ex. 30. This staff schedule, generated prior to the lapse in appropriations, does not establish that the declarant actually worked during the lapse, but instead shows that her agency had planned for her to work, if the lapse had not occurred. *Id*.

Chess's revised declaration explains why empirical documentation demonstrates that 21 of these 39 opt-in challengers did not work during the 2013 lapse in appropriations, while the other 18 were moved to damages calculations. *See* Rev. Chess Decl. ¶ 28-29. As explained by Chess, it reviewed these opt-ins' payroll data, to determine whether their payroll transactions showed that their hours attributed to "furlough" were later reversed. *Id*. at ¶¶ 26-28. For many of the opt-ins, their "furlough" hours were not reversed, which—based upon other payroll transactions showing the contrary—demonstrates that the individual did not work. *Id.* This method was confirmed by the agencies. *Id.* ¶ 28; *see also* Def. Ex. I; Def. Ex. J; De. Ex. K.

In addition, some of the data provided in support of the 39 opt-ins' claims is in the form of BOP "roster" program data, which is not used for payroll or time and attendance purposes. *See*, *e.g.*, Resp. Exs. 38, 39, 66, 69. As the BOP explains, at each institution, local agency management maintains a "schedule roster in order to ensure that all shifts and work posts are sufficiently staffed." Def. Ex. G ¶ 5. That roster program does not cover each position within the institution. *Id*. Nor are those roster programs "relied upon for either time and attendance or

other payroll purposes. Rather, the primary purpose of the roster program records is to ensure that there is sufficient coverage of each custody post." *Id*. The roster program is "utilized mostly prospectively, to ensure sufficient post coverage," and, although the roster program "is supposed to be updated retrospectively as well, it is not always updated and for that reason is not used to ensure employees' time and attendance records are accurate." *Id.* Further, despite the contentions set forth in Response Exhibit 61 regarding the purported requirement that every BOP employee was required to work during the 2013 lapse in appropriations, that was not the case,; further, not every BOP employee scheduled to work actually "showed up for work." *Id*. at ¶ 19.

Consequently, the United States's evidence, which includes empirical data rather than imperfect recollections and records from seven years ago, supports the analysis that 167 opt-ins did not work for more than four hours between October 1-5, 2013 as required by collective element (d), and therefore these 167 opt-ins should be dismissed.

D. 398 Opt-Ins Who Were Paid On Their Regularly Scheduled Paydays Must Be Dismissed

A total of 398 opt-ins do not meet element (e) of the collective because they were paid on their regularly scheduled paydays.

In its motion, the United States demonstrated that 396 Ineligible Plaintiffs were paid on their regularly scheduled paydays. Mot. 15. In response, plaintiffs provided additional information for five opt-ins that they contend should apply to eight total individuals. Resp. 37-38.[14] There are now 398 Ineligible Plaintiffs who do not meet element (e). Rev. Chess Decl. ¶¶ 23(f), (g), 24, Ex. C at rows 1,786 - 2,183. The increase of two opt-ins from the original 396

[14] The heading as well as some of the text in this portion of plaintiffs' response incorrectly reflects argument regarding opt-ins who did not work rather than those who were paid on their regularly scheduled paydays. *See* Resp. 37-38.

opt-ins subject to the United States's motion is due to the following: four opt-ins moved to damages; two opt-ins moved to the ineligibility category FLSA exempt; seven Unidentified Plaintiffs moved into the category; and one opt-in moved into the category from the ineligibility category FLSA exempt. *Id.* at ¶ 25(d), Ex. D. Because plaintiffs fail to present evidence on 390 Ineligible Plaintiffs in this category, at a minimum, the Court should dismiss these 390 Ineligible Plaintiffs for whom no attempt is made to establish that they belong in the collective. Further, the evidence plaintiffs do present does not raise a genuine question of fact that these opt-ins meet each of the elements of the collective, and does not persuasively support their claims.[15]

The declarations provided in support of eight opt-ins' claims do not demonstrate that they are eligible for damages. Chess and the agencies confirmed that six were paid on time and that the two who were not were FLSA exempt and are thus ineligible for damages. Rev. Chess Decl. ¶¶ 32-33; Def. Ex. H; Def. Ex. L; Def. Ex. M; Def. Ex. N; *see* Def. Ex. B. Further, one of the declarations presented by plaintiffs raises a question of whether the opt-in to whom that declaration applies can even properly proceed in the case, because it explains that the opt-in passed away, yet plaintiffs have filed no suggestion of death nor requested substitution of the party pursuant to RCFC 25(a). *See* Resp. Ex. 66 ¶ 3.

Because plaintiffs fail to provide information sufficient to support their claims on each of the 2,183 Ineligible Plaintiffs, they should be dismissed from the case.

[15] A total of 18 opt-ins worked for the USPS, the Veterans Administration (VA), or the Department of State (State); these agencies explained that their employees were timely paid. *See* Dkt. No. 59. Plaintiffs did not contest their exclusion from the collective in 2014 and should be precluded from doing so now, especially because, although plaintiffs concede that the 10 USPS opt-ins were timely paid, they do not so concede for the VA or State opt-ins despite providing no evidence to support their claims. *See* Resp. 10 n.2; Dkt. No. 87-7 at 11-17.

IV. The United States Presented Sufficient Evidence In Support Of Its Motion

As demonstrated above, plaintiffs have failed to establish that any of the 134 Unidentified Plaintiffs can demonstrate an employment relationship or meet all five elements of the collective. Likewise, they cannot demonstrate that any of the 2,183 Ineligible Plaintiffs meet each element of the collective. Moreover, plaintiffs largely fail to produce evidence to support their claims—as is their burden. When plaintiffs did produce sufficient evidence in support of their claims, the United States moved those opt-ins to the damages calculation.

In an attempt to challenge the United States's analysis and evidence, plaintiffs resort to lodging improper attacks on the United States's data collection and evidence, including through challenges to Chess's analysis and the admissibility of its declarations. But the United States acted in good faith when collecting data and presenting that data to the plaintiffs, who did not contemporaneously challenge the data collection process. In addition, Chess's declarations are admissible under multiple hearsay exceptions, as is the underlying evidence utilized by Chess. Moreover, plaintiffs waived, or should be equitably estopped, from raising their arguments regarding reliance upon Chess's expertise or the exclusion of their declarations, considering that plaintiffs both consented to Chess's use and, by failing to engage in the damages eligibility assessments, left the United States with no other recourse in this case but to file its motion.

A. The United States Collected Data, And Presented It To Plaintiffs, In Good Faith

When collecting data from the affected agencies—which occurred despite plaintiffs' inability or unwillingness to provide basic information on certain plaintiffs or to timely challenge the conclusions made on others—the United States acted in good faith.

As demonstrated above, the United States made extensive efforts to not just obtain necessary data from agencies to calculate damages, but to obtain necessary information from

plaintiffs on many of these opt-ins. *See supra* at 9-12; *see also* Def. Ex. C. And in addition to collecting extensive documentation for its damages analysis, the United States also attempted to include plaintiffs in the process, despite their apparent resistance to do so.

In August 2018, Chess presented its preliminary damages calculation to plaintiffs. *See* Rev. Chess Decl. ¶ 16. At this meeting, the parties and Chess discussed not only all of plaintiffs' questions and Chess's preliminary calculations, but also the various categories into which plaintiffs fell, such as ineligible for damages following Chess's review of data; ineligible for damages based upon an agency's analysis; or unable to be identified. *Id.*; *see* Dkt. No. 192 at 2 (explaining that in February 2019, plaintiffs continued to try to provide information on unidentified opt-ins, and that plaintiffs intended to "contact[] certain plaintiffs whom [Chess] has preliminarily determined are not due liquidated damages, . . . to obtain any additional information that [Chess] should consider."); *see also*, *e.g.*, Dkt. Nos. 172, 174, 176-187; Def. Ex. C at 2-170. Thus in August 2018, plaintiffs received information on the Unidentified Plaintiffs and Ineligible Plaintiffs, and knew how those opt-ins were placed into those categories; moreover, plaintiffs were purportedly attempting to gather information and contest these assessments over a year and a half ago.

Following this August 2018 meeting, the United States provided plaintiffs with the information that they requested, and conducted the sampling that they requested. Rev. Chess Decl. ¶¶ 16, 35-44. DOJ explained that sampling method to plaintiffs, with no objection. *Id.* at ¶ 35; Def. Ex. C 62 ("[W]e intend to request a sample of 10% from each category to verify that the information provided to us by the agencies are accurate."). After months spent on data collection and analysis, Chess found that the statistically significant sampling revealed a 97 percent accuracy rate for the agencies' eligibility determinations. Rev. Chess Decl. ¶¶ 37-44.

And after the one systemic agency error was discovered, Chess received and then reviewed data for every opt-in from that agency. *Id.* at ¶ 39; *see also, e.g.,* Def. Ex. C at 212-214 (providing requested information to plaintiffs' counsel on the sampling in May 2020).

The parties and Chess again met in September 2019. Rev. Chess Decl. ¶ 17. Plaintiffs' questions were again addressed, and the parties also discussed the results of the sampling as well as the updated damages calculations. *Id.* Following the meeting, the United States again provided the data and analysis that plaintiffs requested. *Id.*; *see also* Def. Ex. C at 182-210; Dkt. No. 200 at 1 (explaining that Chess had identified over 2,000 opt-ins ineligible for damages).

In sum: plaintiffs requested a sampling of data in August 2018, which DOJ and Chess concluded in September 2019; and plaintiffs requested certain data following the parties' meetings, which plaintiffs received in September 2018 and September 2019. As the parties set forth in their most recent joint status report, the only specific issues that remained in early August 2020 were (1) the methodology to calculate damages for 12 individuals for whom data was unavailable, and (2) how to address attorney fees. Dkt. No. 227. Since that time, the United States has proposed methods by which each of these outstanding issues can be addressed.

Thus, the United States has always demonstrated its willingness to provide plaintiffs with data upon request, and has always sought to include all opt-ins who are eligible for damages into the damages calculations. Plaintiffs have never objected to the United States's methods before, and have not produced a scintilla of evidence that the United States in any manner failed to seek or to collect necessary data; attempted to withhold or to obfuscate data; or included erroneous or incomplete data for analysis. That is because there is no such evidence. Rather, with plaintiffs' knowledge, the United States (1) obtained business records from affected agencies, (2) provided that data to Chess for analysis, (3) presented that information to plaintiffs, and when plaintiffs

refused to dismiss the claims of certain opt-ins, (4) presented the data to the Court though Chess's declaration. The parties set forth as much in their joint status reports, filed monthly since March 2017. *See, e.g.*, Dkt. Nos. 166, 169, 172, 192, 200, 204.

"The presumption that government officials act in good faith is enshrined in our jurisprudence." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). Absent "well-nigh irrefragable proof" that the United States acted in bad faith, with a specific intent to injure the plaintiffs, a presumption exists that "public officials act 'conscientiously in the discharge of their duties'" and in good faith. *Croman Corp. v. United States*, 724 F.3d 1357, 1364 (Fed. Cir. 2013); *see also Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198-99 (1976). In this case the United States went above and beyond in its attempts to identify plaintiffs and assess their damages—despite *plaintiffs themselves* failing to provide sufficient information on their own claims. The United States did not act in bad faith; if anything, plaintiffs failed in their Court-ordered responsibility to determine damages.

B. The Information Relied Upon By Chess Is Admissible, As Are Its Declarations

The data underlying Chess's declarations, as well as the declarations themselves, are admissible, and attempts to preclude reliance upon Chess's expertise or the United States's evidence should be denied.

First and foremost, plaintiffs agreed to the use of Chess. After the Court ordered *plaintiffs* to present their initial damages calculations, Dkt. No. 160 at 13, the parties, in March 2017, agreed to the use of a consultant, and the United States "identified a consultant with such expertise who is acceptable to counsel for plaintiffs"—Chess—to review data and to develop a damages methodology. *See* Dkt. Nos. 162, 164, 192. Part and parcel to reviewing data and developing a damages methodology includes determining a particular plaintiff's entitlement to

damages, *i.e.* if he or she meets the requirements of the collective. As demonstrated above, the United States presented Chess's analysis and conclusions to plaintiffs on multiple occasions, including the eligibility determinations. *See, e.g.*, Dkt. Nos. 164, 192; Rev. Chess Dec. ¶¶ 16-17; *see generally* Def. Ex. C. And Chess's declaration accompanying the United States' motion, as well as the updated declaration attached to this reply, stem from the parties' agreed-upon analysis and data summarization.

Strangely, although plaintiffs urge the Court to exclude the United States's evidence, they offer no alternative to its use. Presumably, plaintiffs' do not intend to delay this case yet further beyond the three-and-a-half years already spent calculating damages, or to start anew with new consultants. Plaintiffs' intent in opposing the United States's motion is thus unclear, considering their dearth of evidence combined with their previously marked lack of desire to review the data available to them, and is particularly surprising since plaintiffs agreed with Chess's conclusions regarding the duplicate plaintiffs. *See* Dkt. No. 208. Nonetheless, plaintiffs contend that Chess's declarations (presumably including Chess's updated declaration attached to this reply), are inadmissible hearsay because the Chess consultants lack personal knowledge of the agencies' conclusions on certain plaintiffs; they are not qualified as expert witnesses under Federal Rule of Evidence (FRE) 702; their opinions are substantively inadmissible under FRE 703; and the United States has insufficiently demonstrated that Chess's analysis meets the *Daubert* standard. Resp. 4, 19-20. Plaintiffs' arguments are both misleading and incorrect.

Chess's declarations consist of (1) conclusions from its analysis of the data, including the agencies' eligibility determinations, and (2) charts summarizing that data and analysis. As demonstrated above, the United States engaged in extensive document collection to analyze plaintiffs' damages, including producing to Chess more than 68,000 files. Rev. Chess Decl.

¶ 14. These declarations are thus summarizations of voluminous records pursuant to FRE 1006. This rule provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation." FRE 1006. Indeed "[FRE] 1006 is aimed at 'providing a practicable means of summarizing voluminous information.'" *Bannum, Inc. v. United States*, 59 Fed. Cl. 241 (2003) (citing *United States v. Bakker*, 925 F.2d 728, 736 (4th Cir. 1991)).

Chess is well versed in this type of analysis. As its consultants explained, they have analyzed the claims of "thousands of individuals bringing claims under" the FLSA. *See* Rev. Chess Decl. ¶¶ 1-5. When the parties agreed to the use of consultants in March 2017, plaintiffs considered Chess acceptable for this very purpose. *See* Dkt. No. 162. Necessarily some of Chess's analysis has required it to determine whether, based upon the data provided by the United States, a particular opt-in "met the Court's definition of a collective action member." *Id.* at ¶ 6. That included determining, for example, whether an opt-in's SF-50 or pay stubs showed FLSA exempt or non-exempt. *See, e.g., id.* at ¶¶ 6-7, 18-44. Likewise, it included determining whether an opt-in's agency had already found that he or she was ineligible for damages. *Id.* These declarations and accompanying charts presented to the Court are admissible summaries of voluminous information. *See, e.g., United States v. Jennings*, 724 F.2d 436, 443 (5th Cir. 1984) ("The calculations in this case were of such a nature, and the government's witness, who, though not an accountant, had received training in accounting procedures and in claim investigations of this kind, was qualified to testify concerning the summary charts.").

Although plaintiffs contend that the United States failed to offer to them "the original or copies of the summarized writings" as required by FRE 1006, Resp. 20, their contentions are wrong. FRE 1006 requires that a party make the underlying documents "available for

examination or copying, or both, by other parties at a reasonable time and place"; it does not require that a party to preemptively produce documents to the other side. Plaintiffs had available to them, simply upon request, all of the underlying data utilized by Chess. They requested, and received, a portion of that data once, approximately two years ago, as well as Chess's conclusions on two occasions. *See generally* Def. Ex. C. Since that time, plaintiffs have sought no further underlying data; rather, at various times the United States proactively requested further information from plaintiffs or informed them of conclusions. *See generally id*. And the United States informed plaintiffs no later than October 2019 that it intended to file this motion, as well as which opt-ins would be subject to the motion. *See* Dkt. No. 201. Plaintiffs did not request the underlying data to rebut the United States's motion. Indeed, in February 2019, plaintiffs had asserted to the Court that they intended to provide further information to Chess for its analysis of ineligible opt-ins at that time, yet plaintiffs never produced such information. *See* Dkt. No. 192 at 2. Plaintiffs' refusal to actively engage in the damages analysis in this case, prior to the United States filing its motion, should not weigh against the admissibility of Chess's declarations. Nor should the United States—nor the 21,882 opt-ins actually eligible for damages, *see* Rev. Chess Decl. ¶ 8—be penalized for plaintiffs' unwillingness to work cooperatively with the United States to conclude this case in a timely manner.

Plaintiffs also contend that Chess's declarations do not accurately summarize the documents as necessary under FRE 1006, asserting that Chess's "conclusions that certain Plaintiffs are exempt are the only information the table contains; nothing reflects the information actually contained in the voluminous documents." Resp. 20-21. Plaintiffs' argument is nonsensical. Chess determined from the extensive documents that the United States presented—including SF-50s, spreadsheets, emails, time and attendance records, pay data, and other

miscellaneous documents—whether an opt-in met the collective definition. From that analysis, the United States brought its motion, which seeks to dismiss the 134 Unidentified Plaintiffs and 2,183 Ineligible Plaintiffs who have not shown an employment relationship with the United States or that they meet all five elements of the collective. Chess's declarations and accompanying exhibits therefore "reflect" the information contained in the original documents as relevant to the claims in this case, *i.e.*, whether the plaintiffs meet the collective's requirements.

In addition, the underlying documents used by Chess are themselves admissible, either as business records pursuant to FRE 803(6), or as admissions by a party-opponent pursuant to FRE 801(d)(2)(D). *See, e.g.*, *Six v. United States*, 71 Fed. Cl. 671, 684 n.7 (2006) ("Government documents would normally be admissible, however, either as business records, [FRE] 803(6), . . . or, in the circumstances of this case, possibly as admissions by a party-opponent, [FRE] 801(d)(2)(A) or (D)."). Particularly, the documents provided to Chess consist of the agencies' business records containing the time and attendance and payroll data of plaintiffs. These documents meet all of the requirements of a business record pursuant to FRE 803(6) as they were made contemporaneously by one with knowledge, were kept in the ordinary course of business, were generally kept in the normal practice,[16] and there is no indication of their untrustworthiness. *See, e.g.*, Rev. Chess Decl. ¶¶ 12-14. Incongruously, some of these types of documents—such as SF-50s and official time data—are documents that plaintiffs themselves seek to admit absent any attempt at authentication. *See, e.g.*, Resp. Ex. 15.

Furthermore, as evidence regarding whether the opt-ins meet the collective definition, the underlying documents could be considered admissions against interest pursuant to FRE

[16] With the exception of several compilation spreadsheets, Chess reviewed individual pieces of data for each plaintiff, including time cards, SF-50s, and paystubs. *See, e.g.*, Rev. Chess Decl. ¶¶ 12-14.

801(d)(2)(A): they show that plaintiffs do not meet one or more of the collective's elements and thus their damages ineligibility. In a similar manner, the documents provided by plaintiffs without accompanying declarations, *see, e.g.*, Resp. Ex. 15, if demonstrating what they purport to demonstrate, could be considered statements against the United States's interest.

In their response, plaintiffs cite to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and to *Exigent Tech. v. Atrana Solutions, Inc.*, 442 F.3d 1301 (Fed. Cir. 2006), to argue that the declarations fail to show "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." Resp. 31. Plaintiffs mischaracterize the holdings in these cases, which demonstrate that the United States's evidence is sufficient. In *Celotex*, the Supreme Court made clear that "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The Court found "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323. *Exigent* likewise confirms that the moving party satisfies its burden on summary judgment by showing that the nonmoving party has failed to provide evidence supporting its case. *Exigent*, 442 F.3d at 1309.

Chess's declarations are sufficient to meet the United States's burden, and demonstrate that plaintiffs cannot show that *each opt-in* subject to the motion is similarly situated and eligible for damages. RCFC 56 provides that the moving party must support its assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]" RCFC 56(c)(1)(A).

Chess's declarations explain, in detail, that the Chess consultants reviewed the opt-in list provided by plaintiffs' counsel, which contained each opt-in's name, agency, component, job location, job title, and partial social security number. *See* Chess Decl. ¶¶ 9-10; Rev. Chess Decl. ¶¶ 10-11. Chess then determined, based upon information provided by the agencies, whether each opt-in did or did not meet each of the five elements of the Court-defined collective. *See generally id.* Chess made these determinations, for each Unidentified Plaintiff and each Ineligible Plaintiff, "according to representations made by the affected Federal agencies," as well as from its "review of payroll and time entry data or other documents provided by the affected Federal agencies." *See* Chess Decl. ¶ 17, Exs. A-C; Rev. Chess Decl. ¶ 23, Exs. A-D. Chess's declarations fully comply with the procedures governing summary judgment. *See P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1356 (Fed. Cir. 2002).

Finally, as a practical matter, the effect of discarding Chess's declarations results in an inherently unworkable burden. Indeed, plaintiffs themselves explain that it is "virtually impossible" to present direct evidence "concerning each of the Plaintiffs whom the Government is challenging," Resp. 35, although that is what they effectively request that the United States do. Moreover, discarding Chess's declarations is inconsistent with plaintiffs' actions. They agreed to utilize Chess in March 2017, in part so that plaintiffs did not have to review the data themselves. They contend that Chess lacks first-hand knowledge "of the facts relevant to determine" whether opt-ins identified by their agencies are actually damages ineligible, *id.* at 20, yet plaintiffs failed to request sampling parameters, challenge the results of the sampling, or provide information to support their blanket assertions that the agencies' determinations are wrong. Likewise, they contend that Chess should not be permitted to put forth its conclusions on the data that it reviewed firsthand because their declarations should be stricken, *see id.* at 19-20,

yet the United States engaged Chess with plaintiffs' consent to determine the eligibility and damages of opt-ins in this case.

Because plaintiffs fail to demonstrate good reason for striking Chess's declarations, the Court should consider the declarations when ruling on the United States's motion.

C. Plaintiffs' Attempts To Preclude Use Of Chess's Analysis Should Be Denied On Waiver Or Equitable Estoppel Grounds

Plaintiffs' attempts to preclude Chess's use should be denied on waiver or equitable estoppel grounds, considering that the United States filed its motion only because plaintiffs failed to provide the United States with sufficient identifying information on the Unidentified Plaintiffs and also failed to challenge the exclusion of the Ineligible Plaintiffs, despite having the information to do so for years.

i. *Plaintiffs Waived The Ability To Challenge Chess's Use Or The Court's Consideration Of Chess's Declarations*

Through their actions, plaintiffs waived the ability to challenge Chess's use or the Court's consideration of Chess's declarations.

"Waiver is the 'intentional relinquishment of a known right.'" *Hahnenkamm, LLC v. United States*, 147 Fed. Cl. 383, 389 (2020) (citing *Int'l Indus. Park, Inc. v. United States*, 100 Fed. Cl. 638, 655 (2011)). To establish waiver, a party must show: (1) the existence at the time of the waiver a right, privilege, advantage or benefit that may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage or benefit. *Id.* (citing *Int'l Indus.*, 100 Fed. Cl. at 655). A party may establish waiver either by an express statement or by implication through a party's conduct inconsistent with an intent to assert a right. *See, Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409, 415-16 (2003) (citing *Mooney v. City of New York*, 219 F.3d 123, 131 (2d Cir. 2000)). A party seeking

to infer waiver bears the particularly heavy burden of showing that the opposing party was aware of its rights and made the conscious choice to waive those rights. *Id*. at 416.

Plaintiffs benefitted from Chess's use, by reducing their own workload as well as receiving any requested data and analysis from Chess. They knew that, by assenting to Chess's use, they would not have to produce evidence to calculate damages or to perform all calculations themselves in the first instance; rather, they could permit the United States to collect data and then have Chess do the analysis, while remaining free to raise questions or challenges. Further, they knew that they would not have to vet the opt-ins' claims, because Chess could do so.

Plaintiffs' waiver was knowing, or at the very least, inconsistent with any intent to assert their rights. Part and parcel to plaintiffs' agreement in March 2017 to use Chess to calculate damages, was an agreement to Chess's ability to determine an opt-in's threshold damages eligibility. *See* Dkt. Nos. 162, 164. Indeed, the most fundamental question to answer, prior to calculating damages, is whether a plaintiff is even *eligible* for damages. In this case, that includes determining for each opt in whether the opt-in: (1) worked for an agency covered by section 203(e)(2)(A); (2) was paid on his or her regularly scheduled payday; (3) worked for more than four hours between October 1-5, 2013; and (4) was classified as non-exempt from the FLSA on October 1, 2013. *Martin*, 130 Fed. Cl. at 581. Consequently, the United States has spent the past three-and-a-half years obtaining, analyzing, and presenting data to plaintiffs, to assess which opt-ins met each of these elements of the collective. And although the collected data were always available for the plaintiffs' review, they requested to review very little. Nor, upon information and belief, have plaintiffs made a fulsome effort to calculate damages of all opt-ins on their own; indeed, without ever requesting all of the underlying data provided by the agencies, they likely could not have made any attempt to do so.

Because it benefitted plaintiffs to cede damages calculations to the United States and to use Chess to conduct the analysis, they did so. Plaintiffs intentionally waived their right to protest Chess's use or the Court's consideration of Chess's declarations in our motion.

ii. *Plaintiffs Should Be Equitably Estopped From Challenging Chess's Use Or The Court's Consideration Of Its Declarations*

Alternatively, plaintiffs' actions—and inactions—warrant equitably estopping plaintiffs from seeking to preclude Chess's use or the Court's consideration of Chess's declarations.

"The elements of equitable estoppel are (1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992). As this Court has explained, a party may be estopped if they have taken an action or made a statement "which would be a fraud on his part to controvert or impair, because the other party has acted upon it in belief that what was done or said was true, conscience and honest dealing require that he not be permitted to repudiate his act or gainsay his statement." *Ebasco Servs. v. United States*, 37 Fed. Cl. 370, 376 (1997) (quoting BLACK'S LAW DICTIONARY 1580 (6th ed. 1990)). Each of the elements of equitable estoppel are met in this case.

First, plaintiffs' actions and inactions on damages calculations were misleading if plaintiffs may now challenge the damages determinations. Since presenting data to plaintiffs in both August 2018 and September 2019, with the limited exceptions noted above, plaintiffs have indicated no specific disagreement with the United States's collection of data or with Chess's analysis. Rather, plaintiffs repeatedly failed to provide the additional data on the Unidentified Plaintiffs that the United States requested, and raised no challenge to Chess's determinations on

the Ineligible Plaintiffs, despite having the access to the data and the ability to do so for years. Second, the United States relied upon these actions and inactions: it proceeded with collecting data and calculating damages in the same manner as it has over the past three-and-a-half years, using the very consultants that plaintiffs explicitly found acceptable.

Third, the United States would be severely prejudiced if it could not rely upon Chess's analysis. Indeed, although plaintiffs were well aware of, and apparently felt a disinclination to verify, Chess's conclusions, plaintiffs nonetheless unreasonably refused to dismiss the claims of the Unidentified Plaintiffs or the Ineligible Plaintiffs. The motion underlying this reply would have been entirely unnecessary had plaintiffs simply provided timely information on the Unidentified Plaintiffs or timely challenged the categorization of the Ineligible Plaintiffs. Instead, despite knowing since at least October 2019 that the United States intended to file its motion, *see, e.g.*, Dkt. No. 201; requesting that it delay filing the motion so that plaintiffs could collect data, *see, e.g.*, Dkt. No. 204; and twice requesting that the Court extend time for them to respond, Dkt. Nos. 209, 213, plaintiffs provided evidentiary support for only a fraction of the opt-ins subject to the motion. Incredibly, rather than agreeing to the dismissal of the opt-ins subject to our motion, plaintiffs attempt to entirely foreclose dismissal of these opt-ins despite completely lacking support to show that they meet all elements of the collective.

Plaintiffs' refusal to dismiss these plaintiffs from the litigation has unreasonably and vexatiously extended proceedings. Indeed, it has been nearly a year since the United States informed plaintiffs that it would file this motion, yet during that time plaintiffs collected information sufficient to challenge only a scant portion of the opt-ins subject to the motion. *See also* Dkt. No. 192 at 2. In addition to apparently failing to sufficiently examine the claims of all opt-ins when they opted into the case (instead leaving that to Chess), plaintiffs' failure to

produce information in support of their claims draws into question whether these opt-ins even have an attorney-client relationship with plaintiffs' counsel. *See, e.g., Alvarado-Morales v. Digital Equip. Corp.*, 843 F.2d 613, 618 (1st Cir. 1988) ("counsel's failure to properly investigate the facts prior to filing suit and his failure to withdraw the complaint when the facts were revealed to him by defendants' attorney during the early stages of discovery, certainly had [a vexatious] effect."). Permitting plaintiffs to foreclose the use of Chess now would simply result in further unnecessary delay in this seven-year-old case, which is prejudicial to not just the United States, but also to the nearly 21,882 plaintiffs who *do* meet the collective definition.[17] Justice should not permit plaintiffs to refuse to dismiss the claims of the opt-ins who do not belong within the collective in these circumstances.

Finally, plaintiffs' only suggestion in lieu of dismissing the Unidentified Plaintiffs and Ineligible Plaintiffs is a request that the Court permit them to "conduct discovery." Resp. 38. Discovery closed on April 11, 2016, and plaintiffs sought no further extensions of that deadline. *See* Dkt. Nos. 150, 152. Plaintiffs' suggestion amounts to an untimely and improperly embedded motion to reopen and to extend discovery to review the data that—for three-and-a-half-years—they had opportunity to review but mostly ignored. Plaintiffs should be equitably estopped from challenging the consultants' declaration or their conclusions, and their insufficiently-raised request for further discovery should be denied.

CONCLUSION

For these reasons, the Court should grant the United States's motion.

[17] As the United States forecasted elsewhere, it may seek to appeal the Court's final decision in this case. *See, e.g., Tarovisky v. United States*, No. 19-4C, Dkt. No. 15 at 3.

Respectfully submitted,

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Dated: September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2020, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS 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
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