IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD MARTIN, JR., *et al.*,	:	
	:	
Plaintiffs,	:	
v.	:	Civil Action No.: 13-834C
	:	
THE UNITED STATES OF AMERICA	:	Chief Judge Patricia E. Campbell-Smith
	:	
Defendant.	:	Collective Action
	:	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION, APPROVE PROPOSED NOTICE AND CONSENT FORMS, DIRECT ISSUANCE OF NOTICE PRIMARILY VIA EMAIL, PERMIT ELECTRONIC SIGNATURES ON CONSENT FORMS AND PERMIT PLAINTIFFS TO FILE CONSENT FORMS ON CD-ROMS

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QUESTIONS PRESENTED

1. Have Plaintiffs met the modest standard for conditional certification of a proposed collective action under 29 U.S.C. § 216(b) when their declarations and exhibits show that there are no factual differences among the members of the proposed action that are material to issues of liability, that damages can be established formulaically based on the Defendant's own records, that the only issues in the case are likely to be legal rather than factual, and that the Court's conclusions as to those legal issues are likely to be the same for all collective action members?

2. Do the proposed Notice of Lawsuit Against United States ("Notice") and the proposed Consent to Join Collective Action ("Consent") meet the requirements established pursuant to 29 U.S.C. § 216(b) by accurately informing recipients of their rights under the collective action?

3. Should the United States be ordered pursuant to 29 U.S.C. § 216(b) to send the Notice by email to the work email addresses of the members of the proposed collective action who still work for the Defendant as of the date of the Court's Order and to provide last known mail and email addresses and other contact information to Plaintiffs to enable Plaintiffs to send the Notice to collective action members who do not work for Defendant on that date?

4. Should the Court exercise its inherent powers to permit collective action members to sign Consent forms electronically, since the large number of potential members – about 1.3 million – would make the task of processing and tracking Consent forms overwhelming and unduly expensive if a significant percentage of those persons submitted their forms in writing and when the electronic signature process requires members to replicate a written signature on their computer screen and twice indicate their intent to submit the Consent form electronically as well as other protections against inadvertent or ill-conceived signatures?

5. Should the Court exercise its power under section IV.9.D to Appendix E to the Court's rules to allow Plaintiffs to file an alphabetical list of the persons who submit Consent forms with their identifying information using the ECF system but submit the Consent forms themselves on a CD-ROM?

INTRODUCTION

The United States of America required Plaintiffs and approximately 1.3 million other employees classified as "essential" to work throughout the partial government shutdown of October 2013 ("Essential Employees"), but made no provision to pay them during that shutdown for the work that they performed. Accordingly, Plaintiffs filed this suit on behalf of themselves and other Essential Employees who performed work between October 1 and October 5, 2013 but were not paid on their regularly scheduled payday for that work ("Members"). As is customary in FLSA cases, Plaintiffs request that the Court conditionally certify the proposed collective action, approve the sending of a proposed notice to members of that action, and approve the use of a proposed consent-to-join form by notice recipients who choose to participate in the case.

Plaintiffs need to make only a modest showing that other Members are similarly situated for this Court to conditionally certify the proposed collective action. Plaintiffs easily meet this standard. Indisputably, the United States acted uniformly as to all Members by failing, as part of the same set of actions, to pay them on a timely basis for work performed between October 1 and October 5, 2013. The relatively few issues in this case will be legal, not factual, and will be resolvable on motions for summary judgment.

Conditional certification is appropriate for two other reasons. The claims of each Member are relatively small – under $1,000 unless they worked a large number of overtime hours. It would be economically foolish to force them to litigate individually. Already, without Court-authorized notice and based only on word of mouth, well over 1,000 Members have found out about the case and submitted Consent to Join forms to Plaintiffs' counsel. The original Plaintiffs have filed an Amended Complaint this day that adds them as Plaintiffs. Without

conditional certification, these Members, along with potentially hundreds of thousands more, would have no reasonable means of litigating their claims.

Despite the large number of potential opt-ins, the lack of factual issues and the small number of legal issues will make this case straightforward to litigate. Plaintiffs contemplate a brief discovery period followed by the filing of cross summary judgment motions, leading to an expeditious resolution.

The conditional certification process should begin with the Court's approval of the language of the Notice of Lawsuit Against United States ("Notice") and the proposed Consent to Join Collective Action ("Consent"). The proposed Notice and Consent provide Members the appropriate information accurately and in language that recipients are likely to understand.

Although the size of the proposed collective action does not make the substantive issues or the language of the Notice and Consent more complex, it does necessitate several administrative procedures. First, the Court should order the Government to provide the Notice by email to the work email addresses of all Members who remain employed by the United States as of the date of the Court's Order, and to provide Plaintiffs with the names, email addresses, mailing addresses and other appropriate information for Members who are no longer employed by the United States. Email notice from the Government is the least expensive, most speedy and most effective means of alerting collective action members to the existence of the case and of their rights, and other means of notice should be used only when email notice from the Government to its employees is not available.

Next, the Court should permit Members to sign Consents electronically. Requiring paper signatures would make it impractical for information about each opt-in to be captured electronically and thereby lead to processing errors and prohibitively increase the cost of

litigation. The methodology proposed by Plaintiffs for electronic signatures is well accepted and gives sufficient formality to the signing process to foreclose any possibility of inadvertent signature. This procedure, which is consistent with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.*, is currently being used for opt-ins and is operating smoothly and efficiently.

Finally, the Court should permit copies of the signed Consent forms to be filed and served on a CD-ROM rather than through the ECF system. This will be efficient for all parties and the Court, whereas the likely volume of these Consents otherwise might overwhelm the ECF system.

STATEMENT OF THE CASE

A. The FLSA Requirements

1. Minimum Wage and Overtime Compensation Must be Paid on the Regularly Scheduled Payday

The Fair Labor Standards Act ("FLSA") requires that employers, including the United States Government, *Berg v. Newman*, 982 F.2d 500, 504 (Fed. Cir. 1992), compensate their non-exempt employees[1] at least a minimum wage for all hours worked and an overtime rate of one and one-half times their regular rate for all hours worked in excess of specified limits. 29 U.S.C. §§ 206(a)(1), 29 U.S.C. § 207(a) (App. A1).[2] Employers violate the FLSA if they do not pay the

[1] Employees are covered by the FLSA's minimum wage and overtime provisions unless they are "exempt." 29 U.S.C. § 213(a) (App. A1-A2). Plaintiffs do not challenge in this case that the Essential Employees classified by the Government as "exempt" are, indeed, normally "exempt" under the FLSA. However, one requirement of exemption is that exempt employees be paid on a "salary basis." Plaintiffs contend for reasons explained below that Essential Employees classified as exempt were not exempt during the week of September 29 through October 5, 2013 because the Government did not pay them on a "salary basis."

[2] Pursuant to RCFC 5.4(a)(1)(D), (G) and 5.4(b)(1)(C), excerpts from statutes, regulations, and documentary exhibits on which Plaintiffs rely are attached as Appendix A. After the citation

mandated minimum wage and overtime on the employees' scheduled payday. *See, e.g., Brown Park Estates v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997); *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993).

The current federal minimum wage is $7.25 per hour. Courts disagree as to whether an employer must pay non-exempt employees $7.25 for each hour worked or an average of $7.25 per hour for every hour worked in a workweek, *i.e.*, $290 for a 40 hour week. *Compare, e.g., Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 22–23 (D. Mass. 2011) (holding that plaintiffs had asserted viable claims even though they had been paid more than an average of $7.25 per hour each workweek because they alleged that they had not been paid at all for several hours each week) *with, e.g., United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960) (dismissing FLSA claims based on employer's failure to pay for six hours of work per week based on weekly average wage theory).[3] The Federal Circuit and this Court have not addressed this specific issue. *See Christofferson v. United States*, 77 Fed. Cl. 361, 364 (Fed. Cl. 2007). This Court will need to decide the issue in this action: no Essential Employees were paid minimum wage for October 1 through October 5 if the Court adopts the former interpretation, but some Essential Employees were paid minimum wage for the period if the Court adopts the latter interpretation.

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to each document included in Appendix A is a reference to the pages in that Appendix at which the relevant excerpt can be found.

[3] No court holds that the period for calculating whether minimum wage has been paid to hourly or salaried workers is longer than a week. *See Sandoz v. Cingular Wireless, LLC*, No. 07-1308, 2013 U.S. Dist. LEXIS 47018, at *12–18 (W.D. La. Mar. 27, 2013) (discussing cases holding that the workweek calculation is the most conservative standard by which minimum wage payments are calculated).

2. Government Employees Classified as FLSA Exempt Are Treated as Non-Exempt and Entitled to Overtime Compensation for any Week in Which They Do Not Receive Their Salary on their Regularly Scheduled Payday

Generally, federal non-exempt employees are entitled to overtime pay when they work more than eight hours in a day or 40 hours in a week. *See Doe v. United States*, 513 F.3d 1348, 1356–57 (Fed. Cir. 2008) (explaining relationship of FLSA and Federal Employees Pay Act, 5 U.S.C. § 5541 *et seq.* in context of overtime pay for non-exempt employees). As described below, non-exempt Essential Employees who worked more than eight hours in a day between October 1 and October 5 or more than 40 hours in the week from September 29 through October 5 were not paid at overtime rates on their next regularly scheduled payday.

Plaintiffs contend that these violations also apply to Essential Employees whom the United States classifies as exempt under the executive, professional or administrative exemptions of the FLSA. Those exemptions apply only to employees who, among other requirements, are paid on a salary basis. To pay an employee on a salary basis, an employer must pay the employee his or her full salary at the scheduled time, unless the employee performs no work during the week or under other circumstances not applicable here. 29 C.F.R. § 541.602(a) (App. A5). In particular, "An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer . . . ." *Id.* For any week in which a public employer fails to pay a normally exempt employee on a salary basis, the employee is treated as a non-exempt employee, and is entitled to receipt of minimum wage and overtime at one and one-half times his or her normal rate. *Id.* § 541.710(b) (App. A6).

3. Employees Are Entitled to Liquidated Damages When Not Paid on their Regularly Scheduled Payday During Government Shutdowns

Employers that violate the FLSA's provisions are liable for the shortfall in timely minimum wage or overtime payments and an additional amount equal to that shortfall as

liquidated damages. 29 U.S.C. § 216(b) (App. A2). The liquidated damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum ***on time*** may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (emphasis added) (quoting 29 U.S.C. § 202(a)); *see Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583–84 (1942) (explaining that liquidated damages are intended to be compensatory rather than punitive; they compensate employees for the losses they may have suffered as a result of not receiving the proper wages at the time they were due).

Courts may award less than full liquidated damages only if the employer shows that it acted "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." *Id.* § 260 (App. A2); *see Abbey v. United States*, 106 Fed. Cl. 254, 265 (2012) (citing 29 U.S.C. § 260). There is a "strong presumption under the statute in favor of doubling." *Angelo v. United States*, 57 Fed. Cl. 100, 104 (2003) (quotations omitted). The employer's burden to establish its good faith and the reasonable grounds for its action is "substantial." *Abbey*, 106 Fed. Cl. at 265 (quoting *Adams v. United States*, 350 F.3d 1216, 1226 (Fed. Cir. 2003)). A court has the discretion to reduce the amount of liquidated damages or to refrain from awarding them only when the employer meets both conditions. Otherwise, the court must award liquidated damages. *See id.* (quoting 29 C.F.R. § 709.22(b) (App. A6-A7).[4]

[4] The types of hardships suffered by Plaintiffs and other collective action members exemplify why Congress chose to award liquidated damages unless an employer can demonstrate both good faith and reasonable grounds for its actions. *See, e.g.*, Copeland Decl., ¶¶ 7-12

Here, the United States will have a difficult time meeting these conditions partly because of guidance issued by the Department of Labor, the agency charged with administering the FLSA. In a fact sheet issued in 2009, the DOL made clear that the FLSA's rules apply to public employees during a furlough, that those rules are "not affected by the classification of an employee as essential or critical for the purposes of a required furlough," and that public employees may sue "to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs" if they "are not paid on a timely basis" in conformity with the FLSA. Wage & Hour Div., U.S. Dep't of Labor, *DOL Fact Sheet #70: Frequently Asked Questions Regarding Furloughs & Other Reductions in Pay and Hours Worked Issues*, Q&A 4,

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(explaining that she and her husband both worked for government and hence were not paid for work on the Scheduled Payday, that she was turned away from a doctor's appointment because she could not afford copay, they needed donations to pay for children's medications, and they had to defer mortgage, vehicle loans, utility bills, and vehicle insurance payments); Melvin Decl., ¶¶ 7-12 (explaining that on Scheduled Payday he not receive wages and per diem to cover his substantial out-of-pocket expenses on government travel, and as a result he had to defer mortgage payments, incurred late fees, discontinued tutoring for son, and cut back on household expenses); Rowell Decl., ¶¶ 9-12 (explaining that he is sole source of income for family of five and that family had little savings due to expenses related to a kidney transplant, and as a result of government's failure to timely pay wages, he incurred late fees because he was unable to make credit card payments and could not afford to buy food that wasn't absolutely necessary); Jones Decl., ¶¶ 7-10 (explaining that he is sole source of income for family of four and could not afford to make home and car payments during shutdown); Ballard Decl., ¶¶ 7-12 (explaining that she was forced to report to work against doctor's orders following surgery, that she incurred late fees because she was unable to make rent, mortgage, and car payments in a timely manner and was forced to obtain a $1,000 loan); Torrain Decl., ¶ 7 (explaining that she incurred late fees because she was unable to make rent and car payments in timely manner); Chamberlain Decl., ¶ 9 (explaining that he incurred late fees because he was unable to pay his creditors on time); Jennings Decl., ¶ 7-8 (explaining that he was unable to pay his bills in a timely manner and that he intends to retire two years earlier than initially planned due to government's failure to pay him on time). They were not alone: "Hardship withdrawals from the Thrift Savings Plan set a record [in October 2013], as thousands of participants tapped their retirement accounts during the 16-day partial government shutdown, according to figures released" by the TSP. Sean Reilly, "TSP hardship withdrawals hit record high" (Nov. 18, 2013), *available at http://www.federaltimes.com/article/20131118/BENEFITS03/311180007/TSP-hardship-withdrawals-hit-record-high* (App. A14).

10, 11 (Nov. 2009), *available at* http://www.dol.gov/whd/regs/compliance/whdfs70.pdf ("DOL Fact Sheet") (App. A8-A9).

B. Factual Background

1. The United States's Policies Regarding Payment to Essential Employees During the October 2013 Partial Government Shutdown

The United States government was partially shut down from October 1, 2013 through October 16, 2013 ("the shutdown"). During this period, the United States classified all civilian employees in agencies and positions affected by the shutdown as either essential or non-essential.[5] *See, e.g.*, U.S. Office of Pers. Mgmt., *Guidance for Shutdown Furloughs*, Q&A B.1 at 1 (Oct. 11, 2013), *available at* http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf ("OPM Guidance") (App. A9) (explaining agency counsel and managers identified employees as "excepted" or "non-excepted"). It decided that about 1.3 million employees were "essential" and thus required to report to work and perform their normal duties during the entire shutdown. *Id.*, Q&A F.2 at 7 (App. A9) ("If an excepted employee refuses to report for work after being ordered to do so, he or she will be considered to be absent without leave (AWOL) and will be subject to any consequences that may follow from being AWOL."); U.S. Dep't of Justice, *Frequently Asked Questions Regarding a Lapse in Appropriations for Dep't of Justice Emps.*, Q&A 1 at 1 (Oct. 11, 2013), *available at* http://www.justice.gov/archive/jmd/employee-faqs.pdf ("DOJ FAQ") (App. A9-A10) (defining excepted employees as employees required to work during the shutdown).

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[5] The Government also uses the terms "excepted employee" and "non-excepted employee" to refer to the classification between essential and non-essential employees. "Essential Employees" and "excepted employees" are equivalent.

Although Members continued to work during the shutdown, they were not timely compensated for the work performed on or after October 1, 2013 as required by the FLSA. Typically, Essential Employees are paid biweekly, pursuant to schedules that permit their pay rates to be calculated as a certain amount per hour. *See* Nat'l Fin. Ctr., Office of the Chief Fin. Officer, USDA, Form No. NFC-1217, *Pay Period Calendar 2013*, *available at* https://www.nfc.usda.gov/Forms/1217n_13.pdf (last updated May 20, 2013, 9:24 AM) ("Pay Period Calendar 2013") (listing biweekly pay periods 1 to 26 for 2013). The first pay period affected by the shutdown commenced on Sunday, September 22, 2013 and ended Saturday, October 5, 2013. *Id*. While Members received a payment on their regularly scheduled payday for this pay period ("Scheduled Payday"),[6] they were not compensated on the Scheduled Payday for the work performed between October 1, 2013 and October 5, 2013 (the "Five Days"). *E.g.*, Broad. Bd. of Governors, *Gov't Shutdown Q&As*, Q&A 34 at 16 (Oct. 11, 2013), *available at* http://www.bbg.gov/wp-content/media/2013/10/BBG-Government-Shutdown-FAQsOct11-2013.pdf ("BBG FAQ") (App. A10) (stating paycheck received on Scheduled Payday will not include payment for work performed during the Five Days); U.S. Dep't of the Interior, *Furlough Pay Questions and Answers*, Q&A 1, 2 at 1 (Oct. 10, 2013), *available at* http://www.doi.gov/shutdown/fy2014/upload/Pay-FY2014.pdf ("DOI FAQ") (App. A11) (stating employees will not receive complete salary on Scheduled Payday since hours worked from October 1, 2013 forward will be delayed); Dep't of Justice, *Important Notice to All DOJ Emps. Regarding Salary Payments for Pay Period 19 (Sept. 22–Oct. 5, 2013) due to the Appropriations Lapse* 1, *available at* http://www.justice.gov/archive/jmd/notice-doj-employees-re-salary-payments.pdf ("DOJ Notice Re. Payments for Period 19") (App. A11) (explaining that

[6] Depending on the agency, an employee's Scheduled Payday was October 11, 2013; October 15, 2013; or October 17, 2013.

essential employees will be considered in "furlough" status during shutdown and thus will not receive payment on Scheduled Payday for the Five Days worked). Instead, they were not compensated for work performed during the Five Days until the partial shutdown ended. U.S. Office of Pers. Mgmt., *Frequently Asked Questions for Retroactive Paychecks for the Biweekly Pay Period September 22 through October 5, 2013* 1 (Oct. 22, 2013), *available at* http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/faqs-for-retroactive-paychecks-for-the-september-22-through-october-5-2013-biweekly-pay-period-october-22-2013.pdf ("OPM Retroactive Paychecks") (App. A11-A12) (stating employees will receive retroactive pay for the Five Days worked on their next regularly scheduled pay day).

The deliberate failure to pay Essential Employees classified as exempt under the FLSA their salaries on the Scheduled Payday meant that they were not paid on a salary basis for the week of September 29 through October 5. None of the allowable deductions for exempt employees applies because the Members actually worked during that week. The failure to pay on a salary basis therefore means that, for the week of September 29 through October 5, 2013, these Members were entitled to minimum wage and overtime pay as if they were non-exempt. *See supra* Part A.2.

2. The United States Uniformly Failed to Pay its Essential Employees Minimum Wages on the Scheduled Payday

The United States was obligated to pay Members on the Scheduled Payday at least minimum wage for each hour worked. Just as various agencies had warned as discussed in the section above, Members were not paid at all on their Scheduled Payday, let alone paid a minimum wage, for any of the time worked between October 1 and October 5.

Members were paid for work performed during the week of September 29 through October 5, 2013 only to the extent that they worked on September 29 or September 30. If the

United States was obligated to pay Essential Employees on the Scheduled Payday $7.25 for each hour worked, no Member received minimum wage for each hour worked. If the United States was obligated to pay Essential Employees on the Scheduled Payday $7.25 times the number of hours worked between September 29 and October 5, many Members received less than $290 ($7.25 per hour times forty hours per week) on the Scheduled Payday for work performed September 29, 2013 through October 5, 2013. *See, e.g.,* Anderson Decl., ¶ 5 (paid nothing for work performed between September 29 and October 5 because he was off work on September 29 and 30); Clapper Decl., ¶ 5 (same); Cook Decl., ¶ 5 (same); Jones Decl., ¶ 5 (same); Jennings Decl., ¶ 5 (paid $167.40 for work performed that week); Chamberlain Decl., ¶ 5 (paid $182.24 for work performed that week); Plank Decl., ¶ 5 (paid $195.36 for work performed that week); Baham Decl., ¶ 5 (paid $235.47 for work performed that week); Ballard Decl., ¶ 5 (paid $242.08 for work performed that week); Torrain Decl., ¶ 5 (paid $244.07 for work performed that week).

Once the Court has determined whether minimum wage is to be assessed on an hourly or weekly basis, the amount by which the United States fell short of paying Members the minimum wage on their Scheduled Payday can be determined from the Government's records. These amounts are relatively easy to determine, especially considering that the Government has consolidated the majority of its agencies' payroll services into four shared centers. *See* Office of Pers. Mgmt., *Migration Planning Guidance: Service Delivery*, OPM HR Line of Business, http://www.opm.gov/services-for-agencies/hr-line-of-business/migration-planning-guidance/service-delivery/ (last visited Nov. 26, 2013) (App. A13-A14) (identifying the four payroll providers that deliver biweekly payroll services to the majority of federal employees).

3. The United States Uniformly Failed to Pay its Essential Employees Overtime Compensation on the Scheduled Payday

During the shutdown, many Essential Employees – including persons classified as exempt and non-exempt under the FLSA – worked in excess of the applicable thresholds for overtime pay. *See, e.g.*, Cook Decl., ¶ 6 (worked 20 hours of overtime between October 1 and October 5); Roberts Decl., ¶ 6 (worked 12 hours of overtime between October 1 and October 5); Rowell ¶ 6 (worked 8 hours of overtime between October 1 and October 5); Anderson Decl., ¶ 6 (worked 2.5 hours of overtime between October 1 and October 5); Plank Decl., ¶ 6 (worked 2.4 hours of overtime between October 1 and October 5); Baham Decl., ¶ 6 (worked 1.6 hours of overtime between October 1 and October 5); Chamberlain Decl., ¶ 6 (worked 1.2 hours of overtime between October 1 and October 5).

The United States did not pay Members who are non-exempt under the FLSA overtime compensation on the Scheduled Payday for the overtime performed during the Five Day period, just as it failed to pay them minimum wage for work on those days. OPM Guidance, Q&A D.5 at 6 (App. A9) (stating Essential Employees will not receive overtime payments until new appropriation or continuing resolution passed); *see, e.g.*, Baham Decl., ¶ 7; Chamberlain Decl., ¶ 7; Cook Decl., ¶ 7; Plank Decl., ¶ 7; Roberts Decl., ¶ 7; Rowell Decl., ¶ 7. Even though non-exempt Members received payment subsequently, they are entitled to liquidated damages for the failure to pay overtime on a timely basis.

Similarly, although many FLSA-exempt Essential Employees worked in excess of the applicable hour thresholds for overtime pay during the week of September 29 through October 5, the United States failed to pay these employees overtime compensation on the Scheduled Payday. OPM Guidance, Q&A D.5 at 6 (App. A9) (stating Essential Employees will not receive overtime payments until new appropriation or continuing resolution passed); *see* Anderson Decl., ¶ 7. To the extent that the United States made overtime payments retroactively, it was under the

formula applicable to exempt employees. *Id.*, ¶ 8. With certain exceptions not germane at this time, that rate is one and a half times the basic pay rate for persons paid no more than the GS 10, step one level, or for persons paid at higher levels, the greater of one and a half times the basic pay rate for persons paid at the GS 10, step one level or the hourly rate of the employee. 5 U.S.C. § 5542(a) (App. A2-A3). The nominally exempt employees, however, were entitled to pay at the non-exempt overtime rate of one and a half times salary for that week, without regard to the limitations in section 5542(a). *See supra* Part A.2. Therefore, they are now entitled to damages equal to the difference between the amount they should have been paid under the non-exempt formula and the amount they were paid for the week of September 29 through October 5, together with liquidated damages equal to one and a half times their regular rate for overtime hours worked during that week.

C. Procedural Background

Five Plaintiffs filed the Complaint initiating this case on October 24, 2013. Since then, word of the lawsuit has spread through word-of-mouth and media coverage, but without any formal individual notice. As of late December 2013, 1,017 Members had signed Consent to Join forms that had been processed by Plaintiffs' counsel, and are included in an Amended Complaint that Plaintiffs have filed as of right because the United States has not yet answered the Complaint. Burakiewicz Decl., ¶ 11. Hundreds of Consent to Join forms that had arrived before late December had not yet been processed, and many others have arrived since then. Plaintiffs are in a position to submit a Second Amended Complaint with over 500 additional joinders, but at this time intend to wait until the Court has ruled on whether they can be submitted on CD-ROMs instead of through the ECF system. *Id.*, ¶ 12.

Initially, Plaintiffs asked Members interested in joining the suit to fill in and sign Consents to Join by hand and send them to counsel by scanned image, fax or United States mail. Counsel found, however, that the large number of forms submitted made manually entering the data as to each new Plaintiff impractical, and a quote from a contractor to enter the data manually would have resulted in prohibitive costs. *Id*., ¶¶ 4-6. Accordingly, on November 20, 2013, counsel switched to requesting that interested persons fill out, sign and submit Consents to Join online, while also making clear that they still could print and fill out the forms by hand. *Id.*, ¶¶ 7-10.

ARGUMENT

I. PLAINTIFFS EASILY HAVE MADE THE "MODEST FACTUAL SHOWING" THAT PROPOSED MEMBERS ARE SIMILARLY SITUATED TO THE PLAINTIFFS

A. The Court Should Conditionally Certify a Proposed Collective Action Upon a Modest Showing that Other Individuals Are Similarly Situated

The FLSA authorizes Plaintiffs to bring suit on behalf of similarly situated individuals. 29 U.S.C. § 216(b) (App. A2) ("An action to recover the liability . . . may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated."). It also gives those similarly situated individuals the right to opt-in to this case. *Id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

As the Supreme Court has noted, this ability to bring collective actions provides several important benefits:

> A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by

> efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) (internal citations omitted);[7] *see Whalen v. United States*, 85 Fed. Cl. 380, 387 (2009) (quoting *Hoffman-LaRoche*, 493 U.S. at 170); *Gayle v. United States*, 85 Fed. Cl. 72, 80 (2008) (same).[8]

Courts in this Circuit engage in a two-step process to determine whether FLSA cases should proceed as collective actions. *See Whalen*, 85 Fed. Cl. at 383, 386 (applying two-step process to certify collective action); *Gayle*, 85 Fed. Cl. at 77, 80 (same). During the "conditional certification" or "notice" stage, the plaintiffs need only make a "modest factual showing" that potential class members are similarly situated and the inquiry is "not particularly searching." *Whalen*, 85 Fed. Cl. at 384 ("[T]he court's task in conditionally certifying a collective action is limited, involving only a modest factual showing of a common policy or plan.") (quotations omitted); *see Gayle*, 85 Fed. Cl. at 77 (authorizing conditional certification in light of lenient evidentiary standard).

This burden may be met through pleadings and affidavits demonstrating that plaintiffs and potential collective action members were "together the victims of a single decision, policy, or plan."[9] *Whalen*, 85 Fed. Cl. at 384. Any "distinctions … in job titles, functions, or pay will

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[7] *Hoffman-LaRoche* involved claims brought pursuant to the Age Discrimination in employment Act of 1967. That statute incorporates the FLSA enforcement provisions set forth in 29 U.S.C. § 216(b).

[8] The ability of individuals to pursue wage and hour violations collectively is a classic example of making it possible to have "an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons." *Greenfield v. Villager Indus.*, 483 F.2d 824, 831 (3d Cir. 1973).

[9] An FLSA collective action is not subject to the class certification standards of Rule 23 such as the numerosity, commonality, and typicality requirements. *Gayle*, 85 Fed. Cl. at 77 ("Collective actions are distinct from class action lawsuits and thus are not subject to the

not stand in the way of conditional certification when an overarching nexus is present." *Whalen*, 85 Fed. Cl. at 386 (quotations omitted). The Court should not consider how it may resolve the disputed issues during this phase. *Id.*

Upon conditional certification, the Court should authorize the sending of a notice to the similarly situated individuals informing them of the pendency of the action and providing them with the opportunity to opt in. *See id.* at 384–85 (citing *Castillo, Inc. v. P&R Enters., Inc.*, 517 F. Supp. 2d 440, 449–50 (D.D.C. 2007)). The case then proceeds as a "representative action" throughout discovery. *See id.* at 385.

During the second phase, after the conclusion of discovery, defendants may move to decertify the conditional class if the record establishes that the plaintiffs are not actually similarly situated. *Id.* at 383; *Gayle*, 85 Fed. Cl. at 78.

B. Plaintiffs Have Made the Modest Factual Showing for Conditional Certification

Plaintiffs have met the lenient burden of making a modest factual showing that they are similarly situated to all Proposed Members. These employees, including Plaintiffs, are similar as to all relevant facts, including:

- The United States designated each of them an Essential Employee for purposes of the shutdown;
- As Essential Employees, each was required to work throughout the shutdown, OPM Guidance, Q&A F.2 at 7 (App. A9); DOJ FAQ, Q&A 1 at 1 (App. A9-A10);
- Each was paid on a two-week pay period schedule, Pay Period Calendar 2013;

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requirements governing class actions set forth in Fed. R. Civ. P. 23 . . . or its counterpart in this court . . . .") (citations omitted).

- For each of them, the first pay period affected by the shutdown was September 22, 2013 through October 5, 2013, DOI FAQ, Q&A 1 at 1 (App. A11); DOJ Notice Re. Payments for Period 19, at 1 (App. A11);
- At their Scheduled Payday after October 5, 2013, the United States paid each of them for work performed from September 22, 2013 through September 30, 2013, but not for work performed during the Five Days, *see* BBG FAQ, Q&A 34 at 16 (App. A10); DOI FAQ, Q&A 1, 2, at 1 (App. A11); DOJ Notice Re. Payments for Period 19, at 1 (App. A11);[10]
- The United States paid each Potential Member for work performed during the Five Days after the Scheduled Payday, OPM Retroactive Paychecks, at 1 (App. A11-A12);
- The United States did not make any effort to pay any Members on the Scheduled Payday minimum wage for work performed during the Five Days, *id.*;
- The United States did not rely on any advice of counsel when it decided not to pay any of the Members on the Scheduled Payday minimum wage for work performed during the Five Days, and instead acted in direct disregard of the guidance issued by its own regulators, DOL Fact Sheet (App. A8-A9);
- The United States did not make any effort to pay any of the Members on the Scheduled Payday for overtime worked during the Five Days, OPM Guidance, Q&A D.5 at 6 (App. A9); BBG FAQ, Q&A 40 at 17 (App. A10); and

[10] On the Scheduled Payday, the United States also may not have paid Members at overtime rates for work in excess of eight hours on September 29 and September 30. Plaintiffs are still exploring the issue, but whether the United States failed to pay overtime on those days does not impact whether Members are similarly situated.

- The United States did not rely on any advice of counsel or any guidance from regulators when it decided not to pay any of the Members on the Scheduled Payday for overtime worked during the Five Days, and instead acted in direct disregard of the guidance issued by its own regulators, DOL Fact Sheet (App. A8-A9).

These common facts establish that the Members were "the victims of a single decision, policy, or plan" to make them work without paying them on their regularly scheduled payday. *Whalen*, 85 Fed. Cl. at 384; *Gayle*, 85 Fed. Cl. at 77. Because the Members are similarly situated factually, they also are similarly situated as to the critical legal questions that are likely to be the principal focus of the litigation:

- Is an employer such as the United States liable under the FLSA for not paying employees minimum wage or overtime pay on their regularly scheduled paydays?
- Even if employers normally are liable under the FLSA for not paying employees minimum wage or overtime pay on their regularly scheduled paydays, did the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, supersede or impliedly amend the FLSA so as to insulate the United States from liability?
- Was the United States obligated to pay Members at least $7.25 for each hour worked during the Five Days or only an average of $7.25 per hour for each hour worked?
- Did the United States act in good faith and with reasonable grounds for believing that it was acting in conformity with the FLSA in not timely paying Members notwithstanding the contrary guidance previously issued by the Department of Labor?

Members classified as exempt under the FLSA, including Plaintiff Jose Rojas, are similarly situated as to these relevant facts in addition to the facts set out above:

- The United States classified each of them as exempt under the FLSA;
- The United States reduced the pay of each Potential Member classified as FLSA-exempt on the Scheduled Payday by not paying them for any of the Five Days, but not for any of the reasons permitted under the FLSA for deducting the pay of employees paid on a salaried basis, 29 C.F.R. § 541.602(b) (App. A5); and
- The United States paid Members classified as FLSA-exempt who worked overtime hours during the week of September 29 through October 5, 2013 under the formula normally applicable to FLSA-exempt employees rather than under the formula applicable to FLSA non-exempt employees.

Again, these common facts show that this subset of members of the proposed action were "the victims of [the United States'] single decision, policy, or plan" to pay them overtime under the less generous formula applicable to exempt employees even though it made deductions from their pay on the Scheduled Payday as if they were non-exempt employees. *Whalen,* 85 Fed. Cl. at 384; *Gayle,* 85 Fed. Cl. at 77. As a result of these factual similarities, the collective action members classified as FLSA-exempt also are similarly situated as to two critical legal questions:

- Should Members classified as FLSA-exempt be treated as non-exempt for the week of September 29 through October 5, 2013 because they were not paid on a salary basis?
- Did the United States act in good faith and with reasonable grounds for believing that it was acting in conformity with the FLSA in reducing the pay of Members it classified as FLSA-exempt on the Scheduled Payday?

The showing of all of these similarities, including that Members were all victims of a single set of actions by the United States, easily meets the standard for conditional certification.

C. The Large Number of Opt-Ins Also Supports Conditional Certification

In addition, conditional certification is warranted by the fact that well over 1,000 persons already have submitted Consent to Join forms. This is significant for two reasons. First, if the Court were to decide – wrongly, we believe – that the original Plaintiffs and Members are not similarly situated, the logical implication is that joinder of plaintiffs is improper under RCFC 20(a)(1). Either the Court would be faced with over 1,000 individual suits at greatly inflated costs to the parties and the Court, *Hoffman-LaRoche,* 493 U.S. at 170 (collective actions benefit the judicial system "by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity"), or the individual Essential Employees would have to drop the litigation notwithstanding the merits because the amounts at stake make litigation impractical. No Plaintiff will recover more than $290 on the minimum wage claim, and only those Plaintiffs who worked substantial overtime have the possibility of recovering over $1,000. The costs to litigate over such small amounts of money are prohibitive. *See Hughes v. Kore Ind. Enter.*, 731 F.3d 672, 675 (7th Cir. 2013) (Posner, J.) (explaining that small value case is appropriate for class certification because of the "difficulty of finding a lawyer willing to handle an individual suit in which the stakes are $100 or an improbable maximum of $1000," even though if "successful the plaintiff's lawyer would be entitled to a fee paid by the defendant" because a reasonable attorneys' fee to obtain a $100 judgment probably would not be "enough to interest a competent lawyer").

Second, the fact that over 1,000 persons already have chosen to join the case shows that there is significant interest among Members in the case. Those who already have opted in have received information about the case through media coverage and word-of-mouth, but the ability

to join should not be limited to the government employees who happen to learn about the case. The Court instead should conditionally certify the action and direct the sending of notice to all Members.

II. THE COURT SHOULD APPROVE THE LANGUAGE OF THE PROPOSED NOTICE AND CONSENT FORMS

Section 216(b)'s affirmative permission for employees to proceed on behalf of similarly situated employees necessarily grants trial courts the authority and imposes on them the responsibility to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to the commands of the Federal Rules of Civil Procedure. As part of this duty, the Supreme Court has directed that trial courts should "facilitate[] notice to potential plaintiffs" early in the litigation. *Hoffman-LaRoche*, 493 U.S. at 169. Notice is appropriate upon the grant of conditional certification. *See Whalen*, 85 Fed. Cl. at 384-85 ("If the court finds that plaintiffs have made a 'modest factual showing' of common circumstance, then it may conditionally certify the collective action and send notice to potential collective action plaintiffs.") (citation omitted); *Gayle*, 85 Fed. Cl. at 77 (explaining that if a collective action is conditionally certified, "notice may be sent to potential collective action plaintiffs").

As the Supreme Court has explained, a Court-authorized notice to similarly situated employees must be "timely, accurate, and informative." *Hoffmann-La Roche*, 493 U.S. at 172. Plaintiffs' proposed Notice and Consent forms meet this standard. They accurately inform Members of the claims in the case, their rights if they join the case, the deadline for joinder, the identity of counsel, the important terms of the retainer agreement, and the fact that the Court has not ruled on the merits, among other topics. They do so in an evenhanded manner while avoiding legalese. The Court should approve both documents.

III. THE UNITED STATES SHOULD SEND THE NOTICE ELECTRONICALLY TO ALL MEMBERS WHO STILL ARE EMPLOYED BY IT AND PROVIDE CONTACT INFORMATION TO PLAINTIFFS FOR THE OTHER MEMBERS

An accurate and informative notice does no good to the extent that members of a proposed collective action are unaware of it. For that reason, a court presiding over an FLSA collective action has "a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71. The goal that the notification process be accomplished efficiently and properly is, of course, consistent with the general mandate that the Federal Rules of Civil Procedure be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

The most speedy and inexpensive means of providing notice in this case is to require the United States through its payroll administrators to send notice by email, with a carbon copy to Plaintiffs' counsel, to the work addresses of all Members who are still employed by the Government as of the date of the Court's Order. Numerous courts in other jurisdictions have used email to provide notice in FLSA and other cases. *See e.g., Margulies v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 3:13-cv-00475-PK, 2013 U.S. Dist. LEXIS 146484, at *60 (D. Or. Oct. 10, 2013) (finding "that email is an efficient and nonintrusive method of communication"); *Alequin v. Darden Rests., Inc.*, No. 12-61742-CIV, 2013 U.S. Dist. LEXIS 108341, at *6 (S.D. Fla. July 31, 2013) ("[C]ourts in this Circuit commonly approve email notice to potential opt-in class members in FLSA cases."); *Ritz v. Mike Rory Corp.*, 12 CV 367 (JBW)(RML), 2013 U.S. Dist. LEXIS 61634, at *15 (E.D.N.Y. Apr. 30, 2013) (permitting email notice); *Rehberg v. Flowers Foods, Ind.*, No. 3:12cv596, 2013 U.S. Dist. LEXIS 40337, at *6 (W.D.N.C. Mar. 22, 2013) (same); *Jones v. JGC Dallas LLC*, Civil Action No. 3:11-CV-2743-O, 2012 U.S. Dist. LEXIS 185042, at *18–19 n.9 (N.D. Tex. Nov. 29, 2012) (listing FLSA cases permitting email notice).

In this case, having the email sent by the Government's payroll administrators will increase the chances that the communication will not be blocked by spam filters and will be read by the intended recipients. The subject line and text of the email, "Notice of Your Rights in a Collective Action Lawsuit Arising Out of the Government Shutdown," are evenhanded while providing critical information to interested employees immediately. The cost to the United States will be minimal, and communication will be essentially instantaneous, furthering the policy objectives set out in Rule 1 of the Federal Rules of Civil Procedure.

The alternative approach of using the United States mail to provide Members with notice would be at odds with the goals of efficient and inexpensive litigation. Approximately 1.3 million Members were affected by the United States' actions and omissions. The cost of processing, printing and mailing notices to all of them almost certainly would exceed one million dollars. Burakiewicz Decl., ¶ 13. Many of the mailed notices undoubtedly would be discarded unread as junk mail.

The provision of notice by email instead of United States mail to the extent possible also is in the Government's interest. It will be liable to Plaintiffs for the fees and expenses of the case pursuant to the FLSA's fee shifting provisions if Plaintiffs prevail. Whether Plaintiffs' counsel hires a claims administration company at a potential cost of $1 million or more or incurs costs and fees for the time of its own paralegals for whom the firm can recover an hourly rate, the Government would be faced with paying a large and unnecessary amount of expenses.

For Members no longer employed by the United States, the Government should be required to provide Plaintiffs with last known email addresses (if known) and last known mailing addresses. Plaintiffs should be allowed to give email notice to all persons for whom that information is provided and mailed notice to the others.

Plaintiffs will receive undeliverable notices for some of the intended recipients. Updated information will be obtainable for many of these Members by use of social security numbers, but there are privacy concerns associated with dissemination of those numbers. Accordingly, Plaintiffs have suggested a process by which they will identify the Members for whom they receive undeliverable notices to the Government. The Government then will be obligated to perform the necessary searches, and provide updated information to Plaintiffs, who will re-send notice to those Members.

IV. MEMBERS SHOULD BE ALLOWED TO SUBMIT CONSENT TO JOIN FORMS USING ELECTRONIC SIGNATURES

A. Plaintiffs' Process for Obtaining Electronic Signatures on Consent Forms Complies with the Language and Purpose of the Consent Requirement

The FLSA requires any employee wishing to join a collective action to "give[] his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (App. A2). A consent form approved by the Court that is signed electronically meets these statutory requirements. It is a written consent to become a party and can be filed with the Court.

Congress required opt-ins to file written consents to ensure that they "clearly manifest [their] consent to become a party plaintiff to the litigation." *Melendez Cintron v. Hershey Puerto Rico, Inc.*, 363 F. Supp. 2d 10, 16 (D.P.R. 2005); *see Faust v. Comcast Cable Comm'ns Mgmt., LLC*, Civ. Act. No. WMN-10-2336, 2013 U.S. Dist. LEXIS 145804, at *17 (D. Md. Oct. 9, 2013) (explaining that document that "manifests a clear intent to be a party plaintiff" satisfies consent requirement) (quoting *D'Antuono v. C & G of Groton, Inc.*, No. 3:11cv33 (MRK), 2012 U.S. Dist. LEXIS 49788, at *10 (D. Conn. Apr. 9, 2012)).

Plaintiffs' proposed methodology for electronic signatures easily meets this standard. Members who wish to opt in must replicate a written signature on his or her computer screen,

either using a mouse, finger or stylus. Burakiewicz Decl. ¶ 8. Under the signature are the capitalized words, ""I AGREE TO THE CONTENTS OF ALL PAGES ABOVE WITH AN ELECTRONIC SIGNATURE." *Id.* Members then must click on a box indicating their intent to submit the Consent form electronically. *Id.* Finally, Members receive an email on which they must click a link indicating their intent to join the case. *Id.* Through this process, Members "clearly manifest [their] consent" to join the lawsuit.[11]

Members who sign electronically using this multi-step process receive as strong a signal that they are entering a transaction with legal consequences as do Members who put pen to paper. In *Becker v. Montgomery*, 532 U.S. 757 (2001), the Supreme Court held that a typewritten name did not suffice as a signature for purposes of Rule 11, concluding that in Rule 11 the word "signed" meant "a name handwritten (or a mark hand placed)." *Id.* at 764. As the Court subsequently explained, the signature requirement is "a 'think twice' prescription that 'stem[s] the urge to litigate irresponsibly.'" *Scarborough v. Principi*, 541 U.S. 401, 416 (2004) (quoting *Edelman v. Lynchburg College*, 535 U.S. 106, 116 (2002). Under Plaintiffs' proposed process, electronic signatures are handwritten, whether made by finger, stylus or mouse. More important, the entire process, unlike the typing of a name, constitutes "a 'think twice' prescription."

B. Electronic Signatures Have Been Accepted by Other Courts in FLSA Cases

Although this Court has not addressed the validity of electronic signatures on consent forms, numerous other courts have permitted consent forms to be signed electronically, recognizing the reliability and effectiveness of electronic signatures. *See, e.g., White v.*

[11] Plaintiffs invite the Court to try the process itself online to reassure itself that the protections are adequate, but ask only that the Court use the word "test" or similar designation so that there is no mistaking it for a Member.

Integrated Elec. Techs., Inc., No. 11-2186, 2013 U.S. Dist. LEXIS 83298, at *39 (E.D. La. June 13, 2013) (identifying courts that have approved use of online, electronic signature consent forms); *Jones v. JGC Dallas LLC*, No. 3:11-CV-2743-O, 2012 U.S. Dist. LEXIS 185042, at *19 (N.D. Tex. Nov. 29, 2012) (providing members option of executing consent forms online via electronic signature service); *Kelly v. Bank of Am., N.A.*, No. 10 C 5332, 2011 WL 7718421, at *2 (N.D. Ill. Sept. 23, 2011) (authorizing members to electronically consent on internet website by providing name, date of birth, and last four digits of social security number); *Nobles v. State Farm Mut. Auto. Ins. Co.*, No. 2:10-CI-04175-NKL, 2011 WL 3794021, at *10 (W.D. Mo. Aug. 25, 2011) (same).

C. Congress Vested Courts with the Authority to Determine Whether Electronic Signatures, Which Are Treated as Equivalent to Handwritten Signatures in Virtually All Transactions, are Allowable.

Congress likewise recognizes the general validity of electronic signatures. The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.* mandates that "any transaction in or affecting interstate or foreign commerce" may not be invalidated because "a signature, contract, or other record relating to such transaction … is in electronic form." 15 U.S.C. § 7001(a)(1) (App. A3).[12] Similarly, the Government Paperwork Elimination Act forbids federal agencies from denying validity to electronic records and their related electronic signature merely because they are in electronic form and encourages federal government use of a range of electronic signature alternatives. Off. Mgmt. & Budget,

[12] The Electronic Signature Act requires that certain disclosures be made to consumers asked to sign electronically, including that the consumer have the option to sign on paper and be informed how to obtain a copy of the electronically signed document. 15 U.S.C. § 7001(c)(1)(B) (App. A3-A4). Plaintiffs' proposed methodology complies with all of the requirements. Among other things, while Plaintiffs strongly encourage electronic submission of the Consent form, including an electronic signature, Plaintiffs' website makes clear that collective action members have the option to print out the form, sign it, and submit it to Plaintiffs' counsel by non-electronic means. Burakiewicz Decl., ¶ 10.

Implementation of the Government Paperwork Elimination Act, *available at* http://www.whitehouse.gov/omb/fedreg_gpea2/ (last visited Jan. 22, 2014) (App. A12).

Congress exempted Court filings from the scope of the Electronic Signature Act, leaving it to the judicial system to determine the extent to which electronic signatures should be allowed. 15 U.S.C. § 7003(b)(1) (App. A4). This Court confers equal status upon electronic signatures and handwritten signatures of attorney members of this Court's bar who use Court's Electronic Filing ("ECF") System. *See* RCFC Appendix E § VI.18, 19(a) & (b) (providing that both electronic and written signatures satisfy RCFC 11(a)'s signature requirement); *see* Fed. R. Civ. P. 5(d)(3) (authorizing courts to adopt local rules governing electronic signatures and providing that electronic filings are equivalent to paper filings). Indeed, the Court's Order on this very motion will bear an electronic signature.

There is no reason in the language of the FLSA, the purpose of the consent requirement, or the more general purposes underlying signature requirements for the Court to prevent Members from signifying their intent to join this lawsuit by signing electronically under the process proposed by Plaintiffs with its myriad protections against ill-considered signatures. The Court should give Members the same option to sign electronically that they have repeatedly used in their lives outside the courts.

D. The Court Should Allow Members to Electronically Sign Consent Forms to Further the Efficient and Proper Management of the Opt-In Procedure

While electronic signatures on consent forms under procedures with appropriate safeguards are consistent with the FLSA, it is imperative that they be allowed in this case as a matter of efficient and proper management of the consent process. As discussed above, trial courts are responsible for ensuring that the opt-in process is administered in an efficient, speedy, and inexpensive manner. *See supra* Part III (discussing Fed. R. Civ. P. 1 and *Hoffman-LaRoche,*

493 U.S. at 170–71). Here, forbidding electronic signatures would directly contravene these objectives. Indeed, Plaintiffs' initial attempt at processing written consents confirms that requiring paper signatures would be unmanageable, inefficient, and prohibitively expensive. *See* Burakiewicz Decl. ¶¶ 3–5 (describing how processing paper consents resulted in significant backlog, considerable consumption of staff's time, and projected out-of-pocket costs of at least one million dollars).

In contrast, allowing Consent forms to be submitted to counsel electronically with electronic signatures significantly increases the efficiency of processing consents and thus facilitates the prompt resolution of this matter. This process allows the names and contact information for persons joining the litigation to be automatically entered into a spreadsheet instead of forcing this necessary information to be entered manually. This conclusion is consistent with the Court's recognition that using electronic documents instead of paper documents is an effective way to promote efficient litigation. *See, e.g.*, *First Fed. Sav. & Loan Ass'n of Rochester v. United States*, 88 Fed. Cl. 572, 600 (2009) (finding electronic transcripts "necessary for [ ] timely and efficient litigation"); *ACE Constructors, Inc. v. United States,* 81 Fed. Cl. 161, 170 (2008) ("[A]lthough certainly convenient for ACE's attorneys, the electronic transcripts were not simply for convenience, but rather were necessary to timely post-trial preparation . . . .").

Furthermore, the use of electronic signatures is essential to reducing the costs of this action. In *First Federal Savings & Loan Ass'n,* the Court found that the relatively low cost of utilizing electronic documents "help[ed] reduce the number of billed attorney and paralegal hours and thereby reduce[d] the overall cost of the litigation." 88 Fed. Cl. 572 at 599; *see ACE Constructors*, 81 Fed. Cl. at 170–71 (finding electronic transcripts "promoted judicial economy

by reducing the attorneys' time compensable . . . from that which would have been required if the attorneys had had to rely only on non-electronic transcripts . . . ."). In the same way, the cost of processing Consent forms submitted electronically with electronic signatures is just a small fraction of the cost of having a claims administration company or paralegal process written forms. *See* Burakiewicz Decl. ¶¶ 4–6 (indicating cost of electronic signature service is less than 5% of the cost of claims administration company).

As with the means of providing notice, the acceptance of electronic signatures is in the Government's interest. The United States' potential liability for fees and costs under the FLSA's fee shifting provisions if Plaintiffs prevail means that it also benefits from strategies such as use of electronic signatures for the reduction of the cost of litigation. In this case, therefore, the use of electronic signatures is in the interest of both parties and necessary in order for the Court to manage the litigation properly.

V. PLAINTIFFS SHOULD BE ALLOWED TO FILE A CD-ROM CONTAINING PDF COPIES OF THE CONSENT FORMS

With their Amended Complaint filed this day, Plaintiffs have filed an appendix containing 1,017 Consent to Join forms. The filing comprises 27.3 megabytes of data, compelling Plaintiffs to submit the filing through the ECF system in multiple batches to accommodate the size limitations of the Court.

Plaintiffs anticipate that after the sending of the Notice the number of signed Consent forms to be filed will increase dramatically. Filing them may completely overwhelm the capacities of the Court's ECF system.

The Court, however, has anticipated this type of problem. Section IV.9.D of Appendix E of the Rules of the Court of Federal Claims provides, "For files that exceed size limitations, the

Filing User must seek appropriate relief from the court, which may, for example, authorize a filing in some other electronic format (e.g., a CD-ROM) or in paper form."

The Court should authorize Plaintiffs to file and serve any group of more than 100 Consent forms on a CD-ROM. Plaintiffs still would file an alphabetical list of the opt-in Plaintiffs through the ECF system.

Defendant has informed Plaintiffs that it intends to take no position on the request to submit Consent to Join forms on CD-ROMs. Plaintiffs' request benefits all parties, and the Court should issue an Order implementing this request without waiting for a decision on the contested issues before it.

CONCLUSION

For the reasons set out above, the Court should: (1) conditionally certify the proposed collective action; (2) approve the language of the proposed Notice and Consent; (3) order the United States, within 30 days after the date of the Order, to send the Notice to the work email addresses of each Potential Member still employed by the Government and to provide Plaintiffs with the names and specified contact information for Members no longer employed by the Government as of the date of the Order; (4) allow Members to sign the Consent to Join forms through electronic signatures; and (5) allow Plaintiffs to submit PDFs of the Consent forms on a CD-ROM rather than using the ECF system.

Dated: January 28, 2014

Respectfully submitted,

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APPENDIX OF PERTINENT PORTIONS OF STAUTES, REGULATIONS AND DOCUMENTARY EXHIBITS

I. FEDERAL STATUTES

Fair Labor and Standards Act of 1938, as amended,29 U.S.C. § 201, *et seq.*

A. 29 U.S.C. § 206(a). Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees . . . wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) $5.85 an hour beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

B. 29 U.S.C. § 207(a)(1). Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

C. 29 U.S.C. § 213(a). Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 . . . and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity . . . ;

D. 29 U.S.C. § 216(b). Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates . . . section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . An action to recover the liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

E. 29 U.S.C. § 260. Liquidated Damages

In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938 . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of such title.

F. 5 U.S.C. § 5542(a). Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an

employee whose basic pay exceeds the minimum rate for GS-10 . . . for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee . . . .

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 . . . or the hourly rate of basic pay of the employee . . . .

Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, *et seq.*

G. 15 U.S.C. § 7001. General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information . . . be provided or made

available to a consumer in writing, the use of an electronic record to provide or make available . . . information satisfies the requirement . . . if—

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences . . . or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

H. 15 U.S.C. § 7003(b)(1). Specific exceptions

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to—

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

II. ADMINISTRATIVE REGULATIONS

A. 29 C.F.R. § 541.602 Salary Basis

(b) **General rule.** An employee will be considered to be paid on a "salary basis" . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation . . . . [A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. . . . An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer. . .

(c) **Exceptions.** The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. . . .

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability . . . if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. . . . Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay . . . without loss of the exemption.

(4) Deductions . . . may be made for penalties imposed in good faith for infractions of safety rules of major significance . . . .

(5) Deductions . . . may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules . . . . Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment . . . . However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. . . .

B. 29 C.F.R. § 541.710(b)

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

C. 29 C.F.R. § 709.22(b)

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two:

(1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and

(2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act.

> If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages . . . . If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.

III. AGENCY GUIDANCE

A. *DOL Fact Sheet #70: Frequently Asked Questions Regarding Furloughs & Other Reductions in Pay and Hours Worked Issues* ("DOL Fact Sheet")

Wage & Hour Division, U.S. Department of Labor
November 2009
http://www.dol.gov/whd/regs/compliance/whdfs70.pdf

4. In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business?

Reductions in the predetermined salary of an employee who is exempt under Part 541 of the Department of Labor's regulations will ordinarily cause a loss of the exemption. Such an employee must then be paid the minimum wage and overtime required by the FLSA, as discussed in **FAQ #2** above. . . .

An employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions found in **29 C.F.R. 541.602(b)(1)-(7)**, salary deductions result in loss of the section 13(a)(1) exemption.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough disqualify the employee from being paid on a salary basis only in the workweek when the furlough occurs and for which the pay is accordingly reduced under **29 C.F.R. 541.710**. See **FAQ #9** below. . . .

10.Does it matter if the State or local government employee is considered an essential or critical employee for the purposes of a required furlough?

The application of the FLSA is not affected by the classification of an employee as essential or critical for the purposes of a required furlough.

11.What remedies are available to correct violations of the FLSA when employees are not paid on a timely basis? . . .

c. An employee may file suit to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs . . .

d. Civil money penalties may be assessed for repeat and/or willful violations of the FLSA's minimum wage or overtime requirements. . . .

B. ***Guidance for Shutdown Furloughs***(“OPM Guidance”)

U.S. Office of Personnel Management
Oct. 11, 2013
http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf

Q1: Who are “excepted” employees?

In the context of shutdown furloughs, the term “excepted” is used to refer to employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations . . . Agency legal counsels, working with senior agency managers, determine which employees are designated to be handling “excepted” and “non-excepted” functions. . . .

Q2: May an excepted employee take previously approved paid time off or be granted new requests for paid time off during a shutdown furlough?

No. . . If an excepted employee refuses to report for work after being ordered to do so, he or she will be considered to be absent without leave (AWOL) and will be subject to any consequences that may follow from being AWOL.

Q5: May an excepted employee be permitted to earn premium pay (e.g., overtime pay, Sunday premium pay, night pay, availability pay) during the furlough period?

Yes. Excepted employees who meet the conditions for overtime pay . . . will be entitled to payment . . . Premium pay may be earned but cannot be paid until Congress passes and the President signs a new appropriation or continuing resolution.

C. ***Frequently Asked Questions Regarding a Lapse in Appropriations for Dep't of Justice Employees***

U.S. Department of Justice
Oct. 11, 2013
http://www.justice.gov/archive/jmd/employee-faqs.pdf

Q1:What is the proper terminology?

- "Excepted" employees are those employees who are required to work.
- "Non-excepted" employees are furloughed. (A furlough is the placing of an employee in a temporary nonduty, non-pay status because of lack of work or funds, or other nondisciplinary reasons.)
- "Emergency" employees are the subset of excepted employees who are required to work under the emergency exception.

D. ***Government Shutdown Q&As***

Broadcasting Board of Governors
Oct. 11, 2013
http://www.bbg.gov/wp-content/media/2013/10/BBG-Government-Shutdown-FAQsOct11-2013.pdf

Q34: I am an employee performing excepted activities and have been required to work during the government shutdown. Will I be paid for the time I worked during the government shutdown on October 11, 2013?

No, your paycheck on October 11, 2013, will include payment for the actual time worked from September 22, 2013 through September 30, 2013. Your paycheck will not include payment for any time worked from October 1, 2013 through October 5, 2013. If you are required to perform excepted activities during the shutdown, you will be paid for the time worked once the government shutdown ends and the normal payroll process resumes.

E. ***Furlough Pay Questions and Answers***("DOI FAQ")

U.S. Department of the Interior
October 10, 2013

http://www.doi.gov/shutdown/fy2014/upload/Pay-FY2014.pdf

Q1: Will my pay for pay period 21 (Sept 22-Oct 5) be processed on time for hours worked prior to a lapse in appropriation?

Employees will receive their paycheck on the usual scheduled pay date. The IBC and the Department of the Treasury have excepted staff scheduled to process all pay schedules on the normal scheduled pay dates.

Q2: If I am required to work as an excepted employee, will I receive my normal rate of pay?

You will be paid at your normal rate of pay; however, you will not receive a complete salary payment during the furlough. Payment for the hours worked from October 1, 2013 forward will be delayed until Congress enacts an appropriate bill which gives us the legal authority to pay you. Once Congress enacts this law, amended timecards will be requested.

F. ***Important Notice to All DOJ Employees Regarding Salary Payments for Pay Period 19 (Sept. 22–Oct. 5, 2013) due to the Appropriations Lapse***

Department of Justice
http://www.justice.gov/archive/jmd/notice-doj-employees-re-salary-payments.pdf

Employees paid from a funding source that has lapsed, regardless of whether they were furloughed (non-excepted) or working (excepted) from October 1 through October 5, will be paid for regular pay and overtime they worked September 22 through September 30. For October 1 through October 5, all such employees, whether working or not, will be in "furlough" status on their T&As and thus will not receive payment for that period. Therefore, employees' usual paychecks will be reduced.

G. ***Frequently Asked Questions for Retroactive Paychecks for the Biweekly Pay Period September 22 through October 5, 2013***

U.S. Office of Personnel Management
October 22, 2013
http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/faqs-for-retroactive-paychecks-for-the-september-22-through-october-5-2013-biweekly-pay-period-october-22-2013.pdf

Q: How will furloughed and excepted employees be paid for the furlough period of October 1 through October 16, 2013, including retroactive pay?

- Retroactive pay for October 1 through October 5, 2013 will be transmitted to your bank account, or received via mail (if you normally receive a paper paycheck) on your next regularly scheduled pay day.

IV. OTHER DOCUMENTARY EXHIBITS

A. HL Line of Business, Migration Planning Guidance: Service Delivery

U.S. Office of Personnel Management
http://www.opm.gov/services-for-agencies/hr-line-of-business/migration planning-guidance/service-delivery/

Table 2: Public Sector Shared Service Center Offerings Summary

Public Sector Shared Service Center	System Base	Payroll Provider	HR Staff Support Services (Non-HRIT)
USDA NFC	Payroll/Personnel System (PPS) and stand alone HR (EmpowHR) and T&A (Web Star)	**NFC**	Partnered with Animal and Plant Health Inspection Service (APHIS)
DoD	Defense Civilian Personnel Data System (DCPDS) with Payroll interface	**Interface to DFAS**	Aligned to DoD Regional Service Centers

Public Sector Shared Service Center	System Base	Payroll Provider	HR Staff Support Services (Non-HRIT)
HHS	CapitalHR		HHS SSC Resources
DOI NBC	Federal Personnel and Payroll System (FPPS) and Quicktime (T&A)	**NBC**	NBC SSC Resources
Treasury	HR Connect	**Interface to NFC**	Partnered with Bureau of Public Debt (BPD)
GSA	Consolidated Human Resources Information System (CHRIS), Payroll, Accounting and Reporting System (PAR) and Electronic Time and Attendance Management System (ETAMS)		GSA SSC Resources

B. "TSP Hardship Withdrawals Hit Record High"

Sean Reilly
November 18, 2013
http://www.federaltimes.com/article/20131118/BENEFITS03/311180007/TSP-hardship-withdrawals-hit-record-high

"Hardship withdrawals from the Thrift Savings Plan set a record [in October 2013], as thousands of participants tapped their retirement accounts during the 16-day partial government shutdown, according to figures released [by the TSP]."