

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 19-59C
)	(Judge Campbell-Smith)
UNITED STATES,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S NOTICE OF DIRECTLY
RELATED CASES AND MOTION TO CONSOLIDATE**

Pursuant to Rules 7(b), 40.2(a)(3), and 42.1(a) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully provides notice that the following 12 cases, each assigned to Judge Campbell-Smith, are directly related:

1. *Justin Tarovisky et al. v. United States*, No. 19-4C;
2. *Eleazar Avalos et al. v. United States*, No. 19-48C;
3. *D.P. et al. v. United States*, 19-54C;
4. *L. Kevin Arnold et al. v. United States*, No. 19-59C;
5. *Roberto Hernandez et al. v. United States*, No. 19-63C;
6. *Tony Rowe et al. v. United States*, No. 19-67C;
7. *Plaintiff No. 1 et al. v. United States*, No. 19-94C;
8. *I.P. et al. v. United States*, No. 19-95C;
9. *Lori Anello et al. v. United States*, No. 19-118C;
10. *Joseph Abrantes et al. v. United States*, No. 19-129C;
11. *Brian Richmond et al. v. United States*, No. 19-161C; and

12. *Quentin Baca et al. v. United States*, No. 19-213C.¹

In the further interest of efficiency and conservation of resources, we respectfully request that the Court consolidate these 12 cases pursuant to RCFC 42.1(b), as set forth in more detail below.

BACKGROUND

Each of the 12 cases asserts the same set of operative facts. On December 22, 2018, several agencies within the Federal Government ceased operations due to a lapse in appropriations, which affected approximately 800,000 Federal employees who work or worked at those agencies. Relevant to each of these cases are the “excepted employees”—the Federal employees who were directed to work, but who were not paid for that work until after appropriations were restored. *See* Office of Personnel Management, *Guidance for Shutdown Furloughs*, at § B; *see also* 31 U.S.C. § 1342; *see, e.g., Tarovisky*, No. 19-4, Dkt. No. 6 at § 1; *Plaintiff No. 1*, No. 19-94C, Dkt. No. 7 at § 4. On January 25, 2019, Congress passed a continuing resolution that provided the affected Federal agencies appropriated funds through February 15, 2019. 116 P.L. 5 § 139. Following passage of this continuing resolution, Federal employees who had worked but had not been paid during the lapse in appropriations, as well as furloughed Federal employees, received their standard pay “at the earliest date possible after the lapse in appropriations end[ed], regardless of scheduled pay dates.” 116 P.L. 1, § 2.

With one exception, each of the 12 cases seeks the same relief based upon the facts outlined above: (1) certification of a collective action comprising Federal employees who worked but were not paid during the lapse in appropriation; (2) notice sent to these prospective

¹ Another related case, *Albert Viera v. United States*, No. 19-40C, was filed on January 6, 2019, but was voluntarily dismissed on January 9, 2019. No. 19-40C, Dkt. No. 5.

plaintiffs; (3) liquidated damages totaling the Fair Labor Standards Act (FLSA) minimum wage earned by these collective action members; (4) liquidated damages totaling the FLSA overtime wage earned by these collective action members; and (5) attorney fees and costs. *See, e.g., Tarovisky*, No. 19-4C, Dkt. No. 6 at 11-12; *Avalos*, No. 19-48C, Dkt. No. 6 at 14-15; *Arnold*, No. 19-59C, Dkt. No. 6 at 10-11. Several complaints also specifically seek additional damages, including, for example, pre- and post-judgment interest, named plaintiff service awards, and a complete accounting of damages. *See, e.g., Hernandez*, No. 19-63C, Dkt. No. 1 at ¶ 64; *Plaintiff No. 1.*, No. 19-94C, Dkt. No. 7 at 24-25; *I.P.*, No. 19-95C, Dkt. No. 1 at 10-11.

Although based upon the same set of operative facts as the other cases, the *Abrantes* plaintiffs seek relief pursuant to the Border Patrol Agent Pay Reform Act (BPAPRA), 5 U.S.C. § 5550, and the Back Pay Act, 5 U.S.C. § 5596. *See Abrantes*, No. 19-129C, Dkt. No. 1, at ¶¶ 1-2, 17, 28-34. In addition, *Abrantes* is the only case that asserts constitutional claims, alleging violations of the Fifth Amendment’s due process component and of the Thirteenth Amendment. *Id.* at ¶¶ 35-48.

ARGUMENT

I. Each Of These Cases Is Directly Related To The Others

Pursuant to RCFC 40.2(a)(2)(A), directly related cases “involve the same parties and are based on the same or similar claims.” *See also Franconia Assocs. v. United States*, 61 Fed. Cl. 335, 337 (2004). Each of the listed cases is already assigned to the same judge, and many plaintiffs have already recognized the related nature of many of these cases. *See, e.g., Arnold*, No. 19-59C, Dkt. No. 4 (notice of directly related case nos. 19-4C and 19-48C); *Plaintiff No. 1*, No. 19-94C, Dkt. No. 8 (amended notice of directly related case nos. 19-4C, 19-48C, 19-54C, 19-59C, 19-63C, 19-95C, 19-118C, 19-161C); *Anello*, No. 19-118C, Dkt. No. 2 (notice of

directly related case nos. 19-04C, 19-40C, 19-48C, 19-59C); *Richmond*, No. 19-161C, Dkt. No. 4 (notice of directly related case no. 19-04C).

These 12 cases “involve the same parties and are based on the same or similar claims,” as required by RCFC 40.2(a)(2)(A). Each involves the same defendant, the United States, and one or more of the agencies or agency subcomponents that were affected by the lapse in appropriations that occurred between December 22, 2018, and January 25, 2019. *See, e.g.*, *Tarovisky*, No. 19-4C, Dkt. No. 6 at ¶ 5 (listing named plaintiff as a Bureau of Prisons employee); *Hernandez*, No. 19-63C, Dkt. No. 1 at ¶¶ 8-9 (listing plaintiffs as Customs and Border Protection employees); *Abrantes*, No. 19-129C, Dkt. No. 1 at ¶ 4 (listing plaintiffs as Customs and Border Protection employees); *Richmond*, No. 19-161C, Dkt. No. 1 at 1 (listing plaintiffs as Bureau of Prisons employees).

Each case involves the same group of proposed plaintiffs because each seeks collective action certification on behalf of the same, or a subset of the same, Federal employees. *Compare, e.g., Arnold*, No. 19-59C, Dkt. No. 6 at ¶¶ 3, 27-32 *with Tarovisky*, No. 19-4C, Dkt. No. 6 at ¶¶ 37-42. Although several cases seek certification of a collective action on behalf of only employees of certain agencies or who work at specific locations, *see, e.g., Abrantes*, No. 19-129C, Dkt. No. 1 at ¶ 19; *Richmond*, No. 19-161C, Dkt. No. 1 at ¶ 4, those plaintiffs are subsumed by the proposed collective action of the other related cases. Jointly, the cases seek certification of a collective action on behalf of *all* “excepted” Federal employees who worked and were not paid for that work during the lapse in appropriations.

Each case involves virtually identical claims for liquidated damages. Even *Abrantes*, which seeks damages under statutes other than the FLSA, does so pursuant to the same set of facts and circumstances as in the other 11 cases. Because the parties and the claims in each of

these 12 cases are in essence the same, they meet RCFC 40.2(a)(2)(A)'s definition of "directly related."

II. The 12 Cases Should Be Consolidated With One Point Of Contact For The Consolidated Cases

Due to the directly-related nature of these cases, and in the interest of judicial economy, these 12 cases should be consolidated, with one point of contact designated on behalf of all plaintiffs' counsel.² "It is within the Court's 'broad discretion' to order consolidation of cases. Two inquiries are required to determine whether consolidation should be granted. First, whether a 'common question of law or fact' exists in both cases. Second, whether considerations regarding 'the interest of judicial economy' outweigh 'the potential for delay, confusion and prejudice that may result from consolidation.'" *AT&T Corp. v. United States*, 69 Fed. Cl. 547, 548 (2006) (citations omitted). For these 12 cases, both inquiries are answered in the affirmative.

First, as discussed above, each case is directly related due to their "common questions of law and fact": whether and to what extent plaintiffs are entitled to liquidated damages. Second, "the interest in judicial economy" outweighs the potential for delay, confusion, or prejudice. Indeed, without consolidation the potential for delay, confusion, and prejudice is increased. As a practical matter, if these cases were each to proceed individually, 12 different plaintiffs' counsel will separately seek the Court to rule on virtually identical motions, including prospective motions to certify a collective action (which, as explained above, would define overlapping

² Counsel for plaintiffs in *Plaintiff No. 1*, No. 19-94C, filed a motion to consolidate eight of the above-listed cases and similarly requests that a lead counsel be appointed. No. 19-94C, Dkt. No. 9. In addition, counsel for the *Tarovisky* plaintiffs agreed in our recently-filed joint status report that consolidation of certain cases was appropriate and assert that they should be appointed as lead counsel. No. 19-4C, Dkt. No. 13. Counsel for the *Tarovisky* plaintiffs, Heidi Burakiewicz, also represents the plaintiffs in *Martin et al. v. United States*, No. 13-834C.

collectives) and motions regarding appropriate notice of a collective action. Proceeding individually on each case would waste Government resources by requiring, for example, Federal agencies in each case that the Court certifies as a collective action and requires notice to either provide multiple notices electronically or to provide information on their employees to multiple plaintiffs' counsel. Moreover, proceeding individually would result in prospective plaintiffs receiving multiple notices for essentially the same case, which has high potential to sow confusion amongst those individuals regarding which lawsuit to join, and thus likely resulting in delay and potential prejudice. It would also create a high likelihood of many plaintiffs opting into multiple different cases—thus requiring additional back-end determinations by the parties to ensure that no plaintiff inadvertently recovered damages multiple times for the same claim. Finally, proceeding with each case individually would unnecessarily and exponentially increase attorney fees awarded to plaintiffs' counsel for virtually identical, overlapping work.

Because the potential for confusion, delay, and prejudice and waste of scarce judicial and party resources is extremely high if these cases were to proceed individually, they should be consolidated. To provide both the Court and defendant's counsel with the ability to proceed in the most efficient fashion on these consolidated cases, we also respectfully suggest that the Court order formation of a plaintiffs' committee, which may then determine a single point of contact for both the Court and defendant. Alternatively, we respectfully suggest that the Court appoint a lead counsel for the consolidated cases who will represent the interests of each of the plaintiffs' counsel to the Court and to defendant. *See L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1530 (Fed. Cir. 1995) (“A district court has the inherent power to ‘control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.’”) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)); *see also In re Flight Safety Techs., Inc. Sec.*

Litig., 231 F.R.D. 124, 130 (D. Conn. 2005) (exercising the court's inherent authority to reduce the number of lead plaintiffs in class action); *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 643 (E.D. La. 2010) (using court's inherent authority to appoint committees of counsel).

CONCLUSION

Accordingly, defendant respectfully provides notice that the listed cases are directly related, and respectfully requests the Court to consolidate the cases and order one point of contact for the consolidated cases.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Reginald T. Blades, Jr.
REGINALD T. BLADES, JR.
Assistant Director

/s/ Erin K. Murdock-Park
ERIN K. MURDOCK-PARK
ANN C. MOTTO
Trial Attorneys
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 616-3753
Fax: (202) 514-8624

Dated: February 13, 2019

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of February, 2019, a copy of the foregoing “DEFENDANT’S NOTICE OF DIRECTLY RELATED CASES AND MOTION TO CONSOLIDATE” was filed electronically. This filing was served electronically to all parties by virtue of the court’s electronic filing system.

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