No. 19-59C
(Judge Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L. KEVIN ARNOLD, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTIONS TO CONSOLIDATE

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DEFENDANT'S REPLY IN SUPPORT OF ITS MOTIONS TO CONSOLIDATE

Pursuant to this Court's March 13, 2019 Order, Dkt. No. 20, defendant, the United States, respectfully submits its reply in support of its motions to consolidate. *See* Dkt. Nos. 10, 13, 14. Consolidation of this case with the other 12 directly-related cases listed in the United States' notices of related cases and motions to consolidate is warranted and in the interest of judicial economy because these cases involve common questions of law and fact, and the likelihood of delay, confusion, and prejudice is increased if the cases proceed individually. To further support judicial economy and efficiency of proceedings, the designation of a single point of contact for all of plaintiffs' counsel is warranted in any consolidated cases.

BACKGROUND

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. This case is one of 13 cases pending before this Court that raise allegations that the Government did not timely pay "excepted" employees for work performed during the lapse in appropriations. *See, e.g.* Dkt. No. 10 at 2-3. All 13 cases are based on the same set of operative facts: the lapse in appropriations that occurred between December 22, 2018, and January 25, 2019; that each of the plaintiffs allegedly worked during the lapse in appropriations; and that during the lapse in appropriations, plaintiffs were not paid for

that work. Of these cases, 12 seek the same relief pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and one case seeks relief pursuant to other Federal pay statutes and provisions of the Constitution.

Plaintiffs seek relief under the exact same circumstances, and all cases are in the same procedural posture. In addition to all of these 13 directly-related cases involving common questions of law and fact, the judicial economy achieved through consolidation outweighs any potential for delay, confusion, or prejudice. Consolidation is warranted, and designating one point of contact or appointing lead counsel for the consolidated cases similarly promotes judicial economy and will assist in the economical and efficient resolution of the consolidated cases.

I. Plaintiffs' Varied Responses To Defendant's Motions To Consolidate

Plaintiffs' responses to the United States' motions to consolidate vary. Plaintiffs in three cases, including this case, do not oppose consolidation of all 13 cases. *Arnold*, No. 19-59C, Dkt. No. 18 (Pl. Resp.) (stating that plaintiffs "do not necessarily" oppose consolidation of all cases, and listing no reasons in opposition of consolidation); *D.P.*, No. 19-54C, Dkt. No. 17 (stating that plaintiffs do not oppose consolidation of all cases for discovery and liability purposes, but asserting that plaintiffs should be permitted to litigate their own damages); *I.P.*, No. 19-95C, Dkt. No. 15 (stating that "other than a Court Appointed Lead Counsel, plaintiffs agree to consolidation"). Plaintiffs in four of the cases agree that consolidation of the 12 cases seeking relief under the FLSA is appropriate. *Tarovisky*, No. 19-4C, Dkt. No. 20 at 2 (consenting to consolidation because "the cases present similar factual matters," "and they all involve similar legal issues"); *Avalos*, No. 19-48C, Dkt. No. 13 at 2 (agreeing with the *Tarovisky* plaintiffs that consolidation is warranted in all FLSA cases); *Hernandez*, No. 19-63C, Dkt. No. 18 at 2 (agreeing that consolidation of the FLSA cases is appropriate); *Plaintiff No. 1*, No. 19-94C, Dkt.

No. 28 at 2-4 (same). Plaintiffs in six cases oppose consolidation. *See Rowe*, No. 19-67C, Dkt. No. 17; *Anello*, No. 19-118C, Dkt. Nos. 11, 16; *Abrantes*, No. 19-129C, Dkt. Nos. 10, 14; *Richmond*, No. 19-161C, Dkt. Nos. 15, 19; *Baca*, No. 19-213C, Dkt. Nos. 13, 22; and *Jones*, No. 19-257C, Dkt. No. 8.

II. Plaintiffs' Varied Responses To Defendant's Request That The Court Designate One Point Of Contact For All Plaintiffs Or Appoint Lead Counsel

Likewise, plaintiffs' responses also vary as to defendant's request that the Court either designate one point of contact or appoint lead counsel, and each plaintiff requests further briefing on the issue. Counsel for *Tarovisky* and counsel for *Avalos* agree that designation of one point of contact or appointment of lead counsel is justified, and that *Tarovisky* counsel would be appropriate as lead counsel if the Court determines that consolidation of the FLSA cases is warranted. *Tarovisky*, No. 19-4C, Dkt. No. 20 at 8; *Avalos*, No. 19-48C, Dkt. No. 13 at 6. Conversely, counsel in nine other cases disagree with any designation of one point of contact or the appointment of any lead counsel. *D.P.*, No. 19-59C, Dkt. No. 17 at 2; *Hernandez*, No. 19-63C, Dkt. No. 18 at 2-3; *Rowe*, No. 19-67C, Dkt. No. 17 at 6-7; *I.P.*, No. 19-95C, Dkt. No. 15 at 1-2; *Anello*, No. 19-118C, Dkt. No. 11 at 6-7 and Dkt. No. 16 at 2-5; *Abrantes*, No. 19-129C, Dkt. No. 10 at 4-5 and Dkt. No. 14 at 4-5; *Richmond*, No. 19-161C, Dkt. No. 15 at 3-5; *Baca*, No. 19-213C, Dkt. No. 13 at 7-8 and Dkt. No. 22 at 3-4; and *Jones*, No. 19-257C, Dkt. No. 8 at 5-6. Although they disagree with the appointment of lead counsel, each of the counsel for *Anello*, *Baca*, *Hernandez*, and *Richmond* nonetheless suggest *Baca* counsel as lead counsel. *See Hernandez*, No. 19-63C, Dkt. No. 18 at 2 n.1; *Anello*, No. 19-118C, Dkt. No. 16 at 2-5; *Richmond*, No. 19-161C, Dkt. No. 15 at 4-5; and *Baca*, No. 19-213C, Dkt. No. 22 at 3-4.

In addition, the *Plaintiff No. 1* plaintiffs suggest that the Court (1) appoint a committee of counsel to represent plaintiffs following consolidation and (2) require counsel for plaintiffs "who

propose to represent the entire universe of presently unrepresented potentially entitled employees to create a consortium of counsel" for purposes of notice, which the *Hernandez* plaintiffs also support. *Plaintiff No. 1*, No. 19-94C, Dkt. No. 28 at 7; *Hernandez*, No. 19-63C, Dkt. No. 18 at 2-3. Similarly, counsel for *I.P.* do not oppose the formation of a plaintiffs' committee, which would itself select a point of contact. *I.P.*, No. 19-95C, Dkt. No. 15 at 1-2. Plaintiffs in this case assert that determining a single point of contact or lead counsel is premature at this time but that, if the cases are consolidated, the Court consider ordering an in-person conference with all plaintiffs' counsel. Pl. Resp. 2-3.

ARGUMENT

I. Consolidation Is Appropriate For All 13 Directly-Related Cases

A. Consolidation Standards And Their Applicability To These 13 Directly-Related Cases

Rule 42(a) of the Rules of the Court of Federal Claims (RCFC) states that, "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." This Court has broad discretion to order consolidation of cases where a common question of law or fact exists, and considerations regarding the interest of judicial economy outweigh the potential for delay, confusion, and prejudice. *Lucent Techs. Inc. v. United States*, 69 Fed. Cl. 512, 513 (2006); *Stroughter v. United States*, 89 Fed. Cl. 755, 760-61 (2009); *d'Abrera v. United States*, 78 Fed. Cl. 51, 60 (2007).

Both of the counts in plaintiffs' amended complaint arise under the FLSA: (1) failure to timely pay FLSA minimum wage; and (2) failure to timely pay overtime wages. *See* Dkt. No. 6 (Compl.) at ¶¶ 33-54. Eleven of the other directly-related cases for which the United States seeks consolidation request essentially the same relief under the FLSA. *See Tarovisky*, No. 19-

4C, Dkt. No. 17 (raising claims for failure to timely pay FLSA minimum wages and for failure to timely pay FLSA overtime); *Avalos*, No. 19-48C, Dkt. No. 6 (same); *D.P.*, No. 19-54C, Dkt. No. 4 (same); *Hernandez*, No. 19-63C, Dkt. No. 1 (same); *Rowe*, No. 19-67C, Dkt. No. 1 (same); *Plaintiff No. 1*, No. 19-94C, Dkt. No. 7 (same); *I.P.*, No. 19-95C, Dkt. No. 1 (same); *Anello*, No. 19-118C, Dkt. No. 1 (same); *Richmond*, No. 19-161C, Dkt. No. 1 (same); *Baca*, No. 19-213C, Dkt. No. 21 (same); and *Jones*, No. 19-257C, Dkt. No. 1 (same). Consequently, these 12 cases share the same questions of law based upon the same series of facts.

As the United States explained in its motion to consolidate, the *Abrantes* plaintiffs bring claims based upon the same set of operative facts, but seek relief under other pay statutes and the Constitution.[1] *See* Dkt. No. 10 at 3. Nevertheless, the overarching legal question in *Abrantes* is the same as in all 13 cases: whether and to what extent plaintiffs are entitled to damages because they performed work and were not paid for that work until after appropriations were restored. Thus, all 13 cases share identical facts and common questions of law.

Absent consolidation, the likelihood of delay, confusion, and prejudice will increase, and scarce judicial resources will be wasted if the Court is asked to address virtually identical issues multiple times. For example, between February 15, 2019, and March 13, 2019, because of the duplication resulting from having to administer 13 separate cases, the Court issued no less than 44 orders across these 13 directly-related cases. As a useful comparison, and although

[1] The *Abrantes* plaintiffs allege violations of the Fifth Amendment's due process component and the Thirteenth Amendment. *Abrantes*, No. 19-129C, Dkt. No. 1 at ¶¶ 35-48. Because the Court does not possess Tucker Act jurisdiction over those claims, which the United States will further demonstrate in its motion to dismiss in *Abrantes*, their existence does not caution against consolidation. *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that the Due Process Clause of the Fifth Amendment is not money-mandating); *Johnson v. United States*, 79 Fed. Cl. 769, 774 (2007) (holding that the Thirteenth Amendment "does not mandate the payment of money damages for its violation.").

inapplicable to these proceedings, the reasons that courts certify class actions and utilize multi-district litigation (MDL) are analogous to the reasons supporting consolidation of these proceedings. Courts routinely establish class actions over the objections of individual plaintiffs when class members share at least one common question of law or fact and those common questions of law or fact "predominate over any questions affecting only individual members." FED. R. CIV. P. 23(a), (b)(3); *see, e.g., In re Deepwater Horizon*, 739 F.3d 790, 815-19 (5th Cir. 2014) (finding certification of class action appropriate when "predominance was based not on common issues of damages but on the numerous common issues of liability," and when damages would be decided on an individual basis); *Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. 41, 53 (E.D.N.Y. 2010) (holding the predominance requirement met in part because it was "obvious" that "[c]ollectively or individually litigated . . . defendants would raise this identical argument and the same basic proof in response to each and every claim."). Likewise, MDL's—"civil actions involving one or more common questions of fact [that] are pending in different districts" and that are "transferred to any district for coordinated or consolidated pretrial proceedings"—are routinely established over plaintiffs' objections when doing so "promote[s] the just and efficient conduct of such actions." 28 U.S.C. § 1407(a); *see, e.g., In re Meridian Funds Group Secs. & Emple. Ret. Income Sec. Act Litig.*, No. 09-md-2082, 2011 U.S. Dist. LEXIS 97486, at **4-5 (S.D.N.Y. Aug. 30, 2011) (overruling objection to consolidating case with MDL when the case "relies on the same allegations and makes similar claims as those contained in the consolidated complaint").

If these cases proceed individually, significant inefficiencies will result. For example, defendant's motions to dismiss in lieu of an answer are currently due on April 19, 2019. *See, e.g.*, Dkt. No. 21. As previously explained, the United States intends to file a motion to dismiss

in each of the 13 cases, which will include separate and additional arguments from those raised in *Martin v. United States*, No. 13-834C. *See, e.g.*, Dkt. No. 11. These 13 motions to dismiss will require 13 separate responses from plaintiffs' counsel. To the extent that any plaintiff requests an extension, each will separately contact defendant's counsel to do so, and will then file a corresponding motion. Defendant will likewise file 13 replies, one or more of which will likely require an extension of time and coordination with various plaintiffs' counsels.[2] If the cases were to proceed individually, each potential issue would necessitate similar coordination between counsel and Court involvement, as necessary, on 13 separate cases rather than efficiently proceeding in a consolidated fashion.

In addition, the likelihood of delay, confusion, and prejudice increases absent consolidation. Multiple cases request certification of the exact same collective action, and for notice to be sent to those potential collective members. If notice were to be sent in individual cases, prospective plaintiffs would therefore receive multiple notices for cases identical in every respect except for plaintiffs' counsel. The likelihood of confusion to prospective plaintiffs increases greatly if notice is sent for individual cases, and could potentially disadvantage plaintiffs by discouraging them from opting in to any one case due to confusion as to which case a plaintiff should choose. Alternatively, plaintiffs could opt in to *all* of the multiple collectives. If so, counsel for the respective collectives will need to establish some protocol, most likely requiring Court approval, to determine which counsel represents a particular plaintiff—a

[2] As another example, counsel for defendant filed no less than 15 motions in these 13 cases, to coordinate the dates for its replies in support of its motions to consolidate, which required seeking positions on those motions from 13 different plaintiffs' counsel. Likewise, the Court then issued 15 corresponding orders on this issue alone, including multiple admonishments to plaintiffs' counsel for failure to adhere to this Court's deadlines. *See, e.g., D.P.*, No. 19-54C, Dkt. Nos. 15, 18; *I.P.*, No. 19-95C, Dkt. No. 18.

question that must be resolved prior to plaintiffs issuing requests to the Government for any pay data.[3] Further, likely delay will result from these efforts, or from later efforts to ensure that no plaintiff recovers damages in multiple cases.

Because all 13 cases raise common questions of law and fact, consolidation of all 13 cases is appropriate to promote efficiency and judicial economy, as well as to reduce the chances of delay, confusion, and prejudice.

B. The *Arnold* Plaintiffs' Response To Defendant's Motions To Consolidate

Plaintiffs assert that, "even though there are differences of both law and fact between several of the cases," "consolidation for the cases may be appropriate." Pl. Resp. 1. Although plaintiffs assert purported differences in law and fact in the cases, they identify none in particular—either by case, by law, or by fact. *Id.* Plaintiffs identify no specific issue with consolidation of any case, and, indeed, recognize the Court's broad discretion to consolidate, as well as "general encouragement of consolidation." *Id.* Nor do plaintiffs raise any concerns with full consolidation of the cases, including through liability and damages. *See generally id.*

RCFC 42(a) does not require cases to be completely identical before consolidation is appropriate. *Bos. Edison Co. v. United States*, 67 Fed. Cl. 63, 66 (2005) ("Identical claims for relief are not a prerequisite for consolidation."). Rather, RCFC 42(a) provides that cases must have common questions of law *or* fact—not both. Nevertheless, all 13 directly-related cases share both common questions of law *and* fact: all of the *Arnold* plaintiffs' claims derive from the same series of events as the other 12 cases, and the principal questions of law are the same. Thus, significant common factual and legal issues strongly outweigh any particular legal or

[3] If necessary, defendant will ask the Court to require plaintiffs to verify that each plaintiff's social security number is unique across the cases, and to ensure that no plaintiff has opted into multiple cases, prior to issuing any discovery requests to the Government.

factual difference to which plaintiffs may refer. *See Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004) (holding that individual issues did not preclude consolidation when common issues outweighed individual issues); *Karuk Tribe of California v. United States*, 27 Fed. Cl. 429, 433 (1993) (holding that, although the Court would need to consider different evidence for some plaintiffs, "these individual issues do not predominate over the common issues.").

II. Designating One Point Of Contact For All Plaintiffs Is Necessary For Efficient Proceedings

A. Judicial Economy And Efficiency Necessitate Designating One Point Of Contact For Any Consolidated Cases

For the same reasons consolidation is warranted, the Court should require one point of contact for all plaintiffs' counsel in the consolidated cases. As explained in the Manual for Complex Litigation, "[c]omplex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily." MANUAL FOR COMPLEX LIT. § 10.22 (4th ed. 2004). To facilitate such complex litigation, courts often appoint counsel to one of several types of leading roles, who will "fairly and adequately represent all of the parties on their side," which in turn facilitates fair, efficient, and economic proceedings for all sides and for the Court. *See generally id.* at § 10.22; *see, e.g., In re Wells Fargo Wage & Hour Empl. Practices Litig.*, No. H-11-2266, 2011 U.S. Dist. LEXIS 159953, at **12-17 (S.D. Tex. Dec. 19, 2011) (analyzing which firm should act as lead counsel in an MDL). Courts have similarly appointed counsel in collective actions upon certification as they do in class actions. *See* RCFC 23(g)(1); *see, e.g., Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 910-11 (N.D. Iowa 2008). Also analogously, this Court's rules permit it to

designate lead counsel prior to determining the appropriateness of class certification. RCFC 23(g)(3).

The same reasons for appointing lead counsel in an MDL or in a class action exist for appointing a single point of contact in these collective cases; namely, efficiency and economy, avoidance of confusion, and limiting the burden on the Court. Requiring both the Court and the defendant to respond to the "unique" interests of 13 sets of plaintiffs who bring claims based upon the exact same set of circumstances is precisely why the Court should designate one point of contact—so that one person speaks for the interests of *all* plaintiffs. Doing so will promote efficiency and ensure that all of plaintiffs' needs, including the needs of prospective plaintiffs, are addressed together rather than piecemeal. Moreover, designating one point of contact will help avoid the delay or confusion that could occur if different plaintiffs' counsel each articulate their various positions, whether similar or inconsistent, in the consolidated cases. Finally, designating one point of contact will reduce the burden on the defendant and the Court by ensuring that neither is required to juggle requests from 13 separate plaintiffs' counsel on similar, if not identical, questions. Having brought almost identical claims based upon the same material facts, plaintiffs' counsel should organize and administer themselves; neither the Court nor defendant should be required to do so.

B. The *Arnold* Plaintiffs' Response To Defendant's Request To Designate A Single Point Of Contact Or To Appoint Lead Counsel

Although the *Arnold* plaintiffs agree that consolidation of the cases is likely appropriate, they assert that selection of a lead counsel or formation of a plaintiffs committee is premature. Pl. Resp. 2. They request instead that, if the Court consolidates any or all of the cases, the Court also "order an in-person conference to be attended by all plaintiffs' counsel to discuss and agree upon an effective and efficient process for representation of the various plaintiff groups." *Id.* at

2-3. Alternatively, they request "the opportunity to submit additional briefing on the issue of a potential steering committee and/or lead counsel." *Id*. at 3.

As explained above, designating one point of contact or appointing lead counsel will both facilitate proceedings and speed up any coordination between plaintiffs and the defendant, and the Court, rather than requiring defendant's counsel, and at times, the Court, to speak separately to a minimum 13 different plaintiffs' attorneys when seeking plaintiffs' input or when responding to plaintiffs on any particular matter.

In the various responses to the motions to consolidate, two prospective lead counsel have been proposed: counsel for *Tarovisky* and counsel for *Baca*. Counsel for *Tarovisky* was endorsed by itself and by counsel for *Avalos*. *See Tarovisky*, No. 19-4C, Dkt. No. 20 at 4, 7-8; *Avalos*, No. 19-48C, Dkt. No. 13 at 6. Counsel for *Baca* was endorsed as lead counsel by itself and also represents that it was endorsed by counsel for *Hernandez*, *Rowe*, *Anello*, *Richmond*, and *Jones*.[4] *See Baca*, No. 19-213C, Dkt. No. 22 at 3-4; *Hernandez*, No. 19-63C, Dkt. No. 18 at 2 n.1; *Anello*, No. 19-118C, Dkt. No. 16 at 3-4; *Richmond*, No. 19-161C, Dkt. No. 15 at 5. In addition, counsel for *Plaintiff No. 1* and for *Hernandez* assert that formation of a plaintiffs' committee is more appropriate than appointment of lead counsel. *Hernandez*, No. 19-63C, Dkt. No. 18 at 2-3; *Plaintiff No. 1*, No. 19-94C, Dkt. No. 28 at 7.

The United States does not propose that counsel for the *Arnold* plaintiffs or counsel for any plaintiffs in any other case should cede their representation of their plaintiff-clients to some other counsel. The United States also does not take a position regarding which individual attorney or firm should be designated as the point of contact for the consolidated cases, or

[4] Counsel for *Rowe* and *Jones* have not explicitly endorsed counsel for *Baca* as lead counsel. *See, e.g.*, *Rowe*, No. 19-67C, Dkt. No. 17; *Jones*, No. 19-257C, Dkt. No. 8.

whether lead counsel, a plaintiffs' committee, or some other organization of plaintiffs' interests should be chosen. As declared above, having brought almost identical claims based upon the same material facts, plaintiffs' counsel should organize and administer themselves; neither the Court nor defendant should be required to do so. The United States respectfully requests only that plaintiffs provide the Court and the defendant with a single point of contact.

All plaintiffs request further briefing on this issue. The United States does not oppose further briefing. If the Court intends to provide further briefing on this issue—for example, regarding whether the Court should utilize liaison counsel, appoint a lead counsel, or form a plaintiffs' committee, *see, e.g.*, MANUAL FOR COMPLEX LIT. § 10.221 (4th ed. 2004)—the United States respectfully requests participation in that further briefing so that its concerns regarding establishing one point of contact may be fully explained in light of plaintiffs' proposals.

If the Court consolidates these cases, the Government respectfully asks the Court to require plaintiffs to designate one point of contact for the consolidated cases. One point of contact will enable the United States and the Court to proceed efficiently in the consolidated cases and will reduce any potential confusion as the matter proceeds.

CONCLUSION

For these reasons, defendant respectfully requests the Court to consolidate the cases and to require plaintiffs to designate one point of contact for the consolidated cases.

Respectfully submitted,

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Dated: April 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of April, 2019, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS MOTIONS 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