

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

ELEAZAR AVALOS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-48C
	)	(Judge Campbell-Smith)
UNITED STATES,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S MOTION TO SUPPEND PROCEEDINGS**

Pursuant to Rule 7(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court suspend proceedings in this case, as set forth in more detail below.

**BACKGROUND**

Each of the 12 cases<sup>1</sup> 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

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<sup>1</sup> Filed simultaneously with this motion is our notice of directly related cases and motion to consolidate, which we also filed in each of the 12 cases listed in that notice. Dkt. No. 8. We filed this motion separately, and in each of the cases, pursuant to the Court’s order in *Plaintiff No. 1 et al. v. United States*, No. 19-94C, Dkt. No. 10.

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 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. The 12 Consolidated Cases Should Be Suspended Pending Final Adjudication Of *Martin et al. v. United States*, No. 13-834C**

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As explicitly cited in the complaints for many of these 12 cases, this Court has previously ruled on very similar legal questions in *Martin et al. v. United States*, No. 13-834C. *See, e.g., Tarovisky*, No. 19-4C, Dkt. No. 6 at ¶ 23; *Plaintiff No. 1*, No. 19-94C, Dkt. No. 7 at ¶ 13; *Rowe*, No. 19-67C, Dkt. No. 1 at ¶ 27; *Baca*, No. 19-213C, Dkt. No. 1 at ¶ 13. In the two most recent status reports filed in *Martin*, the parties explain that damages calculations are continuing, although the lapse in appropriations prohibited defendant's counsel from continuing to work on the case during that time. *See Martin*, No. 13-834C, Dkt. Nos. 190-191; *see also id.* at Dkt. No. 190 (explaining that in August 2018 the parties' counsel met with defendant's consultant to discuss damages). Following passage of the continuing resolution that restored appropriations, the parties have again resumed work on *Martin* and continue to work to finalize the calculation of damages.

Because the questions of law at issue in *Martin* are also relevant in these cases—whether an FLSA violation occurs when Federal agencies are precluded from paying employees during a lapse in appropriations—suspending proceedings in these related cases pending the final resolution of *Martin* would conserve both judicial and the parties' resources. We advised in our joint status report in *Tarovisky* that the Government intends to file a motion to dismiss in each of these cases if the Court determines not to suspend proceedings. *Tarovisky*, No. 19-4, Dkt. No. 13. Suspending proceedings in this case, and each of the other 11 cases, pending a final decision in *Martin*, including any appeal, would greatly assist the Court and the parties in the efficient conduct of these proceedings. For example, if either party were to determine to appeal all or a portion of *Martin*, the binding precedent set by the ultimate final judgment would inform the

Court's decision regarding liability in these 12 cases as well as any necessary damages calculations or certification of a collective action. Moreover, a final decision in *Martin* would inform whether the Government would file dispositive motions in these cases, and could as well inform any decisions by plaintiffs on how best to proceed.<sup>2</sup>

Suspending proceedings in these cases until *Martin* has reached a final resolution will ultimately facilitate more efficient proceedings and the final resolution in these cases.

### **CONCLUSION**

Accordingly, defendant respectfully requests the Court to suspend proceedings in these cases pending the final result in *Martin*.

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<sup>2</sup> For example, the named plaintiffs in *Avalos* state that they are covered by both the FLSA and the Customs Officer Pay Reform Act (COPRA). No. 19-48C, Dkt. No. 6 at ¶ 5. Questions regarding whether these plaintiffs, or other plaintiffs covered by other pay statutes, may ultimately be ineligible to recover damages is a question that would likely be addressed through a motion to dismiss if proceedings are not suspended, and that could be resolved through the final determination in *Martin*.

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Dated: February 13, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 13th day of February, 2019, a copy of the foregoing “DEFENDANT’S MOTION TO SUSPEND PROCEEDINGS” 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