

## Alterman & Boop LLP

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Daniel L. Alterman  
Arlene F. Boop

March 5, 2019

Opt-In Class Members of  
*Gallimore v. United States*

Dear Opt-in Class Member:

Our motion for entry of judgments has been filed, as well as the Government's response and our reply. (Motion documents attached as Exhibit A hereto).

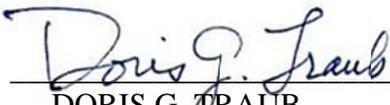
The Government does not dispute the calculations, but has raised a number of other issues that we believe are without merit and which we believe may only be raised via an appeal after the entry of judgments.

The Court has directed the parties to confer for purposes of seeking further clarity as to the parties' respective positions on the issues raised and the potential for an agreed-upon resolution of those issues. Toward that end, we conferred with the Government's attorneys and we will be filing a Joint Status Report to the Court no later than Thursday, March 7th. We also have another conference scheduled for purposes of speaking further with the Government's attorneys on March 12th in an effort to resolve the issues the Government has raised so judgments may be entered at this time.

At this point, we do not know if the Court will proceed with the entry of judgments, require additional legal briefing before doing so, or take other action. Please know that we are doing everything we can to seek the expeditious entry of judgments.

Very truly yours,

TRAUB & TRAUB PC

By:   
DORIS G. TRAUB

ALTERMAN & BOOP LLP

By:   
ARLENE F. BOOP

# **EXHIBIT A**

ALTERMAN & BOOP LLP  
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By: Arlene F. Boop, Esq.

TRAUB & TRAUB, P.C.  
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New York, NY 10006  
(212) 732-0208

By: Doris G. Traub, Esq.

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

-----X

JOSEPH GALLIMORE, on behalf of himself and  
all others similarly situated,

Plaintiff,

- against -

THE UNITED STATES,

Defendant.

-----X

Federal Claims No. 11-715 C

(Hon. Judge Campbell-Smith)

**DECLARATION OF  
ARLENE F. BOOP**

STATE OF NEW YORK     )  
  ) ss  
COUNTY OF NEW YORK    )

**ARLENE F. BOOP**, an attorney at law duly admitted to practice in the courts of the State of New York, the Eastern and Southern District Courts of the State of New York, as well as the United States Court of Federal Claims among other admissions, hereby declares under the penalties of perjury as follows:

1. I am a partner in the firm Alterman & Boop LLP, which together with the firm of Traub & Traub, PC, represents the Plaintiff and Opt-In Class Members in this action which seeks to recover Sunday premium pay on behalf of Plaintiff and those employees similarly situated to Plaintiff. I submit this Declaration in support of the Plaintiff's present Motion seeking that this

Court enter judgments for each of the Opt-In Class Members and direct further relief under Rules 23, 54 and 58 of the RCOFC.

Requested Judgment and Orders

2. Plaintiff requests entry of judgment at this time for the gross amount of pay with interest due to each of the 3487 Opt-In Class Members for the period from October 28, 2005 through December 31, 2017 for their respective Sunday premium pay, as adjusted by all appropriate Federal and states deductions, and any applicable Federal contributions. Plaintiff also seeks an Order directing Defendant pay to each of the Opt-In Class members their respective Sunday premium pay for the period of January 1, 2018 until judgment in this case becomes final and, thereafter, on an ongoing basis.

3. Counsel notes that the requested judgment amounts for each Opt-In Class member represent the full amount of Sunday Premium Pay to which such Class member is entitled, as limited by the statute of limitations under 28 U.S.C. § 2501, based on the member's pay rate(s), the Sunday hours worked under each pay rate, and, for purposes of the interest calculation, the time period during which that Sunday work was performed.<sup>1</sup>

Time Period for Which Sunday Premium Pay Has Been Computed

4. The process by which Defendant was able to obtain Sunday premium pay information – the hours worked by each Opt-In Class member and at what respective rates for each Class member in a class of 3487 individuals for each date involved – was a time-consuming one. Defendant agreed to – and did – update that information as the process was ongoing through the end of the calendar year for 2017. However, it soon became clear that there was no way to

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<sup>1</sup> Interest was computed on the gross amounts in accordance with the schedule of “Interest Rates Used for Computation of Back Pay” issued by the US Office of Personnel Management and reported at <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay.com>.

continue to update the information without creating a continued and ongoing lag in time between Defendant's obtaining the information and producing such to Plaintiff for delivery to the Class Administrator for calculations of additional Sunday premium pay, as well as the subsequent review by Defendant's counsel of those calculations. By the time such process was completed, additional Sunday premium pay hours had been earned by Opt-in members.

5. As a result, in an effort to proceed with the calculation of Sunday pay so as to allow for entry of judgment of specific and accurate gross amounts of pay for each individual, it was determined that Defendant would provide all information through the end of 2017. As a result, the judgment amounts to be entered are accurate up to and through December 31, 2017 only.

Agreement as to Computation and Methodology

6. Plaintiff provided Defendant with the Computations and Methodology utilized by the Class Administrator. Defendant has advised that it has no objections as to either the methodology utilized or the final calculations of the gross amounts due through December 31, 2017.<sup>2</sup>

7. Accordingly, the Court should direct entry of judgment for each of the Opt-in Class members in the amounts set forth in Attachment "A" hereto (which lists each member alphabetically and by the Claims Administrator Rust Consulting Inc.'s identification number), as adjusted by all appropriate Federal and state deductions, and any applicable Federal contributions, including any due relative to any class member's Thrift Savings Plan.

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<sup>2</sup> Defendant has not and does not waive its right to appeal a judgment in this action, notwithstanding it having no objection to the calculation of the amounts sought by Plaintiff for purposes of entry of judgment at this time.

Order Requested for Payment of Taxes and Contributions to Annuities and Thrift Savings Accounts

8. The judgments requested are for back pay and, as such, are subject to social security and other required Federal and state taxes, and with respect to some, required contributions to the Class members' respective Thrift Savings Plan (TSP) accounts. Accordingly, Plaintiff requests that, the Court direct that, upon payment to the Class members of their Sunday premium pay, Defendant make all required payments, contributions and adjustments associated with the payment of Sunday premium pay for each Opt-In Class member, including, but not limited to, Defendant's required tax payments and contributions to the Opt-in Class members' Thrift Savings Plan accounts. It is only in this manner that the Class members may be made whole.

Order Requested for Sunday Premium Pay from January 1, 2018

9. Since it was and is impossible for the ongoing Sunday premium pay information to be provided, analyzed and computed without creating a new lag between provision of the information and ultimate calculation and entry of judgments, Plaintiff respectfully requests the Court issue an Order directing, in addition to entry of judgment in the gross amounts due through December 31, 2017, that Defendant pay the Opt-In Class members their respective Sunday premium pay, with interest, retroactively from January 1, 2018 through the date of final judgment, as well as direct Defendant to pay the Opt-in Class members Sunday premium pay for all Sunday hours they work going forward.

Proposed Judgment

10. A Proposed Judgment and Order is attached hereto as Attachment "B" for the Court's consideration.

Dated: New York, New York  
December 5, 2018

By: /s/ Arlene F. Boop  
ARLENE F. BOOP

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

|                                  |   |                                 |
|----------------------------------|---|---------------------------------|
| JOSEPH GALLIMORE <i>et al.</i> , | ) |                                 |
|                                  | ) |                                 |
| Plaintiffs,                      | ) |                                 |
|                                  | ) | No. 11-715C                     |
| v.                               | ) | (Judge Patricia Campbell-Smith) |
|                                  | ) |                                 |
| THE UNITED STATES,               | ) |                                 |
|                                  | ) |                                 |
| Defendant.                       | ) |                                 |

DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION FOR THE ENTRY OF JUDGMENTS AND RELATED RELIEF

Defendant, the United States, pursuant to Rule 7.2 of the Rules of the Court of Federal Claims (RCFC), respectfully files its response to plaintiffs Joseph Gallimore *et al.*’s motion for entry of judgments and related relief.

The Government has not identified a liability issue presented by the parties in this litigation and not resolved by the Court’s opinion on summary judgment. Moreover, the Government does not disagree with the calculations performed by plaintiff’s consultant, Rust Consulting. However, plaintiff’s request for judgment is for back pay through the date of judgment and beyond. We are not aware of a calculation through the date of judgment and beyond, and it is not clear that the Court possesses jurisdiction to issue a judgment for back pay that accrued after the filing of the complaint.<sup>1</sup>

Accordingly, other than plaintiff’s request for back day beyond the date of the complaint, while defendant respectfully disagrees with the Court’s opinion, it has no ground on which to oppose a judgment granting back pay up to the date of the complaint on the basis of the Court’s decision. Defendant proposes that, prior to the entry of judgment, the parties be allowed to

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<sup>1</sup> We are aware of *Navajo Tribe v. United States*, 218 Ct. Cl. 11, 23 (1978), *Calhoun v. United States*, 173 Ct. Cl. 893, 897 (1965), and cases cited there concerning damages accruing while a suit is pending, but their applicability to a case where certain claims are more than six years beyond the statute of limitations is not clear.

attempt to resolve any issues concerning the proper quantification of back pay. Defendant, however, has not waived and does not intend to waive its right to appeal the Court's judgment,

Respectfully submitted,

JOSEPH H. HUNT  
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.  
Director

s/ Steven J. Gillingham

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February 14, 2019

Attorneys for Defendant



2. As an initial matter and significantly, Defendant agrees with the calculations performed by the Class Administrator Rust Consulting. Defendant also takes no issue with respect to Plaintiff's request for an Order that directs the Government to make all appropriate Federal and state deductions from the judgment amounts, as well as any applicable Federal contributions.

3. Rather, Defendant first appears to oppose that portion of the Plaintiff's motion which requests back pay that accrued after the filing of Plaintiff's Complaint, suggesting that the Court might lack jurisdiction to provide such relief, especially as to any such claims which arose more than 6 years ago, without providing any legal authority for such a position. Under Defendant's apparent reasoning, Plaintiff was required to file and keep filing successive complaints seeking the same relief, but for new periods of time, for purposes of maintaining the Court's jurisdiction.

4. Defendant's argument is misplaced. First, this Court's jurisdiction extends to claims against the United States founded upon, among other things, acts of Congress, such as the Sunday Premium Pay Act and the power to "provide an *entire* remedy" to a successful litigant. 28 U.S.C. §1491(a)(1) and (a)(2)(emphasis supplied). Plaintiff herein brought action to recover Sunday premium pay for himself and those similarly situated and sought not just an Order directing back pay that had accrued "to date" at the time of the filing of the Complaint, but also an order directing "Defendant to pay to plaintiff and those similarly situated Sunday premium pay from this date [of the filing of the Complaint] forward". (Complaint, ECF Document #1, p. 8).

5. So, too, this Court granted Plaintiff's motion for summary judgment and directed that "Part-time Field Representatives are eligible to receive Sunday premium pay for the period

of October 28, 2005 to the present *and going forward.*” (Decision, ECF Document #76, p. 21-22, emphasis supplied).

6. Indeed, this case is no different from the cases cited by the Government in the footnote in its responsive Declaration. In *Calhoun v. United States*, 173 Ct. Cl. 893 (1965), a case involving patent infringement, this Court held that when the pleadings put in issue a continuing violation or continuing claim, a plaintiff may recover for damages sustained after the filing of a complaint and there is no basis for requiring that a new lawsuit be filed. So, too, in the other case cited by Defendant, *Navajo Tribe v. United States*, 218 Ct. Cl. 11 (1978), which addressed, among other things, the Government’s ongoing “course of conduct” and ongoing “policy”, this Court explained that: “Once suit is timely filed .... there need be no difficulty or unfairness in assessing damages for wrongs of the same type continuing while the suit is pending.” *Id.* at 25. The Court found that to find otherwise would result either in “a substantial number of wrongs [that] would never be redressed at all” or unnecessary “concurrent litigation ... on the very same issues”, noting that accountings, not unlike the accounting of Sunday premium pay here, “necessarily take time”.<sup>1</sup> *Id.* at 30-31.

7. In addition, at no point during the more than two-year period during which the Government willingly provided pay data that pertained to all years through calendar year 2017, and calculations were undertaken, reviewed and discussed jointly by counsel, was there ever a suggestion that the Government would not be responsible for Sunday premium pay that accrued during the course of the pending action.

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<sup>1</sup> The interest of judicial economy is well-served by the Court’s view that successive, repetitive filings of separate complaints on continuing violations are not necessary.

8. Defendant's response also suggests opposition to the Court entering an order requiring it to pay all Sunday premium pay accrued since the December 31, 2017 end date of the Rust calculations in stating: "We are not aware of a calculation through the date of judgment and beyond...."

9. However, for the reasons set forth in my moving Declaration, Plaintiff has not sought judgment in a specific amount for the period from January 1, 2018 to the date of judgment or from the date of judgment forward, but rather requests the Court order Defendant to pay that Sunday premium pay.

10. It is undisputed that the Government has or will have the necessary data in order to calculate and make these payments.

11. Moreover, as set forth in my moving Declaration, the process by which Defendant was able to obtain and furnish to Plaintiff and its Class Representative Rust Sunday premium pay information – the hours worked by each Opt-In Class member and at what respective rates for each Class member in a class of 3,487 individuals for each date involved – was arduous and time-consuming. Once it became clear that there was no way to continue to update the information without creating a significant and continued lag in time between the actual eligible work performed by Class Members and Defendant's obtaining the pay information and producing such to Plaintiff for calculation by its Class Administrator, the performance of such calculations, and the subsequent review by Defendant's counsel of those calculations; there was no choice but to agree to a date for purposes of fixed calculation and to seek an Order from that

date forward for payment, as sought by Plaintiff in the Complaint and as the Court directed in the summary judgment Decision.<sup>2</sup>

12. As a practical matter, if such relief is not granted, Class Members (and any new employees) will be required to bring identical cases *ad seriatim* to cover periods of time which elapse between the last date for which calculations were performed and the entry of judgments, creating an endless loop of litigation - a result neither envisioned by nor helpful to the Court.

#### CONCLUSION

13. It has been 28 months since the summary judgment Decision was entered in this matter. There is nothing further for the parties to discuss or resolve respecting back pay. At this time, the judgments should be entered and the further requested relief granted without delay.

Dated: New York, New York  
February 19, 2019

By:           /s/ Arlene F. Boop            
ARLENE F. BOOP

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<sup>2</sup> By way of example, it took the Government six months to provide data for calendar year 2017 alone. This process of requesting, providing and analyzing data must be allowed to come to an end with plaintiffs receiving full relief.