IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH GALLIMORE *et al*.,	)	
	)	
Plaintiffs,	)	
	)	No. 11-715C
v.	)	(Judge Patricia Campbell-Smith)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFFENDANT'S SUPPLEMENTAL BRIEF
ADDRESSING THE AWARD OF DAMAGES

Pursuant to the Court's order dated April 3, 2019, defendant, the United States, respectfully files this supplemental brief addressing the appropriate award of damages in this case. As mentioned in the parties' March 7, 2019 and April 2, 2019 joint status reports, defendant believes that there remain unresolved issues with respect to (1) whether the Court possesses jurisdiction to award damages to plaintiffs after the date the complaint was filed, October 28, 2011, based on plaintiffs' allegations of continuing claim violations; and (2) whether the Court may award prospective damages to plaintiffs.

Plaintiffs' claims are continuing claims, because plaintiffs allege that the Department of Commerce, United States Census Bureau owes plaintiffs a continuing duty for the payment of Sunday Premium Pay (SPP). *See Boling v. United States*, 229 F.3d 1365, 1373 (Fed. Cir. 2000) (a continuing claim exists in cases where the defendant owes the plaintiff an ever-present duty, the nonperformance of which would give rise to a series of actionable breaches). "Under this theory, each breach gives rise to a separate cause of action, and a plaintiff may bring suit for any breaches that occurred within the statute of limitations period." *Central Pines Land Co. et al.*

v. United States, 61 Fed. Cl. 527, 537 (2004); *accord, Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied, Lipp v. United States*, 373 U.S. 932 (1963); *Cannon v. United States*, 146 F. Supp. 827 (Ct. Cl. 1956).

Plaintiffs filed their complaint seeking SPP on October 28, 2011. Pursuant to the statute of limitations that governs claims against the United States, the complaint encompassed plaintiffs' SPP claims going back six years, to October 28, 2005. *See* 28 U.S.C. § 2501 (2012) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."); *see also Gross v. United States*, 128 Fed. Cl. 745, 764 (2016). Plaintiffs, however, seek SPP from 2005 onward, a period of at least 14 years. Plaintiffs have not filed an amended complaint to properly assert their claims beginning on, and continuing past October 29, 2011. Indeed, more than six years has passed since the filing of the complaint. Even assuming that plaintiffs filed an amended or new complaint today, April 15, 2019, their SPP claims for the period October 28, 2011 through April 15, 2013 are outside the statute of limitations because they accrued more than six years prior to the date of a prospective amended or new complaint, and thus are not recoverable. 28 U.S.C. § 2501. Moreover, without the filing of a new or amended complaint, plaintiffs cannot recover for any of their claims that accrue on or after October 29, 2011. *Id*.

"The statute of limitations is jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005) (*quoting Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990)). In *Indiana Michigan*, a case involving allegations of a continuing partial breach of contract, the Federal Circuit Court of Appeals determined that "subsequent claims for future damages are considered to accrue for the purposes of the statute of limitations at the time

such damages are incurred." 422 F.3d at 1378. The Court held that a plaintiff must bring an action for future damages within six years of incurring those damages. *Id*. This Court addressed similar circumstances in *Sacramento Municipal Utility District v. United States*, 98 Fed. Cl. 495 (2011). In that case, plaintiff filed its original complaint on September 4, 2009, but did not subsequently supplement or amend its complaint. The Court held that "as a matter of law, without amending or supplementing the September 4, 2009 [c]omplaint, [p]laintiff may only seek damages that were incurred prior to that date." *Id*. at 498 (*citing Indiana Michigan*, 422 F.3d at 1376-77). *Accord, Pacific Gas and Elec. Co. v. United States*, 70 Fed. Cl. 758 (2006) (plaintiff could seek damages only up to the date of the complaint or amended complaint).

Therefore, without the filing of a new or amended complaint, plaintiffs cannot recover for any of their SPP claims that accrue on or after October 29, 2011. *Id*.

For these reasons, we respectfully request that the Court limit the award of damages to plaintiffs.

Respectfully submitted,

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April 15, 2019

UNITED STATES COURT OF FEDERAL CLAIMS

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JOSEPH GALLIMORE, *et. al.*

Plaintiff, Fed. Claims No. 11-715C

-against – (Judge Patricia Campbell-Smith)

UNITED STATES,

Defendant.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF ADDRESSING AWARD OF DAMAGES

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in opposition to Defendant's Supplemental Brief in which Defendant challenges, in part, Plaintiff's motion for the entry of judgments. Notably, Defendant interposes no opposition to the manner in which the awards were calculated or to the accuracy of such calculations. Rather, Defendant first objects to the entry of judgment for any period past the date the Complaint was filed in this action - October 28, 2011. Second, and in the alternative, Defendant opposes entry of judgment for the period of October 28, 2011 through April 15, 2013, based upon Defendant's argument that said claims would allegedly be beyond the six (6) year statute of limitations if Plaintiffs were to now file a new or amended complaint requesting recovery for damages incurred after the date of the filing of the Complaint. Finally, Defendant appears to also challenge the Court's power to direct payment of Sunday premium pay going forward.

Plaintiff contends that the arguments Defendant makes are specious and wholly unsupported by any precedential authority or by any logical argument grounded on the authority it cites in its brief. Significantly, Defendant cites to no relevant case precedent to support its position that, after a complaint is filed alleging a continuing pay violation, a plaintiff may not recover damages for the ongoing violation past the date of the complaint. Nor does it cite to any relevant case precedent that, to the extent an action has taken more than 6 years to reach resolution, a plaintiff is required to repeatedly file amended or supplemental complaints so that no claim exceeds 6 years prior to the actual date of entry of judgments. In raising this argument, Defendant ignores that cases referring to continuing violations appear to have uniformly done so in the context of considering how far *backward* in time a plaintiff may go *prior to* filing a complaint. Plaintiffs have found not one case holding that a plaintiff cannot recover damages incurred *after* the filing of the complaint and during the pendency of the case on a properly filed

continuing violation claim. Apparently, Defendant has also failed to find a case supporting its position because it has failed to cite one in its Memorandum. As set forth in full below, the few cases upon which Defendant seeks to rely are wholly inapposite because each involves a partial breach of contract claim governed by the contractual principle applicable only to partial breach of contract claims that "future" damages are barred – a principle that has no application to the ongoing violation of the pay statutes passed by Congress and now before this Court.

Moreover, as set forth more fully below, the issues Defendant raises as to the time period for which Class Members may recover are barred under the doctrine of the law of the case, as the appropriate time period for Plaintiff's recovery was established by this Court's October 28, 2016 decision granting Plaintiff's motion for summary judgment. The Court's determination may not be collaterally attacked.

Additionally, Defendant both expressly and implicitly consented to the time period for which judgments should be entered by the framing of its opposition to the motion for summary judgment in which it raised no issue as to the ongoing time period for which Plaintiffs sought to recover, as well as by Defendant's entire course of conduct in the nearly three (3) years since the Court's decision on that motion. Significantly, any alleged "gap" period for which Defendant claims no Class Member can recover exists only as a result of the numerous extensive delays by Defendant at various stages of this litigation – including the very slow provision of the data necessary in order for counsel to give notice to potential Class Members and the even more extensive delay in the provision of the pay data required for the calculation of damages.

For these reasons, Defendant's objections are both misplaced and cannot be raised at this time. However, should the Court find otherwise, Plaintiffs request that the Court deem

Plaintiffs' Complaint amended or supplemented *nunc pro tunc* so that judgments may be entered at this time.

As for Defendant's claim that the Court may not award prospective damages to the Plaintiffs, Defendant again fails to cite even one case in support of its argument, nor does it elucidate the basis for its argument in its Supplemental Brief. However, as set forth more fully in Point II below, the Court has well-established power to provide equitable relief that is incidental and collateral to the money judgments being issued in this case, direct any necessary correction of pay records so Class Members receive Sunday premium pay going forward, and thus provide an entire remedy to Plaintiffs. Defendant articulates no argument why such power should not be exercised in this case and cites no case precedent to support its position.

STATEMENT OF RELEVANT FACTS

For purposes of the present opposition to Defendant's objection to the entry of judgments, a review of the various filings in this Court is appropriate. The Complaint in this matter was filed on October 28, 2011. In that document, Plaintiff specifically sought Sunday premium pay for the period from May 2003 through the date of the Complaint and prospectively "from this date forward." (ECF Doc. No. 1, par, 10, 39 & Wherefore Clause). On October 31, 2016, this Court decided Defendant's Motion for Partial Dismissal and the parties' Cross-Motions for Summary Judgment and resolved the issue of the time period for which the Plaintiff Class could recover under the applicable statute of limitations. The Court agreed with Defendant's premise that October 28, 2005 was the cut-off date looking backward—i.e., the Class could recover for claims 6 years prior to the filing of the lawsuit, finding no basis for the application of the doctrine of accrual suspension.

In granting Plaintiffs' motion for summary judgment, the Court held: "Part-time Field Representatives are eligible to receive Sunday premium pay for the period of October 28, 2005

to the present and going forward." (ECF Doc. No. 76, pp. 21-22) Defendant made no objection to that finding by motion for reconsideration or by seeking to file an interlocutory appeal. That determination of the Court thus became law of the case.

Subsequent to that decision, there was a lengthy process in getting the names and addresses of potential Class Members from the Defendant, such that the original notice to potential Class Members was only able to be sent on May 19, 2017, as Defendant was not able to provide a list of potential Class Members until April 21, 2017. That notice provided an "opt-in" deadline of August 27, 2017. On September 27, 2017, a Notice of Extended Deadline granting an extension to October 26, 2017 was sent to approximately 86 Class Members who had the original Notice mailed to them after the May 19, 2017 mailing date. The list of all opt-in Class Members was filed with the Court on December 5, 2017.[1]

The process of getting the relevant pay and hour data from the Government commenced shortly after the original filing of the Notice of Class Members in December of 2017, and the Government provided to the Class Administrator data for the period through December 17, 2017 on June 27, 2018, a corrected set on July 25, 2018, and supplemental files on September 18 and 19 and on November 9, 2018.

In this regard, it must be noted that at no time during the process of data collection or damage calculation did Defendant object to furnishing Plaintiff the complete payroll information for all Class Members from October 28, 2005 through the end of December of 2017. Indeed, that "end date" was chosen as a logical "update" in circumstances where, given the significant time it took Defendant to have the data prepared, there would always be a substantial gap in time between the last payroll for which data was furnished and the actual provision of that data to

[1] While an amended list was filed on September 12, 2018, this amended list served primarily to clarify the name of the claimant where such claimant had died and a representative had submitted the Opt-In form. Neither the number of claimants nor identifying social security numbers changed.

Plaintiff's counsel and the Class Administrator. Indeed, it took over 14 months from the time Defendant was furnished with Plaintiff's original list of Class Members before Defendant managed to furnish the Class Administrator with the data as to Sunday hours and pay rates of all of the Class Members.

The Class Administrator then calculated the awards due each opt-in Class Member and this information was submitted to the Defendant for its review and receipt of any objections in October 2018. Plaintiffs' counsel was informed several weeks later that the Government had no objection to those calculations. In the Defendant's February 14, 2019 response to the Plaintiff's motion to enter judgments, the Defendant stated: "The Government does not disagree with the calculations performed by the plaintiff's consultant Rust." (ECF No. 149)

On December 5, 2018, Plaintiff then moved to have this Court enter judgments.

ARGUMENT

POINT I

Plaintiffs are Entitled to Judgments for the Entire Period Sought

A. No Law Supports Defendant's Proposed Limitations

In its Supplemental Brief, Defendant asserts that Plaintiff cannot seek recovery for the conceded failure to pay Sunday premium pay to Class Members for any time from the date of the filing of the Complaint in October of 2011 forward. In the alternative, implicitly conceding that the Court has the power to deem Plaintiff's Complaint amended or supplemented, Defendant argues that, even if the Complaint was amended as of April 15, 2019 – the date Defendant filed its Supplemental Brief – Plaintiff would still be barred from seeking to include damages for any period longer than 6 years *before* such amended or supplemented complaint was filed – i.e. any supplement owed for the period October 28, 2011 through April 15, 2013.

This position is unsupported by even a single case precedent.

As this Court's decision on Defendant's motion to dismiss made plain, under 28 U.S.C. §2501, a plaintiff may not go back in time more than 6 years *prior to* filing an action in court on a continuing violation theory to recover pay damages absent a basis for accrual suspension, and the 6-year bar is jurisdictional. But that is not what is at issue here. Rather, Defendant is making the claim that a plaintiff cannot recover for damages going *forward after the filing of an action in court*, i.e. for damages incurred during the pendency of the lawsuit, based upon a specifically alleged continuing, ongoing and recurring violation of the same pay statute. Defendant contends that a plaintiff must instead keep filing serial lawsuits or keep amending and/or supplementing the pending action – a result that would place a wholly unnecessary burden not just upon the plaintiff, but upon the courts, as well.

While it is agreed that 28 U.S.C. §2501 establishes a 6-year statute of limitation for the institution of a suit to recover claims against the Government; significantly, that statute does not bar claims which arise subsequent to the date of the filing of a complaint that properly pleads a continuing violation and a request for consequent damages. Nor does Defendant cite to a single case precedent in which that statute has been interpreted to limit the recovery of claims that arose during the pendency of an action explicitly seeking recovery for an ongoing violation. Indeed, Defendant cites no precedent whatsoever to support its position, but instead relies solely on several cases involving partial breach of contract claims, which are governed by an entirely separate body of law applicable only to such claims.

In this regard, the three cases Defendant does cite are irrelevant except to the extent they support Plaintiff's position. Specifically, in each of the three cases, a plaintiff utility company sued the Department of Energy ("DOE") for a *partial* breach of contract based on the fact that the DOE had announced that it would be unable to meet its obligation to build the necessary

facility to provide for storage of nuclear waste until a date after that provided by the utilities' respective contracts with the DOE. In each case, the court prohibited claims for future damages because, under hornbook law and as reflected in the Restatement of Contracts, future damages are not obtainable in a cause of action for a partial breach of contract. While Defendant correctly cites the general principle articulated in *Indiana Michigan Power Co., v. United States*, 422 F.3d 1369 (Fed. Cir. 2005) that the six-year statute of limitations is jurisdictional, the court did so only in the context of addressing the plaintiff's concern that it would be barred from claims for damages as they might occur in the future. The court first noted that a particular section of the Restatement of Judgments provides an exception to the general rules of merger and bar relative to injuries experienced during the execution phase of a continuing contract in a partial breach case given the parties' continuing obligations to each other and observed that, in a partial breach case, "a cause of action accrues [only] when all the events have occurred that fix the defendant's liability" (*Id*. at 1378) – i.e. when those future damages are actually incurred. The court hence found the plaintiff would have a complete remedy in the event of such future losses. Significantly, in the other two cases cited, the plaintiff was actually permitted to claim damages for a period subsequent to the filing of the complaint where those damages had already accrued, were not speculative, and where the plaintiff had adequately provided all of its necessary proofs to the defendant. Thus, in *Sacramento Municipal Utility District* v. *United States*, 98 Fed. Cl. 495 (2011), the plaintiff was permitted to claim damages for the balance of the year in which the complaint was filed. However, the court also found the request by plaintiff to obtain damages through the end of the following year barred as unripe under the facts in that case because plaintiff had not timely disclosed its damages proofs and the government would need significant additional discovery, delaying the scheduled evidentiary hearing. Moreover, to the extent

Sacramento relies on *Indiana, supra,* it does so not for the Defendant's novel proposition that, in an action not based on a partial breach of contract, a plaintiff may not seek damages that arise after the date of the complaint, but only in the context of the well-established law relative to partial breach of contract claims that bars a plaintiff from recovering damages for anticipated, future non-performance. The court in *Indiana, supra,* noted the basis for such a rule in partial breach of contract cases: "Because of its highly speculative nature, a claimant may not recover, at the time of the first suit for partial breach, prospective damages for anticipated future nonperformance resulting from the same partial breach." *Id at* 1376 (citations omitted). Similarly, in *Pacific Gas & Electric Co. v. United States,* 70 Fed Cl. 758 (2006), the court permitted the plaintiff to seek damages through the end of the year in which the complaint was filed[2] and the court held that, should such evidence be submitted at trial, it would deem the complaint so supplemented. In both cases, the court also relied on the fact that its ruling to limit damages did not prejudice the plaintiff, who was always entitled to file a subsequent suit to seek any damages beyond those to be adjudicated in the pending case.

In contrast, in the action now before this Court, the amount of the damages has been conceded and Defendant in fact seeks to limit the total amount of Plaintiffs' recovery for all time.

B. Defendant's Position is Barred by Law of the Case

Defendant's argument that this Court cannot properly enter judgment for any period after the filing of Plaintiffs' Complaint or, alternatively, for any period that is more than 6 years prior to the date of entry of judgment must also be barred as a collateral attack on this Court's October 31, 2016 determination.[3] Significantly, Plaintiff raised this issue in the February 19, 2019

[2] This encompassed a period of approximately 11 months going forward.
[3] Defendant may, of course, take an appeal on this issue despite the lack of legal support for its position.

Declaration of Arlene F. Boop responding to the Defendant's response to the Plaintiff's motion to enter judgments, but Defendant has failed to address this argument in its Supplemental Brief.

Simply put, law of the case generally posits that, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 496 U.S. 800 (1988) at 816, *citing, Arizona v. California,* 460 U.S. 605 (1983) at 618. While this doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power" and "[a] court has the power to revisit prior decisions of its own…, as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice'" *Id.* at 817 (*citations omitted).*

Here, there are no such extraordinary circumstances. Defendant does not even contend that such circumstances exist. As such, its current attempt to relitigate the original summary judgment Decision of October 31, 2016 must be rejected.

C. Defendant Should Be Deemed to Have Consented to the Entry of Judgments for the Entire Period from October 28, 2011 to December 31, 2017

There is inarguably a strong basis in equity and fundamental fairness for barring Defendant from now claiming that there is a period of approximately 18 months for which Plaintiffs should not recover at all because that period is more than 6 years from the anticipated date of entry of the judgments.

First, as is clear from the factual statement above, which recites the dates of the various phases of this action as reflected in the parties' filings, docket sheet, and substantive provisions of joint status letters; the entirety of the approximately 18-month period for which Defendant claims there should be no recovery is directly attributable to the delay by Defendants in providing a list of potential Class Members (an approximate 6 month period) and in getting

complete payroll data in order to permit the Claims Administrator to fully calculate damages (an additional period of approximately 12 months). In addition, Defendant seems to calculate time frames based on the filing of its Supplemental Brief on April 15, 2019, as opposed to the date on which Plaintiffs filed for the entry of judgment on December 5, 2018, adding an additional delay of over 4 months - solely as a result of Defendant's actions.

Secondly, and more fundamentally, having agreed to the period for which data would be produced and from which the total Sunday premium pay awards would be calculated, Defendant cannot be now entitled to contest a portion of the total period, which of necessity would not only require recalculation of every pay award, but would result in additional delay – permitting Defendant to have a new basis to challenge additional portions of the award, i.e., the pay periods that become older than 6 years during this additional period of recalculation and motion for entry. Indeed, Defendant's argument posits an "endless loop" by which pay awards can never be calculated on a final basis and by which the total awards are reduced with each new calculation. In short, the logic of Defendant's argument would lead to a result which would be wholly unfair, impossible as a practical matter, and which would reward Defendant for its intransigence in providing the very information necessary for the entry of judgments.

D. To the Extent the Court Finds Amendment Appropriate, the Court Should Deem the Complaint Amended Nunc Pro Tunc

For all of the reasons set forth above, Plaintiff maintains that amendment of the Complaint in this action is not and should not be required for purposes of Plaintiffs' complete recovery up through the date of final judgment and directives with respect to the Government's ongoing obligation to pay members of the Plaintiff Class Sunday premium pay going forward. This is particularly so, given the Complaint in this action explicitly requested not just an award of back pay for Sunday premium pay "to [the] date" of the Complaint, but also pay from "this

date [of the Complaint] forward." (ECF Doc. #1, p. 8). Nonetheless, if the Court disagrees, Plaintiff respectfully requests that the Court deem the Complaint amended *nunc pro tunc* – now for then - pursuant to RCFC Rule 15.

Rule 15(b)(2) allows that "when an issue not raised by the pleadings is tried by the parties' express or implied consent, …[a] party may move at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Here, although Plaintiff believes the issue was properly pleaded, if the Court finds otherwise, the issue of the ongoing damages was tried by the parties' "express or implied consent" by virtue of Defendant's failure to contest Plaintiffs ongoing right to recovery in its opposition to Plaintiff's motion for summary judgment; its failure to request reconsideration on the Court's summary judgment Decision; its continued furnishing of the data needed to compute Plaintiff's ongoing damages; and, finally, Defendant's review and confirmation of the calculation of those damages, as set forth above.

Moreover, Rule 15(c)(1)(B) provides for the relation back of an amendment to the date of an original pleading where "the amendment asserts a claim … that arose out of the conduct … set out – or attempted to be set out – in the original pleading" – in this case, the Census Bureau's ongoing and continued failure to pay and its ongoing and continued policy not to pay Sunday premium pay to part-time Field Representatives.

POINT II

The Court Has Jurisdictional Power to Direct the Payment of Sunday Premium Pay Going Forward

28 U.S.C. §1491 addresses the Court's jurisdiction to entertain claims against the United States and provides in subsection (a)(1) that the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon, among

other things, "any Act of Congress." In the instant case, Plaintiffs' case against the United States is founded upon 28 U.S.C. §1491 coupled with the Sunday premium pay statute, 5 U.S.C. §5546(a).

28 USC §1491 subsection (a) (2) explicitly empowers the Court of Federal Claims to "provide an entire remedy and to complete the relief afforded by the judgment" and provides, among other things, that "the court may, as an incident of and collateral to any such judgment, issue orders directing … placement in appropriate duty …status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States." Moreover, the statutory language goes on to provide that "[i]n any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction, as it may deem proper and just."

In other words, the Court of Federal Claims may direct the Census Bureau to correct its personnel and pay records and to provide for proper payment of Sunday premium pay to part-time Census Bureau Field Representatives on an ongoing basis post-date of judgment.

While it has been said that the Court of Federal Claims has no jurisdiction for purposes of providing solely equitable remedies, as the Federal Circuit made plain in *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308 (Fed. Cir. 1979), jurisdiction does exist in cases that require a declaration of rights when such declaration is coupled with a monetary remedy, such as the payment of Sunday premium pay on an ongoing basis in the case now before the Court. In *Pauley*, as here, the plaintiffs explicitly sought a monetary remedy, they were "not asking for a simple declaration of rights … which may or may not result in a subsequent payment of money outside of the court's processes;" rather they were seeking – just as Plaintiffs seek here – a declaration of their monetary rights, in this case the Plaintiffs' monetary right to Sunday

premium pay on an ongoing basis going forward. *Id.* at 1315. The Federal Circuit made plain in *Pauley* that the Court of Federal Claims is "not preclude[d] … from exercising equitable powers and "[e]quitable doctrines can be employed incidentally to this court's general monetary jurisdiction." *Id*. Indeed, the Federal Circuit in *Pauley* reaffirmed the "continued assumption that we can properly use equitable theories in passing upon suits for monetary awards [as] grounded firmly on the Tucker Act's history, on unquestioned Supreme Court cases, and on Court of Claims decisions." *Id.*

A series of cases post-*Pauley* reaffirm the Court's power. In *James v. Caldera,* 159 F.3d 573 (Fed. Cir. 1998), for example, the Federal Circuit found the equitable remedy of directing correction of Army personnel records proper given the existence of back pay damages. In accord is *Passaro v. United States,* 4 Cl. Ct. 395 (1984), in which the Court affirmed its "power to employ equity procedures incidentally to granting monetary relief," citing *Pauley Petroleum, supra*, and noting that the "court has undertaken similar actions by ordering retroactive employment status in a position never held by a party for the purpose of awarding back pay and by reforming a deed or contract as a basis for awarding monetary relief." *Id.* at *399* (citations omitted). While the decision in *Passaro* was reversed on appeal because the serviceman husband of the claimant had never elected to participate in the subject retirement plan, the United States Court of Appeals for the Federal Circuit did so in an opinion that nonetheless affirmed the incidental equity power of the Federal Court of Claims. *Passaro v. United States,* 774 F.2d 456 (1985).

Here, the Court's directive to the Government in the decision issued on Plaintiff's motion for summary judgment that it must comply with 5 U.S.C. §5546(a) by paying the Plaintiff Class Members Sunday premium pay going forward was well within its jurisdictional power, as it is

relief that is incidental and collateral to the monetary judgments to be issued herein; requires the correction of Census Bureau pay records so that the Class Members receive Sunday premium pay going forward on an ongoing basis; and constitutes relief necessary for purposes of providing an entire remedy to the Class Members.

CONCLUSION

It is respectfully submitted that Defendant's objections to the entry of judgments should be overruled; and that judgments should be entered as requested by Plaintiffs' motion, dated December 5, 2018, in the gross amounts set forth for each Class Member in Schedule A attached to the Declaration of Arlene F. Boop, as adjusted by all appropriate Federal and State deductions, and any applicable Federal contributions; and that this Court should issue an Order directing Defendant to pay to each of the Opt-In Class members their respective Sunday premium pay with applicable interest for the period of January 1, 2018 until judgment in this case becomes final and, thereafter, on an ongoing basis.

Dated: New York, New York
May 9, 2019

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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 of 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.

2. Specifically, this Declaration is submitted for the sole purpose of providing the Court with pertinent information concerning the dates on which the government provided the pay data necessary for the Class Administrator Rust to calculate all of the pay together with interest due and as reflected in the Schedule A attached to Plaintiff's original motion for the entry of such judgments.

3. A data set was originally provided on June 27, 2018, but the Government subsequently indicated the data set was over inclusive and should not be used. A corrected data set was provided on July 25, 2018. Supplemental files were provided on September 18, 2018, September 19, 2018 and November 9, 2018.

Dated: New York, New York
May 9, 2019

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

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH GALLIMORE *et al*.,	)	
	)	
Plaintiffs,	)	
	)	No. 11-715C
v.	)	(Judge Patricia Campbell-Smith)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE
TO DEFENDANT'S SUPPLEMENTAL BRIEF
ADDRESSING THE AWARD OF DAMAGES

Pursuant to the Court's order dated April 3, 2019, defendant, the United States, respectfully files this reply to plaintiffs Joseph Gallimore *et al*.'s response to defendant's supplemental brief addressing the appropriate award of damages in this case.

In our supplemental brief, we explained that the Court lacks jurisdiction to award back pay for years not covered by a complaint filed within the six-year statute of limitations specified in 28 U.S.C. § 2501. Plaintiffs' response fails to identify a basis for that jurisdiction. As we explained, the "statute of limitations is jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005) (*quoting Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990)). "In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, and not enlarge the waiver 'beyond what the language requires.'" *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (other citations omitted). This Court, and the Court of Appeals for the Federal Circuit, have strictly applied the Tucker Act's six-year statute of limitations. *See Sacramento Municipal Utility District v. United*

States, 98 Fed. Cl. 495, 498 (2011) ("as a matter of law, without amending or supplementing the September 4, 2009 [c]omplaint, [p]laintiff may only seek damages that were incurred prior to that date") (*citing Indiana Michigan*, 422 F.3d at 1376-77). *Accord Pacific Gas and Elec. Co. v. United States*, 70 Fed. Cl. 758 (2006) (plaintiff could seek damages only up to the date of the complaint or amended complaint).

In their response, plaintiffs contend that the statute of limitation holdings in *Sacramento Municipal* and *Pacific Gas and Electric* do not apply here because in those cases, the Court allowed damages past the date of the complaints. Pls. Res. at 8-9. In both cases, however, the Court required a supplemental or amended complaint before entertaining an award of damages past the date of the initial complaint. In *Sacramento Municipal*, the plaintiff filed a motion with the Court to supplement its complaint, to seek damages past the date of the original complaint. Indeed, this Court in *Sacramento Municipal* stated that "without amending or supplementing the September 4, 2009 [c]omplaint, [p]laintiff may only seek damages that were incurred prior to that date." 98 Fed. Cl. at 498 (citing *Indiana Michigan*, 422 F.3d at 1376-77). Similarly, in *Pacific Gas and Electric*, and with agreement of defendant, the Court deemed the complaint to be amended or supplemented in order to include damages through December 31, 2004. *See* 70 Fed. Cl. at 765 ("consistent with *Indiana Michigan II*, the court will deem plaintiff's complaint to be amended and supplemented as of December 31, 2004, and to allege damages through December 31, 2004, in order to encompass the evidence presented at trial.").[1]

[1] Moreover, even if a breach of an agreement is properly plead, the plead breach may generate post-complaint damages–subject to their being properly plead and other substantive limits such as their being non-speculative, these principles of damages have nothing to do with jurisdiction. Moreover, unlike in those cases, plaintiffs here do not argue – nor could they – that any "damages" have occurred post "breach." The only remedy at issue here is payment of the shortfall plaintiffs allege occurred on the pay day associated with each relevant pay period.

Plaintiffs further contend that the statute of limitation holdings in *Indiana Michigan Power*, *Sacramento Municipal*, and *Pacific Gas and Electric* are inapplicable here because, unlike the partial breach of contract allegations in those cases, plaintiffs' claims in this case are continuing claims. Pls. Res. at 6-8. As an example, plaintiffs explain that the Federal Circuit in *Indiana Michigan Power* observed that, in a partial breach case, "a cause of action accrues [only] when all the events have occurred that fix the defendant's liability." Pl. Res. at 7 (quoting *Indiana Michigan Power*, 422 F.3d at 1378). We agree. Moreover, that rule is applicable to all causes of action, including suits like this one for claimed unpaid wages.

Indeed, as the Court of Claims explained in *Cannon v. United States*, 146 F. Supp. 827 (Ct. Cl. 1956), "[a] cause of action of whatever nature can accrue only at the time the suit may be maintained thereon, and from that date forward the applicable statute of limitation begins to run." *Id*. And, as here, "[w]here the terms of employment contemplate regular periods of service such as weekly, monthly or yearly, with payment for such services to be made at the end of each agreed period, each failure of the employer to pay the wages or salary at the end of the time stipulated for payment will give rise to a separate claim or cause of action for wages not paid and the statute of limitation runs separately on each claim." 146 F. Supp. at 830. As such, each claimed pay period creates a new and separate cause of action, which is subject to the Tucker Act's six-year statute of limitations period. *See Boling v. United States*, 229 F.3d 1365, 1373 (Fed. Cir. 2000) (a continuing claim exists in cases where the defendant owes the plaintiff an ever-present duty, the nonperformance of which would give rise to a series of actionable breaches). *Accord Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied*, *Lipp v. United States*, 373 U.S. 932 (1963); *Cannon*, 146 F. Supp. at 827; *Central Pines Land Co. et al. v. United States*, 61 Fed. Cl. 527, 537 (2004).

Plaintiffs, however, have filed no complaint within the six years of any pay period after October 28, 2011 – let alone one that covers pay periods yet to occur. Thus, even assuming that plaintiffs filed an amended or new complaint today,[2] May 24, 2019, their SPP claims for the period October 28, 2011 through May 24, 2013 are outside the statute of limitations because they accrued more than six years prior to today. 28 U.S.C. § 2501.

Plaintiffs argue that the doctrine of law of the case precludes defendant from raising the issue of the Court's jurisdiction over claims for SPP after October 28, 2011. Pls. Res. at 8-9 (citing *Arizona v. California*, 460 U.S. 605, 618 (1983) (other citation omitted).[3] In *Arizona*, the Supreme Court explained that the law of the case doctrine envisions that a court will consistently apply its rulings at each stage of a case. 460 U.S. at 618. Further, as plaintiffs state in their response, "as a rule courts should be loathe to [revisit prior decisions of [their] own] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id*.; Pls. Res. at 9.

First, raising the issue of a court's jurisdiction is never untimely, because jurisdiction may be raised at any time or at any stage in a proceeding. "Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter

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[2] Plaintiffs request that if necessary, the Court "deem the [c]omplaint amended *nunc pro tunc* . . . pursuant to RCFC Rule 15." Pls. Res. at 11. It is not clear from plaintiffs' request what date plaintiffs are seeking for the amendment. If the proposed amended complaint relates back to the date plaintiffs filed the original complaint, October 28, 2011, plaintiffs' claims that accrued after that date are still outside the statute of limitations. We do not oppose plaintiffs' request to file an amended complaint, or for the Court to deem plaintiffs' complaint amended as of today's date. Such an amendment, however, would still result in the period October 28, 2011 through at least May 24, 2013, as outside the statute of limitations, which would require an appropriate reduction to plaintiffs' damages.

[3] Neither *res judicata* nor *collateral estoppel* apply here. *See Arizona*, 460 U.S. at 619 ("It is clear that *res judicata* and *collateral estoppel* do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment.").

jurisdiction over the controversy." *Sebelius v. Auburn Reg'l Med. Ctr*., 568 U.S. 145, 153 (2013); *see also Cent. Pines Land Co. LLC v. United States*, 697 F.3d 1360, 1364 n.1 (Fed. Cir. 2012) (a challenge to a court's jurisdiction can be raised at any time, "including after trial and the entry of judgment."). Second, the law of the case doctrine is not implicated because, as explained, any pay periods concerning which plaintiffs may wish to make claims subsequent to October 28, 2011 are not in the "case" – nor can an ever-growing number of them (those more than six years ago) ever be. Third, this Court has not ruled on the question presented here – or damages of any kind. Thus, it would not violate the law of the case were the Court to restrict damages to only those claims that fall within the applicable six-year statute of limitations.

Plaintiffs next assert that defendant should be deemed to have consented to damages for the 18-month period from October 28, 2011 to late April 2013, because the entirety of the 18-month period is attributable to defendant's delay in providing a list of plaintiffs and payroll data to plaintiffs. Pls. Res. at 9-10. Defendant disputes that it acted with unreasonable delay in providing the list of more than 3,500 plaintiff names to plaintiffs' counsel, along with all relevant payroll data for each plaintiff. Regardless of whether one or both party's actions caused delay, it was incumbent upon plaintiffs to file an amended or supplemental complaint no later than October 28, 2017, and within six years thereafter, to incorporate SPP damages for each six-year period after the complaint was filed on October 28, 2011. Moreover, the fact that defendant agreed to provide and did provide payroll data for the period of time October 28, 2011 through May 2013, a period of time that ultimately is outside the statute of limitations due to plaintiffs' failure to file an amended complaint does not, and cannot render the statute of limitations meaningless. Indeed, sovereign immunity cannot be waived. *Marathon Oil*, 374 F.3d at 1127.

Therefore, without the filing of a new or amended complaint, plaintiffs cannot recover for any of their SPP claims that accrue on or after October 29, 2011. *Id*.

Finally, plaintiffs assert that the Court may provide declaratory relief and direct the payment of SPP "going forward." Pls. Res. at 11-14. For the reasons stated in our supplemental brief and in this reply, plaintiffs' request for SPP damages after the date of the complaint is untimely. Moreover, as this Court explained in *Eco Tour Adventures, Inc. v. United States*, 114 Fed. Cl. 6 (2013), "[e]xcept in narrow statutorily defined circumstances, the [Court] lacks jurisdiction to award injunctive or declaratory relief." *Id*. at 40 (citing *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1326 n.5 (Fed. Cir. 2007) (other citations omitted). Although the Court can issue an order "directing restoration to office or position" or the correction of records when tied and subordinate to a money judgment, pursuant to 28 U.S.C. § 1491(a)(2), plaintiffs have not demonstrated that they are entitled to monetary relief past the date of the complaint. Consequently, plaintiffs are not eligible for equitable or declaratory relief after October 28, 2011.

For these reasons, and the reasons set forth in our supplemental brief, we respectfully request that the Court limit the award of damages to plaintiffs.

Respectfully submitted,

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