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UNITED STATES DISTRICT COURT

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

10

SOUTHERN DIVISION

11

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ROBERT NIGG and KEITH LEWIS, as  
12 private attorney generals, individually, and  
on behalf of all others similarly situated

13

Plaintiffs,

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v.

15

UNITED STATES POSTAL SERVICE

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Defendant.

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SA Civ 03-1611 (GLT)(ANx)

**(1) NOTICE OF MOTION FOR  
RECONSIDERATION,  
INCLUDING REQUEST FOR  
ORAL ARGUMENT; and  
(2) MEMORANDUM OF LAW  
IN SUPPORT THEREOF**

Date: May 16, 2005

Time: 10:00 a.m.

Ctrm: Hon. Gary L. Taylor

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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PLEASE TAKE NOTICE that at the above time and place, plaintiffs

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Robert Nigg and Keith Lewis will move this Court for reconsideration of its Order

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dated March 29, 2005. Plaintiffs respectfully request that the Court hear oral

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argument on this motion.

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This motion is made pursuant to Local Rule 7-18 and is based on this Notice of Motion, the recent opinion of Bull v. The United States, No. 01-56C (United States Court of Federal Claims, Feb. 1, 2005), the attached memorandum of law, and such arguments as may be presented at the hearing.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on April 18, 2005.

Date: April 18, 2005

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TO: Jason Axe, AUSA  
United States Attorney's Office,  
Central District of California  
Federal Building, Suite 7516  
300 North Los Angeles Street  
Los Angeles, California 90012

1           Plaintiffs Robert Nigg and Keith Lewis respectfully submit this  
2 memorandum of law in support of their motion for reconsideration of this Court's  
3 Order dated March 29, 2005 and the Judgment entered April 11, 2005..

4           The Fair Labor Standards Act, passed in 1938, applies to every employee  
5 in this country, whether at a public agency or private company, whether at a large  
6 company or a small one, whether in Alaska, Maine or somewhere in between.  
7 Because the Act protects all workers, an employer is excused from paying overtime  
8 compensation to a worker only if (i) the worker falls “plainly and unmistakably”  
9 within one of the exemptions specifically enumerated in the Act or (ii) another  
10 Congressional law preempts the Act as to that worker.

11           In its motion for summary judgment, the Postal Service did not try to  
12 argue that postal inspectors fell within one of the exemptions in the FLSA or that  
13 another federal statute preempted the Act. Instead, the Postal Service argued that its  
14 interpretation of Title 39 U.S.C. Section 1003(c) excused it from complying with the  
15 Act. This Court agreed:

16           The Court holds the Postal Service's interpretation of  
17           § 1003(c) is permissible as a matter of law.

18 The Court’s holding is wrong, as a matter of law. Section 1003(c), passed in 1996,  
19 provides that postal inspectors are to be paid comparably to other law enforcement  
20 officers in the executive branch of the Government. Section 1003(c) does not amend  
21 or repeal the FLSA, nor does it constitute or create an exemption to the Act. Without  
22 such a finding, the Postal Service's interpretation of Section 1003(c) is *impermissible*  
23 as a matter of law. Absent preemption or an applicable exemption, postal inspectors  
24 are entitled to overtime. Absent preemption or an applicable exemption, the Postal  
25 Service is not permitted to interpret Section 1003(c) in a way that ignores the FLSA,  
26 which is precisely what it has done here.

1 **THE RECENT COURT OF FEDERAL CLAIMS**

2 **DECISION IN *BULL* v. *THE UNITED STATES***

3 On February 1, 2005, the United States Court of Federal Claims issued  
4 an opinion in Bull v. The United States, No. 01-56 C.<sup>1</sup> The Bull opinion makes clear  
5 that the Postal Service does not possess the authority to exempt postal inspectors from  
6 the FLSA and that the Postal Service's interpretation of Section 1003(c) is  
7 impermissible because it ignores the FLSA. A copy of the Bull decision is attached  
8 as Exhibit A.

9 In Bull, the plaintiffs were canine enforcement officers ("CEOs")  
10 employed by the United States Department of Homeland Security ("DHS"). Bull, slip  
11 op. at 2. Plaintiffs filed suit seeking overtime pay under the FLSA for work  
12 performed while they were off-duty. Id.

13 The government moved to dismiss on the ground that the Customs  
14 Officer Pay Reform Act ("COPRA"), enacted in 1993, was the exclusive pay system  
15 for CEOs. The government argued that based on (1) the text of COPRA, (2) the  
16 interpretation of COPRA by certain agencies, and (3) the legislative history, COPRA  
17 "preempt[ed] the operation of FLSA." Bull, slip op. at 5.<sup>2</sup> The court rejected all three  
18 arguments.

19 The government argued that the interpretations of the Treasury  
20 Department and DHS demonstrated that COPRA was the exclusive pay system for  
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23 <sup>1</sup> Although the opinion was written before plaintiffs filed their opposition  
24 brief and supplemental brief, plaintiffs did not learn of the decision until  
approximately March 10, 2005, when an excerpt of the decision was published in the  
FedAgent message sent to postal inspectors.

25 <sup>2</sup> Plaintiffs Nigg and Lewis have repeatedly argued that the only way the  
26 Postal Service can avoid having to comply with the FLSA is if it demonstrated that  
27 Section 1003(c) preempted the FLSA. A preemption analysis requires the application  
28 of a two part test enunciated by the Supreme Court in Posadas v. National City Bank,  
296 U.S. 497, 503 (1936). The Postal Service has not attempted to meet the  
requirements of this two part test.

1 CEOs. Bull, slip op at 5.<sup>3</sup> According to the government, the interpretations of the  
2 Treasury Department and DHS were entitled to "great deference" because they were  
3 the agencies charged with interpreting COPRA (as the Postal Service is charged with  
4 interpreting Section 1003(c)). Bull, slip op. at 10-11. The court rejected this  
5 argument, holding that the interpretations of these agencies were of "limited  
6 assistance" because:

7 even if the agency regulations [the DHS and Treasury  
8 interpretations of COPRA] were found to exempt customs  
9 officers from FLSA coverage, the court is not persuaded  
10 that the agencies possess the authority to effect such an  
11 exemption. Neither Treasury nor DHS has authority to  
12 create a FLSA exemption by the promulgation of  
13 regulations because FLSA does not confer rulemaking  
14 authority on those agencies. Bull, slip op. at 13; citing 29  
15 U.S.C. §§ 201-219.

16 In other words, although the Treasury Department and DHS had the authority to  
17 interpret COPRA, they did not have the authority to interpret it in such a way as to  
18 create a new exemption to the FLSA. Similarly, although the Postal Service has the  
19 authority to interpret Section 1003(c), it does not have the authority to interpret it in  
20 such a way as to create a new exemption. The Postal Service cannot exclude postal  
21 inspectors from the FLSA overtime provisions based on Section 1003(c), when  
22 Section 1003(c) is not one of the exemptions enumerated in the FLSA. Because the  
23 Postal Service has interpreted Section 1003(c) in a way that creates a new exemption,  
24 the interpretation is impermissible as a matter of law.

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27 <sup>3</sup> At the time COPRA was passed, the United States Customs Service was  
28 part of the Treasury Department. Bull, slip op. at 10, n. 6. In 2002, the Customs  
Service was transferred to the DHS. Id. at pp. 12, n. 10.

1           The Bull court rejected a second “agency interpretation” argument, this  
2 one relating to the effect of regulations issued by the Office of Personnel  
3 Management (“OPM”). OPM is the governmental entity in charge of all employee  
4 relations and, in particular, is responsible for issuing regulations that implement the  
5 exemptions of the FLSA for all individuals employed by the United States, including  
6 CEOs working at DHS. 29 U.S.C. § 204(f).<sup>4</sup> The government argued that certain  
7 remarks made during the comment period preceding the enactment of OPM  
8 regulations in 1997 should be interpreted to exclude CEOs from entitlement to FLSA  
9 overtime. Bull, slip op. at 11-12.

10           The Bull court disagreed on two grounds. First, the court concluded that  
11 neither the text of the OPM's comments nor the text of the regulations themselves had  
12 the effect of creating an exemption from the FLSA. Bull, slip op. at 12. Second, the  
13 court concluded that had the 1997 OPM regulations purported to create a new FLSA  
14 exemption, the OPM had exceeded its authority because its authority “is limited to  
15 ‘issuing regulations that implement the exemptions enumerated in the FLSA statute’.”  
16 Id., at 13. In other words, although the OPM is empowered to enact regulations  
17 relating to FLSA exemptions, the regulations cannot go so far as to create new  
18 exemptions. Without explicitly admonishing the OPM, the Bull court determined that  
19 even if the OPM was attempting to create an FLSA exemption for employees who  
20 receive COPRA, it had acted improperly and overstepped its authority under the  
21 FLSA. Id.

22           The Bull court also rejected the government’s other arguments, one  
23 based on the statutory text of COPRA and the other on the legislative history. With  
24 respect to the text of the statute, the court found that nothing in the statutory language  
25 of COPRA prevented the payment of FLSA overtime and that the government was

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27           <sup>4</sup> For private employers and the Postal Service, the Department of Labor  
28 (“DOL”) administers the provisions of the FLSA. 29 U.S.C. § 204(f).

1 required to read COPRA in a such a way as to give meaning to all of the words in the  
2 statute and in a way that is consistent with the terms of both COPRA and the FLSA.  
3 Bull, slip op. at 6. In the case at bar, the text of Section 1003(c) does not include any  
4 language that expressly prohibits the payment of FLSA overtime and the Postal  
5 Service must give meaning and effect to both Section 1003(c) and the FLSA.

6 With respect to the legislative history argument, the Bull court found that  
7 although there were some comments to suggest that COPRA was designed to be the  
8 exclusive pay system for CEOs, none of the comments were persuasive. In the case  
9 at bar, the analysis is even easier: there are only three pages of legislative history  
10 dealing with Section 1003(c) and none of them contain a single mention of, or  
11 reference to, the FLSA or overtime pay.

## 12 ARGUMENT

### 13 I. Congress Has Spoken Clearly About Overtime for Postal Inspectors

14 It is well established that the text of the statute is the starting point for  
15 all statutory interpretation. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438  
16 (1999). On page 3 of its Order, the Court stated: "Congress has not clearly spoken  
17 whether postal inspectors are entitled to overtime pay under the FLSA." This  
18 statement is flatly contradicted by the text of Title 29 Section 203(e)(2)(B), which  
19 unequivocally states that the FLSA applies to "any individual employed by the United  
20 States Postal Service." Id. (emphasis added).<sup>5</sup> Congress' intent could not be clearer.  
21 Williams v. Taylor, 529 U.S. 362, 364 (2000) (It is a "cardinal principle of statutory  
22 construction that courts must give effect, if possible, to every clause and word of a  
23 statute").

24 In support of its misstatement that Congress has not clearly spoken about  
25 whether postal inspectors are covered by the FLSA, the Court cites to "the historical  
26 record." Order at 3. However, the "historical record" cited by the Court has nothing

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28 <sup>5</sup> A copy of 29 U.S.C. § 203 is included as Exhibit B.

1 to do with Congress' intent. Rather, it consists of a DOL letter interpreting the  
2 "administrative" exemption (one of the recognized exemptions in the FLSA) and two  
3 cases that held, based on the DOL letter, that postal inspectors were administratively  
4 exempt.<sup>6</sup> But neither the DOL letter nor the two court decisions cited by the Court  
5 constitute an expression of *Congress*' intent.

6 In any event, these three opinions do not support the Court's holding.  
7 The DOL and the two court cases began their analysis with the assumption that the  
8 FLSA protected postal inspectors and then they analyzed whether the administrative  
9 exemption applied. See Dymond, 670 F.2d at 94 ("The FLSA was first made  
10 applicable to the Postal Service in 1974"); Sprague 677 F.2d at 868 ("We assume  
11 arguendo postal inspectors are law enforcement officers within the meaning of 29  
12 U.S.C. § 207(k)"). This Court, on the other hand, started with the assumption that the  
13 FLSA did not apply to postal inspectors and, therefore, never reached the issue of  
14 whether postal inspectors are administratively exempt. The Court's ruling that the  
15 FLSA does not apply to postal inspectors is not supported by either Dymond,  
16 Sprague, or the DOL letter.<sup>7</sup>

17 Based upon an inapplicable "historical record", the Court concluded that:  
18 "Defendant's interpretation of § 1003(c) is not contrary to clear congressional intent."  
19 Order at 3. This statement simply ignores the plain language of the FLSA. 29 U.S.C.  
20 § 203(e)(2)(B). Because this Court did not start with the presumption that the FLSA  
21 applies to postal inspectors, its Order focuses only on whether the Postal Service's  
22 interpretation of Section 1003(c) was permissible. This Court, as the Bull Court did,

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24 <sup>6</sup> The two cases are Dymond v. United States Postal Service, 670 F.3d 93 (8th  
25 Cir. 1982) and Sprague v. United States, 677 F.2d 865 (Ct. Cl. 1982).

26 <sup>7</sup> In 1976, the Postal Service wrote to the DOL asking that postal inspectors  
27 be considered exempt from the FLSA based upon the administrative exemption. In  
28 its letter, the Postal Service did not argue or even suggest that the FLSA does not  
apply to postal inspectors. The DOL letter referenced by this Court and the Dymond  
and Sprague decisions is the DOL's response to that letter. A copy of the Postal  
Service letter and the DOL letter are attached as Exs. C and D.

1 should have started its analysis with the presumption that the FLSA applied, because  
2 the Act, by its express terms, does. See 29 U.S.C. § 203(e)(2)(A)(ii) (the FLSA  
3 applies to "an individual employed by the Government of the United States in any  
4 executive agency"). Once the Bull court determined that both COPRA and the FLSA  
5 governed the pay of CEOs, it required the government to comply with the provisions  
6 of both statutes so to give meaning and effect to both. Bull, slip op. at 6. In contrast,  
7 because this Court did not begin its analysis with the premise that the FLSA applied  
8 to postal inspectors, its decision does not give meaning or effect to the plain language  
9 of the FLSA. 29 U.S.C. § 203(e)(2)(B).

## 10 **II. The Postal Service's Interpretation of Section 1003(c) is Impermissible**

11 By holding that the Postal Service's interpretation of Section 1003(c) was  
12 "an appropriate agency interpretation," this Court has allowed the Postal Service to  
13 create a new exemption to the FLSA. Order, at p. 2 ("Applying this pay structure [5  
14 U.S.C. § 5545a] to postal inspectors, they also do not receive overtime pay."). The  
15 Court's decision contradicts the express language of the Act and the Court of Federal  
16 Claims' decision in Bull, both of which establish that only the OPM (and the DOL for  
17 private employees and the Postal Service), not an employer, can interpret FLSA  
18 exemptions. See e.g., 29 U.S.C. § 203(e)(2)(B) (FLSA applies to "any individual"  
19 employed by the Postal Service); 29 U.S.C. § 204(f) (only the DOL and OPM have  
20 authority to interpret FLSA); Bull, slip op. at 13. If the Postal Service does not want  
21 to pay postal inspectors overtime, it bears the burden of proving that postal inspectors  
22 fit "plainly and unmistakably" within one of the limited exemptions of the FLSA,  
23 which are to be "narrowly construed" against the Postal Service. Arnold v. Ben  
24 Kanowsky, Inc., 361 U.S. 388, 392 (1960); Mitchell v. Kentucky Fin. Co., 359 U.S.  
25 290, 295 (1959); Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003); Klem v.  
26 County of Santa Clara, 208 F.3d 1085, 1089 (9th Cir. 2000); Do v. Ocean Peace, Inc.,

1 279 F.3d 688, 691 (9th Cir. 2002); Dole v. W. Extension Irr. Dist., 909 F.2d 349, 351  
2 (9th Cir. 1990).

3 Not only did this Court improperly hold that the Postal Service has the  
4 authority to create a new exemption to the FLSA, but the exemption the Postal  
5 Service created would be impermissible even if promulgated by the DOL, the agency  
6 empowered to interpret the provisions of the FLSA. The Bull decision states that the  
7 OPM cannot create new exemptions. Bull, slip op. at 13. Similarly, the authority of  
8 the DOL is limited to narrowly construing the exemptions enumerated in the FLSA;  
9 it cannot create new exemptions. Id.<sup>8</sup>

10 There are only two existing exemptions that could apply to postal  
11 inspectors: (i) the exemption for employees who receive pay under 5 U.S.C. § 5545a  
12 ("LEAP") and (ii) the exemption for "administrative" employees. The issue of  
13 whether postal inspectors are administratively exempt was not raised by the Postal  
14 Service and thus was not before the Court (the Postal Service stated that it intended  
15 to raise the issue in a separate motion for summary judgment; see point III, *infra*).  
16 This means that the only existing exemption that would justify the Postal Service not  
17 paying postal inspectors FLSA overtime would be the exemption for employees that  
18 receive LEAP. However, because postal inspectors do not receive LEAP, they do not  
19 fall within the exemption for LEAP recipients and even the DOL does not have the  
20 authority to extend that exemption to postal inspectors. Addison 322 U.S. at 617;  
21 Powell 339 U.S. at 512. If the DOL could not promulgate regulations that exempt  
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24 <sup>8</sup> See also Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617 (1944) (holding  
25 DOL interpretation enlarging FLSA exemption invalid because Congress' detailed list  
26 of exemptions precluded their enlargement by implication); Citicorp Indus. Credit,  
27 Inc. v. Brock, 483 U.S. 27, 35 (1987) (same); Powell v. United States Cartridge Co.,  
28 339 U.S. 497, 509-512 (1950) (same); Hodgson v. Klages Coal & Ice Co., 435 F.2d  
377, 382 (6th Cir. 1970), *cert denied*, 402 U.S. 973 (1971) (FLSA "[e]xemptions from  
overtime requirements of this chapter must be limited to those [employees] falling  
expressly within statute.")

1 postal inspectors from the FLSA, then the Postal Service, which has absolutely no  
2 authority to promulgate regulations, cannot create a new FLSA exemption.

3 **III. The Issue of the "Administrative Exemption" Was Not Before the Court**

4 To the extent this Court relied on the DOL letter and the Dymond and  
5 Sprague opinions, this Court may have ruled on an issue that was not before it,  
6 namely, whether postal inspectors actually fall within the "administrative" exemption  
7 in the FLSA. This question has not been presented to the Court. As the Court will  
8 recall, when the Postal Service moved to bifurcate the trial on the issue of liability  
9 and damages, it mentioned in its reply brief that it intended to move for summary  
10 judgment based on the administrative exemption if this Court denied its motion for  
11 summary judgment based on Section 1003(c).

12 If the Postal Service moves for summary judgment on the ground that  
13 postal inspectors are administratively exempt employees, plaintiffs will submit  
14 evidence that the administrative exemption criteria no longer apply to postal  
15 inspectors because since the DOL, Dymond, and Sprague opinions, the job duties of  
16 postal inspectors have changed significantly. In addition, plaintiffs will argue that the  
17 administrative exemption does not apply because postal inspectors: (1) are not paid  
18 on a salary basis as required by 29 C.F.R. § 541.118(a); Auer v. Robbins, 519 U.S.  
19 452, 456 (1997); (2) do not exercise independent discretion and judgment as required  
20 by 29 C.F.R. 541.2(b); and (3) do not perform "office or nonmanual work directly  
21 related to management policies or general business operations," as required by 29  
22 C.F.R. § 541.203(a); Adam v. United States, 26 Ct. Cl. 782, 792-794 (Ct. Cl. 1992).  
23 Plaintiffs submit that, at best, there is a factual dispute regarding (i) the job duties of  
24 postal inspectors and (ii) the fundamental question of whether the plaintiffs still fall  
25 within the administrative exemption. Whether an employer meets the requirements  
26 for an FLSA exemption is a question of fact reserved for the trier of fact. Adair v.  
27 City of Kirkland, 185 F.3d 1055, 1060 (9th Cir. 1999); Hoyt v. General Ins. Co. of

