UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, BRITTANY MONTROIS, and a Class of More Than 700,000 Similarly Situated Individuals and Businesses,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1-14-cv-01523-TSC
UNITED STATES OF AMERICA	)	
Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiffs move to certify this case as a class action pursuant to Fed. R. Civ. P. 23. The requested class is composed of individuals who prepare tax returns for others for compensation and firms (including partnerships) and companies the employees or some or all of the owners of which prepare tax returns for others for compensation, and who: (a) paid the initial Preparer Tax Identification Number ("PTIN") issuance user fee; or (b) paid the initial

PTIN issuance user fee and one or more PTIN renewal user fees.[1] However, Allen Buckley and Allen Buckley LLC are excluded from the class.[2]

STATUTES AND REGULATIONS INVOLVED

The principal statutes, regulations and administrative materials are provided as attachments to this memorandum.

LEGAL BACKGROUND

The Internal Revenue Code defines "tax return preparer" to mean "any person who prepares for compensation . . . any return of tax . . . or any claim for refund of tax." Section 7701a)(36)(A).[3] Pursuant to Code

[1]The class also includes all persons who pay such fees prior to the date that a judgment is both entered and implemented in this case.

[2]Allen Buckley and Allen Buckley LLC filed their own individual action in 2013, challenging the initial PTIN fee and PTIN renewal fee that Allen Buckley and Allen Buckley LLC, respectively, paid in 2010 and 2011. An injunction is also sought, to stop annual filings and future fees. That case is pending in the U.S. Court of Appeals for the Eleventh Circuit, with oral argument tentatively scheduled for the week of December 8, 2014.

[3]Unless otherwise indicated, references to a "Section" in this memorandum relate to the Internal Revenue Code (26 U.S.C.) as amended to the relevant date, and references to the "Code" relate to the Internal Revenue Code.

§6109(a)(4), the U.S. Treasury Department ("Treasury") has the power to require paid tax return preparers to include an identifying number on tax returns prepared for compensation. Treasury has exercised that power for decades. Under Code §6695(c), annual penalties of $50 per return apply to a failure of a return preparer to include his or her identifying number or PTIN on a prepared return.

Absent action by Treasury, an individual's Social Security Number (SSN) is his or her PTIN. Prior to 2010, return preparers had been allowed to use either their SSN or an alternative number issued by Treasury for free as their PTIN. Code §6109(d). Treasury is authorized to require preparers seeking a PTIN to provide "such information as may be necessary to assign an identifying number" (but no more). Code §6109(c).

In January 2010, the IRS issued its study of the return preparer industry, titled "Publication 4832—Return Preparer Review" [Publication 4832—Attachment 9]. The very first sentence of Publication 4832 provides: "Currently, any person may prepare a federal tax return for another for a fee." Publication 4832 then identified perceived problems in the tax return

preparation industry and generally recommended IRS regulation of certain individuals who prepare tax returns for compensation (i.e., a licensing system). It recommended institution of a qualifying test for eligibility to prepare returns and imposition of new continuing professional education (CPE) requirements for returns preparers. *Id*. at 3-4, 34-36. It also recommended that paid tax preparers be required to obtain a Treasury-issued PTIN (and not be permitted to use their SSN as their PTIN) and pay a fee to register. Periodic PTIN renewal (i.e., every three years) was also recommended. *Id.* at 3, 33.

Following issuance of Publication 4832, in 2010, Treasury proposed, and later finalized, regulations requiring tax return preparers to register with the IRS and pay a fee to obtain a PTIN.[4] The total fee was set at $64.25, including a third party charge of $14.25 to cover the cost of administering the PTIN application process. Thus, the total fee for issuance

[4] Notice of Proposed Rulemaking, *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 14539 (March 10, 2010); Final Regulations, *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 60309 (Sept. 30, 2010). [Attachment 8]

of a PTIN has been $64.25 since 2010. Instead of requiring renewal every three years, as recommended by Publication 4832, the final regulations required renewal and fee payment for renewal every year. *See* Final Regulations, *User Fees Relating to Enrollment and Preparer Tax Identification*, 75 Fed. Reg. 60316, 60321 (Sept. 30, 2010); Final Regulations, *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 60309 (Sept. 30, 2010), amending 26 CFR §1.6109-2(e). [Attachment 8] The total PTIN renewal fee was set at $63, including a third party administration charge of $13. *Id.*

In addition to the regulations issued in 2010 relating to PTINs, in fulfillment of the recommendations of Publication 4832, Treasury changed its longstanding position that it lacked authority to regulate tax returns preparers with respect to return preparation. Treasury had never interpreted its statutory authority under 31 U.S.C. §330 to "regulate the practice of representatives of persons before Treasury" in "cases" to cover tax return preparation. Rather, it had always interpreted it to cover only

tax controversy matters (e.g., an audit situation).[5] Treasury changed its position by reinterpreting its Congressional grant of authority under 31 U.S.C. §330 to expand the definition of "practice of representatives of persons before the Treasury Department" in presenting their "cases" to (for the first time ever) include return preparation in and of itself. Thus, a new category of persons subject to regulation was created—"registered tax return preparers." Final Circular 230 Regulations, 76 Fed. Reg. 32, 288 (June 3, 2011). (Circular 230 is the generic named often used to describe the regulations issued under 31 U.S.C. §330 relating to Treasury regulation of the practice of representatives of persons before Treasury in handling cases.) [Attachment 8]

[5] Loving v. Internal Revenue Service, 917 F. Supp. 2d 67 (D.D.C.), *aff'd* 742 F. 3d 1014, 1014-5 (D.C. Cir. 2014). Even *after* the final regulations implementing Publication 4832's recommendations were issued, federal officials continued to recognize that return preparation was beyond the scope of 31 U.S.C. §330. *See* Written Testimony of David R. Williams, Director, Return Preparer Office, Internal Revenue Service, House Ways & Means Subcommittee on Oversight Hearing on Return Preparer Program, July 28, 2011, p.2. [Attachment 9]

Unlike the PTIN fee regulations described *supra* that deviated from Publication 4832's recommendations by requiring annual fees instead of fees payable every three years, the final Circular 230 changes regulations relating to eligibility to prepare returns basically "stuck to the script" of Publication 4832. The final regulations also provided for potentially severe penalties (including potentially disbarment from actual practice before the IRS) for failure of any return preparer to acquire a PTIN and include it on returns. *Id.* Thus, a PTIN was substantively converted from an identification device to a license. *See* 31 C.F.R. Part 10 (2011). [Attachment 7]

According to the preamble to the final 2010 PTIN fee regulations and the final Circular 230 regulations, in order to be able to prepare tax returns for compensation, a person must obtain and annually renew a PTIN. *See* preamble to Final Regulations, *Furnishing Identification Numbers of Tax Returns Preparer*, 75 Fed. Reg. 60309, 60317 (Sept. 30, 2010); 31 CFR Part 10, §10.8 (June 3, 2011). [Attachments 7, 9] To acquire a PTIN, persons other than attorneys, CPAs and enrolled agents were required to take and pass

an IRS competency test and annually complete IRS-approved CPE. The monumental expansion of the definition of practice of representatives of persons before Treasury in cases to include tax return preparation was struck down as unlawful in Loving v. Internal Revenue Service, 917 F. Supp. 2d 67 (D.D.C.), *aff'd* 742 F. 3d 1014 (D.C. Cir. 2014). The *Loving* court issued a permanent injunction barring implementation and enforcement of these regulations. PTIN fees were not in issue in *Loving*.

The IRS anticipated that 800,000 to 1,200,000 PTIN applications or renewals would be received annually. *See* Preamble to the final Circular 230 regulations (issued in 2011). [Attachment 8] The IRS later reported that over 700,000 PTINs had been issued. *See* IRS Newswire Issue Number IR-2011-47 (April 25, 2011). [Attachment 9] According to the IRS, for the first two years of application of the PTIN system, more than $105,000,000 in fees, substantially all of which related to PTINs, had been collected. *See* Declaration of Carol Campbell (Jan. 23, 2013) at ¶ 10. [Attachment 5]

PERTINENT FACTS

Adam Steele is a certified public accountant (CPA) licensed by the State of Minnesota. He has been a Minnesota CPA since 1998. He regularly prepares, and for many years has prepared, tax returns for compensation. He has met Minnesota CPA licensing requirements for each year since 1998 and completed periodic renewal forms to annually renew his firm's permit. In addition, he was or is required to, among other things: (a) pass an initial competency test; (b) meet State-specified ethics requirements; and (c) take annual CPE courses. *See* Declaration of Adam Steele. [Attachment 3] Adam Steele paid both the PTIN issuance fee of $64.25 and two $63 PTIN renewal fees (for 2012 and 2013). Prior to March 2, 2014, Mr. Steele requested refunds of each of the user fees paid. No denial or acceptance responses were received to the requests. *Id*.

Brittany Montrois resides in Georgia. She is a CPA licensed by the State of Georgia, and has been a Georgia CPA since 2011. Through Brittany L. Montrois, CPA, P.C., she regularly prepares, and has for many years prepared, tax returns for compensation. She has met the Georgia CPA

licensing requirements for each year since 2011 and must renew her firm license every two years. She was or is required to, among other things: (a) pass an initial competency test; and (b) take annual CPE courses. She paid both the PTIN issuance fee and two $63 PTIN renewal fees (for 2013 and 2014). *See* Declaration of Brittany Montrois. [Attachment 4]

ARGUMENT

Class certification is governed by Fed. R. Civ. P. 23 and Local Rule Civil 23.1. The requirements of both subsection (a) and subsection (b) of Rule 23 must be met. Rule 23(a) sets forth prerequisites for presentation of a class action. Rule 23(b) describes several types of class actions which may be maintained. The requirements of both subsections are met.

A. This case satisfies the Rule 23(a) prerequisites.

Rule 23(a) establishes the following four prerequisites for maintaining a class action:

> **(a) Prerequisites.** One or more members of a class may sue or be sued as representatives on behalf of class members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;

> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

All four prerequisites are satisfied.

Numerosity. Because over 700,000 persons have already filed for and been issued PTINs, the proposed class is so numerous that joinder of all members is impracticable. *See* Stewart v. Abraham, 275 F. 2d 220, 226-27 (3d Cir. 2001); Consolidated Rail Corp. v. Town of Hyde Park, 47 F. 3d 473, 483 (2d Cir. 1995) (no minimum required but more than 40 is generally sufficient).

Commonality. There are questions of law common to the class. The primary common questions are:

- It is lawful for Treasury to charge $64.25 to issue a PTIN?
- Is it lawful for Treasury to annually charge $63 to renew a PTIN for each year following the year of PTIN issuance?
- Is it lawful to annually require tax return preparers to complete Form W-12, when such a form asks information beyond what is required to issue a PTIN and, following issuance, a PTIN does not change?

The PTIN issuance fee issue is common to all class members. The renewal fee issue is common to all class members who have renewed a PTIN. There are no significant factual issues. All class members seek to recover the fees they paid and to obtain injunctive relief.

Typicality. Each class representative and each class member paid the initial $64.25 PTIN issuance fee for a PTIN. Each class representative and the proposed class members who have renewed their PTINs have paid Treasury the PTIN renewal fee of $63 for each year of renewal. The class representatives and the proposed class contend that it is unlawful to charge the PTIN issuance fees and PTIN renewal fees or, in the alternative, that the fees are excessive. Thus, the facts and legal contentions of the class representatives are typical of those relating to the class.

Adequate Representation. The class representatives will fairly and adequately protect the interests of the class. The representatives are similarly situated to all class members in terms of registration forms they filed and fees they paid. Although the dollar figures in issue are not large on an individual basis, the class representatives are passionate about this

matter and the need to prevent the IRS from imposing professional fees and burdens in addition to their state professional fees and burdens.

Proposed class co-counsel attorneys are Stuart Bassin and Allen Buckley. Mr. Bassin has over 25 years of experience in litigating complex tax disputes in federal courts on behalf of the Government and private taxpayers. He has served as lead counsel in dozens of multi-million dollar cases and as lead trial counsel in several multi-week federal court trials.[6] Mr. Buckley is AV rated by Martindale-Hubbell, and has been so rated since 1996. He previously was a partner with two large law firms (Troutman Sanders LLP and Smith Moore Leatherwood LLP), and he has worked three class action cases in his career, including one very complex ERISA employee stock ownership plan (ESOP) interpleader case.[7] Mr.

[6] Mr. Bassin worked for over 20 years as a trial lawyer for the U.S. Department of Justice, Tax Division, which is likely to defend this case for the Government. Mr. Bassin's knowledge of the workings of the Tax Division and its agency clients at the IRS should assist him in representing the class.

[7] The case was filed by the ESOP's sponsoring employer. Current employees were one defendant class and former employees, broken into three subclasses, were the other defendant class. Counsel Buckley recommended the case in order to prevent potential liability to the sponsor or the ESOP's fiduciaries (or both) in connection with anticipated suits from the former employees' class.

Buckley (who is a CPA as well as an attorney) brought an action pro se to challenge the PTIN fees in 2013. That case is pending in the U.S. Court of Appeals for the Eleventh Circuit, with oral argument tentatively scheduled for the week of December 8th. Without compensation, Mr. Bassin and Mr. Buckley assisted the tax return preparers' counsel in the *Loving* case. Finally, they have consulted with experts in class action litigation, who will be added to the litigation team in the event that their particular skills, knowledge, etc. is needed.[8] Thus, counsel is qualified and committed.

In sum, there are no conflicts or potential conflicts of interest. Everyone wants to: (a) cease being charged; (b) receive their money back; and (c) cease being required to make annual filings to the IRS for a PTIN that does not change.

B. Certification is appropriate under Fed. R. Civ. P. 23(b).

Subsection (b) allows class actions in several types of situations. It provides:

[8] National plaintiffs' law firms have contacted co-counsel, inquiring regarding possible involvement in the case. Co-counsel is analyzing the situation. The nature of the case suggests there are only legal issues to be resolved, and there are no subclasses or similar complexities. In other words, the case is straightforward.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

The requirements of only one paragraph need be met.

As explained below, this case satisfies the requirements of Rule 23(b) under four different approaches. Plaintiffs submit that the requirements of (b)(1)(A), (b)(2) and (b)(3) are each met. Also, certification is proper under a (b)(2)/(b)(3) hybrid approach. If the Court determines that certification is proper under multiple approaches, Plaintiffs request class certification under only paragraph (1) or (2).

According to *Newberg on Class Actions*, 4th edition, the drafters of Rule 23 intended that class actions qualifying under all three paragraphs be certified under paragraph (1) or (2) only.[9] According to *Newberg on Class Actions*, 5th edition:

> When cases are certified under combinations of the (b)(1) and (b)(2) categories, as they occasionally are, there is no need for more precise certification because under both 23(b)(1) and 23(b)(2), there is no requirement that the class receive notice and a right to opt out. By contrast, when a class could be maintained

[9] Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, §4:20, (4th ed. 2002), pp. 144-5. *Id*. at §4:64, pp. 390-1. Also according to *Newberg* (at §4:8, pp. 29-30), courts frequently certify purported classes that qualify under more than one paragraph of subsection (b), by certifying them under each of the relevant paragraphs with only a summary articulation why the class fits within each category. *See also Newberg* at §4:11, p. 61, noting the considerable overlap between the (b)(1) and (b)(2) requirements. [Attachment 10]

> under either Rule 23(b)(1) or Rule 23(b)(3), the situation is more complicated; (b)(1) classes are mandatory, while (b)(3) classes require notice and opt out rights. The prevailing approach to such situations is that if certification is under 23(b)(1) or 23(b)(2) is called for, the case should be certified under that provision and not under Rule 23(b)(3), as providing notice and opt out rights in a case truly fitting within Rule 23(b)(1) or 23(b)(2) would likely undermine the rationale for class treatment under those provisions. [10]

Paragraph (1)(A). To satisfy paragraph (1), either subparagraph (A)'s requirements or subparagraph (B)'s requirements must be met. Subparagraph (A)'s requirements are met. A risk of inconsistent adjudications imposing incompatible standards of conduct for the Defendant exists because members of the proposed class are return preparers residing throughout the United States. If individual class members filed suit in different courts, there would be a substantial risk of inconsistent or varying adjudications on the merits of indistinguishable causes of action—a result that would be inequitable and unreasonable. If

[10] William B. Rubenstein, *Newberg on Class Actions*, §4:48, (5th ed. 2012), pp. 191-2. [Attachments 11, 12] The author of the fifth edition of *Newberg on Class Actions* is different than the authors of the fourth edition of this treatise. The fourth edition was updated through 2011. The layout of the treatise changed from the 4th to the 5th edition. However, the applicable rules have not changed since 2011. Thus, both editions are cited herein.

one U.S. Court of Appeals ruled in favor of return preparers while another U.S. Court of Appeals ruled against return preparers, the treatment of return preparers would vary depending upon their state of residence. Treasury would need to separately track winners and losers, and treat them differently. According to *Newberg on Class Actions*, §4:8 (5th ed.), p. 41, " . . . the party moving for a class need not demonstrate that multiple lawsuits exist, as the theoretical risk of multiplicity is sufficient."[11] [Attachments 11, 12] Thus, prosecution of separate causes of action by individual class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the Defendant. The requirements of subparagraph (A) are met.

"Certification under Rule 23(b)(1) is appropriate when a unitary decision is essential." *Newberg on Class Actions*, 4th ed., §4:9, p. 33. [Attachment 10] According to *Newberg on Class Actions*, 5th edition, §4:11, p. 43 [Attachments 11, 12]:

[11] As noted, Allen Buckley and Allen Buckley LLC currently have a case pending in the Eleventh Circuit Court of Appeals.

> . . . Rule [23(a)(1)(A)] applies to situations in which different courts might put a defendant under conflicting decrees, it therefore focuses on injunctive relief matters.
>
> A core example of the 23(b)(1)(A) case is the situation in which many individuals, all challenging a single government policy, bring separate suits for injunctive relief. . . .

Here, a unitary decision is essential.[12]

Paragraph (2). The requirements of paragraph (2) are met. Here, the party opposing the class, the Federal Government, has acted, or refused to act, on grounds that apply generally to the class and final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. According to *Newberg on Class Actions*, 5th ed., §4:29, p. 109: "This requirement encompasses three components: the requested relief must be (1) final, (2) injunctive or declaratory, and (3) appropriate to the class as a whole." [Attachments 11, 12] Here, plaintiffs seek a permanent injunction

[12] *Newberg on Class Actions*, (4th ed.) notes in §4:8 (pp. 26-33) the most likely candidates for certification under Rule 23(b)(1)(A) have one or more of several characteristics, including: (1) the suit challenges the conduct or practices of defendants who are required by law or by practical circumstances to deal with all class members in the same way; (2) the relief sought is a combination of both injunctive and monetary relief; and (3) other individual suits are already pending or are realistically expected to be filed. [Attachment 10] Here, each of these characteristics is present.

prohibiting the Defendant from requiring annual registration and charging of PTIN fees. The Federal Government has required compensated tax return preparers to pay for a PTIN, and to annually renew and pay to renew PTINs.[13] Final injunctive relief is appropriate respecting the class so that all persons who prepare tax returns will be treated the same with respect to PTINs.

Many courts have read a "cohesiveness" requirement into paragraph (2). *Newberg on Class Actions*, 5th ed., §4:34, pp. 121-132. [Attachments 11, 12] Specifically, the class members' claims must be so intertwined that injunctive relief as to any would be injunctive relief as to all. To satisfy the test, class claims must be "sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623

[13] As noted in paragraphs 83 and 84 of the Complaint, aside from Treasury's refusal to refund to Mr. Steele the fees he paid, at least twice before Treasury refused to issue PTIN refunds. Specifically: (a) Jesse E. Brannen, III, P.C. filed a refund claim request with respect to his initial PTIN fee submission in 2011, and his refund request was rejected; and (b) Allen Buckley and Allen Buckley LLC filed refund claims with respect to the initial PTIN fee and a renewal fee, respectively, and Treasury did not accept (or pay) such claims.

(1997).[14] Some courts have rejected the cohesiveness requirement. However: "Typically, if the class proponents can satisfy the textual requirements of Rule 23(b)(2)—that the defendant has acted in a manner that affects the class members generally such that injunctive relief would be appropriate for all—they ought to be able to meet the cohesiveness test as to that same injunctive relief." *Newberg on Class Actions*, 5th ed., §4:34, pp.131-132. [Attachments 11, 12] Whether or not a cohesiveness requirement exists, there is no problem in this case. All plaintiffs oppose paying PTIN fees and making PTIN renewal filings, and all plaintiffs wish to receive a refund of PTIN fees they have paid.

The fact that Plaintiffs have also requested restitution of fees paid does not impact the result. In Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Supreme Court reversed a class certification alleging workplace discrimination primarily for a lack of "commonality" required by Rule 23(a). The *Wal-Mart* Court also held that claims for monetary relief

[14]A concurring opinion of a D.C. Circuit case approved of this requirement. Blackman v. District of Columbia, 633 F.2d 1088, 1094 (D.C. Cir. 2011).

may not be certified under Rule 23(b)(2) where monetary relief sought is not incidental to injunctive or declaratory relief sought. *Id*. at 2557.

In Johnson v. Meriter Health Services Employee Retirement Plan, 702 F.3d. 364 (7th Cir. 2012), the Seventh Circuit Court of Appeals analyzed *Wal-Mart* and ruled that (b)(2) certification was proper when ten subclasses of retirement plan participants requested a declaratory judgment regarding plan terms. The Court noted that *Wal-Mart* was concerned about "individualized" awards of monetary damages that would necessitate analysis of evidence specific to each class member's particular facts. The *Johnson* court noted the participants were seeking a declaration of their rights under the plan and an injunction ordering the plan sponsor to follow the plan's terms. The Court stated (p. 371):

> If once that is done, the award of monetary damages will just be a matter of laying each class member's pension-related employment records alongside the text of the reformed plan and computing the employee's entitlement by subtracting the benefit already credited to him from the benefit to which the reformed plan document entitles him, the monetary relief will truly be merely 'incidental' to the declaratory and (if necessary) injunctive relief (necessary only if Meriter ignores the declaration).

Comparing the current case to *Johnson*, it is clear that the current case is a much simpler case that *Johnson* in terms of computing monetary relief necessary to fulfill any declaration judgment requested by plaintiffs. Here, all that needs to be determined is the amount of fees paid by each class member.[15]

Paragraph (3). The class qualifies for certification under Rule 23(b)(3) because questions of law or fact common to the class members *predominate* over any questions affecting only individual members, and a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy. Thus, two requirements must be analyzed—the predominance requirement and the superiority requirement.

Rule 23(b)(3) lists the following matters for possible consideration in analyzing subsection (b)(3):

[15] According to *Newberg on Class Actions*, §4:37 (5th ed.), pp. 148-9: "The [U.S. Supreme] Court's decision [in Wal-Mart] suggests that the problem of money damages in (b)(2) classes is more one of *individualization* than of money itself." [Attachments 11, 12] Also according to *Newberg*: "Thus, the types of monetary damages that *may* survive *Wal-Mart* are those that are group-based, flow ineluctably from the injunctive or declaratory relief to the class as a whole, and that do not require individualized assessments." *Id*. at 158.

- class members' interests in controlling their own litigation;
- the extent and nature of any already-pending litigation concerning the controversy;
- the desirability of concentrating claims in one judicial forum; and
- potential problems that could arise in managing the case as a class action.

While Rule 23(b)(3) states that these factors apply in assessing both predominance and superiority, courts generally analyze them solely in determining superiority.[16]

Predominance. According to the American Law Institute, the predominance test is meant to ensure aggregation will materially advance the resolution of multiple claims.[17] A two-step analysis is applied to determine whether the questions of law or fact common to the class members predominate over any questions affecting only individual members. First, the Court must characterize issues as common issues or

[16] *Newberg on Class Actions*, §4:54 (5th ed.), p. 249. [Attachments 11, 12]

[17] *Newberg on Class Actions*, §4:49 (5th ed.), p.195. [Attachments 11, 12]

individual issues. A common issue is one that one that is susceptible of generalized class-wide proof. An individual issue is one with respect to which the evidence varies from class member to class member. Second (once the issues have been characterized), the court must loosely compare the issues subject to common proof to the issues subject to individual proof, and decide which predominate. A qualitative analysis is necessary.[18] Here, the only individual issues are how much each class member paid in fees. The common issues are legal issues, and they are identical with respect to all class members.[19] It is clear that the predominance requirement is met.

Superiority. As noted *supra*, the superiority requirement is a class action must be superior to other available methods for fairly and efficiently adjudicating the controversy. Here, the only other available method of seeking relief is filing of individual actions. Since the annual filing fee is either $64.25 or $63, individual actions are not cost-effective. It is

[18] *Newberg on Class Actions*, §4:50 (5th ed.), p. 196-7. [Attachments 11, 12]

[19] Common issues will predominate if individual factual determinations can be accomplished using computer records and clerical assistance. *Id*.at 197.

unrealistic to think individual return preparers can and would file a lawsuit in federal court to challenge PTIN fees.[20]

"A primary purpose of class actions lawsuits, particularly money damages claims aggregated under 23(b)(3), is to enable the litigation of claims that are worth too little money to be pursued individually." Newberg on Class Actions, §4:65 (5th ed.), 252-3. [Attachments 11, 12] The U.S. Supreme Court has stated:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something someone's (usually an attorney's) labor.[21]

In determining whether a class action is a small claims case that would serve this central function, courts generally compare the monetary value of the claims to the cost of pursuing individual litigation.[22] Here, the claims

[20] As noted, Allen Buckley and Allen Buckley LLC have filed suit. However, Mr. Buckley is an attorney who can handle, and has handled, his matter pro se.

[21] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).

[22] *Newberg on Class Actions*, §4:65 (5th ed.), pp. 253-4. [Attachments 11, 12]

(at most, under $300 for any class member) are much less than it would cost to litigate an individual matter.

Turning to the four matters for consideration described in Rule 23(b), the Advisory Committee that drafted Rule 23 provided the following guidance regarding class members' interest in controlling their own litigation (i.e., the first matter):

> The interests of the individuals in conducting separate lawsuits may be as strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical; the class may have a high degree of cohesion and prosecution of the action through representation would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impractical.[23]

Here, the class is highly cohesive, as their interests are fully aligned. The amounts at stake do not justify separate, individual litigation.

Concerning the second matter (i.e., other pending litigation), the drafters of Rule 23 wrote:

> The court is to consider the interests of the individual members of the class in controlling their own litigations and carrying them on

[23] *Newberg on Class Actions*, §4:69 (5th ed.), p.271. [Attachments 11, 12]

> as they see fit. *In this connection* the court should inform itself of any litigation actually pending by or against the individuals.[24]

If many other individuals have filed suit, individual actions might be superior. However, the presence of a few suits does not prevent this requirement from being met.[25] Here, only one other suit is pending.

Regarding the third matter (i.e., the desire to concentrate claims in one forum), the drafters of Rule 23 wrote:

> Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums in which they would ordinarily be brought.[26]

Issues of aggregation and geography arise. The aggregation issue is whether a class action is a profitable (i.e., cost-effective) means of handling the litigation. The geography issue is whether consolidation in the forum makes sense.[27] Here, it is clear that a class action is the only cost-effective means of both stopping the fees and causing refunds to be issued to all

[24] *Id*., §4:69, p. 277.

[25] *Id*., p. 278.

[26] *Newberg on Class Action*s, §4.71 (5th ed.), p. 271. [Attachments 11, 12]

[27] *Id*.

class members. Washington, D.C., the headquarters of the Defendant, is as good a forum as any other forum to handle the case.

The final matter for consideration is potential problems that could arise in managing the case as a class action. This consideration involves all practicalities of handling the case as a class action. However, class size is not a factor to be considered.[28] Here, the Defendant has a data base that includes each class member's name, address, email address, Social Security number and other information. There are no factual differences of significance amongst the class members. There are only legal issues to be resolved. If plaintiffs fully prevail, Defendant has all the tools necessary to issue notices to class members (if necessary) and to issue restitution checks to the class members. In sum, the class should qualify for certification under Rule 23(b)(3).

Hybrid (b)(2) and (b)(3) Certification. Many courts have permitted a hybrid approach to class certification, by certifying the class with respect to: (a) injunctive and declaratory relief under subsection (b)(2); and (b)

[28] *Newberg on Class Actions*, §4.72 (5th ed.), pp. 284-288. [Attachments 11, 12]

monetary claims under subsection (b)(3). Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997); DL v. District of Columbia, 277 F.R.D. 38, 47-48 (D.D.C. 2011), *vacated and remanded on other grounds*, 713 F. 3d 120 (D.C. Cir. 2013); Bynum v. District of Columbia, 214 F.R.D. 27, 41-42 (D.D.C. 2003). *See also*, *Newberg on Class Actions*, §4.38 (5th ed.), p. 163-4. [Attachments 11, 12] Should the Court find that certification is not possible under any particular paragraph of subsection (b), plaintiffs request that such a hybrid approach be applied to certify the class.

CONCLUSION

For the reasons specified, the proposed class should be certified under Rule 23.

Respectfully submitted,

/s/Allen Buckley
Allen Buckley
Georgia Bar No. 092675
Law Office of Allen Buckley LLC
Suite 408, Ivy Walk Shopping Center
1675 Cumberland Parkway
Smyrna, GA 30080
(404) 610-1936
Fax: (770) 319-0110

ab@allenbuckleylaw.com

/s/Stuart J. Bassin
Stuart J. Bassin
DC Bar Number 366669
The Bassin Law Firm PLLC
Suite 300
1629 K Street, NW
Washington, DC 20006
(202) 895-0969
sjb@bassinlawfirm.com

COUNSEL FOR PLAINTIFFS