IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. United States of America, *Defendant*.	Case No. 14-cv-01523-RCL

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR A STAY PENDING APPEAL

Nearly two months after this Court enjoined the IRS from charging a fee to issue or renew a Preparer Tax Identification Number (PTIN)—but before any appeal has been filed—the IRS moves to stay that injunction. A stay pending appeal is always an "extraordinary remedy," *Cuomo v. Nuclear Regulatory Commission*, 772 F.2d 972, 978 (D.C. Cir. 1985), but the request here is more extraordinary still: it manages to be both too early and too late. Too early, because no appeal has even been taken. And too late, because the government waited 53 days to file a stay motion. Because the motion is procedurally improper, the Court should deny it without prejudice to renewal at an appropriate time—that is, if and when a notice of appeal is actually filed.

If this Court nevertheless decides to entertain the motion, it will see that the IRS is repackaging the same merits arguments already found to be "a stretch at best," backed by "conclusory and unsupported justifications." *Steele v. United States*, 2017 WL 2392425, at *8, *10 (D.D.C. June 1, 2017). The IRS also claims that a minuscule economic loss (just 0.3% of its budget)

would cause an irreparable harm—and yet it has waited two months to make this claim, after deciding to start issuing PTINs free of charge. That is not enough to warrant a stay.

I. The IRS's motion for stay—filed when no "appeal is pending," and 53 days after the injunction—is both too early and too late.

The rule on which the IRS's motion is premised—Federal Rule of Civil Procedure 62(c)—does not apply here. By its terms, it allows a losing party to seek a stay "[w]hile an appeal is pending" from an order granting an injunction. But the IRS comes to this Court empty-handed: in support of its stay motion and its invocation of Rule 62(c), it does not show that "an appeal is pending." Nor does it give any reason to believe that an appeal will even be taken. And yet it makes this improper request *53 days* after learning of the injunction. Instead of waiting so long to seek a stay—without providing *any* assurance that it will actually appeal—the IRS had two options in response to this Court's June 1 order. If the IRS intended to appeal (or thought an appeal were likely), it should have promptly filed a stay motion informing the Court of that fact. If it were unsure whether to appeal, it should have waited until it could represent that it intends to appeal. Having done neither, the motion is procedurally improper.

A. The motion is too early.

Under the overwhelming weight of authority, the IRS's motion is premature. *See United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., AFL-CIO v. Thornburgh*, 1991 WL 171463, at *1 (D.D.C. Aug. 21, 1991) ("The Court considers [a stay motion without notice of appeal] to be premature and declines to rule upon defendants' motion for a stay pending appeal at this time."); *see also Persaud v. McElroy*, 2003 WL 139277, at *1 (S.D.N.Y. Jan. 17, 2003)

(denying as premature a motion for stay and reconsidering it only after an appeal was filed).[1] The mere fact that the Solicitor General has authority over the final determination has no bearing on the premature nature of the motion. *See, e.g.*, *Perez-Olano v. Gonzalez*, 2008 WL 11336794, at *2 (C.D. Cal. Feb. 5, 2008) (where the government "conceded that no appeal is currently pending" by asking for a stay "pending the Solicitor General's determination," the "application for a stay is premature under Rule 62(c)").

Although Rule 62(c) by its terms contemplates that an appeal be pending when a stay is entered, some courts have granted relief before an appeal is pending. But even those courts require at least *some* reason to believe that an appeal will be taken. Otherwise, Rule 62(c)'s general requirement that a party seek a stay only "[w]hile an appeal is pending" would be meaningless. Fed. R. Civ. P. 62(c). Indeed, the very case upon which the IRS relies holds only that Rule 62(c) "permits the issuance of an injunction *whenever there is reason to believe that an appeal will be taken*, even before the actual notice of appeal has been filed." *Common Cause v. Judicial Ethics Committee*, 473 F. Supp. 1251, 1254 (D.D.C. 1979). It does not authorize a party to seek a stay

[1] *See, e.g.*, *Davila v. Texas*, 489 F. Supp. 803, 810 (S.D. Tex. 1980) (stating "Rule 62(c) is not properly invoked until 'an appeal is taken'"); *Atlantic Prince Ltd. v. Jorling*, 1989 WL 50817, at *1 (E.D.N.Y. May 1, 1989) (summarily denying a stay motion under Rule 62(c) as premature because no notice of appeal had been filed); *T.S.M. Properties, Inc. v. Rodin Enterprises, Inc.*, 1991 WL 124597, at *1 (E.D. Pa. July 3, 1991) ("[S]ince there is not at this time an appeal of that Order pending, Rule 62(c) is inapplicable."), *aff'd*, 953 F.2d 1381 (3d Cir. 1992); *Nikon, Inc. v. Ikon, Inc.*, 1992 WL 398440, at *3 (S.D.N.Y. Dec. 18, 1992), *aff'd*, 987 F.2d 91 (2d Cir. 1993) ("In the absence of a pending appeal, a request for relief under Rule 62(c) is premature."); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1241 (C.D. Cal. 2007) ("[A] motion for a stay pending appeal pursuant to Rule 62(c) is premature," and only once "an appeal is taken, [the movant] can renew its request."); *Saldate v. Adams*, 573 F.Supp.2d 1303, 1314 (E.D. Cal. 2008) ("The Court denied the motion as premature because an appeal had not yet been filed."); *APR Energy, LLC v. First Inv. Grp. Corp.*, 2015 WL 736236, at *3 (M.D. Fla. Feb. 20, 2015) ("Defendants have not filed a notice of appeal, thus, Rule 62(c) is inapplicable.").

when there is *no* likelihood one will be taken. The government apparently could not find a single case in this District granting a stay in the absence of an expressed intent to appeal, and we are unable to find one either.

The IRS makes no representation, statement, or even allusion to its intentions of filing an appeal. Yet it knows how to make such a representation when it wants to. In the very first paragraph of stay motion in *Loving*, for example, the IRS was upfront about its "inten[tion] to file a Notice of Appeal from that decision within 30 days (or earlier if the Court so requires)." ECF No. 23–1, *Loving v. I.R.S.*, No. 1:12-cv-00385 (D.D.C. Jan. 23, 2013). And the Court relied on this representation in granting a stay. *See* 920 F.Supp.2d 108, 110 (D.D.C. 2013) ("The IRS's representations [of its intent to appeal] here are sufficient for it to invoke Rule 62(c)."). Here, by contrast, there is no similar representation, nor any self-evident reason to believe that an appeal is imminent. *Cf. Empresa Cubana Del Tabaco v. Culbro Corp.*, 2004 WL 925615, at *1 (S.D.N.Y. Apr. 30, 2004) (entertaining a premature motion to stay in light of "the imminent filing of the entry of final judgment and the representations of both parties of their intent to appeal").

The IRS's failure to provide any assurance that an appeal is likely is particularly inappropriate here, because complying with the injunction causes only economic loss. In that scenario, there is no precedent for granting a premature stay motion. The only two cases in this District that support a limited grant so early in the process involved orders to disclose sensitive documents within a matter of weeks. *See People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174 (D.D.C. 2007); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21 (D.D.C. 2003) (conditioning stay on filing a notice of appeal and a motion for expedited consideration within 14 days). But, as we explain in greater detail below, the IRS faces

no imminent threat of harm here—let alone one that would require such an extraordinary and premature intervention by this Court. If the government wishes to note an appeal, it should do so within the proper time limits—or at the very least it should have expressed an intention to do so. *See* Fed. R. Civ. Pro. §4(a)(1)(B). Because the IRS has not done so, its motion is premature.

B. The motion is too late.

What makes this premature motion even more extraordinary is its delay. The IRS is seeking to stay this Court's June 1 order, pending a determination whether to appeal a final judgment entered on July 10. The IRS took 14 days to file this motion following the appealable judgment and 53 days after this Court's order. Yet, after all of these weeks, the government's motion does not provide *any* "reason to believe that an appeal will be taken." *Common Cause*, 473 F. Supp. at 1254. Nothing—not even some boilerplate language.

In the past, by contrast, the government has been diligent and timely. Again, there is no better comparison than *Loving*: There, it took the government five days to file a motion for stay. *See* ECF 22, *Loving v. I.R.S.*, No. 1:12-cv-00385 (D.D.C. Jan. 18, 2013); ECF 23–1, *Loving v. I.R.S.*, No. 1:12-cv-00385 (D.D.C. Jan. 23, 2013). We found no precedent in this District with a delay on part of the government even remotely close to 53 days.[2]

The IRS's "unexcused delay" simply "implies a lack of urgency and irreparable harm." *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005). This delay in "seeking a stay vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S.

[2] *See, e.g.*, *People for the Am. Way Found. v. United States Dep't of Educ.*, 518 F. Supp. 2d 174 (D.D.C. 2007) (8 days); *Ctr. for Intern'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21 (D.D.C. 2003) (15 days, including holidays).

1310, 1313 (1977). Courts in this District and the D.C. Circuit have found similar delays simply too long to excuse.[3] Were this Court's injunction "so crippling to the [IRS] as to constitute irreparable harm, presumably the [IRS] would not have waited so long to seek [a stay] from the Court." *Davis v. Billington*, 76 F. Supp. 3d 59, 66 n.11 (D.D.C. 2014); *see also Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 340 (D.D.C. 2012). But the IRS didn't.

Instead, the government's lawyers "dragged their feet." *Lightfoot v. District of Columbia*, 2006 WL 175222, at *8 (D.D.C. Jan. 24, 2006). Although the IRS took the PTIN system offline on June 1 and then voluntarily began issuing PTINs free of charge on June 21, it waited until July 24 to seek a stay. *See* Campbell Decl. ¶ 17. And although the IRS's lawyers knew that the Accenture contract deadline was coming up on July 31 and that funding "the next option period for this contract [would be] a significant budget challenge," they did not file earlier. *See* Zottola Decl. ¶12. "Their actions—or relative inaction—indicate that they themselves do not perceive the possible injury as 'irreparable.'" *Lightfoot*, 2006 WL 175222, at *8. If they had, they would have "immediately filed an expedited appeal" or promptly requested a stay while informing the Court that it was planning to appeal, or needed more time to decide whether to appeal. *Id.* The IRS did not do so, but it could have: The arguments the IRS makes today were available two months ago; "[y]et they delayed bringing any action until [53] days later"—an "inexcusable" delay. *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (44 days).

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[3] *See, e.g.*, *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (decision to deny preliminary injunction was "bolstered by the delay ... in seeking one" and finding delay of 44 days "inexcusable"); *Mylan Pharm., Inc. v. Shalala*, 81 F.Supp.2d 30, 44 (D.D.C. 2000) (holding that a delay of two months "militates against a finding of irreparable harm").

In sum, the IRS is seeking an "extraordinary remedy," *Cuomo*, 772 F.2d at 978, at an extraordinary time—both too early and too late. Too early, because it invokes Rule 62(c)'s authority to stay an injunction "while an appeal is pending" without filing a notice of appeal or offering any intention to appeal. And too late, because the IRS's motion rests on a theory that the injunction is irreparably harmful, 53 days after the fact. Rather than grant this oddly timed request, the Court should await a procedurally proper motion and follow "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs, Inc. v. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). Because of its procedural deficiencies, this Court should deny the motion without prejudice to its renewal.

II. The IRS has failed to meet its "heavy burden" to show that a stay is warranted.

If the Court moves past the motion's procedural deficiencies, it should conclude that it fails on the merits. A stay pending appeal is "always an extraordinary remedy," *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emp. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966), and it therefore comes with a "heavy burden," *United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006). That "heavy burden" must be shouldered as to four familiar factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo*, 772 F.2d at 974; *see also Nken v. Holder*, 556 U.S. 418, 433-35 (2009). Because a stay is "an intrusion into the ordinary process of administration and judicial review," *id.* at 427, it "is not a matter of right, even if irreparable injury might otherwise result to the appellant," *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926).

The IRS has the burden to show that these four factors weigh in favor of the stay. *See Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). How courts should weigh these factors "remains an open question." *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). The D.C. Circuit long adhered to the "sliding scale" approach. But because *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7 (2008), "seemed to treat the four factors as independent requirements," some on the D.C. Circuit have "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley*, 644 F.3d at 392-93 (quoting *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring)). The D.C. Circuit has not yet decided whether the "'sliding scale' approach remains valid after *Winter*." *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). But, at the very least, the IRS must show that the four factors weigh in favor of the stay.

A. The IRS has not established a likelihood of prevailing on the merits.

The IRS's stay motion does not even get close to establishing a likelihood of success by raising "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911-12 (D.C. Cir. 2008) (internal quotations omitted). The IRS's argument that the *Loving* scheme and the PTIN regulations are completely separate is, in this Court's own words, "a stretch at best." *Steele*, 2017 WL 2392425, at *8. And because there are no "similar cases in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued," the government's merits argument is an unprecedented stretch. *Id.* at *10.

Similarly, the IRS's other "conclusory and unsupported justifications" don't raise dubious or difficult questions: the answers follow from *Loving* and the relevant statutory text. *Id.*

This Court has already concluded that the last vestige of the IRS's failed licensing scheme—the PTIN fee intended to fund it—cannot persist independently of that scheme. Congress did not remotely "contemplate[] that vast expansion of the IRS's authority" to regulate tax return preparers, nor had the agency itself "ever suggest[ed] that it possessed this authority" in the 125 years before. *Loving v. I.R.S.*, 742 F.3d 742 F.3d 1013, 1021 (D.C. Cir. 2014). The fee is thus unlawful under the IOAA because Congress did not grant the IRS *any* licensing authority, so the PTIN fee does not confer a "service or thing of value." *Steele*, 2017 WL 2392425, at *8; *see also* 31 U.S.C. §9701(a). But, as we explain below, even if this Court were wrong (as the IRS contends, with no support), the PTIN fee is unlawful for a second, independent reason. The requirements that tax return preparers obtain and pay for a PTIN were based entirely on the unauthorized attempt to regulate preparers more broadly—which makes the fee arbitrary and capricious under the APA. 5 U.S.C. §706(2)(A).

1. Because Congress did not grant the IRS any licensing authority over tax return preparers, the PTIN fee does not confer a "special benefit" and is unlawful under the IOAA.

The PTIN fee is unauthorized by the IOAA, which permits agencies to charge a user fee for "each service or thing of value provided by [the] agency." *Steele*, 2017 WL 2392425, at *8. Because agencies cannot impose taxes, any user fee that an agency charges must be "for a service that confers a specific benefit upon an identifiable beneficiary" (as opposed to the public at large), and must be strictly limited to the costs of providing that service. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). As the Supreme Court long ago explained, a fee (unlike a tax)

"connotes a 'benefit,'" and "is incident to a voluntary act." *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340–41 (1974). Under the IOAA, the agency that provides specialized services "normally may exact a fee" because it "bestows a benefit on the applicant, not shared by other members of society." *Id.* But an agency may not impose fees solely to fund its general operations, for that would take the agency "far from its customary orbit and put[] it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341.

Under D.C. Circuit precedent, an agency "charged with ensuring that all those receiving licenses meet certain job-related eligibility criteria … may exact a fee for administering any procedures reasonably necessary to ensure that those particular eligibility criteria have been met." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996). And, sure enough, that is what the IRS was trying to do when it created the tax-preparer licensing regime. It justified the PTIN fee by pointing to the fact that, "[b]y limiting the individuals who may prepare all or substantially all of a tax return or claim for refund to individuals who have a PTIN, the IRS is providing a special benefit to [those] individuals." 75 Fed. Reg. at 60,319. But, as the IRS concedes, there are now *no* "requirements or restrictions" on who may obtain a PTIN. *See* ECF No. 50, at 10. So it is no longer the case that "only a subset of the general public is entitled to a PTIN and the special benefit of receiving compensation for the preparation of a return that it confers." 75 Fed. Reg. at 60,317. "Hypothetically, *every* member of the public could obtain a PTIN." *Steele*, 2017 WL 2392425, at *10 (emphasis added). And they can do so in a matter of minutes. *See* IRS, *PTIN Requirements for Tax Return Preparers*, http://bit.ly/2bMMUUG.

In other words, as this Court correctly noted, the separate regulation authorizing the fee is inextricably tied to the IRS's failed bid to regulate tax return preparers. *See Steele*, 2017 WL

2392425, at *8; *see also* 26 C.F.R. §300.13. To see why, consider the two main reasons the IRS identified for why it decided to begin charging a fee after not doing so in the past. The first was that more people would register for a PTIN because it was mandatory, hence increasing the agency's costs. *See* 75 Fed. Reg. at 43,113. The problem is that this justification simply assumes that the PTIN requirement was a valid exercise of the agency's rulemaking authority in the first place. But it was not. The second asserted justification confirms why. The IRS intended the fee to fund the larger (unlawful) regulatory regime, expressly relying on the fact that the agency would have to "perform Federal tax compliance checks and perform suitability checks prior to issuance of a PTIN," which would increase its costs. *Id.* at 43,113. The IRS elaborated: "The IRS [would] further investigate individuals when the compliance or suitability check suggest[ed] that the individual may be unfit to practice before the IRS. These checks were not previously performed as a prerequisite to obtaining a PTIN." *Id.* at 43,111; *see also* ECF 67-1, Rule 56(c) Statement ¶35 (showing that 74% of estimated costs recovered by fee would go to background and compliance checks).

But the *reason* those checks were not previously performed, *Loving* tells us, is that Congress did not condone "that vast expansion of the IRS's authority." 742 F.3d at 1021. Congress never "authorized a license requirement." *Id*; *see also Seafarers*, 81 F.3d at 186; *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). Without licensing power, there can be no licenses. *Cf. Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 479 (7th Cir. 2005) ("[W]hen no agency stands as a gatekeeper to a proposed private activity, there is no 'license' either."). And without licenses, there is no special benefit, and fees cannot be charged. That is to say, the IRS "may not charge fees for PTINs because this would be equivalent to imposing a regulatory licensing scheme and

the IRS does not have such regulatory authority." *Steele*, 2017 WL 2392425, at *8. The IRS cannot use an unauthorized regulatory scheme to bootstrap a registration requirement, and then use that registration requirement to bootstrap a fee. No, the fee must rest on its own bottom.

As this Court has already recognized, the Eleventh Circuit's decision in *Brannen v. United States* does not help the IRS here. 682 F.3d 1316 (11th Cir. 2012). That case, this Court explained, predated *Loving*, and did not involve a challenge to the larger regulatory regime, as *Loving* did. *See Steele*, 2017 WL 2392425, at *9. The Eleventh Circuit thus had no occasion to consider the question here: whether the fee could lawfully be charged in the absence of the IRS's attempt to regulate preparers more broadly. The Eleventh Circuit's theory—that the IOAA granted the IRS the power to charge a PTIN fee because the agency "is conferring ... the privilege of preparing tax returns for others for compensation," *Brannen*, 682 F.3d at 1319—may have merit if the licensing requirements are taken as a given (as they apparently were in *Brannen*). Back then, only some people could obtain a PTIN. But take those licensing requirements away—as the D.C. Circuit did in *Loving*—and the IRS's justification for the fee vanishes along with them.[4]

Even assuming that the IRS had managed to muster a good reason to require preparers to include an "identifying number," that reason would benefit only the agency and the general public that it serves, not the individual preparer. As the IRS put it during the rulemaking process: PTINs would "be used to collect and track data on tax return preparers," which "will provide important

[4] As explained above, 26 U.S.C. §6109(a)(4), the only applicable statutory provision remaining, is merely a requirement created to help the IRS locate wrongdoers. *See* H.R. Rep. No. 94-658, at 275–77 (1975). And the IRS's argument that the PTIN regulations are independent of the 31 U.S.C. §330 regulations struck down in *Loving* is baseless, as the regulations and their preambles themselves make clear. *See Steele*, 2017 WL 2392425, at *8.

benefits to the IRS." 75 Fed. Reg. at 43,113 (emphasis added). Of course, now that the licensing scheme has been invalidated, it is doubtful that requiring preparers to obtain and pay for a PTIN provides any benefit to anyone. But to the extent that it does, "[t]he only beneficiary" is the IRS. *Steele*, 2017 WL 2392425, at *7. Section 6109(a)(4)'s sole purpose was to benefit the IRS in its "effective administration and oversight." *See Steele*, 2017 WL 2392425, at *7; *see also* H.R. Rep. No. 94-658, at 275, 277 (1975). The government's declarations plainly concede just as much. *See* Campbell Decl. ¶¶ 23–26. That makes the fee impermissible under the IOAA.

2. Because the IRS justified the PTIN program based entirely on the agency's unauthorized attempt to regulate tax return preparers, its collection of PTIN fees is (and was) arbitrary and capricious.

Although the government's motion offers no independent argument to justify the fee, it argues that this Court was incorrect in finding that PTINs are not a service or thing of value. Even assuming that were true, the PTIN fee would nonetheless be unlawful for a second, distinct reason that goes unmentioned in the stay motion: the fee is arbitrary and capricious under the APA. 5 U.S.C. §706(2)(A). A bedrock principle of "administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). So when an agency changes an existing policy and adopts a new one—as the IRS did when it began requiring tax return preparers to obtain and pay for a PTIN after doing neither for decades—it "must ... show that there are good reasons for the new policy." *Id.* at 2126. But "if the agency has relied on factors which Congress has not intended it to consider," then its action must be invalidated as "arbitrary and capricious." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). A court must "set aside agency regulations"—even those that are "within the agencies' scope of authority"—if they "are not supported by the reasons that the agencies

adduce," or if those reasons are impermissible. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

Applying these principles here, the requirements that tax return preparers obtain and pay for a PTIN may be sustained only if the IRS identified in its rulemaking an acceptable reason for those requirements that is consistent with its delegated authority. It did not come close to doing so. The IRS justified the requirements as necessary only to support its broader effort to regulate tax return preparers, which Congress did not authorize. *See Loving*, 742 F.3d at 1021–22. Because the requirements that tax return preparers obtain and pay for a PTIN were "*solely* grounded in" implementing an invalid regulatory scheme—and the IRS did not "articulate *some* valid reason for the continued application" of the requirement apart from the larger scheme itself—the fees are "arbitrary and capricious under the APA." *Haw. Longline Ass'n. v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 28–29 (D.D.C. 2003).

B. The IRS will not be irreparably harmed.

The government alleges that "[t]o bring the PTIN system back on-line, in the absence of a stay," Campbell Decl. ¶27, the IRS "expects the economic loss ... to exceed $37.6 million for the next fiscal year." Stay Mot. 15; *see also* Zottola Decl. ¶5. And, because "funding for the PTIN program will have to be re-directed from other programs within the IRS, . . . taxpayer services from other programs will be reduced by approximately $37.6 million." Zottola Decl. ¶11. Therefore, the government concludes, "[t]he United States would be irreparably harmed if a stay of the Court's injunction is not granted." Stay Mot. 13.

That is far from a correct. In the hopes of meeting the high bar for irreparable harm, the IRS inflates its self-imposed economic loss. But because the IRS does not have to incur PTIN-

related costs pending appeal, because Accenture does everything necessary to issue and renew PTINs, and because the IRS has already collected sufficient excess PTIN fees to offset any losses, the government's alleged economic loss would not be *harmful*.[5] And because the magnitude of that loss—even under the most generous estimate—is miniscule (0.3%) compared to the IRS's yearly budget ($11 billion), any harm that might ensue (if any at all) is far from being *irreparable*. "A movant's failure to show any irreparable harm" is grounds for denying a stay motion, "even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England,*454 F.3d 290, 297 (D.C. Cir. 2006).

1. The IRS's inflated economic loss is not harmful.

For starters, it is hard to understand why it is vital for the IRS to incur any of the costs connected with PTIN renewals pending appeal. If "the return preparer moves or changes employers," or her contact information changes, the IRS claims that it would not be able to properly identify the preparer. Zottola Decl. ¶7. In a conclusory fashion, the government claims that, "[i]f a PTIN-holder does not renew for a given year and returns are filed for that year using that PTIN, the IRS has reason to suspect that the PTIN is not being used correctly," *id.*, because "the Service needs to know which PTINs are in active use to reduce the risk of misuse," Stay Mot. 14. But, independent of the PTIN program, the IRS already collects all of this up-to-date information through the standard income-tax-return forms. *See, e.g.*, Form 1040 (2016) (individuals) (requiring tax return preparer's contact information, employer, and address, in

[5] Indeed, the sole basis for the IRS's claim to economic harm is that it costs a substantial amount to continue issuing PTINs. But really, how much does it cost to issue an identification number that does not change? When the IRS began charging for PTINs in 2011, Accenture's fee was $14.25 for initial PTIN and $13 for renewal.

addition to her PTIN); Form 1065 (2016) (partnerships); Form 1120 (2016) (corporations); Form 1120S (2016) (S corporation). Even if it did not renew any of the outstanding PTINs for this upcoming tax year, the government would thus be able to continue identifying return preparers who have engaged in unlawful conduct pending appeal: the IRS already has that data.

Assume that the IRS must renew all PTINs. The government has already collected enough fees to offset the cost of the PTIN program pending appeal. To justify the amount it initially charged, the IRS explained that the $50 governmental fee included (1) the cost of "registration cards or certificates for each registered tax preparer" (25.75% of the estimated costs or $12.90 per preparer), (2) the costs of forms to instruct registered tax return preparers on which returns they might sign (0.25% or $1.25 per tax preparer), and (3) "tax compliance and suitability checks" (74% or about $37 per tax preparer). *See* 76 Fed. Reg. 32,286, 32,296 (June 3, 2011); Rule 56(c) Statement ¶¶ 35, 43. The first category was never implemented; the second is already funded by congressional appropriations; and the third would benefit the IRS by "suggest[ing] that the individual may be unfit to practice before the IRS." *See* 75 Fed. Reg. at 43,111; Rule 56(c) Statement ¶¶ 35, 43. Following our complaint, the IRS acknowledged the excess revenue from the PTIN program by issuing an "updated" regulation lowering the governmental fee to $33. *See* 80 Fed. Reg. 66792 (Oct. 30, 2015). In a nutshell: the PTIN fee was reduced by 20% because *Loving* struck down the bulk of the programs (education and testing) the IRS intended to fund through those fees. *See* 80 Fed. Reg. at 66,794; *Loving*, 917 F. Supp. 2d at 74.

If the vast majority of PTIN fees (74%) previously went to professional certification and suitability checks to regulate whether an "individual may be unfit to practice before the IRS," see 75 Fed. Reg. at 43111—and, *Loving* tells us, Congress did not condone "that vast expansion of the

IRS's authority," 742 F.3d at 1021—then what is the IRS now doing with the money? The government's declarations obfuscate rather than clarify. The IRS mentions "staffing and contract-related costs associated with registration and renewal submissions," "staffing for PTIN compliance- and certain suitability- related activities (such as revoking PTINs from individuals who have been enjoined), return preparer complaint intake and prioritization, internal and external communications, and outreach and education," and "various overhead costs . . . such as procurement support." Zottola Decl. ¶16. The IRS also acknowledges that some PTIN-fee revenue has been used "to fund labor costs of some employees who handle the Annual Filing Season Program as part of their duties"—practically a kind of licensing program. *See* RFA Responses, at 9; *cf. Seafarers*, 81 F.3d at 185–86.

What staffing costs could possibly continue to be connected with the compliance and suitability checks enjoined by *Loving*? And why is the IRS using PTIN fees to fund another licensing program? Aside from that, if the IRS takes care of registration and renewal submissions, what is Accenture doing in exchange for its $17 cut? The Accenture contract tells us. Accenture is responsible for developing and maintaining a comprehensive web-based application portal, providing customer service support, handling paper transactions, and creating a marketing outreach plan, among other things. *See* ECF 67–17 (Exhibit 15 to Motion for Summary Judgment). So, it seems, Accenture does (and has done) everything necessary to issue a PTIN. And the IRS is left with "return preparer complaint intake and prioritization, internal and external communications, [] outreach and education," and "overhead costs." Zottola Decl. ¶16. In conclusion, it seems that the IRS would at most lose slightly over $12.6 million in vendor fees and other miscellaneous costs during the upcoming fiscal year—not $37.6 million. *See* Zottola Decl. ¶5.

But even assuming that the IRS's $37.6 million figure were accurate, the excess fees collected over the last few years would suffice to offset any loss pending appeal. In providing a rationale for the reduced PTIN fee, the IRS effectively acknowledges that the PTIN fee was initially too high and that, between 2010 and 2015, it collected between $45 and $54 million in excess fees.[6] *See* 80 Fed. Reg. 66792, 66794 (Oct. 30, 2015). Those excess fees would be more than sufficient to cover the alleged loss pending a hypothetical appeal (if any appeal will be filed). Assuming a total loss of $37.6 million, Zottola Decl. ¶11, the IRS likely already has sufficient revenue to run the PTIN program for about 18 months—and still break even. But the IRS's loss is arguably much smaller than it claims. In any case, there would thus be no need to divert resources from other programs and hence no harm warranting a stay.

2. The IRS's self-imposed economic loss is not irreparable.

Even if the IRS had shown that this Court's injunction would cause *any* economic loss, that is a far cry from irreparable harm. Because irreparable harm means "the kind of injury for which money cannot compensate," *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 12 (2d Cir. 1982), "economic loss does not, in and of itself, constitute irreparable harm," *Wisconsin Gas*

[6] Here's the math: Between 2010 and 2015, the government received $50 for each PTIN issuance or renewal. Of that amount, $12.90 was meant to cover the implementation of a registration card program—which never materialized. *See* 76 Fed. Reg. 32,286, 32,296 (June 3, 2011); Rule 56(c) Statement ¶¶ 35, 43. In 2015, in light of *Loving*'s injunction against the IRS licensing program, the government reduced its fee by $17 (from $50 to $33). *See* 80 Fed. Reg. 66,792 (Oct. 30, 2015). In other words, between 2010 and 2015, the government collected but never used at least $12.90 from each PTIN holder. And, between *Loving* (2013) and the 2015 fee reassessment, the IRS also collected an additional $4.10 in extra fees (an amount that, between 2011 and 2013, was reasonably spent for unlawful programs). Since approximately 700,000 tax preparers apply or renew their PTINs each year, the government collected between $9 million ($12.90 x 700,000) and $11 million ($17 x 700,000) per year in excess fees over the course of five fiscal years.

Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985). In other words, under the D.C. Circuit rule set forth in *Wisconsin Gas*, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id.* at 674. Instead, the harm must be "*certain*, *great* and *actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm." *Id.* Needless to say, this is a "very high bar." *Pan Am Flight 73 Liaison Grp. v. Dave*, 711 F. Supp. 2d 13, 32 (D.D.C. 2010). The government cannot clear it.

Any harm that the IRS might suffer is neither certain nor imminent. The government has not met its burden to "show the injury complained of is of such*imminence*" that the injury is in fact "beyond remediation."*Chaplaincy of Full Gospel Churches,*454 F.3d at 297 (citing *Wisconsin Gas,*758 F.2d at 674). But "virtually none of [the alleged $36.7 million] has actually been expended yet by the Government." *Lightfoot*, 2006 WL 175222, at *8. And the IRS has at least three options to avoid future monetary losses. *First*, because PTINs are not mandated by statute, and almost 90% of tax return preparers already hold a PTIN, see ECF 67–15 (Exhibit 13, PTIN Registration Counts), the IRS could cease to require renewals pending appeal and allow those who lack a PTIN to use their SSN instead. *Second*, if it prevailed on appeal, the government could attempt to recover the lost fees through a restitution claim against PTIN holders. The IRS's argument that it would be impractical to do so concedes that any alleged harm is less than certain. *See* Stay Mot. 16-17 (citing *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 442 F.3d 1283 (11th Cir. 2006)). *Third*, if it were to somehow prevail on appeal, the IRS could charge higher fees during the next fiscal year to recoup any losses incurred pending appeal—since, again, almost 90% of the PTIN revenue has come from renewals. *See* ECF 67–15.

Instead of minimizing its economic loss by temporarily ceasing PTIN renewals, the IRS steadfastly embraced a path to *maximizing* it. The IRS took the PTIN system offline and then began issuing PTINs free of charge on June 21, *see* Campbell Decl. ¶ 17, planning to extend its Accenture contract expiring on July 31, *see* Zottola Decl. ¶ 12, notwithstanding the present litigation. But for over two years the IRS has been "explicitly on notice that plaintiffs were asking [this Court for an injunction], and could have structured its public-private arrangements to better protect its financial interests in the event of that possibility." *Friends of Capital Crescent Trail v. FTA*, 2017 WL 2781446, at *5 (D.D.C. June 26, 2017). It didn't. And "[a] stay pending appeal is not intended to inoculate a party against the risks of litigation, nor is it the Court's role to grant emergency relief to protect a party from the consequences of its own fully-informed decisions." *Id. Cf. Cuomo*, 772 F.2d at 977 (holding that a party's decision to incur costs without assurance that the project would go forward were "self-imposed costs [that] are not properly the subject of inquiry on a motion for stay"); *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (no irreparable harm when "the alleged harm is self-inflicted.").

The IRS takes pains to show (unpersuasively) that its economic loss might be *unrecoverable*, but it makes no argument that it would be *irreparable* harm. *See* Stay Mot. 15–17. There is an important difference between the two concepts. Although "irrecoverablefinancial loss *may* constitute irreparableinjury*in some cases*, . . . a party asserting such a loss is not relieved of its obligation" to show that the injury would be certain, great, actual, and imminent under *Wisconsin Gas*, *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010) (emphasis added). That is, "theinjurymust be more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff."*Gulf Oil Corp. v. Dep't of Energy,*514 F. Supp. 1019, 1026

(D.D.C. 1981); *see also Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52–53 (D.D.C. 2011) ("[T]he mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm."). Unrecoverable, in other words, is not always irreparable.

What is a "serious" injury? *Gulf Oil,*514 F. Supp. at 1026. In the private sector, it is a loss that "threatens the very existence of the movant's business." *Wisconsin Gas*, 758 F.2d at 674. For a public movant, the threshold is similar: the economic loss must threaten the existence of the agency. *See, e.g.*, *City of Moundridge v. Exxon Mobil Corp.*, 429 F.Supp.2d 117, 129 (D.D.C. 2006) (no irreparable harm where cities did "not establish that the loss of revenue threatens the existence of the public utilities plaintiffs run, or the municipalities themselves").In *Friends of Capital Crescent Trail*, for example, even though Maryland was facing an irrecoverable loss of $13 million per month, the D.C. District Court summarily dismissed the irreparable harm argument as falling short of the *Wisconsin Gas* standard. *See* 2017 WL 2781446, at *5. The government does not identify a single case holding that the IRS is entitled to special treatment.

But even assuming any harm here is imminent and certain (which it is not), it is miniscule if put into perspective—too small to remotely approach the heavy burden placed upon the movant of showing an harm "so severe as to cause extreme hardship." *Sandoz, Inc. v. F.D.A.*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006). In fact, courts focus on "the magnitude of harm that will be suffered by the moving party, not the particular amount of economic damages that the [party] will suffer." *N. Air Cargo*, 756 F. Supp. at 126 n.9; *see also Holiday CVS, L.L.C. v. Holder*, 839 F. Supp. 2d 145, 169–70 (D.D.C. 2012); *LG Elecs. U.S.A., Inc. v. Dep't of Energy*, 679 F. Supp. 2d 18, 36 (D.D.C. 2010). Because "[a] claim of substantial financial losses must be evaluated from the perspective of the organization's total revenues in order to determine if the harm is of a magnitude that warrants

injunctive relief," *ConverDyn*, 68 F. Supp. 3d at 48, the IRS correctly estimated the magnitude of its loss against its total budget of $11 billion, see Zottola Decl. ¶9.

The government's "figure [of 0.3%] . . . hardly seems ruinous." *Air Transport Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 338 (D.D.C. 2012) (finding a loss of $2.2 billion, or 7% of Delta's revenues, not sufficient to constitute irreparable harm). At best, according to the government's own calculations, the IRS is going to lose 0.3% of its yearly budget in uncollected fees. Zottola Decl. ¶9. More realistically, as described above, the loss would be much smaller. Either way, the magnitude of the government's alleged loss is not even close to the kind of monetary harm—somewhere above 25% of the movant's budget—required to show irreparable harm.[7] The IRS's argument to the contrary is a nonstarter. *See* Stay Mot.15; *cf. Lightfoot*, 2006 WL 175222, at *8 (finding that a loss between $1.3 and $27 million would not irreparably harm the District of Columbia, because the amount is too small if "compared to the government budget of $4.903 billion from local funds and a projected accumulated surplus of $1.219 billion").

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[7] Courts in the District have found economic losses of 1–25% to fall short of showing irreparable harm. *See, e.g.*, *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 48 (D.D.C. 2014) ($10 million or 10% of revenues); *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 212 (D.D.C. 2012) ($1 billion or 1% of revenues); *LG Elecs., USA, Inc. v. Dep't of Energy*, 679 F. Supp. 2d 18, 35–36 (D.D.C. 2010) ("a minuscule portion of the company's worldwide revenues" of about 1%); *Sanofi–Aventis U.S. LLC v. F.D.A.*, 733 F. Supp. 2d 162, 173–75 (D.D.C. 2010) ($2.5 billion or 6% of revenues); *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) ($28 million or less than 1% of revenue); *Varicon Int'l v. Office of Pers. Mgmt.*, 934 F. Supp. 440, 447–48 (D.D.C. 1996) (10% of revenue); *TGS Tech., Inc. v. U.S. Dep't of Air Force*, 1992 WL 19058, at *4 (D.D.C. 1992) ("only" 20% of revenues); *Arrow Air, Inc. v. United States*, 649 F. Supp. 993 (D.D.C. 1986) ($22 million or 25% of revenues). By comparison, an economic loss of 40% of the movant's business has been considered sufficient to meet the irreparable harm standard. *See Feinerman v. Bernardi,* 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (finding "some degree of irreparable injury" where debarment would have affected 40% of the plaintiff's business and "severely damaged" it).

The government's "Hail Mary" argument—that, even if recoverable, its economic loss is *per se* irreparable because "[t]here is no method to restore the timely provision of services"—is doubly unpersuasive. Stay Mot. 18. *First*, if the government were correct, *any* economic loss that would result in the reallocation of *any* government resource would amount to irreparable harm—because it would remove funding from the "timely provision of [other] services." *Id.* But such an interpretation would entitle the government to an automatic right to a stay as long as it showed *some* loss. *Cf. Air Transp. Ass'n of Am.*, 840 F. Supp. 2d at 335 ("Any movant that could show any damages against an agency with sovereign immunity—even as little as $1—would satisfy the standard."). That conclusion would "effectively eliminate" the irreparable harm requirement. *See id. Second*, "[t]he lack of irreparable harm is even more apparent in this case because the defendant is a sovereign nation" with practically unlimited resources. *See Baker*, 810 F. Supp. at 97 (denying a stay because the magnitude of the economic loss was too small when assessed in relation to a sovereign nation's estimated gross domestic product); *cf.* International Monetary Fund, *World Economic Outlook Database* (Apr. 2017), http://bit.ly/2hkDKCR (United States' gross domestic product estimated at over $17 trillion).

In sum, the government's economic loss falls short of irreparable harm. It is neither certain nor imminent because the IRS has multiple avenues to avoid any monetary loss pending appeal. And even by the government's own standards, it is neither great nor actual—for even its overstated estimate is tiny in comparison to the department's appropriations. "The Government Defendants simply cannot establish 'irreparable injury' given serious questions regarding the accuracy of their estimates, the fact that no funds—other than minor administrative costs—have been expended or are likely to be expended for several months, and the relatively minor economic injury faced."

Lightfoot, 2006 WL 175222, at *9. Because the IRS has failed to show irreparable harm, this Court should deny the stay motion "even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

C. Both class members and the public interest will be harmed.

Beyond failing to show any irreparable harm, the IRS asks this Court to *upset* the status quo through a stay pending appeal. But that is not the point of a stay pending it appeal—a stay "seeks to maintain the status quo pending a final determination of the merits of the suit." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *see also Virginian Ry. Co.*, 272 U.S. at 669. The IRS's motion is conspicuously bereft of any reference to the status quo, perhaps because it seeks to subvert it. Until 2010, the IRS issued PTINs to tax return preparers at their request and at no charge. These PTINs never expired and, once issued, did not change. It was not until 2011 that, as part of the regulatory scheme struck down in *Loving*, the IRS started charging a fee and required that all tax return preparers obtain a PTIN and renew it every year—even though the PTINs did not change. Although relatively small in absolute terms, that fee imposed a loss on each tax return preparer of a magnitude similar to the harm claimed by the government.[8] Following this Court's injunction, the IRS has voluntarily returned to that pre-2011 status quo—issuing PTINs free of charge. Campbell Decl. ¶ 22. This is

[8] The government claims a total economic loss of $37.6 million, or 0.3% of the IRS's estimated appropriations for the 2018 fiscal year. *See* Zottola Decl. ¶8–9. The average salary of a professional tax preparer in the United States is $20,000. *See* Glassdor, *Tax Preparer Salaries* (2017), http://bit.ly/2hlIF6L. The current PTIN fee, $50, is 0.25% of the average salary of a professional tax return preparer. In the event of a stay, the magnitude of the harm to many members of this class (0.25% of their income) would be comparable to the magnitude of the alleged harm to the IRS (0.3% of its budget). *Cf., e.g.*, *N. Air Cargo*, 756 F. Supp. at 126 n.9.

the true status quo that was disrupted by five years of unlawful PTIN fees—a status quo that the IRS wishes to overturn to continue extracting millions of dollars from tax return preparers.

Antithetical to the interest of this class and that of the public, a stay would also create confusion and risk unfair treatment. Following this Court's injunction, the IRS suspended all PTIN applications. Campbell Decl., ¶ 17. The IRS then brought the PTIN application system back online on June 21, issuing once again PTINs free of charge. *Id.* at ¶ 22. If this Court granted the requested stay during the pendency of an appeal determination, the IRS would start charging PTIN fees again—a third reversal of policy in a matter of weeks. If the government then decided against filing an appeal—and, indeed, it has given no reason to this Court to believe that such an appeal will ever be taken—the IRS would have to make a fourth policy reversal and stop charging PTIN fees. That fourth policy reversal would also be necessary "[i]f a stay is [] granted and the government is [not] successful on appeal." *Id.* at ¶27.

Needless to say, this chaotic back-and-forth would create a high potential for confusion. It would also treat tax return preparers differently based on when they applied for their PTIN numbers: those applying after the injunction but before the stay would not have paid any fee; those applying after the stay but before the (likely) affirmance on appeal would have paid an unlawful fee. The potential downside of multiple policy reversals within such a short period of time is too great.

The government's argument that this Court should grant an extraordinary relief so that the IRS will not be deprived of revenue extracted from the nation's tax return preparers is also offensive to the promotion of equity and justice. The IRS holds that its unsupported allegations that "it will suffer irreparable [economic] injury in the absence of a stay satisf[y] the requirement

that the granting of a stay is in the public interest." Stay Mot. 19. But the government's syllogism relies on an unstated premise: the public has an interest in providing revenue to the IRS by paying unlawful fees. Hardly so. This Court has already found that "PTINs are not a service or thing of value," and therefore do not benefit the public. *See Steele*, 2017 WL 2392425, at *11. Forcing people to pay fees that are manifestly unlawful would simply enable the IRS to continue using PTIN fees as an illegitimate revenue stream. Tax return preparers are not the IRS's cash cow—they are individuals trying to earn a living by providing a valuable service to taxpayers.

CONCLUSION

The government's motion for stay pending an appeal determination by the Solicitor General should be denied without prejudice to its renewal an appropriate time. Alternatively, if the Court reaches the merits, it should deny the motion with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed this opposition to defendant's motion for summary judgment through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold
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